The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq

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1. The Background: the Crime of Preparing a War of Aggression under German Criminal Law

With the memory of Nazi-Germany's wars of aggression still fresh, the founding fathers of the *Grundgesetz*, the German constitution of 1949, felt the need to elevate the goal of the country's peaceful foreign policy to the level of a constitutional principle. This principle is prominently enshrined in the Preamble and finds its most explicit expression in Article 26, the first paragraph of which reads as follows:

> Acts capable of disturbing the peaceful coexistence between peoples and, in particular, of preparing a war of aggression, and being committed with an intent to that effect, are unconstitutional. They must be penalized.[1]

As it turned out afterwards, it was easier to formulate the duty to penalize aggressive foreign policy than it was to implement it. Indeed, only in 1968 did the German legislator decide to insert section 80 into the Criminal Code. It reads as follows:

> Whoever prepares a war of aggression (Article 26, paragraph 1, of the Basic Law) in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for

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1 Translation by the author; the German text reads as follows: '*Handlungen, die geeignet sind und in der Absicht vorgenommen werden, das friedliche Zusammenleben der Völker zu stören, insbesondere die Führung eines Angriffskrieges vorzubereiten, sind verfassungswidrig. Sie sind unter Strafe zu stellen*'.

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> the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.[2]

As is immediately apparent from its wording, section 80 does not transpose the crime of aggression *under international law*[3] into German criminal law. Instead, any act incriminated by section 80 must be linked to Germany by the following two requirements: first, the Federal Republic of Germany must be participating in the preparation of a war of aggression and, secondly, the act of preparation must be capable of creating a danger of war for the Federal Republic of Germany. These restrictions express the determination of Germany's legislator[4] *not* to empower the German judiciary with universal jurisdiction over the crime of aggression. Unfortunately, the legislative intent underlying section 80 is less clear in many other respects. Most importantly, it is uncertain and, as a consequence, a matter of doctrinal debate whether section 80 serves — exclusively or, at least, predominantly — the purpose of protecting Germany's external security against the risks of war or whether it is — exclusively or, at least, primarily — designed to prevent international peace and security from being threatened by actions in which Germany is involved. Therefore, it is not surprising that opinions are divided, even on such a fundamental question as to whether or not the preparation of a war of aggression directed against Germany comes within the scope of section 80.[5]

Section 80 is not only ambiguous with regard to its field of application, but it is also peculiar in its definition of criminal conduct, which is limited to the *preparation* of a war of aggression. Thus, on the one hand, preparatory acts are criminalized, irrespective of whether the prepared result actually occurs or not, while, on the other hand, the actual waging of a war of aggression is, in itself, *not criminal conduct* under section 80. The reasons for this unsatisfactory[6] wording need not concern us here.[7] For the purposes of this paper, it suffices to understand that, due to the wording of

2 Translation by the author; the German text reads as follows: '*Wer einen Angriffskrieg (Artikel 26 Abs. 1 des Grundgesetzes), an dem die Bundesrepublik Deutschland beteiligt sein soll, vorbereitet und dadurch die Gefahr eines Krieges für die Bundesrepublik Deutschland herbeiführt, wird mit lebenslanger Freiheitsstrafe oder mit Freiheitsstrafe nicht unter zehn Jahren bestraft*'.

3 The term 'crime of aggression' is taken from Art. 5(1)(d) of the ICC Statute, whereas the *content* of the crime continues to be a matter of controversy — its very *existence* is widely recognized; see A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 113; C. Kreß, 'Strafrecht und Angriffskrieg im Licht des "Falles Irak"', 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2003) 297 (with further references in footnote 18).

4 In light of the fact that a definition of the crime of aggression within the meaning of Art. 5(1)(d) of the ICC Statute remains to be worked out, the legislator of the new German Code of Crimes Under International Law (*Völkerstrafgesetzbuch*) has refrained from transposing s. 80 into the *Völkerstrafgesetzbuch*; on the *Völkerstrafgesetzbuch* generally, see S. Wirth, 'Germany's New International Crimes Code: Bringing a Case to Court', 1 *Journal of International Criminal Justice* (2003), 151; on the discussion of how to deal with the crime of aggression in Germany's criminal law, see C. Kreß, *Vom Nutzen eines deutschen Völkerstrafgesetzbuches* (Baden-Baden: Nomos Verlagsgesellschaft, 2000), 37 et seq.

5 For a discussion of this question, see Kreß, *supra* note 3, at 344 et seq.

6 Under customary international criminal law, the waging of a war of aggression constitutes the core of the criminal conduct and preparative acts are criminalized only in so far as the prepared war of aggression actually occurs; see Cassese, *supra* note 3, at 114; Kreß, *supra* note 3, at 298.

7 But see Kreß, *supra* note 3, at 340.

section 80, the Prosecutor, in the decision we will discuss below, was bound only to enquire whether the decisions made by the Chancellor and his cabinet constituted *preparatory* acts.

2. The Prosecutor's Decision Not to Investigate in the Case of Iraq

This and many other ambiguities long remained an area of interest only for a small circle of academics, as section 80 was widely seen as *symbolic* criminal law not likely to reach legal practice. However, from the perspective of Germany's Chief Federal Prosecutor (henceforth: the Prosecutor), within whose competence it falls to deal with section 80 cases, this widely held assumption must now be nuanced. As early as 1999, the Prosecutor had to decide whether Germany's participation in the use of force against the Federal Republic of Yugoslavia gave rise to individual criminal responsibility under section 80.[8] In 2003, the Prosecutor again had to turn his attention to section 80 — this time because of the use of force against Iraq.

This step might seem surprising, for it is well known that Germany's government had expressed its political dissatisfaction with the decision of the 'coalition of the willing' to use force to ensure Iraq's respect for the weapons inspection regime established under Chapter VII of the United Nations Charter. However, despite its opposition to the use of force, Germany's government granted the US armed forces the right to overflight and decided to allow US bases in Germany to be used for activities related to the military operations. Furthermore, German pilots remained on board AWACS aircraft that were conducting reconnaissance flights within the Turkish airspace. These governmental decisions formed the basis for complaints under section 80 against the German Chancellor and members of his cabinet.

The Prosecutor decided[9] not to open investigations under section 80 and, on 21 March 2003, he informed the public about the reasons underlying his decision.[10] The Prosecutor's decision in the case of Iraq, which was not subject to judicial review, constitutes the first detailed official interpretation of section 80 and is therefore of considerable interest both for German and, perhaps, comparative criminal lawyers. It will be shown here that the Prosecutor's reasoning also contains elements which should attract the interest of international criminal lawyers.

3. The Prosecutor's Reasoning

The Prosecutor's decision rests on the following three determinations. First, the continued participation of German pilots in AWACS missions did not constitute

8 For the decision, see Generalbundesanwalt, Press release No. 10 of 21 April 1999.

9 The decision is based on s. 152(2) of Germany's Code of Criminal Procedure. Under this subsection, the Prosecution, as a general rule, opens an investigation where certain facts give reason to believe that a crime could have been committed (*Anfangsverdacht*). *Anfangsverdacht* may be denied for *legal* reasons, as was the case here.

10 The full text of the press statement of the Prosecutor is reprinted in *Juristen Zeitung* 2003, 908 et seq.

preparation of the use of force against Iraq (*infra*, subparagraph A). Secondly, the decision to allow the US forces to make use of German soil and airspace in connection with the use of force against Iraq did not amount to German participation in the use of that force (*infra*, subparagraph B). Finally, no danger of war for Germany had been created as a consequence of the governmental decisions in question (*infra*, subparagraph C). Having reached these conclusions, the Prosecutor could leave unanswered the most delicate question: whether or not the use of force against Iraq was a *war of aggression* within the meaning of section 80. Yet, the Prosecutor takes the opportunity to devote a number of interesting abstract observations to the concept of war of aggression, which is the crucial element of section 80 (*infra*, subparagraph D).

A. The Participation of German Pilots in AWACS Flights in Turkey Did Not Amount to Preparation of the Use of Force against Iraq

The Prosecutor's determination that the participation of German pilots in AWACS flights within Turkish airspace did not constitute a preparation of the use of force against Iraq is based on the understanding that it remained within the framework of Germany's obligations under the NATO treaty and was confined to the protection of Turkey's territory. Hereby, the Prosecutor accepts the governmental statement of facts according to which the AWACS flights were conducted in strict separation from the military operations of the war coalition. From that factual viewpoint,[11] it would indeed appear far-fetched to consider the decision to keep German pilots on board the AWACS in Turkey as a preparation of the war coalition's use of force against Iraq. In the same vein, it would be hard to say[12] that, as a result of the decision of the use of AWACS, Germany was supposed to participate in the use of force against Iraq.

B. The Governmental Decision to Grant Overflight Rights and to Allow the Use of Military Bases in Germany Did Not Constitute Participation in the Use of Force against Iraq

The Prosecutor's legal analysis of the decisions relating to overflight rights and the use of military bases focuses on the material element of Germany's (supposed) participation in the war of aggression. The Prosecutor defines the concept of participation within the meaning of section 80 as Germany's acting as a belligerent power, be it by way of the actual use of its armed forces, or by way of a comparably massive military involvement. In the view of the Prosecutor, Germany has not reached that threshold by virtue of the governmental decisions in question. Almost in passing, the Prosecutor declares immaterial the question of whether or not the implementation of the governmental decisions could have brought Germany within the scope of Article 3(f) of the General Assembly's (GA) definition of 'act of aggression' as contained in the

11 This commentator is not in a position to verify its accuracy.

12 The Prosecutor does not comment on this point.

annex to Resolution 3314 (XXIX).[13] While the last part of this reasoning implies an important, albeit implicit, first determination concerning the concept of war of aggression (*infra*, subparagraph 1), the Prosecutor's narrow construction of the concept of (supposed) participation in a war of aggression excludes (at least certain categories of) those governmental decisions from the field of application of section 80, the implementation of which amounts to *aiding* or *abetting* a *foreign* war of aggression (*infra*, subparagraph 2).

1. *The Concept of War of Aggression under Section 80 and Article 3 of the Annex to GA Resolution 3314*

Under Article 3(f) of the annex to GA Resolution 3314, the Security Council may consider as an act of aggression the conduct of a state which does not use its armed forces but simply allows its territory to be used for the use of the armed forces of another state. More specifically, the text of Article 3(f) is *not* confined to a case where the territorial state places its military bases at the foreign state's disposal with knowledge of the latter's aggressive intentions. Article 3(f) appears to also cover the case where the foreign state uses military bases which had previously been placed at its disposal by the territorial state without knowing the foreign state's aggressive intentions. On the basis of this formulation, one might wonder whether the decisions made by the German government did amount to the preparation of a German war of aggression.

It is certainly possible to entertain serious doubts as to whether the link between Germany's territory and the United States' use of force against Iraq, which Germany's government had allowed to be established by the decision in question, was direct enough to conclude that the United States — assuming that this state committed acts of aggression against Iraq — *used German territory to perpetrate such acts*. This question is, however, of secondary interest for the present purpose. It is more noteworthy that the Prosecutor recognizes the possibility of the concept of war of aggression within the meaning of section 80 as being narrower than the notion of act of aggression within the meaning of Article 3(f) of the annex to GA Resolution 3314. This determination is interesting, not only from the viewpoint of German criminal law but also from that of international criminal law, given that the Prosecutor starts his analysis from the assumption that the concept of war of aggression in section 80 is taken from international criminal law and must be construed accordingly.[14]

This author shares the Prosecutor's view that the concept of war of aggression, the participation in which may give rise to individual criminal responsibility under customary international law, is not identical with that of an act of aggression as contained in Article 39 of the Charter of the United Nations (UN Charter) and as

13 Article 3(f) describes as an act of aggression '[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.' The text of Resolution 3314 (XXIX) and the annex hereto is reprinted in *Historical Review of Developments Relating to Aggression* (United Nations, 2003), 239 et seq.

14 This assumption does not constitute a logical necessity but can be based on convincing reasons; see Kreß, *supra* note 3, at 307 et seq.

defined in the list contained in Article 3 of the annex to GA Resolution 3314. The scope of this short comment does not allow an elaborate explanation of this position.[15] Suffice it to say that Article 5(2) of the annex to GA Resolution 3314[16] reflects the *opinio juris* of a significant number of states that not every act of aggression amounts to a criminal war of aggression.[17] The fact that Article 5(1)(d) of the Statute of the International Criminal Court (ICC Statute) does not use the term *war* of aggression but simply speaks of the *crime* of aggression should not be misunderstood as indicating a change in the legal position of the group of states referred to above.[18] Quite to the contrary — a careful analysis of the statements made in the course of the debate on the definition of the crime of aggression[19] clearly evinces that this group of states sticks to the view expressed in the negotiations leading to the adoption of GA Resolution 3314. According to this view, the definition of *act of aggression* as contained in the annex to this Resolution is, at best, of limited significance as regards international *criminal* law.

The position taken by the Prosecutor sheds light on the persistent controversy in the Working Group on the Crime of Aggression under Article 5(1)(d) of the ICC Statute. The discussion paper submitted in 2002 by the former coordinator of the Working Group contains an interesting compromise proposal: an act of aggression within the meaning of Article 3 of the annex to Resolution 3314 is supposed to operate as a constituent component of the *collective* element, the *Gesamttat* (as German speaking scholars increasingly tend to say) characterizing the crime of aggression. The act of aggression must, however, pass a specific test of flagrancy to qualify as the said collective element.[20] This approach is in line with that taken by the Prosecutor, in that

15 But see Kreß, *supra* note 3, at 299 et seq.

16 This paragraph reads as follows: 'A *war* of aggression is a *crime* against international peace. *Aggression* gives rise to *international responsibility*' (emphasis added).

17 For exhaustive references, see T. Bruha, *Die Definition der Aggression* (Berlin: Duncker & Humblot, 1980), 126 et seq.

18 The official German translation of Art. 5(1)(d) of the ICC Statute, which has resulted from a joint effort of representatives from Austria, Germany and Switzerland, does not use the term 'Verbrechen der Angriffs*handlung*' ('crime of *act* of aggression'), but that of 'Verbrechen der Aggression' ('crime of aggression'); see *Bundesgesetzblatt II* 2000, at 1393; reprinted in Grützner/Pötz (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (2nd edn, Heidelberg: R. v. Decker's Verlag, 1983 et seq.), in Vol. IV, at sub. III, 26.

19 For a list of *some* pertinent statements, see Kreß, *supra* note 3, at 301 (note 39: USA; note 40: UK; note 41: Russian Federation; note 42: Germany).

20 The part of the coordinator's paper to which we refer in the above and in the following text reads as follows:

'1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

Option 1: Add 'such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation or, or annexing, the territory of another State or part thereof'.

Option 2: Add 'such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof'.

Option 3: Neither of the above.

it rejects the 'identity thesis' concerning, on the one hand, the concept of act of aggression under Article 39 of the UN Charter and, on the other, the collective element of the crime of aggression under the ICC Statute and customary international law. Whether the act of aggression under Article 39 of the UN Charter should be incorporated into the definition of the crime of aggression as a *conditio sine qua non* of the crime's collective element remains, however, open to serious doubt. The alternative to describing this collective element without any reference to the term *act of aggression*, for example by calling it a 'massive use of force in contravention of Article 2(4) of the UN Charter',[21] may well have advantages beyond its simplicity.

Coming back to the circumstances of the case, it should perhaps be added that the idea of Germany's being involved in a war of aggression by allowing its territory to be used for acts of aggression by the United States appears to be so far-fetched in light of the concrete rights granted to the United States that this idea, understandably, was not even alluded to by the Prosecutor.

2. *Germany's Aiding and Abetting a Foreign War of Aggression and the Concept of Participation within the Meaning of Section 80*

There remains the issue of whether Germany aided or assisted in a war of aggression waged by the members of the coalition. The applicability of section 80 to such a form of participation is a different legal matter. If we assume the illegality of the use of force carried out by the 'Coalition of the Willing', it would not be easy, to say the least, to avoid the conclusion that Germany aided or assisted in an internationally wrongful act.[22] Article 16 of the International Law Commission's Articles on State Responsibility (ILC–Article 16),[23] which can safely be regarded as reflecting customary

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 . . ..

3. The provisions of articles 25, paragraphs 3, 28 and 33 of the Statute do not apply to the crime of aggression.'

See also UN Doc. PCINICC/2002/2/Add.2, 24 July 2002, at 3; for a thoughtful analysis of this paper by a leading commentator, see R.S. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002), at 859 et seq.; during the second meeting of the Assembly of States Parties of the ICC, held in New York in September 2003, this discussion paper has been accepted as the point of reference for the future deliberations of the Working Group; Official Record of the Assembly of States Parties, ICC-ASP/2/10 at 9 in conjunction with Annex II.

21 Other proposals submitted orally in the course of the discussions within the Working Group during the second meeting of the Assembly of States Parties (such as 'massive armed attack in violation of Article 2 [4] of the UN Charter') only slightly differ from the above quoted formulation.

22 The reference to Germany's duties as a Member State of NATO, which could often be heard during the political debate in Germany, is misplaced: neither can the NATO treaty serve as a legal basis to justify an assistance in a use of force in contravention of the UN Charter, nor could such an argument be invoked vis-à-vis the third state Iraq; see also Kreß, *supra* note 1, at 913.

23 Article 16 reads as follows: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with the knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State'; the text is reprinted in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), 148.

international law, appears to cover the type of assistance rendered by Germany to the United States. As is stated in the commentary:

> [t]he obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State.[24]

Therefore, Germany's conduct with respect to the use of force against Iraq gave rise to an extremely interesting legal question which received, at best, limited attention from German scholars before the Prosecutor's decision: can members of the German cabinet incur individual criminal responsibility under section 80 if they decide to render assistance to a foreign war of aggression? As has been stated above, the Prosecutor, essentially, answers this question in the negative by stating that participation within section 80 in accordance with the laws of war is tantamount to the status of *Belligerent Power* or, in the modern terms of the law of armed conflict, *Party to the conflict*. Starting from that premise, the Prosecutor is right in denying the (supposed) participation of Germany within the meaning of section 80: Germany's assistance did not reach the level of direct military support for the actual hostilities which would have been necessary to qualify Germany as a party to the international armed conflict in question. It is thus immaterial whether the stand taken by Germany as regards the Iraq war should be qualified as merely non-belligerent instead of neutral (*stricto sensu*).[25] In any event, Germany was not involved in the war as a co-belligerent.

How should we appraise the premise as such? The wording of section 80 is not conclusive. In section 80, the term 'participation' is not related to that of 'war' as a legal status between more than one subject of international law. Instead, the term is connected with the *internationally wrongful act* of *a* state, which is the 'war of aggression'. As the concept of aiding and assisting forms part of the law of state responsibility for internationally wrongful acts, it is at least possible to interpret 'participation' in section 80 in accordance with the law of state responsibility so as to include aid and assistance. Incidentally, this more extensive interpretation would bring the term 'participation' in section 80 closer to the concept of participation (*Beteiligung*) as used in the General Part of Germany's Criminal Code.[26] The Prosecutor's reasoning is, however, not just based on the wording of section 80; in addition, he puts forward a purposive argument. He is of the view that the 'central goal' of both Article 26 of the German *Grundgesetz* and section 80 of Germany's Criminal Code is to prevent that 'ever again a war will be initiated from German soil'.

24 In this context, specific reference is made to the *opinio juris* expressed by Germany. It states that Germany 'seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act'; see Crawford, *supra* note 23, at 150.

25 Whether a distinction between mere non-belligerency and neutrality is at all useful remains open to question; for weighty arguments against the legal significance of such a distinction, see W. Heintschel v. Heinegg, *Seekriegsrecht und Neutralität im Seekrieg* (Berlin: Duncker & Humblot, 1995), 100 et seq.

26 According to s. 28, para. 2, in conjunction with s. 27, *participation* is the generic term for the different forms of individual criminal responsibility and includes *aid and assistance* (*Beihilfe*).

According to the Prosecutor, the governmental decision in question falls outside the type of conduct which Article 26 and section 80 wish to prevent from occurring.[27]

This author does not disagree with the Prosecutor's premise,[28] but doubts that the conclusion is compelling. It does not follow from the Prosecutor's (correct) statement that the central goal of section 80 is to prevent any repetition of a German policy of aggressive war, that it would fall outside the *telos* or goal of that section to prevent Germany's political leadership from *aiding* and *assisting* the aggressive war policy of another state. Quite to the contrary — it would appear that section 80 aims at preventing any form of German involvement in a war of aggression. Therefore, this commentator remains unconvinced by the Prosecutor's narrow construction of the term 'participation' under section 80. As a consequence of his narrow construction, the Prosecutor could leave unanswered the question of whether or not the governmental decisions in question amounted to the preparation of the war coalition's use of force. As the relevance of this question is due to the peculiar wording of section 80 (*supra*, subparagraph 1), we shall not deal with it here at any length.[29] Suffice it to say that the conduct in question could at least be qualified under section 27 of German's Criminal Code as assistance *in the preparation* of the foreign use of force.

The relevance of the question of how to deal with political leaders who bear responsibility for their country's assistance in a foreign war of aggression is not confined to German criminal law; it can also be framed as one of international criminal law. As such, it has not yet received more scholarly attention than its German equivalent.[30] Again, space does not permit a searching analysis but perhaps the following thoughts may be offered. The customary development of the crime of aggression has crystallized a regime of forms of participation which is distinct from the general one contained in Article 25(3)(a)–(d) of the ICC Statute. Accordingly, the coordinator's discussion paper correctly[31] rules out the applicability of Article 25(3) of the ICC Statute to the crime of aggression.[32] The distinctive feature of the crime of aggression, as compared with other crimes under international law, is its nature of a *leadership* crime.[33] It is, no doubt, an interesting question to identify the underlying

27 In German, the key sentence reads as follows: 'Dem zentralen Anliegen des § 80 StGB, zu verhindern, dass von deutschem Boden aus jemals wieder ein Krieg ausgelöst wird, läuft das angezeigte Verhalten nicht zuwider'; *supra* note 10, at 911.

28 For a detailed analysis of s. 80's purpose, see Kreß, *supra* note 3, at 342 et seq. Contrary to what is, correctly, held by the Prosecutor, many writers (for references, see ibid., at 345, note 257) argue that s. 80's primary goal is to protect *Germany*'s external security.

29 But see Kreß, *supra* note 3, at 339 et seq.

30 The problem is not discussed at all, e.g. in the leading treatise on international criminal law (see Cassese, *supra* note 3, at 111 et seq.); neither is it highlighted in the meticulous analysis by Clark, *supra* note 20).

31 Concurring Clark, *supra* note 20, at 883 et seq.

32 *Supra* note 20, at 3 (sub. I. 3).

33 Whether we shall witness a strong tendency to *generally* confine *international* investigations into crimes under international law to political leaders remains to be seen (see the passage sub II. 2. 2.1. *in fine* in the policy paper drafted by the Office of the Prosecutor of the ICC in 2003; for the text, visit www.icc-cpi.int); as regards crimes other than aggression, such a tendency would, however, be a matter of international prosecutorial strategy and would not follow from *substantive* international criminal law.

policy reasons and to ask whether they still hold true in our times.[34] But it is hard to question the crime of aggression's leadership character under *lex lata*.[35]

Clear as this principle is, it does not, in itself, answer the question of the potential criminal responsibility of those state leaders' who direct or otherwise control their country's aiding or assisting in *another* (group of) *state*'s waging a war of aggression. More particularly, it is open to doubt whether the coordinator's discussion paper's description of the perpetrator of a crime of aggression as somebody who 'orders or participates actively[36] in the planning, preparation, initiation or execution of'[37] the use of force refers exclusively to the leaders of the (co-)belligerent state(s) or whether it is meant to encompass the responsible leaders of a (secondary) accomplice-state. The few precedents for the prosecution of the crime of aggression as a crime under international law do not address the issue as they dealt with the leadership of one and the same aggressor state. However, it would certainly be too simplistic to conclude from this that the leaders of a (secondary) accomplice-state should be exempted from individual criminal responsibility for the crime of aggression. Upon reflection, quite the contrary appears to hold true. The inclusion of those individuals who are responsible for the rendering of aid or assistance by their state to an aggressor state into the list of possible participants in a crime of aggression would *not* put the latter's leadership character into question. As the inclusion of the accomplice in the list of possible participants in a crime under international law is the general rule, weighty reasons would be called for to justify lenience vis-à-vis the individuals in question. To the best of his knowledge, this commentator is unaware of such reasons having ever been spelt out.[38]

34 For a critical assessment, see O. Triffterer, 'Bestandsaufnahme zum Völkerstrafrecht', in G. Hankel and G. Stuby (eds), *Strafgerichte gegen Menschheitsverbrechen. Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburg: Hamburger Edition, 1995), at 231 et seq.

35 See the coordinator's discussion paper, *supra* note 20, at 3 (sub. I. 1), concurring Clark, *supra* note 20, at 873.

36 The addition 'actively', *a contrario*, touches upon the issue of crime under international law *by omission*. The dogmatic questions surrounding the concept of crime by omission under international law are so complex that this case note does not even start to highlight them; suffice it to say that the case in question indicates their possible relevance *in practice*: Was the decision of the German cabinet to allow the continued use of the US bases in Germany to be qualified as an *active* participation (what, then, was the activity?) or as the *omission* to prevent the USA from making the continued use in question? Would (and should) the answer make a legal difference? Understandably, the Prosecutor does not even allude to these intricate questions.

37 *Supra* note 20, at 3 (sub. I. 1).

38 If the inclusion of those who are responsible for the conduct of an accomplice state on the list of those incurring individual criminal responsibility for a crime of aggression is accepted as such, one may wonder about the potential relevance of the (specific) intent requirement for aiding and abetting as a form of individual criminal responsibility in the general rule of Art. 25(3)(c) ('[f]or the purpose of facilitating the commission of such a crime'). The question would be as follows: Should leaders of an accomplice state incur criminal responsibility for the crime of aggression only where their state acts for the (collective) purpose to facilitate the waging of a war of aggression by the principal perpetrator state or should the less demanding *knowledge* requirement of ILC–Art. 16(a) apply? This commentator's inclination goes in the latter direction.

C. There Was No Danger of War for Germany

It follows from the foregoing remarks that the Prosecutor's denial of a (supposed) German participation within the meaning of section 80 in the war coalition's use of force was by no means inevitable. Neither was, however, his additional conclusion that no danger of war for Germany had been created as a consequence of the governmental decisions indirectly to assist the United States in its war efforts. As has already been stated, Germany had not become a party to the conflict because of the granting of the rights in question to the United States. Furthermore, no deeper German involvement into the coalition's military activities was to be expected, given Berlin's political opposition to the decision to go to war. And finally, it was more than unlikely that Iraq would open hostilities against Germany as a reaction to the latter's indirect assistance to the United States.

Although the Prosecutor's conclusion appears to be correct, it also reveals another weakness of the wording of section 80. On the assumption that the policy behind section 80 is to prevent any German involvement in a war of aggression, the formulation 'danger of war for Germany' is unfortunate. If it was felt necessary to require the incriminated *conduct* of preparing a war of aggression to produce a certain *result* to restrict the criminalization, one should have focused on the danger of a war of aggression with Germany's participation. The formulation 'danger of war for Germany' thus reflects the confusion about the goal actually to be pursued. This confusion regrettably clouded the drafting process, leading to the insertion of section 80 into the Criminal Code.

4. The Prosecutor's *Obiter Dicta* on the Concept of War of Aggression

It is not without significance that the Prosecutor's decision contains, in addition to the *ratio decidendi* summarized and analysed so far, rather detailed *obiter dicta* concerning the concept of war of aggression. Quite obviously, the Prosecutor felt the need to contribute to the clarification of the law in this respect. Because of the Prosecutor's starting point, that the concept of war of aggression within section 80 should be understood in accordance with international criminal law (*supra*, subparagraph B(1)), it is of interest, not just for German criminal lawyers, to note that the Prosecutor takes a war of aggression to be a *massive use of force in clear violation of international law*. Whereas this paper will not dwell upon the quantitative threshold requirement at any length,[39] the rest of the suggested definition calls for a number of comments.

39 The author notes that it is in line with customary international law, as reflected in the coordinator's discussion paper (*supra* note 20, at 3, sub. I. 1: 'act of aggression which by its . . . *gravity and scale* . . .' (emphasis added)); concurring Cassese, *supra* note 3, at 114; G. Werle, *Völkerstrafrecht* (Tübingen: J.C.B. Mohr, 2003), 438 (marginal note 1156 *in fine*); I.K. Müller-Schieke, 'Defining the Crime of Aggression Under the Statute of the International Criminal Court', 14 *Leiden Journal of International Law* (2001), at 418 et seq.; R.L. Griffiths, 'International Law, the Crime of Aggression and the Ius Ad Bellum', 2 *International Criminal Law Review* (2002), at 319 et seq., argues for a 'more than *de minimis*' requirement.

A. The Question of the Requirement of a (Specific) Collective Intent Underlying the State's Use of Force

In the case of Kosovo, the Prosecutor decided that the members of the German cabinet did not incur individual criminal responsibility under section 80. He held that the armed intervention in question, irrespective of the controversy about the legality of the allied use of force against the Federal Republic of Yugoslavia, did not pursue the goal of disturbing international peace but was rather intended to react to a threat to international peace and security, as authoritatively determined by the UN Security Council. In the case of Iraq, the Prosecutor appears to move away from the special intent requirement of disturbing international peace. Otherwise, he could have denied the existence of a war of aggression in light of the determination made by the Security Council under Resolution 1441 (2002) that 'Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses a threat to international peace and security'.[40]

This commentator tends to share the Prosecutor's view. The requirement in question not only has never been suggested for incorporation into the international definition of the crime of aggression; it is also fraught with conceptual difficulties. In fact, irrespective of the threat to international peace and security which was posed by the Federal Republic of Yugoslavia and Iraq at the relevant moment in time, it is hard to deny that the decision to use force against those states entailed, by necessity, the intent to breach international peace to attain the respective goals. It is, of course, possible to characterize the breach of international peace in the cases of Kosovo and Iraq as an *interim* goal compared to the final — and not reprehensible — goal of averting a pre-existing threat to international peace and security. It is, however, open to serious doubt whether legal consequences should be attached to the often difficult distinction between the interim and the final goal of a given use of force within the context of the crime of aggression.

This is not to say, however, that the Prosecutor, when deciding the Kosovo case, was mistaken to look for a specific intent requirement as such. Starting with Glaser's important study of 1957,[41] it has constantly been a matter of theoretical debate whether the crime of aggression requires that the underlying use of force be carried out with a specific objective.[42] To be sure, this intent would be collective: it would underlie the collective use of force and, as a general rule, it would be formulated by the collective leadership behind the military operation. This 'collective intent' must not to be confused with the 'individual intent', i.e. the *mental element stricto sensu* of the crime

40 UN Doc. S/RES/1441 (2002), 8 November 2002, at 1; third preambular paragraph (order of the sentence reversed for citation purposes).

41 S. Glaser, 'Quelques Remarques sur la Définition de l'Agression en Droit Internationl Pénal', in S. Hohenleitner et al. (eds), *Festschrift Th. Rittler* (Aalen: Verlag Scientia, 1957), at 388 et seq.

42 Whether one should require that this objective *be reached* appears to be of secondary importance; it should be noted, though, that the requirement of a specific illegal *result* beyond that of the illegal and forceful violation of the target state's territorial inviolability would entail that the point in time of the crime's completion is shifted backwards.

of aggression.[43] In fact, conceptually, the 'collective intent' requirement in question, i.e. the goal underlying the use of force, would form part of the *objective* elements of the crime of aggression, and would thus be a point of reference for the required *mens rea* of the criminal individual, rather than an ingredient of this *mens rea*.[44] The recognition of a collective intent requirement could decisively help to single out those uses of force which, by their particularly reprehensible character, come close to the Nuremberg and Tokyo precedents for the customary international criminalization of wars of aggression. The still unresolved question is, however, how best to define the requirement at issue.[45]

In his new treatise on international criminal law, Werle restricts the customary concept of war of aggression (or, simply, criminal aggression) to those uses of force which are carried out with the intent to annex foreign territory or to subjugate a foreign state.[46] This approach, which can claim to be firmly embedded in customary international law, resembles that advocated by Germany. The German proposal to require, in addition to the illegality of the use of force as such, a 'purpose unacceptable to the international community as a whole' would, however, include other illegal goals such as mass destruction or extensive plundering of the target state's natural resources.[47] An alternative option is to require the goal of annexation or military occupation. This proposal, although it has gained some prominence during the ongoing negotiations,[48] is not altogether unproblematic. First, it excludes, like Werle's approach, a number of other clearly reprehensible objectives.[49] But, secondly, it must be asked whether the goal to establish a military occupation is an appropriate criterion to single out aggressions giving rise to criminal responsibility under any circumstances. Take the case of Kosovo as an illustration of the problem: should the criminality of the NATO states' leaders depend upon whether or not they pursued the interim goal of a temporary military occupation to stabilize Kosovo during a fragile interim period? The goal of temporarily establishing a military occupation would *not* affect its objective to enforce international law, including human rights law and

43 In the context of *genocide*, the ICTY has clearly recognized the need to distinguish between collective and individual intent (without, unfortunately, spelling out the *consequences* of this distinction with the same degree of clarity) in Judgment, *Krstić* (IT-98–33-T), Trial Chamber, 2 August 2001, para. 549; for a useful exposition of the arguments in favour of such a distinction, see H. Vest, *Genozid durch organisatorische Machtapparate* (2002), at 101 et seq.

44 For an exposition of rare clarity in that sense, see Werle, *supra* note 39, at 439 (marginal notes 1159–1161), on the one hand, and at 444 (marginal note 1170) on the other hand.

45 Cassese, *supra* note 3, at 116.

46 *Supra* note 39 at 444 (marginal note 1161).

47 For Germany's 'further informal discussion paper', see UN Doc. PCNICC/2000/WGCA/DP.4 (13 November 2000), at 3 (sub. 1. 10).

48 *Supra* note 20, at 3 (sub. I. 1 — option 2); see, in this sense, the oral statement, 12 June 2000, made by the UK representative to the Preparatory Commission for the ICC: 'The qualification . . . which relates to the establishment of a military occupation or annexation of the territory of another State appears to us to reflect what is indeed the essence of the crime of aggression (the statement is on file with the commentator)'; for a scholarly argument in this direction, see M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression* (Baden-Baden: Nomos Verlagsgesellschaft, 2001), at 215 et seq., and at 239 et seq.

49 This has already been noted by Clark, *supra* note 20, at 878.

Security Council law. To this commentator, the latter facet of the Kosovo operation should carry crucial weight when it comes to the question of criminal responsibility.

This leads us to the question of whether it is possible to exclude from the scope of the crime of aggression those (but, perhaps, *only* those) instances of use of force which, irrespective of their (most often controversial; cf. *supra*, 2) legality under international law, pursue a law enforcement objective, instead of an aggressive objective.[50] One way to capture this idea in the definition of the crime of aggression could be to require the use of force to be directed against the territorial integrity or political independence of the target state. Although it does not count among the options reflected in the latest coordinator's discussion paper, the formulation in question, which figures in a joint proposal submitted by Bosnia and Herzegovina, New Zealand and Romania,[51] should therefore not be dismissed out of hand. This suggestion is, however, submitted with one crucial proviso: the reference to the state's right to territorial integrity and political independence would have to be understood as having the truly limiting effect of excluding from criminalization the leadership decision with respect to the use of force designed only to enforce an international legal obligation of the target state. Such an understanding of the concepts of territorial integrity and political independence is, however, far from generally accepted. To give just one example: Griffiths, in his recent and very detailed analysis of the crime of aggression, states that 'few, if any, examples occur to the writer' where an illegal use of force could not be said to be directed against the territorial integrity or political independence.[52] This position can be challenged, however. Not being able to pursue this thought any further within the limited scope of this paper, we instead refer to the arguments advanced by Bowett as early as 1958 to demonstrate the limits of the right to territorial integrity (as distinct from territorial inviolability)[53] and to political independence. These arguments were soon after challenged with vigour and with some success as regards the interpretation of Article 2(4) of the UN Charter.[54] They are, however, of great interest in the context of the still unfulfilled task of pinpointing the criminal *noyeau dur* of this UN Charter provision.

In light of the state of the debate, the Prosecutor was probably well advised not to enter into the discussion about the possible 'collective intent' requirement of the crime of aggression. Scholars, however, should not shy away from reflecting upon this complex question. A convincing answer hereto could well constitute the key to a

50 For an important recognition of the fact that there may be uses of force, which are legally controversial (if not illegal), and yet not carried out of an *animus aggressionis*, see T. Franck, *Recourse to Force, State Actions against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), at 174 et seq. (see, in particular, p. 184, note 31); regrettably, Franck himself does not refer to international *criminal* law as the general thrust of his reasoning goes very well with the ideas put forward in this text; see also his thoughts on uses of force driven by *mixed* motives (ibid., at 189).

51 UN Doc. PCNICC/2001/WGCA/DP.2, 27 August 2001.

52 *Supra* note 39, at 368.

53 D. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), at 29 et seq. and at 42 et seq.

54 See I. Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), passim.

convincing definition of the crime of aggression under customary international law, to be incorporated into the ICC Statute.

B. The Requirement that the Use of Force Be in Clear Violation of International Law

The Prosecutor's view that the concept of war of aggression should be limited to those instances of the use of force whose illegality cannot seriously be questioned is based on a mixture of international and criminal law arguments. As far as international law is concerned, the Prosecutor refers to the fact that the current law on the use of force is characterized by a number of grey areas. The Prosecutor recognizes that recent state practice tends to broaden the existing legal bases for the use of force and even to accept new legal bases. More specifically, it appears to the Prosecutor 'that there is a move within the state community and international legal doctrine to strike a balance between the international prohibition on the use of force and fundamental human rights under international law so as to admit humanitarian interventions in particularly serious cases'. The Prosecutor also mentions the 'revitalization' of 'the discussion about preventive self-defence' and asks the question (without, however, answering it) of whether the use of force against Iraq could be justified 'without the will of the Security Council'.[55] In light of the uncertainty of current international law, the Prosecutor is of the view that the principle of legal certainty of criminal law[56] calls for the restriction of the concept of war of aggression to instances of unambiguous illegality. Otherwise, so the Prosecutor holds, the individual concerned would run the intolerable risk of being criminally responsible for having strayed into a grey area of international law. These considerations deserve closest attention. The few comments which follow deal in turn with the aspects of criminal and international law.

5. The Prosecutor's 'Clear Illegality' Test in the Light of some General Principles of Criminal Law

The requirement of a clear violation of international law can be seen as the functional equivalent of the 'collective intent' requirement discussed above. The common goal is to exclude those instances of use of force which are both (i) *not unambiguously illegal*, and (ii) by their law enforcement objective, *substantially less reprehensible* than the wars of aggression underlying the precedents of Nuremberg and Tokyo. The Prosecutor's analysis can serve as a useful illustration of the said functional equivalence. As the Prosecutor did not look for a 'collective intent' requirement (*supra*, subparagraph D(1)), he had to lay emphasis on the requirement that the use of force underlying the crime of aggression be clearly illegal.

It follows from this commentator's restrictive approach to the crime of aggression under customary international law that he agrees with the Prosecutor in excluding

55 *Supra* note 10, at 910 et seq.

56 Article 103(2) of the German *Grundgesetz* enshrines a qualified principle of legal certainty in criminal law.

from the criminalized conduct the participation in those instances of use of force, the legality of which can be a matter of controversy between reasonable international lawyers. Preferably, this result should be achieved by the recognition of an appropriate 'collective intent' requirement. In light of the prevailing uncertainty at the international level, it is at least understandable, however, that a national prosecutor prefers to work with the requirement of a clear illegality.[57] This adds some measure of legal certainty to the definition of the crime, because it is easier for reasonable international lawyers to agree on cases which can form the object of reasonable legal controversy than to agree on the conclusion to be drawn.

Conceptually, the requirement of clear illegality need not necessarily be an objective element of the crime, as the Prosecutor suggests. It may also be introduced through the 'back door' of a rather generous recognition of mistake of law as a ground for excluding criminal responsibility. The same alternative arises at the level of international criminal law. In the coordinator's discussion paper, the requirement of a *flagrant* act of aggression[58] can be understood to exclude instances of use of force where an 'arguable case for legality' can be made. Alternatively, one would, in such an instance, be faced with the question of whether individual criminal responsibility was excluded on the basis of a mistake of law under the second sentence of Article 32(2) of the ICC Statute, the applicability of which is confirmed in paragraph 3 of the discussion paper.[59]

As far as international criminal law is concerned, the mistake of law approach appears to have some support amongst scholars with a common-law background.[60] It entails, however, the following difficulty. In practice, the existence of a mistake will often be questionable because the state leader concerned will usually have been informed by his or her legal adviser about the legal *pro et contra* of the legally controversial use of force.[61] It can thus be considered a realistic assumption that at least such legal advice, which is being rendered for solely internal decision-making purposes, would reflect the legal uncertainty rather than inaccurately create the perception that a clear legal basis for the military action in question is available.[62] Under German criminal law, it is a matter of controversy whether an individual who has been informed in such a manner and who, accordingly, acts with 'potential'

57 It is submitted that the ICC prosecutor would not do otherwise under para. 1, option 3 of the coordinator's discussion paper, cited *supra* note 20.

58 In the course of the most recent debate within the ICC Working Group on the Crime of Aggression on September 2003 in New York, several delegations have expressed doubts whether the term 'flagrant' has been well chosen; it has been asked, *inter alia*, whether it would not be preferable to choose the term 'manifest', which was contained, e.g. in the German proposal PCINICC/1999/DP.13.

59 For the text of the discussion paper, see the citation, *supra* note 20.

60 Y. Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge: Cambridge University Press, 2001), 127; Griffiths, *supra* note 39, at 325; in tentatively the same direction, see also Clark, *supra* note 20, at 876.

61 Clark, *supra* note 20, at 876, deals only with the hypothesis where a Legal Adviser informs his oder her superior just about the *conclusion* (and perhaps the arguments supporting the latter) that an envisaged operation would be legal.

62 In a very similar sense, see Franck, *supra* note 50, at 191, on the legal advise to be tendered on 'a future Kosovo'.

knowledge of the illegality of his or her conduct (*Handeln mit bedingtem Unrechtsbewußtsein*) can claim to have been affected by a mistake of law.[63] With regard to the crime of aggression under international law, Griffiths suggests solving the problem by accepting a mistake of law only where the state leader genuinely believed in the legality of the use of force. However, in practice, such a subjective test is difficult to apply. More fundamentally, it is questionable as a matter of principle whether the criminality of those belonging to the group of state leaders concerned should depend upon the judgment about the sincerity of the individual's belief in the legality of the use of force. It is most likely that an international judge would resort to the objective test of manifest illegality, as suggested by Dinstein,[64] at least as an evidentiary point of reference to ascertain the genuineness of the individual's belief. However, if the principle of manifest illegality is likely to be resorted to anyway, this commentator wonders whether it would not be better to introduce it by the 'front door', in the form of an objective element of the crime.

6. The Prosecutor's Remarks about Current Trends in International Law on the Use of Force

These remarks provoke mixed feelings. In so far as the Prosecutor looks back to the case of Kosovo and finds the law on humanitarian intervention 'moving' towards the recognition of a new legal basis for the use of force, this commentator agrees. Indeed, he voiced a very similar opinion after the Kosovo intervention.[65] It is noteworthy that the Prosecutor has followed this assessment, notwithstanding that many leading international lawyers hold the contrary view.[66]

63 For references, see Kreß, 'Anmerkung,' at 916 (notes 62 et seq.), cited above in introductory note.

64 *Supra* note 60.

65 C. Kreß, 'Staat und Individuum in Krieg und Bürgerkrieg', 52 *Neue Juristische Wochenschrift* (1999), at 3082.

66 For a rather unequivocal dismissal of a right to humanitarian intervention, see, among many others, M. Bothe in G. Vitzthum (ed.), *Völkerrecht* (2nd edn, Berlin/New York: Walter de Gruyter, 2001), at 615 et seq.; A. Cassese, *International Law* (Oxford: Oxford University Press, 2001), 321; B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* (1999), at 1 et seq.; but see C. Greenwood 'Humanitarian Intervention: The Case of Kosovo,' 10 *Finnish Yearbook of International Law* (2002), at 141; M. Herdegen, *Völkerrecht* (2nd edn, München: Verlag C.H. Beck, 2002), at 236 et seq. (marginal notes 25 et seq.), arguing that a legal basis for humanitarian intervention *in extremis* already exists; see Franck, *supra* note 50, at 174 et seq., who argues in favour of a 'plea in mitigation of an otherwise unlawful act' (ibid., at 188); the *method* underlying Franck's suggestion sharply differs from the one of the Prosecutor: in fact, Franck's approach reminds the reader of the recommendation made by Falk about 25 years ago to use 'second-order levels of legal inquiry' to assess controversial claims concerning the use of force (see R. Falk, 'The Beirut Raid and the International Law of Retaliation', 63 *American Journal of International Law* (1969), at 428 et seq.); this commentator has explained elsewhere (in *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen in Fällen staatlicher Verwicklung in Gewaltakte Privater* (Berlin: Duncker & Humblot, 1995), at 32 et seq.) why he doubts the usefulness of a resort to 'second-order levels of legal inquiry'; this question of method is, however, of secondary interest here, as Franck states himself that 'the distinction between what is justified (exculpated) and what is excusable (mitigated) is so fine as to be of pure (yet also considerable) theoretical interest' (ibid., at 191).

In contrast, the Prosecutor's remarks on the legal questions relating to the war coalition's use of force against Iraq are unsatisfactory. This is true, first, for the asserted 'revitalization' of the 'discussion about preventive self-defence'.[67] Regretfully, the Prosecutor fails to draw the necessary distinction. Indeed, whether or not the right to self-defence under the UN Charter extends to the situation where an armed attack within the meaning of Article 51 is imminent is a matter of controversy among reasonable international lawyers since the Charter's entry into force.[68] Therefore, this category, whether you call it 'preventive' self-defence or 'interceptive'[69] self-defence, falls into that grey area of current international law[70] to which international criminal law should not extend.

In fact, the new *National Security Strategy of the United States of America*,[71] although it refers to the need to '*adapt* the concept of imminent threat' (emphasis added), appears to be designed to free the United States from the requirement of imminence.[72] The so-called Bush doctrine of pre-emptive self-defence is thus a truly 'new doctrine'[73] and any debate about its legality must be kept distinct from the traditional discussion about preventive/interceptive self-defence. Without being able in this paper to enter into a debate about the policy behind the Bush doctrine, it should be stated that, in this regard, the law is unambiguous. The new doctrine lacks any legal basis in the UN

67 For a more detailed exposition of the following text, see Kreß, *supra* note 3, at 313 et seq.

68 For detailed references for the time between 1945 and 1995, see Kreß, *supra* note 66, at 199 (note 845); for more recent statements *in favour* of a right to self-defence in the case of an imminent armed attack, see Dinstein, *supra* note 60, at 169 et seq.; Franck, *supra* note 50, at 108; Schmitt, 'Preemptive Strategies in International Law', 24 *Michigan Journal of International Law* (2003), at 529 et seq; For the *contrary* view, see Cassese, *supra* note 66, at 310 et seq.; H. Fischer, 'Friedenssicherung und friedliche Streibeiegung' in K. Ipsen (ed.), *Völkerrecht* (4th edn, Munich: Verlag C.H. Beck, 1999), 945 (marginal note 29 et seq.).

69 Dinstein, *supra* note 60, at 172.

70 A grey area, it should be added, the existence of which the International Court of Justice has confirmed in passing in the *Nicaragua* case; *International Court of Justice Reports* (1986) 103 (para. 194).

71 *The National Security Strategy of the United States of America* (September 2002), at 15.

72 Concurring M. Byers, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change', 11 *Journal of Political Philosophy* (2003) 171; C. Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 *San Diego International Law Journal* (2003) 16, argues for the need to adapt the '*Caroline test*' of imminence to the kind of threats that states are facing in the contemporary world, but he, too, insists on the need to keep self-defence restricted to cases of imminent armed attacks; even Schmitt, *supra* note 68, who goes some way to justify the new doctrine, requires the 'near certainty that an armed attack will be launched' and the determination that 'the last available window of opportunity' has been reached for the state acting in legitimate (preventive) self-defence (ibid., at 547).

73 In fact, it is one which, in the words of the UN Secretary General, 'represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years'; address to the UN General Assembly of 23 September 2003 (www.un.org/webcast/ga/58/statements/sg2eng030923.htm).

Charter or in recent state practice; it is, thus, clearly at odds with current international law.[74] The Prosecutor should have said so clearly.

The legal analysis of the Bush doctrine does not, however, exhaust the legal questions surrounding the use of force against Iraq. In fact, the states forming the 'Coalition of the Willing' have not based their legal claim on a right to pre-emptive self-defence; they have rather invoked Chapter VII of the UN Charter and, more specifically, Security Council Resolution 678[75] as the legal bases for their action.[76] In other words, they have portrayed the armed intervention as a measure of collective security authorized by the UN Security Council. The Prosecutor thus misses the point when he asks whether the use of force against Iraq could be justified '*without* the will of the Security Council' (emphasis added). The correct question should have been whether the war 'coalition states' were right in their assertion to act with the will of the Council. This is not the place to deal with this crucial issue in depth. The position taken by this commentator, set out at length elsewhere,[77] is as follows: the arguments against the legality of the use of force against Iraq carry more weight. The counter-arguments, however, which are best expressed in a recent study by Greenwood,[78] cannot be easily dismissed.[79] Thus, the use of force against Iraq does not meet the test of 'clear' illegality. In the opinion of this commentator, this use of force constituted an attempt to enforce mandatory Security Council resolutions[80] — an attempt which, though having been carried out in contravention of Article 2(4) of the UN Charter, did not give rise to the criminal responsibility of the war coalition's political leadership under customary international law.

7. Conclusion

The use of force against Iraq, deplorable as it is in many respects, offers an excellent laboratory for an in-depth analysis of many intriguing problems pertaining both to the crime of preparing a war of aggression under German criminal law, and to the definition of the crime of aggression under international law. The effort of Germany's

74 But see M. Reisman, 'Assessing Claims to Revise The Laws of War', 97 *American Journal of International Law* (2003) 90, who recognizes — in the somewhat cloudy 'New Haven' style — the possibility that the new Security Doctrine might contribute to 'minimum order' and who calls upon 'the college of international lawyers' to establish criteria for the lawfulness of the initiation and application of unilateral anticipatory and pre-emptive defensive actions.

75 UN Doc. S/RES/678 (1990), 29 November 1990.

76 The official justification given by the core coalition states is contained in letters dated 20 March 2003 and addressed to the President of the Security Council; see UN Docs S/2003/350–352 (United Kingdom, USA and Australia).

77 *Supra* note 3, at 313–331.

78 Ibid., at 7 et seq.

79 The main reason being the wording of the now famous Security Council Resolution 1441 (UN Doc. S/RES 1441 [2002], 8 November 2002) as subsequent practice to Resolution 678; see the succinct statement made by Byers, *supra* note 72, at 183: 'Resolution 1441 is a masterpiece in legal drafting that deliberately provides ground for all key players to stand upon.'

80 For a more detailed exposition of the view that the use of force against Iraq was based on an *enforcement* rather than an *aggressive* intent, see Kreß, *supra* note 3, at 331 et seq.; for a similar position, see Werle, *supra* note 39, at 440 (marginal note 1161).

Chief Federal Prosecutor to cope with these problems was not only meritorious in itself, but also produced the correct result (not to open an investigation against members of the German cabinet), based on a partially convincing reasoning. From the perspective of German criminal law, the most important aspect of the Prosecutor's decision is perhaps the demonstration of the serious flaws from which section 80 is suffering. In the context of international criminal law, the decision highlights many controversial points: the disputed status of the annex to Resolution 3314 as regards the *crime* of aggression under customary international law; the potential criminal responsibility of the leaders of a state-accomplice with an aggressor state; the question of whether the use of force underlying the crime of aggression should be based on a 'collective intent' requirement; as well as the closely intertwined difficulty of conceptualizing the indisputable fact that current international law on the use of force contains a number of grey areas. As of yet, none of these issues has been successfully tackled by the Working Group on the Crime of Aggression. It is submitted that all those issues can and should be resolved in the near future by a joint venture of criminal and international law experts. There may well exist a feeling in some diplomatic quarters that the aftermath of the Iraq war is not the right moment for making progress on the definition of the crime of aggression. Some diplomats (and some state leaders) may even think that such an opportunity will not materialize at all in the foreseeable future. This commentator respectfully disagrees. The ICC Statute will suffer from a serious legitimacy gap as long as it fails to incorporate what the IMT at Nuremberg termed the 'supreme crime under international law'. This gap must be filled sooner rather than later by a definition which is both conceptually sound and solidly grounded in customary international law.