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Aleksa
Škundrić

The Crime of Aggression in International Criminal Law

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Preface

Wars and armed conflicts have, regrettably, been a constant feature of human history. Since the earliest forms of organised social life, such life has possessed a 'dark side': a persistent pattern of organised violence and destruction. Naturally, with a development of science and technology, increasingly 'sophisticated', and therefore more lethal, means of waging war emerged. This process culminated in the outbreak of the two world wars in the twentieth century, which produced levels of human suffering unprecedented at the time and unmatched since. These developments prompted the gradual emergence of the idea of limiting, and ultimately eliminating, the legal possibility for states to resort to war in international relations. One logical consequence of this idea was the conception of individual criminal responsibility for persons who have led their states to wage war or to commit other relevant acts of aggression against other states.

The principal aim of this book is to examine the rules governing individual criminal responsibility for the unlawful use, or threat of use, of force in international relations. To achieve this aim, the book adopts several perspectives. First, it traces the historical development of these rules. Second, it analyses the position of positive international criminal law on this issue, with particular emphasis on the place and scope of the crime of aggression within the legal framework of the International Criminal Court. Third, it addresses certain aspects of national law relating to individual criminal liability for the crime of aggression. Finally, throughout the book, and most explicitly in the conclusion, it advances the author's own views, particularly concerning the future of the crime of aggression and, more broadly, individual criminal responsibility for the unlawful use, or threat of use, of force in international relations.

This book is an expanded, revised, and updated version of the author's LLM (MA) thesis, successfully defended at the University of Belgrade, Faculty of Law, on 3 February 2023, entitled 'Aggression as the Crime Against Peace' ('Агресија као злочин против мира'), translated into English. In comparison with the original Serbian version, additional material and explanations have been included, and further literature has been consulted. Moreover, in light of the passage of several years since the completion of the original text, recent developments in the field of the crime of aggression in international law are also addressed, including the most recent initiatives concerning the establishment of a Special Tribunal for the Crime of Aggression against Ukraine.

The author expresses his gratitude to his mentor, Prof. Dr Milan Škulić, for his valuable feedback on several of the most contentious issues addressed in this book, and to Prof. Dr János Ede Szilágyi, for enabling this work to reach a wider audience. The author also thanks his colleagues and friends, Silvija Tripalo and Antun Matija Filipović, for their technical assistance with the translation of the text. Finally, the author acknowledges with gratitude the unwavering support of his family during the preparation of this book.

Aleksa Škundrić
Budapest, December 2025

1

Introduction

Some sources claim that 'according to archaeological and other research, it is believed that wars have been waged in the last 10,000 years'.[1] Nevertheless, throughout its history, and particularly over the past century, international law has, in principle, moved towards limiting the right of states to wage war (*ius ad bellum*). As Rakić observes, 'peace is certainly a key preoccupation of international law and the theory and practice of international relations'.[2] For a long period, such restrictions primarily aimed to establish legal rules governing the grounds for initiating war.[3] In other words, a distinct branch of international law existed, namely *ius ad bellum* in the objective sense.[4] It set out the obligations of the state in exercising its subjective right to wage war, that is, *ius ad bellum* in the subjective sense. Where a state breached its obligations under *ius ad bellum*, it incurred responsibility under international law. Such responsibility was understood to be civil in nature, prompting sanctions within the civil law sphere, such as restitution and compensation.

However, the idea of individual criminal responsibility for violations of a state's right to wage war, that is, for the unlawful use of force in international relations, emerged only towards the end of the First World War.[5] This responsibility would operate alongside, and concurrently with, state responsibility under

1 Krivokapić, 2023, p. 41.

2 Rakić, 2009, p. 9. Shaw similarly underlines that 'it is fair to say that international law has always considered its fundamental purpose to be the maintenance of peace': Shaw, 2003, p. 914. Conversely, Avramov points out that 'war (as the opposite of peace, author's remark) is the most extreme instrument of politics and is a centuries-old companion of history': Avramov, 2011, p. 637. In this sense, Škulić also observes that 'the general history of mankind is to a large extent a history of war': Škulić, 2020a, p. 91. In a related vein, Bovan argues that 'the collective violence practiced by the sapiens...is of such a character that human culture can freely and without hesitation be labeled as a culture of violence, regardless of the incredible and strange results and contributions that man gives to civilization in the spiritual and technological field', and further that 'in an environment that can be called a culture of violence without question, the most important task of the entire society and each community individually, to a greater or lesser extent, is to establish, and more importantly, to implement an appropriate mechanism of social control in dealing with war, with all possible conflicts, and with every possible form of violence and aggression': Bovan, 2024, p. 426.

3 More about this: Sukijasović, 1967, pp. 13–25.

4 This branch of international law has traditionally been referred to as 'the law of war in the broader sense'; see Kreća, 2019, p. 768.

5 For further discussion of the development of the idea of individual criminal responsibility in international law, see Kreštalica, 2023, pp. 95–108.

international law. During the twentieth century, and continuing into the twenty-first century, this idea materialised through the development of an international crime concerned with the unlawful use of force in international relations. Initially termed a crime against peace, it is now more commonly referred to as the crime of aggression. This book addresses the criminal law response to the unlawful use of force in international relations. The issue is of central importance in international criminal law, particularly in light of the increasing frequency and severity of armed conflicts arising from acts of aggression.[6]

The first part of the book examines the historical development of this crime. It focuses on key moments, including the initial attempts to conduct criminal proceedings following the First World War, the trials held after the Second World War in Nuremberg and Tokyo, and efforts to criminalise the offence during the Cold War.

The second part addresses the crime of aggression as defined in the Rome Statute of the International Criminal Court (ICC). To clarify its substantive provisions in detail, the analysis employs established normative methods of criminal law doctrine. It also examines the applicability of the rules of the general part of criminal law, as contained in the Rome Statute, to the crime of aggression. The discussion then turns to the procedural and legal provisions governing the Court's jurisdiction over this crime, including the legal effect of the 2010 amendments incorporating the crime of aggression into the Rome Statute.

Finally, the book considers selected issues of domestic law relevant to its subject matter, including the applicability of the principles of complementarity and universal jurisdiction to offences concerning the unlawful use of force in international relations. It also includes a focused analysis of the Criminal Code of the Republic of Serbia[7] and the offence of 'war of aggression' contained therein (Art. 386).

In the conclusion, the book, *inter alia*, offers an assessment of whether the existence of such a criminal offence is expedient, realistic, and desirable, taking into account the current state of positive international (criminal) law and the broader condition in which the international community finds itself today.

6 In this regard, it is appropriate to observe that 'wars of aggression and genocide are once again entering the international scene, without any real condemnation due to the hypocrisy of large states and their geopolitical and geostrategic aspirations': Kambovski, 2024, p. 250.

7 Criminal Code – CC, *Official Gazette of RS,* No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

2

The Historical Development of Aggression as an International Crime

2.1 The Period Up to the Treaty of Versailles of 1919

It is generally accepted that international law, as a relatively coherent field, did not emerge until the seventeenth century.[8] However, it is equally clear that it did not arise all at once; rather, it developed gradually over a long period. In this respect, the literature observes that individual rules governing relations between political collectivities originated in the distant past.[9]

A similar pattern characterised the development of rules on recourse to war. In the earliest period, various versions of the theory of just war (*bellum iustum*) predominated.[10] Although the theory has its roots in Ancient Greece, it first assumed a systematic form in Ancient Rome through the doctrine of 'a just and God-pleasing war' (*bellum iustum piumque*).[11] Its essence lay in a formal, religious assessment of whether a particular war initiated by the Roman state was just.[12] Christianity, although initially hostile to war,[13] later developed its own doctrine after becoming the official religion of the Empire.[14] Thus, according to Augustine of Hippo (354–430), the most prominent representative of patristic philosophy, 'a just war is the war which occurs as a result of an injustice previously committed…'.[15] The leading figure of the scholastic tradition, Thomas Aquinas (1225–1274), further systematised the doctrine. In his view, a just war must satisfy three conditions: (1) a just cause (*iusta causa*), (2) authorisation by the Emperor or in the name of the Emperor (*auctoritas principis*), and (3) a right intention (*recta intentio*).[16]

8 Kreća, 2019, p. 35.
9 Ibid.
10 For a detailed account of the historical development of just war theory, including some contemporary variants, see Krivokapić, 2023, pp. 121–129.
11 Sukijasović, 1967, p. 15.
12 More on this: ibid., pp. 15–16.
13 Avramov, 2011, p. 637.
14 More on this in: Sukijasović, 1967, pp. 16–18.
15 Ibid., p. 17.
16 Ibid.

During the Renaissance and the consolidation of sovereign states in Europe, the doctrine of just war gradually yielded to the utilitarian concept of 'reason of state' (*raison d'État*), according to which a just, and therefore permissible, war is one that is necessary.[17] Following the Peace of Westphalia (1648), war increasingly came to be understood as a legal relationship between sovereign states[18] and was defined as 'a state of lawful enemy attack'.[19] The principle of sovereign equality contributed to the abandonment of just war theory: if states are equal, none has the authority to judge the legitimacy of another's reasons for resorting to war.[20] By the nineteenth century, the doctrine of the 'state of war' had emerged. According to this doctrine, war exists where states recognise a condition of war between them; the mere use of armed force is not, in itself, sufficient to establish such a state.[21]

Accordingly, from the emergence of early proto-states to the end of the First World War, war was regarded as a lawful instrument available to states in their international relations.[22] What changed over time was the understanding of when war is justified, what constitutes a legitimate cause for war (*casus belli*), and the

17 Ibid., p. 21. This is Suarez's (Francisco Suárez 1548–1617) view, according to which 'war is justified only if it brings success and benefit to the king's subjects': Milisavljević, 2024, p. 9.

18 In this context, the literature refers to Grotius's (Hugo Grotius 1583–1645) understanding of war as 'a judicial procedure for punishing the wrong party and correcting the wrongs committed': Sukijasović, 1967, p. 21. Grotius further emphasised that the 'formal moment of declaration of war was relevant' as a criterion for assessing whether a war was just: Milisavljević, 2024, p. 17. Avramov similarly states that classical international law viewed war as a legal institution, a form of court which, depending on the outcome of the battle, resolved disputes between states: Avramov, 2011, p. 629. Etinski, Đajić and Tubić argue that, contrary to Grotius's view, which conceived war as a relationship between the ruler of one state and his subjects on the one hand and the ruler of another state and his subjects on the other, Rousseau's (Jean-Jacques Rousseau 1712–1778) view, developed at a time when war was waged by professional armies, held that war is a relationship between two states in which individuals are enemies not as peoples or citizens, but only as soldiers: Etinski and Đajić and Tubić, 2017, p. 730. It should be noted, however, that neither Rousseau nor Grotius excluded war as a possibility in international relations, and thus as a subjective right of states. Finally, Kant's (Immanuel Kant 1724–1804) position may be noted, according to which 'the natural state of human relations is war, not peace', and who accordingly proposed 'the introduction of an international state in order to prevent constant wars and conflicts between men': Milisavljević, 2024, p. 17.

19 Sukijasović, 1967, p. 22.

20 Shaw, 2003, p. 1015.

21 In this regard, see Sukijasović, 1967, p. 22. From that period originates the well-known statement by the Prussian general and military theorist Clausewitz (Carl von Clausewitz 1780–1831) that 'war is the continuation of politics by other means'. For an account of the fundamentals of Clausewitz's theory of war, see Avramov, 2011, pp. 638–639.

22 In this sense, Mrkić observes that 'until the First World War, international law never even tried to outlaw war': Mrkić, 2009, pp. 225–226. Similarly, it has been noted that 'classical international law did not contain a definition of aggression, nor was there a need for it, because resorting to war was legally allowed': Avramov, 2011, p. 663. In the same vein, Tesla states that 'under classical international law, a war of aggression was considered a legal act. War of Aggression Is Treated as a Symbol of State Sovereignty': Tesla, 2016, p. 53.

procedures for initiating hostilities. A state that violated these rules could, at least in theory, incur responsibility under international law. In practice, however, the more powerful the state, the less likely it was to be held accountable for violations of the law governing recourse to war (*ius ad bellum*). It is therefore unsurprising that the notion of individual criminal responsibility for initiating and waging an unlawful war remained largely undeveloped until the First World War.[23]

In contrast to this situation in the area of *ius ad bellum*,[24] in the decades preceding the First World War, the law governing conduct in war (*ius in bello*) expanded significantly, culminating in the adoption of the Hague Conventions of 1899 and 1907.[25] These instruments also exerted some influence on *ius ad bellum*. The 1899 Convention for the Pacific Settlement of International Disputes (1899 I Hague Convention) provided that 'with a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences' (Art. 1), and that 'in case of serious disagreement or conflict, before an appeal to arms the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers' (Art. 2). Substantially identical provisions were retained in the 1907 Convention for the Pacific Settlement of International Disputes (1907 I Hague Convention, Arts. 1 and 2), which replaced the 1899 Convention.

It is also necessary to note the 1907 Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (1907 II Hague Convention), which, *inter alia*, prescribed that:

> 'The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.
> This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any

23 However, some authors note that, following Napoleon's final defeat at the Battle of Waterloo in 1815, one proposal concerning his fate was to try him before a French court, but only for the (last) Hundred Days campaign he waged after escaping from his first exile on the Italian island of Elba, as only that war, among his campaigns, was considered illegal. This did not occur; instead, Napoleon was exiled to the island of St Helena in the Atlantic Ocean, where he died in early 1821: Škulić 2020a, pp. 280–281.

24 It constitutes a corpus of international legal rules concerned with 'the protection of persons in armed conflicts and the limitation of the means and methods used in war': Milisavljević, 2024, p. 9. This branch of law is also referred to as the (international) law of war, the (international) law of armed conflict, and, more recently, international humanitarian law. On the terminological designation of this branch of law, see Jončić, 2010, pp. 13–16; Kreća, 2019, pp. 768–769; Milisavljević, 2024, p. 10.

25 In theory, a disadvantage of these conventions is that they address only war and its conduct, and not the maintenance of peace: Jovašević, 2011, p. 47.

compromise from being agreed on, or, after the arbitration, fails to submit to the award' (Art. 1).[26]

These conventions did not abolish the sovereign right of states to resort to war; rather, they encouraged states to make every effort to avoid armed conflict.

2.2 The Treaty of Versailles and the Attempted Trial of German Kaiser Wilhelm II

The First World War (1914–1918) was, at that time, the bloodiest armed conflict in history. It involved a large number of states and caused destruction on an unprecedented scale, largely due to the rapid industrial development of the most powerful states in the preceding decades. In its aftermath, common-sense reasoning pointed to the need to limit, as far as possible, the right of states to resort to war, if not to abolish it entirely.[27] This war, therefore, marks a turning point in the Law of War and in international law more generally. Most importantly for present purposes, it signalled the beginning of the development of an international crime whose object is the unlawful use of force in international relations.[28]

The peace treaties concluded with the Central Powers after the First World War established their international responsibility for the losses and damage caused

26 Krivokapić notes that one of the most significant achievements of the Second Hague Peace Conference in 1907 was that the 'until then existing right of the state to enforce the financial claims of its nationals by force was limited to the cases in which a debtor state refuses to commit to an arbitration process or to execute the arbitration decision': Krivokapić, 2023, p. 243. The II Hague Convention of 1907 'represents the last of the chief steps in the international investigation and discussion of the Drago Doctrine': Drago and Nettles, 1928, p. 208. This doctrine, also known as the 'Drago-Porter doctrine' or simply the 'Porter doctrine' (named after the American representative who finalised its outline during the 1907 Hague Conference), concerns the prohibition of recourse to war to enforce the payment of financial claims. It developed in response to the 1903 intervention against Venezuela by Great Britain, Germany, and Italy; see Milisavljević, 2025, p. 98.

27 In this connection, it should be noted that in Russia, immediately after the October Revolution of 1917, while the First World War was still ongoing and Russia remained a participant, the so-called Decree on Peace was adopted. This instrument qualified a war of aggression as an international crime and formed the basis of the Marxist-Leninist doctrine of just wars, according to which just wars are defensive wars of peoples for national and social liberation: Sukijasović, 1967, p. 27. According to Lenin (Владимир Ильич Ленин 1870–1924), 'war is the inevitable companion of the highest form of capitalism, imperialism, because it is nothing but the prolongation of politics by other means, namely by means of force...': Patrnogić, 1956, p. 41.

28 As the First World War drew to a close, public pressure increased, particularly in England, to prosecute those widely regarded as responsible for the war: Schabas, 2001, p. 3.

by the war imposed on the Allied and Associated States through their aggression.[29] Sukijasović notes that these provisions did not establish responsibility of the defeated states for the war as such, but only for its consequences, namely losses and damage.[30] This approach was unsurprising. At the outbreak of the war, international law recognised the right of states to wage war (*ius ad bellum*), and the acute need to limit that right emerged only during the conflict.

Against this background, it may seem surprising that the victorious powers nevertheless sought to establish the individual criminal responsibility of the former German Kaiser, Wilhelm II Hohenzollern. The Treaty of Versailles provided that he was publicly accused by the victorious states 'for a supreme offence against international morality and the sanctity of treaties' (Art. 227(1)).[31] It also envisaged the establishment of a special tribunal to try him (Art. 227(2)).[32] The Treaty further stipulated that, in its decision, the tribunal 'will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality', and that 'it will be its duty to fix the punishment which it considers should be imposed' (Art. 227(3)).

29 See Article 231 of the Treaty of Versailles with Germany (1919), Article 177 of the Treaty of Saint-Germain with Austria (1919), Article 161 of the Treaty of Trianon with Hungary (1920), and Article 121 of the Treaty of Neuilly with Bulgaria (1919). Notably, a similar provision appeared in the original peace treaty with Turkey concluded in Sèvres in 1920 (Art. 231), but it was omitted from the final peace treaty concluded with that country in Lausanne in 1923.

30 Sukijasović, 1967, p. 28. It was, therefore, essentially a matter of the international responsibility of those states, which was of a civil law nature. Some authors argue that the peace treaties concluded after the First World War introduced the international responsibility of the defeated states as criminal in nature; see, for example, Bartoš, 1954, p. 305. This view is unpersuasive, as the essence of the responsibility of the defeated states lay in the *compensation of damage* (reparations), which is the civil law sanction *par excellence*, rather than in retribution, which is characteristic of criminal law sanctions.

31 Essentially, Wilhelm II was held personally responsible for the German attack on Belgium and Luxembourg in 1914, as Germany was one of the guarantors of the permanent neutrality of those two states: Degan and Pavišić, 2005, p. 380. Škulić notes that English and French positions concerning the proposed trial of the former German emperor differed. The English position, which may be described as narrower, regarded the Kaiser's responsibility for violating the neutrality of Belgium and Luxembourg as indisputable. The French position, which may be described as broader, accepted that a crime against peace was not established in international law at the time but emphasised that the unjustified initiation of war could be sanctioned on the basis of medieval doctrines of (un)just wars: Škulić, 2020a, p. 280, fn. 710.

32 The same paragraph of Article 227 of the Treaty also stipulated that, during the proceedings before the tribunal, the defendants would have 'guarantees essential to the right of defense', and that the tribunal would be composed of five judges, one from each of the five victorious powers (the United States of America, the United Kingdom, France, Italy and Japan).

The dominant view in the literature is that these provisions created the conditions for the individual criminal responsibility of the German Emperor for the aforementioned 'criminal offence'.[33] Other authors, however, consider that the emphasis lay more on moral than on legal responsibility.[34] Regardless of how the Kaiser's proposed responsibility is understood, particularly if characterised as criminal, the solution appears both surprising and somewhat paradoxical. On the one hand, the peace treaty with Germany did not formally establish responsibility for the war itself, not even of a civil nature, but only for its consequences, since resort to war at the time was not *per se* contrary to international law. On the other hand, an attempt was made to hold the head of the German state individually criminally responsible for initiating the war, even though the launching of a war of aggression in 1914 was not defined as a criminal offence in either international law or German domestic law.

In the end, criminal proceedings against the former German Emperor never took place. He had taken refuge in the Netherlands,[35] which in the 1920s refused to extradite him to the Allies on the grounds that it could not extradite a former head of state for a political offence.[36] It has been observed that the attempt to try the ex-Kaiser was a 'far cry from seriously wanting to prosecute a monarch, when most of Europe's heads of state were monarchs, many of whom were related to the Kaiser as descendants of Queen Victoria'.[37] Wilhelm II spent the remainder of his

33 In this regard, Stojanović states that 'these provisions of the Treaty of Versailles, for the first time in International Law, explicitly take a position in favor of individual criminal responsibility for violations of the norms of international law': Stojanović, 2017a, p. 33. Babić goes further, arguing that what the German Emperor was accused of 'corresponded to a crime against peace', and that 'it was then that the foundations of the principle of individual criminal responsibility were laid... for a crime against peace': Babić, 2011, pp. 21–22. By contrast, Dumée explains that, precisely because no legal rule criminalising aggression had yet been established, recourse was to the formulation 'international morality and sanctity of treaties': Dumée, 2000, p. 253. Finally, Kolarić draws a clear distinction between the charges brought against the German Emperor under the Treaty of Versailles and criminal responsibility for aggression, emphasising that 'the intention of the Allies was to try the German Kaiser for "violating international morality and the inviolability of international treaties", and not for aggression': Kolarić, 2013, p. 95. Similarly, Ikanović adds that 'it was considered that it was not possible to prosecute him for aggression, because it has not been declared an international crime by any international legal act and no one has been tried on that basis. Therefore, the trial of the German emperor for aggression would represent a retroactive application of the law': Ikanović, 2015, pp. 191–192.

34 Sukijasović, 1967, p. 30; Degan and Pavišić, 2005, p. 380. This view finds some support in the provisions of the Treaty of Versailles, which state that 'in its decision the Tribunal shall be guided by the highest motives of international policy, with regard to the protection of solemn international obligations and the validity of international morality...' (Art. 227, para. 3).

35 The Netherlands remained neutral throughout the First World War and was therefore not a party to the Treaty of Versailles.

36 Degan and Pavišić, 2005, p. 380.

37 Bassiouni, 2009, p. 132.

life in the Netherlands, where he died in 1941, ironically when the country that had sheltered him for two decades was under Nazi occupation.

Nevertheless, although the trial never took place,[38] and although the nature of the Kaiser's responsibility remained highly disputable, and notwithstanding the difficulties relating to the principle of legality, the very attempt to prosecute him for the alleged offence 'opened' the way to the idea of individual criminal responsibility for the unlawful use of force in international relations.[39] As Bassiouni observes, 'this incomplete precedent nevertheless was the cornerstone of what some 25 years later became 'crimes against peace' in the Nuremberg Charter and the Tokyo Statute'.[40]

2.3 Attempts to Incriminate Aggression Between World Wars

2.3.1 The Covenant of the League of Nations

The legal concept of aggression could not be addressed prior to the Treaty of Versailles and the establishment of the League of Nations as the first global political organisation of states.[41] In this context, the Covenant of the League of Nations stipulated that 'the members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League' (Art. 10). However, the text of the Covenant did not provide a definition of aggression; it did not clarify what would constitute aggression in a particular case.

38 It is noteworthy that, in Bulgaria, following its defeat in the First World War, the so-called 'Law on the Trials of Persons Guilty of War and in War' was adopted. The first article provided that 'whoever took an active part in the preparation, announcement or management of the war from 1915 to 1918 and directly or indirectly contributed to its unsuccessful conclusion, is to be punished...'. On the basis of this law, a number of senior Bulgarian officials and politicians were convicted: Sukijasović, 1967, p. 31. Although this example, and particularly the first part of the quoted provision, namely 'taking an active part in the preparation, announcement or conduct of war', is important for illuminating the development of the idea of aggression as an international crime, it appears that the law was enacted, and those individuals were sentenced under it, not because they initiated the war, but because they lost it.

39 In this regard, some authors observe that, by deciding to try Wilhelm II, notwithstanding that the trial did not take place, 'the first, decisive step was taken, which, as it turned out, meant the basis for the practical emergence of international criminal law': Bojanić, 2022, p. 190.

40 Bassiouni, 2009, p. 132.

41 Bojanić, 2022, p. 25. In this sense: Dumée, 2000, p. 253; Simović and Simović, 2013, p. 176.

It is widely recognised in the legal literature that the Covenant of the League of Nations did not abolish the right of states to resort to war but rather limited it.[42] States retained the subjective *ius ad bellum*, albeit restricted, primarily on procedural or formal grounds rather than substantive ones. Consequently, it is exaggerated to assert that the war of aggression was already a crime at this stage in its legal and historical development,[43] that is, a 'crime against peace, but a crime without sanction'.[44] Even a state acting as the 'aggressor' (the attacking party[45] in a war) would not be liable under international law if it adhered to the procedural rules of the Covenant before resorting to war.[46] Conversely, a state that violated the Covenant by attacking another state immediately would bear responsibility under

42 'In the order of the League of Nations, war was not completely forbidden': Jelić, 1955, p. 62; 'The Covenant of the League of Nations did not directly deny states the right to resort to war, but imposed certain obligations on its members before they exercised their right to declare war': Patrnogić, 1956, p. 31; 'The pact does not prohibit all war. Its provisions allowed the members of the League to resort to war in certain cases': Sukijasović, 1967, p. 32; 'The pact does not contain a general prohibition against resorting to war, but only distinguishes between permitted and forbidden wars': Dumée, 2000, p. 253; 'The League system did not, it should be noted, prohibit war or the use of force, but it did set up a procedure designed to restrict it to tolerable levels': Shaw, 2003, p. 1017; '… war was not banned altogether; it was only subjected to a cooling-off period, in the naïve hope that States would calm down and become less agitated after a certain delay, and that the procedures for the settlement of disputes provided for in the Covenant would meanwhile induce them to refrain from using force': Cassese, 2005, p. 37; 'Through the Pact of the League of Nations, states have voluntarily restricted the right to wage war...': Avramov, 2011, p. 630; 'There was no general prohibition in the Covenant. War remained a legitimate option for states, after attempts at peaceful settlement of the dispute': Tesla, 2016, p. 54; '… we can say that the Covenant of the League of Nations did not establish a prohibition of war, but limited recourse to war on a procedural basis': Kreća, 2019, p. 185; '... according to the Covenant of the League of Nations, the use of force was only limited, but not completely excluded': Milisavljević, 2024, p. 45.
Nevertheless, some authors interpret the provisions of the Covenant of the League of Nations in such a way as to deny entirely the right of states to resort to war. For example, Jončić asserts that 'War was definitely prohibited by the Covenant of the League of Nations between the two world wars': Jončić, 2010, p. 13, fn. 1. However, the author appears hesitant on this issue. In the immediately preceding sentence, he states that 'the first attempt to prohibit war refers to the Briand-Kellogg Pact of 1928' (which postdates the Covenant of the League of Nations), while in the subsequent sentence he concludes that 'the complete prohibition of war with the mechanisms that will enforce and control this prohibition was effected through the Charter of the United Nations after World War II': ibid.

43 Jovašević, 2011, p. 49.

44 Čejović, 2006, p. 41.

45 In this regard, another shortcoming of the Covenant of the League of Nations lay in the fact that 'states could decide for themselves what should be considered an attack and what should be considered a defense': Patrnogić, 1956, p. 22.

46 In this context, Tesla observes that the system of the League of Nations 'has created a new division of wars, contrary to the one on just and unjust wars. It was now a matter of dividing them into legal and illegal, i.e. on permitted and illicit wars': Tesla, 2016, p. 55.

international law.[47] Nevertheless, any such responsibility would be of a civil law nature, arising only at the level of the aggressor state. The Covenant contained no provision for individual criminal responsibility for aggression, even in cases where the aggressor state could theoretically be deemed internationally responsible.

2.3.2 From the Covenant of the League of Nations to the Briand–Kellogg Pact

Following the Covenant, which introduced the term 'aggression' into international law, a series of international legal instruments engaged with this concept or related notions. For instance, the war of aggression was declared an 'international crime' in the 1923 Draft Treaty of Mutual Assistance and in the proposed 1924 Geneva Protocol for the Pacific Settlement of International Disputes.[48] The resolution of the Sixth International Conference of American States, adopted in Havana in 1928, affirmed that the war of aggression constitutes a crime against the human race and declared all aggression illegal and impermissible.[49]

2.3.3 The Briand–Kellogg Pact

Article 1 of the General Treaty for the Renunciation of War as an Instrument of National Policy, better known as the Paris Pact or the Briand–Kellogg Pact of 1928, provides: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another'. With this treaty, the Contracting Parties, which had previously possessed the right to resort to war under general Customary International Law, explicitly renounced this right, representing a significant development compared

47 Realisation of such responsibility proved to be entirely different in practice. It is now well established that the League of Nations was unable effectively to oppose the increasingly frequent violations of peace, including acts of aggression, during the 1930s. In this regard, *inter alia*, Rakić states that 'the mentioned system from the Covenant of the League of Nations... has not proved to be effective enough due to insufficient measure of obliquity and insufficient precision': Rakić, 2009, p. 45.

48 Sukijasović, 1967, p. 37. Babić notes that, by means of the 1924 Geneva Protocol, war of aggression was, for the first time in history, characterised as an international crime in a positive international legal act. According to that instrument, a state resorting to war against another state in violation of the Protocol would be considered an aggressor: Babić, 2011, p. 174. It should be emphasised that the term 'international crime', in the sense of the cited Protocol, should not necessarily be linked to the possibility of so-called criminal responsibility of the state.

49 Sukijasović, 1967, p. 37.

with the solution provided in the Covenant of the League of Nations.[50] However, doctrine highlights several serious shortcomings of the Briand–Kellogg Pact. It is emphasised that the Pact prohibited only war in a legal sense, understood as a legal relationship between warring states, but did not address other forms of the use of force in international relations that, for various reasons, did not amount to war.[51] Furthermore, the Pact did not establish mechanisms to ensure its effectiveness.[52] Its weakness also lies in leaving states a wide margin for extensive and arbitrary interpretation of their right to self-defence under general International Law.[53] Finally, the Pact applied only to its member states, allowing non-parties to retain the right to resort to war.[54]

Some objections to the Pact appear less compelling. Authors who argue that the Pact was binding only on member states overlook the fact that, by 3 September 1939,[55] it constituted a binding legal instrument for all sovereign states except Bolivia, El Salvador, Uruguay, and Argentina.[56] Even if the provisions of the Briand–Kellogg Pact forbidding war in international relations had not, by that time, become norms of general Customary International Law,[57] they were nonetheless binding under International Treaty Law for nearly all sovereign states. Thus, the argument

50 In this regard, Sukijasović observes that the Briand–Kellogg Pact shifted the burden of proof in comparison with the Covenant of the League of Nations. Under the Covenant, war was, in principle, permissible, and the attacked state bore the burden of proving that a particular war was prohibited. By contrast, under the Briand–Kellogg Pact, war of aggression was, in principle, prohibited, and the state initiating hostilities had to demonstrate that the specific war fell within the permitted exceptions to that general prohibition: Ibid., p. 39. In the same vein, Tesla remarks that 'the basic idea behind the creation of the Briand–Kellog Pact was that, after only a procedural restriction against war contained in the Covenant of the League of Nations, an explicit general prohibition of war should be introduced': Tesla, 2016, p. 56.

51 In this sense: Cassese, 2005, p. 37; Ikanović, 2015, p. 192; Kreća, 2019, p. 185.

52 In this regard: Patrnogić, 1956, p. 32; Dumée, 2000, p. 254; Cassese, 2005, p. 37; Čejović, 2006, p. 41; Avramov, 2011, p. 640; Kreća, 2019, p. 185; Dimitrijević, 2020, p. 192.

53 In this sense: Kolarić, 2013, p. 96; Dimitrijević, 2020, p. 192. Jelić states that 'the official correspondence from the time of the signing of the Pact stipulated that each State is free to defend its territory against attack or invasion and that it alone is authorized to decide whether circumstances require recourse to war for the sake of legitimate self-defense': A. Jelić, op. cit., p. 62. Radbruch's interpretation is also noteworthy, according to which 'defense against attack, which is also permitted under the Kellogg Pact, is not a defensive war, because it contains the right against the wrong, while war, however, presupposes equal opponents': Radrbuh, 2016, p. 246.

54 In this regard: Patrnogić, 1956, p. 32; Avramov, 2011, p. 640; Kolarić, 2013, p. 96.

55 The day on which the United Kingdom and France, following the expiry of the ultimatum previously delivered, declared war on Nazi Germany and thereby entered the Second World War.

56 Sukijasović, 1967, p. 38. In this regard, Milisavljević considers that, by the outbreak of the Second World War, the norms of the Pact had become 'generally accepted rules of international law': Milisavljević, 2025, pp. 98–99.

57 As Cassese claims: Cassese, 2005, pp. 37–38. For the opposite position, see: Sukijasović, 1967, pp. 65–66.

concerning the non-universality of the Pact carries limited weight. Moreover, a positive feature of the Pact was that it applied to states that were not members of the League of Nations but were parties to the Briand–Kellogg Pact.[58]

It can be concluded that the Briand–Kellogg Pact, at least from a legal perspective, abolished the right of its member states to resort to war.[59] From the moment its provisions became binding on a particular state, that state would incur international responsibility if it initiated a war of aggression. Other forms of armed force that did not constitute war in the formal legal sense remained outside the scope of the Pact. The Pact also neglected the issue of enforcing international legal responsibility, leaving only the application of general rules on the international liability of states of a civil law character, the likelihood of enforcement of which was inversely proportional to the power of the state concerned. Finally, the Pact contained no provisions regarding individual criminal liability for violations of its prohibition on resorting to war, indicating that such violations did not constitute an international crime at the time.[60]

2.3.4 Attempts to Define Aggression Between the Two World Wars

Although aggression, understood under the Briand–Kellogg Pact as a war of aggression,[61] was prohibited in relations between the greatest number of sovereign states at the time, no authoritative legal definition of aggression existed in general international law. Nonetheless, numerous attempts were made during the interwar period to fill this gap.[62]

The Locarno Treaties of 1925 are particularly noteworthy in this context, especially the Treaty of Mutual Guarantee, commonly known as the Locarno Pact or the Rhineland Pact, concluded between Germany, Belgium, France, the United Kingdom, and Italy. This treaty indirectly attempted to define aggression by

58 In this regard: Cassese, 2005, p. 37.

59 'The Kellogg–Briand Pact was an international treaty that renounced the use of war as a means to settle international disputes. Previously, war as such was not prohibited by international law': Schabas, 2001, p. 6, fn. 17. In this sense, see also: Mrkić, 2009, p. 241.

60 The Pact not only lacked provisions on aggression as an individual criminal act, but also failed to define aggression as an unlawful act of the state: Dumée, 2000, p. 254. This deficiency inevitably allowed excessively broad and provisional interpretations of the general prohibition on recourse to war.

61 Thus, from the entry into force of the Briand–Kellogg Pact until subsequent developments through the establishment and practice of international military tribunals after the Second World War, the concept of aggression largely coincided with, or was reduced to, the notion of aggressive war, which was regarded as an international crime: Sukijasović, 1967, p. 67. Here, too, the term 'international crime' is used in the sense of a qualified delict of the state entailing international responsibility, rather than a criminal offence.

62 'In order to do more to limit the war in the system of the League of Nations, we resorted to work on defining aggression': Milisavljević, 2024, p. 45.

distinguishing between simple and flagrant aggression. Simple aggression was understood as a form whose existence could be challenged in the given circumstances, whereas flagrant aggression was so manifest that no dispute over its existence was possible.[63] With respect to the forms of aggression, the Locarno Pact distinguished between two categories of armed action: (1) those concerning the territory of a state (attack, invasion, and war of aggression)[64] and (2) those concerning the demilitarised zone (crossing its borders, initiating hostilities, and concentrating armed forces within its territory).[65]

The work of the Conference for the Reduction and Limitation of Armaments, known as the World Disarmament Conference, was also significant for defining aggression, particularly through the Litvinov–Politis proposal.[66] According to this definition, in an international conflict, except where agreements between the parties were in force, the aggressor was to be the state that first undertook one of the following actions: (1) declaration of war on another state; (2) military invasion of another state's territory, even without a declaration of war; (3) attack by land, naval, or air forces on the territory, ships, or aircraft of another state, even without a declaration of war; (4) naval blockade of the coasts or ports of another state; or (5) provision of assistance to armed groups formed within its territory that invaded another state, or refusal, despite a request from the state under attack, to take measures within its territory to deprive such groups of all assistance and protection.[67] The proposed definition further stipulated that no political, military, economic, or other reason could justify such aggression.[68] Despite its sophistication, the Litvinov–Politis definition was ultimately not adopted.[69]

Shortly thereafter, at the World Monetary and Economic Conference held in London in July 1933, three conventions on the definition of aggression were signed,[70] based on the Litvinov–Politis proposal. This marked the first introduction

63 For further discussion, see: Sukijasović, 1967, pp. 49–50.

64 It is significant that, for the first time, acts involving the use of force other than war were also brought within the scope of aggression.

65 Ibid., p. 50. The treaty was flagrantly violated by the entry of German troops into the demilitarised Rhineland in 1936, without any firm reaction from the other parties.

66 Ibid., p. 51. This definition is named after two men who played a decisive role in its creation: the Soviet diplomat Maxim Litvinov (Макси́м Литви́нов, 1876–1951), who at the time served as People's Commissar for Foreign Affairs of the USSR (the Soviet equivalent of the minister for foreign affairs), and Nikolaos Politis (Νικόλαος Πολίτης, 1872–1942), a Greek diplomat.

67 Ibid., pp. 51–52.

68 Ibid., p. 53.

69 For further discussion of attempts to define aggression within the framework of the Conference on Disarmament, see: Ibid., pp. 51–53.

70 Ibid., p. 54. The first convention of 3 July 1933 was signed and ratified by the USSR, Afghanistan, Estonia, Poland, Iran, Latvia, Finland, Romania, and Turkey. The second convention, signed on 4 July 1933, was ratified by the USSR, Romania, Czechoslovakia, Turkey, and Yugoslavia and, unlike the other two, was open to accession by other states. The third convention was signed on 5 July 1933 between the USSR and Lithuania: Ibid.

of a definition of aggression into positive international law. However, these conventions were not universal and did not establish specific procedures for determining aggression *in concreto*.[71]

It is also notable that between the two world wars, attempts were made to regulate other forms of the use of force in international relations, such as economic or ideological aggression.[72] These attempts were similarly unsuccessful.

The clear conclusion regarding the legal trajectory of aggression during the interwar period is as follows: aggression was largely equated with aggressive war, while all other forms of the use[73] or threat of force remained outside its scope. Initially limited by the Covenant of the League of Nations and subsequently prohibited by the Briand–Kellogg Pact, aggression was understood exclusively as a state offence (delict), rather than an individual crime carrying personal criminal responsibility.[74] Efforts to define aggression persisted, but their results were confined to particular international law at best. A fundamental weakness of international law during this period was the complete absence of effective enforcement mechanisms, which also affected the regulation of the use of force.

In the years leading up to the Second World War, instances of aggression multiplied[75] without the imposition of any (or only symbolic) legal sanctions. Ultimately, in 1939, the United Kingdom and France resorted to war as a traditional remedy, setting aside the ineffective League of Nations[76] system and the related international treaties.[77]

71 Ibid.

72 For further discussion, see: Ibid., pp. 41–43.

73 Except in the case of certain international treaties that nevertheless retained a particular character, such as the aforementioned London Conventions of 1933.

74 However, even during this period, some authors advocated the introduction of individual criminal responsibility for aggression. Among them, the Soviet jurist Trainin (Арон Трайнин, 1883–1957) is particularly notable. In 1937, he published 'The Defense of Peace and Criminal Law', in which he criticised the League of Nations for failing to criminalise wars of aggression and to establish an international criminal court to punish aggressors: Hirsch, 2008, pp. 705–706.

75 These included the Japanese invasion of Manchuria in 1931 and of the rest of China in 1937; the Italian invasion of Ethiopia (Abyssinia) in 1935 and Albania in 1939; the German remilitarisation of the Rhineland in 1936; the Anschluss of Austria in 1938; the annexation of the Sudetenland in 1938 and the remainder of Czechoslovakia in 1939; the annexation of Memel in 1939; and the invasion of Poland on 1 September 1939.

76 In this regard, it suffices to note that the League of Nations, despite requests from member states that were victims of aggression, did not in any instance qualify a particular act as aggression, most likely in order to avoid offending the aggressor: Sukijasović, 1967, p. 63.

77 At this point, it is noteworthy that certain strands of German legal theory before and during the Second World War supported Hitler's expansionist ambitions. According to these views, states were unquestionably entitled to manifest their sovereignty by engaging in international armed conflict. For further discussion, see: Ibid., p. 41.

2.4 International Military Tribunals After the Second World War: The Origins of Crimes Against Peace

2.4.1 International Military Tribunal at Nuremberg

The Second World War, initiated in Europe by Nazi Germany with the invasion of Poland on 1 September 1939 and subsequently escalated through attacks on several other countries, culminated in German aggression against the Soviet Union on 22 June 1941. This conflict surpassed the First World War both in terms of casualties and the scale of destruction, and it is widely regarded as the bloodiest conflict in human history. During the war, mass atrocities were committed, including the Holocaust, which resulted in the systematic extermination of approximately six million European Jews.

Efforts to hold those responsible accountable began even during the war. As early as October 1941, U.S. President Roosevelt and British Prime Minister Churchill agreed to conduct a major trial of Nazi leadership following the conflict.[78] On 13 January 1942, nine European governments in exile issued a joint statement 'on the punishment of those responsible as one of their most important war aims'.[79] This was followed by the Moscow Conference in October 1943, which produced the Moscow Declaration, one of the most significant wartime pronouncements.[80] Finally, on 8 August 1945, the United States, the USSR, the United Kingdom and France concluded the London Agreement, establishing the International Military Tribunal at Nuremberg (IMTN), with the tribunal's Charter (Statute) as an integral component.[81]

The Statute of the IMTN conferred jurisdiction over crimes against peace,[82] defined as: (1) planning, preparing, initiation or waging of (a) a war of aggression, or (b) a war in violation of international treaties, agreements or assurances, or (2)

78 Škulić, 2020a, p. 103.
79 Ibid., p. 104.
80 Ilić, 2024, p. 312.
81 Škulić, 2020a, p. 104.
82 There are opinions in the literature according to which the terms 'crimes against peace' and '(international crime) of aggression' may be regarded as synonymous. See, for example, Kolarić, 2013, p. 97; Ikanović, 2015, p. 193. In this sense, Schabas observes that '…while probably not identical, the two terms largely overlap': Schabas, 2001, p. 22. Nevertheless, as will be shown later in this book, crimes against peace, if understood as a specific crime, constitute a narrower and historically older category than the crime of aggression.

participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[83]

The norm establishing this crime is complex, prescribing two possible forms of individual responsibility: classic individual subjective responsibility and special forms of extended responsibility – participation in a common plan or conspiracy.

Under the first form, not only waging an aggressive war but also its attempt and preparatory actions (planning and preparation) were criminalised.[84] These preparatory acts were 'raised' to the status of independently punishable conduct. Significantly, the Statute provided for liability for both a war of aggression and a war violating international treaties, agreements or guarantees.[85] However, neither the Statute of the IMTN nor preceding international instruments defined aggression,[86] and the Statute did not specify the subjective elements (*mens rea*) of the offence, either generally or specifically in relation to crimes against peace.[87]

Regarding the second situation, namely participation in a joint plan or conspiracy, difficulties arose in the practice of the IMTN.[88] The legal conception of conspiracy, to which the concept of participation in a common plan is closely related, derives from Anglo-Saxon criminal law. This tradition does not distinguish between specific forms of complicity but instead defines the perpetrator's position

83 The literature indicates that the definitive formulation of the concept of crimes against peace was provided by the Soviet jurist Trainin (Hirsch, 2008, p. 707), and that the definition in Article 6 of the Statute of the IMTN closely resembles that proposed by Trainin himself (Ibid., p. 709).

84 Jovašević, 2011, p. 203. This statement is of limited significance, since none of the individual wars waged by Germany within the framework of the Second World War remained at the stage of attempt. However, it is possible that an individual participated in preparatory activities (for example, in the development of military plans) and subsequently withdrew from active military service, and thus did not participate in the initiation or conduct of the war.

85 Thus, wars of aggression were only 'one of the subgroups of the broad category of "crimes against peace"': Kaseze, 2005, p. 127. Sukijasović argues that this solution resulted from a compromise between the United States and France. The United States advocated a solution under which the mere criminalisation of war of aggression would suffice, since, in its view, it already constituted a crime under general customary international law. France, by contrast, considered that wars constituting a violation of international treaties or guarantees should be provided for as an alternative, in order to avoid possible objections based on retroactivity, since it was not indisputable that aggression was prohibited by general customary international law. For further discussion, see Sukijasović, 1967, pp. 78–79. In relation to this issue, Škulić proposes the term 'unlawful war' as a general theoretical designation for these two types of wars: Škulić, 2005, p. 208.

86 Sukijasović, 1967, p. 78; Paulus, 2009, p. 119.

87 Sukijasović states that 'the Nuremberg verdict obviously starts from the fact that in them', that is, in the incriminated acts, 'both objective and subjective elements must be sought. When it comes to crimes against peace, the verdict often speaks of the aggressive intention of the accused': Sukijasović, 1967, p. 87.

88 The doctrine observes that 'it is evident that it is practically impossible to separate responsibility for participation in the said common plan or conspiracy from responsibility for the planning or preparation of the war of aggression itself': Ibid., p. 79.

within the offence in a unitary manner. While this approach may facilitate proof in individual cases, it can also create significant difficulties, particularly in relation to causation.[89] Such a conception is unknown, or only minimally recognised, in continental legal systems.[90] In the Nuremberg Indictment, the 'joint conspiracy plan' covered the period from the founding of the Nazi Party in 1919 to the end of the war in 1945.[91] According to the Charter of the IMTN and the interpretation advanced by United States prosecutorial authorities, conspiracy to plan, prepare, initiate, or wage an unlawful war did not constitute a punishable preparatory act in the classical Euro-continental sense, between which and the attempt or completion of the offence there would exist a relationship of apparent concurrence. Rather, it was treated as an independent criminal offence.[92] However, this understanding was not accepted even within the Tribunal itself. Ultimately, a compromise emerged whereby the charges of conspiracy to wage an illegal war and the actual implementation of that conspiracy were merged.[93] Finally, although Article 6(3) of the Statute of the IMTN provided that 'leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit *any* (emphasis added by A. Š.) of the foregoing crimes[94] are responsible for all acts performed by any persons in execution of such plan', in practice the IMTN held that trials for conspiracy were permissible only in relation to crimes against peace, and not in relation to the other two categories of crimes within its jurisdiction.[95]

Article 7 of the Statute is also significant for the crime of aggression, stipulating that 'the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'. This provision established individual criminal responsibility for aggression, thereby exposing state leaders to prosecution despite the so-called theory of state acts.[96] In other words, neither the position of Head of State nor actions taken on behalf of the state conferred substantive immunity or procedural protection from criminal prosecution.[97]

89 Škulić, 2005, p. 207.
90 Kaseze, 2005, p. 229.
91 Škulić, 2005, 209.
92 Ibid.
93 Ibid., p. 210. The cited author emphasises that, ultimately, only Rudolf Hess was convicted solely for participation in the conspiracy and crimes against peace, whereas all other convicted persons were also convicted of another crime (war crimes or crimes against humanity): ibid. In French legal theory, it is observed that 'the solution by which aggression absorbed the conspiracy as the first count of the indictment is in accordance with the spirit of the Nuremberg trials, which tended to make aggression the basis of repressive justice dispensed for the first time by an international criminal tribunal': Dumée, 2000, p. 254.
94 These are the three crimes within the jurisdiction of the IMTN: crimes against peace, war crimes, and crimes against humanity.
95 Kaseze, 2005, p. 224.
96 Sukijasović, 1967, p. 77.
97 More on this: Škulić, 2020b, pp. 133–134.

The indictment before the IMTN distinguished between an 'act of aggression' and an 'aggressive war'. An act of aggression is unilateral and does not necessarily lead to war, whereas an aggressive war entails a bilateral or multilateral relationship, i.e. a state of war between two or more countries.[98]

The essence of the defence's argument before the IMTN was that the offence charged (crimes against peace) was not criminalised at the time of its commission, and that convicting the defendants for such a 'criminal offense' would, therefore, constitute a clear violation of the principle of legality, expressed in the maxim *nullum crimen, nulla poena sine lege*.[99] In accordance with this reasoning, even if it were accepted that at the time of the execution of the acts in question, a general international treaty prohibiting war was in force that prohibited war (which was also disputed by the defense), then its breach could give rise only to civil international liability, not criminal responsibility, whether for states or individuals.[100]

The IMTN, in its ruling,[101] rejected such objections. It stated, among other things, that:

> 'the maxim nullum crimen sine lege is not a limitation of sovereignty, but is a general principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong…the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlements of international disputes, they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression'.[102]

Further, the judgement stated that:

> 'this view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27th August, 1928, more generally known as the Pact of Paris or the

98 In this regard, see Sukijasović, 1967, p. 83; Simović and Simović, 2013, p. 176. For example, the defendants were charged with the annexation of Austria in 1938 (the so-called *Anschluss*) as an act of aggression: ibid., p. 82. In that case, there was no war between Germany and Austria, and therefore the indictment could not have charged the defendants with a war of aggression in that instance.

99 In this regard, see Sukijasović, 1967, p. 84; Etinski, Đajić and Tubić, 2017, p. 414. The literature notes that 'the objection from Nazi defendants was ironic indeed because the Nazis infamously rejected the principle *nulla crimen sine lege*, opting instead for the notion *nullum crimen sine poena* ("no crime without punishment")': Cassese et al., 2011, p. 54.

100 In this sense: Sukijasović, 1967, p. 84.

101 Twelve of the twenty-two defendants were found guilty of crimes against peace by the IMTN, of whom eight were also found guilty of participating in a joint plan or conspiracy to commit crimes against peace: Strapatsas, 2011, p. 157.

102 Cited according to: Cassese et al., 2011, p. 55.

> Kellogg–Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939'.[103]

It added that:

> 'in the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing'.[104]

The Court then addressed the Defence's argument that the Briand–Kellogg Pact, although prohibiting war, did not explicitly prescribe that resorting to war would constitute a criminal offence, that is, that the Pact did not establish courts to try persons who resorted to war. The Tribunal refuted this argument by analogy with the 1907 Hague Convention and war crimes, noting that, although violations were not explicitly qualified as crimes in the Convention, this did not prevent criminal proceedings being conducted for such violations years before the Nuremberg trials.[105] Finally, the Tribunal listed other international legal instruments (both adopted and unadopted) to substantiate its thesis that crimes against peace were punishable under general customary international law as early as 1939.[106]

In theory, however, the dominant view is that the principle of legality was indeed violated in the IMTN proceedings, particularly regarding the prohibition

103 Ibid.
104 Ibid., p. 56.
105 Ibid.
106 Ibid., pp. 56–57.

of retroactive application of criminal law (*Lex Praevia*).[107] This conclusion holds despite recognition that the principle of legality in international criminal law, as opposed to continental European domestic criminal law, has a somewhat more elastic meaning.[108] Indeed, on the eve of the Second World War, no treaty or customary rule of international law prescribed individual criminal responsibility for the crime set out in Article 6(2)(a) of the IMTN Statute.

Nonetheless, despite the recognition by most authors that the principle of legality was not fully respected before the IMTN, the prevailing view is that the magnitude and extraordinary gravity of the crimes committed by the Axis powers during the Second World War were such that they justified a deviation from this fundamental principle of criminal law. In other words, the scale of the tragedy that Germany imposed on the world demanded that those personally responsible be held accountable. The necessity of such punishment is explained in the literature with

107 'Although resorting to war in 1939 was unanimously condemned, no international treaty provided for war of aggression as a criminal offence': Dumée, 2000, p. 255; 'It seems indisputable that the London Agreement provides for two new types of crimes: crimes against peace and crimes against humanity…The IMT applied international law retroactively... Moreover, the reasons by which the IMT proved that aggression already in 1939 constituted an international crime are not convincing': Kaseze, 2005, pp. 170–171; '… Regarding crimes against peace... it was very difficult to prove that before they were committed, they were recognised as such either by international law or by the internal law of states': Degan and Pavišić, 2005, p. 392; 'At the time of its execution, aggression was not envisaged as a criminal offence that could be committed by a person, that is, an individual, but only as an unlawful act of the state as a subject of public international law. Accordingly, no specific punishment was envisaged for the state, and especially not for the natural person who would commit aggression. Thus, it is a highly speculative proposition that such conduct was punishable, and it is indisputable that no punishment was prescribed. The requirement of *nullum crimen sine lege* was therefore respected only in a relative and largely questionable manner, while the requirement of *nullum poena sine lege* was not respected at all': Škulić, 2010, p. 87; '… it seems quite clear that crimes against peace were invented by the Allies and were not part of customary law at that time': McDougall, 2021, p. 174. On the other hand, Sukijasović emphasises that 'the London Agreement and the Statute first of all confirmed the legal rule on the prohibition of war of aggression in the formal sense, which had been established and was in force on the eve of the Second World War': Sukijasović, 1967, p. 77. However, as noted above, the prohibition on resorting to war, to which the vast majority of sovereign states were subject in 1939, is distinct from individual criminal responsibility for violating that prohibition.

108 In this regard, it is emphasised, *inter alia*, that 'traditionally international criminal law has not extended the principle of legality to criminal sanctions': Škulić, 2010, p. 85. The literature also frequently notes similarities between the principle of legality in international criminal law and its understanding in Anglo-American criminal justice systems, where the element of 'judicial creativity' in law-making is particularly emphasised. For further discussion, see Triana, 2024, pp. 178–184.

reference to the principle of legitimacy[109] or the principle of substantive justice,[110] emphasising that it was justifiable for the principle of legality to yield in exceptional circumstances, such as the Second World War, to address the grave international crimes that resulted. The basic human sense of justice imposed a duty to punish the principal actors in the bloodiest armed conflict in human history, which witnessed some of the most heinous crimes recorded in civilisation. The initial trigger for these events (the crime that made them possible) was a crime against peace.[111] Consequently, the exceptional nature of the situation renders reliance on the principle of legality largely ineffectual.[112, 113]

109 'The Nuremberg Trials... are a historically exceptional and extremely rare case in which the principle of legitimacy, based on the necessity of justly punishing the perpetrators of the most serious and unprecedented mass crimes in history, justifiably prevails over the principle of legality': Škulić, 2020a, p. 25. In this regard, see also Bassiouni: '…the legitimacy of prosecuting such offenders by far outweighed the legal weaknesses of the process and certainly outweighed non-prosecution': Bassiouni, 2015, p. 1185.

110 '...substantive justice punishes for the acts which cause grave harm to society, and are considered by all members of society to be heinous, even if, at the time they were committed, they were not prohibited as criminal acts.', Kaseze, 2005, p. 165.

111 It is exactly for this reason that the IMTN in its verdict marked it as 'the greatest international crime that differs from other war crimes only in that it unites the accumulated evil of all war crimes together', Babić, 2011, p. 174.

112 'The gravity of the crimes committed during the Second World War by Nazi Germany and its allies was so enormous and, in fact, unprecedented in history, that it therefore made it quite pointless to insist on the fulfillment of all the "formal" requirements, which especially refers to the crime against peace, which were practically the initiation for all the subsequent crimes...': Škulić, 2020a, p. 24.

113 However, it is disputable whether the principle of legality, in any form, was accepted in International Law at the time of the Nuremberg and Tokyo trials. It appears that this was not the case. Specifically, the statutes (charters) of the IMTN and the IMTT did not incorporate any element of this principle. Moreover, no international treaty of a more general nature at that time provided for it. Since the IMTN and IMTT were effectively the first international criminal tribunals in the true sense, there was no prior practice from which one could infer the existence of a principle of legality in International Law. With regard to the domestic criminal legislation of the world's states at that time, the principle of legality was also in a form of 'crisis' in the decades preceding the Second World War. Consider, for example, the countries from which the IMTN judges were drawn. Among these states, the principle of legality, understood in the classical continental-European sense, existed only in France. The United States and the United Kingdom, representing the Anglo-American legal tradition, attached a markedly different meaning to this principle than that prevalent in continental European criminal law systems (more on this: Škulić, 2010, pp. 81–84). The Soviet Union had entirely eliminated the principle of legality in its domestic criminal law, a position subsequently adopted by the majority of socialist states in the immediate post-war period. Germany itself, under Nazi rule, had also abandoned this principle. Accordingly, it appears that the IMTN and IMTT were not obliged to demonstrate that their verdicts did not violate the principle of legality. They could merely state that this principle was irrelevant to their decisions, as it did not exist within the legal framework the tribunals were empowered to apply. In a similar vein, the Dutch judge Röling reasoned in his dissenting opinion in the IMTT (see further in this book). For more details, see: Škundrić, 2024, pp. 598–600.

In addition to these objections, post-Second World War trials are frequently criticised[114] for representing, in the view of some authors, 'the justice of the victors'.[115] It has been observed that 'it is a pity that the Allies did not have the moral strength to bring to justice persons from their own ranks who could certainly be charged with certain international crimes'.[116] These observations are largely correct. It is undeniable that crimes occurred on all sides during the Second World War, as in any conflict throughout history.[117] However, while it may have been conceivable to prosecute lower-ranking Allied personnel for war crimes,[118] and in some cases crimes against humanity, it was wholly unrealistic to expect the Allies to prosecute their political and military leaders for crimes against peace.[119] One can scarcely imagine a scenario in which, for example, Churchill and Stalin would have faced trial at Nuremberg for the British–Soviet invasion of Iran in 1941.

It should also be noted that responsibility for crimes against peace, as well as other crimes, extended to certain organisations under the Nuremberg framework.[120] According to Article 9(1) of the IMTN Statute:

> 'at the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization'.[121]

Škulić concludes that 'this is in fact a creation of a special form of criminal liability of legal entities'.[122]

In addition to the trial of 'major war criminals' before the IMTN,[123] individuals in post-war Germany who did not hold the highest state or military positions in

114 This observation applies not only to the IMTN but also to the IMTT and to other trials for international crimes immediately following the Second World War.
115 Kaseze, 2005, 391–392; Degan and Pavišić, 2005, p. 387; Ristivojević, 2011, p. 209.
116 Škulić, 2020a, p. 105.
117 Although it is undoubtedly true that, during the Second World War, the crimes committed by the Axis powers were vastly more severe and extensive than those committed by the Allies.
118 Such trials might have been feasible, as war crimes could have been committed by ordinary soldiers, and their prosecution would not have been as politically sensitive as the trials of political and military leaders.
119 Theoretically, some actions by the Allies could fall under the definition of crimes against peace in the Statute of the IMTN, such as the Soviet aggression against Finland in 1939, the British invasion of Iceland in 1940, and the British-Soviet invasion of Iran in 1941.
120 Babić, 2011, p. 174.
121 In this context, the IMTN declared the leadership of the Nazi Party, the Gestapo, the SD and the SS to be criminal organisations: Etinski and Đajić and Tubić, 2017, p. 415, fn. 973.
122 Škulić, 2020a, p. 112.
123 See Articles 1 and 6 of the Statute of the IMTN.

Nazi Germany were tried under Law Number 10[124] of the Allied Control Council for Germany by military tribunals in the four occupation zones established in 1945.[125] The provision on crimes against peace in Law Number 10 differs slightly from that in the IMTN Statute. It defines crimes against peace as:

> 'the initiation of invasions of other countries[126] and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. [127]

Although Law Number 10 provides a more detailed provision on crimes against peace than the IMTN Statute, it does not fundamentally establish a comprehensive definition of aggression.[128]

2.4.2 International Military Tribunal in Tokyo[129]

On the basis of the Potsdam Declaration of 26 July 1945, U.S. General Douglas MacArthur (1880–1964) established the International Military Tribunal in Tokyo (IMTT) by his Proclamation of 19 January 1946.[130] According to the Statute (Charter) of the IMTT, the tribunal also had jurisdiction over crimes against peace,[131] defined as 'the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing' (Art. 5 (1) (a)). This provision is similar to that of the IMTN Statute, although some differences are notable. First, the IMTT Statute specifies that the existence of a criminal offence does not depend on whether a war of aggression has been formally declared.[132] Second, in criminalising other types of unlawful war, the IMTT Statute allows for the possibility that the relevant war may have arisen from a 'violation of international law', in addition to violations of treaties, agreements or assurances.

124 The full title of the law is 'Law n. 10 on the Punishment of persons guilty of war crimes, crimes against peace and against humanity', Sukijasović, 1967, p. 79.
125 Ikanović, 2015, p. 194.
126 Sukijasović observes that 'initiating invasions' was introduced as 'a new special crime that is not in the Statute' of the IMTN: Sukijasović, 1967, p. 80.
127 Cited by: Ibid.
128 In this sense also: Ibid.
129 The official name of this tribunal was the 'International Military Tribunal for the Far East'.
130 Etinski and Đajić and Tubić, 2017, pp. 415–416.
131 Moreover, the literature notes that the defendants in Tokyo were 'mostly tried for crimes against peace': Degan and Pavišić, 2005, p. 389.
132 We share the view that this does not signify a fundamental change: Sukijasović, 1967, p. 81.

Unlike the indictment before the IMTN, the Tokyo indictment did not distinguish between acts of aggression and wars of aggression.[133] The defence before the IMTT relied on arguments similar to those advanced before the IMTN, focusing on the violation of the principle of legality.[134] The Tokyo verdict, delivered in 1948, found all the defendants guilty of crimes against peace.[135]

Although the majority of IMTT judges accepted the IMTN position that crimes against peace had been criminalised as early as 1939, and that the conviction therefore did not violate the principle of legality,[136] some dissenting opinions were expressed. The opinions of the Dutch judge Röling (Bernard Victor Aloysius Röling, 1906–1985) and the Indian judge Pal (Radhabinod Pal, 1886–1967) are particularly significant. Judge Röling observed:

> 'There is no doubt that powers victorious in a "bellum iustum" and as such responsible for peace and order thereafter, have, according to international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensice conduct, to seek and retain the custody of the pertinent persons…Mere political action, based on the responsibility of power, could have achieved this aim. That the judicial way is chosen to select those who were in fact the planners, instigators and wagers of Japanese aggression is a novelty which cannot be regarded as a violation of international law in that it affords the vanquished more guarantees than a mere political action could do…'[137]

Judge Röling thus sought to justify the prosecution of crimes against peace by alternative reasoning, acknowledging the limitations of the argument that the principle of legality had not been violated.[138] Of particular significance is his further remark on the principle of legality:

> 'is not a principle of justice, but a rule of policy, *valid only if expressly adopted*,[139] so as to protect citizens against arbitrariness of courts (nullum crimen, nulla poena sine lege), as well as against arbitrariness of legislators (nullum crimen, nulla poena

133 Ibid., p. 88.
134 Ibid., pp. 88–89.
135 Ibid., p. 89.
136 Cassese et al., 2011, p. 58.
137 Ibid., pp. 58–59. The dissenting opinion cited above further emphasises that crimes against peace should be understood as similar to political crimes in domestic law, in which the decisive element is the danger posed rather than the guilt of the perpetrator, and where the perpetrator is considered an enemy rather than a criminal, that is, where punishment constitutes a political rather than judicial measure: Ibid., p. 59.
138 It is true, however, that he argued, bearing in mind that 'the dominant principle in crime against peace is the dangerous character of the individual who committed this crime', that no one who is guilty of that crime alone should be sentenced to death: Ibid.
139 Emphasis added by A. Škundrić.

> sine praevia lege)… As such, the prohibition of ex post facto law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom'.[140]

By contrast, Judge Pal[141] argued that:

> 'the so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge[142]… In my judgment, therefore, it is beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes and then punish the prisoners for having committed offences according to this new definition'.[143]

Judge Pal therefore adhered strictly to the traditional concept of the principle of legality, rejecting any notion that it could yield to a higher principle of justice, even under the extreme circumstances of the Second World War.

2.4.3 Other Trials for Crimes Against Peace Conducted Immediately After the Second World War

In addition to the criminal proceedings conducted before the IMTN and IMTT, and by other courts in occupied Germany, several cases in which crimes against peace were prosecuted by national courts also took place in the immediate aftermath of the Second World War.

In this context, the Finnish trial (1945–1946) of those responsible for the war is particularly significant. The armistice that Finland concluded in Moscow in 1944 with the Soviet Union and the United Kingdom stipulated, among other things, that 'Finland shall co-operate with Allied Powers to arrest and pass judgment on those accused of war crimes'.[144] Despite the possible interpretation that this provision

140 Ibid., pp. 58–59.
141 By the way, Pal was the only IMTT judge who opined that Japan's top leaders should not at all be found guilty of crimes against peace: Ibid., p. 60.
142 In theory, there are views suggesting that the entire trial in Tokyo reflected a revenge for the Japanese attack on the U.S. naval base at Pearl Harbor on 7 December 1941: Degan and Pavišić, 2005, p. 389. In this regard, Zolo states that 'Japanese public opinion viewed the trial as a judicial parody that… satisfied the desire for revenge of the United States for the (treacherous) naval attack on Pearl Harbor': Zolo, 2012, p. 88.
143 Cassese et al., 2011, p. 60.
144 Tallgren, 2013, p. 435.

applied exclusively to 'classic' war crimes, the Allies made it clear that they expected the Finnish wartime leadership to face criminal responsibility for aggression as well.[145] On the basis of the armistice, Finland adopted a special law providing for the criminal liability of government members who had significantly contributed to Finland's participation in the war or had obstructed peace from 1941 to 1944.[146] Although the entire procedure was formally conducted by the Finnish authorities, the Allied Control Commission (a body established to oversee the implementation of the Moscow Armistice) exerted substantial pressure, particularly from the USSR.[147] Nevertheless, the sentences imposed were generally milder than those in other post-war proceedings, and although all the accused were convicted, they were pardoned over the subsequent years.[148]

The trial of Gauleiter Arthur Greiser (1897–1946) by the Supreme National Tribunal of Poland is also noteworthy.[149] Between 1933 and 1939, as leader of the Nazi Party branch in Danzig (now Gdańsk, Poland), he participated in a conspiracy with the German government to carry out war activities, aggression, and the military occupation of Poland.[150] On 9 July 1946, he was sentenced to death and executed.[151]

Finally, the literature also notes the trial of Japanese General Takashi Sakai (1887–1946) by a Chinese tribunal in Nanjing in the summer of 1946.[152] Among other charges, he was convicted of crimes against peace in a highly expeditious procedure and executed on 30 September 1946.[153]

Thus, in all three cases analysed, crimes against peace were tried before national (domestic) rather than international courts, as occurred with the IMTN and IMTT. However, the distinction between the first case, on the one hand, and the second and third cases, on the other, is clear. In the first case, a Finnish court (albeit under the aforementioned pressure from the Allies) tried Finnish nationals.

145 Ibid., p. 436.
146 Ibid., p. 436, p. 438. From the scope of this provision, it is clear that the responsibility of the USSR, specifically its leaders, for the original aggression against Finland in 1939 was excluded. Pursuant to this law, the wartime President of Finland, six members of the Government, and the Ambassador of Finland in Berlin were prosecuted. By contrast, none of the Finnish military leaders were prosecuted, including the war hero Mannerheim (Carl Gustaf Emil Mannerheim, 1867–1951): Ibid., p. 438. The first three counts of the indictment concerned conduct that essentially constitutes crimes against peace as defined under the Statute of the IMTN, while the remaining four counts addressed so-called crimes of preventing peace, which is notable in relation to the Statute of the IMTN, in that Finland remained at war despite numerous opportunities to secure peace: Ibid., pp. 438–439.
147 Ibid., p. 439.
148 Ibid., p. 441.
149 Drumbl, 2013, p. 411.
150 Ibid., p. 419. The author notes that in this trial, the defence invoked, *inter alia*, a violation of the principle of legality: Ibid., p. 422.
151 Ibid., p. 411.
152 Clark, 2013, p. 387.
153 Ibid., p. 390.

This circumstance explains the relatively lenient sentences imposed for crimes against peace, when compared with other post-war trials. By contrast, in the Greiser and Sakai trials, the courts of the states that had defended themselves in the war, and ultimately prevailed, tried individuals from the defeated side. It is therefore unsurprising that both proceedings resulted in death sentences, which were carried out.

These examples demonstrate an important feature of international criminal law. This feature is particularly pronounced in relation to the crime of aggression and the crime of genocide, although it remains present, albeit less visibly, in relation to war crimes and crimes against humanity. In international criminal law generally, and especially in relation to genocide and aggression, it is difficult to expect a fully fair, independent, and impartial trial before a court composed solely of judges drawn from one of the parties to the conflict, whether victorious or defeated.[154] Such judges will often feel a moral obligation to 'help' accused persons from their own state, or from allied states, while at the same time adopting an unduly severe approach towards those belonging to the opposing side.

2.5 Aggression Between the Second World War and the Establishment of the International Criminal Court

2.5.1 Charter of the United Nations

The Charter of the United Nations (UN), adopted in San Francisco in 1945, prohibits the threat and use of force in international relations.[155] This prohibition forms part of the mandatory rules (*ius cogens*)[156] of international law.[157] States are obliged to

154 In this sense: 'Given the nature of this criminal offense, it is difficult to imagine that any national criminal court could display the necessary degree of impartiality and independence in conducting proceedings whose subject is aggression': Škulić, 2015, p. 108.

155 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' (Art. 2 (4) of the UN Charter). According to Kreća, the obligation of States to refrain from the threat or use of force in their relations with each other 'is essential to the constitution of the international order as a legal order': Kreća, 2019, p. 184.

156 These are peremptory, absolutely binding norms of general International Law, from which there can be no derogation. For further discussion, see Shaw, 2003, pp. 115–120; Cassese, 2005, pp. 198–212; Avramov, 2011, pp. 136–140; Etinski, Đajić and Tubić, 2017, pp. 76–78; Kreća, 2019, pp. 488–491.

157 Kreća, 2019, p. 185; '… it is often asserted that the prohibition of the threat or use of force is the prime example of a rule that has attained the status of *jus cogens*.' McDougall, 2021, p. 49.

settle their disputes by peaceful means.[158] However, the Charter provides three exceptions to this general prohibition: (1) collective measures taken by the UN Security Council in accordance with Chapter VII, (2) individual and collective self-defence (Art. 51 of the UN Charter), and (3) measures against former enemy states (Art. 107 of the Charter).[159, 160]

With the introduction of these rules, the threat or use of force, i.e. not only war in the formal sense, was generally prohibited as a mandatory norm of international law, subject only to the exceptions listed in the Charter.[161] Peace thus became a fundamental goal of the international community.[162] In this regard, the UN Charter avoided the shortcomings of earlier international legal instruments addressing this issue.[163] It established a mechanism to sanction violations by vesting the Security Council with the authority to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to 'make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security' (Art. 39 of the Charter).[164] The Charter therefore confers on the Security Council a formal monopoly over the use of physical

158 This obligation, which is also peremptory (Kreća, 2019, p. 187), was first set out in general terms in Article 2(3) and further elaborated in Chapter VI of the UN Charter.

159 This third exception has only historical relevance, as it included acts of force against the states that were enemies of the United Nations (members of the Axis Powers) during the Second World War: Avramov, 2011, p. 640; Kreća, 2019, p. 186.

160 These three listed exceptions to the general prohibition of threat and use of force in international relations are, like the prohibition itself, peremptory: Ibid.

161 In this sense: '...The rule on the prohibition of resorting to the war of aggression, created in the order of the League of Nations, is extended to the rule on the prohibition of the use of force and the threat of the use of force. The prohibition obviously includes both war in the legal sense and unilateral acts of aggression': Sukijasović, 1967, p. 90; 'This provision is regarded now as a principle of customary international law and as such is binding upon all states in the world community. The reference to "force" rather than war is beneficial and this covers situations in which violence is employed which fall short of the technical requirements of the state of war': Shaw, 2003, p. 1018; '…for the first time the Charter prohibited not just war, but any threat of or resort to the use of military force': Cassese, 2005, p. 41; '…The Charter represents a completely new quality in the development of restrictions on the right of war – because for the first time it declares war an unlawful act for all countries': Mrkić, 2009, p. 227; 'The UN Charter introduces into the international order an absolute prohibition of war as a means of settling disputes': Avramov, 2011, p. 640.
Some of the cited authors (Mrkić, Avramov) appear to state (perhaps unintentionally, since the essence of their statements is identical to that of the other cited authors) that the Charter forbids *war* (emphasis added by A. Š.). While this is correct, it is incomplete, as the Charter introduces a prohibition of all use of force and threat of force in international relations, whether or not such conduct leads to war in the formal sense.

162 Cassese, 2005, p. 39.

163 For example, the Briand-Kellogg Pact.

164 Article 41 regulates situations in which the Security Council need not respond with armed action, while Article 42 provides for the possibility of using force against the violating state, which constitutes one of the exceptions to the general prohibition of threat and use of force.

force in responding to state conduct constituting a threat to peace, a breach of the peace, or an act of aggression.

As can be seen, the UN Charter performs a form of 'analysis' of unlawful State behaviour in cases involving violations of the prohibition on the threat or use of force. It successively identifies 'threat to the peace', 'breach of the peace', and 'act of aggression' as possible forms of such unlawful conduct.[165] Although a 'threat to the peace' appears to be the least serious, and an 'act of aggression' the most serious violation of the Charter,[166] the text provides no definition of any of these three categories. Nor does it define aggression,[167] notwithstanding that it refers to the terms 'aggression' and , 'act of aggression', four times.[168] Under the final text of the Charter adopted in San Francisco in 1945, the Security Council enjoys discretionary power to determine whether a threat to the peace, a breach of the peace, or an act of aggression exists, and, if so, what measures should be taken in response. It is not bound by any definitions of these unlawful acts, which, as noted, the Charter does not provide.[169]

Finally, the Charter, in referring to a 'breach of the peace', an 'act of aggression', and related concepts, addresses the unlawful conduct by States. Individual criminal responsibility for aggression undoubtedly falls outside its scope.[170]

However, the absence of a definition of aggression does not necessarily preclude the Security Council from exercising its competence under Chapter VII of the

165 This trichotomy originates in the Covenant of the League of Nations. For further discussion, see Sukijasović, 1967, pp. 115–116.

166 '"Act of aggression" is a term reserved to describe grave breaches of the peace': McDougall, 2021, p. 90.

167 During the drafting and adoption of the UN Charter at the San Francisco Conference in 1945, some proposals sought to include a definition of aggression. Bolivia, Colombia, and the Philippines submitted proposals that were either synthetic ('an act of aggression is any threat and every act of force by one state against another state') or enumerative, based on the pre-war Litvinov-Politis definition: Sukijasović, 1967, p. 112. None of these proposals was accepted, as the dominant view held that defining aggression would exceed the conference's framework: Ibid.; Dimitrijević, 2020, p. 194. Sukijasović observes that 'in this way, perhaps the most favorable opportunity to define aggression and introduce it into general international law, represented by the Charter of the United Nations, has been missed': Sukijasović, 1967, p. 112.

168 Ibid. Theoretically, the notion of aggression can be derived indirectly by interpreting the relevant provisions of the Charter, leading to the definition of 'any unlawful threat or use of force': Ibid., p. 113. A similar definition is offered by Zolo: Zolo, 2012, p. 63. However, Sukijasović correctly concludes that the concept thus obtained is 'greatly generalized and insufficiently precise': Sukijasović, 1967, p. 113.

169 'The Charter, therefore, leaves the determination of the aggressor to the discretion of the Security Council': Avramov, 2011, p. 665. Ikanović notes that this "controversial" solution is justified by the impossibility of adopting a definition of aggression that would encompass all cases: Ikanović, 2015, p. 196.

170 Nevertheless, in doing so, the Charter did not prohibit the existence of the international crime of aggression; it merely did not regulate the issue, leaving it open to regulation either within the framework of the United Nations or outside it.

Charter.[171] By contrast, such a definition constitutes a *conditio sine qua non* for aggression as an international crime.[172] From the perspective of international criminal law, it would be advantageous for the Charter to provide a definition of aggression, which would thereby form part of general international law and constitute a norm *ius cogens*, even if it directly concerned only States as subjects of international law and not individuals. Such a definition could then be incorporated into criminal law, whether international or domestic, through appropriate legislative techniques and adapted to the requirements of criminal law. In the absence of such a definition at the time of the Charter's adoption, international law, including international criminal law, embarked on a prolonged process towards its formulation and adoption.

2.5.2 The Nuremberg Principles

The UN General Assembly, in its Resolution No. 95 (I) of 11 December 1946, unanimously reaffirmed the 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal".[173] Then, the General Assembly, by Resolution No. 177 (II) of 21 November 1947, requested the International Law Commission to formulate these principles in a concise form.[174] The Commission completed its work in 1950, producing the seven so-called 'Nuremberg Principles'.[175] Among these is a criminal offence directed at the unlawful use of

171 This sense, Jelić concludes that 'for the initiation and functioning of the mechanism of the system of collective security, a legal definition of aggression is not necessary': Jelić, 1955, p. 64. The author further argues that the definition of aggression '... In some cases, can also lead to negative consequences.': Ibid., p. 70. Sukijasović, on the other hand, although acknowledging that 'in practice so far, the system of collective security of the United Nations has functioned even without these definitions', adds that 'this does not mean that for the competent international bodies... their presence will be harmful. On the contrary, and especially when it is known that the practice of these bodies so far has been inconsistent and unclear, and that the Security Council has most often avoided taking a certain position regarding the legal nature of the certain situation': Sukijasović, 1967, p. 114.

172 'Even if the definition of aggression does not prove necessary for the functioning of the system of collective security, it is undoubtedly necessary when it comes to a question of trying those guilty of crimes against the peace and security of humanity.': Jelić, 1955, p. 66.

173 Sukijasović, 1967, p. 95.

174 Ibid.

175 For the full text of the Nuremberg Principles, see, for example, Babić, 2011, p. 182, fn. 194.

force in international relations, designated as 'crimes against peace' and mirroring the corresponding provision in the Statute of the IMTN.[176]

The legal effect of the Nuremberg Principles is not immediately clear.[177] First, the principles were drafted by the International Law Commission, an advisory body to the UN General Assembly, and thus do not have binding force on their own. Second, the Commission merely 'concretised' the content of the 1946 General Assembly resolution, which endorsed the principles of the Nuremberg Statute and the subsequent trials. As UN General Assembly resolutions are not, in themselves, legally binding, questions of enforceability arise.[178]

Nevertheless, it appears that the Nuremberg Principles form part of international law, specifically general customary international law. In legal theory, unanimously adopted General Assembly resolutions are often cited as classic examples of so-called 'instantly created' rules of customary international law.[179] By voting in favour of such a resolution, States clarify their position on the relevant international legal issue. In the case of a unanimous vote, there is no dispute that the resolution effectively establishes a customary international law rule.[180] Since the Nuremberg Principles were adopted by such a unanimous General Assembly resolution, it can

176 Principle VI (1) (a) provides: 'The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace: (I) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (II) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (I).' Of particular importance for the crime of aggression are also Principle II, regarding the primacy of international incriminations over those under internal law; Principle III, which excludes official position (immunity) as a basis for exclusion of criminal responsibility; and Principle VII, which addresses complicity in crimes under international law.

177 In this sense, Sukijasović notes that 'their fate and legal force are unclear after the adoption of General Assembly Resolution 488 (V) of 12 December 1950': Sukijasović, 1967, p. 96.

178 Kreća, 2019, p. 110.

179 These customs emphasise the *opinio iuris* element (awareness of an obligation) at the expense of state practice as the second element of a customary international law rule. See further: Ibid., p. 89.

180 Degan and Pavišić reach a similar conclusion, stating that the text of the Nuremberg Principles 'faithfully reflects the law in force in 1950': Degan and Pavišić, 2005, p. 394. The literature also argues that 'the reason for the universal obligatoriness of all or at least some of the principles contained in the IMTN Statute can be sought in the fact that identical or similar incriminations are accepted in the internal laws of a large number of states, and that they are therefore valid as general legal principles': Etinski, Đajić and Tubić, 2017, p. 436, fn. 1014.

be argued convincingly that they constitute an integral part of general customary international law,[181, 182] including the provisions relating to crimes against peace.

2.5.3 Attempts to Define Aggression Until 1974

Despite the decision not to define aggression at the time of the establishment of the UN, work towards this objective within the UN, under the auspices of its General Assembly, commenced soon after the organisation's creation. In 1947,[183] the General Assembly instructed the International Law Commission to draft a *Code of Crimes against the Peace and Security of Mankind*.

However, it soon became clear that the post-war enthusiasm with which the development of International Criminal Law had begun was waning. In particular, the new circumstances of international relations, and above all the Cold War between the socialist and capitalist blocs, once again afforded an unquestionable advantage to Realpolitik. In other words, the great powers, especially those in the West,[184] had no interest in further developing International Criminal Law

181 In this sense, Kreća states: 'The resolution is an expression of the legal consciousness (opinio iuris) of the international community. The crime of aggression…is confirmed by the resolution, which, in other words, expresses the understanding of the aggression as part of positive international law': Kreća, 2019, p. 646. Although the author refers to the crime of aggression, he appears to be thinking of the crimes against peace, which are, as this book demonstrates, a historical predecessor of the crime of aggression. Moreover, the content of the crimes against peace is significantly narrower than that of the crime of aggression.

182 Therefore, the literature emphasises that 'the Nuremberg Principles are considered to be the basis for prosecuting the perpetrators of the crime of aggression under the veil of universal criminal jurisdiction in accordance with customary international law': Arsić, 2023, p. 264. This statement, like the previous one, is only conditionally correct. It is accurate only if the phrase 'crime of aggression' is replaced with 'wars of aggression'. In criminal law terms, the crime of aggressive war, as a sub-category of crimes against peace tried in Nuremberg and Tokyo after the Second World War, is not identical to the crime of aggression introduced by the Kampala Amendments to the Rome Statute of the International Criminal Court.

183 General Assembly Resolution n. 177 (III) of November 21, 1947.

184 With respect to the Soviet Union, it is noteworthy that throughout the twentieth century it generally adopted a more constructive approach than the Western great powers in attempts to define aggression. The contributions of Soviet jurists Litvinov and Trainin have already been mentioned. Even after the Second World War, the USSR displayed a greater inclination to support a definition of aggression than the capitalist great powers. For example, see the draft resolution submitted by the USSR to the UN General Assembly, which contained an enumerative definition of aggression on 6 November 1950 (quoted in Sukijasović, 1967, p. 127.).

through the establishment of precise definitions of international crimes, particularly the crime of aggression, and the creation of a permanent international criminal court.[185]

These two issues, namely the definition of the crime of aggression and the possible establishment of a permanent ICC, constituted the principal reasons for the general slowdown in the development of International Criminal Law during the post-war period. This is evident from the work of the International Law Commission. Within the scope of its general mandate, which included both consideration of the establishment of an ICC[186] and the drafting of a code of international crimes, these two issues were subsequently singled out as the most contentious and entrusted to special committees.[187] As regards the crime of aggression, its definition was initially assigned to a fifteen-member Special Committee.[188] This was one of four special committees established by the UN General Assembly to define the crime of aggression, all of which operated between 1953 and 1974. The need to establish four separate bodies under the auspices of the General Assembly in order to produce an acceptable draft definition of aggression clearly illustrates the extent of controversy surrounding this international crime within the international community at the time.[189]

A form of 'ping-pong', played for almost 20 years between successive special committees tasked with defining the crime of aggression and the UN General Assembly, served to justify the suspension of work on both the drafting of the Code of Crimes against the Peace and Security of Mankind and the statute of the future international criminal court. Namely, in 1954, the International Law

185 In the same vein, Cassese observes: 'The problem with aggression is that the great powers preferred to avoid defining the violation of the prohibition of force, enshrined in Art. 2 (4) of the UN Charter, in order to leave themselves sufficient room for individual application of that provision – and collective application in the Security Council.': Kaseze, 2005, p. 128.

186 Resolution n. 260 B (III) of 9 December 1948.

187 For further discussion of the work of the Special Committee for International Criminal Justice (founded in 1950), tasked with drafting a statute for the future international criminal court, see Milojević, 1997, p. 98.

188 UN General Assembly Resolution n. 688 (VII) of 20 December 1952.

189 For information on the work of all four special committees tasked with drafting the definition of the crime of aggression, see Sukijasović, 1967, pp. 129–135; Sukijasović, 1976, pp. 122–125.

Commission drafted the Code of Crimes against the Peace and Security of Mankind.[190] The General Assembly postponed its consideration and possible adoption pending the adoption of a definition of aggression based on a proposal by the Special Committee on Aggression.[191] The same occurred in relation to the drafting of the statute of the future ICC.[192]

In contrast to the delay in defining aggression for the purposes of general International Law, the period immediately following the Second World War witnessed the conclusion of several international treaties of a particular character that

190 The Draft declared, *inter alia*, as crimes against the peace and security of humanity the following (see Art. 2(1)–(9) of the 1954 Draft): (1) ny act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations, (2) Any threat by the authorities of a State to resort to an act of aggression against another State, (3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations, (4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions, (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State, (6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State, (7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character, (8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law, (9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.
Some authors comment that such a 'detailed and elaborate definition leaves very few gaps and represents a very efficient basis for the preservation of international peace and security in the case if it is applied in the right way': Đorđević Aleksovski, 2016, p. 202. Nevertheless, although the quoted text shows that the International Law Commission approached the Draft in great detail, it did not provide a specific definition of the concept of aggression. First, the first two paragraphs of Article 2 explicitly criminalise an act of aggression or a threat of an act of aggression but do not specify what constitutes an 'act of aggression' in a concrete sense. Second, the incriminating acts in paragraphs 3 to 9 of Article 2 constitute special incriminations, that is, specific crimes against the peace and security of humanity, and consequently cannot legally be considered concrete manifestations of an 'act of aggression'. Importantly for our topic, the Draft prescribed individual criminal responsibility for the incriminated acts (Art. 1 of the Draft).

191 Etinski and Đajić and Tubić, 2017, p. 437.

192 Milojević, 1997, p. 98.

contained explicit definitions of aggression, legally binding upon the contracting states in their mutual relations. In this regard, the literature refers to the so-called Act of Chapultepec of 1945, adopted as a resolution by the Inter-American Conference on Problems of War and Peace,[193] the 1947 Inter-American Treaty of Reciprocal Assistance (the Rio Pact), and the 1947 Treaty of Brotherhood and Alliance between Iraq and Transjordan.[194]

The apparent stalemate in defining international crimes and establishing an international criminal court in the late 1950s and throughout the 1960s gave rise to certain 'private initiatives' in this field. In this context, Škulić cites the example of the so-called 'Russel Tribunal', founded in 1966 by the English philosopher Bertrand Russell (1872–1970). In 1967, this 'court' considered, among other matters, the 'crimes against peace through participation, influence on the course of the war and the very conduct of the war of aggression in Vietnam', alleged against the United States Government.[195] Although it is clear that such 'criminal proceedings' lack legal significance, this example remains noteworthy as an expression of world public opinion reacting to the continued commission of conduct that could be subsumed under international crimes, including aggression, in the post-Nuremberg period without the imposition of any criminal sanction.

2.5.4 The 1974 Definition of Aggression

Within the UN, the task of defining aggression was delegated to the General Assembly. However, for a long time, the General Assembly did not adopt any definition in this regard.

During the 1960s, changes in international relations intensified. At that time, the process of decolonisation was at its peak, resulting in the creation of a large number of new sovereign states. These states became full members of the UN and, consequently, acquired voting rights within the General Assembly. Most of these states were underdeveloped and, as a rule, refused to align with either of the two dominant military-political blocs. Instead, they generally pursued a third way, primarily through the framework of the Non-Aligned Movement. These countries relied on International Law to safeguard their newly acquired independence and therefore had a strong interest in its development and full observance. One

193 This treaty is notable because it contains both a synthetic and an analytical definition of aggression. According to the synthetic definition, an act of aggression represents 'every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State', while the analytical definition stipulates that an act of aggression is, in any case, an 'invasion by armed forces of one State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith': see more in Sukijasović, 1967, p. 141.

194 Cited by: Ibid.

195 More on this: Škulić, 2020a, pp. 115–116.

expression of this interest was the adoption of a definitive legal definition of aggression as an international crime. Such a definition would provide an additional mechanism for protecting their sovereignty, establishing aggression as a recognised and enforceable tool to deter any attempts to violate their nascent statehood.[196]

By the end of the 1960s, efforts to define aggression in International Law intensified. These efforts were pursued both through the activities of the fourth (and, ultimately, final) Special Committee of the UN General Assembly tasked with developing the definition of aggression and through other initiatives.[197] Ultimately, the UN General Assembly adopted the definition of aggression by consensus in Resolution No. 3314 (XXIX) of 14 December 1974.[198]

The definition is of a mixed character.[199] It combines a general definition of aggression with a list of specific acts that constitute aggression. Aggression is generally defined as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the UN, as set out in this Definition' (Art. 1 of the 1974 Definition of Aggression).[200] Article 3 of the 1974 Definition further specifies that:

> 'Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:[201] (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State

196 In this sense, also: Jelić, 1955, p. 61, fn. 2. Similarly, some authors, in addition to citing 'the struggle of the peoples for independence from colonial regimes', note as circumstances that influenced the creation of the definition of aggression 'the political and strategic competition of the USSR and the USA for global supremacy' and various 'forms of armed conflicts that should have been included in the definition': Kolarić, 2013, p. 100.

197 It is important to mention the 1970 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', which reaffirmed that 'A war of aggression constitutes a crime against the peace, for which there is responsibility under international law' (Point 1(3) of the Declaration).

198 It can therefore be said that the resolution was adopted by acclamation, which has the same legal effect as unanimous adoption.

199 Sukijasović, 1976, p. 126; Avramov, 2011, p. 665; Kreća, 2019, p. 646.

200 In the literature, it is noted that this general formula defines only armed aggression, leaving other possible forms of aggression beyond its scope, such as economic and ideological aggression, as well as the threat of the use of force, including the threat of armed force, that is, the threat of aggression as understood under this definition. See: Sukijasović, 1976, p. 127; Simović and Simović, 2013, p. 174.

201 Sukijasović remarks that 'all the listed acts are based on the once famous Litvinov-Politis definition of aggression with certain not always good deviations': Sukijasović, 1976, p. 128.

> or the use of any weapons by a State against the territory of another State;[202] (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein'.[203]

Nevertheless, this enumeration of acts is not an exhaustive, *numerus clausus* list. The Security Council may determine that other acts constitute aggression in accordance with the rules of the UN Charter (Art. 4 of the Definition), indicating that the list in Article 3 is of an *exempli causa* character.[204]

The 1974 Definition also provides that 'No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression' (Art. 5(1) of the Definition), and that 'No territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful' (Art. 5(3) of the Definition).

The essential provision of the definition is contained in Article 2,[205] which states:

> 'The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity'.

202 Sukijasović correctly notes that the act of aggression contained in point (b) is in fact already covered by point (a) of the definition, since "bombing" and "use of any weapon" can be subsumed under the term "attack" in point (a): Ibid., pp. 128–129.

203 The literature points out that, in addition to the direct armed action covered by points (a) and (d), the acts of aggression in points (f) and (g) also cover some forms of indirect armed aggression: Ibid., pp. 127–128, 129; Dimitrijević, 2020, p. 197.

204 According to Cassese, this was 'done deliberately, so that the UN Security Council could be free to qualify certain other acts as aggression within the meaning of the provisions of the Charter': Kaseze, 2005, p. 128.

205 Sukijasović labels this article as the "heart of the definition": Sukijasović, 1976, p. 130.

In other words, the Security Council may, at any time, invoke the 'other relevant circumstances' and thereby decline to declare an act, however flagrant (for example, the invasion of one State by another) to constitute an act of aggression. The question arises as to the meaning of the term 'other relevant circumstances'. While some interpret it as a euphemism for aggressive intent (so-called *animus aggressionis*),[206] we consider the term to be legally akin to the notion of 'expediency'. Accordingly, this provision should be understood to mean that the Security Council may decline to apply the provisions of the 1974 Definition of Aggression whenever it determines that such inaction is appropriate, or expedient, provided that it remains guided by its fundamental duty: the preservation of international peace.

This interpretation of Article 2 is reinforced by the fact that the definition of aggression adopted by the UN General Assembly in 1974 is not binding on the Security Council. Rather, it is intended as guidance for the Security Council in the exercise of its powers under Article 39 of the UN Charter.[207] General Assembly Resolution No. 3314 (XXIX), prior to the Annex containing the definition of aggression, explicitly states that the General Assembly 'Calls the attention of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determination, in accordance with the Charter, the existence of an act of aggression' (point 4 of the resolution). Even if the resolution had not explicitly stated this, it would not be legally possible for a UN General Assembly Resolution, however unanimously adopted, to imperatively alter or supplement the powers of the Security Council. Such changes could occur only through an amendment to the UN Charter itself.

Finally, the 1974 Definition of Aggression contains a provision stating: 'A war of aggression is a crime against international peace. Aggression gives rise to international responsibility' (Art. 5(2)). This provision establishes the existence of responsibility under international law for aggression but does not specify the subject of such responsibility: the state, the individual, or both. Furthermore, the character of this legal responsibility remains unclear, whether it is civil, criminal, or a combination of both. Opinions on these matters are divided. Some scholars maintain that the 1974 definition exclusively implies the international responsibility of the state, understood as civil law responsibility, and not individual criminal liability.[208] Others interpret the provision as also providing for individual criminal responsibility.[209] The majority, however, does not adopt either position and concludes that

206 More on this: Ibid., pp. 130–131.
207 In this sense: Dumée, 2000, p. 252; Stein, 2005, p. 12; Avramov, 2011, p. 665.
208 'It is important to note that the GA Resolution 3314 contained a definition of aggression for traditional international law purposes but not for criminal law': Sarkin and Almeida, 2019, p. 525.
209 'Given that the said resolution was adopted almost thirty years after the Nuremberg trials, it seems quite logical that its authors, in the light of the Nuremberg experience, had in mind both the responsibility of the state and the criminal responsibility of the individual': Škulić, 2020a, p. 282.

the 1974 resolution does not precisely define the nature of the responsibility under international law.[210] It appears plausible that Resolution 3314 should be interpreted as providing for individual criminal responsibility only in the case of an aggressive war,[211] whereas other forms of aggression give rise solely to the international responsibility of the aggressor state, which is civil in nature. In the first sentence of paragraph 2 of Article 5, it is stated that 'a war of aggression is a crime against international peace'. This statement effectively reaffirms the relevant provisions of the Statute of the IMTN on the crime of aggression, originally reiterated by the adoption of the Nuremberg Principles,[212] and which may be considered part of general (customary) international law. The 1974 Definition of Aggression does not introduce new principles in international criminal law but rather restates those already established in the Statute of the IMTN and the Nuremberg Principles. The authors of Resolution 3314 were reluctant to recognise aggression in its entirety as a crime against peace, that is, as an international crime carrying individual criminal responsibility. Hence, the second sentence of paragraph 2 was added: 'Aggression gives rise to international responsibility'. In other words, if a specific act of aggression does not constitute an aggressive war, understood in the traditional formal sense under the doctrine of a state of war, the resolution treats it not as the crime of aggression but as an international wrongful act giving rise to the international responsibility of the state, which is civil rather than criminal in nature.

Based on historical experience from its adoption to the present, the 1974 Definition of Aggression has largely failed to meet its expectations,[213] which may have been unrealistically high from the outset.[214] The Security Council has never,

210 Degan and Pavišić, 2005, p. 394; Kaseze, 2005, p. 128; Kolarić, 2013, p. 101; Simović and Simović, p. 176.

211 In this regard: McDougall, 2021, p. 105.

212 In other words, it does not represent a progressive development in International Criminal Law but only restates or reaffirms the existing general Customary International Law on aggression.

213 In this sense, the Yugoslav legal theory emphasised that 'what has been adopted is a definition only in its form of, but not in content... The adopted definition is more of a list of optional wishes than a mandatory legal rule': Sukijasović, 1976, p. 133.

214 In this regard, the position of the previously cited author (Sukijasović) is not entirely clear. It is evident, as previously noted, that the only possible way to introduce a definition of aggression into general International Law that would bind the Security Council by its content is to amend the UN Charter. Therefore, there is no basis for the view that Resolution 3314 failed expectations, as no greater result could be expected from a single UN General Assembly resolution. A separate question concerns the obligatoriness of such a definition in International Criminal Law, applicable in national or international criminal courts. In this context, the definition would indeed be disappointing and practically inapplicable without politicising the criminal proceedings to the maximum extent.

even in the few instances in which it has established the existence of aggression,[215] invoked it.[216] In terms of international criminal law, the 1974 Definition could only have a theoretical or legal-technical impact, and, even then, its application must be approached cautiously, as the text presents significant structural problems from a criminal law perspective.[217] Scholarly literature notes that the Definition of Aggression does not specify 'which person (in what capacity) within the aggressor state and by which specific actions can commit the crime of aggression'.[218] It does not clarify whether the commission of the crime requires merely ordering an invasion or the actual crossing of a border by the aggressor state's armed forces, among other possible acts. Additionally, the Security Council's authority under Article 4 to determine that other acts constitute acts of aggression conflicts with the principle of legality,[219] a fundamental principle of criminal law. It has also been argued that the 1974 Definition 'takes an anachronistic approach to the problem of aggression which indicates its inapplicability, in an integral sense'.[220] In short, it has been described as 'incredibly broad'.[221] Consequently, the 1974 Definition of Aggression has been used primarily in a nomotechnical sense in subsequent negotiations on the drafting of the crime of aggression, but it required further adaptation to comply with the basic requirements of criminal law.

215 As rare historical examples in which the Security Council established the existence of aggression, the attacks by Israel on the Palestine Liberation Organisation and the attacks of South Africa on Angola are mentioned. Both were qualified by the Security Council as aggression in 1985: Kaseze, 2005, p. 128. McDougall provides an exhaustive list of Security Council resolutions recognising certain acts as aggression: McDougall, 2021, pp. 107–109. However, the author admits that in almost all cases the Security Council established the existence of aggression indirectly, since 'it is difficult to conclude that the Council has ever made an Article 39 determination as to the existence of an act of aggression': Ibid., p. 107. Milisavljević concludes that the Security Council has 'for the sake of diplomatic relations, avoided to call the things by their right name and has therefore very rarely used the qualification of aggression even when it was clear that it was committed': Milisavljević, 2025, p. 102.

216 Solera, 2010, p. 805; McDougall, 2021, p. 106.

217 Similarly, Stojanović notes: 'Although certain objections can be addressed to it, the definition could have been a good starting point for determining the concept of the crime of aggression and its constituent elements': Stojanović, 2017a, p. 113.

218 Simović and Blagojević and Simović, 2013, p. 239, fn. 596.

219 Kolarić, 2013, p. 101. In this regard, Dimitrijevic observes: 'Unfortunately, the aforementioned solution has left the "door wide open" to legal uncertainty, and thus to the voluntaristic decisions of the Security Council': Dimitrijević, 2020, p. 197. Novaković also points out that the resolution 'does not contain clear criteria on the basis of which the Security Council should determine whether an act of aggression exists or not': Novaković, 2023, p. 70.

220 Kolarić, 2013, p. 102. This anachronistic approach is particularly evident given that the 1974 Definition of Aggression recognises only the war of aggression as a crime against peace (that is, as an international crime), while it does not extend to other forms of use of armed force in international relations, for which a *jus cogens* prohibition exists in International Law.

221 McDougall, 2021, p. 102.

2.5.5 Aggression on the Road Towards the International Criminal Court

As noted, the principal reason[222] for the delay in drafting the *Code of Crimes against the Peace and Security of Mankind* and establishing a permanent international criminal court, a process that began in the mid-1950s, was the absence of a definition of aggression in the international law of the period. After two decades of work, the UN General Assembly adopted such a definition in 1974. However, progress on these matters remained slow. Concerning the Code, the General Assembly decided in 1978 to reintroduce its drafting onto the agenda.[223] In 1981, it called on the International Law Commission to continue work on the draft.[224] Work on establishing a permanent international criminal court resumed in 1989, when the General Assembly requested the International Law Commission to address the creation of a court that would have jurisdiction over the crimes prescribed in the future Code as part of its work on the draft.[225]

Meanwhile, while the process of establishing a permanent international criminal court was ongoing, the UN Security Council established *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda in 1993 and 1994,

222 Or rather, an excuse for such a standstill.

223 Resolution n. 33/97 of the UN General Assembly of 16 December 1978.

224 Resolution n. 36/106 of the UN General Assembly of 10 December 1981. In essence, the UN General Assembly *de facto* requested that the International Law Commission draft a new Code, taking into account 'the results achieved in the process of progressive development of International Law'.

225 Resolution n. 44/39 of the General Assembly of 4 December 1989. This resolution was adopted at the initiative of Trinidad and Tobago, a country that, together with other Caribbean states, faced significant challenges regarding transnational narcotics trafficking: Schabas, 2001, p. 9.

respectively.[226] Neither of these tribunals, however, had jurisdiction over the crime of aggression.[227]

In 1994, the International Law Commission drafted the *Statute of the International Criminal Court*.[228] The Draft envisaged, among other matters, the jurisdiction of the future international criminal court with regard to the crime of aggression

226 For a detailed discussion of the establishment and legality of these tribunals, and for further literature on these issues, see: Škundrić, 2021, pp. 26–40, pp. 58–60.

227 This fact is understandable with regard to the International Criminal Tribunal for Rwanda, as the conflict there was a typical non-international armed conflict. However, in relation to the International Criminal Tribunal for the former Yugoslavia, the situation is more complex. Although the armed conflicts comprising the 'first round' (1991–1995) on the territory of the former Yugoslavia (in Slovenia, Croatia, and Bosnia and Herzegovina) were, generally speaking, of an internal character, in 1999 NATO attacked the Federal Republic of Yugoslavia without the approval of the UN Security Council, invoking the so-called 'right of humanitarian intervention' (see further below in this book). According to some authors, 'the air war against Yugoslavia is a textbook example of aggression' Avramov, 2011, p. 667. However, 'since its jurisdiction was limited to violations of the "law of war" in the strict sense of *jus in bello* – that is, only to the modalities of warfare – the Tribunal could ignore the fact that NATO was responsible for a "crime against peace", that is, for genuine aggression': Zolo, 2012, p. 99. Some authors argue that 'any proof of politicization of such a solution', namely the absence of formal jurisdiction over the crime of aggression, 'was superfluous, unnecessary': Banović, Bejatović and Turanjanin, 2020, p. 177. From the fact that the ICTY lacked jurisdiction over the crime of aggression, some authors even conclude that 'the Hague Tribunal and the International Criminal Court have no continuity with the Nuremberg Tribunal': Mirović, 2020, p. 230. It may therefore be concluded that the absence of the crime of aggression in the statutes of the first post-Second World War institutions of international criminal justice, namely the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, constitutes a further indication of the controversy surrounding this crime. It is also noteworthy that certain great powers, most notably the United States, which exerted significant influence over the establishment of these *ad hoc* tribunals, chose not to include the crime of aggression within their jurisdiction. This may suggest an attempt to marginalise the crime and, ultimately, to remove it from international criminal law, given that its very existence stands in tension with their geopolitical interests. A similar conclusion is advanced by Scharf, who observes that 'the decision to exclude aggression' from the statutes of the Security Council's *ad hoc* tribunals 'reflected the drafters' recognition that aggression is a different species of offense as it is based on jus ad bellum (the legality of the war itself), whereas the crimes within the tribunals' jurisdiction are based on jus in bello (the legality of the conduct of the war)', and that 'the members of the Security Council viewed jurisdiction over aggression as antithetical to their interests in an era in which they, themselves, were constantly being accused of having committed acts of aggression throughout the world': Scharf, 2012, p. 361.

228 This is a revised version of the draft prepared by the International Law Commission in 1993, to which States subsequently submitted their comments and suggestions: Stojanović, 2017a, p. 144.

(Art. 20(1)(b) of the draft).[229] However, according to the methodology of the International Law Commission at that time, which, as noted, has its roots in the early 1950s, the statute was to contain only provisions regulating the organisation, jurisdiction, and procedure of the Court, while the definition of the crimes falling within its jurisdiction was to be addressed through the *Code of Crimes against the Peace and Security of Mankind*.[230] Accordingly, it is unsurprising that the 1994 Draft Statute contained only an exhaustive list of the crimes within the Court's jurisdiction, specifying their names without providing detailed definitions or elements.

In 1991, the International Law Commission issued a preliminary draft of the Code, which was subsequently circulated to states for comments and suggestions.[231] While work on the revised text of the Draft Code continued, and after the International Law Commission finalised the aforementioned Draft Statute in 1994, the UN General Assembly decided to establish an *ad hoc* Committee to consider the Draft Statute and organise a diplomatic conference for its adoption.[232] From that point, through the work of the *ad hoc* Committee, the previous division of labour (where matters concerning the organisation, jurisdiction, and procedure were to be prescribed by the Statute and substantive criminal definitions by the Code of Crimes against the Peace and Security of Mankind) was abandoned. The prevailing view became that the Statute should also include definitions and the basic elements of the crimes within the Court's jurisdiction.[233] Consequently, the work on the *Code of Crimes against the Peace and Security of Mankind*, finalised by the International Law Commission in 1996,[234] has lost some of its significance.[235]

Nevertheless, it became apparent that the expectations of the General Assembly regarding the *ad hoc* Committee's ability to organise a diplomatic conference to

229 In the comments published alongside the Draft, the International Law Commission, while noting certain difficulties regarding the crime of aggression, emphasised that it would be 'retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nürnberg', see *Commentary* on Article 20 of the Draft, paragraph 6.

230 This point is made clearly in the comments to the Draft, see *Commentary* on Article 20 of the Draft, paragraph 4.

231 Schabas, 2001, p. 9.

232 Resolution n. 49/53 of the UN General Assembly of 9 December 1994.

233 In this regard: Schabas, 2001, p. 13.

234 According to the text of this Draft, 'An individual who, as leader or organiser, 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' (Art. 16). Cassese considered this definition 'vague and disappointing': Kaseze, 2005, p. 128. Đorđević Aleksovski observes that the definition in the 1996 Draft departs from the approach adopted in the 1954 and 1991 Drafts, as well as that in the 3314 Resolution, because the 1996 definition 'does not prescribe a mixed, but rather a general definition of aggression': Đorđević Aleksovski, 2016, p. 204.

235 This Draft, together with the Draft Statute of 1994, exerted considerable factual influence on the drafting of the (Rome) Statute of the (Future) International Criminal Court. See Schabas, 2001, p. 10.

establish a permanent international criminal law and adopt its Statute were premature.[236] Divergences between states on key issues remained significant. Therefore, in 1995, the General Assembly established the Preparatory Committee (*PrepCom*)[237] to examine unresolved issues arising from the 1994 Draft Statute and to prepare for the diplomatic conference. Over the next two years, the Preparatory Committee worked intensively, and, on 19 April 1998, it issued a Draft Statute of the future international criminal court, which served as the basis for the 1998 diplomatic conference in Rome. The text of this Draft revealed that the crime of aggression remained one of the most contentious issues.[238] Specifically, the substantive provision on the crime of aggression in art. 5 was placed in brackets, with an explanatory footnote (No. 6) indicating that the proposed solutions reflected 'the view held by a large number of delegations that the crime of aggression should be included in the Statute'. Accordingly, the Preparatory Committee as a whole had not reached a definitive position on whether the crime of aggression should be included in the Statute.[239] The Draft itself presented three alternative proposals regarding this

236 On the other hand, Ibid., p. 14.
237 Resolution n. 50/46 of the UN General Assembly of 11 December 1995.
238 With regard to the crime of aggression, the key issues concerned its definition and the jurisdiction of the future International Criminal Tribunal over that crime, in particular the role of the United Nations Security Council in the exercise of such jurisdiction. For further discussion of the positions of the Preparatory Committee, see: Đorđević Aleksovski, 2016, p. 206; Škulić, 2020a, p. 283.
239 Zimmermann, 1998, p. 171. The author (who, since February 1997, has served as the German representative to the Preparatory Committee: Ibid., p. 169, fn. 1) further notes that, among the five permanent members of the UN Security Council, the United States was particularly prominent in opposing the inclusion of the crime of aggression in the statute of the future International Criminal Court, whereas the other four permanent members were 'somewhat more flexible'. He nevertheless emphasised that the *conditio sine qua non* for all five permanent members was the preservation of the powers of the UN Security Council: Ibid., p. 199.

crime, which were subsequently to be discussed at the diplomatic conference in Rome.[240]

240 The first option read: 'For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]: (a) planning, (b) preparing, (c) ordering, (d) initiating, or (e) carrying out [an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council]]'.
The second option read: '1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.' The acts of aggression contained in the 1974 Definition of Aggression are then listed as specific acts, with the alternative possibility of requiring that such acts or their consequences be 'of sufficient gravity'.
Finally, the third option read: '1. For the purpose of the present Statute [and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State], the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing the political or military action of a State: (a) initiating, or (b) carrying out an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.] 2. Where an attack under paragraph 1 has been committed, the (a) planning, (b) preparing, or (c) ordering thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.]'.
It is also important to note the proposal for a definition of aggression submitted by the German delegation only a few days before the adoption of the final draft. This proposal defined aggression as an armed attack directed by a State against the territorial integrity or political independence of another State, undertaken in a manner constituting a clear violation of the Charter of the United Nations, with the optional inclusion of aggressive intent. Although this proposal was not incorporated into the alternatives contained in the final draft of 19 April 1998, it remained significant because it introduced the qualification 'manifest violation of the Charter of the United Nations'. This qualification later became a key feature of the definition of aggression adopted at the Kampala Review Conference, and at the same time one of its most criticised elements in legal scholarship. See: Solera, 2010, pp. 807–808. Although the German proposal was not included in its entirety, the requirement that the violation of the Charter be *manifest* was incorporated into the third alternative definition included in the Draft.

3

The Crime of Aggression in the Law of the International Criminal Court

3.1 Non-inclusion of Provisions on the Crime of Aggression in Rome in 1998

Despite decades of negotiations aimed at recognising aggression as an international crime within the jurisdiction of a (permanent) ICC, the crime remained without a final and clear definition at the Rome Conference,[241] at which the Court was established and its Statute adopted. It was evident that the Preparatory Committee had encountered substantial differences on this issue, which led to the matter being referred to the diplomatic representatives of states at the Rome Conference.

However, the Conference itself produced no significant progress.[242] The non-aligned countries, together with Germany and Japan, advocated for the inclusion of the crime of aggression in the Statute, primarily because their citizens had been almost exclusively prosecuted for this crime.[243] In contrast, the United States remained the principal opponent of its inclusion under the Court's jurisdiction.

Delegations supporting the inclusion argued that recognising aggression as a crime would have a deterrent effect on potential aggressors and noted that aggression had already been criminalised in the Statute of the IMTN, thus forming part of Customary International Law.[244] Opponents, however, cited concerns over the politicisation of the Court and the inadequacy of the existing definition of aggression in international law, particularly from the perspective of the principle of legality (*nullum crimen, nulla poena sine lege*). They considered the definition in UN General Assembly Resolution 3314 of 1974 to be overly broad.[245] As the Conference progressed, some even questioned the very existence of the crime of aggression.[246]

241 The conference was held from 15 June to 17 July 1998.
242 For the part of the Rome Conference addressing the crime of aggression, see: Đorđević Aleksovski, 2016, pp. 207–210.
243 Schabas, 2001, pp. 26–27.
244 Sarkin and Almeida, 2019, p. 527.
245 Ibid., pp. 526–527.
246 Dumée, 2000, p. 261.

Nevertheless, on the final day of the Rome Conference, a compromise was reached.[247] In principle, the crime of aggression was to be included within the nominal jurisdiction of the future ICC. However, the Statute itself did not provide an immediate definition of the crime. In other words, the Court could not effectively exercise *ratione materiae* jurisdiction over aggression until amendments to the Statute were adopted that defined the crime and established the specific conditions for the Court's jurisdiction in relation to it.[248] In effect, part of the Court's nominal jurisdiction was reduced to a *nudum ius*.[249]

This approach has attracted criticism. It has been emphasised that:

> 'such a solution is political, not legal, and expresses the intention of states with a great capacity of military and factual power to maintain freedom of action in relation to the fundamental norm of positive International Law – the norm on the prohibition of the use of force against the political independence and territorial integrity of other states'.[250]

Furthermore, it has been argued that the claim, based on the final text of the Statute, that the definition of aggression was controversial is 'an excuse, because the concept of aggression was already defined by UN General Assembly Resolution No. 3314 of 14 December 1974' and that 'although certain objections may be addressed to it, it could have been a good starting point for determining the concept of the crime of aggression and its constituent elements'.[251] It has also been observed that 'postponement of the adoption of the definition of aggression…has in a certain way compromised the trial in Nuremberg for crimes against peace, that is, for aggression. These circumstances raise the question of whether it is possible that during

247 Schabas, 2001, p. 26.
248 See Article 5(2) of the original text of the Rome Statute of 1998.
249 Škulić, 2020a, p. 284
250 Kreća, 2019, p. 647.
251 Stojanović, 2017a, pp. 112–113. In this regard, see also: Babić, 2011, p. 175; Ikanović, 2015, pp. 190, 199. In its *Nicaragua* case, the International Court of Justice held that (at least) the description 'contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) may be taken to reflect customary international law': *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, para. 195. By contrast, in writings produced shortly before the adoption of the Rome Statute of the International Criminal Court in 1998, it was argued that 'it is already doubtful whether all of the elements contained in Resolution 3314 can now be considered as forming part of customary international law': Zimmermann, 1998, p. 201. Similarly, McDougall, expanding Zimmermann's position both substantively and temporally, argues that 'it can be concluded that the 3314 Definition had not crystallised into customary international law for the purpose of the *jus ad bellum* by the time of the adoption of the crime of aggression amendments in 2010': McDougall, 2021, p. 119. Furthermore, some authors express general scepticism regarding the use of the 1974 Definition as the basis for a criminal law definition of aggression; see, for example: Solera, 2010, pp. 805–806.

the Second World War there was a right that allowed individuals to be tried for crimes against peace, and that later on that right ceased to exist'.[252]

Accordingly, although the Rome Statute of the Permanent ICC was adopted on 17 July 1998 and entered into force on 1 May 2002, with the ICC commencing operations two months later, the crime of aggression, despite appearing on the list of offences within the Court's *ratione materiae* jurisdiction, could not initially be prosecuted. The ICC lacked an authoritative definition of the crime, rendering aggression a 'sleeper' within its subject-matter jurisdiction during its early years.[253]

3.2 From Rome to Kampala – Work on the Amendments on the Crime of Aggression

The text of the Rome Statute, adopted in 1998, provided that seven years after the entry into force of the Statute, the Secretary-General of the UN would convene a review conference to consider amendments to the Statute, with the possibility that the review conference would also address the crimes within the Court's jurisdiction (Art. 123(1) of the Rome Statute). After the Rome Statute came into force in 2002, that period began to run. In other words, seven years after the Statute's entry into force, the opportunity to activate the ICC's jurisdiction regarding the crime of aggression arose.

In the Final Act of the Rome Conference, the Preparatory Committee[254] received a new mandate to prepare proposals for a provision on aggression, including its definition and elements, as well as the conditions under which the ICC would be able to exercise jurisdiction over this crime, and to submit them to the Assembly of States Parties for the purposes of the Review Conference.[255] From 1999 to 2002, the Preparatory Committee met 10 times, and, at its third session, it established the Working Group on Aggression, which, however, achieved limited results.[256] Consequently, after the Statute's entry into force, the Assembly of States Parties established a Special Working Group on the Crime of Aggression, which operated from 2003 to 2009 and drafted a proposal for amendments to the Rome Statute concerning the crime of aggression. Ironically, the most difficult issue was not the definition of aggression itself but the conditions under which the ICC could exercise

252 Etinski and Đajić and Tubić, 2017, p. 420. Similarly, Kreß, commenting on the solution adopted in Rome, considers that 'this judicial disability also constitutes a rather sad historic irony in light of the fact that the Nuremberg IMT called the crime of waging a war of aggression the supreme international crime': Kreß, 2009, p. 153.

253 Schabas, 2001, p. 26. In this sense, some authors describe the crime of aggression during the initial period of validity of the Rome Statute as a 'sleeping beauty': Heinsch, 2010, p. 718.

254 This is the same Preparatory Committee that operated prior to the Rome Conference in 1998.

255 Cited according to: Kreß and von Holtzendorff, 2010, p. 1182.

256 For further discussion, see Ibid., p. 1183.

jurisdiction over the crime.[257] This is evident from the proposed amendments, which contained a single definition of the crime of aggression but included two alternative proposals regarding the ICC's jurisdictional regime for this crime.[258]

It is also noteworthy that none of the so-called mixed or hybrid forms of international criminal justice have exercised jurisdiction over the crime of aggression.[259]

257 Ibid., p. 1184. For details concerning the work of the Special Working Group on the Crime of Aggression, see Ibid., pp. 1184–1199.

258 Heinsch, 2010, p. 719. The definition of the crime of aggression in the proposed amendment from 2009 (then proposed Art. 8*bis* of the Rome Statute) read: 'For the purposes of this Statute, the "crime of aggression" means the means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (paragraph 1). For the purposes of paragraph 1 of this Art., "act of aggression" means the the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of the declaration of war, shall, in accordance with General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression' (then the list of the six acts of aggression (from (a) to (g)) contained in the 1974 definition of aggression is provided) (par. 2).
Regarding the proposed amendment regulating the conditions for the exercise of the ICC's jurisdiction over the crime of aggression (proposed Art. 15*bis*), it provided that the Court may exercise jurisdiction over that crime in accordance with Article 13 and with this Article (par. 1). Where the Prosecutor concludes that there are reasonable grounds to initiate an investigation in relation to the crime of aggression, he or she must first determine whether the Security Council has already established that the State concerned has committed an act of aggression. The Prosecutor must inform the Secretary-General of the United Nations of the situation before the Court and provide relevant information and documents (par. 2). If the Security Council has established the existence of an act of aggression, the Prosecutor may proceed with the investigation of the crime of aggression. However, two alternative formulations of proposed Article 15*bis* were envisaged. Under the first alternative, in the absence of a prior determination of an act of aggression by the Security Council, the Prosecutor could not proceed with the investigation. It was also proposed, as an optional variation within this alternative, that the Prosecutor could nevertheless initiate an investigation if the Security Council, acting under Chapter VII of the Charter of the United Nations, requested the continuation of the investigation in a specific case, notwithstanding that it had not previously established the existence of an act of aggression *in concreto*. Under the second alternative, if the Security Council had not established the existence of an act of aggression within six months of receiving the relevant information from the Prosecutor, the Prosecutor could proceed with the investigation of the crime of aggression. Optional additional conditions were also envisaged: (a) that the Prosecutor obtain authorisation from the Pre-Trial Chamber; (b) that the act of aggression be determined by the United Nations General Assembly in accordance with Article 8*bis*; or (c) that the act of aggression be established by the International Court of Justice in accordance with Article 8*bis*.

259 These are special judicial bodies for Cambodia, Sierra Leone, East Timor, Lebanon, Bosnia and Herzegovina, and Kosovo and Metohija.

3.3 The Kampala Amendments – The Crime of Aggression Incorporated in the Rome Statute

In accordance with the mandate provided in Article 123 of the Rome Statute, the Secretary-General of the UN convened the first Review Conference of the Rome Statute on 7 August 2009. The conference was held from 31 May to 11 June 2010 in Kampala, Uganda. Although it was not the only matter under consideration,[260] the crime of aggression was certainly the most significant issue addressed during the conference.[261] Initially, it was entirely uncertain whether agreement on this crime would be reached.[262] Ultimately, however, Resolution No. 6 of the Review Confer-

260 The Conference also adopted amendments introducing three new forms of war crimes into the Rome Statute; see Resolution RC/Res. 5 of the Review Conference.

261 This is evidenced by the fact that not only representatives of States that have ratified the Rome Statute, but also those that have merely signed the Rome Statute or the Final Act of the 1998 Rome Conference, as well as representatives of numerous international and non-governmental organisations, were invited to the Conference. *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May to 11 June 2010, Official Records*, pp. 1–2. The broad participation aimed to achieve a solution acceptable to as many actors as possible, in particular States.

262 In this regard, see Kreß and von Holtzendorff, 2010, p. 1201. Moreover, in the literature published immediately prior to the Kampala Conference, some authors argued that the idea of the ICC prosecuting the crime of aggression should be abandoned altogether. In this context, the position advanced by Paulus is particularly noteworthy. He argues that it is undesirable to place violations of *ius in bello* and *ius ad bellum* within the jurisdiction of the same court. The rationale for maintaining the separation between these two branches of law lies in the requirement that all parties to an armed conflict, irrespective of whether one has violated *ius ad bellum*, must comply with the rules of *ius in bello*. If the leadership of one party is found guilty by the Court of initiating the conflict, its incentive to comply with *ius in bello* may be diminished: A. Paulus, 2009, p. 1126. The author ultimately concludes that the time was not yet ripe for the effective inclusion of the crime of aggression within the ICC framework: Ibid., pp. 1127–1128. Furthermore, the literature notes that 'the process of adopting amendments regarding the crime of aggression was unclear and confusing': see Murphy, 2009, pp. 1148–1149.

ence,[263] a legal instrument that included the relevant provisions on the crime of aggression, was adopted unanimously.[264] Any doubt that international criminal law might not be the most appropriate means of countering aggression was dismissed by invoking the phrase that 'the train has already left the station'.[265]

The creation of normative possibilities for activating the ICC's jurisdiction regarding the crime of aggression, though a compromise solution, has generally

263 Resolution RC/Res. 6. The Resolution contains three annexes. The first annex introduces amendments to the Rome Statute concerning the definition of the crime of aggression and the conditions under which the ICC may exercise jurisdiction over that offence. The second annex sets out relevant additions to the Elements of Crimes in relation to the crime of aggression. Finally, the fourth annex provides additional interpretative rules relating to the adopted amendments, the so-called *Understandings*. The legal nature and effect of this third annex (III) remain disputed. Although the view that it constitutes a 'clear expression of the intention of the Assembly of States Parties' may be accepted in terms of international treaty law (McDougall, 2021, p. 149), it is questionable whether the ICC may rely on the *Understandings* in its practice as a formal source of law in relation to the crime of aggression. This appears unlikely, given that Article 21 of the Rome Statute, which governs applicable law before the ICC, does not refer to additional interpretative sources of this kind. Moreover, the Statute already recognises the Elements of Crimes as an interpretative source of substantive criminal law, which further weakens the case for the formal binding force of the *Understandings*. Nevertheless, it seems that, in its future practice concerning the crime of aggression, the ICC will, if not formally, then in practice, take these *Understandings* into account.

264 Kreß and von Holtzendorff, 2010, p. 1180. For a detailed account of the work of the Conference, see ibid., pp. 1201–1210.

265 de Hoon, 2018, p. 931. The quoted author, somewhat ironically, further explains the dominant attitude at the Kampala Conference, adding: 'We cannot now say we will not do it, can we? Not after the Nuremberg Tribunal called it the "supreme international crime". And, anyway, we already decided in Rome that we could not have an International Criminal Court without the crime of aggression': ibid. In Serbian legal literature, the issue of the 'judiciability' of aggression as a criminal offence was addressed by Vučić, who found that 'it has been indisputably established that the legality of the use of force by a state can be assessed by an international court or tribunal – of course, if the state has voluntarily consented to its jurisdiction. It is a bit confusing why some then still find it appropriate to dispute that an international court can pronounce on individual criminal responsibility for the crime of aggression, although the state can be internationally responsible for the violation of the prohibition of the use of force (and thus for the commission of an act of aggression)', and concludes that 'after the Second World War, a criminal prosecution of individual "aggressors" came first, and only then until the determination of the responsibility of the state for the violation of the prohibition of the use of force': Vučić, 2017, p. 83.

received positive evaluations from the scholarly and professional community.[266] The following discussion addresses three main issues arising from the Kampala Amendments: (1) the definition of the crime of aggression and its elements; (2) the ICC's jurisdiction regarding the crime of aggression and the conditions for its exercise; and (3) the legal effect of these amendments.

3.3.1 The Crime of Aggression in the Substantive Criminal Law of the ICC After the Kampala Amendments

Article 8*bis* (1) of the Rome Statute stipulates that:

> 'For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.

Article 8*bis* (2) further elaborates:

> 'For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

266 'Despite some shortcomings that can be addressed to the definition of aggression…we can conclude that its implementation into the Rome Statute will discourage political and military leaders from using armed force because it may endanger them personally': Kolarić, 2013, p. 114; 'The definition…is the result of a compromise… such a path is certainly better than entering the wilderness of the blockade': Ikanović, 2015, p. 207; 'We are of the opinion that the activation of competence will bring progress in the field of general prevention in terms of exerting moral pressure on states not to use aggressive force that is not authorized by the Security Council, i.e. which does not represent individual or collective self-defence': Vučić, 2017, p. 97; 'Nevertheless, it can be said that what was achieved in 2010 in Kampala is a success and that it gives grounds for hope that one day there will indeed be prosecution and punishment of those who commit one of the most serious international crimes': Stojanović, 2017a, p. 115; '. The common belief was that adopting an abstract and open crime of aggression amendment was better than leaving it outside the realm of law in the policy domain – that the law's power would generate more beneficial effects than harmful effects' (de Hoon, 2018, p. 933), although it is true that the quoted author adds that 'it is difficult to verify the accuracy of such claims': ibid.; 'The activation of the crime of aggression represents a milestone in the development of international criminal law': Sarkin and Almeida, 2019, p. 520; similarly, Heinsch, 2010, p. 715; Kreß and von Holtzendorff, 2010, p. 1217.
In this context, Ban Ki-moon, then Secretary-General of the United Nations, welcomed the 'historic agreement on the definition of aggression' and emphasised that 'this compromise text represents a significant step forward in the fight against impunity and towards an era of accountability', quoted in Simović and Blagojević and Simović, 2013, p. 241, fn. 599.

> Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein'.

3.3.1.1 Object of Protection and Passive Subject of the Crime of Aggression

The object of[267] protection of this crime is international peace.[268] Its criminalisation seeks to safeguard international peace[269] as one of the highest, if not the highest,

267 This is the so-called group protective object, understood as a specific good to which criminal law affords protection by prescribing certain criminal offences. See further: Srzentić and Stajić and Lazarević, 1986, p. 161; Bačić, 1986, p. 142; Stojanović, 2017b, p. 130; Vuković, 2021, p. 69.

268 Similarly, Sukijasović advocated the view that the object of protection in respect of the crime of aggression is international peace and security: Sukijasović, 1967, pp. 226–229. See also Bassiouni, 2014, p. 150. However, it appears superfluous to distinguish between two values, namely international peace and security, within this offence. By contrast, Jovašević states that 'the object of protection in this criminal offense is peace among peoples and their states': Jovašević, 2011, p. 227. It is unnecessary to single out 'peace among nations' as a separate protected good, since the Rome Statute stipulates that an act of aggression entails the use of armed force by *one state* against another, not by one people against another. Moreover, peoples as such are not subjects of international law capable of disturbing international peace; only states can do so. Finally, some authors contend that 'aggression is primarily a political crime' and that 'it attacks an abstract object of protection in the sense of a state, a people, and that the prosecution of the crime of aggression requires a political connotation': Spasić, 2024, p. 687.

269 The object of protection is exclusively *international* peace, that is, peace between states, rather than internal peace within a single state. This follows from the construction of the crime of aggression, which does not encompass internal armed conflicts (civil wars).

values of the international order. The passive subject[270] in the criminal act of aggression is the state, as the victim, since it protects the interests it embodies: sovereignty, territorial integrity, and political independence.[271] The question of whether a particular entity constitutes a state, and therefore a possible passive subject of the crime of aggression, should be resolved according to the usual rules of international law concerning statehood.[272] In other words, the passive subject of this criminal offence can only be an entity that is indisputably a state, whereas the 'states' whose statehood is disputed cannot be regarded as such. This conclusion ultimately derives from the principle of legality in criminal law (*nullum crimen, nulla poena sine lege*),[273] specifically its *lex certa* requirement, which demands that criminal law norms be as precise as possible, and its *lex stricta* requirement, which prohibits the use of analogy in interpreting criminal law norms. In this context, the example of the so-called 'State of Kosovo' is instructive. Even if one accepts that its status is disputed,[274] it is evident that this quasi-state should be excluded from consideration as a state in the sense of a passive subject of the criminal act of aggression as prescribed by the Rome Statute.

3.3.1.2 Objective Elements (*actus reus*) of the Crime of Aggression

3.3.1.2.1 Perpetrator of the Crime

The perpetrator (subject) of this criminal offence cannot be any person, but only one who is in a position to effectively exercise control over or direct the political or military actions of the state. Therefore, although differing opinions exist in the literature,[275] the criminal offence of aggression belongs to the so-called special

270 Serbian criminal law theory also advances the justified view that a legal entity may constitute a passive subject: Stojanović, 2017b, p. 131.

271 In Yugoslav theory, some authors argued that the category of passive subject in aggression should include, in addition to states, territories under an international regime, dependent areas, and peoples under foreign domination. See Sukijasović, 1967, pp. 220–222.

272 See also McDougall, 2021, p. 135.

273 This principle is regarded as being of 'paramount importance' in the field of substantive international criminal law: Werle, 2009, p. 55.

274 We agree with the view in the literature that, under the current state of affairs, Kosovo and Metohija cannot be considered a state, either under the internal law of the Republic of Serbia or under international law, absent the prior consent of the Republic of Serbia. See Kreća, 2019, pp. 147–150.

275 'By its very nature this is a criminal offense delicta communia, although in practice the perpetrator of the act must have a certain political, state, official or military position, capacity or influence in order to be able to undertake the relevant act at all.': Jovašević, 2011, p. 227. This position is unpersuasive, since the Rome Statute expressly prescribes the qualities required of a perpetrator of this crime.

crimes (*delicta propria*).[276] For this reason, it is often referred to as the 'crime of the leaders' or as a 'leadership crime'.[277] As noted, 'It would not be justified to envisage ordinary participation in a war of aggression[278] as a criminal offence. Aggression is an act of violation of the right to war (*ius ad bellum*), which cannot be done, e.g., by an ordinary soldier'.[279]

However, not all individuals in the highest state positions will automatically be criminally responsible if their state commits an act of aggression; it is necessary that they were in a real position to influence such a decision.[280] It would also be unjustified to label as a perpetrator, for example, a member of the government who voted against the decision at the session in which the state resolved to invade another state.[281] Conversely, the approach adopted in the Rome Statute allows for the identification as a perpetrator of a person who holds no formal function in the state apparatus but is able to effectively direct or control the actions of the state.[282] Accordingly, although holding a high state office constitutes a significant indication,

276 These are criminal offences whose legal description (in this case, that contained in the Rome Statute) can be realised only by a person possessing specific personal characteristics or holding a particular position: Vuković, 2021, p. 76. In other words, not every person can commit such offences.

277 Heinsch, 2010, p. 722; Kreß and von Holtzendorff, 2010, p. 1189; Scharf, 2012, p. 383; Clark, 2013, p. 397; Kolarić, 2013, p. 107; McDougall, 2021, p. 51.

278 It should be noted that the criminalisation of aggression in the Rome Statute is significantly broader than the criminalisation of the war of aggression in the formal sense. This does not affect the essential accuracy of the quoted statement.

279 Stojanović, 2017a, p. 114. In earlier legal theory, however, it was argued that the perpetrators of the crime of aggression, in a broad sense, include organisers and commanders as indirect perpetrators, as well as the people and armed forces of a particular state as direct perpetrators: Sukijasović, 1967, p. 218. This view aligns with earlier strands of legal theory recognising the possibility of state criminal responsibility in international law. In contemporary conditions, however, the acceptance of individual criminal responsibility and the abandonment of collective criminal responsibility render this position practically inapplicable.

280 In this sense, Ikanović observes that a head of state with predominantly ceremonial powers, such as the British monarch, cannot be regarded as the perpetrator of this crime: Ikanović, 2015, p. 203. Conversely, if, hypothetically, the British monarch were to execute a *coup d'état* and thereby acquire effective control of the state, they could be considered the perpetrator of this crime should their country commit an act of aggression against another state.

281 In this regard: Etinski and Đajić and Tubić, 2017, p. 444.

282 In the literature, wealthy businessmen and religious leaders are cited as examples of such persons: Kolarić, 2013, p. 108. See also, in that sense, Heinsch, 2010, p. 723. Similarly, Clark argues that 'it seems to be generally agreed' that 'someone like an industrialist who is closely involved with the organization of the state but not formally part of its structure' could 'be liable to prosecution': Clark, 2010, p. 1105. We contend that the leader of a political party that wields significant power and control in a state, but holds no official state office, should also be included in this category. Such a person could routinely exercise effective control over state actions. Historically, this was common in former communist countries, where the greatest power often rested with the general secretary of the Communist Party, who did not necessarily occupy any official state position.

the determination of whether a person may be considered the perpetrator of a crime of aggression must be assessed in light of all the circumstances indicating whether that person had effective control or influence over state policy.[283]

The *Elements of Crimes* specify that a single act of aggression may involve multiple perpetrators.[284] This indicates that the number of acts of aggression does not necessarily correspond to the number of perpetrators. For instance, if one state imposes a blockade on the coast or port of another state (with the fulfilment of other conditions necessary for the existence of this criminal offence), the perpetrators could include the head of state, who as supreme military commander ordered the blockade; the chief of the general staff and the admiral of the fleet, who participated in developing and executing the blockade plan; and the minister of defence of the aggressor state, among others.

The perpetrator of the crime of aggression can only be a natural person. Article 25(1) of the Rome Statute grants the ICC jurisdiction exclusively over natural persons. Paragraph 4 of the same article provides that 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'. Thus, despite certain arguments, mainly within older international legal theory, that states should also bear criminal responsibility for international crimes, including aggression,[285] the Rome Statute maintains the traditional parallelism of responsibilities under international law: (1) the international legal responsibility of states, which is civil in character, and (2) the international legal responsibility of individuals (natural persons), which is criminal in nature.

283 Attention should also be drawn to article 27 of the Rome Statute, which provides that 'This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence' (Art. 27 (1)), and that 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person' (Art. 27 (2)). These general provisions also apply to the crime of aggression, which is logical, as without them this criminal offence would be practically ineffective.

284 Footnote 75 in *Elements of Crimes*.

285 '… The state's responsibility can also be criminal in its nature. Criminal responsibility is twofold: either the United Nations sanctions are envisaged by the decision of the Security Council against a state that grossly violates international law in the event of a threat or breach of peace, or certain persons are punished. The responsibility of the state can be: political, responsibility for damage and of criminal legal nature': Bartoš, 1954, pp. 304–305. In this regard, Sukijasović notes that 'Practice shows that the state can bear a specific criminal responsibility… with the simultaneous criminal-judicial responsibility of its representatives' (Sukijasović, 1967, p. 236), and that reparations imposed on an internationally responsible state following the end of a war are not civil but of a criminal law nature (the so-called criminal compensation for damages), functioning similarly to a fine (Ibid., p. 237). The author further clarifies that this criminal responsibility of the state is not determined judicially but extrajudicially (Ibid., p. 233), and that it is 'collective in the personal sphere; It affects the state in its basic meaning *res publicae*': Ibid., p. 237.

This conception is accepted by the vast majority of the doctrine.[286] In other words, the existence of individual criminal responsibility under the Rome Statute does not preclude the responsibility of the state that committed aggression against another state. Both the state and the individual remain responsible, but the state's responsibility is civil in character, whereas the individual's responsibility is criminal.[287] As stated, 'state and individual responsibility at international law are distinct regimes which present different features'.[288]

Since the Rome Statute addresses only the ICC's competence with respect to natural persons, its jurisdiction does not extend to other legal entities,[289] including terrorist organisations, which therefore cannot be considered perpetrators of any criminal offence within its current jurisdiction, including the crime of aggression.

286 In this context: '… the introduction of criminal liability by the state is not yet possible': Dumée, 2000, p. 261; 'This body of international criminal law has developed as a separate branch from the international law on State responsibility, although overlaps may come about (particularly in the case of genocide and aggression) between individual criminal responsibility and State responsibility': Cassese, 2005, p. 245; '… Despite the many reasons that would justify the responsibility of the state in international criminal law, nevertheless, at today's level of development… This form of responsibility is not accepted… In order for the state to be criminally responsible at all, it is necessary to establish its guilt, which is impossible': Jovašević, 2011, p. 157; 'In the international order, there is criminal responsibility, as the state as a legal entity cannot be criminally responsible. To attribute intended, reckless or negligent acts to the state as a whole would mean, as a last resort, to allow collective sanctions against the entire people, which is fundamentally unacceptable. Criminal responsibility in the modern international order is always reduced to the individual criminal responsibility of the individual': Avramov, 2011, p. 211; 'There is no convention in force that provides for state penal responsibility': Bassiouni, 2014, pp. 105–106; 'A smaller part of the theory even advocates the view that the criminal responsibility of the state is justified. However, not only is this not accepted by the majority of theoreticians, but it is also not accepted in positive International Criminal Law…': Stojanović, 2017a, p. 25; 'The state cannot be guilty in the sense of criminal law, since the concept of guilt implies a subjective element (intent or negligence), which cannot be ascribed to an abstract being such as the state. From the point of view of the relevant rules of International Law, in cases of violations of an international obligation of fundamental importance to the international community as a whole, as in the case of aggression…individual criminal responsibility and civil responsibility of the state are acquired': Kreća, 2019, p. 220; 'The principle of guilt in International Criminal Law implies a guilt that is of an individual character, so that the responsibility of legal persons for criminal offences is out of the question': Škulić, 2020a, p. 35; 'A minority of theories even advocate the notion that the criminal responsibility of states is justified, although this understanding has not yet found any basis either in the theory or in the practice of international criminal tribunals and in the Statute of the ICC': Banović and Bejatović and Turanjanin, 2020, p. 47.

287 In fact, as can be seen from the provision on the crime of aggression in the Rome Statute, an international unlawful act of the state is a condition for the existence of a crime of aggression. In this sense: Kreß and von Holtzendorff, 2010, p. 1190; Dimitrijević, 2020, p. 200.

288 Bianchi, 2009, p. 18.

289 However, during the process of adopting the Rome Statute, serious consideration was given to extending the jurisdiction of the ICC to at least some legal entities, though certainly not to the states. For more on this, see Schabas, 2001, pp. 80–81.

Moreover, the provision on the crime of aggression stipulates that an act of aggression can only be undertaken by one state against another. It follows that individuals acting within a terrorist organisation cannot be held individually criminally responsible for this offence, as the text of the Rome Statute precludes the possibility that the act of aggression itself (a precondition for the crime of aggression) could be committed by any entity other than a state.[290]

3.3.1.2.2 Acts of Commission

The act of committing the crime of aggression is alternatively defined[291] as planning, preparing, initiating, or executing *an act of aggression* which, according to its character, gravity, and scale, constitutes a manifest violation of the Charter of the UN.[292] The first three of these four alternatively prescribed acts of commission were adopted from the Charter of the IMTN, whereas the fourth act of commission under the Nuremberg Law ('waging war') was replaced by the 'execution' of an act of aggression.[293]

As indicated by the rules of the Rome Statute, certain preparatory actions are prescribed as alternative means of committing the crime of aggression.[294] At first glance, this might suggest that, for the criminal offence to exist (that is, for an act of commission as its essential element), it suffices that any of the alternatively

290 McDougall points out that it would be 'inappropriate to incorporate terrorism or other acts of non-State actor violence into the Statute via the crime of aggression' (McDougall, 2021, p. 136), and further gives two basic reasons. First, 'the legal basis for the crime of aggression is the prohibition of the threat or use of force found in Article 2(4) of the UN Charter, which prohibits States from threatening or using armed force' (Ibid.). Second, 'the crime of aggression and terrorism are two very different species of crime' (Ibid., p. 137).

291 Škulić, 2020a, p. 284.

292 Therefore, in the criminal law sense, the commission of a crime of aggression is an individual act of one person, or in cases of co-perpetration or complicity, of several persons, whose object is an act of aggression of a particular state. Therefore, the view that 'here the act of commission is a collective act of the state, a procedure that represents an act of aggression, and not, as in the case of other crimes, a specific individual action' (V. Ikanović, *op. cit.,* p. 204) is incorrect. In other words, the act of committing a crime of aggression and the state act of aggression, which is a condition for the existence of a completed crime of aggression, are not the same legal notions.

293 Heinsch, 2010, p. 721. This substitution of the fourth alternatively prescribed act of commission occurred because the concept of an aggressive war was replaced by the broader concept of 'act of aggression', which cannot be 'waged' but only 'executed'.

294 We have already noted that no clear distinction exists between preparing for an act of aggression and planning an act of aggression. A distinction could perhaps be drawn if one understands 'planning' as the formal development of a plan (for example, an invasion plan), whereas 'preparation' would involve creating factual conditions or possibilities for the execution of that plan (for example, positioning military units on the border, logistical arrangements, or propaganda activities). However, in criminal law, it is sufficient to criminalize the 'preparation' of an act of aggression, as this would encompass both its planning and any factual preparations.

prescribed actions have been undertaken.[295] Consequently, the preparation or planning of any of the listed acts of aggression could appear to constitute a completed criminal offence, without the need for the planned or prepared *act of aggression* to be carried out. However, the *Elements of Crimes* explicitly stipulate that the criminal offence requires the act of aggression itself to have been actually committed.[296] Therefore, a state act of aggression is always necessary: for the first two acts of commission (planning and preparation), it is a condition for the completion of the offence, whereas the other two acts of commission (initiation and execution) coincide with the actual execution of the state act of aggression.

The most contested element of the definition of the crime of aggression in the Rome Statute concerns the characteristics that the act of aggression itself must possess for its planning, preparation, initiation, or execution to constitute the act of committing the criminal offence. It is required that a concrete act of aggression, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the UN. Diplomatic negotiations to date indicate a unanimous understanding that not every illegal use of force amounts to aggression; rather, aggression constitutes a *qualified* illegal use of force. The central challenge has consistently been to identify an appropriate threshold that distinguishes between illegal use of force that constitutes aggression and illegal use of force that does not warrant such classification.[297]

295 Stojanović, 2017b, p. 113.

296 Point 3 (Elements) attached to Article 8*bis* in the *Elements of Crimes*. Although the legal nature of the *Elements of Crimes* is theoretically debatable (for discussion, see Ristivojević, 2014, pp. 26–30), it can be accepted that they constitute 'a kind of addendum to the Statute in relation to specific incriminations' (Škulić, 2020a, p. 73); that is, a legal act of lesser force than the Rome Statute itself, as indicated *inter alia* by Article 9(3) of the Rome Statute, which explicitly requires that the *Elements of Crimes* conform to the Statute. Nevertheless, the norm in point 3 (Elements) attached to Article 8*bis* does not represent a *norm contra legem*, which would be invalid for conflicting with a higher legal act, but rather a *norm praeter legem*, which supplements or specifies the relevant provisions of the Rome Statute.

297 See also: de Hoon, 2018, p. 922. In literature produced during the drafting of the original Rome Statute text (which, as previously noted, did not include a definition of the crime of aggression), it was emphasised that 'it seems to be appropriate and in accordance with relevant historic precedents to limit the individual criminal responsibility for the crime of aggression to those cases in which there has been a massive violation of the prohibition of the use of force': A. Zimmermann, 1998, p. 200.

The criterion 'found' in Kampala to address this problem is set broadly. The violation of the UN Charter must be 'manifest' in three cumulative aspects:[298] its character, gravity, and scale. First, the term 'manifest'[299] is inherently indeterminate and necessarily subjective, as what is 'manifest' to one observer may not be to another.[300] This represents a novel criterion, absent from both the UN Charter and the 1974 Definition on Aggression, the meaning of which remains 'not entirely clear'.[301] The drafters of the Kampala provisions appear to have recognised this indeterminacy and sought to objectivise the concept of a 'manifest violation' by linking it to the attributes of character, gravity, and scale. However, none of these three criteria substantially clarifies the fundamental question: what constitutes a 'manifest violation' of the Charter, and, consequently, an act of aggression targeted by the crime of aggression, since they, like the term 'manifest violation', remain inherently indeterminate.[302]

298 In theory, some scholars, relying primarily on the aforementioned *Understandings* (specifically *Understanding* No. 7), contend that an act of aggression need not constitute a manifest violation of the UN Charter in all three respects (character, gravity and scale) but that the presence of any two suffices (McDougall, 2021, p. 160). Even if one accepts this interpretation of the *Understandings*, it contradicts Article 8*bis* (1) of the Rome Statute, which explicitly requires that a manifest violation arise from 'the character, gravity and (emphasis added) scale of an act of aggression'. Consequently, even if the *Understandings* possess some binding legal force (which remains disputed), their provisions cannot go *contra legem*; that is, they cannot contravene the text of the Rome Statute.

299 The literature notes that 'the term manifest violation was chosen after terms such as serious or flagrant violation were rejected': Etinski, Đajić and Tubić, 2017, p. 444. See also: Paulus, 2009, p. 1121.

300 Several authors have criticised the use of the term 'manifest': 'The meaning of "manifest" remains unclear': Paulus, 2009, p. 1121; 'There is little clarity in the line being drawn here between aggressive acts which are criminal and those which are not': Murphy, 2009, p. 1150; 'The meaning of the term "manifest" is not obvious': McDougall, 2021, p. 157.

301 Heinsch, 2010, p. 726. In this regard, the brief 'clarification' of the 'manifest' criterion in the *Elements of Crimes* – that it is an 'objective qualification' (paragraph 4 (Introduction) to Article 8*bis*) – is purely declarative and lacks substantive significance.

302 In this regard, several authors have also criticised all or some of the criteria: '"Character", of course, is so indeterminate that it is almost meaningless. It is entirely in the eye of the beholder – or, rather, the Court – to determine which use of armed force is of a "character" that warrants treatment as an individual crime': Paulus, 2009, p. 1121; 'The proposed definition provides no real guideposts for what "character, gravity and scale" of aggression is criminal, and hence suffers from considerable indeterminacy on a central issue': Murphy, 2009, p. 1151; 'The criteria of "gravity" and "scale" are, in my view, insufficient and inadequate': Solera, 2010, p. 808; 'Such an explanation of the manifest violation, due to the vagueness of the concepts of "character, gravity and the scale of an "armed attack", leads to the fact that the concept of the international crime of aggression is unclear and indeterminate': Kolarić, 2013, p. 108. Škulić observes that, owing to these conditions, the norms of the Rome Statute concerning the crime of aggression may be considered caoutchouc norms: Škulić, 2020a, p. 286.

It appears that the intention was for the term 'character' to represent a qualitative criterion,[303] while 'gravity' and[304] 'scale' were intended as quantitative criteria for assessing the manifest nature of a violation of the Charter.[305] However, these criteria are excessively broad to be useful for precisely and effectively determining what constitutes a manifest violation of the Charter. With such a loose formulation, the responsibility for determining whether an illegal use of force constitutes an act of aggression *in concreto* is effectively transferred from the drafters of the Kampala Amendments to the judges of the ICC, who must concretise this type of legal standard in their practice.[306] This approach has been rightly criticised in the literature, where it is noted, among other points, that it compels judges to make 'intrinsically political decisions between differing views of the world and the function of use of force in it', and that 'the judge has to do so without much external guidance in the form of a meta-criterion that provides support in grasping what to prioritise. On the other hand, a judge is not allowed to appear (too) political either'.[307] In other words, the Kampala Amendments require ICC judges to be guided by essentially political criteria when determining what may be considered an act of aggression, without providing effective guidance on which criteria to select, while simultaneously expecting them to remain impartial and independent, an essentially irreconcilable contradiction.[308] In this regard, McDougal rightly observes that 'leaving such sensitive, highly contentious and complex issues to be determined by the ICC is, in a way, a gamble in relation to international criminal law'.[309]

303 The literature notes that the 'character' component was included to 'exempt from Article 8bis of the Rome Statute certain categories of use of force of contested legality or, put differently, cases falling in a legal "grey area"': Ruys, 2018, p. 911.

304 The doctrine also criticises the cumulative imposition of quantitative criteria (gravity and scale): Solera, 2010, pp. 808–809.

305 Some authors note that most cases of unlawful use of force in international relations fall outside the provisions of Article 8*bis* Rome Statute, precisely because they are not of sufficient gravity or scale to constitute a "manifest" violation of the UN Charter: Ruys, 2018, p. 906.

306 '... the overriding shared assumption among the diplomatic community was that the ICC's judges could and should decide in a concrete case whether or not the alleged crime of aggression was indeed a manifest violation of the UN Charter': de Hoon, 2018, p. 924. Similarly, Murphy observes that one possible solution to the vagueness of the analysed framework is that 'such matters can be resolved by the prosecutor and judges of the ICC over time': Murphy, 2009, p. 1151.

307 de Hoon, 2018, p. 929.

308 In addition, the literature also highlights another, indirect danger of the adopted solution: the content of the criteria for distinguishing aggression from other forms of illegal use of force will ultimately be determined by ICC practice. It is emphasised that, in the long term, this could undermine the 'normative and institutional legitimacy' of the ICC, since 'While a norm which lacks determinacy on the margins might be left for adjudication through institutional processes, a norm which lacks core determinacy is problematic, for there is no obvious basis upon which institutional structures can reach principled determinations about the meaning of the norm': Murphy, 2009, p. 1151.

309 McDougall, 2021, p. 206.

Considering the features of the crime of aggression described above, which render it imprecise and indeterminate, the conclusion is that, as formulated in the Rome Statute, it is fundamentally contrary to the principle of legality, a core principle of criminal law.[310] More specifically, the vague formulation of the crime of aggression does not comply with the principle of legality, which is of 'paramount importance' in substantive international criminal law[311] and which, *inter alia*, requires that 'the norms of criminal law must be precise to the greatest extent possible, which especially refers to those norms that create specific incriminations and prescribe penalties for them',[312] typically expressed by the Latin maxim *nullum crimen sine lege certa*.[313] This conclusion gains additional significance given that the principle of legality, including its *lex certa* component (in connection with the *lex stricta* aspect), is explicitly enshrined in the Rome Statute.[314] It follows that the drafters of the Kampala Amendments neglected the principle of legality when defining the criminal offence of aggression, acting contrary even to the general norm of the Rome Statute, which explicitly enshrines this principle.

At this stage, the question arises: why did the delegates in Kampala adopt such a vague, imprecise, and broad formulation? It appears that the answer is self-evident: the most politically, militarily, and economically powerful members of the international community lacked any essential interest in ensuring that the crime of aggression was formulated in a legally robust and enforceable manner.[315] In other words, the outcome of the Kampala amendments further blurred the definition of this criminal offence, enabling states pursuing aggressive foreign policies, and their political and military leaders, including those responsible for the (illegal) use of force against other states, to invoke various para-legal, legally nonexistent

310 In this regard, see de Hoon, 2018, p. 931.
311 See Werle, 2009, p. 55.
312 Škulić, 2010, p. 80.
313 In this sense, the literature further observes that 'in criminal law, indeterminate norms should be avoided to the greatest extent' (Stojanović, 2017b, p. 22) and that 'ambiguous expressions' should be avoided (Vuković, 2021, p. 19). It is evident that these requirements were not respected in Kampala.
314 'The definition of a crime shall be strictly construed...' (Art. 22 (2) of the Rome Statute). More on this: Škundrić, 2024, p. 607.
315 It should be noted that some of these states remain parties to the Rome Statute (for example, the United Kingdom, France and Germany). During the drafting of the Kampala Amendments, they were motivated both by an interest in retaining membership (primarily to maintain a progressive, democratic, and peaceful image internationally and domestically) and by an interest in shielding their political and military leaders from any possibility of accountability for the crime of aggression. The latter concern was particularly significant given the historically aggressive foreign policies these states have pursued for decades and centuries, and which they continue to pursue. For additional possible reasons why the United Kingdom and France, the only states that are both permanent members of the UN Security Council and parties to the Rome Statute, supported the amendments during the Kampala vote, see McDougall, 2021, pp. 71–72.

categories as a form of justification, the most notable[316] example being the so-called humanitarian intervention.[317]

Nevertheless, from a strictly legal perspective, even when one takes into account the broad and vague provisions of the Rome Statute on aggression, no obstacle prevents the classification of humanitarian intervention as a clear violation of the Charter of the UN. As already noted, the rule prohibiting the threat or use of force in international relations constitutes a mandatory (*ius cogens*) norm of international law, possessing *erga omnes* legal force. Accordingly, any exceptions to this rule must themselves be prescribed by mandatory (*ius cogens*) norms of international law. The Charter of the UN provides such exceptions within its own framework, namely collective and individual self-defence, as well as actions undertaken by the Security Council under Chapter VII of the Charter. In other words, the Charter, as a written source of international law, does not contain any mandatory norm that recognises

316 The case of so-called "intervention by invitation" in situations of civil war is illustrative; more on this: Ruys, 2018, p. 913.

317 In this context, 'If one has a look at the *travaux préparatoires*, it becomes clear that the idea behind this qualifier is to exclude all violations of the prohibition of the use of force which are controversial and thereby not "manifest" violations of the UN Charter. Possible cases which come to mind in this context are so-called situations of "humanitarian intervention", for example, in the Kosovo-War': Heinsch, 2010, p. 730. Similarly, 'The adopted definition covers only "clear" cases of aggression, such as the invasion of Kuwait by Iraq. Other forms of aggression such as the so-called humanitarian interventions (e.g. NATO bombing of FR Yugoslavia in 1999)... are not covered by the definition of the crime': Simović and Simović, op. cit., p. 180. Moreover, '… the concept of aggression... is objectively limited by the additional condition that it must be an act of aggression which, by its nature, gravity and scale, constitutes a manifest and indisputable violation of the Charter of the United Nations. This leaves room for those who commit aggression to continue to invoke "humanitarian intervention", protection of human rights or similar reasons, due to which their act from the aspect of that provision becomes disputable and, therefore, beyond its reach': Stojanović, 2017a, p. 115. Furthermore, 'In the end, the persistent support of part of the legal doctrine that genuine humanitarian interventions ought to be regarded as lawful *de lege ferenda* or that (according to a minority view) it is part of *lex lata*, the strong moral imperative underlying such interventions and the fact that they precisely seek to halt and/or prevent the very crimes of atrocity that the ICC was set up to punish make it plausible that the ICC will regard them as falling within the "legal grey" area that the "character" component was intended to exempt from Article 8 bis of the Rome Statute': Ruys, 2018, p. 897. A further reason for this threshold is that it 'would result in the automatic exclusion of humanitarian interventions as these would usually fall out of the concept of a manifest violation of the Charter': Sarkin and Almeida, 2019, p. 531. In practice, 'the very condition relating to the character of actions that clearly violate the UN Charter is to a large extent a caoutchouc norm, which allows aggression to be "camouflaged" as a humanitarian intervention if necessary, i.e. to use the concept of humanitarian intervention as a basis that excludes the existence of aggression': Škulić, 2020a, p. 286. Finally, 'Starting from the fact that the Rome Statute incriminates the crime of aggression in the way in which it directly rests on the norms which regulate the use of force in international relations, humanitarian intervention, as a concept which directly deals with the use of force between states, could play a significant role as a potential exception from the rule contained in the Article 2(4) of the UN Charter': Radmanović, 2022, p. 145.

humanitarian intervention as an exception to the prohibition of the threat or use of force in international relations.[318] Therefore, so-called 'humanitarian intervention' is not legally permissible outside the scope of the Security Council's powers under Chapter VII of the Charter. Any use of force undertaken without Security Council authorisation and justified by reference to 'humanitarian intervention' would constitute an act of aggression which, by its character, amounts to a manifest violation of the Charter. The remaining question is whether such an act would, *in concreto*, constitute a manifest violation of the Charter in terms of both gravity and scale. This threshold would clearly be met where the act results in loss of life, large-scale damage, or an attack exceeding the level of a border 'skirmish'. Accordingly, we agree with the view advanced by a substantial body of scholarship that no right of humanitarian intervention exists under international law. Such intervention cannot

318 In other words, any possible exceptions to the mandatory norm contained in the written source of law (which must also fall within the *ius cogens*) must themselves be prescribed by the written source of law. Thus, all exceptions to the mandatory prohibition of the threat or use of force prescribed in the Charter as a written international treaty must likewise be prescribed by the written source of international law. This implies that such exceptions cannot be established as norms of International Customary Law, since any state practice contrary to a written mandatory prohibition would be illegal by definition and could not form a valid basis for the emergence of a new mandatory custom derogating the written prohibition. In this sense: Kreća, 2019, pp. 199, 490.

serve as a justification for the crime of aggression; rather, it constitutes an act of aggression.[319]

3.3.1.2.3 An Act of Aggression

As noted previously, any of the four alternatively prescribed acts constituting the crime of aggression must be directed at a specific act of aggression, the definition of which is set out in paragraph 2 of Article 8*bis* of the Rome Statute. According to this provision, an act of aggression constitutes 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. The second sentence of the same paragraph further provides that 'any of the following acts, regardless of a declaration of war, shall, in accordance with UN General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression', followed by an enumeration of acts identical to those contained in Article 3 of the 1974 Resolution.

319 See the extensive literature generally critical of the existence of a so-called right of states to undertake humanitarian intervention: Cassese, 2005, pp. 373–374; Čejović, 2006, p. 131; Zolo, 2012, especially pp. 40, 73, 133; Talmon, 2014, pp. 581–596; Stojanović, 2017a, pp. 65–67; Kreća, 2019, pp. 197–200; Škulić, 2020a, pp. 221–229; Banović Bejatović Turanjanin, 2020, pp. 114–115; Babić, 2023, pp. 25–26; Stevanović, 2023, pp. 250–261; Krivokapić, 2023, p. 184; Škulić, 2024, pp. 41–54. A somewhat milder view is expressed by Novokmet: 'Whatever the justification, NATO's intervention in the former Yugoslavia has encountered heavy criticism among international lawyers who argue that the rules of international law are not easily changed, and that a different and arbitrary interpretation of fundamental principles on which the international community is based could lead to legal uncertainty and impair their legitimacy': Rusan Novokmet, 2022, pp. 82–83. Some authors adopt a neutral stance, refraining from assessing the existence of a right to humanitarian intervention: see among others Shaw, 2003, pp. 1045–1048. Others argue that, although humanitarian intervention is not part of positive international law in principle (Peters, 2009, p. 537), the humanized concept of sovereignty they advocate may permit the establishment of such a right within positive law, based on the R2P (*responsibility to protect*) doctrine (Ibid., pp. 522–524, 544). Counterarguments maintain that it is premature to regard R2P as an emerging rule of international law: Kapur, 2009, p. 562.
Finally, it is noteworthy that the activation of the ICC's jurisdiction concerning the crime of aggression could contribute to wider acceptance and consolidation of the humanitarian intervention doctrine. It has been argued that 'a finding by the prosecutor or the chambers that a humanitarian intervention does not give rise to a manifest violation of the UN Charter in the sense of Article 8bis of the Rome Statute will undoubtedly strengthen the perception that such interventions are not "unambiguously unlawful" and give further impetus to the doctrine... Thus, a decision of this type would probably leave its mark on state practice and *opinio juris*' (Ruys, 2018, pp. 900–901). The author also acknowledges the less likely possibility that the ICC could establish that a specific humanitarian intervention constitutes a manifest violation of the UN Charter (Ibid., p. 902). Nevertheless, we consider that a finding that no manifest violation occurred cannot establish the concept of humanitarian intervention in international law, as any customary rule cannot deviate from a written mandatory norm prohibiting the threat or use of force.

Earlier in this book, in discussing Resolution 3314 itself, we observed that it could, primarily in a nomotechnical sense, serve as a basis for the criminal law provision on aggression. However, caution is necessary when employing it, as the definition was formulated not for criminal law or criminal justice purposes, but according to the standards of general Public International Law and for the needs of the UN Security Council. Moreover, the Security Council has never invoked the Resolution since its adoption. Accordingly, the literature notes that the definition did not become part of general Customary International Law until the adoption of the Kampala Amendments in 2010.[320]

Despite these caveats, the definition of aggression in Resolution 3314 provided the foundation for the 2010 criminal law definition of aggression, particularly regarding state acts of aggression.[321] In this regard, it is acknowledged that the Rome Statute's definition of an act of aggression is based on Articles 1 and 3 of Resolution 3314.[322]

First, only the most serious violations of the prohibition on the threat or use of force under Article 2(4) of the UN Charter (the use of armed force) can constitute an act of aggression. Other forms of force, as well as mere threats in international relations, remain outside the definition, as was the case in 1974.[323]

Second, with respect to the enumerated state acts of aggression (Art. 8*bis* (2) (a)–(g)), there is theoretical debate as to whether the list is open (*exempli causae*),[324]

320 McDougall, 2021, p. 119.

321 Heinsch observes that the use of Resolution 3314 is self-evident and justified. At the adoption of the original Rome Statute, states committed to codify existing customary law to the greatest extent possible when defining crimes within the ICC's jurisdiction. Members of the Special Working Group on the Crime of Aggression aimed to adopt a definition with at least some international support: Heinsch, 2010, p. 725. McDougall further notes that the prevailing view within the working group was to maintain the specific acts of aggression described in Resolution 3314, so as not to 'open a Pandora's box of varying views': McDougall, 2021, p. 131.

322 Ibid., p. 85. In this regard, some authors state: 'The criminal law definition of the crime of aggression relies on the international legal definition of aggression adopted by the UN General Assembly by Resolution 3314 (XXIX) on 14 December 1974': Etinski and Đajić and Tubić, 2017, p. 443.

323 Some authors criticise this approach. Murphy contends that it is unclear why the crime does not criminalise all violations of the prohibition in Article 2(4) of the Charter, a provision 'regarded by many, including the International Court of Justice, as expressing perhaps the most important norm in international law, one which even qualifies as *jus cogens*', prohibiting both the use and threat of force: Murphy, 2009, p. 1152. Similarly, the Kampala definition is considered 'significantly narrower than the one stemming from the UN Charter', criminalising 'only direct aggression' while excluding indirect aggression, such as economic blockades, political sanctions, war propaganda, or other forms of unarmed attack: Ikanović, 2015, p. 203.

324 McDougall, 2021, p. 129.

closed (*numerus clausus*),[325] or 'half-open/half-closed'.[326] The point of contention arises from Article 8*bis* (2) of the Rome Statute, which explicitly states that the listed acts are to be regarded as acts of aggression *in accordance with Resolution 3314*, which in Article 4 declared that 'the acts enumerated above are not exhaustive' and that 'the Security Council may determine that other acts constitute aggression under the provisions of the Charter'.[327]

We consider it necessary to accept that the list of acts of aggression is exhaustive (*numerus clausus*). First, with regard to the problem arising from the Rome Statute's explicit reference to Resolution 3314, we agree with those authors who argue that this reference merely indicates the 'source of the definition, much like the reference to common Article 3 of the Geneva Conventions in Article 8(2)(c) of the Rome Statute'.[328] Furthermore, had the drafters of the 2010 provisions on the crime of aggression intended to leave the definition open, including the possibility under Resolution 3314 for the Security Council to classify additional acts as acts of aggression, they would have provided for this expressly. This is particularly so because such a solution already existed in the instrument that served as their point of departure, namely Resolution 3314. Finally, we consider that, as with any ambiguity in the Rome Statute, Article 22 should apply.[329] Paragraph 2 provides, *inter alia*, that 'in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'. It is beyond dispute that a more limited range of possible acts of aggression is more favourable to the accused. In particular, a solution under which the Security Council lacks authority to

325 Jovašević observes: 'although there were such proposals at the meeting in Kampala, in the end it was not accepted that other acts could also be qualified as acts of aggression by the decision of the UN Security Council, in accordance with the UN Charter': Jovašević, 2011, p. 227. Similarly, Etinski, Đajić and Tubić note: 'General Assembly Resolution 3314 (XXIX) lists certain forms of aggression in an exemplary manner and leaves the possibility that other acts can be qualified as aggression. This is not the case with the criminal law definition of aggression': Etinski and Đajić and Tubić, 2017, p. 444. However, the authors immediately qualify this by noting: 'Nevertheless, the International Criminal Court will determine whether the enumeration of specific forms of aggression in the criminal law definition is done exhaustively or exemplarily': Ibid.

326 Kolarić, 2013, p. 109.

327 Heinsch also highlights this problem: Heinsch, 2010, p. 724.

328 McDougall, 2021, p. 124.

329 The article is dedicated to the principle of legality (*nullum crimen sine lege*).

classify additional acts as acts of aggression under the Charter is more favourable.[330] It, therefore, follows that the list of acts of aggression in Article 8*bis* (2) of the Rome Statute is exhaustive in character.[331]

As to the substance of the prescribed acts of aggression, we have already noted that it is identical to that of Resolution 3314. However, given that more than 35 years elapsed between the adoption of that Resolution in 1974 and the Kampala amendments in 2010, one might ask whether these acts have become 'obsolete', and whether the Kampala delegates ought to have considered adding new forms of aggression. We do not consider this necessary. The listed acts are formulated in sufficiently broad terms to encompass technologically novel means of using armed force.[332] Finally, we agree with the assessment that it is difficult to envisage the practical application before the ICC of certain listed acts of aggression, in particular

330 Accepting the opposite would violate Article 22(1) of the Rome Statute, which provides that 'a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'. If the list of aggressive acts in Article 8*bis* (2) were interpreted as open-ended (*exempli causa*), allowing the Security Council to determine the existence of an act of aggression in any case under the UN Charter, the *lex praevia* requirement of the principle of legality would be breached. In this context, the theoretical position (McDougall, 2021, p. 130) that such an interpretation does not violate the principle of legality because the substantive definition of the offence appears in the first paragraph, rather than in the second paragraph of Article 8*bis*, which addresses only the act of aggression, is untenable. The principle of legality under Article 22 applies to all provisions of the Rome Statute, including Article 8*bis* (2). Furthermore, the third and fourth alternative acts of committing the crime of aggression (initiating and executing an act of aggression) coincide with the act of aggression itself as undertaken by the aggressor state. If the Security Council could declare acts outside those expressly listed in Article 8*bis* (2) as acts of aggression, it would effectively determine on an *ad hoc* basis which actions fall under the initiation or execution of an act of aggression. This would directly contravene the principle of legality, which is explicitly enshrined in the Rome Statute.

331 Although we agree in principle with McDougal that the acts listed in Article 8*bis* (2) are very broadly prescribed (Ibid., 131), and that a wide range of acts could therefore be included under them, for the reasons explained above we cannot concur with her view that the list of these acts is open-ended (Ibid.).

332 In legal literature, it has been noted that 'sovereignty in cyber space can also be an object of protection against aggression in the same way as the physical territory of a state': Milisavljević, 2025, p. 106. In this regard, McDougal observes that so-called cyber attacks could be subsumed both under the act of aggression prescribed in point (b) (use of any weapons by a State against the territory of another State) and under the act provided for in point (d) (attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State) of Article 8*bis* (2) of the Rome Statute: McDougal, 2021, pp. 140–141. By contrast, Ambos contends that the 'computer network attack (CNA) would hardly amount to a crime of aggression for three reasons. First, Article 8*bis* ICC Statute does not encompass the conduct of non-state actors, but these are often the authors of CNAs. Secondly, a CNA may only in exceptional circumstances amount to an "act of aggression" within the meaning of Article 8*bis* (2), namely only as an "attack by the armed forces of a State" within the meaning of lit. (d). Thirdly, a CNA will hardly amount to "a manifest violation" of the UN Charter as required by Article 8*bis* (1) ICC Statute': Ambos, 2016, pp. 495–496.

those set out in points (e)[333] and (f).[334] It is highly unlikely that such acts would satisfy the threshold in paragraph 1 of Article 8*bis* of the Rome Statute, namely that the act in question, by its character, gravity, and scale, constitutes a manifest violation of the UN Charter.[335]

3.3.1.2.4 Consequence of the Crime

The crime of aggression is a consequential (material) offence.[336] Its consequence consists in the endangerment or violation of the sovereignty, territorial integrity, or political independence of another state.[337] For this crime to arise, it is therefore necessary that these interests (that is, values), which by their nature constitute essential attributes of every state, are harmed or at least threatened.[338] The consequence of the offence of aggression is not, for example, the killing of large numbers

333 It is an act of aggression consisting of violating the provisions of an agreement on the basis of which the armed forces of one state are present on the territory of another state, or in their prolonged presence after the expiry of that agreement.

334 It is an act of aggression in which one state makes its territory available to another state for use in committing an act of aggression against a third state.

335 On the other hand, see Ibid., p. 167.

336 These are criminal offences in which "the legal description includes, in addition to the perpetrator's action, the occurrence of an appropriate legally relevant effect on the object of the action, visible in the essence of the act, and separated in time and space from the perpetrator's behaviour": Vuković, 2021, p. 73. Similarly, see Bačić, 1986, pp. 152–153; Z. Stojanović, 2017b, p. 115. For slightly different views on the division of criminal offences into consequential (material) and those consisting exclusively of the activity of the perpetrator (formal), see: Srzentić and Stajić and Lazarević, 1986, pp. 140–141.

337 In this regard, see: Kolarić, 2013, p. 109. In this sense, the distinction made by Simović, Blagojević and Simović between aggression and armed intervention is not entirely clear: '... While aggression, as we shall see, is the use of military force by one State against the sovereignty, territorial integrity or political independence of another State, it is inherent to an armed intervention that the State which undertakes it…does not necessarily need to have as its aim the infringement of territorial integrity of the victim state. This is because armed intervention is the use of armed force by one or more states in order to change or preserve a certain situation in the state against which it is being taken, which does not necessarily refer to the territory of the attacked state. Therefore, by achieving this goal, the sovereignty and political independence are violated, but not necessarily the territorial integrity of the state': Simović and Blagojević and Simović, 2013, p. 237, fn. 588. This conclusion appears self-contradictory, as the cited authors clearly state that, in the case of aggression, an attack can target sovereignty, territorial integrity, or political independence. In other words, an attack on any one of these elements constitutes aggression. Therefore, an armed intervention defined in this manner, which affects the sovereignty and/or political independence of another state, should be considered aggression.

338 Naturally, it is more likely to constitute damage than a mere threat. The completion of this criminal offence requires that the act of aggression has actually been committed. Since every act of aggression generally violates at least one of the three state attributes, the consequence in the criminal act of aggression will almost always consist of such a violation. Endangerment of these goods occurs only when the crime remains an attempt, for example, when planning takes place but the act of aggression itself is not executed.

of persons or the forced relocation of populations carried out during the act of aggression;[339] rather, it lies in the fact of the violation or endangerment of the aforementioned state attributes.

Although the literature contains criticism regarding their specific formulation,[340] it is nevertheless possible to agree with the view that:

> 'Sovereignty, political independence, and territorial integrity are the building blocks of international law and international relations: harm caused to these interests is incredibly real. The majority of States depend on respect for territorial integrity, political independence, and sovereignty for their very survival'.[341]

Accordingly, given the importance of these attributes of the state, it is necessary, if there is an intention to criminalise aggression, to enumerate them in the manner adopted in the Rome Statute.

3.3.1.3 Subjective Elements of the Crime of Aggression (*mens rea*)

The issue of the subjective elements of crimes within the jurisdiction of the ICC is systematically regulated by the Rome Statute in Article 30. According to the general rule, unless otherwise provided, a person shall be criminally responsible for a criminal offence within the jurisdiction of the ICC only if the material (objective) element of the offence was committed with 'intent' and 'knowledge' (Art. 30(1)). Article 30(2) further specifies that a person acts with 'intent' if: a) in relation to conduct, the person means to engage in that conduct; or b) in relation to a consequence, the person means to cause that consequence or is aware that it will occur in the ordinary course of events. Finally, Article 30(3) clarifies that 'knowledge' implies the 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.

However, the *Elements of Crimes*, in its 'General Introduction' (par. 2), provides that:

339 Such violations may fall either under other core international crimes, such as genocide, war crimes, or crimes against humanity, or under other "classical" crimes, such as murder or rape.

340 For example, Solera noted that 'it seems unnecessary in a definition of aggression to state explicitly that aggression is the use of armed force against the territorial integrity, political independence, or sovereignty of a State. Instead, simply indicating that aggression is "the use of force against another State" furnishes all the necessary elements in terms of the value to be protected against aggression': Solera, 2010, p. 814. Although this argument deserves consideration, we maintain that, for reasons including the principle of legality (*lex certa segment*), it remains necessary to specify precisely against which state goods the use of armed force must be directed in order to constitute an act of aggression, and thus to give rise to the crime of aggression.

341 McDougall, 2021, p. 51.

> 'where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies'.

This provision indicates that knowledge and intent do not necessarily need to exist in relation to each objective element of a criminal offence simultaneously; rather, the relevant subjective (mental) element (intent, knowledge, or both) applies to each element as appropriate.[342]

The general provisions of both the Rome Statute and the Elements of Crimes concerning the subjective elements of crimes apply fully to the crime of aggression. First, in relation to the act of commission of the crime (planning, preparing, initiating, or executing), the perpetrator must act with intent.[343] Further, scholars have noted that, given that the qualification of leadership constitutes a circumstance,[344] Article 30(3) applies, requiring awareness of that circumstance. Accordingly, the perpetrator must have been aware that they were in a position effectively to control or direct the political or military action of their State.

Second, regarding the requirement that an act of aggression (that is, the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or otherwise contrary to the Charter of the UN) has actually occurred,[345] the perpetrator must have been aware of 'the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations'.[346] It is further clarified that 'there is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations'.[347]

Finally, with regard to the condition that 'the act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations',[348] the perpetrator must have been aware of 'the factual circumstances that established such a manifest violation of the Charter of the United Nations'.[349]

342 In this regard: Ibid., pp. 239–240.
343 Such a conclusion arises from the application of Article 30(2)(a) to the act of commission of the crime of aggression.
344 McDougall, 2021, p. 240
345 Element 3 regarding Article 8*bis* in the Elements of Crimes.
346 Element 4 regarding Article 8*bis* in the Elements of Crimes.
347 Point 2 of the Introduction to Article 8*bis* in Elements of Crimes.
348 Element 5 regarding Article 8*bis* in the Elements of Crimes.
349 Element 6 regarding Article 8*bis* in the Elements of Crimes.

It is not necessary to prove 'that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations'.[350]

Accordingly, it can be concluded that, compared to the very high threshold required to establish the necessary objective elements of this crime, the threshold for its subjective elements is set relatively low.[351] This remains the case even though, although the Rome Statute does not explicitly state it,[352] the crime can only be committed intentionally.[353] In other words, in eventual judicial practice regarding the crime of aggression, it will be far more difficult to prove the existence of all objective elements (*actus reus*) than to establish those of a subjective nature (*mens rea*), since for a significant number of objective elements, the latter is reduced to mere awareness.

With regard to the subjective characteristics of this crime, the question arises whether the so-called special aggressive intent (*animus aggressionis*) is required. Historically, and particularly in older theoretical literature, it has long been considered justified to hold that, in relation to the crime of aggression (or, in earlier terminology, crimes against peace), in addition to the existence of general intent, a special intent (*dolus specialis*), the so-called 'aggressive intent', would also be necessary.[354] Such specific intent, understood in the manner commonly applied in the criminal law theory of Continental Europe as a subjective element distinct from general intent,[355] would be aimed at achieving a goal external to the crime itself. For example, it would not suffice to carry out an act of aggression (for example, invasion) accompanied by general intent; the perpetrator would also need a special intent,[356] such as the aim of conquering or annexing territory, effecting a change

350 Point 4 of the Introduction to Article 8*bis* in the *Elements of Crimes*. The literature observes that the main reason for the formulation of 'awareness of the actual circumstances' was 'to ensure that there was no requirement that a perpetrator positively knew that the State act was inconsistent with the UN Charter or that the act of aggression constituted a manifest violation of the same' and that 'it was argued that this would effectively require knowledge of the *jus ad bellum*…': C. McDougall, op. cit., p. 242.

351 Ibid., pp. 242–243.

352 In this regard, Banović rightly notes that 'unlike the Criminal Code of the Republic of Serbia, which explicitly recognises intent and negligence as forms of guilt (Art. 22), this is not the case with the Rome Statute. The Statute speaks of intention and knowledge. So, roughly speaking, intent is in principle the only form of guilt': Banović, 2023, p. 129.

353 Legal theory also supports the exclusively intentional nature of this crime: Kolarić, 2013, p. 109; Ikanović, 2015, p. 204; Škulić, 2020a, p. 283.

354 Sukijasović, 1967, p. 170; Avramov, 2011, p. 663. In this sense, it has been pointed out that 'force that is not used in an aggressive intent does not constitute aggression', but that 'in that case, the very fact of its objective use remains, for which international law provides another qualification (threat to peace, violation of peace)': Sukijasović, 1967, p. 213.

355 Delić, 2016, p. 103; Stojanović, 2017b, p. 104; Vuković, 2021, p. 79.

356 For example, the general subjective element would be fulfilled if the perpetrator intended to initiate an act of aggression consisting of an invasion of a territory belonging to another State. It does not require proof of the perpetrator's *further aims*, that is, why he initiated the act of aggression (for example, to annex the territory in question).

of government or regime in the victim state, or altering the socio-economic system of that state.

However, as noted, the decisions adopted in Kampala in 2010 regarding the crime of aggression do not provide for any specific subjective element; that is, they do not prescribe a requirement of special aggressive intent.[357] Consequently, the general rules on subjective (mental) elements contained in Article 30 of the Rome Statute apply to this crime.[358] Theoretical opinions on this solution are divided. Some authors criticise it.[359] However, it is the view of those supporting this solution that it is correct.[360] Their arguments rest on the fact that introducing aggressive intent at the subjective level would further complicate the proof of a crime that is already difficult to establish, given its narrowly defined objective elements, particularly the condition of the 'manifest' violation of the UN Charter.[361] In other words, the crime of aggression would become largely inapplicable if aggressive intent were introduced, as it would then be necessary to prove that such intent had been manifested (not necessarily achieved), which in practice would amount to *probatio diabolica*, given the extreme improbability that any national leader would openly advocate, for example, the annexation of another state's territory or similar political objectives.[362]

3.3.1.4 Forms of Participation in the Crime of Aggression

For the crime of aggression, as for other offences within the jurisdiction of the ICC, all possible forms of participation enumerated in Article 25(3), points (a) to

357 Accordingly, the statements of some authors that the subjective element of the definition of aggression as an international crime is 'the intent of the aggressor to achieve his goal in this way, with the awareness of the illegality of his act' are not acceptable in this regard: Tesla, 2016, p. 53; in this sense also, albeit in relation to the act of aggression, which formally does not require the existence of *animus aggressionis*: Milisavljević, 2025, p. 105.

358 This differs from other crimes contained in the Rome Statute. For example, in relation to the crime of genocide, a specific, so-called genocidal intent is required (see Art. 6(1) of the Rome Statute).

359 In this context, Solera observes that 'it is impossible to distinguish armed aggression from the use of force that does not deserve to be considered aggression solely on the basis of a material element' (Solera, 2010, p. 813), and he proposes that, similarly to the crime of genocide, the requirement for the existence of a specific intent (*dolus specialis*) should also apply to the crime of aggression (Ibid., p. 817).

360 In this sense, for example: Ikanović, 2015, p. 199; Stojanović, 2017a, p. 113.

361 Stojanović supports this conclusion when he states that 'although, justifiably, the concept of aggression is not narrowed on the subjective level, it is objectively narrowed by the additional condition that there must be an act of aggression which, by its character, gravity and scale, represents an obvious and indisputable ("manifest violation") violation of the Charter of the United Nations': Ibid., p. 115.

362 'Today, rarely would anyone openly advocate and manifest an aggressive intent, but will rather find other reasons via which he would try to justify and disguise an aggression': Ikanović, 2015, p. 199.

(d), apply. However, the Kampala amendments introduced a new paragraph 3*bis* to Article 25 of the Rome Statute, which provides that 'in respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State'. This addition significantly narrows the 'criminal zone' for the crime of aggression. In practice, it means that 'only persons exercising effective control, ie, basically those belonging to the immediate leadership circle, may be criminally responsible, according to one of the modes of responsibility enshrined in Article 25(3) ICC'.[363]

Paragraph 3*bis* extends the leadership requirement to all individuals who could be held individually responsible for the crime of aggression, in addition to the perpetrator. Without this provision, the leadership criterion would apply only to perpetrators and not to accomplices. This distinction arises from the general rule that, for *delicta propria* offences, specific personal characteristics, status, or qualifications must exist on the part of the perpetrator but are not required for an accomplice. As Vuković observes regarding this category of crimes, a person 'who does not possess the required quality of the subject (so-called *extraneus*) cannot be their perpetrator at all (neither direct, nor indirect, nor a co-perpetrator), but only an accomplice, even if he directly undertakes an act of commission'.[364] Because paragraph 3*bis* is now an integral part of the Rome Statute, any accomplice to the crime of aggression must also satisfy the leadership criterion, as must a perpetrator.

Some authors have criticised this approach. For example, Ambos has written that:

> 'This is an unnecessary limitation of individual responsibility. It is one thing to create a special offence of aggression, limiting the direct, perpetration-like responsibility to leaders exercising effective control, but quite another to extend this special responsibility model to all other persons taking part in a war of aggression (from the foot soldiers executing the aggressive action, to middle-ranking bureaucrats preparing and planning it and high-ranking members of the regime without sufficient effective control), excluding them from responsibility. If one takes the differentiation between perpetration and complicity (secondary participation), embodied in Article 25(3), seriously, the special character of the crime of aggression should only play out with regard to its perpetrators, but not with regard to accomplices (secondary participants). In other words, the leadership clause does not necessarily entail the exemption of responsibility of persons not belonging to the leadership level nor exercising sufficient control as secondary participants. On the contrary, conceptually it is perfectly possible and reasonable to hold a person responsible for participation in a war of aggression, as long as his or her contribution is significant and made with the requisite *mens rea*. While this person, for lack of hierarchical status, does not rise to the

363 Ambos, 2016, p. 502.
364 Vuković, 2021, p. 371.

> position of a perpetrator, he or she may well be qualified as a secondary participant according to Article 25(3)(c) ICC Statute'.[365]

Such arguments are firmly grounded in the dogmatics of criminal law, particularly that of the European continent. We are, however, of the opinion that the drafters of the Kampala amendments should have adopted a different approach to this issue concerning the various modes of complicity. First, with respect to incitement as a form of complicity,[366] it is generally accepted that it encompasses situations of 'creating or strengthening the will of a person that is being incited to become a perpetrator'.[367] Pursuant to paragraph 3*bis* of Article 25 of the Rome Statute, the inciter must also satisfy the leadership criterion; that is, a person can be regarded as an inciter of the crime of aggression only if that person would also be capable of committing the crime themselves. This approach could give rise to significant difficulties in the future practice of the ICC concerning this crime.

Consider the following example. A state has a president who almost always follows the advice of his wife, who holds no official position in the state. This wife persuades him to initiate an invasion of a neighbouring country, thereby creating a decision in his mind to commit a crime of aggression; in other words, she incites him to commit the crime. The key question that arises is whether she can be regarded as a person in a position to effectively control or direct the political or military actions of the state. This is potentially contentious. On one hand, it could be argued that, because she could not commit the crime independently (given that her only influence over state action derives from her persuasive power over her husband),[368] she does not satisfy the leadership criterion. On the other hand, it may be argued that, given her decisive influence over her husband, who possesses the mechanisms to control or direct the relevant state actions, she does fulfil the leadership criterion on a more abstract or indirect level, as she is able to direct state actions through her influence.

The Kampala amendments should have avoided such potential confusion. Specifically, if any person is capable of creating or strengthening the decision of another person who is in a position to commit a crime of aggression, there are clear substantive grounds for establishing individual criminal responsibility of that person as an inciter, irrespective of the so-called leadership criterion. Accordingly, we contend that it was erroneous to limit the scope of potential inciters for the crime

365 Ambos, 2016, p. 502.
366 Article 25(3)(b) of the Rome Statute.
367 Škulić, 2020a, p. 160.
368 In other words, she could not in any case be considered a direct perpetrator of the crime of aggression, as she is in no position to commit any of the alternatively prescribed acts of commission of that crime, that is, planning, preparing, initiating or executing an act of aggression. She could only undertake an act of incitement, that is, incite others (in this example, her husband-president) to commit the crime of aggression. The problem, however, lies in the effect of paragraph 3*bis* of Article 25 of the Rome Statute.

of aggression solely to those who could have committed the crime independently because they are in a position to control or direct the political or military actions of the state. [369]

Second, regarding aiding and abetting as a form of complicity,[370] the ICC has held in its jurisprudence that the Rome Statute 'does not require the accessory's contribution to reach a specific threshold'.[371] In the absence of a leadership requirement for the aider or abettor, it is conceivable that in any future case of a crime of aggression before the ICC, numerous persons who facilitated the commission of the crime in some manner could be indicted as aiders or abettors. This might include several dozen or even hundreds of military officers, a large number of public officials who are not top decision-makers, and numerous individuals working in various forms of media, such as state-run television and radio stations. Such a broad scope would place an excessive burden on the Court and would likely divert attention from the principal participants: the decision-makers in the state responsible for undertaking the act of aggression.

In conclusion, we suggest that incitement as a form of complicity should have been excluded from the effects of Article 25 (3*bis*), whereas it was justified to extend the application of the leadership criterion to aiding and abetting as forms of complicity.

3.3.1.4.1 Committing the Crime of Aggression

All forms of commission stipulated in the Rome Statute are possible in relation to the crime of aggression.[372] Primarily, this crime can be committed in the capacity

369 This finding is even more important if we consider that a person who does not fulfil the leadership criterion cannot be deemed an indirect perpetrator of the crime of aggression either. Indirect perpetration of a crime is not possible in relation to *delicta propria*, 'unless the indirect perpetrator himself does not possess the required qualification': Vuković, 2016, p. 384.

370 Article 25(3)(c) of the Rome Statute.

371 *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Trial Judgment, 26 June 2024, para. 1224. See also *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Trial Judgment, 19 October 2016, para. 93.

372 In the Rome Statute, the issue of commission of the crime is regulated in Article 25(3)(a). Unlike in some national criminal law systems (for example, the criminal law of the Republic of Serbia), co-perpetration under the Rome Statute is considered a form of commission of the crime rather than a form of complicity.

of a direct perpetrator.[373] Indirect commission is also possible, although it is expected to occur far less frequently.[374] For instance, this could arise where a person exercising effective political control in a state delegates another individual to replace him in the preparation of plans for an act of aggression, providing binding instructions through, for example, regular telephone contact, while misleading that person into believing that the plans concern a military exercise rather than an act of aggression.[375]

In states where power is concentrated in a single individual, only that person could realistically be considered the perpetrator of this crime, whether directly or indirectly, while others might be held accountable on a different basis, typically

373 'In the spirit of the doctrine of power over the crime, the (direct) perpetrator is the subject who, as the bearer of the act of commission, is the master of the crime (*Herr der Tat*), because he holds under his control the course of events, i.e., with his directing will, he creates a causal flow that results in the realization of the crime': Đokić, 2021a, p. 55. It should be noted that, in the context of the crime of aggression, direct commission includes, for example, direct participation in the development of a plan for an act of aggression or direct participation in the preparation of such an act. With regard to the other two alternatively prescribed acts of commission, direct perpetration consists, for example, of giving the order to commence an act of aggression or executing the order by commanding the entire invading army. It is important to bear in mind the so-called 'leadership criterion' required for the crime of aggression: a soldier who is part of an armed force that invades a neighbouring state cannot be considered a direct perpetrator of the crime of aggression, as he is not in a position to exercise effective control or to direct the political or military actions of his state. The situation is more complex for officers. Lower-ranking officers generally cannot meet the condition of exercising effective control over a state's military activities. However, officers of the highest ranks (for example, field marshals, high-ranking generals, admirals of the fleet) could, in our view, be considered perpetrators of this criminal offence, though not automatically; it is necessary to consider all circumstances of the specific case (for example, whether the general in question is Chief of the General Staff of the aggressor state's army, commands an entire invading army, or whether the admiral commands a fleet blockading the ports of another state).

374 This is because 'indirect commission implies a regime of firm control by an indirect perpetrator, and such control can exist only in the context of an organized criminal hierarchy' (Banović and Bejatović and Turanjanin, 2020, p. 131). Bearing in mind the leadership criterion required for this criminal offence, cases of indirect commission are rare. The 'instrumentalized person', as a rule, would not have the actual capacity to directly carry out any of the envisaged acts of commission, which can only be undertaken by the person acting as an indirect perpetrator (for example, it is unlikely that an order from a state president, delivered through another person, to initiate an act of aggression would be executed at all; it would need to originate from the president directly). For discussion of indirect commission of crimes in international criminal law generally, see: Đokić, 2024, pp. 445–464.

375 Here, the indirect perpetrator effectively uses the person who substitutes for him at meetings as a 'mere tool' in the commission of a criminal offence involving the planning of an act of aggression. In this example, we deliberately emphasise that the indirect perpetrator deceives the 'tool person', i.e., keeps him in error, as the typical cases of indirect perpetratorship involve exploiting a defect in the 'tool person'. By contrast, constellations in which the 'tool person' acts with a *dolus* are more contentious in criminal law theory; see: Đokić, 2021a, pp. 63–64.

as accomplices.[376] In most modern states, however, a circle of individuals, often members of the highest collective state bodies, can collectively control or direct the political or military activities of their country. In such cases, these individuals would be regarded as co-perpetrators of the crime of aggression.[377]

3.3.1.4.2 Complicity

The Rome Statute recognises the following forms of complicity: incitement (soliciting and inducing), aiding and abetting, and a specific form of complicity consisting of contributing in any other way to the commission or attempted commission of a crime by a group of persons acting with a common purpose.[378] Although all these forms are formally and legally applicable to the crime of aggression, their practical application, particularly regarding incitement and aiding and abetting, would, given the leadership criterion, be very rare. A person may be criminally responsible, for instance, for inciting the commission of an act of aggression only if they are capable of exercising real control or directing the political or military actions of a particular state. In other words, liability for incitement arises only if the individual is also able to commit one of the four alternatively prescribed acts of commission of the crime, whether as a direct perpetrator, indirect perpetrator, or co-perpetrator.

For example, a senior government official, as the highest authority in a state, could incite colleagues to vote for a decision authorising an invasion of a neighbouring country, even if they themselves did not vote at a specific session. This would not constitute an attempt to commit the crime of aggression on their part (as it would have, as will be discussed below, if the individual intended to attend the session to vote in favour but was prevented by, for example, a traffic accident), but would constitute incitement under the Rome Statute, most likely in the

376 Such situations are characteristic of states with autocratic forms of government, for example modern dictatorships or absolute monarchies.

377 Of course, each co-perpetrator must act with the *mens rea* required for the crime of aggression. See more: Banović and Bejatović and Turanjanin, 2020, p. 130.

378 Škulić, 2020a, p. 159. For the purposes of this paper, we adopt the conception presented by the quoted author, by which he practically 'resembled' the forms of complicity in the criminal offence prescribed by the Rome Statute to the terminology common in Serbian criminal law theory. The Rome Statute itself, in Articles 25(3), does not explicitly mention 'incitement'; however, point (b) of that paragraph (which the quoted author equates to incitement) refers to 'ordering, soliciting and inducing'. Regarding aiding and abetting, the Statute explicitly prescribes it in point (c), alongside other ways of assisting in the commission or attempted commission of the crime, including providing the means for its commission. Škulić, by contrast, subsumes all forms of participation in the commission of the international crime prescribed in point (c) under the broader concept of 'aiding and abetting'. We consider this approach useful because it enables a more comprehensive systematisation of the forms of complicity in the Rome Statute (which clearly draw on the common law tradition) and makes the concept of complicity more understandable and accessible to readers familiar with Continental European legal traditions.

form of inducing. Liability requires that the individual's actions influenced the decision-making process or contributed to the consolidation of the decision among those voting in favour of the act of aggression.[379]

Regarding aiding and abetting, while theoretically possible, such responsibility is also difficult to envisage in the context of the crime of aggression. Even if the highest military leaders (for example, the Chief of the General Staff or the Chief of the Navy), who can direct the military activity of the state, 'make available' military capacities to the political leadership for executing the act of aggression, the requirement that the act of aggression has in fact been committed means they will rarely remain merely accomplices. They are more likely to be liable as direct perpetrators or co-perpetrators. Other scenarios of aiding and abetting are similarly unlikely, given the leadership criterion required for this crime.

Finally, concerning the specific form of complicity prescribed in Article 25(3)(d) of the Rome Statute, contributing in any other way to the commission or attempted commission of a crime by a group acting with a common purpose,[380] we consider that, for the crime of aggression, its applicability is similarly limited due to the leadership requirement. In cases of collective state leadership (for example, members of a government who collectively decide to undertake an act of aggression), the classical form of direct commission is more appropriate than this form of complicity. Such collective leadership engages in one of the alternatively

379 It is important to note that the Rome Statute, together with two classical forms of incitement (soliciting and inducing), also criminalises giving an order to commit a crime within the jurisdiction of the ICC. In the literature, it is rightly observed that 'it is somewhat unusual to prescribe that an order can be a form of incitement, when the order of the superior, on the one hand, is already prescribed as a possible basis (under certain conditions) for exclusion of criminal liability of the subordinate perpetrator... while, on the other hand, in many crimes, the act of their commission may also consist in ordering certain actions, when the ordering officer is considered to be the perpetrator of the crime.': Škulić, 2020a, p. 160. This explains why some authors particularly single out 'ordering' when discussing possible forms of participation in the commission of an international crime. For example: Banović and Bejatović and Turanjanin, 2020, p. 132. The crime of aggression will, in fact, although not explicitly prescribed, and particularly in relation to the other two alternatively prescribed acts of its commission (initiation and execution), regularly be carried out by giving an order. This means that it is also factually envisaged as an act of commission. In such cases, the order will not be treated as a form of incitement but as the act of commission of the crime of aggression (in this sense: Škulić, 2020a, p. 160). Similarly, in our earlier example concerning an indirect perpetrator, we reasoned that a person who sends a deputy to a meeting at which plans for the invasion of another country are drawn up should be held accountable not for incitement (in the sense of giving orders to the deputy) but as an indirect perpetrator. Therefore, we consider the possibility of being held accountable for the crime of aggression on the basis of an order as a variant of incitement (that is, alongside classical forms of incitement in the Rome Statute) as very limited.

380 It is further required that such contribution be intentional and either: (I) made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (II) made with knowledge of the group's intention to commit the crime.

prescribed acts of commission, such as adopting a decision to initiate aggression, and therefore commits the crime directly rather than participating in another's crime. In other words, it exercises control over its own crime, not complicity in someone else's.[381]

3.3.1.4.3 Responsibility of Leaders of Third States

When considering the acts of aggression listed in paragraph 2 of Article 8*bis* of the Rome Statute, one of them is described as 'the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State' (point f). In such a case, it is indisputable that the leader or leaders of the State that permitted its territory to be used by another State for the commission of an act of aggression will be regarded as the perpetrator or perpetrators of the crime of aggression, provided that all other conditions are met.[382]

However, the question arises whether the leaders of a third State can be held criminally liable outside the situation described in point (f). In other words, is it possible to hold the leaders of a third State criminally responsible when the first State attacks the second State, in circumstances other than through the territory of the third State that the latter made available for use to the first? We consider such liability possible in the following cases:

1. If a State that *in concreto* commits any of the acts of aggression is in a subordinate political, economic, or other factual position relative to a third State, the leadership of that third State[383] could be regarded as indirect perpetrators of the crime of aggression.[384]
2. The leaders of the third State may be held criminally liable as accomplices, for example, through aiding and abetting. This could occur, for example, if they provide a substantial quantity of powerful weapons and

381 There are, however, opposing views in the literature. For example, McDougal observes that this form of complicity is 'likely to be highly relevant in scenarios involving aggressor States where decisions concerning the use of force are made by a body such as a cabinet or council of ministers': McDougall, 2021, p. 250. We do not concur with this view. In short, members of such collective state bodies generally commit the crime of aggression as (in most cases) direct perpetrators.

382 Of course, in this situation, leaders of the state whose forces have attacked another state using territory provided by a third state would also be held accountable for the crime of aggression. The difference lies in the relevant state act of aggression forming the basis of their criminal responsibility: they would be responsible for an invasion committed by their state (Art. 8*bis* (2)(a) of the Rome Statute), whereas the leaders of the third state would be responsible for providing their territory for use in the invasion (Art. 8*bis* (f) of the Rome Statute).

383 For example, if the government of that state is a *de facto* puppet government of a third state.

384 In this sense: McDougall, 2021, p. 251.

ammunition to another State, which then uses them to commit an act of aggression.[385]

3.3.1.5 Extended Forms of Responsibility for the Crime of Aggression

In addition to the classical criminal responsibility of perpetrators and accomplices, legal theory identifies three forms of extended responsibility for international crimes under the Rome Statute: (1) responsibility for the attempted commission of an international crime, (2) responsibility for other relevant contributions to the crime committed by a group, and (3) command responsibility.[386] We have already analysed 'any other contribution to the commission or attempted commission of a crime by a group of persons acting with common purpose' (Art. 25(2)(d) of the Rome Statute) in the context of the crime of aggression when discussing complicity. It remains necessary, however, to examine the attempted crime of aggression and the potential application of command responsibility to this offence.

3.3.1.5.1 Attempt

First, in the context of attempt, the crime of aggression is not formally distinct from other crimes within the jurisdiction of the ICC. In other words, this offence is also subject to the general provisions of the Rome Statute regulating attempt.[387] Accordingly, no formal obstacles prevent accountability for an attempted crime of aggression. Whether such an attempt is factually possible, however, depends primarily on which of the four alternatively prescribed modes of commission is at issue in a particular case. With respect to planning and preparation, an attempt is always possible. For instance, participation in the development of plans for an act of aggression constitutes a substantial step towards the commission of the crime. A completed criminal offence exists only if the planned act of aggression is executed. If the act of aggression does not materialise,[388] the conduct remains an attempt, punishable under the general rules of the Rome Statute.[389]

385 In this sense: Ibid., pp. 251–252.

386 Škulić, 2020a, pp. 162–163. The cited author derives the division into 'classical' and 'extended forms of responsibility' from the fact that, in the latter, it involves an appropriate expansion of the criminal zone beyond its initial scope. More on this: Ibid., pp. 163–164.

387 According to the Rome Statute, an attempt exists when the perpetrator 'attempts to commit a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions' (Art. 25 (3)(f)).

388 For example, a change of government in a particular state may result in the new government abandoning the planned act of aggression for some reason.

389 The literature emphasises that 'although the provision of the Statute does not explicitly prescribe this, it is clear that intent must exist on the part of the perpetrator': Banović and Bejatović and Turanjanin, 2020, p. 153.

However, the central question is whether it is possible to attempt a crime of aggression where a (state) act of aggression has in fact been carried out. Unlike the previous case, we consider this scenario to be formally possible in law but factually unrealistic. The literature nevertheless recognises the theoretical possibility that the crime of aggression, with respect to the first and second alternative modes of commission (planning and preparation), may remain at the stage of attempt even where those plans are subsequently implemented; that is, where a state act of aggression occurs. One conceivable variant is that an individual seeks to participate in the development of plans for an act of aggression but is prevented from doing so by those responsible for formulating those plans.[390] We submit that such a scenario is implausible, not primarily because of any inconsistency with the rules on attempt contained in the Rome Statute,[391] but because it would be extremely difficult for a person who merely 'strives' or 'tries' to enter the inner circle of the military or, more often, political leadership of a state to satisfy the basic requirement for perpetration of this offence, namely that the individual is capable of effectively controlling or directing the political or military action of that state (the so-called leadership criterion).

Finally, we consider that, in principle, the doctrine of voluntary abandonment may apply to the crime of aggression.[392] In practice, however, this is highly unlikely. It is conceivable, and history provides numerous examples, that a state leader abandons a planned attack against another state. Such withdrawal will rarely be voluntary, and may not even be complete. Rather, it typically results from uncertainty as to the outcome of the proposed war, or from changes in circumstances, such as the intended target strengthening its military capacity or securing powerful allies. In short, individuals in positions of leadership are unlikely to abandon an intended act of aggression voluntarily. Instead, they act under compulsion or in response to the risk that a superior force may be deployed against them or their state.

390 Quoted upon McDougall, 2021, p. 255.

391 McDougal criticises the possibility of attempting the crime of aggression in this manner, as she considers that, in such a constellation, no 'substantial step' towards the commission of the crime exists: Ibid.

392 According to the Rome Statute, 'a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose' (Art. 25(3)(f)).

This reality effectively excludes the application of the doctrine of voluntary abandonment in relation to the crime of aggression.[393]

3.3.1.5.2 Command Responsibility and the Crime of Aggression

As with the previously discussed matters concerning both the forms of participation in the crime of aggression and the forms of responsibility for it, the Kampala Amendments do not explicitly exclude command responsibility for this offence.[394] However, considering the nature of both the crime of aggression and the institute of command responsibility, it appears that command responsibility is, in practice, almost entirely inapplicable in relation to this crime.

The essence of command responsibility lies in the superior's liability for failing[395] to prevent subordinates from committing a crime; in this case, one within the jurisdiction of the ICC. As noted, the defining feature that distinguishes perpetrators of the crime of aggression from perpetrators of other crimes within the ICC's competence is the leadership position of the perpetrator; that is, the requirement that the individual actually directs or controls the military or political action of the aggressor State. Consequently, it is impossible for a subordinate, who could have been prevented from committing the crime by a superior, to commit the crime of aggression; the superior cannot subsequently be held liable on the basis of command responsibility for failing to prevent it. In this scenario, the subordinate lacks the authority to control or direct the State's military or political actions, whereas

393 In this context, criminal law theory notes that 'today, in comparative doctrine, in accordance with a mixed approach, based on psychological learning, it is considered that the withdrawal decision is not free if the perpetrator, exposed to the internal psychological pressure of circumstances beyond his control, feels compelled to deviate from the completion of the act': Vuković, 2021, p. 332. In our example, a leader who planned for his state to commit an act of aggression against another state did not desist when he could have done so; rather, he refrained precisely because he could not. That is, although he could have committed the act, he was subjected to the pressure of a very likely unfavourable outcome, namely the defeat of his state in the conflict and, subsequently, severe personal consequences.

394 Rules regarding command responsibility are stipulated in Article 28 of the Rome Statute (titled 'Responsibility of commanders and other superiors'), which encompasses two forms. The first prescribes the command responsibility of a military commander for crimes under the jurisdiction of the ICC committed by forces under his command due to his relevant inaction (see Art. 28(1)(a)). The second provides for the command responsibility of persons who are not military but hold superior authority over subordinates, referred to as the command responsibility of civilian superiors (see Art. 28(1)(b)).

395 See Kaseze, 2005, p. 238. Similarly: 'Command responsibility refers to the violation of the principle of responsible commanding by the commander or superior, who is the only one who has the power to control his subordinates': Miljuš and Stanković, 2018, p. 584.

the superior[396] may indeed bear criminal responsibility for the crime of aggression, but only under the classic forms of liability set out in Article 25 of the Rome Statute, not under the of command responsibility.

The practical impossibility of applying command responsibility to the crime of aggression is further illustrated by a hypothetical example. Suppose a prime minister of a State that is a parliamentary democracy fails to act in response to armed incursions by the State's armed forces into the territory of a neighboring State, despite being aware of them. Two scenarios may arise. In the first, the prime minister implicitly supports the incursions; in this case, he would be criminally liable as a perpetrator of the crime of aggression by omission (*delicta ommissiva*), under Article 25 of the Rome Statute, rather than under command responsibility.[397] In the second scenario, the prime minister opposes the incursions but is factually powerless to prevent them; here, he would bear no responsibility for the crime of aggression, as he lacks the capacity to control or direct the State's military action. In such circumstances, essentially a *de facto coup d'état*, the individuals who exercise factual control over the armed forces (for example, military commanders) would be criminally responsible for the crime of aggression.[398]

396 In the literature, some authors argue that it is theoretically possible to extend the second form of command responsibility (that is, the responsibility of a civilian superior) to the crime of aggression. McDougall provides the following example: 'a presidential head of State in whom vests the constitutional power to dismiss the prime minister and who has the power to command the armed forces of a State, but who absents himself from key decision-making meetings so as to avoid dealing with the conflict that he feels arises from his view that the use of force being called for by the prime minister will be a manifest violation of the UN Charter, but which enjoys widespread popular support, meaning that a failure to support it could jeopardise his own privileged position. Arguably, the failure to dismiss the war-hungry prime minister, or a failure to exercise restraint over the armed forces could satisfy the conditions of Article 28(b)': McDougall, 2021, p. 234.

397 He could not be held responsible under the provisions of command responsibility in this situation because it is required that forces under his effective command and control *committed crimes under the jurisdiction of the ICC (sic!)*. Typical cases of command responsibility presume parallel criminal liability for the same crime by both the superior and subordinates. Consequently, a prerequisite for command responsibility is that subordinates commit a crime under ICC jurisdiction. In the case of the crime of aggression, subordinates cannot meet the leadership criterion required for the perpetrator. Therefore, command responsibility is inherently inapplicable to the crime of aggression.

398 Here it must be emphasised that this applies only if the use of the armed forces of the state can be attributed to that state. In other words, a segment of a state's armed forces may become effectively independent from central authority, over which the state cannot exercise control. In such a case, the members of this rebellious faction could be considered outlaws, and their actions should not be attributed to the state to which they previously belonged, provided that the state publicly denounces their conduct and actively seeks to terminate their activities. However, if this faction ultimately seizes power within the state, for example following victory in a civil war, its actions should be regarded as acts of state aggression, giving rise to the criminal responsibility of its leaders for the crime of aggression.

3.3.1.6 Grounds for Excluding Criminal Responsibility[399] and the Crime of Aggression

The application of any ground for excluding criminal responsibility prescribed by the Rome Statute is formally possible.[400] It is therefore theoretically conceivable that a particular act would not constitute the crime of aggression if one of these grounds applies. Nevertheless, the practical application of most grounds in relation to this crime is highly unlikely.

3.3.1.6.1 Insanity, Intoxication, and Duress

First, in relation to insanity, intoxication, and duress, their potential application to the crime of aggression is largely theoretical. For example, one cannot entirely exclude the possibility that an individual was in a state of insanity when ordering the execution of an act of aggression.[401] However, this is unlikely, given the significance of the highest state and military functions that perpetrators of the crime of aggression must ordinarily perform in order to qualify as such.[402] The successful invocation of intoxication is even less probable. This might arise, for instance, if a state leader were rendered intoxicated by agents of another state's intelligence service, for example, by contaminating food or drink with a psychoactive substance, and, in that condition, ordered the commission of an act of aggression. Finally, only

399 Unlike some national criminal laws, typically within the Continental European legal tradition, the Rome Statute does not distinguish between grounds that exclude the unlawfulness of an act and grounds that exclude the perpetrator's guilt. Instead, it subsumes all such grounds under the common term 'grounds for excluding criminal responsibility' (see Art. 31). Some authors employ the broader term 'grounds for excluding the existence of the crime', arguing that 'the essence of these grounds is not in the exclusion of criminal responsibility, which, given the "subjective character" of the term "responsibility", is associated with the exclusion of guilt, but it lies in the fact that when such grounds exist, they act by excluding the existence of an international crime in a particular case, regardless of whether the specific ground excludes unlawfulness or guilt': Škulić, 2020a, p. 200.

400 Most of these grounds are enumerated in Article 31 of the Rome Statute: insanity (Art. 31(1)(a)), intoxication (Art. 31(1)(b)), necessary defence (Art. 31(1)(c)), duress (Art. 31(1)(d)), and other grounds for excluding criminal responsibility not listed in Article 31(1), where such a ground is derived from applicable law under Article- 21 of the Rome Statute. In addition, two further grounds are provided in separate provisions of the Rome Statute: mistake of fact and mistake of law (Art. 32) and superior orders (Art. 33).

401 For example, the person suffered from a mental illness that prevented him from controlling his behaviour in accordance with the law. This constitutes one of the possible combinations of certain biological or aetiological grounds with a corresponding voluntary or intellectual incapacity, as prescribed by the Rome Statute for the ground of insanity to arise. More on this: Škulić, 2020a, p. 201.

402 It is worth noting a well-known example from the history of international criminal law. During the trial before the IMTN, the question of the (in)sanity of one of the defendants, Rudolf Hess, arose. More on this: Ibid., pp. 200–201.

in very rare circumstances would it be possible for the ICC to apply duress as a ground for excluding the existence of the crime of aggression.[403]

3.3.1.6.2 Necessary Defence

While the previous three grounds for excluding criminal responsibility under the Rome Statute (insanity, intoxication, and duress) are, at least theoretically, capable of arising, the application of the necessary defence[404] as a ground in relation to the crime of aggression appears entirely impossible, although it is not formally excluded.[405] Two concepts must be distinguished: the right of states to self-defence (individual and collective), guaranteed under Article 51 of the UN Charter, and necessary defence as a basis for excluding criminal responsibility for an individual under the Rome Statute. The right to self-defence belongs to states as subjects of

403 As an illustration, one might consider a situation in which a State leader is coerced, under a threat to the life of his abducted child, into ordering the commission of an act of aggression. However, several additional questions arise here. The Rome Statute provides that a person shall not be criminally responsible if, at the time of that person's conduct, 'the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided' (Art. 31(1)(d)). In this example, it is doubtful whether the leader 'acts necessarily and reasonably to avoid the threat' if he yields to such threats and orders his State to commit an act of aggression against another State. In other words, is it reasonable to order, for example, the invasion of another country solely out of fear, even if that fear is genuine and factually grounded, for the life of one's child? Moreover, such conduct would almost never satisfy the additional requirement for duress, namely that the harm caused must not exceed the harm avoided. The harm resulting from an act of aggression would, in most cases, far exceed the harm sought to be avoided, that is, the death of the leader's child.

404 The Rome Statute does not explicitly designate the ground in Article 31(1)(c) as 'necessary defence', but rather sets out circumstances in which 'defence' may be legally relevant, that is, when the protection of a certain good or value may exclude criminal responsibility. We adopt the general term 'necessary defence' to denote this ground, as its content broadly corresponds to the understanding of necessary defence in Continental European legal systems, where it operates as a ground excluding the unlawfulness of the act and, consequently, the existence of a criminal offence in a particular case. By contrast, common law systems 'do not consider necessary defense as one institute', but instead recognise 'a number of variations of defense which justify the use of force, which are very similar to the necessary defense in the criminal law of Continental Europe': Škulić, 2023, p. 126. Đokić observes that 'although the Anglo-Saxon legal terminology uses the term *self-defense*, it is traditionally understood to encompass not only the defense of one's own good, but also the so-called necessary help, i.e. the defense of another person': Đokić, 2021b, p. 124. Given that the Rome Statute explicitly includes the defence of another person's goods alongside the defence of one's own, the term 'self-defence' would be too narrow. We therefore use the term 'necessary defence'.

405 In this sense, Stojanović states: 'The crime of aggression is incompatible with the situation of necessary defense': Stojanović, 2017a, p. 57.

international (public) law, whereas necessary defence applies to natural persons accused before the ICC of a crime within its *ratione materiae* jurisdiction. The state's right to self-defence cannot, in any circumstances, serve as a basis for excluding the existence of the crime of aggression, since the state exercising that right (that is, the defending state) does not commit an act of aggression but merely defends itself against an act of aggression by another state.[406]

However, the necessary defence, as one of the grounds excluding criminal responsibility, undoubtedly prescribed in the Rome Statute, is inapplicable to the crime of aggression. Under the Rome Statute, necessary defence entails that a person who has committed a crime within the jurisdiction of the ICC acted 'reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected' (Art. 31(1)(c)). For this ground of exclusion of criminal responsibility to apply, it is therefore necessary that direct and unlawful force has been used against the perpetrator or another person. First, if such force is directed against the perpetrator himself (for example, if another person physically attacks him with a weapon), it is inconceivable that a reasonable and especially proportionate defence could consist in committing the crime of aggression.[407] The same reasoning applies where the attack is directed against another person. Second, even if the term 'other person' is interpreted in the broadest sense, encompassing, for instance, the population of an entire state against which an act of aggression in the form of an invasion has been committed (thus representing a direct and unlawful attack on the life and body of a large number of persons), there remains no need to invoke necessary defence in the case of the leader of the attacked state. In such circumstances, the state itself may act within the framework of the state's right to self-defence as prescribed by the UN Charter; consequently, there is no act of aggression by the defending state, and the leader of that state has no occasion to rely on necessary defence as a ground for excluding criminal responsibility.

406 The right to self-defence under Article 51 of the UN Charter cannot, therefore, be recognised as a ground for excluding criminal responsibility, even under Article 31(3) of the Rome Statute. That provision allows for the possibility that other such grounds may arise where the Court considers them to derive from the law applicable before the ICC. This is because no act of aggression exists on the part of the defending State. As noted, the existence of an act of aggression constitutes a *conditio sine qua non* for any of the four alternatively prescribed modes of commission of the crime of aggression, since each must be directed against such an act.

407 Of course, in addition, the so-called leadership criterion must be satisfied, that is, the attacked person must be capable of effectively controlling or directing the political or military activity of the State. Accordingly, the directly attacked person would generally be among the highest State or military officials.

3.3.1.6.3 Mistake of Fact and Mistake of Law

Under the Rome Statute, a mistake of fact (*error facti*) constitutes a ground for excluding criminal responsibility only if it negates the mental (that is, subjective) element required by the crime (Art. 32(1)). It must therefore concern the negation of the subjective element that should exist in relation to some of the objective constitutive elements of the crime. In other words, the Rome Statute recognises only mistakes of fact concerning the elements that constitute the objective description of the crime,[408] and not mistakes of fact regarding the actual circumstances related to the (un)lawfulness of the act.[409] Furthermore, the literature notes that, since the ICC's jurisdiction encompasses crimes that are exclusively intentional in nature, including the crime of aggression, both types of mistake of fact, avoidable and unavoidable, exclude the perpetrator's guilt and, consequently, the existence of a specific crime.[410]

There are no formal obstacles to recognising a mistake of fact as a basis for excluding criminal responsibility in respect of the crime of aggression. The relevant provisions of the *Elements of Crimes* indicate that the perpetrator's awareness must encompass the 'factual circumstances' that determine that a particular use of armed force is contrary to the UN Charter, and the 'factual circumstances' that render the violation 'manifest'. Consequently, any mistake regarding these circumstances would constitute a mistake of fact and would preclude the existence of the crime of aggression in the particular case. Moreover, a mistake concerning any other fact subsumed under the objective elements of the crime of aggression would also constitute a relevant mistake of fact and, therefore, exclude criminal responsibility.

In contrast, a mistake of law (*error iuris*) is expressly excluded by the Rome Statute as a ground for excluding criminal responsibility.[411] No person may invoke a mistake of law to deny the existence of an international crime, for instance, by claiming unawareness that the planning of an act of aggression subsequently carried out constituted an international crime of aggression. Nevertheless, paragraph 2 of Article 32 provides that *error iuris* may exclude criminal responsibility 'if it negates the mental element required by such a crime, or as provided for in article 33' (superior orders). The issue of superior orders is addressed in the following section of this book. Regarding the rule that a mistake of law may exclude criminal responsibility if it negates the required subjective element, we concur with certain

408 In this sense: Stojanović, 2017a, p. 61.

409 This second subtype of mistake of fact concerns facts forming the basis for the application of certain grounds which, in the legal terminology of continental Europe, constitute grounds for excluding the unlawfulness of the conduct in question: Vuković, 2021, p. 254.

410 In this regard: Škulić, 2020a, p. 210.

411 'A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility' (Art. 32 (2) of the Rome Statute). In criminal law theory, this type of mistake of law is referred to as a 'direct mistake of law': Stojanović, 2017b, p. 187; Vuković, 2021, p. 266.

authors who observe that this ground is essentially inapplicable to the crime of aggression. This is because the offence requires that the perpetrator was aware both of the factual circumstances establishing that the use of armed force was inconsistent with the UN Charter and of the factual circumstances that made the violation manifest.[412]

3.3.1.6.4 Superior Orders

The Rome Statute provides for the grounds under which a person may be exempt from criminal responsibility for crimes within the jurisdiction of the ICC on the basis of superior orders.[413] Specifically, if a person commits a crime within the jurisdiction of the Court pursuant to an order of a Government[414] or a superior, whether military or civilian, that person shall not be relieved of criminal responsibility unless: (a) the person was under a legal obligation to obey the orders of the Government or superior in question, and; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful (Art. 33(1) of the Rome Statute). It is further expressly stipulated that, for the purposes of Article 33, orders to commit genocide or crimes against humanity are always to be regarded as manifestly unlawful (Art. 33(2) of the Rome Statute). In other words, with respect to these two crimes, superior orders can never serve as a basis for excluding criminal responsibility, as they invariably fail to meet the third mandatory requirement that the order was not manifestly unlawful.[415]

Accordingly, in addition to war crimes, this ground for excluding criminal responsibility may formally be invoked only in the case of the crime of aggression. However, considering the so-called leadership criterion, which requires that the perpetrator of the crime of aggression be a person capable of effectively controlling

412 In this sense: McDougall, 2021, p. 247.

413 Legal theory emphasises that this is 'a rather specific ground that should certainly be taken into account when evaluating and assessing the criminal responsibility of the one who committed the criminal offense by carrying out the order of a superior': Babić, 2011, p. 20.

414 Škulić explains that, in this context, 'government' is understood as 'any form of lawful, i.e. legally established and regulated state authority, depending on the legal system of a particular state, which means that it means a certain circle of state officials, and above all, those holders of public office who have high hierarchical positions in the executive power': Škulić, 2020a, p. 213, fn. 548.

415 It is noteworthy that, even after the conference in Kampala at which the Rome Statute was supplemented with provisions on the crime of aggression, that crime was not listed, alongside genocide and crimes against humanity, as a crime in respect of which it is irrefutably presumed that an order to commit it is manifestly unlawful, nor as one in respect of which the defence of superior orders is formally excluded. Although this may be an omission, it is also possible that it was intentional, in order to avoid any conflict with the requirement of a 'manifest violation of the UN Charter', which is necessary for an act of aggression to constitute the crime of aggression in a given case.

or directing the political or military action of the aggressor State, the practical applicability of this defence appears to be minimal.[416]

3.3.1.6.5 Other Possible Grounds for Excluding Criminal Responsibility and the Crime of Aggression

Finally, the Rome Statute allows for the possibility (Art. 31(1)) of applying other grounds for excluding criminal responsibility beyond those explicitly stipulated, provided that such grounds are derived from applicable law as set out in Article 21 of the Rome Statute. The literature notes that, in this sense, in relation to 'some other grounds' for excluding criminal responsibility, 'the principles and rules of international law, including the principles of the international law of war', as well as the corresponding 'principles from national criminal legislations', may be significant.[417]

However, in relation to the crime of aggression, no such grounds appear to exist. In legal theory, when considering the application of Article 31(3) of the Rome Statute, reprisals and humanitarian intervention are most frequently cited as possible examples.[418] Humanitarian intervention has already been discussed earlier in this text; it is sufficient to reiterate here that, since international law recognises no right of states to humanitarian intervention, it cannot constitute a ground for excluding criminal responsibility for the crime of aggression.

With regard to reprisals, they are inapplicable to the crime of aggression. Theoretical distinctions are commonly made between reprisals in peacetime and reprisals during armed conflict.[419] Reprisals in peacetime are prohibited under the rules governing the use of force in international relations and therefore cannot serve as a ground for excluding criminal responsibility for the crime of aggression.[420] Although, under certain conditions, reprisals during armed conflict may constitute a valid ground for excluding responsibility for some international crimes,[421] they

416 In this regard, the literature notes that 'while it is possible to conceive of a situation where one individual in a position effectively to exercise control over or to direct the political or military action of a State is able to give binding orders to another individual who meets this definition (such as an order given by a member of a royal family to an elected leader), clearly there is a tension between such scenarios and the leadership nature of the crime': McDougall, 2021, p. 248.

417 Škulić, 2020a, p. 214.

418 See, for example: Stojanović, 2017a, pp. 63–67; Škulić, 2020a, pp. 217–229. In addition to these two grounds, doctrine also identifies the principle of *tu quoque*, immunities, and military or war necessity as possible grounds relating to the existence of an international crime. On this, see: Babić, 2011, pp. 23–25.

419 Stojanović, 2017a, p. 64; Škulić, 2020a, p. 217.

420 In this sense: Ibid., p. 218. Consequently, such reprisals cannot have any relevance in international criminal law: Stojanović, 2017a, p. 64.

421 For further discussion, see: Stojanović, 2017a, pp. 64–65; Škulić, 2020a, pp. 219–220.

are inherently irrelevant in the context of the crime of aggression, as they can only be applied once a war or armed conflict has commenced.

3.3.1.7 Penalties and Other Measures Prescribed in the Rome Statute and the Crime of Aggression

As with the other three crimes within the jurisdiction of the ICC, the Rome Statute does not prescribe specific penalties or other measures for the crime of aggression. Consequently, the general rules contained in Article 77 of the Rome Statute apply.

For the crime of aggression, the ICC may impose: (a) imprisonment for a specified number of years, not exceeding 30 years, or (b) life imprisonment, which may only be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person (Art. 77(1) of the Rome Statute). Sentencing is determined on the basis of criteria such as the gravity of the crime and the individual circumstances of the convicted person (Art. 78(1) of the Rome Statute), and is further regulated by the Rules of Procedure and Evidence.[422] The Rome Statute also addresses the imposition of a joint sentence where more than one crime within its jurisdiction has been committed (Art. 78(3)).[423] Finally, regarding punishment for the crime of aggression, reduction of the sentence is possible in accordance with the general rules (Art. 110 of the Rome Statute).

In addition to imprisonment, which constitutes the primary penalty, the Rome Statute (Art. 77(2)) allows the ICC, for any crime within its jurisdiction, including the crime of aggression, to impose: (a) a fine,[424] and (b) forfeiture of proceeds, prop-

422 See the Rule 145 of the Rules of Procedure and Evidence.

423 At this point, it should be noted that the crime of aggression may be committed together with any of the other three crimes within the jurisdiction of the ICC. Thus, the same person may, for example, order the commission of an act of aggression and, at the same time, order the commission of genocide against the population of the invaded State with the intent to destroy it as an ethnic group. Similarly, a person who commits the crime of aggression may order that 'there must be no prisoners' in the ensuing armed conflict, thereby also committing a relevant war crime.
However, the crime of aggression may also be committed without 'violating the law in war' (Stojanović, 2017a, p. 68), that is, without committing any other core international crime. This conclusion follows from the strict distinction between *ius ad bellum* and *ius in bello*. In this regard, some authors emphasise that international humanitarian law 'applies independently of the legitimacy of the cause for which a party or an individual is fighting. This separation implies a key limitation of IHL (at least from the viewpoint of those who are fighting): it imposes the same legal obligations on all parties to a conflict while concurrently providing equal protection to all persons affected by the conflict, irrespective of whether the parties or individuals are fighting for a just or unjust cause': Sassòli, 2019, p. 2. For example, a war crime may be committed by a person fighting on the side of a State that is the victim of aggression, that is, a State exercising its right to self-defence under the UN Charter.

424 Regulated in more detail by the Rule 146 of the Rules of Procedure and Evidence.

erty, and assets derived directly or indirectly from the crime, without prejudice to the rights of bona fide third parties.[425]

3.3.2 Exercise of Jurisdiction of the International Criminal Court Regarding the Crime of Aggression

As discussed in the first part of this book, which addressed the historical development of aggression in international law (first as an unlawful act of a State and subsequently as an international crime), the principal issue concerning the notion of aggression was its definition, that is, what constitutes aggression. This difficulty persisted even after the UN General Assembly adopted Resolution 3314 in 1974.

Following the adoption of the Rome Statute in 1998, during the work of the Special Working Group on the Crime of Aggression, the focus shifted from defining the crime to determining the conditions under which the ICC may exercise jurisdiction over it. The Kampala Conference continued this line of inquiry.[426] At that time, two narrower issues emerged as particularly problematic within the broader question of the ICC's jurisdiction over the crime of aggression: first, the role of the Security Council in prosecuting this crime,[427] and second, the legal authority of the amendments that were to be adopted.

Ultimately, these issues were resolved through a compromise: the adoption of amendments incorporating new articles into the Rome Statute. Article 15*bis* regulates the exercise of the ICC's jurisdiction when a situation has been referred by a Member State or when the Prosecutor initiates proceedings *proprio motu*. Article 15*ter* governs the exercise of jurisdiction when the situation is referred by the UN

425 Regulated in more detail by the Rule 147 of the Rules of Procedure and Evidence.

426 Heinsch, 2010, p. 716; Ikanović, 2015, p. 205; Sarkin and Almeida, 2019, p. 529; McDougall, 2021, p. 258.

427 'One of the most controversial questions surrounding the new International Criminal Court was what role the Security Council should play in prosecuting the crime of aggression.' M. Stein, op. cit., p. 1. Similarly, Simić notes that the principal problem concerning the crime of aggression in the context of the ICC was precisely 'the relationship between the Prosecutor at the International Criminal Court and the Security Council in terms of assessing whether an act of aggression by one state against another has been committed in a particular case': Simić, 2023, p. 102.

Security Council.[428] In the literature, this division of jurisdictional competence is widely recognised as a decisive step towards achieving agreement on the ICC's authority to prosecute the crime of aggression.[429]

3.3.2.1 Exercise of Jurisdiction over the Crime of Aggression—State Referral and *Proprio Motu* Prosecution (Art. 15*bis* of the Rome Statute)

During the negotiations preceding the Kampala Conference, as well as during the conference itself, divergent views emerged regarding the role of the UN Security Council in the prosecution of the crime of aggression within the framework of the ICC, whether the initiative originated from a member state of the Rome Statute or from the Prosecutor *proprio motu*.[430] The 'seeds of discord' were sown by the UN Charter itself, which, in Article 39, among other provisions, grants the Security Council the power to determine the existence of an act of aggression by a state, as well as to make appropriate recommendations or decide on measures to maintain or restore international peace and security. This provision led some states (most notably the permanent members of the Security Council) and certain scholars of legal theory to conclude that the Security Council is the only body under international law empowered to determine the existence of an act of aggression for any

428 At this point, it is important to note the general rules of the Rome Statute governing the establishment of the ICC's jurisdiction in a concrete case. Under Article 13 of the Rome Statute, the ICC may exercise jurisdiction over the offences listed in Article 5 where: (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) such a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15 (*proprio motu*). By adding new articles 15*bis* and 15*ter* to the Rome Statute, a special regime of ICC jurisdiction has, to some extent, been established for the crime of aggression in relation to the general regime applicable to the other three crimes within the Court's jurisdiction *ratione materiae*.

429 Heinsch, 2010, p. 735.

430 Four groups of solutions were proposed: (1) those under which a determination by the Security Council of a state act of aggression would be a necessary condition for the exercise of ICC jurisdiction; (2) those under which the Security Council would be given a specified period to determine the existence of an act of aggression in a concrete case; (3) those under which the Security Council would have the exclusive right to refer to the ICC cases in which there is sufficient suspicion that the crime of aggression has been committed, but without authority to determine the existence of an act of aggression for the purposes of judicial proceedings; and (4) those under which the ICC would be able to act independently of the actions or inaction of the Security Council in this regard. See Stein, 2005, pp. 3–4.

purpose.[431] As one of the conditions for the existence of the crime of aggression is that a state act of aggression has been committed, the stated view implies that a prior decision of the Security Council establishing the relevant state act of aggression would be a *conditio sine qua non* for the ICC to exercise jurisdiction over this crime in every case.

However, this narrative has been criticised by several other States, as well as by a majority of scholars. It has been emphasised that 'no court can leave the determination of such a central factual issue to an essentially political body'.[432]

431 In this regard, for example, Zimmerman states: 'First, the Statute of the ICC will – unlike the Statute of the ICJ – not form an integral part of the Charter of the United Nations... whatever the contracting parties of the statute of the ICC agree on – their obligations under the Charter and thus, in particular, their obligations under Arts. 324 and 39 of the Charter will always prevail': Zimmermann, 1998, p. 202. The same author also points to the risk that an investigation into the crime of aggression without prior Security Council approval could lead to the 'escalation' of the concrete situation: Ibid., p. 203.

432 Schabas, 2001, p. 27. Similarly, other authors argue: 'No national or international court should be bound by the decision of a political authority, while a political authority should take into account every judicial decision on the relevant subject': Kaseze, 2005, p. 134; 'In this regard, it should be noted that the authority of the Security Council to determine in each individual case the existence of aggression in relation to the power of the International Criminal Court to adjudicate for the same act, can also be interpreted as a preliminary assumption of "quasi-judicial" jurisdiction of the Security Council, for which there is no tangible basis in the Charter', Dimitrijević, 2020, p. 202; 'The establishment of such a relationship between the Court and the Security Council is devoid of legal logic... The competence of a political authority to give a prior and, for the purposes of criminal proceedings, the primary qualification of an act in the matter of criminal liability is a limitation of the function of the Court and a violation of the principle of nullum crimen sine lege' Kreća, 2019, p. 648; 'However, such dependence on the SC would represent a strong limitation to the role of the Court, as it would require a decision of an overtly political body': Sarkin and Almeida, 2019, p. 533; '… Giving the Security Council a key role in assessing whether the aggression exists could have some similarities with the institution of motion by the injured party in the law of criminal procedure. However, these two situations would not be the same, because the Security Council would not simply give approval for criminal prosecution (although even such a solution would be unfair, as it could potentially lead to discrimination and arbitrary decisions), but would enter into the substantive criminal matters, by determining whether there are elements of a crime of aggression, which would on the one hand unjustifiably give it a judicial function, and on the other hand, it would in fact prejudicate the future decision of the International Criminal Court': Škulić, 2020a, p. 283.

On the other hand, some authors in the literature remain essentially undecided on this issue. For example, Dumée acknowledges that a decisive argument in favour of complete ICC independence from the Security Council lies in the Council's functioning, particularly the veto power of its permanent members, and that 'otherwise it could happen that an act that would have all the characteristics of aggression, does not lead to any repression on the criminal legal level': Dumée, 2000, p. 263. However, the author immediately cautions that placing within the ICC's competence the authority to characterise an act as aggression, even contrary to a Security Council decision, would be 'hard to imagine', and that in such a case 'the present system of maintaining international peace and security would be fundamentally shaken': Ibid.

Moreover, some argue that Article 39 of the UN Charter does not prohibit bodies other than the Security Council from establishing the existence of an act of aggression, but only prevents them from doing so for the purposes of the Security Council, that is, for the preservation or restoration of international peace.[433] Finally, certain authors consider the requirement that the Security Council first determine an act as an act of aggression before the ICC may exercise jurisdiction over the crime of aggression to be potentially catastrophic, since it is highly improbable that the Security Council would ever take such a step, as it has done so only rarely in the past.[434] In essence, proponents of these views contend that the ICC should not be dependent on a prior assessment by the Security Council regarding whether an act of aggression has occurred in a specific case.

In the solution adopted at Kampala, none of the proposed concepts was fully accepted; from this perspective, it may be regarded as a form of compromise.[435] However, as will be discussed in more detail shortly, if the adopted solution is examined systematically, that is, in accordance with all other provisions of the Rome Statute, it is our view that it is, if not formally, then certainly substantially closer to the first rather than the second approach.

Specifically, the fundamental rule on the exercise of the ICC's jurisdiction over the crime of aggression, in situations reported by a State Party or initiated by the Prosecutor *proprio motu*, provides: 'Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned' (Art. 15*bis* (6) of the Rome Statute). Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation (Art. 15*bis* (7) of the Rome Statute). However, if no such determination exists, the Prosecutor shall 'notify the

433 In this sense: Stein, 2005, p. 12. Similarly, Vučić: 'In essence, such an interpretation of Article 39 of the UN Charter ascribes to its creators an intention that they never had, apart from the fact that the Security Council very rarely announces an aggressive act in its resolutions, that is, not once since 1990': Vučić, 2017, p. 85. McDougall observes that 'Art. 39 is wholly silent in relation to individual criminal responsibility' (McDougall, 2021, p. 268) and argues that, since both the UN General Assembly and the International Court of Justice can identify acts of aggression for purposes other than those pursued by the Security Council acting under Chapter VII of the Charter, and since national courts may theoretically do so for the purpose of prosecuting the crime of aggression, it does not follow that the ICC lacks such competence for its own purposes, namely criminal proceedings for the crime of aggression (Ibid., p. 283).

434 In this regard: Paulus, 2009, p. 1125. The author further asks rhetorically: 'do we really want to make prosecution of one of the gravest crimes dependent on a political body in which the great powers have veto power to shield themselves and their allies entirely from prosecution?': ibid.

435 This is how some authors describe it: Kolarić, 2013, p. 111; Simović, Blagojević and Simović, 2013, p. 242. McDougall characterises it as an 'inelegant compromise': McDougall, 2021, p. 258.

Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents'[436] (Art. 15*bis* (6), second sentence) and:

> 'Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16' (Art. 15*bis*(8) of the Rome Statute).

Accordingly, it can be said that the procedure for establishing the jurisdiction of the ICC in relation to the crime of aggression, when the initiative for prosecution arises from a member state or the prosecutor, consists of two stages. First, if the prosecutor, following a so-called 'preliminary investigation', determines that there are reasonable grounds to commence a formal investigation, he may do so immediately if the Security Council has previously characterised the specific act as an act of aggression. However, as noted above, the Security Council has very rarely established the existence of acts of aggression throughout its history. It is therefore more likely that, in the future practice of the ICC, the second scenario will be more common: the prosecutor must wait for six months from the date on which he informs the UN Secretary-General of the specific case, during which the Security Council may, but is not obliged to, declare the act an act of aggression.[437] If the Security Council fails

436 In fact, the Prosecutor must issue such a notification even where he has established that the Security Council has already determined the existence of an act of aggression. In that case, however, notification to the UN Secretary-General constitutes a 'mere formality': Sayapin, 2014, p. 307.

437 McDougall notes that the six-month period may facilitate the destruction and/or concealment of evidence establishing individual criminal responsibility for the crime of aggression. See further McDougall, 2021, pp. 344–345.

to do so by the expiry of this period, the investigation may only proceed with the approval of the ICC's Pre-Trial Division.[438]

With respect to this solution adopted in Kampala, some authors comment that it 'adds a filter to the exercise of jurisdiction by the Court against politically motivated cases, while simultaneously taking into consideration the role played by the UNSC, in the maintenance of international peace and security'.[439] However, we consider that conclusions suggesting that the Kampala solution represents a form of 'balance' or 'compromise' overlook a crucial point. The entire procedural system for establishing ICC jurisdiction over the crime of aggression, based on the initiative of a member state or the prosecutor, is substantially weakened by the final part of Article 15*bis* (8), which states: '... and the Security Council has not decided otherwise in accordance with article 16'. Article 16 provides that:

> 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the UN, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'.

438 It should be noted that, under the general rule for conducting an investigation on the initiative of the prosecutor *proprio motu* (but not where the situation has been reported by a State Party pursuant to Art. 14 of the Rome Statute), the ICC requires the approval of the Pre-Trial *Chamber* (Art. 15(3) of the Rome Statute). By contrast, for an investigation concerning the crime of aggression, where the UN Security Council has not determined that the act in question constitutes aggression, a decision of the Pre-Trial Division is required as a precondition (Art. 15*bis* (8) of the Rome Statute). This raises the question of the relationship between these two rules. To clarify this issue, two situations may be distinguished. First, if, after the expiration of the six-month period, the Security Council has not established the existence of an act of aggression, it is our view that approval by the Pre-Trial Division alone is sufficient for the investigation, without the need for additional approval by the Pre-Trial Chamber. Pursuant to Article 39 of the Rome Statute (paras. 1 and 2(b)(III)), the Pre-Trial Chamber consists of three judges drawn from the Pre-Trial Division, which comprises all judges serving in the existing Pre-Trial Chambers. It follows that seeking separate approval from the Pre-Trial Chamber would be redundant, as the judges forming the Pre-Trial Chamber would participate in the decision as members of the Pre-Trial Division. Second, if the Security Council has established the existence of an act of aggression, the question arises as to whether approval by the Pre-Trial Chamber is required for further investigation, given that we are considering a *proprio motu* investigation by the prosecutor. In this scenario, unlike the previous case, approval by the Pre-Trial Division is not necessary. It is our view that the Pre-Trial Chamber's approval is not required in this case either. This conclusion follows from Article 15*bis* (7) of the Rome Statute, which provides: 'Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.' Consequently, this provision constitutes a *lex specialis* in relation to the *lex generalis* contained in Article 15 of the Rome Statute. This interpretation is also supported by McDougall, 2021, p. 346.

439 Sarkin and Almeida, 2019, p. 533.

Accordingly, the Security Council can indefinitely block the prosecution of a crime of aggression, and its decision in this regard is entirely discretionary.[440] This provision underpins our earlier observation that the unavoidable role of the UN Security Council in prosecuting the perpetrators of the crime of aggression was substantially, if not formally, accepted in Kampala.[441] In other words, although the procedure may formally proceed if the Security Council has not *in concreto* deemed an act to be an act of aggression, it cannot proceed contrary to the will of the Security Council.[442]

Finally, we turn to the last two paragraphs of Article 15*bis* of the Rome Statute. Paragraph 9 stipulates that 'A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute'. This provision appears to have been inserted to emphasise the ICC's independence from the UN Security Council,[443] although its wording extends to all other bodies, such as the International Court of Justice, that may determine the existence of an aggressive act for their own purposes. Its essence is that, even if the Security Council has established the existence of an act of aggression, the ICC is not bound by that finding in a specific criminal case; it may conclude, conversely, that no act of aggression occurred and that an essential element of the crime of aggression in the particular case is absent.

Paragraph 10 of Article 15bis of the Rome Statute states that 'This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5'. This provision merely confirms that the rules governing the ICC's jurisdiction over the crime of aggression are of a special nature (*lex specialis*) relative to the general jurisdictional framework (*lex generalis*) established by the Rome Statute.

440 'The same article of the Rome Statute stipulates that the Security Council 'may renew the request under the same conditions', which means that the procedure can be 'stopped' indefinitely, as long as the members of the Security Council request it. On the other hand, the Rome Statute and the Rules of Procedure and Evidence do not specify the conditions under which the Security Council will exercise this possibility, nor does the Court have the possibility to reject this request': Bajović, 2022, p. 268.

441 Just as occurred in Rome in 1998 with regard to the other three crimes within the jurisdiction of the ICC.

442 On the other hand, some authors consider that the position of the Security Council should be further strengthened. In this regard, for example, Stein: 'to achieve maximum alignment between the ICC Statute and the Charter, the Security Council should be given additional powers in proceedings concerning the crime of aggression, beyond the powers it already possesses, under ICC Article 16, to suspend proceedings involving war crimes, crimes against humanity, and genocide. In prosecutions for the crime of aggression, the Security Council should be able to go beyond the one-year renewable suspension provided for in ICC Article 16; the Security Council should be able to call a permanent halt to ICC proceedings on the crime of aggression. Moreover, the Security Council should be able to undo ICC prosecutions for the crime of aggression': Stein, 2005, pp. 31–32.

443 In this sense: Sarkin and Almeida, 2019, p. 533.

3.3.2.2 Exercise of Jurisdiction over the Crime of Aggression – United Nations Security Council Referral (Art. 15*ter* of the Rome Statute)

Article 15*ter* of the Rome Statute addresses the exercise of the ICC's jurisdiction over the crime of aggression when the situation in question has been referred to the Court by the UN Security Council. Unlike Article 15*bis*, which, as noted, has a complex structure, Article 15*ter* is comparatively straightforward. Specifically, paragraph 1 provides that 'The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this article'. Article 13(b) of the Rome Statute allows the ICC to exercise jurisdiction over any crime listed in Article 5 in accordance with the provisions of the Statute, *inter alia*, when 'A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'. Thus, unlike situations referred by a State Party to the Statute, or cases initiated *proprio motu* by the Prosecutor, where a special regime of jurisdiction applies in relation to the general rules of the Rome Statute,[444] situations referred by the UN Security Council are governed by the general provisions of the Statute. It is not necessary for the Security Council to formally determine that an act of aggression has occurred; it suffices that the Council reports the situation as such.[445]

It has been observed that 'the chance of the Security Council reporting states to the ICC is extremely limited by the existence of veto rights of permanent members'.[446] Although this observation appears correct at first glance, it does not fundamentally differ from the possibility of prosecution for the crime of aggression initiated by a State Party or by the Prosecutor *proprio motu*, since, as noted, both are subject to the effects of Article 16 of the Rome Statute.

3.3.3 Legal Force of the Kampala Amendments

In Kampala, a compromise was reached between those States seeking the broadest possible protection against the risk of becoming victims of aggression in the future, and consequently supporting the ICC's unrestricted jurisdiction over the

444 Like Article 15*bis*, Article 15*ter* also contains a provision according to which 'A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute' (para. 4), as well as a provision stipulating that 'This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5' (para. 5).

445 In this sense: Heinsch, 2010, p. 741. Similarly, Kreß and von Holzendorf observe that the decision not to require the Security Council formally to determine the existence of an act of aggression before reporting the situation to the ICC accepts the idea that the Council may authorise an investigation without first establishing the most serious violation under Article 39 of the Charter of the United Nations: Kreß and von Holtzendorff, 2010, p. 1211.

446 Sarkin and Almeida, 2019, p. 537.

crime of aggression, and those States aiming to prevent the ICC from exercising jurisdiction over this crime, often by invoking the UN Security Council. To achieve this compromise, the provisions on the exercise of jurisdiction over the crime of aggression were separated into two distinct articles of the Rome Statute: Articles 15*bis* and 15*ter*. In the preceding pages, we analysed certain segments of these articles concerning the mechanisms through which the ICC may establish jurisdiction over the crime of aggression, depending on the source from which the initiative for prosecution arises. It remains to address the question of which States are legally affected by the amendments adopted in Kampala; that is, in which cases the ICC may exercise jurisdiction over this crime, depending on the territory where it was committed or the nationality of the perpetrator. Given that the Court's jurisdiction varies according to the competent initiating entity, we will first examine cases in which the initiative originates from a State Party to the Rome Statute or from the Prosecutor *proprio motu*, and subsequently consider situations in which it originates from the UN Security Council.

Before commencing this analysis, it is important to note that the provisions governing the temporal jurisdiction (*ratione temporis*) of the ICC with respect to the crime of aggression are identical regardless of the initiating entity. Specifically, it is provided that 'The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties' (Arts. 15*bis* (2) and 15*ter* (2) of the Rome Statute). It is further stipulated that 'The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute' (Arts 15*bis* (3) and 15*ter* (3) of the Rome Statute). In other words, for the ICC to exercise jurisdiction over the crime of aggression, both conditions must be satisfied : first, the amendments must be ratified or accepted by at least 30 States Parties; and second, the requisite decision must be made at the Assembly of States Parties session convened after 1 January 2017.[447]

447 This interpretation of the cumulative fulfilment of both conditions is clearly indicated in *Understanding* No. 3, which forms an integral part of Annex III to the Kampala Resolution (RC/Res. 6), adopting the amendments related to the crime of aggression. In the literature, the reasons for this postponed and doubly conditional entry into force of the amendments are explained by the fact that in 2010 the ICC was not yet ready to try this crime. In this regard, scholars also mention the need, arising from the principle of complementarity, to harmonise national criminal legislation with the amendments, as well as the pragmatic reason of gaining support from states initially opposed to the amendments: McDougall, 2021, pp. 325–326.

3.3.3.1 Effect of the Rules on the Jurisdiction of the International Criminal Court in Relation to the Crime of Aggression in Cases Covered by Art. 15*bis* of the Rome Statute

3.3.3.1.1 Effect With Respect to States Parties to the Rome Statute

The ICC may, on the basis of a referral by a Member State or on the initiative of the Prosecutor (*proprio motu*), 'exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years' (Art. 15*bis* (4) of the Rome Statute). The meaning and effect of this provision have been widely debated since its adoption. Nevertheless, the scope of the ICC's jurisdiction in relation to the crime of aggression ultimately depends on its interpretation. Under the general rule in Article 12(2) of the Rome Statute, the ICC may exercise jurisdiction if at least one of the following States is a party to the Statute:[448] (a) the State on whose territory the conduct in question occurred;[449] or (b) the State of which the accused is a national. It is therefore essential to determine which States are deemed to have accepted the ICC's jurisdiction under Article 15*bis* (4), that is, which States qualify as 'Member States' for the purposes of the Kampala Amendments to the Rome Statute.

In essence, two interpretations of this provision exist. According to the first, broader interpretation, the amendments produce legal effects for all Member States of the Rome Statute once they have entered into force in accordance with Article 15*bis* (2) and (3), irrespective of whether those States have ratified or otherwise accepted them, unless they have expressly declared, prior to the commission of a particular act of aggression on their territory or by their nationals, that they do not

448 The possibility of *ad hoc* acceptance of the ICC's jurisdiction by non-member states of the Rome Statute will be addressed later in this book.

449 Or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.

accept the ICC's jurisdiction (the so-called *opt-out* declaration).[450] This interpretation prevailed in legal scholarship immediately following the Kampala Conference.[451]

By contrast, the narrower interpretation holds that the amendments produce legal effects only *vis-à-vis* those States that have ratified or otherwise accepted them. On this view, a State Party to the Rome Statute need not *expressis verbis* exclude itself from the application of the provisions on the crime of aggression by depositing an *opt-out* declaration; its failure to ratify the amendments suffices to achieve that result.[452]

As previously noted, adopting one interpretation or the other produces different practical legal consequences. Consider a scenario in which both the aggressor State and the victim State of aggression are Parties to the Rome Statute,[453] but only the victim State has ratified the amendments, while the aggressor State has not, and has not explicitly *opted out* of the ICC's jurisdiction. Under a broader interpretation, the ICC could establish jurisdiction on two grounds: first, because the crime was committed on the territory of a State Party (the victim State); and second, because the crime was committed by a national of a State Party (the aggressor State). According to this interpretation, the ICC's jurisdiction would be excluded only if the aggressor State had deposited a statement exempting itself from the application of the amendments prior to committing the act of aggression. By contrast, under a narrower interpretation, the ICC would be unable to exercise jurisdiction over the

450 In legal literature, it is noted, among other things, as the 'weakest point of this solution' that it 'does not limit the time in which a state party may deposit this statement with the Registrar of the Court', and it is further observed that 'it appears that such a statement can be deposited at any time before the Court has begun to exercise its jurisdiction with regard to those responsible for the crime of aggression committed by that State': Etinski and Đajić and Tubić, 2017, p. 429.

451 In this sense: 'This jurisdiction shall apply to all States Parties, but each may be excluded by unilateral declaration', Ibid.; '…opt-out comes from a compromise solution that found middle ground in order to try to respect the different interests at stake. This meant that State Parties were not required to decide to opt-in, or ratify, the amendments before they could lodge the opt-out, an indicator that the Court would be able to exercise its jurisdiction over a State Party that has not ratified the amendments', Sarkin and Almeida, 2019, p. 534. Similarly, McDougall observes that Rome Statute member states effectively accepted ICC jurisdiction over the crime of aggression, one of the four crimes originally listed in Article 5 of the Rome Statute, and that a State Party wishing to avoid proceedings for this crime must do so explicitly via *opt-out*: McDougall, 2021, p. 352.

452 For example, Akande and Tzanakopoulos argue for a narrower interpretation: 'However, there are a number of reasons why the narrow view – namely, that the ICC has no jurisdiction with respect to aggression committed by an ICC state party that has not ratified or accepted the Kampala Amendments and has also not opted out of jurisdiction over aggression – is to be preferred': Akande and Tzanakopoulos, 2018, p. 955. For the arguments in favour of this interpretation, see: Ibid., pp. 955–959.

453 The assumption is that this example occurs after the amendments on the crime of aggression have come into force.

crime of aggression in this scenario,[454] since such an interpretation requires that the aggressor State must have ratified or otherwise accepted the amendments. If this narrower view were adopted, the provision concerning an *opt-out* statement would become practically redundant, rendering the possibility of making such a declaration effectively meaningless.[455]

From the foregoing, another argument in favour of a broader interpretation arises, which may be formulated as a rhetorical question: why was the possibility of an *opt-out* prescribed in the first place if the correct interpretation of the relevant provisions renders the entire *opt-out* mechanism meaningless? Although some scholars have attempted to reconcile the narrower interpretation of the provisions on the jurisdiction of the ICC in relation to the crime of aggression with the existence of an *opt-out*,[456] we consider these two positions irreconcilable. In our view, it is clear that the intention of the drafters of the Kampala amendments was to interpret the provisions on jurisdiction regarding the crime of aggression in the broader sense explained above.

During the Kampala Conference, and particularly in its aftermath, a concerted effort by certain states to influence the interpretation of the amendments concerning the ICC's jurisdiction over the crime of aggression emerged. Some commentators note that the narrower interpretation (according to which the amendments are binding only on those member states that have ratified or otherwise accepted them) originated with the United States and was subsequently followed by the United

454 Regardless, the ICC could undoubtedly establish jurisdiction over the other three crimes within its mandate (genocide, war crimes and crimes against humanity) when there is a procedurally relevant degree of suspicion that they were committed in the context of the same situation.

455 Some authors reach a similar conclusion. Thus, *inter alia*, Sarkin and Almeida, commenting on the New York resolution of 2017, which finally activated the ICC's jurisdiction over the crime of aggression, note that the exclusion of jurisdiction regarding nationals of member states that have not ratified the amendments, but which have not declared an *opt-out*, effectively renders the entire *opt-out* mechanism useless, a result that the creators of the Kampala amendments certainly did not intend: Sarkin and Almeida, 2019, pp. 547–548.

456 In this regard, some authors provide examples of situations in which a State Party to the Rome Statute ratifies the amendments but subsequently decides to submit an opt-out declaration exempting it from the jurisdiction of the ICC in respect of the crime of aggression. First, a State Party may seek to ensure that the 'threshold' of thirty ratifications required for the entry into force of the amendments is reached as soon as possible, allowing criminal proceedings to be conducted if the situation is reported by the UN Security Council and falls within the special jurisdictional regime, while simultaneously seeking to exclude itself from the ICC's competence in cases reported by other member states or from *proprio motu* investigations (Heinsch, 2010, p. 739). Second, a State Party may wish the ICC to have jurisdiction over any acts of aggression of which it is a victim, while excluding itself from ICC jurisdiction in respect of aggression it may commit against another member state (Akande and Tzanakopoulos, 2018, p. 958). Although such scenarios are formally possible, they are difficult to envisage in practice. More importantly for the present discussion, it is likely that the drafters of the *opt-out* mechanism did not contemplate these situations at the time of its creation.

Kingdom and France, the only two states that are simultaneously permanent members of the UN Security Council and parties to the Rome Statute.[457] Indeed, in the period between the Kampala Conference and the final decision on the entry into force of the amendments (during the so-called *facilitation process*), there was 'a political discussion between the larger States that would more likely be subject to the jurisdiction of the Court over the crime of aggression, and the smaller States, that were trying to get protection against the possibility of such an act'.[458] The former group favoured a narrower interpretation, whereas the latter advocated a broader reading of the amendments.

Meanwhile, Member States of the Rome Statute began to ratify the amendments. Liechtenstein was the first to do so on 8 May 2012, and Palestine was the thirtieth, on 26 June 2016.[459] This fulfilled one of the two conditions required for the amendments to come into force.[460] The second condition (adoption of a decision by the Assembly of States Parties to the Rome Statute) remained outstanding. As the amendments stipulated that such a decision could not be made before 1 January 2017,[461] it was decided that the final entry into force of the amendments on the crime of aggression would be considered at the Assembly of States Parties session scheduled for December 2017.

At the sixteenth session of the Assembly of States Parties to the Rome Statute, held in New York from 4 to 14 December 2017, Resolution No. 5 was adopted by consensus of the delegations present.[462] This activated the ICC's jurisdiction over the crime of aggression from 17 July 2018, the twentieth anniversary of the adoption of the Rome Statute (point 1 of the Resolution).[463] From that date, prosecution for the crime of aggression became formally possible before the ICC.

However, point 2 of the New York Resolution commits the Assembly of States Parties to the narrower interpretation of the provisions on jurisdiction over the

457 More on this: McDougall, 2021, pp. 318–319.

458 Sarkin and Almeida, 2019, p. 542. For further discussion of the post-Kampala negotiations, see Ibid., pp. 540–543.

459 Shortly after Palestine (whose statehood is disputed by part of the international community), the amendments were ratified by the Netherlands on 23 September 2016, thereby removing any doubt regarding the attainment of the thirty ratifications required for their entry into force. At the time of writing of this book, forty-nine states had ratified or otherwise accepted the amendments. Data are provided by the official United Nations Treaty Collection: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en, last accessed 18 December 2025.

460 See once again, Article 15*bis* (2) and Article 15*ter* (2) of the Rome Statute.

461 See once again, Article 15*bis* (3) and Article 15*ter* (3) of the Rome Statute.

462 ICC-ASP/16/Res.5: *Activation of the jurisdiction of the Court over the crime of aggression*.

463 For more details on the session in New York, and on the opposing views expressed at that time by the delegations of different countries, see: Sarkin and Almeida, 2019, pp. 543–546.

crime of aggression,[464] rendering the *opt-out* mechanism effectively redundant.[465] It provides that, 'in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments'. Accordingly, under the New York Resolution and on the basis of Article 15*bis* of the Rome Statute, both the aggressor state and the victim state must have ratified the amendments, and the aggressor state must not have deposited an *opt-out* statement after ratification, for the ICC to exercise jurisdiction.[466]

Although the legal effect, or the binding force, of this solution remains debatable in theory,[467] it reflects the reality of positive international law and the international community today. Even if one accepts the arguments of authors who maintain that the Resolution cannot derogate from the norms of the amendments themselves, it is reasonable to conclude that the ICC will, if not formally, then at

464 The literature notes that 'the confirmation of the narrow view and the restriction of the jurisdiction of the Court was the "price to pay" for the crime of aggression to finally become effective in the international criminal justice framework': Ibid., p. 547.

465 So far, only two States have deposited an *opt-out* statement: Kenya (30 November 2015) and Guatemala (2 February 2018). Data are cited according to the official website of the International Criminal Court: https://www.icc-cpi.int/resource-library#, last accessed 25 May 2025. It appears, therefore, that among Member States wishing to avoid the prosecution of their nationals by the ICC for the crime of aggression, those accepting a narrower interpretation constitute the clear majority. Otherwise, the number of *opt-out* statements would be considerably higher.

466 In this sense: McDougall, 2019, p. 326. The same author elsewhere observes that 'much of the ground won in Kampala was lost in New York in the context of the activation decision': Ibid., p. 73.

467 Namely, it is disputable whether a resolution of this type can be understood either as a subsequent treaty between the same contracting States on the interpretation of the treaty or on the application of its individual provisions, or as subsequent practice in the application of the treaty constituting an agreement between the contracting States on its interpretation, which, under the rules of the Vienna Convention on the Law of Treaties of 1969 (Art. 31(3)(a) and (b)), is to be 'taken into account' in interpreting the treaty itself (for further discussion on the interpretation of international treaties based on these rules, see: Ђорђевић, 2011, p. 380). The prevailing view is that the New York Resolution cannot be regarded as either a subsequent treaty on the interpretation of the Rome Statute or as subsequent practice constituting an agreement on interpretation. In this sense: Akande and Tzanakopoulos, 2018, pp. 946–947; McDougall, 2021, pp. 332–333. Furthermore, Akande and Tzanakopoulos correctly note that even if the resolution represents a subsequent treaty or subsequent practice, it is only one of the various means of interpreting an international treaty under Article 31 of the Vienna Convention and does not constitute a legally binding interpretation: Akande and Tzanakopoulos, 2018, pp. 947–948. Similarly: McDougall, 2021, p. 334.

least factually, adopt the interpretation set out in the Resolution in its eventual jurisprudence on the crime of aggression.[468]

3.3.3.1.2 Effect With Respect to Non-Member States of the Rome Statute

Article 15*bis* (5) of the Rome Statute stipulates that 'In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory'. In legal theory, it has been observed that this rule represents 'a complete reversal of the general principle of how jurisdiction by the ICC is exercised'.[469] Indeed, under the general rule in Article 12(1) of the Rome Statute, alternative conditions for establishing the jurisdiction of the ICC (when a situation has been referred by a member state or an investigation has been initiated by the Prosecutor *proprio motu*) require that the crime within the jurisdiction of the ICC was either committed on the territory of a member state or by a national of a member state.[470]

Article 15*bis* (5) significantly 'tightens' these conditions with respect to the crime of aggression. For instance, if the general jurisdictional regime under Article 12(2) of the Rome Statute applied to this crime, the ICC could exercise jurisdiction if, for example, a national of a member state ordered an invasion of a non-member state. However, according to the specific rules for establishing ICC jurisdiction over the crime of aggression in Article 15*bis* (5), this would not be permissible because the crime was committed on the territory of a state that is not a party to the Rome Statute.[471]

3.3.3.1.3 The (Im)Possibility of Establishing an ad hoc Jurisdiction of the International Criminal Court for the Crime of Aggression

Article 12(3) of the Rome Statute provides that a state which is not a party to the Statute may accept the jurisdiction of the ICC on an *ad hoc* basis, namely in relation to a specific crime or crimes, by lodging a declaration with the Registrar. This

468 This position is also recognised by other authors: Akande and Tzanakopoulos, 2018, p. 949. It is noteworthy that, as observed, the cited authors advocate a narrower interpretation while maintaining that it does not derive from the binding effect of the New York Resolution, but from other reasons discussed earlier in this book.

469 Sarkin and Almeida, 2019, p. 536.

470 For the ICC to establish jurisdiction under these general rules, it is sufficient that at least one of the two conditions is met. It is, of course, possible that both conditions are fulfilled in a particular case: that the perpetrator is a national of a Member State and that the crime is committed on the territory of that or another Member State.

471 In this regard, Kreß and von Holzendorff note that Article 15*bis* (5) adds to Article 15*bis* (4) a further limitation, in that the Court will not be able to exercise jurisdiction over an alleged crime of aggression committed by a State that has ratified the amendments on aggression without declaring an *opt-out* against a State that is not a member of the Rome Statute: Kreß and von Holtzendorff, 2010, p. 1213.

acceptance would permit the prosecution of such crimes before the ICC, either at the initiative of a member state[472] or at the initiative of the Prosecutor *proprio motu*.

However, we contend that this mechanism cannot apply to the crime of aggression. Article 15*bis* (5) of the Rome Statute explicitly precludes the possibility of ICC jurisdiction where the crime of aggression is committed on the territory of, or by a national of, a non-member state. This provision thus operates as a rule *lex specialis* with respect to the *ad hoc* acceptance of ICC jurisdiction under Article 12(3), which functions as a rule *lex generalis*.[473]

3.3.3.2 Effect of the Rules on the Jurisdiction of the International Criminal Court in Relation to the Crime of Aggression in Cases Covered by Article 15ter of the Rome Statute

As noted, Article 15*ter* of the Rome Statute regulates the exercise of the ICC's jurisdiction in relation to the crime of aggression in accordance with Article 13(1) (b) of the Rome Statute, which provides for the possibility of the ICC exercising jurisdiction on the basis of a situation referred to the Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter. Unlike situations reported by a State Party to the Rome Statute, or investigations initiated by the Prosecutor *proprio motu*, the referral of a situation by the Security Council does not trigger the application of Article 12(2) of the Rome Statute, which prescribes alternative conditions for establishing jurisdiction in a specific case, namely, the territory or nationality of a State Party. Moreover, Article 15*ter* does not incorporate the provisions of Article 15*bis* (4) and (5), which, in relation to the general rules of Article 12(2), further restrict the ICC's jurisdiction over the crime of aggression when a situation is referred by a State Party or investigated *proprio motu* by the Prosecutor.

Consequently, when the Security Council refers a situation in which there are reasonable grounds to believe that a crime of aggression has been committed, no restrictions apply under the general jurisdictional regime. It is irrelevant whether any State Party has ratified the amendments on the crime of aggression or lodged an *opt-out* statement, and it is equally irrelevant where or by whom the alleged crime was committed.[474] On this basis, the ICC may establish and exercise jurisdiction over a crime of aggression arising from an act of aggression committed by a non-State Party against another non-State Party.

472 A State accepting the ICC's jurisdiction on an *ad hoc* basis cannot refer a situation 'on its own' under Article 14 of the Rome Statute; a referral must be made either by a Rome Statute Member State or by the Prosecutor *proprio motu*.

473 In this sense, see also: Akande and Tzanakopoulos, 2018, pp. 954–955; McDougall, 2021, p. 336. The cited authors further note that such *ad hoc* acceptance of ICC jurisdiction places non-member States in a more favourable position than Member States: Akande and Tzanakopoulos, 2018, p. 955; McDougall, 2021, p. 336.

474 On the other hand, see Ibid., p. 348.

We contend that this outcome is fundamentally flawed for several reasons. First, it heavily favours the permanent members of the Security Council and their closest allies, whose leaders are, *de facto*, highly unlikely ever to be subject to ICC investigative actions under this mechanism. Conversely, all other states and their nationals remain subject to the discretion of the Security Council. The permanent members may, if their interests coincide in a particular case, refer a situation to the ICC concerning a State that has explicitly expressed its decision not to be subject to the ICC's jurisdiction for the crime of aggression, while none of the five permanent members have submitted themselves to such jurisdiction. This creates a situation that is potentially highly hypocritical. This possibility recalls the Security Council's establishment of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively.[475] Although the ICC's interference with state sovereignty is considerably less than in those historical examples, it remains unjustified. Even if the Prosecutor determines that no factual basis exists for further proceedings, the state against which the Security Council referral is directed (and its nationals) will remain publicly stigmatised and may suffer various negative consequences for an extended period. For these reasons, we argue that the Security Council, a body in which legal inequality is inherent, should not play any role in initiating criminal proceedings before the ICC, either in relation to the crime of aggression or more generally.[476]

475 In this regard, McDougall observes that the UN Security Council's unrestricted ability to refer situations to the ICC is 'premised on the general acceptance that under Chapter VII of the UN Charter the Council has the ability to establish ad hoc tribunals for the prosecution of crimes absent the consent of the States involved': Ibid., p. 349. We fundamentally disagree with this interpretation of the UN Charter and refer readers to our earlier paper in which we, along with other scholars, enumerate and explain arguments against it: Škundrić, 2021, pp. 26–40.

476 In other words, it is entirely unacceptable that, in the sphere of criminal law, certain (potential) addressees may receive *a priori* preferential treatment over others. The UN Security Council plays a crucial role in public international law, primarily reflected in its duty to maintain international peace. In this context, inequalities in its composition may be justified. However, it is wholly unjustifiable that some *individuals* can be *prosecuted* for the crime of aggression solely because they are nationals of particular states (contrary to the will of those states), while others will never face prosecution for the same crime because they are nationals of states that are permanent members of the Security Council. It should be emphasised that our analysis here is exclusively legal, focusing on criminal law, and does not consider factors within the realm of *realpolitik*.

3.4 The Future of the Crime of Aggression in International Criminal Law – International Criminal Court and the Special Tribunal for the Crime of Aggression Against Ukraine

A little more than seven decades after the trials for crimes against peace conducted following the Second World War, in 2018, an international judicial body finally acquired active jurisdiction over the crime of aggression, a crime that can be considered a form of 'legal successor' to the concept of crimes against peace. However, the possibility of conducting criminal proceedings before the ICC for this offence is legally very limited, and these limitations operate on several levels. The first level of limitation concerns substantive criminal law. By the very construction of the crime of aggression in the Rome Statute, and particularly its objective elements, the scope of criminal liability is narrowly defined. Notably, the requirement that the act of aggression to which the commission of the crime of aggression is directed must, by its character, gravity, and scale, constitute a manifest violation of the UN Charter significantly restricts the 'criminal zone'. The second level of limitation is procedural and formal, relating to the exercise of the ICC's jurisdiction over this crime. The Court has no jurisdiction if either the victim state or the aggressor state is not a party to the Rome Statute. Furthermore, the ICC may exercise jurisdiction only where an act of aggression has occurred between states that have ratified, or otherwise accepted, the Kampala Amendments and have not submitted an *opt-out* declaration. Considering that, among the states that have ratified the amendments, very few (with some exceptions) have undertaken acts of aggression after the Second World War,[477] it appears that the likelihood of this crime being prosecuted before the ICC in the near future is extremely low.

One contemporary example illustrates these limitations. Since 2013/2014, the conflict in Eastern Ukraine has been ongoing and escalated into a full-scale armed conflict between Ukraine and the Russian Federation in early 2022. At both stages, neither Russia nor Ukraine were parties to the Rome Statute. Ukraine, however, made an *ad hoc* acceptance of the ICC's jurisdiction over its territory under Article 12(3) of the Rome Statute through two separate declarations issued in 2014[478] and 2015.[479] In subsequent years, the ICC Prosecutor has conducted 'preliminary

477 For example, the amendments have not been ratified by France or the United Kingdom. Moreover, a substantial number of African countries (whose nationals have been subject to the overwhelming majority of criminal proceedings before the ICC to date) have also not ratified the amendments.

478 For the text of the first declaration see: https://www.icccpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf, last access: 27 May 2025.

479 For the text of the second declaration see: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine, last access: 27 May 2025.

investigations"[480] in Ukraine. Following the further escalation of the conflict in 2022, 38 Rome Statute member states, later joined by additional states, reported the situation in Ukraine under Article 14 of the Rome Statute, prompting the Prosecutor to open a formal investigation.[481]

However, this investigation, in accordance with Ukraine's second statement on its acceptance of the ICC's jurisdiction, was limited to war crimes and crimes against humanity.[482] Consequently, within its scope, the ICC Prosecutor cannot investigate the crime of aggression, even if he considers that there are reasonable grounds to believe that such a crime has been committed in the context of the situation in Ukraine. This conclusion remains unchanged despite Ukraine's subsequent accession to the Rome Statute *in toto*, including the Kampala amendments concerning the crime of aggression.[483] Specifically, under the narrower interpretation of the Kampala amendments, adopted at the 2017 New York session of the Assembly of States Parties to the ICC, the Court can exercise jurisdiction over the crime of aggression only if both the alleged 'victim state' and the 'alleged aggressor state' have ratified or otherwise adopted the amendments. This requirement is not met, as Russia has ratified neither the Rome Statute nor its Kampala amendments. Therefore, at the time of completing this book, it is legally impossible for the ICC

480 This is a phase that does not constitute an investigation in the formal sense, but is analogous to what some national criminal legal systems, including Serbian criminal procedural law, regard as a pre-investigation procedure. More on this: Škulić, 2020a, pp. 399–400.

481 For more on the situation in Ukraine before the ICC, see: Radojčić, 2023, pp. 490–491.

482 Data according to the official website of the International Criminal Court: https://www.icc-cpi.int/ukraine. Last accessed 27 May 2025.

483 Ukraine ratified the Rome Statute, including the Kampala amendments, on 24 October 2024. The Statute entered into force for that State on 1 January 2025. See https://asp.icc-cpi.int/states-parties/eastern-european-states/ukraine, last accessed 27 May 2025, and https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en, last accessed 27 May 2025.

to exercise jurisdiction over the crime of aggression in the context of the situation in Ukraine.[484]

Recognition of this limitation led to the initiation of a process to establish a Special International Tribunal for the crime of aggression in relation to the war in Ukraine.[485]

On 25 June 2025, in Strasbourg, the Council of Europe and Ukraine signed an Agreement on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine (the Special Tribunal),[486] creating a tribunal to 'investigate, prosecute and try persons who bear the greatest responsibility for the crime of aggression against Ukraine'.[487] The Statute of the Special Tribunal, annexed to the Agreement,[488] provides in Article 1 that the Tribunal 'shall have the power to investigate, prosecute and try persons who bear the greatest responsibility for the crime of aggression against Ukraine'. Regarding the crime of aggression itself, Article 2 of the Statute defines it as follows:

484 Some authors claim that 'the crime of aggression, in terms of the content of aggression and its legal definition, has become an integral part and reflects customary international law', and note that in this sense 'a part of legal theory, but also legal practice, believes that the jurisdiction of the ICC in relation to the perpetrators of this international crime can be established': Novaković, 2023, p. 78. First, as noted in several places in this book, it cannot be said that the crime of aggression, as prescribed in the Rome Statute, forms part of general customary international law. It is a crime contained in an international treaty that still represents particular international law. The only assertion that can be made is that crimes against peace, in their variant relating to wars of aggression, as contained in the Charters of the IMTN and IMTT, have become part of general customary international law. However, as also noted in several places in this book, crimes against peace tried before the IMTN and IMTT differ in content from the crime of aggression prescribed by the Rome Statute. Further, even if the question of whether the crime of aggression forms part of general customary international law is disregarded, it remains indisputable that the ICC does not have jurisdiction over this crime in the context of the situation in Ukraine, for reasons already mentioned above. Finally, the mere fact that an international crime is part of general international criminal law, and even that it constitutes a norm ius cogens (such as genocide), is irrelevant to the question of whether the ICC would have jurisdiction over that crime in a particular case; such jurisdiction can only be established in accordance with the relevant provisions of the Rome Statute governing jurisdiction.

485 European foreign ministers approved the creation of a special tribunal for the crime of aggression against Ukraine during a meeting in Lviv on 9 May. See more at: European ministers approve special tribunal to prosecute Russia's aggression against Ukraine, last accessed 30 May 2025.

486 The text of the Agreement is available here: https://search.coe.int/cm#{%22CoEIdentifier%22:[%220900001680b678c9%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}, last accessed 9 December 2025.

487 Article 1(1) of the Agreement.

488 See Article 1(2) of the Agreement. The text of the Statute of the Special Tribunal is available here: https://search.coe.int/cm#{%22CoEIdentifier%22:[%220900001680b678ca%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}, last accessed 9 December 2025.

> '(1) For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
> (2) For the purpose of paragraph 1 of this article, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.
> (3) For the purpose of determining whether an act of aggression, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, the Special Tribunal shall take into account United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 and all relevant United Nations General Assembly resolutions with respect to Ukraine, including those recited in the preamble of the Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine (hereinafter "Agreement")
> (4) For the purpose of this Statute, in the context of the aggression against Ukraine, an act of aggression which is determined by its character, gravity and scale to constitute a manifest violation of the Charter of the United Nations, shall also be deemed to constitute a war of aggression'.

Several observations can be made regarding this definition. First, its opening paragraph is identical to the first paragraph of the definition of the crime of aggression contained within the Rome Statute; consequently, all discussions in the preceding sections of this book concerning the elements of the crime of aggression under Article 8*bis* (1) of the Rome Statute apply equally here. Similarly, the first sentence of paragraph 2 of the Special Tribunal's definition mirrors the first sentence of Article 8*bis* (2) of the Rome Statute.

However, the remainder of the definition in the Statute of the Special Tribunal differs from that in the Rome Statute. Specifically, the Rome Statute continues with the provision that 'any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression', followed by a list of seven concrete acts of aggression.[489] In contrast, the Statute of the Special Tribunal provides that:

'for the purpose of determining whether an act of aggression, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, the Special Tribunal shall take into account United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 and all relevant United Nations General Assembly resolutions with respect to Ukraine, including those recited in

489 See Article 8*bis* (2) of the Rome Statute.

the preamble of the Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine (hereinafter "Agreement")'.[490]

The Statute of the Special Tribunal thus omits the explicit enumeration of particular acts of aggression that could, if all other conditions are satisfied, serve as a basis for individual criminal responsibility for the crime of aggression. From a purely criminal law perspective, this could be regarded as a regression relative to the approach adopted in Kampala. The definition in the Special Tribunal Statute is consequently less precise than that in the Rome Statute, thereby moving away from the principle of legality in criminal law, specifically its *lex certa* component, which requires that 'the norms of criminal law must be as precise as possible and particularly the norms which create concrete incriminations and prescribe penalties for them'.[491]

Another notable modification in the Special Tribunal's definition, compared with that relevant for the ICC, is the equalisation of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the UN Charter, with a war of aggression. This equalisation is problematic because of conceptual distinctions between an act of aggression and a war of aggression.[492] As has been reiterated in several sections of this book, the term 'act of aggression' is significantly broader than 'war of aggression'; the former encompasses unlawful forms of threat or use of armed force between states that do not necessarily amount to a war of aggression, while the latter is limited to situations in which a formal state of war exists between two states. It appears that the authors of the definition in the Statute of the Special Tribunal recognised this distinction and included the equalisation because Ukrainian law continues to focus on the incrimination of 'aggressive wars'

490 Article 2(3) of the Statute of the Special Tribunal.
491 Škulić, 2010, p. 80.
492 See Article 2 (4) of the Statute of the Special Tribunal.

and does not provide a substantive definition of the crime of aggression comparable either to that in the Statute of the Special Tribunal or the Rome Statute.[493]

Ukraine, as a sovereign state and a subject of international law, possesses, *in abstracto*, the right to transfer the exercise of any part of its sovereignty, including its jurisdiction in criminal matters, to an international judicial body. Nevertheless, the *in concreto* jurisdiction of the Special Tribunal, as established through the Agreement with the Council of Europe, is at least contentious, due to the inherent difficulties associated with criminal jurisdiction in this particular context.

First given that both the founding Agreement[494] of the Special Tribunal and its Statute[495] stipulate that the Tribunal is to investigate, prosecute, and try persons 'who bear the greatest responsibility for the crime of aggression against Ukraine', and bearing in mind the leadership criterion contained in the definition of the crime of aggression,[496] it is evident that the creators of the Tribunal intended to criminally prosecute the political and military leadership of the Russian Federation, and possibly of Belarus. The realisation of this intention, however, is problematic for two reasons. The first is factual: it is difficult to envisage that individuals representing the political and military leadership of Russia during its still-ongoing war with Ukraine (as of the submission of this book for printing) would, in any realistic scenario, come into the custody of the Tribunal. The second is legal and arises from the immunities granted to certain persons under international law.

In criminal law, international law recognises two types of immunity. The first is procedural or formal immunity (immunity *ratione personae*), which bars

493 Until recently, the domestic criminal law of Ukraine contained a criminal offence named 'Planning, preparing, unleashing, and waging a war of aggression' (Art. 437 of the Ukrainian Criminal Code), which differed from the crime of aggression under the Rome Statute or the Statute of the Special Tribunal. Legal scholars noted that 'there is a difference between these norms of international criminal law and the national criminal law of Ukraine: the criminal law of Ukraine does not contain a clear provision on which persons can be the subject of the crime of aggression': Hazdayka-Vasylyshyn, 2024, p. 173. In other words, Ukrainian criminal law did not explicitly include the 'leadership criterion', a key feature of the ICC definition of the crime of aggression. The 2025 amendments to the Criminal Code of Ukraine (available here: https://zakon.rada.gov.ua/laws/show/4012-20#n33, last accessed 11 December 2025) renamed the offence as the 'crime of aggression' but did not alter its substantive definition, although they prescribed harsher penalties. Consequently, Article 437 of the Ukrainian Criminal Code remains more closely aligned with Nuremberg and Tokyo law than with the Rome Statute or the Special Tribunal regarding the unlawful threat or use of force in international relations.
Notably, Ukrainian courts already have extensive jurisprudence regarding the criminal offence in Article 437 of the Ukrainian Criminal Code, with more than twenty sentences handed down between 2013 and 2023: Ibid., p. 172.

494 See Article 1(1) of the Agreement.

495 See Article 1 of the Statute.

496 See Article 2 (1) of the Statute of the Special Tribunal.

the criminal prosecution of certain high-ranking officials of a foreign state.[497] The second, substantive immunity (immunity *ratione materiae*), operates to render officials not criminally responsible for acts committed while acting on behalf of the state they represent.[498, 499] As Masumbe notes, 'immunity ratione materiae attaches to official acts that are exercised in accordance with certain state policy by using the apparatus of the state'.[500] Procedural immunity (*ratione personae*) is temporary, lasting only for the duration of the office held; once the official's mandate ends, this form of immunity ceases.[501] Substantive immunity, by contrast, is effectively permanent: a person cannot be held criminally responsible for acts performed in their official capacity even after leaving office. In other words, 'this type of immunity constitutes (or, perhaps more appropriately, gives effect to) a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state',[502] and 'immunity *ratione materiae* protects an individual for official acts performed on behalf of his/her state'.[503]

These rules regarding immunities form part of general customary international law.[504] A state may, if it chooses, depart from these rules by expressing its will freely, for example, by concluding a treaty with other states in which it declares that the general regime of immunities does not apply to certain crimes. However, under general rules of the international law of treaties, such a treaty binds only the

497 In its *Arrest Warrant* case, the International Court of Justice (ICJ) noted that 'Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility': *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, paragraph 60.

498 'As this type of immunity attaches to the official act rather than the status of the official, it may be relied on by all who have acted on behalf of the state with respect to their official acts': Akande and Shah, 2011, p. 825. The ratione materiae immunity 'is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state': Cassese, 2002, p. 862.

499 For a detailed theoretical analysis of the dichotomy of *ratione personae* and *ratione materiae*, see Dinstein, 1966.

500 Masumbe, 2021, p. 1.

501 'The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those state officials who represent the state at the international level': Akande and Shah, 2011, p. 818. The ratione personae immunity 'is predicated on the notion that any activity of a head of state or government, or diplomatic agent or foreign minister must be immune from foreign jurisdiction to avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the pretext of dealing with an exclusively private act': Cassese, 2002, p. 862.

502 Akande and Shah, 2011, p. 826.

503 Shi, 2021, p. 229.

504 See: Akande, 2004, p. 409; Summers, 2007, pp. 461–468; Akande and Shah, 2011, p. 818.

parties to it (*inter partes* effect).[505] In relation to states that are not parties to such a treaty or to any other instrument limiting immunities for their officials, the general regime of immunities under customary international law continues to apply.[506]

This also applies to international criminal courts and tribunals. As Akande correctly observes, 'it is not an adequate response to assert that those immunities are conferred by international law only with respect to interstate relations and in proceedings before national courts'.[507] 'Whether or not those wanted for prosecution by an international criminal tribunal may rely on international law immunities to exempt themselves from its jurisdiction depends, first, on the provisions of the statute establishing that tribunal',[508] and, second and more importantly, on 'the nature of the tribunal: how it was established and whether the state of the official sought to be tried is bound by the instrument establishing the tribunal'.[509] The original jurisdiction in criminal matters belongs to states as part of their sovereignty. States may freely choose to transfer part of that jurisdiction for certain crimes to international judicial bodies. They are also free to exclude the effects of international immunities in criminal law in relation to their own officials to ensure that proceedings before international criminal courts or tribunals are effective. However, as the rules of general customary international law on immunities bind all states in their mutual relations, no state can empower an international criminal court or tribunal it has established consensually with other states, or to which it has voluntarily acceded, to disregard those rules in relation to third states; that is, states that have not expressed their will to transfer part of their criminal jurisdiction to the concrete international criminal court or tribunal, or that have not excluded the effects of these immunities in relation to their officials. In other words, no state can transfer more rights (namely, the right to disregard immunities) to another (that is, the international criminal court or tribunal) than it itself possesses, *nemo plus iuris transfere ad alium potest quam ipse habeat*. Accordingly, it is incorrect to assert in abstracto that ratione personae and *ratione materiae* immunities do not apply before international criminal courts or tribunals simply because of their international character. Rather, such an assessment, whether these immunities do or do not apply, must be made *in concreto*, taking into account all relevant circumstances regarding the particular international criminal court or tribunal.

All of this indicates that, with respect to the Russian Federation, its officials, and at least its Head of State, Head of Government, and Minister of Foreign Affairs,

505 See Article 34 of the 1969 Vienna Convention on the Law of the Treaties.
506 Gajić reaches the same conclusion regarding the immunity of a Head of State in the context of the ICC: '…international legal rules concerning the immunity of a Head of State are rules of customary international law that might be modified by international treaty binding only State parties to the treaty in their mutual relations': Gajić, 2023, p. 62. Similarly: Milisavljević and Novaković, 2020, p. 45.
507 Akande, 2004, p. 417.
508 Ibid., p. 417.
509 Ibid., p. 417.

unquestionably enjoy procedural (*ratione personae*) immunity from criminal prosecution for the crime of aggression. The creators of the Statute of the Special Tribunal appear to have been aware of this legal reality, as the Statute does not include a rule on the irrelevance of procedural immunity, unlike the Rome Statute. [510, 511] Nevertheless, the Special Tribunal Statute contains the following rule:

> 'For the purpose of this Statute, the official position of any accused person at the time of the alleged commission of a crime, whether as head of State or government, a member of a government or parliament, an elected representative or a government official, shall not relieve such person of criminal responsibility nor mitigate punishment'.[512]

Therefore, the Statute of the Special Tribunal seeks only to limit the application of substantive (*ratione materiae*) immunity in relation to the crime of aggression. The question remains, however, whether the drafters of the Statute, namely the Council of Europe and Ukraine, possessed the authority to modify the effects of such immunity under general international law in relation to third states, in this instance, Russia.

To address this question, it is first necessary to note that, although substantial (*ratione materiae*) immunity remains part of general customary international law, it may no longer be considered absolute; certain international crimes may fall outside its scope. [513] Akande and Shah observe that 'the best explanation for the absence of immunity *ratione materiae* in cases concerning international crimes is that the principle is necessarily in conflict with more recent rules of international law and it is the older rule of immunity which must yield'.[514] This appears to be the case,

510 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person', Article 27(2) of the Rome Statute.

511 Moreover, the Statute of the Special Tribunal in Article 23(5) prescribes that 'Where the indictment concerns a head of State, head of government or minister of foreign affairs, the Pre-Trial Judge shall not confirm the indictment and shall order the proceedings be suspended until that person no longer holds that office or an appropriate waiver has been presented to the Special Tribunal'. This rule recognises procedural (*ratione personae*) immunity of persons in those positions under international law.

512 Article 4(2) of the Statute of the Special Tribunal. The same effect is provided in Article 23(4) of the Statute of the Special Tribunal.

513 As Akande and Shah state, 'Despite the fact that international crimes when committed by state officials in their official capacity are to be categorized as official acts, there are good reasons for arguing that international law is now at a stage where immunity *ratione materiae* does not apply in relation to such crimes': Akande and Shah, 2011, p. 839. Similarly, Milisavljević and Novaković regard the possibility of holding the highest state officials criminally responsible for international crimes as a 'reasonable exception from the absolute immunity in criminal law': Milisavljević and Novaković, 2020, p. 32.

514 Akande and Shah, 2011, p. 840.

for example, with genocide, crimes against humanity, and certain war crimes.[515] However, the applicability of this principle to the crime of aggression remains unclear. Historically, trials for crimes against peace were conducted against individuals who indisputably enjoyed such immunity under international law. Notable examples include the Japanese Prime Minister during most of the Second World War, Hideki Tojo, and the German Minister of Foreign Affairs of the same period, Joachim von Ribbentrop, in the post-war trials. These, however, concerned crimes against peace rather than the crime of aggression as defined in the Statute of the Special Tribunal and, similarly though not identically, in the Rome Statute. As noted elsewhere in this book, a significant distinction exists between these two offences. It is also unfounded to claim that the crime of aggression constitutes part of general customary international law, given that a substantial portion of the international community refuses to recognise it as an international crime and that no jurisprudence exists on the matter. By contrast, crimes against peace, as *inter alia* prosecuted before the IMTN and IMTT and subsequently reflected in the Nuremberg Principles, are unquestionably part of general customary international law.

The Statute of the Special Tribunal's equalisation of an act of aggression, which, by its character, gravity, and scale, constitutes a manifest violation of the UN Charter, with a war of aggression, cannot bridge the conceptual gap between the modern crime of aggression and the historical concept of crimes against peace. First, this equalisation is atypical in criminal law. Conceptually, an 'act of aggression' is broader than a 'war of aggression'; an unlawful use of force between states may qualify as an act of aggression, manifestly violating the UN Charter without reaching the threshold of a war of aggression. Second, even if such equalisation is accepted, other elements of the crime of aggression differ from those of crimes against peace, beyond the criterion concerning the unlawful threat or use of force

515 One of the most prominent proponents of the view that immunity *ratione materiae* no longer applies to the international crimes of genocide, crimes against humanity, and war crimes, and that such an exception has become part of general customary international law, is Cassese, see: Cassese, 2002, pp. 870–874. Nevertheless, some authors remain critical of the notion that immunity *ratione materiae* does not apply to certain international crimes. For example: 'Only on the most skewed approach to the identification of rules of customary international law could one currently discern any form of "international crime" exception to the immunity *ratione materiae* from foreign criminal jurisdiction from which a state is entitled to see its officials and ex-officials benefit. Indeed, there is nothing even approaching the widespread and representative concordance of state practice and concomitant *opinio juris* necessary for a rule of customary international law. Nor, for that matter, does practice or international jurisprudence exhibit any trend in favour of an "international crime" exception to immunity *ratione materiae*': O'Keefe, 2015, p. 168. Similarly, Murphy argues that state practice demonstrating that such exceptions from the immunity *ratione materiae* are part of *lex lata* is clearly lacking: Murphy, 2018, pp. 4–7. Shi concurs: 'From a positivist perspective, however, it is difficult to maintain that an exception to immunity *ratione materiae* based on crimes in international law exists in customary rules': Shi, 2021, p. 233; see also Ibid., p. 235.

by a state. Notably, the crime of aggression explicitly incorporates a leadership requirement, which crimes against peace do not.

The problematic nature of including the crime of aggression among the international crimes to which substantive (*ratione materiae*) immunity does not apply is also reflected in the recent work of the International Law Commission. The Commission did not include the crime of aggression in the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, adopted on first reading in 2022. Article 7(1) of the Draft Articles provides that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction does not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; and (f) enforced disappearance.[516] Moreover, in its Commentary to the Draft Articles, the Commission stated that:

> 'The Commission decided not to include the crime of aggression at this time, even though it too is included in article 5 of the Rome Statute and is characterized as a crime under the amendments adopted at the Review Conference of the Rome Statute held in Kampala in 2010. The Commission took this decision in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of crime, given that it constitutes a "crime of leaders"'.[517]

The International Law Commission's reluctance to include the crime of aggression in Article 7(1) of the Draft Articles further demonstrates that the crime of aggression cannot presently be regarded as part of general customary international law.[518] *A fortiori,* it cannot be considered one of the crimes in respect of which, under customary international law, the effects of substantive (*ratione materiae*) immunity no longer apply, as may be the case with genocide, crimes against humanity, and war crimes.

516 The inclusion of Article 7 in the Draft Articles has attracted criticism in legal theory. Some authors have commented that the 'Draft Article 7 is a new rule in international law with no legal basis': Masumbe, 2021, p. 8.

517 Commentary on Article 7 of the Draft Articles, p. 239 (available at: https://legal.un.org/ilc/reports/2022/english/chp6.pdf, last accessed 16 December 2025). Nevertheless, the latest report of the Special Rapporteur, issued in 2025, includes the crime of aggression in the list of international crimes in respect of which substantive (*ratione materiae*) immunity shall apply. See *Second report on immunity of State officials from foreign criminal jurisdiction by Claudio Grossman Guiloff*, 29 January 2025, p. 18. Available at: https://documents.un.org/doc/undoc/gen/g25/012/32/pdf/g2501232.pdf, last accessed 10 December 2025.

518 Such caution is also apparent in doctrinal works by authors who strongly advocate the view that contemporary general customary international law exempts certain international crimes from *ratione materiae* immunity. For instance, when providing a list of international crimes for which he argues that *ratione materiae* immunity no longer applies, Cassese notably omits the crime of aggression: Cassese, 2002, p. 864.

Accordingly, under general customary international law, both procedural (*ratione personae*) and substantive (*ratione materiae*) immunities apply to the Russian Federation and its relevant officials in relation to the crime of aggression as defined in the Statute of the Special Tribunal. Russia is not a party to the agreement establishing the Special Tribunal and is therefore not bound by its provisions, including the rule on the irrelevance of official capacity.[519] Nor is Russia a party to the Rome Statute; accordingly, its provisions on immunities do not apply.[520] Consequently, the Russian Head of State, Head of Government, and Minister for Foreign Affairs enjoy procedural (*ratione personae*) immunity from prosecution before the Special Tribunal. In addition, Russian State officials are not criminally liable for acts performed in an official capacity and therefore benefit from substantive (*ratione materiae*) immunity in relation to the crime of aggression as defined in the Statute of the Special Tribunal.

It follows that, in international criminal law, including within the legal framework of the ICC, the crime of aggression will, unless there is a fundamental shift in international relations, remain *de facto* a *nudum ius*. The States that have ratified the Kampala amendments are predominantly European and South American and have, for many decades, rarely engaged in armed conflict with other States.[521] For these reasons, we cannot agree with the view that the activation of the Rome Statute's provisions on the crime of aggression should be assessed predominantly positively.[522] It is preferable to adopt a neutral assessment: this development is unlikely to produce any fundamental change in international relations and, in particular, will not substantially enhance the protection of the legal interest underlying this offence, namely international peace.[523]

519 See Article 4(2) of the Statute of the Special Tribunal.

520 See Article 27 of the Rome Statute.

521 Similarly, Gašparić: 'Regardless of the subsequent definition of the crime of aggression as an umbrella international crime against peace, without ratification by the leading powers, there will be no guarantee of justice being administered in relation to the potential culprits. The maximum that the ICC can provide in the current framework is to prosecute officials of less influential states': Gašparić, 2023, p. 732.

522 For example, McDougall states: 'I think there is room to hope that the crime of aggression will be a meaningful addition to the ICC's jurisdiction' (McDougall, 2021, p. 399).

523 Some authors note that 'the regime as it stands does not really provide much protection': Sarkin and Almeida, 2019, p. 549. Conversely, other commentators argue that activating the crime of aggression could still lead to a minor disturbance of international peace: 'States subject to the crime of aggression may be less willing to use force that has not been authorised by the Security Council or is not a clear example of self-defence. If countries like Canada and Australia join countries like Germany and the Netherlands in subjecting themselves to the ICC's jurisdiction over the crime of aggression, it could become far more difficult for the United States, the most active proponent of coalitions of the willing in the twenty-first century, to build such coalitions in the absence of Security Council authorisation': McDougall, 2021, p. 81.

4

Unlawful Use of Force in International Relations and Domestic Criminal Law

The crime of aggression, together with crimes against peace as its historical 'precursor', originated and developed in international law. Soon after its emergence, states began to incorporate these crimes into their domestic legal systems. However, the designation of the offence, as well as its definition and constituent elements, has varied across national criminal legislation. A detailed analysis of the crime of aggression in each domestic legal system falls beyond the scope of this monograph.[524] This chapter, therefore, addresses three principal issues. First, it examines the appropriateness of applying the principle of complementarity, a fundamental principle of international criminal law, to this offence. Second, it considers the possibility and justification for applying the principle of universal criminal jurisdiction to the crime of aggression. Finally, it analyses the criminal offence of 'aggressive war' as prescribed in Article 386 of the Criminal Code of the Republic of Serbia.[525]

4.1 The Crime of Aggression and the Principle of Complementarity

One of the central principles of positive International Criminal Law, or at least of the law of the ICC, is the principle of complementarity.[526] In the theory of Interna-

524 For a detailed comparative and historical overview of the incrimination of aggression, war of aggression, and crimes against peace, see ibid., pp. 169–200.

525 The author chose to analyse the criminal offence of aggressive war in the legislation of Serbia for two reasons. First, the author is from the Republic of Serbia, which renders the choice practically relevant. Second, although Serbia is a member state of the Rome Statute, it has not ratified the Kampala amendments and has therefore not implemented the crime of aggression, as defined therein, in its national criminal legislation. Instead, it retains the historically established incrimination of aggressive war, which renders its analysis particularly instructive. By contrast, examining the national legislation of Rome Statute member states that have ratified the Kampala amendments is less informative, as they have incorporated the definition of the crime of aggression contained in those amendments; see, for example, Article 89 of the Criminal Act of the Republic of Croatia, NN 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/23, 36/24, 136/25.

526 Kovács underlines that 'the main philosophy behind complementarity is that beside the importance of the principle *ne bis in idem re*, the real solution is punishment at the national level, an international legal commitment enshrined in several international conventions': Kovács, 2022, p. 210.

tional Criminal Law, this principle is usually understood to have two main aspects. First, with regard to crimes within the jurisdiction of the ICC, primary jurisdiction lies with the national criminal law and judicial system of a particular State. The ICC exercises jurisdiction only where a national system is unwilling or unable to conduct proceedings for a crime falling within the ICC's jurisdiction *ratione materiae*. Second, the principle of complementarity indirectly derives from the Rome Statute itself, in that there must be a 'substantial similarity' between the norms contained in the Rome Statute and those of the applicable national criminal law where proceedings are conducted before national authorities.[527]

Against this background, the following question arises: can the principle of complementarity, understood in this way, be applied to the crime of aggression? Formally, the answer is yes, since no provision in the Rome Statute, including the Kampala Amendments, excludes the application of this principle to that offence. In principle, therefore, Article 17 of the Rome Statute, which establishes the primacy of national criminal jurisdiction while conferring only subsidiary competence on the ICC,[528] applies to the crime of aggression. The same applies to Article 20, which

527 More on this: Škulić, 2020a, pp. 36–39. Other authors also emphasise the importance of this principle; see, for example: Gajić, 2019, p. 101. Similarly, 'Unlike the International Criminal Tribunals which had a kind of "primacy" over national legal systems in terms of conducting the criminal proceedings, the jurisdiction of the International Criminal Court is subsidiary and complementary': Škulić and Bajović, 2017, p. 120. In the literature, it is accurately observed that 'Nowhere in the Rome Statute itself is it explained what the content of this principle is. This can only be inferred from other provisions of the Statute relating to the Court's jurisdiction and the initiation of proceedings, from which it follows that the principle of complementarity implies *the parallel jurisdiction* of this Court and national courts, with the jurisdiction of national courts being *primary*, and the ICC *subsidiary*': Babić, 2011, p. 203. This quotation is the most precise regarding the second aspect of the principle of complementarity, namely the "intrinsic similarity" between the Rome Statute and national criminal law. The Rome Statute does not explicitly prescribe that member states must harmonise their criminal legislation with its provisions; however, such an obligation arises from the Statute's establishment of the ICC's primary jurisdiction and the national judiciary's subsidiary role. In other words, the national judiciary cannot exercise primary jurisdiction if the state's legislation does not criminalise the acts provided for by the Rome Statute.

528 Pursuant to Article 17(1) of the Rome Statute, the ICC shall not initiate criminal proceedings where: (a) the case is being investigated or prosecuted by a State with jurisdiction, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State with jurisdiction and that State has decided not to prosecute the person concerned, unless the decision resulted from the State's unwillingness or inability genuinely to prosecute; (c) the person concerned has already been tried for conduct forming the subject of the complaint, and a trial by the Court is not permitted under Article 20(3); or (d) the case is not of sufficient gravity to justify further action by the Court. Paragraphs 2 and 3 clarify when it is considered that the State authorities are unwilling or unable to act.

regulates the effect of the principle *ne bis in idem*.[529] Accordingly, it is indisputable that States Parties to the Rome Statute that have ratified or otherwise accepted the Kampala Amendments on the crime of aggression are under a formal legal obligation to incorporate that crime into their domestic criminal legislation in the manner prescribed by the Rome Statute.[530]

However, legal scholarship remains divided on the appropriateness of applying the principle of complementarity to the crime of aggression. The central question is whether it is realistic to expect that criminal proceedings for this offence in any State could proceed in an independent and impartial manner, irrespective of the identity of the defendant. Some authors consider this possible: 'No doubt, many domestic courts and legal authorities will be able to handle prosecutions of the crime of aggression in a professional and impartial manner. Courts in many countries have displayed courage and integrity in difficult circumstances'.[531] By contrast, others argue that the crime of aggression should be dealt with exclusively by the ICC, 'at least until the contours of the crime are more firmly established'.[532]

The second opinion appears more realistic. Even if one assumes that the factual conditions, primarily of a political nature, are met for criminal responsibility for a crime of aggression to arise, some of the conditions prescribed in Article 17 of the Rome Statute will almost invariably be present. These conditions concern situations in which the ICC may exercise jurisdiction, mainly because the national judiciary either seeks to protect the accused or, conversely, is extremely hostile to the accused in a manner that would jeopardise the right to a defence and the right to a fair trial. In other words, of the four crimes falling within the *ratione materiae* jurisdiction of the ICC, the crime of aggression is the most politically 'sensitive'.[533] This sensitivity arises because the crime of aggression requires the previously explained leadership criterion for its potential perpetrator and because the act of aggression by the state constitutes a precondition for the crime. Consequently, the crime can only be formally committed by persons who effectively direct or control

529 This provision provides, *inter alia*, in paragraph 3 that no person who has already been tried by another court for conduct provided for in Arts. 6, 7, 8 or 8*bis* of the Rome Statute shall be tried by the Court in respect of the same conduct unless the proceedings before another court: (a) were conducted for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

530 In this sense: Sarkin and Almeida, 2019, pp. 549–550.

531 Wrange, 2010, p. 607. The quoted author, on the other hand, admits in the following sentence: 'Nevertheless, controversial cases can sometimes be dealt with in a more effective and legitimate manner in an international than in a domestic court': Ibid.

532 McDougall, 2021, p. 392. Vučić is even more radical on this issue: 'There is no doubt that the crime of aggression is not suitable for the application of the principle of complementarity': Vučić, 2017, p. 91.

533 Another international crime that is possibly close to the crime of aggression regarding this kind of "sensitivity" is the crime of genocide.

the political or military activity of their state.[534] Domestic courts will, therefore, almost invariably be biased or, at the very least, face enormous pressures that ultimately undermine their independence in any trial for this crime. For instance, if a state that has been the victim of aggression were to try individuals who held leadership positions in the aggressor state during the commission of an act of aggression, it is almost certain that the trial would be biased, with the court *a priori* predisposed against such defendants. Conversely, if the court were to try leaders of its own state, it would generally be biased in their favour.

It is also possible, however, that following a radical change of government in a state that previously committed an act of aggression, the former leaders of that state could be brought before national courts on charges of committing a crime of aggression. Even in such circumstances, the court would generally be biased, either to the detriment or the benefit of the defendant. For example, the court might seek to protect the defendants, not primarily for their sake, but to safeguard the interests of the state. A conviction for a crime of aggression in this context would, in effect, constitute an admission that the state itself committed an act of aggression against another state.[535]

4.2 The Crime of Aggression and the Principle of Universal Criminal Jurisdiction

Another issue that has attracted the attention of scholars in the field of international criminal law concerns the possible establishment of the jurisdiction of a national judiciary over the crime of aggression or crimes against peace on the basis of the principle of universal criminal jurisdiction. This principle:

> 'enables the prosecution of criminal offenses regardless of the place where the offence was committed and regardless of the nationality of the perpetrator or victim, so it is not established in the interest of the concrete state but the security of the entire

534 Of course, these persons will very often also appear as perpetrators of other crimes within the jurisdiction of the ICC, especially genocide and crimes against humanity. However, in terms of the crime of aggression, it is specific that its perpetrator can *only* be a person who holds an appropriate leadership position, whereas such a criterion does not formally exist in other international crimes.

535 Vučić: 'A national court of a state that would convict a former leader of that state for aggression, would therefore recognize that its state is internationally responsible towards the state that is the victim of aggression, with all the consequences that a violation of jus *in bellum* brings': Vučić, 2017, p. 92.

> international community, especially if the offenses are committed in a territory that is not subject to the sovereign authority of states'.[536]

Generally, two principal reasons justify the existence of the principle of universal criminal jurisdiction: first, the extreme gravity of the specific crime to which it applies; and second, the location of the crime, namely where no state has jurisdiction according to the territorial principle or where it is highly unlikely that the territorial state will exercise its jurisdiction, for instance because the perpetrators are members of a state's leadership.[537]

In legal theory, opinions differ regarding the applicability of the principle of universal criminal jurisdiction to the crime of aggression. Specifically, there is debate over whether customary international law provides for such application and whether states are therefore obliged to incorporate the principle into their national legal systems with respect to this crime. One view holds that 'it is reasonable for states to conclude that Nuremberg and its progeny provide a customary international law basis for prosecuting the crime of aggression under universal jurisdiction'.[538] Conversely, the majority view suggests that the application of universal jurisdiction to the crime of aggression is likely to encounter serious difficulties[539] and that 'it is very doubtful that under current customary law it can be asserted unequivocally that aggression "is" subject to universal jurisdiction'.[540]

It is important to note the following: under the principle of universal criminal jurisdiction, a state's judiciary may try a person only when jurisdiction cannot be established under any of the other principles governing criminal law, such as the territorial or personal principle. This implies that neither a person who is a national of the state conducting the proceedings, nor a person who is a national of the state that has committed an act of aggression against that state, should be tried under this principle, as other principles of criminal law would apply to them.[541] Accordingly, under the principle of universal criminal jurisdiction, criminal proceedings would be appropriate only against a person who is a national of a third state and has committed a crime of aggression against a fourth state. However, it

536 Vuković, 2021, p. 31. In this sense also: 'According to this principle, each State has jurisdiction to try certain crimes. The basis for this is the fact that the crimes in question are particularly harmful to the international community as a whole': Shaw, 2003, pp. 592–593. In legal theory, it has been noted that it would be very rare, in situations where the application of this principle would be possible, that extradition would not be carried out: Škulić, 2022, p. 128.

537 Scharf, 2012, p. 366.

538 Ibid., p. 379.

539 Shaw, 2003, p. 595. In this regard, Vučić observes that 'it is difficult to reconcile the trials of foreign nationals for the crime of aggression before national courts with the principle of sovereign equality of states and the principle *par in parem*': Vučić, 2017, p. 93.

540 Clark, 2013, p. 405.

541 This includes the classical territorial principle as well as the so-called real and active personal principles. For further discussion of these principles, see: Škulić, 2022, pp. 125–128.

is likely that any state would pursue such proceedings only if it has poor political relations with that third state, since acting otherwise would contravene the basic logic of international relations. A state not affected by a specific act of aggression would have little reason to assert jurisdiction and prosecute a national of the aggressor state, as doing so could seriously damage bilateral relations.[542] Therefore, with regard to the substantive and practical applicability of the principle of universal criminal jurisdiction to the crime of aggression, we consider the prospects more negative than positive.

Regarding the formal aspect of this issue (namely, whether each state's universal jurisdiction over the crime of aggression forms part of customary international law, and whether it constitutes the right and duty of every state to prosecute this offence wherever it occurs and whoever commits it), we are also of the view that the answer is negative. There is considerably more evidence supporting the contrary position: there exists neither sufficient state practice nor a clearly established *opinio iuris* in this regard.[543] This point was illustrated in the 2010 Kampala Resolution, which adopted Annex III containing the following *Understanding* (no. 5): 'It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State'. In other words, the states that voted in favour of the Kampala Resolution, which was adopted unanimously, explicitly expressed their position regarding the absence of universal jurisdiction for the crime of aggression. States that are not parties to the Rome Statute are therefore even further from recognising the principle of universal criminal jurisdiction in respect of this crime.

542 Scharf offers certain answers to this rhetorical question, which appear unconvincing. He contends that 'A well-meaning state may seek to assert universal jurisdiction over a foreign suspect accused of masterminding an act of aggression as a way of bringing the case to the attention of the international community and inducing the state of nationality or residence to prosecute the perpetrator': Scharf, 2012, p. 381. The author further acknowledges that one problem in prosecuting the crime of aggression is that 'such prosecution may be politically sensitive to such an extent that it would impede efforts aimed at restoring or maintaining international peace' (Ibid.), but he immediately provides a counterargument, asserting that in this respect the crime of aggression is no different from other international crimes (Ibid., p. 382). We maintain that these claims are untenable for a simple reason emphasised repeatedly: the crime of aggression differs from other core international crimes, as its perpetrator can formally only be a person who satisfies the leadership criterion.

543 'Even if it were accepted that under customary international law *crimes against peace* attract universal jurisdiction, it is not possible to point to State practice or *opinio juris* that would establish *universal jurisdiction* over the *crime of aggression*...' McDougall, 2021, p. 384.

4.3 The Criminal Offence of Aggressive War in the Criminal Law of Serbia

In the former Yugoslavia, an action relating to the unlawful use of force in international relations was first criminalised in Article 152 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY),[544] which came into force in 1977, under the title 'Incitement to Aggressive War'. An identical offence later appeared in the Criminal Code of the Federal Republic of Yugoslavia (FRY).[545]

Under the positive Serbian criminal law, this offence has been modified. A harsher form has been introduced, and the punishment for the original, now lighter, form has been increased. The offence has also been renamed 'Aggressive War' (Art. 386 of the Criminal Code). It is contained within Chapter XXXIV, entitled 'Crimes Against Humanity and Other Goods Protected by International Law'.

The criminal offence of aggressive war consists of two forms. Paragraph 1 provides: 'Whoever calls for or incites an aggressive war shall be punished by imprisonment for a term of two to twelve years'. Paragraph 2 provides: 'Whoever orders the conduct of an aggressive war shall be punished by imprisonment for at least ten years or life imprisonment'.

For the first, milder form (par. 1), the act of commission of the crime is alternatively prescribed and consists either in calling for or inciting an aggressive war. Calling for an aggressive war is envisaged as a classic propaganda action directed at an indefinite number and circle of persons.[546] Incitement, by contrast, involves, for the purposes of this criminal offence, 'raising' complicity in the narrow sense to the level of the act of commission of the crime,[547] which then consists in 'creating

544 Criminal Code of SFRY – *Official Gazette of SFRY,* No. 44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90-1217, 45/90-1340, 54/90-1773.

545 Criminal Code of the FRY – Official Gazette of the Federal Republic of Yugoslavia, No. 35/92-651, 37/93-816, 24/94-273, 61/01 of 09.11. While the Republic of Serbia was a federal unit within a wider federal state (i.e., until the formation of the State Union of Serbia and Montenegro), it had its own criminal code, but federal constitutional norms stipulated that the regulation of international crimes was reserved for the Federal Criminal Code (see Art. 281(1)(12) of the Constitution of the Socialist Federal Republic of Yugoslavia of 1974). In essence, the criminal offence of incitement to war of aggression under Article 152 of the Criminal Code of the SFRY/FRY was identical to the currently existing (milder) form of the criminal offence of aggressive war prescribed in the Criminal Code of Serbia from 2005 (Art. 386(1)), except that the prescribed punishment was slightly less severe (one to ten years' imprisonment). For this reason, we do not address this historical offence in detail.

546 Škulić, 2020a, p. 320, and in this sense also: Stojanović, 2017c, p. 1102. Other authors similarly understand propaganda for the purposes of criminal law: 'Propaganda, in general, can be defined as an action aimed at gaining adherents for something among an individually indeterminate number of people. The goal of propaganda is to create a certain opinion in people or to lead them to accept certain ideas, which in turn should lead to their certain behavior in accordance with those opinions or ideas': Atanacković, 1985, p. 17.

547 In this sense: Škulić, 2020a, p. 321.

or strengthening the will in the direction of waging an aggressive war in relation to a certain person/persons'.[548] For example, a leader of a political party advocating in speeches at public gatherings that a neighbouring state should be attacked would constitute a call for a war of aggression. By contrast, incitement to a war of aggression need not be public: a well-off businessman could, for instance, persuade the prime minister of a state to engage in a war of aggression to advance particular financial interests.[549] The crime is complete as soon as the relevant calling or incitement occurs. In other words, it is unnecessary for an aggressive war actually to take place for the criminal offence under Article 386(1) of the Criminal Code to be established.[550] Finally, the perpetrator of this form of the criminal offence of aggressive war may formally be any person, although, as a rule, such individuals are those who possess a measure of influence within the society of a given state.[551]

In relation to the second, harsher form of the criminal offence of aggressive war, stipulated in paragraph 2 of Article 386 of the Criminal Code, only one act of commission exists: ordering the conduct of an aggressive war. Unlike the first form, the second form of this criminal offence is 'by definition of a "more exclusive character" and can be performed only by a person who has a certain command position... And by the logic of things, it is a position that in principle must be high on the hierarchical ladder. For example, it could be the President of the State, the Prime Minister, the Chief of the General Staff, the Minister of Defense, etc.'[552] As noted, this second form of the criminal offence was introduced into Serbian

548 Ibid., p. 320. In this sense also: Stojanović, 2017c, p. 1102. In Yugoslav theory, there was a view that the then-existing criminal offence of inciting an aggressive war (which today corresponds to the first form of the criminal offence of aggressive war), in its entirety, including the part relating to incitement, and not only that concerning the act of calling for an aggressive war, was reduced to propaganda: Atanacković, 1985, pp. 73, 17. However, we contend that only the first of the alternatively prescribed acts constituting this form of the criminal offence of aggressive war (the invocation of aggressive war) can be interpreted as propaganda. In the case of incitement to aggressive war, as the second alternatively prescribed act of commission, it constitutes, as noted, incitement elevated to the level of an act of execution. Were the contrary true, there would be no need to criminalize incitement as a distinct act of commission, as criminalising the act of 'calling' for a war of aggression alone would suffice.

549 At the same time, we note that, in this example, the motive of such a businessman ('to pursue certain financial interests') is not necessary for the existence of the criminal offence of aggressive war. We have included it in our example to make it more illustrative.

550 In this sense, the theory of the (limited) accessory nature of incitement in relation to an act of commission does not apply to the second alternatively prescribed act of commission of this crime, which, as we have seen, materially represents incitement to wage an aggressive war (for more on this theory, see Vuković, 2021, p. 402). Formally, here incitement is elevated to the rank of an act of commission of the crime.

551 Škulić is of the opinion that calling for, as well as incitement to wage, an aggressive war by persons from the social 'margins' could hardly be taken seriously, and that in such cases the rules on the so-called 'inappropriate attempt' could be applied. More on this see Škulić, 2020a, p. 321.

552 Ibid., p. 322. In this sense also: Stojanović, 2017c, p. 1102.

domestic criminal law more recently than the first form contained in paragraph 2 of Article 386. In this regard, the literature observes: 'In addition to calling and inciting to wage a war of aggression, it is justified from the perspective of criminal policy to include as perpetrators of this crime those who, according to their position, make a decision to wage an aggressive war, that is, who order the execution of an aggressive war'.[553] In other words, it would be logically inexplicable if it were punishable to call for or incite a war of aggression, while it were not punishable to order such a war to be waged.

It is evident that, in relation to this otherwise straightforward criminal offence in the legal and technical sense, the key question concerns the meaning of the term 'aggressive war'. Since Serbian domestic criminal law does not provide an explicit definition of the term, it can be said that the crime of aggressive war constitutes a blanket criminal offence,[554] although such a conclusion is not explicitly apparent from Article 386 of the Criminal Code.[555] Moreover, as the domestic law of the Republic of Serbia contains no definition of aggressive war in its other sources, it is clear that such a definition must be sought in international law,[556] which, *inter alia*, is recognised as a source of law under Serbian constitutional law.[557]

Bearing in mind that the criminal offence of aggressive war explicitly refers only to aggressive war, and not to aggression, that is, an act of aggression, we consider that only those provisions of international law that refer to aggressive war should be applied here, as a kind of 'older', that is, 'narrower', category of illegal use of force in international relations than the broader notion of (an act of) aggression. In other words, when determining what is to be understood by the term 'aggressive war' for the purposes of the criminal offence under Article 386 of the Criminal Code, one should not refer to UN General Assembly Resolution 3314 of 1974, nor to

553 Ibid.

554 These are criminal offences in which, in order to determine the content of some of their elements (in our case, 'aggressive war' as an element of the criminal offence of war of aggression), 'it is necessary to gain insight into the extra-criminal legal rule to which the provision refers': Vuković, 2021, pp. 72–73.

555 The legislator does not explicitly prescribe that this criminal offence (unlike, for example, crimes against humanity (Art. 371 of the Criminal Code), war crimes against the civilian population (Art. 372 of the Criminal Code), war crimes against the wounded and sick (Art. 373 of the Criminal Code), war crimes against prisoners of war (Art. 374 of the Criminal Code), and others) can be committed in 'violation of the rules of international law'.

556 Similarly, Stojanović observes: 'The concept of aggression and aggressive war is determined by international law. And the criminal acts that are prescribed by the criminal law of a state in connection with aggression cannot be viewed as isolated from aggression in international law': Stojanović, 2017c, p. 1099.

557 'Generally accepted rules of international law and ratified international treaties are an integral part of the legal order of the Republic of Serbia and are directly applicable. Ratified international treaties must be in accordance with the Constitution' (Art. 16(2) of the Constitution of the Republic of Serbia – *Official Gazette of the Republic of Serbia*, no. 98/2006 and 115/2021).

the provisions of the Rome Statute on the crime of aggression, since these address aggression as a broader concept than that of a war of aggression.[558]

Accordingly, the application of the provisions on the crime of aggressive war should rely on general customary international law, established primarily through the precedents of the Nuremberg and Tokyo trials, where the subject of prosecution was wars of aggression, rather than the broader and historically more recent crime of aggression. Although at first glance this approach in Serbian criminal law may appear outdated, it is in fact consistent with contemporary general customary international criminal law concerning individual criminal responsibility for the illegal use of force in international relations. The definitions of aggression contained in Resolution 3314 and the relevant provisions of the Rome Statute, as noted, have not yet attained the status of general customary international law. Resolution 3314 is declaratory in character and has had little practical effect on the practice of the bodies it was intended to guide, primarily the UN Security Council. The Rome Statute's provisions on the crime of aggression are treaty norms binding only on states that have ratified or otherwise accepted them. Since the Republic of Serbia, although a member of the Rome Statute, has not ratified the Kampala Amendments, it is not obliged to implement these provisions in its domestic criminal law. We can therefore conclude that the approach adopted in Serbian criminal law regarding the crime of aggressive war is largely compatible with current general customary international criminal law.[559]

The criminal offence of aggressive war can only be committed with intent, which applies to both its first and second forms.[560] The existence of a specific aggressive intent (*animus aggressionis*) is not required,[561] which is justified for the same reasons previously stated in relation to the crime of aggression under the Rome Statute.

The first form of the criminal offence of aggressive war is punishable by imprisonment for two to 12 years, whereas the second form carries a penalty of at least 10 years' imprisonment or life imprisonment. The possibility of imposing a life

558 In legal theory, there are also differing opinions: Atanacković, 1985, p. 74; Stojanović, 2017c, pp. 1100, 1102.

559 Some discrepancies nevertheless remain. The Statute of the IMTN criminalised the 'planning, preparation, initiation and waging' of a war of aggression. In essence, the 'initiation' and 'waging' of a war of aggression can be linked to the 'ordering' to wage a war of aggression prescribed under Article 386(2) of the Serbian Criminal Code, and in this sense the requirements of general customary international law are met. However, the Serbian legislator does not criminalise the 'preparation' of an aggressive war (in essence, the 'planning' of such a war could be subsumed under 'preparation' in criminal law) as an alternative act of commission of the criminal offence of aggressive war. This omission, as can be seen, is contrary to the Statute of the IMTN and, therefore, to general customary international criminal law.

560 Škulić, 2020a, p. 321. The author further specifies that, in this criminal offence, 'by the logic of things, it will certainly be a direct intent': Ibid.

561 Stojanović, 2017c, p. 1102; Škulić, 2020a, p. 321.

sentence renders the second form of this criminal offence significantly more severe than the first, milder form.[562]

562 The literature notes that such a difference in prescribed penalties results from 'the legislator's principled assessment of the degree of "attack on the good protected by the law" (peace), which is of course greater in the second form of aggressive war… This second, i.e., most severe form of aggressive war has the character of the so-called capital crime in our criminal legislation': Ibid., p. 320, fn. 765.

5.

Conclusion

It has been more than a century since, in the aftermath of the First World War, the first serious proposals regarding individual criminal responsibility for initiating and conducting war emerged. It has also been more than seven decades since, immediately after the Second World War, representatives of the states defeated in that conflict were tried for crimes against peace. Finally, it has been more than a decade since the elements of the crime of aggression were incorporated into the Rome Statute, and more than seven years since the final formal obstacles to the prosecution of this crime before the ICC were removed.

After examining this entire period in this book, the most general conclusion is that the crime of aggression, or more broadly, the criminal offence targeting the unlawful use of force in international relations, is the most controversial of all four core international crimes. Unlike other core international crimes, this offence generates a greater diversity of opinions, attitudes, and interpretations. The principal reason for this, we suggest, lies in the nature of the offence itself: it can, by definition, only be committed by individuals occupying the highest political or military, and potentially social, positions who represent their state through their actions in international relations. This so-called 'leadership criterion' is now formally enshrined in the Rome Statute's definition of the crime of aggression. In other words, any trial for this offence against the leader or leaders of a state necessarily involves, formally or substantively, a determination of whether the state represented by that leader committed an act of aggression against another state. Such scrutiny is unpalatable to most states, particularly the most powerful, which wish to preserve as much flexibility as possible in conducting foreign policy, including, in some cases, acts of aggression.

From this observation, a further conclusion follows. All states, by virtue of their membership in the UN, are at least formally committed to the general prohibition of the threat or use of force prescribed in the UN Charter. However, they are reluctant to accept a further step: the possibility that their leaders may incur criminal liability, particularly before an international court, for violating this prohibition. This reluctance reflects the inherently 'softer' character of the prohibition under general international law, compared with the potential criminal liability for its breach. Numerous violations of the prohibition since the UN Charter's entry into force have gone unpunished, despite the availability of sanctions under public international law.

More concretely, positive legal rules, both international and domestic, regarding the criminal sanctioning of violations of the prohibition on the threat or use of force in international relations can be considered, in practice, largely ineffective. Although certain offences involving the unlawful use of force, such as crimes against peace relating to aggressive war, form part of customary international law and have been criminalised by a majority of states (for example, Serbia and Ukraine), perpetrators are rarely prosecuted, either by national courts or by international judicial bodies,[563] from Nuremberg and Tokyo onwards.

With respect to the ICC, it can be argued that its credibility has further diminished following the adoption of the Kampala Amendments and their entry into force in 2018. Even prior to the adoption of these amendments, the Court faced serious challenges that called its very existence into question, the most significant being that some of the world's most powerful states (notably the United States, Russia, China, and India) are not parties to the Rome Statute and therefore do not recognise its jurisdiction. The adoption of the amendments concerning the crime of aggression created a rift even among states that are parties to the Rome Statute. In essence, the ICC overreached through these amendments. Consequently, only a relatively small number of states, in comparison with the total number of states parties to the Rome Statute, have accepted its jurisdiction with respect to the crime of aggression, while other states, including some of the most influential, such as the United Kingdom and France, have not.

Moreover, the substantive provisions on the crime of aggression, particularly the requirement that the act of aggression must constitute a 'manifest violation of the UN Charter', further restrict the scope of criminal liability. As a result, the likelihood that hypothetical proceedings before the ICC against an individual accused of this crime would culminate in a conviction appears minimal.

Accordingly, the question arises as to the future of the criminalisation of the unlawful use of force in international relations, and specifically the future of the crime of aggression within the ICC's legal framework. The answer appears self-evident: these criminal offences will continue to exist in both international and domestic law, but their application will be exceptional. Any prosecution would likely require prior political authorisation, typically from the most powerful states. For instance, it is conceivable that future trials, whether before a permanent international court or an *ad hoc* tribunal, might be conducted against leaders of a defeated state for the crime of aggression or a similar offence. Additionally, domestic courts might try such individuals if, following defeat in armed conflict, a new government, often imposed externally, assumes control of their state. In all other circumstances, the probability of effective prosecution for these crimes is either nonexistent or minimal.

563 Except for rare examples, which we have cited in the book, when, immediately after the Second World War, crimes against peace were tried by some national courts. Also, one notable exception is the extensive recent jurisprudence of the Ukrainian courts.

Therefore, one can argue that the concept of an international community of sovereign states governed by international law is fundamentally incompatible with the administration of criminal justice in cases concerning the prohibition of the threat or use of force in international relations. In practical terms, it is almost impossible to conduct a criminal trial for aggression that satisfies basic standards of fair procedure, including the independence and impartiality of the court, within an environment characterised by the formally proclaimed sovereign equality of states. Such a trial could only become feasible under a far greater integration of states into a form of 'world state' (*civitas maxima*). However, under such circumstances, international relations and international law would cease to exist, eliminating the need for the crime of aggression or the criminal sanctioning of unlawful threats or uses of force in relations between states, as no sovereign states would remain as subjects of international law.

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