BRILL

Spanish Yearbook of International Law XVII (2011–2012): 73–93

SYIL

A Hybrid Strategy to Prosecute the Waging of War[1]

Marta Sosa Navarro
Universidad Carlos III de Madrid

ABSTRACT

The Kampala Conference held in 2010 to review the Rome Statute portrays a discouraging image regarding the fight against impunity for those responsible for the waging of war. Its outcome reflects the international community's lack of willingness to take the necessary steps to hold accountable those responsible for the crime of aggression.

[1] This paper was selected finalist in the Inaugural Benjamin B. Ferencz Essay Competition, launched by the Whitney R. Harris World Law Institute at the Washington University Law, October, 2012.

DOI: 10.1163/9789004264755_005

Regardless of the existing agreement on its definition, the International Criminal Court's jurisdiction has been postponed again, fostering the need to resort to alternative formulas to prosecute this crime. This paper aims to study the possibility of prosecuting aggression as a crime against humanity in so far as the illegal use of force amounts to "other inhuman acts of similar character (…)", articulated in article 7.1.k of the Statute. It also searches for alternative procedures to prosecute these crimes, focusing on the emerging role of domestic jurisdiction through the consolidation of the *aut dedere aut judicare* clause.

Keywords

Crime of aggression, use of force, crimes against humanity, International Criminal Court, national jurisdiction, *aut dedere aut judicare*.

RÉSUMÉ

La Conférence de Kampala tenue en 2010 a fin de examiner le Statut de Rome dépeint une image décourageante en ce qui concerne la lutte contre l'impunité pour les responsables du déclenchement de la guerre. Son résultat reflète l'absence d'une volonté politique dans le communauté internationale de prendre les mesures nécessaires pour demander des comptes aux responsables du crime d'agression. Indépendamment de l'accord existant sur sa définition, la compétence de la Cour Pénale Internationale a été reportée à nouveau, en favorisant la nécessité de recourir à des formules alternatives pour poursuivre ce crime. Cet article vise à étudier la possibilité de poursuivre l'agression en tant que crime contre l'humanité dans la mesure où l'utilisation illégale de la force peut être inclus dans la catégorie « autres actes inhumains de caractère analogue (…) », articulé en 7.1.k article du Statut. On explore également des procédures alternatives sur la base du rôle émergent de la compétence des tribunaux nationales à travers la consolidation du principe *aut dedere aut judicare*.

Mots clés

Crime d'agression, l'utilisation illégale de la force, crime contre l'humanité, Cour Pénale Internationale, compétence nationale, *aut dedere aut judicare*.

RESUMEN

La Conferencia de Kampala, celebrada en 2010 con el objetivo de revisar el Estatuto de Roma, nos ha dejado un legado desesperanzador en cuanto a los logros alcanzados en el ámbito de la exigencia de responsabilidades por el acto de iniciar y provocar la guerra. El resultado de la misma refleja la ausencia de una voluntad política en el seno de la comunidad internacional dirigida al enjuiciamiento a aquellos presuntos autores del crimen de agresión. A pesar de la existencia de un acuerdo en torno a su definición, el ejercicio de la competencia de la Corte Penal Internacional para conocer de este crimen ha tenido que ser retrasado una vez más, lo cual ha provocado la necesidad de recurrir

a fórmulas alternativas para lograr el enjuiciamiento de este crimen internacional. Este trabajo tiene como finalidad estudiar la posibilidad de enjuiciar el crimen de agresión como crimen de lesa humanidad encuadrando el uso ilegítimo de la fuerza dentro del subtipo "otros actos inhumanos de carácter similar (…)", recogido en el artículo 7.1.k del Estatuto. Asimismo, se exploran también procedimientos alternativos para enjuiciar estos crímenes basados en el papel emergente de las jurisdicciones nacionales a través de la consolidación de la cláusula *aut dedere aut judicare*.

Palabras clave

Crimen de agresión, uso ilegítimo de la fuerza, crimen de lesa humanidad, Corte Penal Internacional, jurisdicción nacional, *aut dedere aut judicare*.

1. INTRODUCTION

Despite the grave violations for human rights starting a war entails, the crime of aggression, has had a very irregular legal history of condemnation. The first signs of a common will within the international community to prosecute the initiation of war during the Nuremberg trials has slowly faded away with time and the international criminal justice system finds itself in a situation which starts to seem kafkian: the ICC, after taking 12 years to agree upon a definition of the crime of aggression, has recently seen the possibility of exercising its jurisdiction postponed at least until 2017, when another meeting to discuss this issue will be held.

The present article aims to tackle this problem by proposing two alternative and complementary techniques of legal engineering, which, in application of international law, could contribute to fulfil the impunity gap created by this new delay of the ICC's jurisdiction.

In order to do so, this paper is divided into two parts: the first part addresses the crime of aggression from an historical perspective in order to understand what the foundations and first manifestations of this crime were.

The second part concentrates on presenting conveying legal arguments that may be used both by the International Criminal Court (ICC) and by national courts to guarantee accountability for those responsible for waging war.

A two-head approach is taken to try and offer two different legal constructions that will allow the prosecution of the waging of war both by the International Criminal Court, through the consideration of aggression as an act of illegal use of force that can amount to a crime against humanity and by national courts, through the implementation of the recently defined crime of aggression into their legislations and subsequent prosecution of the alleged responsible in application of an emerging consuetudinary principle of international law: the obligation to extradite or prosecute.

2. BACKGROUND: THE ORIGIN OF THE CRIME OF AGGRESSION

Context is crucial when presenting any argument aimed at persuading the reader. In a matter as politically charged as the one studied in this essay, understanding and referring

to the history and evolution of the "crime of aggression" becomes essential, both to infer the scope and elements of such a crime, and to establish the legitimacy of national and international courts to investigate and prosecute its alleged perpetrators.

2.1. The Nuremberg Trials

The prosecution of Nazi leaders for conspiracy to wage aggressive war can be deemed the origin of aggression as an international crime. The London Agreement consolidated this crime as a specific one among the more general category of crimes against peace (Art 6.a. IMT Charter).

In his exhaustive analysis on the origin of the notion of aggressive war through the detailed consideration of correspondence between some of the most influential men in the construction of the Nuremberg trials,[2] professor Jonathan Bush highlights the magnitude of the challenges faced by these "legal architects", who, given the circumstances, had to rely, in a big proportion, on their imagination and legal skills to articulate convincing arguments which had little or no precedent support.[3]

The absence of a precedent and the little academic debate on the notion of aggression can be explained through a realistic analysis of the recent European history. As Chanler bluntly puts it in one of his letters, the rising of imperialism in Europe conditioned international lawyers who had been struggling to draw a distinction between "just" and "unjust" war, forcing them to advance theories that justified, in law, military conquests:

> *"Obediently, the international lawyers of that day dropped their attempts to draw distinction between "just" and "unjust" war, and, in order to support the desires of their rulers, advanced the theory that the use of the nation's military power in support of its national policy was an inherent attribute of sovereignty-or to put it in layman's language, that all wars are lawful, whatever their origin".*[4]

Nevertheless, after World War II, the international community had two powerful arms for fighting the crystallization of this crime: a legal one and an intellectual one.

2.1.a. The Legal Arm: The Kellogg-Briand Pact (KBP)

The KBP from 1928 was undoubtedly the strongest legal tool to be used by defenders of this position. Through this Pact, over 60 nations declared war to be illegal. This instrument was considered to be hard treaty law and binding for all ratifying States.

---

[2] William C. Chanler (Wall Street lawyer serving in the War Department in Washington), Sheldon Glueck (leading Harvard criminologist whose intellectual contribution to Nuremberg has long been known) and General Telford Taylor (chief Prosecutor at the later Nuremberg trials).

[3] J.A. Bush, "The Supreme Crime and its origins: the lost legislative history of the crime of aggressive war", 102 *Columbia Law Review*, (2002), 2324–2424, p. 2329: "(. . .) allied lawyers and planners around 1940 found little precedent for the notion that aggressive war itself might be a crime that, when they started to contemplate war crimes trials".

[4] Letter from William Chanler to Sheldon Glueck, 9 May 1945 in J.A. Bush, "The Supreme Crime and its origins . . . loc. cit., p. 2410. Bush himself supports this view, Ibid., p. 2230.

Moreover, its influence in the construction of aggressive war was manifest when it was raised, in the context of the negotiation of the Nuremberg trials' framework, to counterbalance the argument that asserted that the charges relating to aggressive war were violations of the legality principle or the rule against retroactivity of criminal law. This Pact, as well as the subsequent bilateral friendship, neutrality and collective security treaties, evidenced that the concept of crimes against peace was already clear law by the 1930s.[5] However, in 1944, in the context of the Nuremberg Trials negotiations, two of the most influential figures in this process (Belgian Judge de Baer and criminology scholar Glueck) had concluded that Nazi leaders could not be tried for a crime called aggression. According to de Baer, the reason was that the KBP lacked specific punishments, which meant that countries would have had to incorporate its provisions into their domestic law to make the violations of this Pact punishable.[6] In Glueck's view, the Versailles Commission's precedent, which had declined to impose personal criminal liability on Kaiser Wilhem for starting World War I, together with the Kellogg-Briand failure to "make violations of its terms an international crime punishable either by national courts or some international tribunal",[7] resulted in the impossibility to recognize the existence of the crime of aggression and hence impeded the prosecution of Nazi leaders on this count.

2.1.b. The Intellectual Arm: William Chanler and His "Kellogg-Briand Implies Murder Liability" Theory[8]

If this was the leading opinion in 1944, how did 14 defendants get to be charged for committing crimes against peace? According to Bush, the key to this answer should be searched "behind the scene". This author asserts that William Chanler, a Wall Street lawyer that had previously worked in the War Department, was the first person to propose the framing of crimes against peace as an international crime and to succeed in placing it on the American agenda. The United Nations War Crimes Commission (UNWCC) requested its member Nations for their views on the criminality of aggression. In the US, the State Department referred it also to the War Department for advice. Chanler, who at this point in time was a member of the War Department, still had in mind the Mussolini failure (he, with his colleague Robert O. Gorman, drafted an indictment against Mussolini, where he was accused of initiating an aggressive war against Ethiopia and the then Allies, but the Italian king declined to turn over the Italian dictator to Anglo-American forces and Mussolini was rescued by Nazi commandos),[9] and consequently wrote that the solution was to recognize that the illegality of aggressive wars had been established by the Kellogg-Briand Pact and related instruments. If this was to

---

5 Ibid., p. 2335.

6 Marcel de Baer, "Considerations of Present Interest on the Pact of Paris. 27 Message", *Belgium Review*, (1944) at 31.

7 Sheldon Glueck, *War Criminals: Their Prosecution and Punishment*, New York: Alfred A. Knopf, 1944), p. 38.

8 For its use at Nuremberg see Report of Robert Jackson, The Nuremberg Case at 84 (London Conference Report).

9 T. Taylor, "The Nuremberg Trials", 55 *Columbia Law Review*, (1955), 488–525, pp. 488–493.

be accepted, authors of killings in Poland or Czechoslovakia would not enjoy the status of privileged combatants that they would have had in a lawful war under the traditional laws and customs of war, but that of underprivileged fighters consequently breaching Polish or Czech domestic criminal law.

Initially, Chanler found a great deal of resistance from American academics, policy makers and members of the War Department when trying to defend this theory. Nevertheless, after debating the whole idea, some of them, such as Glueck, were persuaded.[10] Finally, Chanler's arguments managed to convince President Roosevelt of the importance of including it in the indictment.[11] But the fact that a key person in Nuremberg shared his position must not be underestimated. Justice Robert Jackson, who was, appointed by the President to lead the American team in the negotiations, managed to incorporate his view on the definition of the crime of aggression and the individual criminal responsibility it entailed, which went a step further than Chanler's and was more compromising: "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".[12] Consequently, the Nuremberg Tribunal would later conclude that international law already applied, allowing criminal punishment of individuals for aggression or crimes against peace, without requiring domestic incorporation of this prohibition by victim States.

2.2. Subsequent Attempts to Define the Crime of Aggression

2.2.a. General Assembly (GA) Resolution 3314, 14 December 1974

This Resolution was the result of the materialization of Resolution 95 (I), adopted unanimously by the UN GA on the 11th September 1946. It affirmed the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal". It was however agreed that the definition would be a non-binding guide to the Security Council.

Resolution 3314 was non-exhaustive, consequently representing an important but incomplete step towards the crystallization of this crime in international criminal law. It left the Security Council a broad area of discretion by stating that it was free to characterize other acts of aggression under the Charter.[13]

---

[10] *See* letter exchange in J.A. Bush, "The Supreme Crime and its origins . . . loc. cit., pp. 2402–2417.

[11] To see the tensions Chanler had to deal with see ibid., p. 2359. President's Roosevelt's memorandum specifically stated that "(t)he charges should include an indictment for waging aggressive warfare, in violation of the Kellogg Pact. Perhaps this and other charges might be joined in a conspiracy indictment". Ibid., p. 2363. Justice Robert Jackson, Supreme Court Judge at the time also defended the inclusion of the crime of aggression in the American draft proposal for the international court. Ibid., p. 2367.

[12] Charter of the International Military Tribunal, art. 6(a).

[13] A. Cassese, "On Some Problematical Aspects of the Crime of Aggression", *Leiden Journal of International Law*, 20 (Dec. 2007), 841–849, p. 842.

2.2.b. *The International Court of Justice's (ICJ) decision in the Nicaragua Case*[14]

In this case, the ICJ interpreted the prohibition of using force against another State to reflect customary international law. It addressed the legality of American government actions and policy, rather than individual liability, but it was rightly deemed a groundbreaking decision, both for the judges' precedent-setting reasoning which shed some light on the specific acts that could be considered to amount to aggression and for the fact that the ICJ as an institution tackled the case at all.

2.2.c. *Security Council Resolutions*

The role assigned to the Security Council by the Rome Statute in respect of the crime of aggression is undoubtedly a very significant one.[15] Nevertheless, this body has very rarely asserted the perpetration of an act of aggression by a State. Among the exceptions, Resolution 573 from the 4th of October 1985 (Israeli attacks on PLO targets in Tunisia) and Resolution 577 from the 6th of December 1985 (South African attacks on Angola) may be cited. The excessively prudent approach taken by the Security Council on this issue was evidenced by its failure to label the Iraqi attack on Kuwait as an aggression, despite the fact it declared the annexation void (SC RES 660, 2 Aug. 1990 and 662).

2.2.d. *The International Law Commission (ILC) and the urgency to conclude the Draft Code of Offences against the Peace and Security of Mankind in the light of the creation of the ICC*

The ILC started working in the Draft Code of Offences against the Peace and Security of Mankind back in 1949, in the context of the formulation of the Nuremberg principles. It was not until 1953 that the General Assembly received a draft statute for a Court and a 1954 draft code that included aggression, but it put them on hold, pending a better definition of aggression.

The explosion of the crisis in the Balkans and Rwanda and the subsequent establishment of international tribunals determined the emergence of what Bush described as "an institutional "customer" interested in the legal product the ILC was producing", being that costumer the proposed permanent International Criminal Court. This fostered the completion of the Draft Code of Offenses against the Peace and Security of Mankind,

---

[14] Military and paramilitary activities in and Against Nicaragua (ICJ Reports 1986, 14 at 195), Judgement.

[15] *See* article 5(2), 13(b) and 16 of the Rome Statute. Precisely in the light of this, some authors have stressed the importance of finding a balance between this important role and the necessity of counterbalancing the resulting political taint affecting an ICC in need of objectivity to consolidate its legitimacy. See Escobar Hernández, C., Corte Penal Internacional, Consejo de Seguridad y Crimen de Agresión: el equilibrio difícil e inestable *en El derecho internacional en los albores del siglo XXI: homenaje al profesor Juan Manuel Castro-Rial Canosa*, coord. por Fernando M. Mariño Menéndez, 2002, pp. 243–264.

which included a definition of aggression strongly criticized by international experts, despite the almost 50 years it took to crystallize.[16]

3. THE TWO-HEAD STRATEGY: COMBINING INTERNATIONAL AND NATIONAL JURISDICTION TO PROSECUTE THE CRIME OF AGGRESSION

3.a. The Kampala Conference and its limited success

Aggression requires individual conduct (on the part of the accused) and State conduct (on the part of the State on behalf of which the aggressive war was planned or initiated). This has raised questions as to whether aggression is to be found by criminal courts prosecuting individuals or political institutions such as the Security Council categorizing the actions of States.

However, giving content to this crime has been a long pending issue.[17] Finally, in May–June 2010, at the Conference held in Kampala to review the Rome Statute, a definition of this crime was adopted by consensus.[18]

Shortly after this Conference, ICC Judge Hans-Peter Kaul[19] openly expressed his views on the proscription of the crime of aggression and celebrated the final agreement on the definition of aggression as a great achievement: "The waging of war will become triable after all".[20]

The magnitude of the step taken towards ending impunity for aggression is unquestionable. However, some problems resulting from the way in which this crime has been articulated in the Rome Statute remain unsolved.

---

16 A. Cassese, "On Some Problematical Aspects . . . loc. cit., p. 842, referring to the definition in the Draft Code: "(. . .) although it specifically dealt with criminal liability for aggression, was rather circular and in fact did not provide any definition (. . .)".

17 The extensive academic production on the content of this crime confirms this assertion. See, among others, Remiro Brotons, A., "Agresión, crimen de agresión, crimen sin castigo", Documento de Trabajo, nº 10, *Fundación para las Relaciones Internacionales y el Diálogo Exterior*, Junio, (2005); Orozco Torres, L.E., "La criminalización de las guerras de agresión", *Revista Española de Relaciones Internacionales*, nº 3, (2011), pp. 223–249 and Meron, T., "Defining Aggression for the International Criminal Court", *Suffolk Transnational Law Review*, Vol. 25, Issue 1 (2001–2002), pp. 1–16.

18 Resolution RC/Res. 6, adopted at the 13th plenary meeting, on the 11th June 2010, RC/11; See articles 8 *bis*, 15 *bis* and 25(3) *bis* of the Rome Statute. The working dynamics and method applied in this Conference have already provoked reactions among scholars. See, among others, Kress, C.; Von Holtzendorf, L., "El compromiso de Kampala sobre el crimen de agresión", *Revista General de Derecho Penal*, nº 15, (2011).

19 The author was elected as one of the first 18 judges at the International Criminal Court in 2003 for a term of three years and re-elected in 2006 for a further term of nine years. Since 2009, he is serving as Second Vice-President of the ICC. Judge Kaul is assigned to the Pre-Trial Division.

20 Kaul, H.P., "Kampala June 2012 – A First Review of the ICC Review Conference", *2 Göttingen Journal of International Law*, Nº 2, (2010), 649–667, p. 658.

Firstly, the Court will not be able to exercise its jurisdiction for almost five years, at the earliest. The effective exercise of jurisdiction is subject to a decision to be taken after 1 January 2017, with the same majority that would be needed for any other amendment of the Statute. It must be accepted or ratified by at least 30 State Parties. Kaul estimates that the delay should be considered in long term perspectives and asserts that "There is now an increasing likelihood that in the years to come the ICC will be able to prosecute perpetrators for the crime of aggression, not like in Nuremberg by means of law created ex post fact, but on a strong legal basis created by the common will of States before the commission of the crime.[21]

Ferencz, on the other hand, does not assess the Conference's outcome in very positive terms and points out its limited progress towards the actual materialization in the prosecution of those alleged to be responsible for the crime of aggression by the ICC as it has just "postponed the issue again".[22]

Secondly, the preeminent role assigned to the Security Council in this matter raises legitimacy and fairness issues. There are three ways of referring a situation of aggression to the ICC. The first one refers to the Security Council's right to refer the situation to the Court after determining, in application of Chapter VII of the Charter, the existence of an unlawful use of force.[23] The second one consists of the Prosecutor *motu proprio* initiating investigations, and the third one implies the Prosecutor initiating investigations upon request of the State Party. In the last two cases, however, the Prosecutor may only initiate an investigation after having consulted the Security Council.

The two-head strategy hereby proposed tackles these two problems by offering short-term and long-term solutions to the impunity gap which those allegedly responsible of committing the crime of aggression might be benefitting from. Through head 1, the ICC, temporarily finding itself in a handcuffed situation, is offered a way out to prosecute this crime as a crime against humanity through the subcategory "other inhumane acts . . .". Head 2, as will be exposed, proposes a long-term and State-centred alternative that grants national jurisdictions with the key role to hold those responsible for the waging of war accountable.

3.b. Head 1. The international via: Crimes against Humanity and the ICC

> *"The illegal use of force, which is the soil from which all Human Rights violations grow, must be condemned as a Crime against Humanity".*

It was impossible for Spencer Tracy to foresee that 40 years after he played the role of Judge Haywood in the film "Trial at Nuremberg", one of his lines would actually summarize one of the main arguments for the prosecution of the waging of war, in the context of a complex legal debate.

---

[21] Ibid., pp. 666–667.

[22] B. Ferencz, A New Approach to deterring illegal wars, August 2011, B. Ferencz. Law. Not War.

[23] Article 39 of the Charter of the United Nations: "The Security Council shall determine the existence of any threat to the peace, breach to the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security".

Under the present circumstances, the limitations faced by the ICC when trying to prosecute the crime of aggression have been officially extended until 2017 at Kampala, inviting international lawyers and academics to find alternative ways of bringing the alleged responsible for aggression to trial.[24] Part 1 of the two proposed arguments will concentrate on articulating the way in which the notion "crimes against humanity" (CAH) can serve as an instrument to achieve this goal at the international level.

The concept "crimes against humanity" is regulated in article 7 of the Rome Statute and it includes an exhaustive list of acts "when committed as part of a widespread and systematic attack directed against any civilian population, with knowledge of the attack". The definition that was finally agreed upon during the Diplomatic Conferences to draft the Rome Statute basically includes the core elements of the formula adopted by the ICTY in the Tadic case, which will be further analysed, with an exception: the exclusion of the two-tiered approach which required proof of both the intent to commit the act (murder, extermination, enslavement, deportation, . . .) and the knowledge of the context in which his/her act took place. There was also a no-war nexus requirement included. It is notable that, according to the Rome Statute, the ICC does not require this "widespread and systematic attack" to rise to the level of an armed conflict.

The origin of this crime and its international criminalization goes back to Nuremberg, although its roots can be found far earlier.[25]

This paper's initial hypothesis is that the illegal use of force can amount to a CAH in so far these acts can amount to "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health", articulated Article 7.1.k of the Rome Statute, which regulates CAH.

In order to support this hypothesis, key concepts such as "the illegal use of force" and "other inhumane acts" will be analysed and compared, together with a thorough analysis of the definitional features of the notion CAH, in order to construct a strong legal argument to support this alternative shortcut to end impunity.

I. *Definitional features of the notion CAH*

The *ad hoc* tribunals have played an essential role in the development of the content of the CAH. The fact that the general element of "widespread and systematic attack"

---

[24] On the Kampala Conference outcome see Rodríguez-Villasante y Prieto, J.L., "La Corte Penal Internacional, de Roma a Kampala pasando por la Haya: "Consenso" sobre el crimen de agresión en la Conferencia de Revisión del Estatuto", *Revista general de la marina*, Vol. 260, Mes 5 (Junio, 2011), pp. 769–779; Milanovic M., "Aggression and Legality: Custom in Kampala", *Journal of International Criminal Justice*, Vol. 10, Issue 1 (March 2012), pp. 165–188; Scheffer, D., El significado y la activación del crimen de aggression bajo el Estatuto de Roma de la Corte Penal Internacional", *Política Criminal*, Vol. 7, Nº 13 (Julio 2012), pp. 209–229; and more recently, Quesada Alcalá, C., El crimen de agresión como amenaza a la seguridad global, Cuadernos de estrategia, Nº 160, (2013), pp. 77–116. This paper also presents a complete timeline on the evolution of the content of the crime of aggression.

[25] Van Schaak highlights the links between humanitarian intervention, as a pre-existing principle from the 19th century that was later developed in the Charter and CAH, E. Van Schack, "The Definiton of Crimes Against Humanity: Resolving the Incoherence", 37 *Columbia Journal of Transnational Law,* 787–850, (1998–1999), p. 849.

was not explicitly included in the ICTY Statute but interpreted into the definition from the words "directed against any civilian population", can serve as an example of it.[26]

Also at the ICTY, the Trial Chamber defined CAH based on the *mens rea* of the defendant and the existence of a widespread or systematic attack against a civilian population,[27] increasing with this the Prosecutor's burden of proof by adding additional elements to the definition of the offense that do not appear in the Statute.[28]

The war nexus requirement appears in the ICTY Statute despite the opposition to include it, expressed by the Commission of Experts Established Pursuant to Security Council Resolution 780.[29] Nevertheless, this limitation in the Statute has been generally considered to be jurisdictional rather than definitional.[30] Moreover, the ICTY Appeals Chamber in the Tadic case confirmed that conviction for CAH under customary international law no longer requires proof of link to a state of war or war crimes.

Following this precedent, the war-link nexus has also been omitted in the Statutes of later international or mixed tribunals and courts such as the ICTR, Special Court of Sierra Leone, East Timor Special Panels and the Extraordinary Chambers in the Courts of Cambodia. Special reference should be made to the ICC's articulation of the crime which reformulates its definition on a consensual basis and removes the requirement of a policy as one of its definitional elements.[31]

It can be concluded from a combined analysis of the conventional statements and case-developments that the general and definitional elements of this crime enable it to be defined as a "widespread and systematic attack against a civilian population".

---

[26] See Judgement Kunarac (IT-96-23) AC 12 June 2002, para. 85. Some differences between Statutes should be pointed out. While according to the ICTY, this attack it must be carried out in the context of an armed conflict, the ICTR Statute established that acts against civilians must be carried out on national, political, ethnic, racial or religious grounds. The regulation of CAH in the Rome Statute also presents some particularities: it requires the perpetrator to commit the crime pursuing or furthering a "State or organizational policy to commit" an attack against a civilian population.

[27] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (Int'l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 252, para. 656. Two mental state requirements can be found in this definition: first, intent to carry out the enumerated offense must be proved (i.e. inhumane treatment, murder) and second, the prosecutor must prove that the perpetrator knew "of the broader context in which his acts occurs" (para. 656). This knowledge however "can be factually implied form the circumstances" (para. 657).

[28] E. Van Schack, "The Definition of Crimes Against Humanity . . . loc. cit., p. 828.

[29] *See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. SCOR 49th Sess., Annex VI, at 21, U.N. Doc. S/1994/674 (1994) ("Crimes against humanity are also no longer dependent on their linkage to crimes against the peace or war crimes.").

[30] Van Schaak, *supra* note 22, p. 827. This author supports this position on the commentators' interpretation on the Secretary General's comments emphasizing the prohibition of CAH "regardless of whether they are committed in an armed conflict, international or internal in character".

[31] On the legal arguments supporting the consolidation of this version within international law, see Mettraux, G., "The Definition of Crimes Against Humanity and the Question of a 'Policy' element" in Forging a Convention for Crimes Against Humanity, edited by Leila Nadya Sadat, Cambridge University Press (2011), pp. 142–176.

It is precisely the concurrence of these elements that allow ordinary crimes to become crimes of much greater consequences: crimes against humanity.[32] In this line, professor Tieger asserts that although CAH emerged from the field of IHL as an extension of war crimes, this category of crimes has become the criminal law response to gross violations of human rights.[33]

II. *The category of "other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health" as a vehicle to prosecute illegal use of force as CAH*

In the Tadic case, at the Trial Chamber, the Prosecution seemed to confuse persecution with "inhumane treatment" and considered that when integrating "racial, political, (…) motives into the main elements of the crime, persecution and inhumane acts are made redundant". This position has been strongly criticized by authors such as Van Schaak, who argues that "the discriminatory motive requirement adds nothing to the international nature of the offense and threatens to exclude from the rubric of crimes against humanity inhumane acts involving non-enumerated motives".[34] It can be inferred from her words that she had a wide concept of "inhumane acts" and clearly rejected the idea of establishing an exhaustive list of conducts, based on the underlying motives that could amount to this crime, opinion with which the present author fully subscribes.

Some authors have pointed out the challenges this category would have to face for being too "vague", potentially colliding with the principle of *nullum crime sine lege*.[35] Nevertheless, international case law has given some steps towards its concretion.

Among the international case law that has contributed to define "other inhumane acts", the Krnolejac case may be highlighted.[36] In this case, the accused is charged with inhumane acts as a CAH as a result of his participation in the implementation of brutal living conditions to victims while he was warden. As a result of these living conditions, many detainees, according to the Prosecutor, suffered serious physical and psychological consequences.

"The elements to be proved are:

1. The occurrence of an act or omission of similar seriousness to the other enumerated crimes under the Article concerned;
2. The act or omission causes serious mental or physical suffering or injury or constitutes a resinous attack on human dignity; and
3. The act or omission is performed deliberately by the accused or a person or persons for whose acts or omissions he bears criminal responsibility".[37]

---

[32] A. Tieger, Crimes Against Humanity in *The Oxford Companion to International Criminal Justice*, Editor in Chief: Antonio Cassese, Oxford University Press, New York, (2009), p. 286.

[33] Ibid., p. 287.

[34] E. Van Schack, "The Definiton of Crimes Against Humanity… loc. cit., p. 840.

[35] A. Tieger, Crimes Against Humanity in *The Oxford*… op. cit. p. 287.

[36] *Prosecutor v. Krnolejac* (IT-97-25), TC, 15 March 2002, para. 130.

[37] Kayishema and Ruzindana, ICTR, Judgement, (ICTR-95-1-T), TC, 21 May 1999, para. 151–154; *Prosecutor v. Vasiljevic*, ICTY, Judgement, (IT-98-32-T), TC, 29 November 2002, para. 234. In this

As for the subjective element, Ferencz considers that "the Prosecutor would have to prove beyond doubt that the accused held a position of high authority, played a key role and intended the foreseeable consequences".[38] The required *mens rea* for an act to amount to a CAH has been established by the international case law. In the Krnojelac case, the TC specifically referred to the inclusion to the civil law notion of *dolus eventualis* by asserting that:

> *"The required mens rea is met where the principal offender, at the time of the act or mission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or mission".*[39]

In short, it can be asserted that the content of the notion CAH has been significantly shaped by the *ad hoc* tribunals jurisprudence, preceding the Rome Statutes' articulation of the crime, which includes a definition based on the existence of a widespread or systematic attack against a civilian population and the perpetrator's knowing contribution to that attack.[40]

At this point, and once the subjective and objective elements of the crime which will serve us as an instrument to prosecute aggression have been established, the direction in which this argumentation is taking us becomes clear. Having clarified the definitional elements of CAH through an international conventional and case-law analysis and taking into account the existence of an open clause in which we can embody the "illegal use of force", the foundations of this proposal have been built. Once the perpetration of an act of illegal use of force has been verified, a box-ticking exercise on the aforementioned definitional elements of CAH would be sufficient to justify the ICC's prosecution of an act of illegal use of force as an inhumane act amounting to a CAH.

---

cont.

case, the TC highlights that this notion "functions as a residual category for serious charges which are not otherwise enumerated under Article 5".

38 B. Ferencz, A New Approach to deterring illegal wars, August 2011, B. Ferencz. Law. Not War.

39 Krnolejac (IT-97-25), TC, 15 March 2002, para. 132 referring to Kayishema and Ruzindana Trial Judgement, para. 153; Aleksovski, Trial Judgement, para. 56.

40 Much more critical with the *ad hoc* tribunals' contribution to the shaping of the CAH's legal framework is Professor Sluiter. Sluiter, G., "Chapeau Elements" of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals" in Forging a Convention for Crimes Against Humanity, edited by Leila Nadya Sadat, Cambridge University Press (2011), p. 140: "As with many aspects of the law of the ad hoc tribunals, the important decisions and choices were made in the early case law. Even if they fundamentally disagreed with these choices, subsequent Trial Chambers could not significantly deviate from these initial findings without risking the invalidation of earlier judgements. (…) There is a lot of uncritical repetition going on, and what matters is the origin and quality of the initial solution proposed".

III. *Illegal use of force*

Among international scholars, with some exceptional opinions,[41] there is a common agreement on the absolute illegality of the use of force by States lacking authorization from the Security Council.[42]

According to current international law, in the absence of a Security Council Resolution, the use of armed force by States can only be justified as collective self-defence pursuant to Article 51 of the Charter of the United Nations.[43]

With the help of the referred case law, there are three questions the ICC must respond to in order to be able to establish its jurisdiction to investigate the use of force by a State against another State resulting in widespread and systematic attack of civilian population as a potential case of CAH:

1. Is this use of force illegal?
2. Are the definitional features of CAH present?
3. Do these acts amount to other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health?

Despite the fact that, as stated above, scholars' positions range from considering the use of force illegal in all situations to estimating that in some occasions, though remaining illegal it may be justified, the present research paper takes a legalistic approach to

---

41 In this article Professor Simma, though accepting that the use of force by NATO in the Kosovo crisis is contrary to the United Nations Charter, he diminishes the importance of this illegality in so far it was aimed at avoiding the perpetration of big-scale atrocities: B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, 10, (1999), p. 22.

42 Professor Phillip Allot, in an article on the invasion of Iraq, positions himself against the possibility of armed force being legal in any case: "The use of armed force by States can never be unlawful because it can never be lawful". P. Allot, "The invasion of Iraq and the nature of international law", 5 *Inter Alia* 91, (2006); Cassese A., "*Ex iniuria ius oritur*: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?", *European Journal of International Law*, 10 (1999), pp. 25–29. In the light of the Kosovo crisis, Professor Cassese suggests that the nascent trends in the world community may lead to justifying, under strict conditions, resort to armed force, even absent any authorization by the Security Council as an exception similar to that laid in Article 51. However, he clearly states that, in the present moment, the use of force by NATO countries in the Kosovo crisis was fully unlawful, justified from an ethical point of view but contrary to current international law; also in this sense, see O. Schachter, *International Law in Theory and Practice* (1991), Martinus Nijhoff Publishers, p. 128; On the question of the Security Council's capacity to legalise ex post facto the unilateral use of force see Österdahl, I., "Preach what you practice. The Security Council and the Legislation *ex post facto* of the Unilateral Use of Force", *74 Nordic Journal of International Law*, 231–260 (2005).

43 Cassese, *supr*a note 13, p. 25: "Under the UN Charter system, as complemented by the international standards which have emerged in the last 50 years, respect for human rights and self-determination of peoples, however important or crucial it may be, is never allowed to put peace in jeopardy. One may like or dislike this state of affairs, but so it is under *lex lata*".

respond to this question, consequently considering illegal the use of force perpetrated by a State without Security Council authorisation.[44] Thus, the first question can straightforwardly be answered in positivistic terms by finding out this body's position on the exercise of the use of force by a given State. The second question requires further analysis, as it is necessary to verify that the "illegal use of force" is committed through an act in which the aforementioned definitional elements of CAH are present, that is, through an act amounting to a widespread and systematic attack against a civilian population. Finally, despite the existence of guiding standards set up by international case law in order to answer the third question, the vagueness inherent to the concepts that conforms it makes it, undoubtedly, the most complex question to answer. Interesting developments made by the international criminal tribunals, serve as examples of the inclusion of "attacks against human dignity" in the definition of "other inhumane acts".[45] Nevertheless, establishing the borders of such a concept remains one of the big unsolved issues in the context of international criminal law. A proper attempt to present a content proposal would require an in depth transversal approach from disciplines ranging from philosophical tradition to ethics and anthropology. Though extremely interesting, it is beyond the scope of this paper.[46]

It can be inferred from the previous arguments that despite the recent postponement of the ICC's jurisdiction to investigate the crime of aggression, this body has the legal tools to prosecute those alleged responsible for the waging of war by resorting to the CAH's subcategory "other inhumane acts . . .". Dependence of the Security Council's decision to authorize a State's use of force partially diminishes the legitimacy of this option, regardless of the very rare occasions in which this body has done so. In any case, this flaw will serve to introduce us to the second proposal, consisting of a State-centred approach to the prosecution of those alleged authors of the crime of aggression through the consolidation of a territorial jurisdictional principle: the *aut dedere aut judicare* clause.

---

[44] Position which has also been defended by academics. See, among others, Sarooshi, D., The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers (Clarendon Press, Oxford, 1999).

[45] Kayishema y Ruzindana, ICTR, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 151; Bagilishema, ICTR, Judgement, Case No. ICTR-95-1A-T, 7 June 2001, para. 91; Blaskic, TPIY, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 240.

[46] A couple of interesting attempts to answer this question can be found in D. Luban, A Theory of Crimes Against Humanity, *29 Yale Journal of International Law, (2004) 1, 85* and Kuschnik, B., Humaness, Humankind and Crimes Against Humanity, *2 Göttingen Journal of International Law*, 501, 2010.

3.c. Head 2. The national via: the crime of aggression and the aut dedere aut judicare clause

Despite the discouraging precedents in the scope of domestic initiative to prosecute the crime of aggression,[47] after Kampala, those States that have not yet done so,[48] have no more excuses not to incorporate the crime of aggression into their domestic legislations.

It is in this context that the emerging obligation to extradite or prosecute as a part of customary international law becomes relevant. Having achieved a full definition of this crime at an international level, there are no more obstacles to extend the applicability of this clause to this crime.

The "extradite or prosecute" clause is an emerging international obligation whereby a State's obligation to extradite in the absence of prosecution cannot be subject to executive discretion. It can be defined as "the alternative obligation of a State holding an alleged perpetrator of certain crimes to extradite him or to set in motion the procedure to prosecute him".[49] This alternative formula deals with one of globalisation's main challenges: the need for a universal and consistent approach towards impunity in respect of the most serious violations of Human Rights.

The "extradite or prosecute" principle presents itself in this context as a tool that can potentially fill in the existing impunity gaps and consolidate consistent procedure regulations that would result in the respect of international Human Right standards in this scope. The novelty resides in that to meet these objectives, the duties and responsibilities of domestic jurisdictions are enforced in application of international law. Nevertheless, the binding nature of this clause, and hence the enforceability of the referred duties and responsibilities, is dependant on its consideration as part of customary international law.

The International Law Commission (ILC) is addressing the analysis of this principle since 2004. Various reports have been published after the appointment of a Special

---

47 See *R. v. Jones* et al., decided by the House of Lords on 29 March 2006. The appellants, who in 2003 had unlawfully entered British or NATO military bases in the United Kingdom to prevent what they considered to be preparations for a war of aggression against Iraq, had been charged with or convicted of causing criminal damage or aggravated trespass in British military bases. The House of Lords held that aggression is criminalized in international law; however, absent any statutory enactment in the United Kingdom incorporating the international customary law criminalizing aggression, the appellants were not entitled to rely upon that criminalization as a defence for the illegality of their action.

48 For instance, see the following provisions of criminal codes: Art. 80 of the German Criminal Code ('Whoever prepares a war of aggression ([envisaged in] Art. 26 para. 1 of the Basic Law) in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for no less that ten years'); of Bulgaria (Art. 409), the Russian Federation (Art. 353); Ukraine (Art. 437); Armenia (Art. 384); Uzbekistan (Art. 151); Tajikistan (Art. 395); Latvia (Para. 72), Moldova (Art. 139), Macedonia (Art. 415). See also Art. 1 of the Iraqi Law no. 7 of 17 August 1958.

49 G. Acquaviva, "*Aut dedere aut judicare*" in *The Oxford Companion to International Criminal Justice*, Editor in Chief: Antonio Cassese, Oxford University Press, New York, (2009), pp. 253–254.

Rapporteur for this topic,[50] which has preceded the constitution of a Working Group in 2008. However, until recently, this matter has received very little attention from academics.[51]

Up until now, progress in this scope has been limited to the establishment of the sources to be considered and to the methodological aspect dealing with the way in which this topic should be approached.[52]

---

50 Reports issued by the Special Rapporteur, Mr. Zdzislaw Galicki: A/CN.4/571, Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*"), June 2006, ILC 58th Session; A/CN.4/585, Second report on the obligation to extradite or prosecute *(aut dedere aut judicare*), June 2007, ILC 59th Session; A/CN.4/603, Third report on the obligation to extradite or prosecute *(aut dedere aut judicare*), August 2008, ILC 60th Session; A/CN.4/648, Fourth report on the obligation to extradite or prosecute *(aut dedere aut judicare*), May 2011, ILC 63rd Session.

51 This issue has been indirectly referred to in in-depth extradition monographs (i.e. BASSIOUNI, M.C., *International Extradition: United States Law and Practice*, Oxford University Press, New York, 2007). The list of specific research papers included in the bibliography suggests that only recently has this topic gained the attention of scholars. See also Remiro Brotóns, A. y otros, *Derecho Internacional*, Ed. Tirant lo Blanch, Valencia (2007), p. 1254; Abad Castelos, M., "La persecución restringida de los delitos que lesionan valores esenciales de la comunidad internacional: ¿sigue existiendo la jurisdicción universal en España?", *Universitas. Revista de Filosofía, Derecho y Política*, nº 15, enero 2012, pp. 65–90. See pp. 72–73. Available at http://e-archivo.uc3m.es/bitstream/10016/13385/1/abad_RU_2012.pdf; Gómez-Benítez, J.M., "Complementariedad de la Corte Penal Internacional y Jurisdicción Universal de los Tribunales Nacionales", *Revista de Derecho Penal y Criminología*, Vol. 27, Nº 82 (2006), p. 41; Pérez González, C., "Jurisdicción universal y enjuiciamiento de crímenes de Guerra: ¿qué obligaciones impone el Derecho internacional público?", *La responsabilidad penal por la commission de Crímenes de Guerra: El Caso de Palestina,* C. Pérez González y R. Escudero Alday (editores), Thomson Reuters, Aranzadi, Navarra (2009), pp. 131–163 and Bassiouni, M.C.; Wise, E.M., Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law, Martinus Nijhoff publishers, (1995), considered to be the first monographic work exclusively addressing the scope and nature on this principle written in the context of the new world order created after the Second World War. Historically, the origins of the *aut dedere aut judicare* clause can be traced back to the 16th century with Spanish jurist and theologist Diego de Covarrubias and Dutch jurist Hugo Grotious considered to be at the foundations, see Garcés, J., "Epílogo", *La Responsabilidad Penal por la Comisión de Crímenes de Guerra: El Caso de Palestina*, C. Pérez González y R. Escudero Alday (editores), Thomson Reuters, Aranzadi, Navarra, 2009, pp. 231–238; p. 233 and Grocio, H., *De Iure Belli ac Pacis*, 1625; traducción española: Del derecho de la guerra y de la paz (Clásicos jurídicos, Editorial Reus, traducción de Jaime Torrubiano Ripoll), 1925. In chapter XXI, book II, paragraph IV, this principle is studied in depth. Its initial construction (aut dedere aut punier) would be later on modified in application of legal security rights and respect to the presumption of innocence to become "aut dedere aut judicare".

52 One of the most recent research works on this issue (C. Mitchell, *Aut Dedere, aut Judicare*: The Extradite or Prosecute Clause in International Law (« eCahiers », nº 2), 2009, Online, Online since May 2011, connection on 31 March 2013, URL: http://iheid.revues.org/299 ; DOI: 10.4000/iheid.299) concentrates on the preliminary phase of a research project that is still pending: organising and systematizing the sources to be examined while proposing a methodology to approach this challenge. Among other ideas, this author suggests that undertaking this task appropriately requires analysing the legal nature of this clause regarding each international crime separately.

Consequently, although this second proposal, until its legal nature is defined, is still under construction, recent developments of both *opinion iuris* and State practice seem to consider the crystallization of this mechanism to end impunity in respect of the most serious crimes, more than plausible. At a case-law level, a very recent ICJ decision on the obligation to extradite or prosecute that binds Senegal in the conflict that arose between this country and Belgium in respect of former Chad dictator Hissène Habré[53] seems to confirm it. This ground-breaking decision estimates that in this particular case, the obligation to extradite or prosecute is a conventional one, which binds both States, as they are both signatories of the Convention against Torture that articulates this clause as a mechanism to fight impunity in respect of the crimes of torture.[54]

From all of the above, and in attempt to sum up the flaws and strong points of the alternatives proposed to tackle the temporary problem of the ICC's lack of jurisdiction, two considerations should be made: firstly, it should be pointed out that fostering national courts to take the lead in the investigation of the crime of aggression finds, after Kampala, no legal, definitional or procedural obstacles; secondly, by using this stalemate period in which the ICC is impeded to exercise its jurisdiction to consolidate the role of domestic courts in holding these criminals accountable, an unprecedented step towards the effective application of the principle of complementarity is taken. This principle, which should regulate the relationship between the ICC and national courts' jurisdictions, is very far from being fully applied. Moreover, the ICC, created to intervene on a subsidiary basis is currently being the object of criticism for not being able to deal with all the cases that are being presented before it.[55] It is in this scenario that the obligation to extradite or prosecute stands out as a tool to reduce the ICC's case burden. By applying this alternative obligation, the impunity gap which the alleged authors of international crime may benefit from is closed by national jurisdictions on the basis of the presence of the accused in the territory of a given State. In so far the

---

53 Questions relating to the obligation to prosecute or extradite, *Belgium v. Senegal*, 12th July 2012, Judgement.

54 The nature of *ius cogens* of the prohibition of torture and the developing State Practice and *Opinio Iuris* on the legal nature of the *aut dedere aut judicare* clause invite to further debate on the emerging customary nature of this obligation in respect of core international crimes. Nevertheless, this discussion exceeds the scope of this paper and should be addressed monographically.

55 On the complementarity principle see, among others, Kleffner, J., Complementarity in the Rome Statute and National Criminal Jurisdictions, Oxford University Press, New York, 2008, p. 100: "In the light of the general meaning of the term employed, the ICC is thus envisaged to supply the deficiencies of national criminal jurisdictions, and together they form a unit in the enforcement of the prohibition of ICC crimes"; Olásolo, H., Reflexiones sobre el principio de complementariedad en el Estatuto de Roma, *Revista española de derecho militar*, Nº 82 (2003). On the de facto capacity of the ICC, see Burke-White, W.W., Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, 49 HARV. INT'L L.J. (2008), p. 49. The author refers to the ICC's budget for 2005, which has been progressively increased up to 11 million euros per year in 2012. Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.4-ENG.pdf and 118 million euros per year in 2013, available at http://icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-10-ENG.pdf: "No institution with a 66.8 million (euros) annual Budget can possibly provide global accountability".

legal nature of this obligation has not yet been defined in international law, it would be desirable to have an international convention on the crime of aggression that recognises the application of this alternative principle. This way, the temporary lack of definition of its legal nature would be resolved by a conventional legitimisation which, at the same time, would contribute to crystallize the emerging consuetudinary nature of the a*ut dedere aut judicare* principle in respect of core international crimes.

4. CONCLUSION

There is no doubt on the diplomatic tensions that will result from any attempt to exercise jurisdiction to prosecute the crime of aggression. When investigating the commission of this crime, an international or national court will have to question a decision made by a State, which will argue to be doing so in application of the discretion that the principle of sovereignty entitles it with. This disadvantage, although it should not be underestimated, has been a common place in the strive to prosecute all international core crimes, committed, most of the time, with a State's direct or indirect participation.

It follows from the present paper that although there is a latent intention in the international community to end impunity in respect of those responsible for the waging of war, State actors seem to lack the strength to materialize this will. The modest outcome of the Kampala Conference in the scope of the ICC's capacity to exercise its jurisdiction is the latest proof of it. Until the ICC can effectively assume its rightful role in respect of the crime of aggression, the two proposals presented in this paper offer alternative ways of filling temporarily the impunity gap left by the inability of State representatives to reach an agreement at Kampala.

The first proposal, consisting of prosecuting the crime of aggression through the classification of the act of starting a war as "illegal use of force", which can potentially qualify as a crime against humanity if it fulfils the definitional requisites of the aforementioned crime, opens automatically a door through which international criminal jurisdiction can step in. In this case, the proposed legal engineering would allow the ICC to prosecute those alleged responsible for the act of starting a war by concentrating on the concurrence of the elements of the crime against humanity.

From a practical point of view, the international option seems to be more viable as the existence of a whole working structure with a consolidated international judicial body which applies well-settled definitions and substantial case-law. It also enjoys a very important advantage: the limited or null role of the SC in deciding to investigate and prosecute these crimes as CAH. This assertion, which at first may seem to contradict the SC's power of referral, requires further explanation. The idea behind this statement is that regardless of this body's capacity to block an investigation through the exercise of the power of deferral, it cannot stop States from referring the illegal use of force as a CAH to the ICC for further investigation when this crime appears to have been committed, or the Prosecutor to initiate investigations on this basis *propio motu.* In so far this mechanism allows the crime of aggression to be redirected to the crime against humanity, the Security Council's role, in any of these two cases, is reduced to evaluating whether it wants to exercise its power of referral to block the investigation on an apparently committed crime against humanity. If the referral is presented in a

way that evidences that there has been an illegal use of force with consequences that can apparently amount to crimes against humanity, the ICC is obliged to consider this covert crime of aggression, unless the SC exercises the cited power. This is to say that through this shortcut, we can avoid the SC's influence on the initial classification of this act as a CAH.[56] Judicial independence is guaranteed through this mechanism with the advantage of carrying out the whole process in full respect of international standards of human rights.

On the other hand, the State-centred alternative based on the promotion of the application of the obligation to extradite or prosecute might seem riskier at first sight but, if studied in depth, it will soon be perceived that contributing to the emergence of this clause as customary international law might be the hardest and longest way to end impunity, but it is definitively the most enduring alternative, in a long term perspective. After 10 years functioning, the need to enforce a solid system that enables the just application of the principle of complementarity on which the ICC's role is based on, has become more than obvious. The ICC does not have the capacity to investigate and prosecute all genocides, crimes against humanity, war crimes and crimes of aggression occurring in the world. A more committed step towards the consolidation of an "integrated system" which places the national courts at the centre of the prosecution of core international crimes has become a world priority.[57] It is in this context that the potentiality of the *aut dedere aut judicare* clause to enforce accountability of those responsible for the commission of the crime of aggression, having been defined in Kampala 2010, stands out. The proposed option has obviously a long road ahead of it before it crystallizes, specially given the fact that the legal nature of this alternative clause has not yet been completely defined, as can be inferred from the analysis of the ICL's work on this topic. However, the consensus on the definition of the crime of aggression represents an important step forward and sets the basis for the development of a domestic-centred approach to the prosecution of this crime. Among the unavoidable measures, an international convention which prohibits it and incorporates the obligation to extradite or prosecute, is strongly recommended.

All in all, it can be concluded that investing in the promotion of this second proposal, will produce, in the long term, bigger and more solid results as it counts with the means to effectively achieve the main goal of international criminal justice: end

---

[56] Despite the aforementioned power that it indirectly exercises on the first proposal in so far it decides whether to classify a use of force by a State as legal or illegal.

[57] Oriolo, A., Revisiting the interactions between the ICC and national jurisdictions as a new Gateway to strengthening the effectiveness of international criminal justice, Revue Internationale de Droit Pénal, Vol. 83, (1er et 2ème trimestres 2012), pp. 195–220, p. 198, citando a Ziccardi Capaldo, G., The Pillars of Global Law (2008), p. 46: "According to the "integrated system", "the right of States to sanction uti universi breaches of fundamental rules must be "integrated" with the general functions conferred on international institutions to "determine" the breaches themselves and "control" the activity carried out by States, Thus, "the control exercised by international bodies gives the action undertaken 'unilaterally' by States or groups os States the objectivity needed to endow it with a 'public' nature and avoid abuses, providing an institutional control of legitimacy".

impunity through the eradication of safe havens for those responsible for the commission of core international crimes.

The acceptance and combined application of these two propositions by the international community is the closest we can come, for the time being, to materializing Professor Ferencz's assertion: "Deterring war should not depend on nomenclature".[58]

[58] B. Ferencz, A New Approach to deterring... op. cit.