The Iraqi Special Tribunal and the Crime of Aggression

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Back to the Nuremberg paradigm? In respect to the crime of aggression,[1] for once, the answer to Zolo's intriguing question on the Iraqi Special Tribunal (IST) is negative. During negotiations of the London Charter, the United States vigorously fought to have wars of aggression condemned as criminal. As a result, Article 6(a) of the International Military Tribunal (IMT) Charter located crimes against peace, namely the waging of a war of aggression, at the top of the crimes under the jurisdiction of the IMT. The Tribunal, in turn, not only dismissed the defence case, which had essentially relied upon the *nullum crimen* principle, but also raised the crime of aggression to the level of the 'supreme international crime'.[2]

More then 50 years after the liberation of Nazi Germany, the United States invaded and occupied Iraq 'to restore international peace and international security in the area'.[3] The underlying breach of regional peace and security dated back to 1990, when Iraq attacked Kuwait in an effort to annex its territory, and there is not much disagreement among international legal scholars that Iraq's use of force amounted to a war of aggression.[4] Against this historical background, one might have expected the United States, again acting as an occupying power, to revitalize the Nuremberg paradigm of treating war of aggression as a crime in the IST Statute. The Bush Administration has instead taken a different course. While including the other three core crimes under international law[5] in the jurisdiction of the Special Tribunal and thereby again confirming the customary status of the crimes listed in Articles 6–8 ICC

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1 The term 'crime of aggression' is used in accordance with Article 5(1)(d) ICCSt.

2 *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (Nuremberg, 1947), at 186.

3 Cf. operative para. 2 of Res. 678 (1990), 29 November 1990, which, according to the coalition states, was the legal basis of the use of force against Iraq; cf. S/2003/351, 21 March 2003.

4 Cf. A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 113: '[N]obody would deny that the attack by Iraq on Kuwait was … an international crime of aggression.' Cf. also the informal discussion paper UN. doc. A/AC.249/1997/WG.1/DP.20, 11 December 1997, at 2, put forward by Germany, in which 'the aggressions committed by Hitler and the one committed against Kuwait in August 1990' are qualified as 'obvious and indisputable cases' of the crime of aggression.

5 These crimes are genocide, crimes against humanity and war crimes.

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St.,[6] the United States did not incorporate the crime of (waging a war of) aggression in the IST Statute.

However, the IST Statute is not altogether silent on the matter of illegal cross-border use of force. Under the title 'Violations of Stipulated Iraqi Laws', Article 14(c) lists as a crime under the Iraqi Tribunal's jurisdiction:

> The abuse of position and the pursuit of policies that may lead to the threat of war or the use of force of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.

Even without having access to Law Number 7 of 1958 and the relevant *travaux préparatoires*, it may safely be contended that the above does not aim at codifying (part of) the Nuremberg crimes against peace. The crime referred to in Article 14(c) instead tends to criminalize certain types of official or quasi-official Iraqi conduct that might threaten the external security of other Arab states. In doing so, the crime in question resembles provisions found in other national criminal codes.[7] In short, while the Nuremberg Charter raised aggression to the international level, the IST Statute appears to downgrade the waging of a war of aggression to the status of a *domestic crime*.[8]

This approach cannot be justified by reference to current international criminal *law*: despite the scarcity of 'hard practice' and notwithstanding some scholarly opinions to the contrary,[9] the international crime of aggression has not fallen *in desuetutinem* after Nuremberg and Tokyo.[10] This is clearly the *opinio juris communis* of states: while they have yet to reach agreement on its definition,[11] no state questioned the existence of the crime of aggression under international law during the negotiations of the ICC Statute.[12] Similarly, the inclusion of the crime of aggression into the ICC Statute's list of the 'most serious crimes of concern to the international

6 This is noteworthy, in particular, for war crimes committed in non-international armed conflicts, as these crimes are a recent arrival at the level of criminality under international law; for the crystallization and consolidation process of war crimes committed in non-international conflicts, cf. C. Kress, 'War Crimes Committed in Non-International Armed Conflicts', 30 *Israel Yearbook on Human Rights* (2000), 104 et seq.

7 On s. 80 of Germany's criminal code, cf. C. Kress, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2 *Journal of International Criminal Justice* (2004) 245.

8 It should at least be noted in passing that the crime referred to in Article 14(c) does not appear to cover the Iraqi use of force against Iran, the latter state not being an 'Arab country'.

9 C. Tomuschat,'Das Strafgesetzbuch der Verbrechen gegen den Frieden und die Sicherheit der Menschheit', *Europäische Grundrechte Zeitschrift* (1998) 5.

10 For a meticulous and convincing analysis, see M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression* (Baden-Baden: Nomos Verlagsgesellschaft, 2001) 90.

11 On recent developments, see the excellent analysis by R.S. Clark, 'Rethinking Aggression as a Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002) 859; on some open issues, see Kress, *supra* note 7.

12 For the best account of the negotiations, see G. Westdickenberg and O. Fixson, 'Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes', in J.A. Frowein, K. Scharioth, I. Winkelmann and R. Wolfrum (eds), *Verhandeln für den Frieden. Liber Amicorum Tono Eitel* (Berlin: Springer, 2003) 483.

community as a whole' is certainly not devoid of legal significance, but 'can be seen as confirmation of aggression as a crime under international law'.[13]

The fact that the UN Security Council did not determine the 1990 Iraqi invasion of Kuwait to be an act of aggression within the meaning of Article 39 of the UN Charter is not a convincing explanation for the omission of the international crime of aggression from the Iraqi Statute, either. The exclusive power of the Security Council to determine acts of aggression within the meaning of Article 39 of the UN Charter pertains to the Charter system of collective security. However, even if the Security Council does not determine an action to be an act of aggression by virtue of Article 39, under current international law that would not preclude a criminal court from adjudicating the crime of aggression, nor would it bar the International Court of Justice from determining the existence of an armed attack under Article 51 of the UN Charter.[14] As an aside, the politically motivated failure of the Security Council to characterize Iraq's invasion of Kuwait as an act of aggression offers an excellent illustration of the unfortunate results that might follow if the Security Council's determination of an act of aggression is recognized as a procedural prerequisite for the commencement of investigations into an alleged crime of aggression.

Notwithstanding the still unresolved controversy surrounding the definition of the crime of aggression, the Iraqi Statute's 'domestic law approach' should not be praised as a prudent international legal *policy* choice. In this respect, it is interesting to note the extent to which this initiative deviates from the bold approach to aggression taken by the United States at Nuremberg, when it went so far as to criminalize the waging of a war of aggression, even without judicial precedent. In his famous opening speech, Robert Jackson described the underlying method:

> International Law is not capable of development by normal processes of legislation, for there is no continuing legislative authority. Innovations and revisions in International Law are brought about by the action of government [. . .], designed to meet a change in circumstances. It grows, as did the Common Law, through decisions reached from time to time in adapting settled principles to new situations. The fact is when the law evolves by the case method, as did the Common Law and as International Law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The law, so far as International Law can be decreed, had been clearly pronounced when these acts took place. Hence we are not disturbed by the lack of judicial precedent for the inquiry it is proposed to conduct.[15]

Clearly, modern international criminal law no longer evolves through cases alone. The ICC's power to progressively develop the law is confined within the limits of Article 22(1) and (2) of its Statute, and national criminal courts are certainly well

13 G. Gaja, 'The Long Journey towards Repressing Aggression', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*. Volume I (Oxford: Oxford University Press, 2003), 431.

14 For a more detailed argument in the same sense, see Hummrich, *supra* note 10, at 225.

15 *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (commencing 20 November 1945), Opening Speeches of the Chief Prosecutors for the Untied States of the United States of America; The French Republic; The United Kingdom of Great Britain and Northern Ireland; and the Union of Soviet Socialist Republics (London: HMSO, 1946) 40.

advised, in particular when exercising universal jurisdiction, to act cautiously in order not to transgress the limits of pre-existing international law. With respect to the crime of aggression, the additional argument may be advanced that the Special Working Group on the Crime of Aggression under Article 5(1)(d) ICCSt. is currently acting as a quasi-legislative body and that this legislative process should not be pre-empted by the judicial practice of a (small group of) state(s).

However, the alleged individual criminal responsibility of the former Iraqi leadership for their policy decisions concerning the invasion of Kuwait does not raise questions of the progressive development of international criminal law or even of legally unjustified, and, thus, ill-advised, legislation. In that respect, the case of Iraq crucially differs from, for instance, the case of the former Yugoslavia. What is at stake in the case of Iraq is no more than empowering the Special Tribunal to judicially reaffirm the Nuremberg '*acquis*'. A potential Prosecutor of the Iraqi Tribunal could then even copy the following passage of Jackson's opening speech:

> Abstractly, the subject [of crimes against peace under the London Charter] is full of difficulty, and all kinds of troublesome hypothetical cases can be conjured up. It is a subject which, if the defence should be permitted to go afield beyond the very narrow charge in the Indictment, would prolong the trial and involve the Tribunal in insoluble political issues. But so far as the question can properly be involved in this case, the issue is one of no novelty, and is one on which legal opinion has well crystallised.[16]

The question remains, however, of whether the Iraqi Special Tribunal would be an appropriate forum to adjudicate individual criminal responsibility for aggression. In this respect, two issues should be kept separate: (i) whether a national criminal court can ever constitute a convenient forum for a trial on aggression, and (ii) to what extent the fact that the Iraqi Special Tribunal was created by virtue of the authorization of the US occupation force 'contaminates' the Tribunal as an institution which can satisfactorily deal with the crime of aggression.

In his 'Reflections on International Criminal Justice', Antonio Cassese has drawn up an impressive list of the advantages of *international* criminal justice, including better guarantees for objectivity and for the international perception of objectivity, special expertise in the application of international law, better equipment to deal with transnational crimes, and the capacity to apply uniform standards to persons accused of international crimes.[17] Nonetheless, I would also agree with Alvarez (*infra*) that international criminal proceedings are not *inherently* preferable to their national counterparts and that the principle of complementarity as prominently enshrined in the ICC Statute suggests that national judiciaries can and should cope with crimes under international law.

With respect to the crime of aggression, though, the case for international proceedings is particularly strong: waging a war of aggression is the *international* crime *par excellence*, because it necessarily implies a *breach* of *international* peace and is inextricably linked to an *inter-state* conflict. Furthermore, individual responsibility is,

16 *Ibid.*

17 A. Cassese, 'Reflections on International Criminal Justice', 61 *Modern Law Review* (1998) 6.

by definition, limited to state leadership. Therefore, an international trial tends to be the preferable option in the case of a crime of aggression. And yet, one may wonder whether there is a compelling reason why the option of *national* proceedings should be excluded altogether. Would it be illegitimate, by definition, for a successor government and for the society of the aggressor state to deal with its aggressive past judicially?

I shall not attempt to answer this question in this comment, nor will I attempt to assess the ability of Iraq's judiciary to shoulder the heavy burden of confronting the aggressive record of Saddam Hussein's regime. What can safely be established, though, is the inappropriateness of the Iraqi Special Tribunal to deal with the alleged crime of aggression by the former Iraqi leadership. The reason for this is simply that the Tribunal rests on the authority of an occupying power which, first of all, has a highly questionable record on the use of force in the region, and, secondly, does not allow international investigations into its own use of force. I have argued elsewhere that Operation Iraqi Freedom can be distinguished from Iraqi's invasion of Kuwait and does not give rise to leadership criminality for aggression under current international law.[18] But the fact alone, that the occupying power is legally vulnerable because of its own violation of Article 2(4) of the UN Charter seriously jeopardizes the legitimacy of any trial conducted by the Special Tribunal for Iraq against the former Iraqi leaders for their alleged involvement in a war of aggression.

At Nuremberg, Justice Jackson represented the United States in the aftermath of a military victory which had been achieved, with the law firmly on the country's side. He could thus solemnly declare:

> But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nation, including those which sit here now in judgment.[19]

In the war against Saddam Hussein's Iraq, the United States has again prevailed militarily. This time, however, its position in international law is rather weak. So is the message that the US government is sending out on the crime on aggression. The opening speech for the prosecution case under Article 14(c) of the Statute of the Special Tribunal for Iraq is likely to fall short of Jackson's powerful words. Instead of reaffirming the Nuremberg precedent, the Bush administration—as Alvarez put it—has limited the Tribunal's jurisdiction 'to unique charges of aggression permitted under Iraqi law … presumably to exclude tu quoque-style contentions directed at Operation Iraqi Freedom'.[20]

In deviating from the Nuremberg paradigm on the war of aggression, the United

18 C. Kreß, 'Strafrecht und Angriffskrieg im Lichte des "Falles Irak"', 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2003) 294; on this author's views on the crime of aggression, see also the article *supra* note 7.

19 *Supra* note 15, at 45.

20 Alvarez, *infra* at 319.

States has failed to consolidate the international criminal law on aggression. This failure comes as no surprise: a government which is as selective in its adherence to international law as the Bush Administration[21] cannot be expected to take a leadership role in working towards the establishment of a fully legitimate system of international criminal law that fortifies the international rule of law.

21 Suffice it to mention the abusive US veto threat to push Res. 1422 (2002) and 1487 (2003) through the Security Council; cf. the thorough analysis by A. Mokhtar, 'The Fine Art of Arm-Twisting: The US, Resolution 1422 and Security Council Deferral Power under the Rome Statute', 3 *International Criminal Law Review* (2003), 295.