

---

## A "RIGHT TO PEACE" AND PROSECUTING THE CRIME OF AGGRESSION

Edwin Bikundo\*

---

### I. INTRODUCTION: THE NEED FOR PROSECUTION.

In discussing the legality or illegality of the use of force and its normative manifestation there is a universal yet inarticulate major premise posited, that at its simplest says, 'there is a right to peace'<sup>1</sup>.

This right to peace and concomitant duty<sup>2</sup> to keep the peace inheres in the nation state but also, it is argued, in individuals<sup>3</sup> through the operation of international human rights instruments and customary international law<sup>4</sup>. The laws that govern entry into and conduct of war (or arguably armed conflict) are traditionally divided into two, being, *jus ad bellum* and *jus in bello*<sup>5</sup>.

The contemporary arguments extending '*jus in bello* principles into internal armed conflict just as cogently apply to *jus ad bellum*<sup>6</sup>.

---

\* Assistant Lecturer, School of Law , University of Nairobi.

<sup>1</sup> Concerning the right of peoples to peace, article 23 of The African Charter on Human and Peoples' Rights provides that, "All peoples have the right to national and international peace and security."

<sup>2</sup> See, e.g., the United Nations General Assembly Resolution on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Resolution 2625 (XXV) of October 24, 1970, which solemnly proclaims that "Every State has the duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues. A war of aggression constitutes a crime against the peace, for which there is responsibility under international law. In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression."

<sup>3</sup> 1978, the General Assembly adopted Resolution 33/73 on the Preparation of Societies for Life in Peace which provides that, "Every nation and every human being, regardless of race, conscience, language or sex, has the inherent right to life in peace. Respect for that right, as well as for the other human rights, is in the common interest of all mankind and an indispensable condition of advancement of all nations, large and small, in all fields."

<sup>4</sup> See, e.g., UNGA Res 39/11 of 12<sup>th</sup> November 1984 on the "Right of Peoples to Peace."

<sup>5</sup> "*Jus ad bellum* refers to the conditions under which one may resort to war or to force in general; *jus in bello* governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well". Origin of the twin terms *jus ad bellum/jus in bello* by Robert Kolb published in< [www.icrc.org](http://www.icrc.org)>.

<sup>6</sup> See *Prosecutor v. Dusko Tadic A/K/A "Dule"* Decision of 2 October 1995 On The Defence Motion for Interlocutory Appeal On Jurisdiction, at paras 83 and 134

Peace at its most basic is the absence of armed conflict. Armed conflict is resort to force by state or non-state actors which may be legal or illegal.

A clear distinction must be maintained between a finding of *factual* aggression under the United Nations Charter<sup>7</sup> and a charge of criminal aggression such as under the Rome Statute for the International Criminal Court<sup>8</sup> and domestic penal legislation in Germany, Japan, Switzerland, Austria, Russia and Sweden<sup>9</sup>. The former entails state responsibility, the latter, individual criminal responsibility. One political, the other judicial.

The dearth of trials for the crime of Aggression and not for lack of perpetrators thereof is much the subject of academic discourse<sup>10</sup>. If, indeed, it is irrefutable that present-day positive international law reflects the Nuremberg Judgment,<sup>11</sup> and UN declarations,<sup>12</sup> is then, the lacuna observed in normative application merely a result of realpolitik, or are there largely suppressed, legally conclusive, underlying reasons extant?

In general under contemporary international law the prosecution of international crimes is first the responsibility of the State as the oldest, most traditional and indeed appropriate subject of international law. The Nuremberg Charter itself was established without prejudice to the jurisdiction of national courts<sup>2</sup>.

---

<sup>7</sup> United Nations Charter, Article 39 provides that, "The Security Council shall determine the existence of any...act of aggression..."

<sup>8</sup> Ibid at Article 5 (1) "The Court has jurisdiction...with respect to...The crime of aggression."

<sup>9</sup> See J Gewehr 'Defining Aggression for the International Criminal Court: A Proposal' pp. 34-37 available at < <http://web.uct.ac.za/depts/pbl/gewehr.pdf> > (last visited on 2<sup>nd</sup> April 2005)

<sup>10</sup> AL Paulus, 'Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis,' 50 Wayne Law Review (2004).

<sup>11</sup> Y Dinstein, *War, Aggression and Self-Defence* (2002), p.109.

<sup>12</sup> UNGA Res 3314 (XXIX) of December 14, 1974, Article 1: "Aggression is 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". Article 2: "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."

<sup>13</sup> See generally, JI Charney 'International Criminal Law and the Role of Domestic Courts' 95 *American Journal of International Law* (2001), p. 120.

<sup>2</sup> Article 6 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter Of The International Military Tribunal. London, 8 August 1945

Even with the advent of the International Criminal Court<sup>3</sup> this responsibility is still mainly with the state to prosecute as expressly provided under Article 17 of the Rome Statute on issues of admissibility.

This states that due regard be given to paragraph 10 of the Preamble,<sup>4</sup> and the very first article of the Statute<sup>5</sup>, both of which unequivocally lay stress on the principle of complementarity.

It is in no uncertain terms laid down that the Court shall determine that a case is inadmissible where, inter alia, the case is being or has been investigated or prosecuted by a State which has jurisdiction over it, and the exception is the State is either, unwilling or unable in good faith to carry out such investigation or prosecution.

Thus under the Statute of the International Criminal Court the accent and emphasis is on the primary duty of the state to prosecute violators of international criminal law.

One must bear in mind that, with a few relatively minor exceptions, the statute does not create, codify or legislate new types of crime but only provides a novel collective mechanism for dealing with the most serious crimes of international concern and even then only when the state primarily responsible for its investigation and/or prosecution has abdicated its responsibility and, it is submitted, any other state has not taken it upon itself to investigate and/or prosecute such crime. Further the Court has jurisdiction only over the most serious crimes of international concern<sup>1</sup>, the rest presumably remain solely within the purview of states.

With particular emphasis on the crime of aggression<sup>2</sup>, The Court shall exercise jurisdiction over the crime of aggression only once a provision is adopted

---

<sup>3</sup> Kenya has ratified the Rome Statute creating the International Criminal Court but is yet to provide domestic legislation as of the 28<sup>th</sup> of April 2005.

<sup>4</sup> Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions (Emphasis supplied)

<sup>5</sup>Ibid at Article 1 The Court an International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute. (Emphasis supplied)

<sup>1</sup>Ibid at Article 5, Crimes within the jurisdiction of the Court 1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide ;(b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

<sup>2</sup>From earliest times, the Western tradition sought to place war in a legal framework by formulating a doctrine of just war. The aim was to reconcile might and right, *Sein* and *Sollen*, by making the former serve the latter, or by curtailing might with right. On the basis of those premises, war was seen as a just response to unprovoked aggression, and more generally as the ultimate

containing a definition and procedure of how the court shall deal with it without usurping the Security Council's function.

Such a provision has to wait at least another seven years from the coming into force of the Statute and even then it is far from guaranteed that a universally acceptable definition will be forthcoming and we may have to wait for another meeting of state parties and so on, *ad nauseam*.

Meanwhile, wars declared or not, are being waged, won and lost. In view of the relevant provisions of the United Nations Charter in Article 2(4) at least one of the parties to such conflicts is an illegal user of force being an aggressor.

What then between the, Security Council, International Criminal Court and National Criminal Courts would be the appropriate legal mechanism if any of dealing with such aggressors?

It is proposed to be demonstrated below that it is each state's bounden duty to investigate, apprehend, prosecute and punish individual violators of the international criminal law.

A cursory examination reveals a plethora of prosecutions for violations of *jus in bello*, which is the law concerning the conduct of hostilities but none, to the writer's knowledge, of prosecuting violation of *jus ad bellum* since the Nuremberg<sup>1</sup> and Tokyo prosecutions for crimes against peace, punishing as they did, what had erstwhile been seen as a political act outside the realm of law as such..

This is the lacuna referred to and the aim of this study is simply to establish that: The crime exists; It is punishable; and Individual States as such have primary jurisdiction over it. State practice does not however unequivocally support such a proposition.

The relevance of such a study is not merely academic. In the Great Lakes region of Africa a 'war' involving Rwanda, Uganda and others in the Congo is raging.

---

means for restoring a right that had been violated (*consecutio juris*) or for punishing the offender. The material causes for which a just war could be waged fell into four categories: defence, recuperation of property, recovery of debts and punishment. An act of war was considered lawful if it was just; and it was considered just if it met the conditions enumerated above". Grotius, *De iure belli ac pacis* (1625), Book II, chap. I, 2, 1. See Haggemacher, *Grotius*, quoted in "Origin of the twin terms *jus ad bellum*/*jus in bello*" by Robert Kolb published in <[www.icrc.org](http://www.icrc.org)>.

<sup>1</sup> Following German defeat in May 1945, the Allies adopted the London Agreement of August 8, 1945 containing the Charter of the Nuremberg Tribunal. Article 6 (a) provided for a new category of crime in international law, crimes against peace: "namely, planning, preparation, initiation or waging of 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".

Uganda is a member of the East African Community that includes both Kenya and Tanzania, while admission of Rwanda is being considered with it being granted observer status.

The Community is implementing common tariffs and already has an East African Parliament and Judiciary. There are, reportedly even plans to progressively integrate, some operations such as regional peace-keeping involving all the three national armies under unified command. This is in line to restore and finally surpass the former federation, uniting the three countries as one, which foundered in the 1970s under political pressures<sup>1</sup>. The East African Community Treaty commits its signatories to a *political federation* that on paper at least has all the attributes of a supersate.

However to dampen the mood of optimism, there is some disquiet over the conduct of hostilities in the war in the Congo by all parties concerned. War crimes and Crimes against Peace/Aggression have occurred and are documented.

Under international law<sup>2</sup>, the crimes within the jurisdiction of the ICC shall not be subject to any statute of limitations<sup>3</sup>.

By dint of the doctrine of State Succession, Kenya arguably could have more enhanced responsibility over the actions of Uganda (and possibly Rwanda) in the Congo than it bargained for.

One can visualize an intriguing possible scenario with violator and victim united in a single political entity raising interesting questions on reparations and suchlike. An investigation on the obligations and duty incumbent upon each state is therefore very much in order.

---

<sup>1</sup>Tuesday, March 18, 2003 President Mwai Kibaki [of Kenya] has called for the speedy integration of Kenya, Uganda and Tanzania into a federation...He said the reasons that were holding back the integration of the three sister states were trivial, noting that the factors that led to the formation of the East African Community soon after independence were still tenable. <<http://www.eastandard.net/archives/March/tue18032003/headlines/news18032003015.htm> >

<sup>2</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968. Article I, "No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) war crimes as they are defined in the charter of the international military tribunal, Nürnberg, of 8 august 1945 and confirmed by resolutions 3 (i) of 13 February 1946 and 95 (i) of 11 December 1946 of the general assembly of the united nations, particularly the "grave breaches" enumerated in the Geneva convention of 12 august 1949 for the protection of war victims;

(b) crimes against humanity whether committed in time of war or in time of peace as they are defined in the charter of the international military tribunal, Nürnberg, of 8 august 1945 and confirmed by resolutions 3 (i) of 13 February 1946 and 95 ((i) of 11 December 1946 of the general assembly of the united nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 convention on the prevention and punishment of the crime of genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

<sup>3</sup> ICC Statute Article 29 "Non-Applicability Of Statute Of Limitations."

Nor is the worry only confined to Africa. The Second Gulf War has been declared, fought and won yet even its supporters acknowledge it is at variance with the current norms governing *jus ad bellum*.

The US is conspicuously not party to the ICC statute and therefore the court's jurisdiction over the actions of American personnel does not yet arise, especially in view of the so called 'article 98 agreements'. The United Kingdom is indeed a party but in view of the present lack of jurisdiction over Aggression, its citizens too cannot be brought up before the ICC over the Iraq war.

The Case before the International Court of Justice over the Legality of the use of force by the NATO countries in Kosovo, neither affirmed nor further developed the current law, ducking trying the case on its merits.

In this paper the use of force contrary to applicable laws is considered a war of aggression a species in the genus of 'crimes against peace'.

## II. ANALYSIS: PROHIBITION ON THE USE OF FORCE.

### A. Historical Background

In the beginning there were no legal restrictions on the use of force. Might was right and anyone with enough power could do as he pleased within the limits imposed by such power itself in practical and military terms as opposed to legal or moral constraints.

Commentators have remarked that "prior to this century, no prohibition of the use of force existed, so states were free to resort to war"<sup>4</sup> and also "Contemporary public international law does not know of any rules about when it is permissible to wage war. If a state so decides, it may resort to war at any time. Force is thus permitted in the relations between states without any conditions"<sup>5</sup>.

However in more reflective times the Hague Peace conferences of 1899 and 1907 contained the first, albeit modest, restrictions on the use of force but did not go so far as to comprehensively outlaw its use outright.

During the time of the League of Nations its Covenant, Draft Treaty of Mutual Assistance and Draft Treaty of Disarmament and Security went some way towards progressively regulating and restricting the use of force amounting to

---

<sup>4</sup>Heilborn P Grundbegriffe des Volkerechts quoted in B. Simma, ed., *The Charter of the United Nations a Commentary*.

<sup>5</sup> Ibid.

war<sup>6</sup> between states. Another welcome development was the Geneva Protocol for the Pacific Settlement of International disputes of 1924 outlawing aggressive war and labelling it an international crime.

In the Kellogg-Briand Pact i.e. the General Treaty for the Renunciation of War<sup>1928</sup> the State Parties to it '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'. The provisions of this treaty may be taken accordingly as evidence of international customary law rules. The position as it stands now is markedly different.

## B. Current Position

The United Nations Charter in Article 2(4) instructs States to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'.

This provision is an improvement of the language of the Kellogg-Briand pact in replacing the term 'war' with 'force'. This is in anticipation of aggressors qualifying the force they use as not amounting to war.

In the Nicaragua (Merits) Case<sup>7</sup> the International Court of Justice considered the principle of non-use of force a rule of customary international law. The Court went on to say the United Nations Charter by no means covers the whole area of the regulation of the use of force in foreign relations, and stating that relevant customary rules still applied some of which being in the nature of *jus cogens* could not be varied by treaty.

It is a pity that the United States denied the jurisdiction of the Court to interpret the Charter unless all the state parties to it were enjoined thus denying us the benefit of full and authoritative enunciation of the rules applicable.

According to Simma,<sup>8</sup> neither Article 2 (4) nor any Charter provision provides a basis for the criminal prosecution of individuals violating the prohibition of the use of force. Therefore the international community has not yet succeeded in transforming the respective principles emanating from the Nuremberg and Tokyo trials into valid international law.

Another commentator has expressed the opinion that the Charter does not *per se* declare war illegal or criminal, but merely a breach of treaty subject to the sanctions embodied in that treaty<sup>9</sup>.

---

<sup>6</sup> "War" in its technical sense only occurs between, and not within, States.

<sup>7</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14 (June 27)

<sup>8</sup> Simma B et al. eds., 2002 *"The Charter of the United Nations: A Commentary"* p127

<sup>9</sup> LC Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 2000).

However on precisely the point in issue Akehurst<sup>10</sup> is of the view that "As for the question of individual liability, pre existing types of 'international crimes', such as war crimes, entailed individual liability, and it was therefore reasonable to apply the principle of individual liability by analogy to the new international crime of aggression. This is the position that in the writer's opinion is most consonant with current international law.

Akehurst is also of the view that under customary international law, war crimes and crimes against peace are subject to universal jurisdiction, so that all states are entitled to bring offenders to trial, <sup>11</sup>an opinion with which seems supported by the majority of authorities.

One must therefore, with great respect, disagree with the position adopted by Simma and Green above and align with Akehurst his view being more in keeping with what I perceive to be the correct interpretation when all the applicable law is taken into consideration.

Another matter to be taken into consideration is that the principles laid down in the Charter and Judgement of the Nuremberg Tribunal concerning individual criminal responsibility for the aggression or crimes against peace, have been approved by the General Assembly<sup>12</sup> and the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind. The Draft Code expressly provides that aggression etc. constitute crimes carrying personal liability by those responsible superior or subordinate.

Both the General Assembly and the International Law Commission however remained, silent on punishment as it was envisaged to be provided for in the then proposed but not putative ICC<sup>13</sup>.

## C. Criminalisation of the Use of Force

### i. Aggression under Contemporary International Law

The answer simply must be a resounding yes. The Nuremberg International Military Tribunal famously characterised 'a war of aggression as the supreme international crime in that it contained within itself the accumulated evil of the

---

<sup>10</sup> Akehurst, *A Modern Introduction to International Law*

<sup>11</sup> Reprisals by Third States 44 Brit YB Int'l law 1 18 (1970) quoted by Y Dinstein 'The Distinctions between War Crimes and Crimes against Peace' in Y Dinstein & M Tabory, *War Crimes in International Law*.

<sup>12</sup> UNGA Res 3314(XXIX) 29(1).

<sup>13</sup> 'The Distinctions between War Crimes and Crimes against Peace' in Y Dinstein & M Tabory, supra note 11.

whole<sup>14</sup>. This international crime *par excellence* calls out for concerted measures to eschew, prohibit, investigate, prosecute and punish it.

The Criminalisation of Aggression illustrates that the prohibited conduct affects a significant international interest, the nature of the crime is *sui generis* no other comes even close. The individual responsibility must be viewed separate and distinct from State Responsibility in which compensation by way of reparations, etc. would be the appropriate remedy.

In the 19th Century Napoleon's resort to war in breach of the treaty of Paris 1814 was considered illegal and by way of punishment he was exiled to the island of St Helena.

After the First World War, through the Treaty of Versailles 1919, William II of Hohenzollern, former German emperor, was indicted for "a supreme offence against international morality and the sanctity of treaties and essential rules of justice"<sup>15</sup>. However the Netherlands, where he was exiled declined to give him up for trial after receiving assurances that the Allied Powers would not vigorously pursue the point.

But the real watershed in individual criminal responsibility terms came in Article 6 of the Constitution of the International Military Tribunal appended to London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

The Tribunal set up had the power to try and punish persons who, as individuals committed crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances.

The judgement of the Court said, that crimes against international law were committed by men, not abstract entities, and only by punishing individuals who commit such crimes could the provisions of international law be enforced<sup>16</sup>.

The aforementioned General Assembly Resolution<sup>17</sup> affirmed the rules of law developed by the Nuremberg Charter and Judgement and directed the International Law Commission to draft them into a Code.

According to the British House of Lords, in the Pinochet case, then at least from that date onwards the concept of personal liability for a crime in international law must have been part of international law.

---

<sup>14</sup>HMSO Cmd 6964(1946), 13.

<sup>15</sup>12 BFSP 1;13 AM J.INT'L LAW(1919), Supp.

<sup>16</sup>Judgment of the International Military Tribunal for the Trial of German Major War Criminals, <<http://www.yale.edu/lawweb/avalon/>>

<sup>17</sup> UNGA Res 3314(XXIX) 29(1)

The Lords were of the considered opinion that the Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal, in this context the torturer, could find no safe haven.

What was said in regard to the Torture Convention could with justice be also said *mutatis mutandis* of the Rome Statute for the International Criminal Court in regard to aggression.

To reiterate the point, because the Nicaragua case held even if a treaty norm and a customary norm relevant to a dispute were to have exactly the same content, this would not be a reason for a court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.

Nor can the multi lateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or substantially the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

Still harping on the point the International Law Commission said "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*<sup>18</sup>.

## ii. Penal Consequences of Aggression

Both the Nuremberg and Tokyo judgements included the Death penalty in their repertoire of possible punishments.

However the International Criminal Tribunals for Rwanda and Yugoslavia and the International Criminal Court have imprisonment as the harshest punishment though this does not yet reflect customary international law<sup>19</sup>.

The ICC Statute in its Preamble affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", (emphasis supplied). This is the major premiss upon which this study is ultimately based.

---

<sup>18</sup>YBILC 1966 II p.247

<sup>19</sup> See Yoram *supra*23

### iii. Jurisdictional Primacy in Trial and Punishment

According to the "Legalist" paradigm<sup>20</sup>, There is an International 'Society', as opposed to 'Community' of States which while establishing the highest legal rights of territorial integrity and political sovereignty.

Therefore use of force by one state against the territorial integrity and political sovereignty of another constitutes a criminal act of aggression that justifies either a war of self defence by the victim and/or a war of law enforcement by the victim and any other member of the International Community.

However, only aggression can justify war and once the aggressor state has been militarily repulsed it and its leading individuals can also be punished.

It is therefore, submitted that every state has the right, and indeed a duty, *obligation erga omnes* to utilise the doctrine of Universal Jurisdiction in repressing the crime of aggression. The House of Lords in the Pinochet case said one could not deny that universal jurisdiction over crimes against international law was an irreversibly growing trend and the principle *aut dedere aut punire* that is, either you prosecute or punish, dated back at least to the time of Grotius. Because the inclusion of universal jurisdiction in the draft Torture Convention was finally no longer opposed by any delegation, such a proposition is a fortiori true of the crime of aggression.

Further, the Lords added that Universal Jurisdiction is asserted in certain circumstances to prosecute offences irrespective of where these offences were committed, the nationality of the offenders, or any connection of the state asserting this jurisdiction.

In the Israeli case, *AG vs. Eichmann* the court held this universal source of jurisdiction vests the right to prosecute and punish crimes of this order in every State within the family of nations<sup>21</sup>.

It has also been judicially observed that International Law provides that offences *jus cogens* may be punished by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution<sup>22</sup>.

Based on the law outlined above, the conclusion drawn is that there are Customary International Law provisions with the force of obligations *erga omnes* supplemented by UN Charter in the nature of *jus cogens* that give the right and impose the duty to investigate, prosecute and punish aggression.

---

<sup>20</sup> "Just and Unjust Wars" Walzer Michael at p 61

<sup>21</sup> *AG vs. Eichmann* (1962) 56AJIL 805 para 30.

<sup>22</sup> *Demjanjuk v. Petrovsky* (1985) 603 F Supp 1468; 776 F.2d.571

Domestic legislation should be promulgated to reflect this reality in the fast-developing area of international criminal law.

#### iv. The Problem of Definition

The aforementioned UNGA Resolution 3314(XXIX) in Article 1 provides a definition of aggression as the use of armed force against the sovereignty, integrity or political independence of another state, or otherwise inconsistent with the Charter of the United Nations. This definition was adopted by consensus and was considered as evidence of customary law by the ICJ in the Nicaragua case.

The ICC suffers from the drawback of a lack of definition, but this upon close reflection is not a barrier to prosecution elsewhere under the State system that has primary responsibility. Because of the rule against *non liquet*, the doctrine of precedent, the provisions of the Statute of the ICJ (on sources of law) and the Vienna Convention on the Law of Treaties all applicable in domestic courts, the relevant legal definition was, is and shall for the next few years at least, be the one provided by the United Nations General Assembly.

As for the critical matter of Individual Criminal Responsibility, The High Command case ruled that the criminality of aggressive war attached only to individuals at the policy-making level<sup>23</sup>.

At this point one may well do well to ask, what then is the lacuna? Well, no one has to the best of my knowledge been domestically prosecuted for aggression so far. Other international crimes have found their way into domestic courts but not this most serious one. This is a regrettable omission that needs addressing. What then could be the solution? The acknowledgement of state power and duty under treaty and customary law to refrain from, prosecute and punish aggression at the national level is the sine qua non of the whole concept of accountability for actions contrary to the law governing initiation or entry into war. States must not shirk their international duties and especially not the State Parties to the ICC Statute.

A question of some merit is whether the judicial enforcement of peace is compatible with the role of the Security Council. However this is addressed by the Statute itself that gives a perpetually renewable 'veto' to the Security Council concerning deferral of investigations or prosecutions<sup>24</sup>.

---

<sup>23</sup>USA v. Von Leeb et al (Nuremberg 1948) quoted in Yoram Dinstein *the Distinctions between War Crimes and Crimes against peace* in Yoram Dinstein and Mala Tabory War Crimes in International Law 1996

<sup>24</sup>Article 16 Deferral of investigation or prosecution 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 United Nations, has

### III. CONCLUSION

The fundamental principles of legality being regularity; generality and prospectivity are all adequately and cogently addressed in the legal sources examined above. Regular because of pre-existing legal provisions, General because these apply universally being generally known and Prospective because they are, and have been, provided for from at least half a century ago. Thus all the requirements for criminal jurisdiction have been addressed and all that remains is the necessary political will. In the realm of international relations political considerations are weightier than legal ones. What is lawful does not always coincide with what is expedient.

However in this brave new world of internationalisation, keeping order in the world will do well to be through judicial mechanisms with their merit of impartial, neutral and objective decisions, that is, relative to political mechanisms. Domestic legislation should provide for this as a matter of legal imperative.

---

requested the Court to that effect; that request may be renewed by the Council under the same conditions.