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 law⁵ 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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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.


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’.


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


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’.  

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.  

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.  

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

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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 United 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.
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 govern-
ment 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. 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.

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’.

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\textsuperscript{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.