Florida Journal of International Law

Volume 19 | Issue 1 Article 4

April 2007

Is Article 25(3) of the ICC Statute Compatible with "Crime of Aggression"?

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I. INTRODUCTION

At the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) States could not agree over a definition of the "crime of aggression."[1] As

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1. Three main issues pertaining to the crime of aggression were being discussed, namely whether the crime should be included in the ICC Statute, what would be the role of the U.N. Security Council in relation to the adjudication of this crime by the ICC, and finally how would the crime be defined. *See* Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 81-83 (Roy Lee ed., 1999) [hereinafter THE MAKING OF THE ROME STATUTE]; Andreas Zimmermann, *Article 5: Crimes Within the Jurisdiction of the Court, in* COMMENTARY ON THE ROME STATUTE: OBSERVERS' NOTES, ARTICLE BY ARTICLE 104 (Otto

the Rome Conference was winding down, the Bureau of the Committee of Whole proposed that the "crime of aggression" could be included in the Statute of the International Criminal Court (ICC Statute) only if generally accepted provisions could be developed by interested delegations by 13 July, that is, four days before the end.[2] The Movement of Non-Aligned Countries proposed that the Preparatory commission for the International Criminal Court (PrepCom) be given the task of defining the "crime of aggression," and that the Court would not exercise its jurisdiction over this crime until such a definition be adopted.[3] This was accepted as compromise to move past the deadlock.[4]

The "crime of aggression" was included in article 5(1) of the ICC Statute but not defined.[5] Article 5(2) imposes three conditions in order for the ICC to exercise its jurisdiction over the "crime of aggression." First, a provision must be adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Second, the provision must be consistent with the relevant provisions of the U.N. Charter. Third, this provision must be adopted in accordance with articles 121 and 123 of the ICC Statute.[6] Resolution F of

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Triffterer ed., 1999) [hereinafter COMMENTARY ON THE ROME STATUTE]; Pietro Gargiulo, *The Controversial Relationship Between the International Criminal Court and the Security Council, in* ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT vol. I, at 91-92 (Flavia Lattanzi & William A. Schabas eds., 1999); Giorgio Gaja, *The Long Journey Towards Repressing Aggression, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT vol. I, at 436 (Antonio Cassese et al. eds., 2002); Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference, in id.* at 71; U.N. Doc. A/CONF.183/C.1/L.37, Proposal Submitted by Algeria, Bahrain, Islamic Republic of Iran, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates, and Yemen; U.N. Doc. A/CONF.183/C.1/L.56/Corr.1, Proposal Submitted by Algeria, Bahrain, Islamic Republic of Iran, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Sudan, United Arab Emirates, and Yemen; U.N. Doc. A/CONF.183/C.1/L.38, Proposal Submitted by Armenia; U.N. Doc. A/CONF.183/C.1/L.39, Proposal Submitted by Cameroon, Article 5, "Crime of Aggression."

2. U.N. Doc. A/CONF.183/C.1/L.59, Bureau Proposal, at 1. It specified that if no generally accepted definition was presented, the Bureau would propose that this crime be reflected in some other manner such as a Protocol or a review conference.

3. U.N. Doc. A/CONF.183/C.1/L.75, Amendments Submitted by the Movement of Non-Aligned Countries to the Bureau Proposal (A/CONF.183/C.1/L.59).

4. Silvia A. Fernández de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT'L L.J. 589 (2001-2002).

5. U.N. Doc. A/CONF.183/9, *Rome Statute of the International Criminal Court*, art. 5(1) [hereinafter ICC Statute].

6. *Id.* art 5(2):

the Final Act of the Rome Conference[7] established the PrepCom to ensure that the ICC would become operational without undue delay. The PrepCom's specific mandate included the preparation of proposals for a provision on aggression, including the definition and elements of this crime, as well, as the conditions under which the ICC shall exercise its jurisdiction. Such proposals will be submitted to the Assembly of States Parties [ASP] at a Review Conference, with a view to arriving at an acceptable provision on the "crime of aggression" for inclusion in the ICC Statute.[8]

By the end of its last session in July 2002, the PrepCom had not produced a final provision of the "crime of aggression" meeting the criteria of article 5(2) of the ICC Statute. However, the Coordinator of the PrepCom's Working Group on the Crime of Aggression had come up with a discussion paper that addressed these issues.[9]

The ASP to the ICC Statute met for the first time in September 2002 and adopted a resolution on the continuity of the work in respect to the "crime of aggression." A new Special Working Group on the Crime of Aggression (SWGCA) open to all Member States of the United Nations, as well as members of specialized agencies and of the International Atomic Energy Agency, was established for the purpose of elaborating proposals for a provision on aggression for the ASP's consideration at a Review Conference on the ICC Statute.[10]

The SWGCA has attempted to build on the progress made during the PrepCom. It held its first informal inter-sessional meeting in July 2004 at the Liechtenstein Institute on Self-Determination, Woodrow Wilson

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> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

7. U.N. Doc. A/CONFR.183/10 (1998), Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I; *see* Resolutions adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution F.

8. *Id.* ¶ 7.

9. International Criminal Court, *Discussion Paper on the Definition and Elements of the Crime of Aggression*, at 3, U.N. Doc. PCNICC/2002/2/Add.2 (2002) [hereinafter Coordinator's Discussion Paper] (prepared by the Coordinator of the Working Group on the Crime of Aggression, Proposals for a Provision on the Crime of Aggression).

10. Assembly of State Parties, Continuity of Work in Respect of the Crime of Aggression, at 328, PCNICC/2002/2/Add.2 (2002).

School, at Princeton University and discussed a number of substantive and procedural issues relating to the "crime of aggression."[11]

At its second informal inter-sessional meeting at Princeton University in June 2005 the SWGCA discussed the definition of the "crime of aggression" and the conditions under which the Court shall exercise jurisdiction,[12] as well as the application to this crime of the provisions in the ICC statute pertaining to the investigation and prosecution of a case by the Prosecutor and those pertaining to national security information.[13] The SWGCA also revisited some of the issues it had discussed the previous year. It examined whether it was possible for a state to opt out of the Court's jurisdiction over the "crime of aggression,"[14] and whether specific articles of the ICC Statute had to be retained, excluded, or adapted in relation to this crime, among which was article 25(3).[15]

Article 25 of the ICC Statute refers to individual criminal responsibility in general, and paragraph three thereof deals with specific means for attributing criminal responsibility. Subparagraph (a) of article 25(3) states that a person is criminally responsible for committing a crime, whether as an individual, jointly with another person, or through another person.[16] Subparagraph (b) punishes the ordering, soliciting, or inducing the

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11. ICC-ASP/3/SWGCA/INF.1 (2004). Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 21 to 23 June 2004. The issues discussed included the jurisdiction *ratione temporis* of the ICC, the incorporation and placement of the provisions on the crime of aggression, issues relating to complementarity and admissibility, the principle of *ne bis in idem* in relation to the crime of aggression, and general principles of criminal law contained in articles 25(3), 28, 30, 31, and 33 of the ICC Statute.

12. ICC-ASP/4/SWGCA/INF.1 (2005), Information Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 13 to 15 June 2005, ¶¶ 56-86 [hereinafter SWGCA Report].

13. *Id.* ¶¶ 52-55.

14. *Id.* ¶¶ 5-17.

15. *Id.* ¶¶ 18-51. These included article 25(3) (individual participation in a crime, article 28 (command responsibility), article 30 (the mental element), and article 33 (the defense of superior orders).

16. ICC Statute, *supra* note 5, art. 25(3)(a). The first form of perpetration refers to the direct or immediate perpetration of a crime by an individual. The second relates to situations of co-perpetration, whereby the functional tasks of a crime are divided between at least two perpetrators, who have in principle a common plan or agreement to this effect. The third pertains to the "perpetration of a crime by means," whereby an indirect (the author of the crime) is used as an instrument or tool by an indirect perpetrator or mastermind. *See* Kai Ambos, *Article 25: Individual Criminal Responsibility, in* COMMENTARY ON THE ROME STATUTE, *supra* note 1, at 478-79.

commission of a crime.[17] Subparagraph (c) relates to criminal responsibility for aiding, abetting, or otherwise assisting in the commission of a crime, for the purpose of facilitating its commission.[18] An individual can be held criminally responsible under subparagraph (d) for his or her contribution to the commission or attempted commission of a crime in any other way than those mentioned above, that is, when committed by a group of persons acting with a common plan or purpose.[19] Such a contribution must be made either with the aim of furthering the criminal activity or criminal purpose of the group, or in the knowledge of the intention of the group to commit the crime.[20] Subparagraph (e) deals with the direct and public incitement of genocide,[21] whereas subparagraph (f) relates to the attempted commission of a crime.[22]

The debate as to whether article 25(3) of the ICC Statute should be retained, excluded, or adapted in relation to the "crime of aggression" stems from the discussion paper proposed by the coordinator of the PrepCom's Working Group on the crime of aggression. In it the Coordinator based her definition of the "crime of aggression" on a formula derived from the Charter of the International Military Tribunal at Nuremberg (IMT),[23] which criminalized the planning, preparation, initiation or waging of a war of aggression under the rubric of "crimes against peace."[24] The Coordinator's discussion paper proposed that article 25(3) of the ICC Statute be not applicable to the "crime of aggression."[25] This has given the SWGCA the impression that article 25(3) of the ICC Statute and "crimes against peace" are mutually exclusive.

This Article challenges this assumption and focuses on whether article 25(3) of the ICC Statute is compatible with the "crime of aggression."

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17. ICC Statute, *supra* note 5, art. 25(3)(b). Technically speaking, a person who orders a crime is not merely an accomplice, but a perpetrator by means. Soliciting a crime relates to when a person commands, encourages, requests, or incites another person to commit the crime in question. The concept of inducing a crime envelops that of soliciting, because it relates to "any conduct which causes or leads another person to commit a crime, including soliciting that person." *See* Ambos, *supra* note 16, at 480-81.

18. ICC Statute, *supra* note 5, art. 25(3)(c). This is the lowest form of complicity and covers any act which contributes to commission or attempted commission of a crime. *See* Ambos, *supra* note 16, at 481-83.

19. ICC Statute, *supra* note 5, art. 25(3)(d).

20. *Id.* art. 25(3)(d)(i), (ii).

21. *Id.* art. 25(3)(e).

22. *Id.* art. 25(3)(f).

23. Charter of the International Military Tribunal, Annexed to the London Agreement, Aug. 8, 1945, 8 U.N.T.S. 279 [hereinafter IMT Charter].

24. *Id.* art. 6(a).

25. Coordinator's Discussion Paper, *supra* note 9, § I, ¶ 3.

Evidently the "crime of aggression" has not been defined in final terms. The SWGCA acknowledged that the jurisprudence of the IMT and of the International Military Tribunal for the Far East (IMTFE)[26] is more relevant to this question than the jurisprudence of the Ad Hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, which do not deal with the "crime of aggression."[27]

"Crimes against peace" is the legal predecessor of the modern "crime of aggression" and the interpretation given to the former is essential when framing the latter. In this Article many inferences are drawn based on the IMT Charter, the IMTFE Charter and Allied Control Council Law No. 10[28] as well as the resulting case law formt he adjudication of "crimes against peace."

II. THE PREPCOM'S WORKING GROUP ON THE CRIME OF AGGRESSION

As indicated above, the discussion paper proposed by the Coordinator of the PrepCom's Working Group on the Crime of Aggression attributed individual criminal responsibility for the "crime of aggression" to a person who "intentionally and knowingly orders or participates actively in the planning, preparation, initiation, or execution of an act of aggression."[29]

The discussion paper also stated that article 25(3) of the ICC Statute is not applicable to the "crime of aggression." This is possibly understood by the fact that the general provisions contained in the ICC Statute would be overridden by the specific formula adopted (planning, preparation, initiation, or execution), which is derived from the IMT Charter. In actual fact, article 25(3) would not be completely excluded because it would be relied upon when interpreting the terms "orders or participates" used in the discussion paper.

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26. International Military Tribunal for the Far East, TIAS No. 1589 [hereinafter IMTFE Charter].

27. SWGCA Report, *supra* note 12, ¶ 26.

28. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, in the Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, at 50-55 [hereinafter Control Council Law No. 10].

29. Coordinator's Discussion Paper, *supra* note 9, § I, ¶ 1; *see* Roger S. Clark, *Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*, 15 LEIDEN J. INT'L L. 859-90 (2002); Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 CRIM. L.F. 1-57 (2003).

The SWGCA recognized this inconsistency and stated that if it were to follow the Coordinator's discussion paper it would have to refine the definition of aggression contained therein by aligning the general principles of criminal with other provisions of the ICC Statute.[30]

The SWGCA also considered departing from the Coordinator's discussion paper altogether and saw two options for doing so. Although the SWGCA examined them separately these two options can in fact be combined.[31] Under the first option the SWGCA could elaborate a concise definition of aggression, leaving the general principles to be covered by the ICC Statute, in particular article 25.[32] Under the second option, the SWGCA could insert a new subparagraph "e) *bis*" to clarify the specific relationship between the "crime of aggression" as a leadership crime and article 25(3) of the ICC Statute.[33]

The Coordinator's discussion paper qualified the "crime of aggression" as a leadership crime because it attributed criminal responsibility only to individuals that were "in a position to effectively exercise control over or direct the political or military action of a State."[34] This followed a proposal by Belgium, Cambodia, Sierra Leone, and Thailand, which took the view that "the crime of aggression is a leadership crime which may only be committed by persons who have effective control of the State and military apparatus on a policy level" according to the jurisprudence of the IMT and the Allied Tribunals established under Control Council Law No. 10.[35]

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30. SWGCA Report, *supra* note 12, ¶ 24(b).

31. Theoretically, the only situation in the second approach in which the exclusion of article 25(3) could be justified is if the future definition of the act of aggression would require a prior determination for it to exist. If such a determination were not made, then the act of aggression would not exist and the criminalization of this act through the "crime of aggression" would not be possible. *See id.* ¶ 23.

32. *Id.* ¶ 24(a).

33. *Id.* ¶¶ 24(c), 30, 32; *id.* Annex I, Proposals A & B.

34. Coordinator's Discussion Paper, *supra* note 9, § I, ¶ 1:

> For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

35. U.N. Doc. PCNICC/2002/WGCA/DP.5, Incorporating the Crime of Aggression as a Leadership Crime Into the Definition; Draft Code of Crimes Against the Peace and Security of Mankind, in *Report of the International Law Commission on the Work of Its 48th Sess.*, U.N. Doc. A/51/10 (1996). 48th Sess., Supp. No. 10, 89, 1996, art. 16: "An individual who, as leader or

Some of the States with constitutional monarchies sponsored this proposal in order to ensure that heads of state that did not exercise any real executive governmental power would be spared from a prosecution for the "crime of aggression."

The IMT stated that its Charter codified and contributed to customary international law.[36] Two observations must be made when the Coordinator's discussion paper is compared with the IMT Charter, specifically article 6 *in fine*, which stated that: "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[37] The first observation is that the "crime of aggression" is a leadership crime given the reference in the IMT Charter to leaders, organizers, and instigators; this specific topic is discussed in further detail below. The second observation is that the definition in the Coordinator's discussion paper was based on an incomplete formulation of the IMT Charter because it only criminalized the planning, preparation, initiation, and execution of an act of aggression but did not refer to accomplices or those participating in a common plan or conspiracy to commit aggression. The Coordinator's discussion paper creates the problem whereby an accomplice in the "crime of aggression" could not be prosecuted because both article 6 *in fine* of the IMT Charter and article 25(3) of the ICC Statute were excluded.[38]

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organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression."

36. *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 216 (1947) [hereinafter IMT Judgment]. The IMT stated that its Charter was an expression of international law existing at the time of its creation as well as a contribution to international law. For commentaries on the IMT Judgment, see George Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20 (1947); Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38 (1947); Quincy Wright, *Legal Positivism and the Nuremberg Judgment*, 42 AM. J. INT'L L. 405 (1948); Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AM. J. INT'L L. 223 (1949); Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L.Q. 153 (1947); Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 209 (1998).

37. IMT Charter, *supra* note 23, art. 6 *in fine*; IMTFE Charter, *supra* note 26, art. 5(c); Control Council Law No. 10, *supra* note 28, art. II(1)(c).

38. Coordinator's Discussion Paper, *supra* note 9, § I, ¶¶ 1, 3. *See* William A. Schabas, *The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They are Forever Banned?*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT, LEGAL AND POLICY ISSUES 123-41 (Dominic McGoldrick et al. eds., 2004).

The SWGCA has taken this problem into account and noted in its report the potential risk of excluding a group of perpetrators.[39] It also stated that before definitely excluding article 25(3) of the ICC Statute, it would be preferable to verify whether its provisions matched each specific situation.[40]

Therefore the question that arises is whether "crimes against peace," the legal predecessor of the "crime of aggression," is compatible with the means of participation in a crime under article 25(3) of the ICC Statute.

There was a tendency by participants of the SWGCA to comment at first instance on article 25(3) subparagraphs (a) to (e), which is indicated above relate to the direct and indirect commission of a crime, the complicity in a crime, the commission of a crime by virtue of a common plan or purpose, and the incitement of genocide. The participants commented at a later instance on subparagraph (f), which deals with the attempted commission of a crime. The rationale expressed by some participants was that the "crime of aggression" presupposed the existence of a completed collective act of aggression, whereas the attempt to commit this crime did not require the completion of the act of aggression.[41] The report of the SWGCA reflects this split approach and addresses the attempt to commit the "crime of aggression" separately from the other forms through which the crimes can be committed.[42]

The case law analysis of the substance of "crimes against peace" in the following section shall serve as the basis for evaluating its compatibility of article 25(3) subparagraphs (a) to (d) of the ICC Statute. Subparagraph (e) relating to incitement and subparagraph (f) relating to attempt are dealt with in later sections of this Article.

III. THE DEFINITION OF "CRIMES AGAINST PEACE"

A. *Points of Overlap*

The IMTFE in the case of *United States v. Araki Sadao*,[43] stated that five separate crimes appeared under the heading of "crimes against peace."

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39. SWGCA Report, *supra* note 12, ¶ 23.

40. *Id.*

41. *Id.* ¶ 38.

42. *Id.* ¶ 18. Article 25(3) subparagraphs (a) to (e) of the ICC Statute are dealt with together. *See id.* ¶¶ 18-43. Whereas subparagraph (f) is dealt with in another section. *Id.* ¶¶ 33-43.

43. THE TOKYO WAR CRIMES TRIAL (R.J. Pitchard & S.N. Zaide eds., 1981) vols. 20 & 21 [hereinafter IMTFE Judgment].

The first four were the planning, preparing, initiating, and waging a war of aggression or a war in "violation of international law, agreements, treaties, or assurances." The fifth crime was the participation in either a conspiracy or a common plan to commit "crimes against peace."[44]

It is evident that there is some degree of overlap between some of these five crimes. The first point of overlap is between the participation in a "common plan" and the "planning" of aggression. For example, the IMT in *United States v. Hermann Wilhelm Goering*[45] decided to examine the questions of the existence of a common plan and the question of planning aggressive war together because it considered them to be in substance the same and because the Prosecution introduced the same evidence to support these counts.[46]

The IMTFE also acknowledged such an overlap and decided that for the defendants that were found guilty of conspiracy it was not necessary for it to consider nor to enter convictions in relation to counts referring to planning and preparing "crimes against peace," even though it did not question the validity of these charges.[47] Although Judges Röling and Bernard dissented from the decision rendered by the majority of the IMTFE, they each conceded that planning and preparing aggressive war overlapped with the conspiracy count.[48]

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44. *Id.* vol. 20, at 48447.

45. IMT Judgment, *supra* note 36.

46. *Id.* at 222.

47. *See* IMTFE Judgment, *supra* note 43, at 48448 (specifically, counts 6 to 17 inclusive). Judge Jaranilla in his concurring opinion is the only Judge who disagreed with the IMTFE's view, however, he seems to have based his opinion to some extent on a misinterpretation of the IMTFE's findings. He found that the IMTFE Judgment implied that a defendant was guilty of conspiracy in the waging of a war of aggression was necessarily guilty of planning, preparing, and initiating it. He believed this premise to be correct on the condition that this defendant had in fact planned, prepared, initiated, and waged a war. However, he argued that this premise did not work in the case where a defendant was guilty of only planning, preparing, and initiating, but not guilty of waging an aggressive war. Judge Jaranilla is incorrect in his analysis of the issue of conspiracy because the IMTFE only examined the question of conspiracy in relation to planning and preparing, and not with regards to initiating and waging a war of aggression. Also, Judge Jaranilla incorrectly construed the IMTFE's view in that initiating and waging a war of aggression did not merely overlap but in fact were synonymous. Consequently, he stated that these terms did not mean the same thing. He found that waging could include initiating, but not necessarily in all circumstances. Also, initiating could be a form of waging, but the latter is much wider a notion. Moreover, a defendant could take part in initiating or waging a war of aggression without having ever participated in its planning or preparation. *See id.* vol. 21, at 8-9 (Jaranilla, J., concurring).

48. Judge Röling stated that it was not necessary to decide in detail whether someone planned or prepared an aggressive war, or conspired in the accomplishment of its planning, preparation, initiation, and waging. *See* Separate Opinion of the Member for the Netherlands, Judge Bernard Victor Röling, in *id.* vol. 21, at 51; Judge Bernard, in his dissenting opinion, admitted that

Judge Anderson, concurring in *United States v. Alfried Felix Alwyn Krupp von Bohlen und Halbach* (*Krupp* Case),[49] saw this overlap somewhat differently. He considered that the participation in a "conspiracy" to commit "crimes against peace" encompassed the "common plan."[50] Also, based on his reading of the IMT Judgment he stated that: "the offence of planning, preparation, and initiation of aggressive wars is, in practical effect, the same as the conspiracy."[51]

However, the prosecution in *United States v. Wilhelm von Leeb* (*High Command* Case)[52] challenged Judge Anderson's view. It did not consider that the offence of conspiracy was not identical to the offence of planning, preparing, and initiating aggression, and that waging aggression was a distinct offence.[53] It correctly pointed out that despite the fact that the IMT considered the two crimes as essentially the same, it actually treated them differently and came to different conclusions when determining the individual guilt of defendants under the two crimes charged.[54] Judge Anderson's position is untenable when considering the case of the defendants Frick and Funk who were acquitted by the IMT on the charge of conspiracy but nevertheless convicted on the charge of planning, preparing, initiating, and waging aggressive war.[55] The Prosecution acknowledged that in practical terms the distinction drawn by the IMT

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conspiracy overlapped with planning and preparing aggressive war according to the IMTFE, nevertheless he stressed that these offences were distinct. He considered planning and preparing as more serious matters than mere conspiracy and wished that the IMTFE had taken the former crimes, if established, into consideration as the basis for a conviction. *See* Dissenting Opinion of the Member from France, Judge Henri Bernard, in *id.* vol. 21, at 5.

49. United States v. Alfried Felix Alwyn Krupp von Bohlen und Halbach et al., *in* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG TRIBUNALS, 1947-1948, at 1 (U.S. Government Printing Office 1950) [hereinafter TRIALS OF WAR CRIMINALS].

50. *Id.* at 420 (Anderson, J., concurring opinion). Judge Anderson considered the most substantial aspect of conspiracy to be the association or acting in concert for the purpose of formulating or executing a common plan involving criminal ends.

51. *Id.* at 443.

52. United States v. Wilhelm von Leeb (High Command Case), *in* 10 TRIALS OF WAR CRIMINALS, *supra* note 49, at 3.

53. *Id.* at 330-31. Judge Anderson came to such a conclusion based on the fact the IMT had acquitted Doenitz of conspiracy to aggressive wars and of planning, preparing, and initiating wars of aggression, but convicted him of waging aggressive wars. However, this was solely based on the fact that he had ascended to a policy level. *See infra* text accompanying note 130.

54. United States v. Wilhelm von Leeb (High Command Case), *in* 10 TRIALS OF WAR CRIMINALS, *supra* note 49, at 331-32."Eight defendants were convicted under count one, charge for conspiracy, and 14 were acquitted. Twelve defendants were convicted under count two and only four were acquitted; six were not charged under count two."

55. *Id.* at 331-32. The IMT came to similar findings regarding Seyss-Inquart. *See* IMT Judgment, *supra* note 36, at 291-93, 296-98, 318-21.

between "conspiracy," and "planning, preparing, initiating, and waging" was academic because most of the defendants had attended one or more of the Hitler conferences, except for Funk and Frick.[56] The Tribunal in the *High Command* Case took a practical approach instead and did not dwell on these subtleties. It dismissed the conspiracy count on the grounds that the Prosecution did not introduce any new evidence that was not admissible already under the count of "crimes against peace."[57]

The IMTFE also found another point of overlap in that "initiating," defined as the commencing of hostilities, included the crime of "waging" aggressive war. After some individuals initiate an aggressive war, others may participate therein as to become guilty of waging the war. Thus, it had no reason to convict persons on the counts of initiating as well as waging aggressive war.[58] Judge Röling, in his dissenting opinion, acknowledged this overlap as well.[59]

This section highlights a portion of the Second World War case law that is often overlooked by the literature when examining the definition of "crimes against peace." It demonstrates that there are two points of overlap between the five crimes covered by "crimes against peace." It is questionable why this case law did not adopt a systematic approach because a complete analysis of the definition of "crimes against peace" also requires an examination of the points of overlap between the crimes thereby covered.

B. *Planning, Preparing, Initiating, and Waging a War of Aggression*

The ICC Statute requires that an individual be held criminally responsible if he or she commits the material elements of a crime with intent and knowledge.[60] Intent presupposes knowledge but knowledge can exist independently of intent.[61] The mental element of "crimes against," that is the aggressive intent or *animus aggression* is very important

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56. 10 TRIALS OF WAR CRIMES, *supra* note 49, at 334.

57. United States v. Wilhelm von Leeb (High Command), in 11 TRIALS OF WAR CRIMINALS, *supra* note 49, at 483.

58. IMTFE Judgment, *supra* note 43, vol. 20, at 48448-49 (relating specifically to counts 18 to 26 inclusive).

59. The Separate Opinion of the Member for the Netherlands, Judge Bernard Victor Röling, in *id.* vol. 21, at 51. He stated that it was not necessary to decide in detail whether someone planned or prepared an aggressive war, or conspired in the accomplishment of its planning, preparation, initiation, and waging. Moreover, he found he had to distinguish between initiating and waging aggressive war because the former established the latter.

60. ICC Statute, *supra* note 5, art. 30.

61. David K. Piragoff, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE, *supra* note 1, at 530.

because that is what transforms mere rearmament for instance into the preparation of aggressive war, as will be demonstrated below. Although the case law cited below does not deal in great detail with the question of aggressive intent, it is implicit in the factual determinations made by the Tribunals. The IMT determined that Nazi Germany's wars were aggressive, which implied that they had been committed with an aggressive intent. Its factual finding were binding on the Allied Military Tribunals under Control Council Law No. 10.[62] For its part the IMTFE determined that Japan had waged wars of aggression, which also implied the existence of an aggressive intent. Having established the aggressive intent in general terms, the IMT, IMTFE, and Allied Military Tribunals proceeded to determine the extent of knowledge and participation individuals had in "crimes against peace."

For instance, the IMT acquitted Kaltenbrunner of the charge of planning and preparing aggressive war because the evidence did not show his direct participation in any plan to wage such a war.[63] Von Schirach was acquitted of the same charge because it did not appear that he participated in the planning or preparation of any of the wars of aggression.[64] Schacht was acquitted of part of the charge to wage aggressive war because his participation in the occupation of Austria and Czechoslovakia was so limited that it did not amount to participation in the common plan, and because he lacked knowledge of the plans to invade these countries.[65] Streicher, Fritzsche, and Bormann were acquitted by the IMT of "crimes against peach" because there was insufficient evidence that they had knowledge of Hitler's plans.[66]

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62. Telford Taylor, *Ordinance No. 7: Organization and Power of Certain Military Tribunals*, *in* FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, app. L, Washington, DC: Government Printing Office, 1949, art. X:

> The determinations of the International Military Tribunal in the judgments In Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

63. IMT Judgment, *supra* note 36, at 284.
64. *Id.* at 310.
65. *Id.* at 301.
66. *Id.* at 294, 328, 329.

The IMTFE acquitted Hata of waging aggressive wars against the USSR and Mongolia because when the Lake Khassan hostilities occurred when he was in central China. Also, he was acquitted for the Nomonhan incident because he was, at that time, the Aide-de-Camp to the Japanese Emperor and became War Minister just over a week before that incident concluded.[67] Umezu was acquitted with regards to the same incident. Although the war at Nomonhan had already begun, Umezu had only taken command of the Kwantung Army only days before the fighting ceased.[68] Muto was also acquitted in relation to the Nomonhan incident because this war was over when he became Chief of the Military Affairs Bureau. Moreover, he was acquitted of waging aggressive war against France because he was Chief-of-Staff in the Philippines when Japan attacked French Indo-China.[69] The IMTFE also acquitted Matsui, a Japanese General, of participating in a conspiracy to commit "crimes against peace" because the evidence did not demonstrate that he had actual knowledge of the purposes and policies of the Japanese conspirators, even though he was closely associated to them due to his position. Also, he was acquitted of waging a war of aggression against China specifically because he did not have knowledge of this war's criminal character and the IMTFE did not consider justifying a conviction based on his military service alone.[70]

Another example is Judge Wilkins concurring in the *Krupp* Case, who stated that participation in "crimes against peace" required a substantial participation in, and a responsibility for, activities vital to building up the power of a country to wage war. The requisite criminal intent required was knowledge that the military power would be used in a manner which included war as an instrument of national policy according to the Kellogg-Briand Pact.[71]

In *United States v. Carl Krauch* (*Farben* Case),[72] the Tribunal interpreted the IMT judgment as requiring both knowledge and active participation to be conclusive.[73] The tribunal stated that the plan for aggressive war was not common or general knowledge in German society.

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67. IMTFE Judgment, *supra* note 43, vol. 20, at 49754.

68. *Id.* at 49350-51.

69. *Id.* at 49819.

70. *Id.* at 49814.

71. Special Concurring Opinion of Judge Wilkins on the Dismissal of the Charge of Aggressive War in the *Krupp* Case. TRIALS OF WAR CRIMINALS, *supra* note 49, at 456. This led Judge Wilkins to find the defendants not guilty for "crimes against peace" because their influence in the course of events was not substantial enough.

72. United States v. Carl Krauch (Farben Case), *in* 8 TRIALS OF WAR CRIMINALS, *supra* note 49, at 1.

73. *Id.* at 1102.

In order to find the defendants guilty, it would have to be demonstrated that they were parties to the plan or conspiracy or that they knew of the plan and furthered its purpose and objective by participating in the preparation of aggressive war. In examining the question of personal knowledge, the Tribunal took into consideration the position, authority, responsibility, and activities of the defendants toward the state and their position and activities with, or on behalf of, Farben.[74] In relation to the issue of preparation, the Tribunal examined whether the defendants must have known that by aiding Germany's extensive rearmament effort, they were preparing for aggressive war. The Tribunal pointed out that if the case concerned military experts then it would be possible to impute knowledge that the extent of rearmament was in excess of that necessary for defensive purposes only. However, this was not the case as the defendants were not military men. The evidence did not show that any of them knew of the extent of the planned rearmament, of how far it had progressed at any given time, or of the armament strength of neighboring countries.[75] The Tribunal in the *Farben* Case concluded that knowledge of Hitler's intention to wage aggressive war could not be inferred from the evidence with regards to any of the defendants.[76]

Judge Hebert, in his concurring opinion in the *Farben* Case, stated that "crimes against peace" required an act of substantial participation accompanied by the necessary criminal intent.[77] Participation in the policies, planning, and purposes of the Nazi regime constituted "crimes against peace" after concrete plans were drawn up for waging aggressive war. Knowledge of the offence Meant that the accused positively knew of Hitler's intentions to resort to aggressive war. However, he found it unnecessary for an individual to have knowledge of specific plans for aggressive war against specific countries as of a certain time, nor was it necessary for an individual to have exact knowledge of the order in which states would be aggressed. It had to be established beyond reasonable doubt that when engaged in substantial participation of crimes against peace, the accused knew or believed that ultimately the result would be aggressive war.[78] It further had to be established that the individual believed that armed force would actually be employed, if necessary, to achieve the Nazi government's policy of territorial aggrandizement.[79]

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74. *Id.* at 1108.
75. *Id.* at 1113.
76. *Id.* at 1116-24.
77. 8 TRIALS OF WAR CRIMINALS, *supra* note 49, at 1300 (Herbert, J., concurring).
78. *Id.* at 1302.
79. *Id.* at 1302-03. While the *Farben* defendants knew that acts of aggression had been and

In the *Judgment of 25 January 1949 in the Case versus Hermann Roechling and Others Charged with Crimes Against Peace, War Crimes and Crimes Against Humanity*[80] (*Roechling* Case), the Superior Military Court of France stated that in order to establish Roechling's culpability for "crimes against peace," it was necessary to determine whether his activities constituted a sufficient and intentional collaboration with Hitler or Goering in the preparation and waging of the war of aggression.[81]

However, the IMT and the Allied Military Tribunals all drew a distinction between rearmament in the strict sense and the preparation for a war of aggression. The IMT stated that rearmament in and of itself was not illegal under its Charter. However, rearmament carried out as part of a plan to wage aggressive war can be equated to preparation for aggressive warfare. This is why the IMT acquitted the defendant Schacht although he was a central figure in Germany's rearmament.[82] Judge Anderson, concurring in the *Krupp* Case,[83] the Tribunal in the *Farben* Case,[84] as well as the Superior Military Court in the *Roechling* Case,[85] all supported this reasoning. Moreover, Judge Hebert in his concurring opinion in the *Farben* Case stated that building armament level or developing the "war potential" of a state may constitute an act of participation in the planning and preparation for aggressive war provided that such participation is substantial and is done with the intention to further the aim of such a war.[86] Furthermore, the Tribunal in the *High Command* Case stated that there is

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were being carried out against Austria and Czechoslovakia it could not be concluded that this action amounted to the requisite knowledge or state of mind constituting plans to wage aggressive war. The fact that they acquired industries as a result, and aided materially to the territorial expansion by resorting to threats of force do not constitute "crimes against peace." In relation to Poland, the evidence did not conclude that the defendants knew of a decision to absorb it into the Reich. Judge Hebert conceded that the defendants knew methods of aggression were being employed and threats of force being made against Poland prior to Germany's attack, however he considered that there existed a possibility that due to the increasing stiff resistance to the possibility of war the aggressor would in fact not go ahead.

80. Judgment of 25 Jan. 1949 in the Case Versus Hermann Roechling and Others Charged with Crimes Against Peace (Roechling Case), War Crimes and Crimes Against Humanity. Decision on Writ of Appeal Against the Judgment of 30 June 1948, *in* 14 TRIALS OF WAR CRIMINALS, *supra* note 49, at 1097 app. B.

81. *Id.* at 1107.

82. IMT Judgment, *supra* note 36, at 300-01.

83. Special Concurring Opinion of Judge Wilkins on the Dismissal of the charge of Aggressive War, *in* 9 TRIALS OF WAR CRIMINALS, *supra* note 49, at 435.

84. *Farben Case, in id.* vol. VIII, at 1112.

85. *Roechling Case, in id.* vol. XIV, at 1108.

86. Concurring Opinion of Judge Hebert on the Charges of Crimes Against Peace, *Farben Case, in id.* vol. VIII, at 1300.

no general criterion under international common law for determining the extent to which a nation may arm and prepare for war. As long as there is no aggressive intent, there is no evil inherent in a nation making itself militarily strong. It cited Switzerland as an example, which for her geographical extent, her population and resources is proportionally stronger militarily than many nations of the world, however its military strength is used to implement a national policy that seeks peace and to maintain its borders against aggression.[87]

The decisions of the IMT and the IMTFE as well as various decisions by Allied Military Tribunals all reveal that knowledge and participation was one decisive factor taken into account in determining guilt or innocence in relation to "crimes against peace." Whether individuals were high-ranking governmental or military officials, or whether they had a particular influence on governmental affairs through their private interests was not automatically decisive. Instead, the role they played on a policy level was the other decisive factor and will be discussed below.

C. *Participation in a Common Plan or Conspiracy to Commit "Crimes Against Peace"*

The IMTFE indicated that conspiracy to wage aggressive war arose when two or more persons entered into an agreement to commit that crime. The conspiracy is followed and furthered by the planning and preparation for a war of aggression. Those who participate at that stage may be either original or late adherents. The adherents become conspirators when they adopt the conspiracy's purpose and plan and prepare for its fulfilment.[88] The IMTFE pointed out that not all of the Japanese conspirators were parties to the conspiracy to commit "crimes against peace" at the beginning, and that some of those who were parties to it initially had ceased to be active in its execution before the end. Nevertheless, all of those who at any time knowingly participated in the execution of the conspiracy would be guilty of this charge.[89]

Thus, the Nazi Party programme as expressed in the 25 points announced in 1920, or its political affirmations as expressed in *Mein Kampf*, did not alone suffice as planning to commit "crimes against peace." With regard to conspiracy, it has to be clearly outlined in its criminal purpose and not too far removed from the time of decision and of

87. *High Command Case*, *in id.* vol. XI, at 488.
88. IMTFE Judgment, *supra* note 43, vol. 20, at 48447-48.
89. *Id.* at 49769-70.

action. It was not necessary to establish the existence of a single master conspiracy between the defendants.[90]

In his concurrence in *Krupp*, Judge Anderson interpreted the IMT's findings regarding conspiracy as requiring a concrete plan in which two or more persons participated; such a plan must have a clearly outlined criminal purpose and must not be too far removed from the time of and decision of action.[91] The criminal purpose in question was "first to prepare and then to wage aggressive war."[92]

In order to be a participant in either a common plan or a conspiracy the accused must actually know of such plan or conspiracy.[93] The Tribunal in the *Farben* Case, relying on the U.S. Supreme Court in *United States v. Falcone*, stated that an individual does "not become a party to a conspiracy by aiding and abetting it, through the sales of supplies or otherwise, unless he knows of the conspiracy and such knowledge cannot be inferred merely from the knowledge that the buyer will use the goods illegally."[94] Moreover, Judge Anderson in *Krupp* found that the defendants' contribution to the war effort was not made in connection with or furtherance of any criminal conspiracy or plan to prepare or wage aggressive war, but was merely motivated by the legitimate interests of the Krupp firm from a business standpoint. The Krupp firm could not wage war or aid in doing so independently of the German government.[95] He deemed it necessary that the evidence show that the defendants manufactured and sold armaments to the government with the knowledge that these were going to be used in some invasion or war of aggression, and with the intent to aid in the accomplishment of the criminal purpose of those initiating or waging such a war.[96] Thus, actual knowledge is required and must be determined by objective standards and not by relying on a standard applicable in cases of ordinary negligence.[97] The requisite knowledge could be shown by direct or circumstantial evidence. Such knowledge relates to the facts and circumstances that enable an individual to determine or not that there is a concrete plan to initiate and wage a war

90. IMT Judgment, *supra* note 36, at 222.

91. Concurring Opinion of Presiding Judge Anderson on the Dismissal of the Charges of Aggressive War, *in* 9 TRIALS OF WAR CRIMINALS, *supra* note 49, at 407, 411.

92. *Id.* at 412.

93. *Id.* at 407; *see also* 8 TRIALS OF WAR CRIMINALS, *supra* note 49, at 1127.

94. 8 TRIALS OF WAR CRIMINALS, *supra* note 49, at 1127 (citing United States v. Falcone, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940)).

95. Concurring Opinion of Presiding Judge Anderson on the Dismissal of the Charges of Aggressive War, *in* 9 TRIALS OF WAR CRIMINALS, *supra* note 49, at 417-19.

96. *Id.* at 435-36.

97. *Id.* at 436.

of aggression. It must be shown that this individual participated in the plan with the felonious intent to aid in the accomplishment of the criminal objective.[98] The fact that the defendants in the *Krupp* Case were engaged in the manufacture of weapons ordinarily employed in offensive warfare was not deemed to be of determinative significant. There was no evidence that they were informed (by any government official or anyone else) that the Krupp firm's armament activities were connected with concrete plans for aggressive war.[99]

The Tribunal's findings in the *Krupp* Case were based on its evaluation of the facts before it. On the one hand it can be argued that its decision is a bit too kind to armaments manufacturers given the role they play in fuelling wars in general. On the other hand, its legal reasoning is consistent with the findings made above whereby rearmament (which includes arms manufacturing) should be considered as preparation for aggressive war if it is accompanied by an *animus aggressionis*.

Based on the above it is clear that article 25(3) subparagraphs (a) to (d) of the ICC Statute are compatible with "crimes against peace" as adjudicated by the Second World War case law, and therefore compatible with customary international law. Taken as a whole, the text of the IMT Charter, the IMTFE Charter and Control Council Law No. 10 dealt with individuals participating directly (those who planned, prepared, initiated, or waged a war of aggression), individuals participating indirectly (leaders, organizers and, instigators), as well as accomplices. These three categories of perpetrators are reflected in subparagraphs (a) to (c) of article 25(3) of the ICC Statute.

Also, the reference to the "common plan or conspiracy" to commit aggression in the IMT Charter is compatible with subparagraph (d) of article 25(3) in relation to the criminal responsibility of an individual contributing to the a crime by a group of persons acting with a common purpose. The Allies relied on the crime of participation in a common plan or conspiracy as the lynchpin that ensured that the leaders of the Nazi regime who were responsible for the war would not go unpunished. They did not really consider relying on other prosecutorial techniques that would have yielded the same result such as command responsibility or complicity through a "joint criminal enterprise" a that time.[100] Article 6 *in fine* of the

98. *Id.*

99. *Id.* at 439.

100. William A. Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the 'Supreme International Crime,' in* THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 25-30 (Mauro Politi & Guisepe Nesi eds., 2004); Jonathan A. Bush,

IMT Charter was drafted in broad terms and made the crime of participation in a common plan or conspiracy apply to "crimes against peace" as well as war crimes and crimes against humanity. Individuals charged under the crime of participation in a common plan or conspiracy could be held responsible for "all acts performed by any persons in execution of such plan."[101] However, the IMT interpreted this provision and the conspiracy count narrowly, that is, as applying only to "crimes against peace" and disregarded the charges of conspiracy to commit war crimes or crimes against humanity.[102] When applied to the "crime of aggression," article 25(3) subparagraph (d)(I) of the ICC Statute essentially reverses the IMT's decision on this point. Subparagraph (d)(I) criminalizes the contribution to the commission of a crime by a group of persons acting with a common purpose; this contribution must intentionally aim at furthering the group's criminal activity or criminal purpose, and the activity or purpose in question must involve the commission of a crime within the jurisdiction of the ICC.[103] Suppose that State A (a State-party to the ICC Statute) and State B (a non-party State to the ICC Statute) form a coalition and decide to attack, invade, and occupy State C (another non-party State to the ICC Statute). State A can be held liable for war crimes committed by State B in the territory of State C because State A is part of a "joint criminal enterprise" to commit a crime within the jurisdiction of the ICC Statute, namely the "crime of aggression." A prosecution before the ICC for this scenario would not be contrary to article 5(2) of the ICC Statute because it entails the exercise of jurisdiction over war crimes and not over the "crime of aggression."[104]

A person accused of such a crime can attempt to challenge it by stating that although the crime at the heart of the "joint criminal enterprise," that is, the "crime of aggression" falls within the jurisdiction of the ICC, it has not yet been defined, which is a violation of the principle of legality, *nullum crime sine lege*, under article 22(2) of the ICC Statute.[105] The Prosecutor can counter this challenge based on the exception provided for in article 15(2) of the International Covenant on Civil and Political Rights (ICCPR) which states that the principle of legality shall not "prejudice the

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"The Supreme . . . Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324, 2363-64 (2002).

101. IMT Charter, *supra* note 23, art. 6 *in fine*.

102. IMT Judgment, *supra* note 36, at 224.

103. ICC Statute, *supra* note 5, art. 25(3)(d)(i).

104. *Id.* art. 5(2).

105. *Id.* art. 22(2); *see* Bruce Broomhall, *Article 22: Nullum Crimen Sine Lege*, *in* COMMENTARY ON THE ROME STATUTE, *supra* note 1, at 456-59.

trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[106] However, the accused can contradict this assertion based on two arguments. The first is based on article 22(3) of the ICC Statute which states that "this article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."[107] The second argument is based on article 21 which specifies that the application of the ICC Statute takes precedence over applicable treaties, principles and rules of international law.[108] Nevertheless, the Prosecution could invoke the rule whereby the application and interpretation of law pursuant to article 21 of the ICC Statute must be consistent with internationally recognized human rights,[109] thereby maintaining the validity of the exception in article 15(2) of the ICCPR. Ultimately the ICC will have to decide this question.

D. *Incitement to Commit Aggression*

The SWGCA proposed to deal with the leadership nature of the "crime of aggression" by adding in article 25(3) of the ICC Statute a new subparagraph (e) *bis*. Accordingly two proposals were put forward specifying that the "crime of aggression" would aim at punishing persons in a position to effectively exercise control over the political or military action of the state.[110]

However, it is not absolutely clear whether the SWGCA wished to criminalize the incitement of aggression. On the one hand, the SWGCA stated in its report that the new subparagraph (e) *bis* regarding the leadership aspect of aggression would be modelled on the existing subparagraph (e) which deals with direct and public incitement to commit genocide.[111] On the other hand, the two proposals put forward do not deal in any way with incitement to commit aggression. In fact, "Proposal A" specifically states that the leadership aspect of the "crime of aggression" would only apply to subparagraphs (a) to (d) of Article 25(3).

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106. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 15(2) [hereinafter ICCPR]; *see* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 223; Eur. T.S. 5, art. 7(2); Nicolaos Strapatsas, *Book Review: The Crime of Aggression*, 15 CLF no. 4 (forthcoming 2005).

107. ICC Statute, *supra* note 5, art. 22(3).

108. *Id.* art. 21(1).

109. *Id.* art. 21(3).

110. SWGCA Report, *supra* note 12, Annex I, Proposals A & B.

111. *Id.* ¶ 20.

Two important things must be noted at this point. The first thing is that in this section the assumption is made that what was meant by the SWGCA was to create a new subparagraph (e) *bis* that would criminalize the direct and public incitement to commit aggression and specify that the "crime of aggression" was a leadership crime. The second thing is that this section will only address the question of whether the direct and public incitement to commit aggression is a crime under international law. The leadership aspect of the crime will be dealt with in the next section of this Article.

Under international law, the crime of direct and public incitement relates only to genocide. It derives from article 3(c) of the 1948 Genocide Convention and was reproduced in article 25(3)(e) of the ICC Statute. Incitement is an inchoate crime, that is, an offence in and of itself regardless of whether genocide actually occurs following such incitement.[112] At the Rome Conference, attempts at extending article 25(3)(e) to cover crimes against humanity and war crimes failed.[113]

The Charters of the IMT, the IMTFE, and Control Council Law No. 10 did not criminalize the direct and public incitement of aggression under "crimes against peace." Propaganda for war was only one indicator considered by the IMT[114] and the IMTFE[115] in their judgments when establishing the existence of the common plan or conspiracy to commit "crimes against peace."[116]

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112. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 102 (2d ed. 2004); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 266-80 (2000).

113. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 112, at 272.

114. IMT Judgment, *supra* note 36, at 187-88, 222. In acquitting Fritzsche of "crimes against peace," the IMT noted that although he became the head of the Radio Division of the Propaganda Ministry and Plenipotentiary for the Political Organization of the Greater German Radio, he remained subordinate to Dietrich, the Reich Press Chief, who was a subordinate of Goebbels. Each Nazi major act of Nazi aggression was preceded by a vigorous propaganda campaign, however Fritzsche had no control of the formulation of the propaganda policies and served merely as a conduit to the press of the instructions handed him by Dietrich. The IMT concluded that Fritzsche had not achieved a sufficient stature to attend the planning conferences that led to aggressive war and he was not informed of the decisions taken at these conferences. His activities could not fall within the definition of the common plan to wage aggressive war. *See id.* at 327-28.

115. IMTFE Judgment, *supra* note 43, at 48517-19, 48566, 48589-92, 48658-60, 48759-61. Shiratori was acquitted of all counts relating to "crimes against peace" except for count 1 relating to the participation in the common plan or conspiracy. In finding him guilty of this crime, the IMTFE relied heavily on his role in forming, publishing, and supporting Japanese propaganda for aggressive war. *See id.* at 49835-37.

116. For an overview of the concept of war-mongering and propaganda for war, see Wright Quincy, *The Crime of War-Mongering*, 42 AM. J. INT'L L. 128 (1948); John B. Whitton, *Aggressive Propaganda*, *in* 1 INTERNATIONAL CRIMINAL LAW 238 (M. Cherif Bassiouni & Ved P. Nanada eds.,

Nonetheless, the U.N. General Assembly adopted resolution 110(II) (1947) entitled: "Measures to be Taken Against Propaganda and the Inciters of a New War," in which it condemns all forms of propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression.[117] The General Assembly also adopted the "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations" contained in resolution 2625 (1970), which imposes on states the "duty to refrain from propaganda for wars of aggression" in accordance with the purposes and principles of the United Nations.[118] Moreover, the ICCPR, as an exception to the freedom of expression, states that: "any propaganda for war shall be prohibited by law."[119] The prohibition in this context relates to propaganda for aggressive war.[120] It also provides for the prohibition by law of any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence, which parallels the crime of direct and public incitement to commit genocide.[121]

It is evident that propaganda for war is a broader notion than direct and public incitement to commit aggression. However, the creation of a crime of direct and public incitement to commit aggression in the future under the ICC Statute would be firmly based on the legal obligation contained in the ICCPR as well as being its logical consequence.

E. *Policy Level Requirement*

As indicated above, the SWGCA sought to make article 25(3) of the ICC Statute compatible with the notions of leadership nature of the "crime

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1973); S.V. Molodcov, *The Principle that States Should Refrain from the Threat or Use of Force in International Relations*, *in* THE LEGAL PRINCIPLES GOVERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES 38-39 (M.K. Nawaz et al. eds., 1966).

117. Measures to be Taken Against Propaganda and the Inciters of a New War, U.N. Doc. A/RES/110(II).

118. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, U.N. Doc. A/RES/2625(XXV), Annex, 25 U.N. GAOR, Supp. (No. 28), U.N. Dec. A/5217 (1970), at 121, princ. 1, ¶ 3.

119. ICCPR, *supra* note 106, art. 20(1).

120. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 473 (2d ed. 2005); *see* Office of the High Commissioner for Human Rights, General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred, art. 20, ¶ 2(1983) [hereinafter General Comment No. 11], *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/60dcfa23f32d3feac12563ed00491355?Opendocument.

121. General Comment No. 11, *supra* note 120, art. 20(2).

of aggression"[122] and two proposals were made to this effect.[123] Various cases from the Second World War developed a policy level requirement in their analysis of "crimes against peace" in order to deal with this particular issue.

The IMT recognized that the aggressive designs of the Nazi government were not accidents arising out of the immediate political situation in Europe and the world, but were a deliberate and essential part of Nazi foreign policy.[124] Beyond this, it did not elaborate the policy level requirement of "crimes against peace" extensively in its main judgment. This is perhaps explained by the fact that in practical terms it did not need to do so. There was no question of trying lower level perpetrators but only the Major War Criminals of the European Axis, that is, the highest-ranking political and military officials as provided for by articles 1 and 6 of the IMT Charter.[125] Nevertheless, in acquitting Streicher of all charges relating to "crimes against peace," the IMT took into account the fact that the evidence did not show that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies leading to war, nor had he knowledge of these policies."[126]

Although the IMTFE's Charter contained a similar provision in relation to the Major War Criminals in the Far East,[127] its Judgment made reference to the issue of formulating and supporting the Japanese policy of waging aggressive war in determining the guilt of certain individuals in relation to the charges of conspiracy and of committing "crimes against peace."[128] In relation to Sato, the IMTFE stated:

> It was not until 1941 that SATO attained a position which by itself enabled him to influence the making of policy, and no evidence has been adduced that prior to that date he had indulged in plotting to influence the making of policy. The crucial question is whether by that date he had become aware that Japan's designs were criminal, for thereafter he furthered the development and execution of these designs as far as he was able.[129]

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122. SWGCA Report, *supra* note 12, ¶ 20.

123. *See supra* text accompanying note 109.

124. IMT Judgment, *supra* note 36, at 187.

125. IMT Charter, *supra* note 23, arts. 1, 6.

126. IMT Judgment, *supra* note 36, at 294.

127. IMTFE Charter, *supra* note 26, art. 1.

128. IMTFE Judgment, *supra* note 43, vol. 20, at 49787, 49823, 49828, 49844 (pronouncements by IMTFE against the defendants Hiranuma, Oshima, Shigemitsu and Tojo).

129. *Id.* at 49826.

Judge Röling, in his dissenting opinion, acknowledged the importance of the policy level requirement regarding "crimes against peace" but drew a distinction as to whether an individual was a member or not of the government. He stated that the simple fact of having been a member of a government that decided to wage aggressive war or that was in the process of waging such a war did not suffice to warrant a conviction for "crimes against peace." The intention with which this individual entered government was decisive.[130] Judge Röling dissented on the conviction of five defendants for "crimes against peace" because he differed with the majority in the interpretation of the facts.[131] Thus, in relation to the defendant Shigemitsu, he stated:

> If one has entered a War Cabinet, such as the Tojo or Koiso Cabinet, with the intention of promoting peace, and of bringing to speedy end the war already in progress, one cannot be said to have waged that aggressive war. This war was planned and initiated by individuals, but once started, it assumed an impersonal existence of its own. However, those individuals who after the outbreak if war are appointed to public functions in the war machine but who actively support the aggressive policy which prolongs the war, such individuals may be guilty of the crime of waging war. But he who assumed public office in order to oppose that war, who accepts his appointment in order to promote peace, cannot and should not be accused of waging an aggressive war.[132]

Judge Röling based his position on the findings of the IMT with regards to Speer.[133] He came to similar findings with regard to the defendant Togo.[134] He also found that the defendant Kido should have been acquitted for "crimes against peace" because he did not actively support Japan's policy of aggressive war but in fact opposed this.[135]

In relation to individuals outside government, Judge Röling, citing the example of the Army, found that when such individuals assume a position that makes them a "decisive agent in the formulation of the State policy,"

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130. The Separate Opinion of the Member for the Netherlands, Judge Bernard Victor Röling, in *id.* vol. 21, at 236.

131. These were defendants Hata, Hirota, Kido, Shigemitsu and Togo.

132. IMTFE Judgment, *supra* note 43, vol. 21, at 236 (Separate Opinion of the Member for the Netherlands, Judge Bernard Victor Röling).

133. *Id.*

134. *Id.* at 249.

135. *Id.* at 219-26.

they can wage aggressive war.[136] He noted that the Army could not wage aggressive war by carrying out its normal duties, namely, executing the commands of the Executive.[137] This led him to the conclusion that defendant Hata should have been acquitted for "crimes against peace."[138] Soldiers and sailors that perform a strictly military function should never be considered to wage an aggressive war in the sense of the IMTFE Charter, even if they are Generals or Admirals, as long as they do not, in that capacity, decide government policy.[139] Accordingly, only the government and those authorities who carry out governmental functions and are instrumental in formulating policy actually wage aggressive war.[140]

The Allied Military Tribunals saw charges of "crimes against peace" being brought before them against individuals that were not necessarily Major War Criminals. Accordingly, they developed in detail the policy level requirement of this crime. The defendants before the tribunals were all acquitted of charges related to "crimes against peace" essentially because none of them were on a policy level.

The Tribunal in the *High Command* Case stated that war results from the implementation of a predetermined national policy, which is drawn up by individuals:[141]

> If the policy under which it is initiated is criminal in its intent and purpose it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained then the waging of the war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level. [. . .]
> If and as long as a member of the armed forces does not participate in the preparation, planning, initiating, or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace. It is not a person's rank or status, but his power to shape or influence the policy of his state, which is the

136. *Id.* at 52.
137. IMTFE Judgment, *supra* note 43, at 52.
138. *Id.* at 188.
139. *Id.*
140. *Id.*
141. 11 TRIALS OF WAR CRIMINALS, *supra* note 49, at 485, 490.

> relevant issue for determining his criminality under the charge of crimes against peace.[142]

The Tribunal refused to accept that Hitler alone had to bear criminal responsibility for the Nazi policies of aggressive war even though he was the Dictator of the Third Reich and Supreme Commander in both civil and military fields. Hitler could not formulate these policies of aggressive war alone and implement them by planning, preparing, and waging war.[143]

The IMT had stated that the Major Nazi War Criminals could not invoke the fact that Germany at the time was a complete dictatorship thereby absolving them from participation in crimes against peace:

> A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts.[144]

The Tribunal in the *High Command* Case found that although making national policy is essentially a political act, it requires the consideration of military matters once war becomes an element of such policy.[145] The accused must have knowledge that an aggressive war is intended and that if launched it will be an aggressive war. However, mere knowledge does not suffice to make participation even by high ranking military officers in this war a criminal offense. The additional requirement is that the accused, after having acquired this knowledge, is in a position to shape or influence

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142. *Id.* at 486-89.

143. *Id.* at 486.

144. IMT Judgment, *supra* note 36, at 223. The IMTFE also acknowledge that the "far-reaching plans for waging wars of aggression and the prolonged and intricate preparation for and waging of these wars of aggression were not the work of one man. They were the work of many leaders acting in pursuance of a common plan for the achievement of a common object." *See* IMTFE Charter, *supra* note 43, vol. 20, at 49768.

145. 11 TRIALS OF WAR CRIMINALS, *supra* note 49, at 490.

such policy. If this individual affects such policy as to initiate the war or to continue it, he or she becomes criminally responsible. If he or she hinders or prevents the war, to the extent of their ability, then he or she lacks the criminal intent regarding such war policy. If an individual did not know that the war in which he or she was involved in planning and preparing was aggressive then this individual cannot be guilty of crimes against peace. However, this individual is criminally responsible if he learnt after the policy was formulated that such war was aggressive and being in a position to influence such policy to the contrary but failed to do so.[146] After the initiation of the war of aggression, the policy question then becomes that of extending and continuing the war or otherwise discontinuing it.[147] Those who are below the policy level and who execute such policy by planning and carrying out military campaigns merely act as instruments of the policymakers and are not subject to criminal responsibility.[148] The spectrum of action in question includes the Dictator or Supreme Commander on one end (Hitler) and the common soldier on the other end. Amid this is the division between individuals whose participation in the waging of aggressive war is criminal and those whose participation is excusable. Although, Control Council Law No. 10 did not definitely draw such a line, the Tribunal fixed the demarcation at the policy level.[149]

Thus, the accused individuals in the *High Command* Case were acquitted of the charge of "crimes against peace" for not being on the policy level even though they were "only one or two steps removed from Goering, Keitel, Jodl, Doenitz, and Raeder, defendants in the IMT case."[150]

The Tribunal in the *Farben* Case focused on the defendant Krauch, who was considered to be the link between Farben and the Reich, and found that he was beneath the membership of the circle of individuals that planned the wars of aggression (which is equivalent to those at the policy level).[151] He did not have any opportunity to participate in this planning either generally or in relation to specific wars. Moreover, Krauch had no connection with the initiation of any of the invasions or wars of aggressions because he was neither informed of the time nor the method

146. *Id.* at 489-90.

147. *Id.* at 490.

148. *Id.* at 491.

149. *Id.* at 486.

150. 11 TRIALS OF WAR CRIMINALS, *supra* note 45, at 477. Four of the defendants were leading Staff Officers and the nine others were all top level Field Commanders.

151. The other defendants were even further removed from the scene of Nazi governmental activity than was Krauch.

of initiation.[152] The Tribunal stated that nothing in the IMT Charter or in Control Council Law No. 10 indicated that the term "waging a war of aggression" was intended to apply to any and all persons who aided, supported, or contributed to the carrying on of an aggressive war. Thus, basing itself on the IMT Judgment it held that the liability of individuals should be limited, for instance, to those in the political, military, and industrial fields who are responsible for the formulation and execution of policies that result in their state carrying out a war of aggression. The defendants participated as followers and not as leaders. They were not policymakers, high public officials in the civil government, or high military officers. A departure from this concept would make it difficult to find a logical place to draw the line between the guilty and the innocent among the entire population of the aggressor-state, and no practical limitation on individual criminal responsibility would apply. Theoretically, "the private soldier on the battlefield, the farmer who has increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions" could all be held accountable for waging wars of aggression by the uncontrolled discretion of the indicting authorities.[153]

Both Judges Anderson and Wilkins in their separate individual concurring opinions held that the defendants in the *Krupp* Case did not hold positions on a policymaking level as required by crimes against peace.[154] Judge Anderson stated:

> None of them had any voice in the policies which led their nation into aggressive war; nor were any of them privies to that policy. None had any control over the conduct of the war or over any of the armed forces; nor were any of them parties to the plans pursuant to which the wars were waged and so far as appears, none of them had any knowledge of such plans.[155]

If the threat of criminal prosecution and punishment would deter the individuals at this specific level, then no war would occur.[156] Judge Anderson acknowledged that although the defendants' activities in connection with the war consisted primarily in the performance of their duties as employees of a private enterprise engaged for profit in the

152. 8 TRIALS OF WAR CRIMINALS, *supra* note 49, at 1112.
153. *Id.* at 1125.
154. *Id.* at 466 (Wilkins, J., concurring). *See also id.* at 449-50.
155. *Id.* at 449 (Anderson, J., concurring).
156. *Id.* at 450.

manufacture and sale of armament, together with membership by some of them in the economic and industrial associations organized to aid in the war effort, this did not amount to acting on a policy level.[157] He stressed the importance of this element of "crimes against peace" and resisted any attempt to extend its scope beyond the leaders, the policymakers and their privies, to private citizens called upon to aid their country's war effort. He considered such an extension would not only violate the principle forbidding ex post facto law and be a form of mass punishment, but it would be of no practical usefulness because it would be virtually impossible to draw the demarcation line thereby potentially putting at risk every private citizen of criminal punishment. He cited the example of Doenitz who was convicted by the IMT for waging aggressive war but acquitted for participation in the planning and initiation of aggressive war and participation in the planning and initiation of aggressive war as well as the common plan or conspiracy to wage aggressive war. This was based on the fact that his status changed from a mere "line officer performing strictly tactical duties" to a position of leadership in 1943 in charge of the direction and operation of submarine warfare.[158]

The example of Doenitz runs parallel to the acquittal of Shigemitsu by the IMTFE of the conspiracy charge but his conviction for waging aggressive war on several counts. This was because Shigemitsu only became Foreign Minister of Japan in 1943, after the policy of the Japanese conspirators to wage aggressive war had been settled and was in the course of its execution. No further formulation or development of this policy had occurred thereafter.[159]

The Superior Military Court in the *Roechling* Case in overturning Hermann Roechling's conviction for "crimes again peace" by a Tribunal of first instance stated that it did not wish to go beyond the boundary that was fixed very high by the IMT (the policy level) to go as far as the lowest ranks, such as the ordinary soldier.[160]

Of all the cases and judicial opinions produced in relation to the Second World War regarding "crimes against peace," the President of the IMTFE, Judge Sir William Flood Webb, in his separate concurring opinion, is the

157. 8 TRIALS OF WAR CRIMINALS, *supra* note 49, at 449.

158. *Id.* at 452; *see* IMT Judgment, *supra* note 36, at 302-03, 306.

159. IMTFE Judgment, *supra* note 43, at 49828.

160. 14 TRIALS OF WAR CRIMINALS, *supra* note 49, at 1108-10. The Superior Military Court did not consider that in contributing thusly to the war effort of his country, Roechling played a leading part within the meaning of crimes against peace in Control Council Law No. 10 because he took over the direction of the iron industry long after the outbreak of the war. The Superior Military Court also cited the example of Speer who was acquitted by the IMT for participation in the conduct of the war.

only one who suggested that "crimes against peace" were not subject to a policy level requirement. He stated that the view that aggressive war was illegal and had to be taken to its logical conclusion. Consequently, a soldier or a civilian was guilty of waging aggressive war if he or she opposed the war but decided after it began to carry on until a more favorable time for making peace would arise.[161] Moreover, Judge Flood Webb saw no special rules that would limit the responsibility for waging aggressive war, no matter how high or low the rank or status of the person promoting or taking part in it, provided that the individual in question knew or should have known that the war was aggressive.[162]

In addition to the practical consideration of drawing a line in relation to the prosecution of "crimes against peace" and avoiding collective punishment mentioned above, there are a number of reasons why Judge Flood Webb's position is invalid.

An individual can be in a situation where he or she is legally obligated to contribute to the war effort of his or her country. The government can impose special measures on its citizens such as conscription or mandatory financial contributions aimed at supporting the war. Although this is not a situation of duress as defined in article 31(1) subparagraph (d) of the ICC Statute, it would be preposterous to suggest that an individual in such a situation committed "crimes against peace" if he or she knew that the war in question is aggressive in nature.

Aside from this, the further away one moves from the policy level requirement of "crimes against peace," the higher the likelihood that an individual will not be in a position to know whether the war in question is aggressive. For example, a soldier is trained to adhere to a command structure and to follow the orders given to him or her from above without questioning them. This is reinforced by the potential of disciplinary or legal sanctions in case of disobedience. The soldier and the private citizen are not in a position to know with absolute certainty whether the war is aggressive. Although the soldier and the private citizen can inform themselves from the media and the information provided to them by the government, this does not amount to first hand knowledge of the actual facts behind the decision to go to war. Such information is often subjected to restrictions that can include the protection of national security information. Some situations may require extensive fact-finding which is beyond the capabilities of the soldier and private citizen. Moreover, a state

161. The Separate Opinion of the President of the Tribunal, Judge Sir William Flood Webb, *in* IMTFE Judgment, *supra* note 43, vol. 21, at 7.

162. *Id.*

will never admit that it is committing aggression. Instead it will rely on a pretext or justification for doing so.

Therefore if a soldier or private citizen cannot know directly that a war is aggressive, it is even less likely that he or she should have known this fact. The ICC Statute under article 28 subparagraph (a) allows for an individual to be held criminally responsible for a crime that he or she knew or should have known about. However, this specifically applies to commanders or persons effectively acting as such for acts committed by their subordinates. It is entirely incompatible with attributing criminal responsibility to low-level soldiers or private citizens as suggested by Judge Flood Webb. Moreover, one cannot invoke negligence (should have known), which is a crime without genuine intent, in order to prosecute an individual for "crimes against peace" because this crime requires a specific intent, this is the "foreknowledge of specific illegal ends and intentional conduct to achieve those ends."[163] Thus, an individual must intentionally and knowingly plan, prepare, initiate, or wage a war, and must intend this war to be illegal under international law thereby making it aggressive.

V. ATTEMPT

The SWGCA noted in its report the importance of distinguishing between the collective act of aggression by a state and the participation by an individual in such an act.[164] Article 25(3)(f) of the ICC Statutes relates to an attempt to commit the "crime of aggression," that is, the attempt by an individual to participate in the collective act of aggression, and not to the collective act *per se*.[165]

Accordingly, three situations merit consideration, two of which relate to the collective act of aggression by a state, whereas the third relates to the attempt by an individual to commit the "crime of aggression."

First, a situation can arise where an act of aggression is planned, prepared, initiated, and executed by a state against another state, however the latter withstands the attack and repels it. For example, State A invades the territory of State B but the latter's army immediately pushes back the invading forces completely. This situation demonstrates the occurrence of an act of aggression and should not be confused with an attempted act of

163. Bush, *supra* note 100, at 2387. A parallel can also be drawn between the "crime of aggression" and the specific intent required for genocide. *See* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 112, at 226-27.

164. SWGCA Report, *supra* note 12, ¶ 33.

165. *Id.* ¶ 82.

aggression. The fact that State A's invasion was unsuccessful is irrelevant because the act of aggression was initiated and executed. Its failure is due entirely to the self-defense capabilities of the aggressed state.

The second situation is where an act of aggression is planned, prepared, and initiated but is not executed against the target state. For example, State A fires missiles against the territory of State B and these miss entirely and fall in the sea due to faulty equipment or miscalculation. There is no apology or attempt to indicate that the missile launch was a mistake or an accident. This is an attempted act of aggression and does not reach the threshold of a completed act of aggression. The individuals involved would be tried for planning, preparing, and initiating an attempted act of aggression.

The third situation is the attempt to commit the "crime of aggression," by attempting to participate in the collective act of aggression. Under the ICC Statute, "attempt" is an inchoate crime. Even if the planned crime is not executed, entirely or partially, due to circumstances independent of the individual's intentions, it remains punishable as an attempt, on condition that he or she took a substantial step towards its execution (which is left up to the ICC to determine).[166] The SWGCA took the view that the existing case law from the Second World War related only to acts of aggression that had in fact been committed and did not cover this situation.[167] However, case of *Swiss Federal Prosecutor v. Josef Franz Barwirsch* (*Barwirsch* Case)[168] decided by the Federal Criminal Court of Switzerland in 1946 is instrumental when considering the attempt to commit the "crime of aggression." *Barwirsch* dealt with the criminalization of the attempted planning and preparation of an annexation, that is, an act of aggression that was not executed or attempted.[169]

Barwirsch was charged with having committed an "attack on the independence of the Swiss Confederation" under article 266, subsection I, of the Swiss Criminal Code.[170] Under this provision, an individual was

166. ICC Statute, *supra* note 5, art. 25(3)(f). However, the Statute also indicates that a person will not incur liability provided that he or she completely and voluntarily gives up his or her criminal purpose and abandons or prevents the crime's completion. *See* Ambos, *supra* note 16, at 489-90.

167. SWGCA Report, *supra* note 7, ¶ 39.

168. Swiss Federal Prosecutor v. Josef Franz Barwirsch, Bundes Gerichts Entscheidungen [BGE] [Federal Criminal Court] Dec. 16-20, 1946, 3631 Bstr. 3 (Switz.) [hereinafter *Barwirsch*].

169. The IMT found Germany's annexation of Austria and Czechoslovakia were acts of aggression.

170. Schweizerisches Strafgesetzbuch [StGB] [Criminal Code] vom. 21, Dec. 21, 1937, art. 266 [hereinafter Swiss Criminal Code].

liable to prosecution for carrying out an act with the aim of violating or endangering the independence of the Confederation, especially of endangering the independence of the Confederation by bringing about the interference of a foreign power in federal affairs.[171] Also, he was charged under the Swiss Criminal Code with political and military espionage,[172] and military espionage against foreign states,[173] as well as treasonable breach of military secrecy under the Swiss Military Penal Code.[174]

The Court found Barwirsch guilty because he aimed to eliminate Switzerland's independence and subjugate it to Nazi Germany. He tried to convince Seyss-Inquart and other influential German officials through submissions, reports, memoranda, and verbally, that the Third Reich should annex all or part of Switzerland or at least integrate it therein in some form. Consequently, the federal constitution and cantonal constitutions to be abolished or modified, a national socialist government dependent on the Third Reich would be established, race laws would be introduced, Jews would be persecuted, and a part of the population would be displaced into other areas of the Third Reich.[175]

Germany never attempted to annex Switzerland. However, the Court considered it irrelevant that Barwirsch did not achieve his aim. The crime contained in article 266, subsection I, covered any action, which aimed to violate the independence of the Confederation. Article 266 also covered actions that aimed to endanger the independence of the Confederation, including bringing about the interference of a foreign power in Swiss federal affairs.[176]

The Court interpreted the crime in article 266, subsection I, as covering action taken merely toward a situation tantamount to endangering Switzerland's independence as well as an actual violation thereof.[177] The

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171. *Barwirsch*, 3631 Bstr. ¶ 3. It should be noted that article 266, subsection II, of the Swiss Criminal Code criminalized the action of a person who entered into a relationship with the government of a foreign state or its agents, in order to bring about a war against the Swiss Confederation. He drew up plans for Switzerland's annexation without resolving to actual war along the lines of Austria's annexation by Germany. He had considered making Switzerland a theatre of war but only as a last resort. The Court concluded that based on the evidence it was not certain that Barwirsch wanted to bring about a war or that he foresaw and desired war as a possible effect of his contacts with Seyss-Inquart and other Germans, nor that he saw and approved of a means to bring about war through his own actions. Consequently, the Court found that article 266, subsection II, was not applicable. *See id.* ¶ 4.

172. Swiss Criminal Code, *supra* note 170, arts. 272, 274.

173. *Id.* art. 301.

174. Militärstrafgesetz vom 13, Juni 1927, MstG (Swiss Military Penal Code), art. 86.

175. *Barwirsch*, 3631 Bstr. ¶ 3.

176. *Id.*

177. *Id.*

Court stated that not all acts of preparation were covered, but only those that were not far removed from the actual danger or violation.[178] Accordingly, the Court defined danger as meaning a concrete danger, that is, a situation that does not simply make a violation possible in objective terms, but brings about a situation which would probably develop further, with or without the actions of the perpetrator in the nearer or more distant future, such as to bring about a violation in the normal course of events.[179]

The Court found that Barwirsch's aim of violating Switzerland's independence had progressed far enough to fall under the crime in question. His actions exceeded the mere preparation of a state of danger to the Confederation and had in fact already endangered its independence. The Court recalled the examples of Nazi Germany's actions in Austria, Czechoslovakia, Norway, Holland, and other countries. The Germans listened to Barwirsch and valued him because he provided them intelligence used to prepare Switerland's annexation, and because Barwirsch potentially played an auxiliary role at the "stage of interim solutions" thereafter.[180] Moreover, Switzerland's independence was all the more endangered by Barwirsch's direct contact with Seyss-Inquart, one of the architects of the annexation of Austria. The Court indicated that Barwirsch acted knowingly and wilfully. He was fully aware of the danger he brought to Switzerland's independence. Moreover, Barwirsch's awareness of the illegality of his actions was deduced from the fact that he sought to abolish or modify, with Germany's help, the federal constitution and the constitution of the cantons in an unconstitutional and illegal manner.[181]

In sentencing Barwirsch to twenty years imprisonment, the Court noted that he was in contact with leading figures of the Third Reich for years and submitted to them detailed plans for the annexation of Switzerland thereto. Barwirsch played no part in the fact that these plans were never realized. He personally wished that preparations had begun in 1939 with the goal of bringing about the annexation by 1942. Barwirsch also spread false information and told the Nazi authorities that a large proportion of the Swiss population was ready for annexation, and that the situation in the country was similar or even more favourable for an annexation than the situation in Austria in 1938. In order to convince the Nazis of this, Barwirsch stated that he had supporters that shared his aspirations. Given

178. *Id.*
179. *Id.*
180. *Barwirsch*, 3631 Bstr.¶ 3.
181. *Id.*

the volatile political situation in Europe at the time, Switzerland's independence was in fact in great danger.[182]

Taken on face value, one can correctly conclude that Barwirsch was prosecuted for treason. However, treason can include various forms of behavior such as the sale of military secrets, or as in the *Barwirsch* Case, the preparation for a foreign power to invade, occupy and annex one's country. If Nazi German had annexed Switzerland as planned, then this would have amounted to a completed act of aggression and Barwirsch could have been prosecuted for the "crime of aggression." This latter scenario would be analogous to the trial of Artur Greiser (Greiser Trial) decided by the Supreme National Tribunal of Poland.[183] He was a citizen of the Free City of Danzig and a member of the Nazi Party since 1930. He used his position as President of the Danzig Senate together with other members of the Nazi Party to bring about the seizure of Danzig and the incorporation of Western Polish territories into the German Reich. Evidently, his actions were treasonous. However, he was tried for preparing, directing, and executing a war of aggression.[184]

VI. CONCLUSION

The commonalities between Article 25(3) of the ICC Statute and "crimes against peace" derived from the IMT Charter are striking. There is no practical difference if the SWGCA chooses to depart from the language derived from the IMT Charter while framing the "crime of aggression" and opts for the default language in the ICC Statute. For instance, the ICC will have to interpret subparagraphs (a) and (b) of article 25(3) of its Statute in light of the Second World War case law relating to "crimes against peace." Thus, in order to establish whether an individual committed, ordered, induced, or solicited the "crime of aggression," the ICC will necessarily examine whether the accused planned, prepared, initiated, or waged aggressive warfare. As regards the issue of complicity, article 25(3), subparagraph (c), punishes the aiding and abetting of a crime whereas article 6 *in fine* of the IMT Charter dealt with accomplices. The difference in this case is one of vocabulary and not one of substance. Moreover, it is highly probable that the same objectives will be met by prosecuting an individual either for participating in a common plan or

182. *Id.* ¶ 8

183. U.N. War Crimes Commission, *The Greiser Trial*, *in* 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 70 (1949).

184. *Id.* at 74-78.

conspiracy to commit "crimes against peace" as prosecuted after the Second World War or for engaging in a so-called "joint criminal enterprise" to commit the "crime of aggression" under subparagraph (d) of article 25(3) of the ICC Statute.

Consequently, subparagraphs (a) to (d) of article 25(3) of the ICC Statute do not conflict with "crimes against peace." They can be directly applied to the "crime of aggression" without departing in any way from customary international law.

In relation to subparagraph (f) of article 25(3), it is evident that the ICC will have to interpret on a case-by-case basis the meaning of taking action that commences a crime's execution by means of a substantial step. Nevertheless, the *Barwirsch* Case can serve as a precedent on which the SWGCA can base itself if it chooses to criminalize the attempt to commit the "crime of aggression." Barwirsch was for all intents and purposes convicted for the planning and preparing of a "crime of aggression" even though the collective act of aggression was never initiated or attempted.

The most progressive step the SWGCA can take is criminalizing the direct and public incitement to commit aggression because there is no judicial precedent to this effect. However, even this is not far detached from the present state of international law, which prohibits propaganda for aggressive war. This new international crime will have the direct advantage of striking at the causes of aggression.

Furthermore, the SWGCA must not exclude an important component of the "crime of aggression," namely, the policy level requirement. The SWGCA has inadvertently touched upon this while discussing the crime's so-called leadership nature. Its report states that there "was agreement that the crime of aggression had the peculiar feature of being a leadership crime, thereby excluding participants who could not influence the policy of carrying out the crime, such as soldiers executing orders."[185] There are two reasons why it is essential that any mention of "leadership crime" be replaced by the policy level requirement. First, the reference to the "policy level" achieves the same objective as relying on "leadership crime" but with more clarity and accuracy. The SWGCA's report indicates that the view was expressed that more clarity was needed in regards to the meaning of leadership as well as the scope of its application.[186]

Second, by limiting the "crime of aggression" to persons in "a position effectively to exercise control over or to direct the political or military

185. SWGCA Report, *supra* note 12, ¶ 19.

186. *Id.* ¶ 29.

action of the State,"[187] the prosecutorial net is cast more narrowly than in the cases from the Second World War to the possible exclusion for instance of accomplices.[188] Also, this case law supports the reliance on the policy level requirement and offers abundant information for the ICC in defining the parameters of this notion. Judge Sir William Flood Webb, Presiding Judge of the IMTFE, was the only one who contested the existence of the policy level requirement with regard to "crimes against peace." However, Judge Webb's findings appear superficial and unconvincing and cannot be supported when compared to the extensive case law analysis to the opposite effect cited above. A state that commits aggression has the obligation to make reparations under the law of state responsibility, but criminal prosecution should be reserved to that state's policymakers that brought about the aggression.

Several participants of the SWGCA believed that article 25(3), as a whole, was applicable to the "crime of aggression."[189] The policy level requirement of the "crime of aggression" should also apply accordingly. Yet, "proposal A" contained in the SWGCA's report limited the policy level requirement to subparagraphs (a) to (d) of article 25(3) of the ICC Statute. There is no reason why it should not also expressly include the crimes of attempt and incitement of aggression.[190] The discussion undertaken above remains open regarding the obligation to strictly construe the definition of any crime in the ICC Statute and not to extend it by analogy.[191] It then follows that the approach taken in "proposal B," where the policy level requirement is inserted in article 25(3)(e) *bis*[192] without making express reference to the other subparagraphs of article 25(3), is not advisable.

It has been pointed out that in democratic society the application of the policy level requirement of the "crime of aggression" would make it difficult to differentiate between actual policymakers and mere

187. *See* Coordinator's Discussion Paper, *supra* note 9, § I, ¶ 1; *see also* SWGCA Report, *supra* note 12, Annex I, Proposals A & B.

188. SWGCA Report, *supra* note 12, ¶ 22. Some participants of the SWGCA cautioned against potentially excluding a given group of perpetrators.

189. *Id.* ¶ 21.

190. *Id.* Annex I, Proposal A. This is based on the assumption made earlier that the new article 25(3)(e) *bis* of the ICC Statute will criminalize the incitement of aggression and contain the policy level requirement. Although not expressly stated by the Court in *Barwirsch*, it can be said that Barwirsch acted on a policy level in relation to his attempted "crime of aggression." Moreover, the application of the policy level requirement to the incitement of aggression is consistent with the intention of the members of the SWGCA.

191. ICC Statute, *supra* note 5, art. 22(2). *See supra* text accompanying notes 105-09.

192. SWGCA Report, *supra* note 12, Annex I, Proposal B.

executioners because a large number of persons outside the Executive or Parliament can be involved in the preparation and shaping of a political decision such as journalists, members of think tanks and academics.[193] This does not mean that anyone directly or indirectly related to the governmental apparatus can be prosecuted. For instance, some individuals under a legal obligation to obey the order of their government can potentially benefit from the defense of superior orders.[194] This will likely negate any assumption that they are on a policymaking level. Other individuals on a policy level can invoke the various defenses provided for in the ICC Statute, including the mistake of fact[195] and the right to self-defense under article 51 of the U.N. Charter.[196] The policy level requirement ensures that the "crime of aggression" serves as a deterrent against waging illegal warfare. However, this is counter-balanced by the knowledge and specific intent requirements of the crime. Finally, the extent, or lack thereof, of an individual's involvement in the "crime of aggression" shall be taken into consideration by the ICC in determining the appropriate sentence to be rendered.[197]

193. Fernández de Gurmendi, *supra* note 4, at 598.
194. ICC Statute, *supra* note 5, art. 33.
195. *Id.* art. 32.
196. *Id.* art. 31(3).
197. *Id.* art. 78.