For the Sake of Present and Future Generations

Essays on International Law, Crime and Justice in Honour of Roger S. Clark

Edited by

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CHAPTER 6

Germany and the Crime of Aggression*

Claus Kreß†

My friendship with Roger Clark is a most pleasant collateral advantage of the negotiations on the Statute of the International Criminal Court ('ICC') since the 1998 Rome Conference. While Samoa is perhaps not considered as a global power in military or economic terms, Samoa's delegates, and not least Roger, made a very significant contribution to the establishment of the ICC in intellectual terms. The latter is also true with respect to the negotiations on the crime of aggression that continued after the Rome conference and that culminated in the 2010 diplomatic breakthrough in Kampala. Like Samoa, Germany invested considerable efforts in making the negotiations on the crime of aggression a success. Perhaps it is of some interest to give an account of this active role and to place that role within the broader perspective of Germany's history since 1914. It is my sincere hope that Roger will derive some pleasure from reading such a German perspective, written by a German friend and admirer of his.

1 Introduction

In 1919, the former German Emperor William II and his role in the outbreak of the First World War were at the heart of the first attempt made in modern times to conduct an international trial for the decision of a State to go to war. In 1946, Germany's wars of aggression under the Nazi regime formed the object of the 'creative precedent' set in Nuremberg. In 2010, Germany was widely seen as one of the more important players when a diplomatic breakthrough was achieved in Kampala on the definition of the crime of aggression and on the activation of the ICC's jurisdiction over that crime. This should suffice to indicate a 'special connection' between Germany's history and that of the crime of aggression.

Let me begin with two citations in support of my suggestion that there is quite a rich and eventful story to be told. In 1953, the American State Department commented on that policy as follows:

* The essay is based on a lecture given by the author to the Japanese Society of International Law at its 2014 session in Niigata.

† The opinions stated in this article are the author's own and do not necessarily represent the official German view.

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> (The) German position on the trials of war criminals is a problem which has continued to trouble us ever since the trials were held. The Germans have failed to accept the principles on which the trials were based and do not believe that those convicted were guilty. Their attitude is very much sentimental and can not be influenced by arguments or an objective statement of the facts. They adhere to the view that the majority of the war criminals were soldiers who were punished for doing what all soldiers do in war, or indeed were ordered to do.[1]

Forty-five years later in 1998, William R. Pace, the American convenor of the global coalition of non-governmental organizations for an international criminal court passed the following judgment on Germany's international criminal law policy:

> (No) country can be prouder than Germany of their participation and support for the (International Criminal Court) (...). The German refusal to accept what they called an 'alibi court', and their resistance to the highly publicized United States threats to the German leaders during the Rome Conference deserves great appreciation by the world community.[2]

These two citations, of course, refer to the German approach to international criminal law in general, but they can be applied to Germany's attitude towards the crime of aggression as well, as I hope the story that follows will show.

2 Versailles, Nuremberg and the Prevailing Scepticism until the End of the Cold War[3]

1 *Versailles*

At the end of the First World War, the British Prime Minister David Lloyd George, declared: 'The (German) Kaiser must be prosecuted. The war was a

1 Cited in Jörg Friedrich, 'Kein in Nürnberg Verurteilter kam in das Strafregister' Süddeutsche Zeitung (1 October 1996) 10.

2 William R Pace, 'The Relationship between the International Criminal Court and Non-Governmental Organizations' in Herman A M von Hebel and others (eds), *Reflections on the International Criminal Court* (TMC Asser Press 1999) 197.

3 This part of the essay is a much condensed version of Claus Kreß, 'Versailles-Nürnberg-Den Haag: Deutschland und das Völkerstrafrecht' in Verein zur Förderung der Rechtswissenschaft (ed), *Fakultätsspiegel* (Carl Heymanns Verlag 2006) ('Kreß', Versailles-Nürnberg-Den Haag: Deutschland und das Völkerstrafrecht') 14–37; for an English version, see Claus Kreß,

crime. Who doubts that?'[4] This set the stage for the first attempt made in modern times to conduct international criminal proceedings to determine individual criminal responsibility for going to war.[5] The attempt proved unsuccessful, probably for a mixture of political and legal reasons. The fundamental legal obstacle to which the United States of America, in particular, referred was the novelty of the crime in question. Art. 227 of the Versailles Treaty implicitly went a long way to endorse the sceptical position taken by the United States in that it declared to 'arraign William II of Hohenzollern, formerly German Emperor' *not* for a crime under international *law*, but 'for a supreme offence against international *morality* and the sanctity of treaties'. The Government of the Netherlands, where the German Emperor had taken domicile, declared that State was unable and unwilling to surrender William II to a 'special tribunal' for want of a sufficiently solid legal basis. While the Treaty of Versailles did therefore not result in international criminal proceedings against the German Emperor for waging a war of aggression, the historic fact remained that the idea of criminalizing the waging of a war of aggression under international law had been connected, in Art. 231 of the Treaty of Versailles, with the attribution to 'Germany and its allies' of the responsibility for the outbreak of the First World War—an attribution of responsibility which, at the time, proved extremely controversial in Germany, to put it mildly. As one consequence of this broader historical context, there was little German involvement in the inter-War debates on international criminal justice. As Hellmuth von Weber, one of the few German authors dealing with the subject matter, noted in 1934:

> It has gone almost unnoticed by the German public that a movement to establish an international criminal jurisdiction has started after the World War. The German reservation is rooted in the fact that this movement has at its origin the allegation of Germany's responsibility for and during the war. Such allegation made it impossible for a German to take a positive attitude towards the said movement.[6]

'Versailles-Nuremberg-The Hague' (2006) 40 The American Lawyer 16 ('Kreß, 'Versailles-Nuremberg-The Hague") (each study contains detailed further references).

4 'Coalition policy defined, Mr. Lloyd George's pledges', *The Times* (6 December 1918) 9.

5 For a fascinating account of this first attempt with many detailed references, see Kirsten Sellars, *'Crimes Against Peace' and International Law* (CUP 2013) 1–11.

6 Helmut von Weber, *Internationale Strafgerichtsbarkeit* (Ferd Dümmlers Verlag 1934), preface.

2 *Nuremberg*

Robert Jackson's success at Nuremberg in setting a 'creative precedent' for the international criminalization of waging a war of aggression, bolstered this negative German position towards international criminal law in general and crimes against peace in particular for quite a while.[7] Interestingly, about 80% of the German population had considered the Nuremberg trial against the Major War Criminals to be 'fair' at the time when the trial was being conducted, but already in 1950 public opinion changed dramatically and only 38% of the Germans held that view any longer.[8] While West Germany's political leaders generally tended to avoid addressing the topic in political and patriotic terms, they invested much energy to persuade the Occupying Powers to release the imprisoned German war criminals. This tireless endeavour met with success: by 1958, all those sentenced to imprisonment in the Nuremberg-follow up proceedings had been set free. These so-called 'humanitarian initiatives' to seek the early release of those imprisoned for crimes under international law, were complemented by Germany's non-recognition of the Nuremberg precedent on legal grounds. One main objection, which was most prominently applied to the crime against peace, was the retroactive application of this 'new crime' at Nuremberg. Hermann Jahrreiß, Professor of Law at the University of Cologne, had set the tone on the '*nullum crimen*-objection' as early as in the Nuremberg trial itself when he had stated in eloquent terms in support of the defence:

> The regulations of the Charter negate the basis of international law, they anticipate the law of a world state. They are revolutionary. Perhaps in the hopes and longings of the nations the future is theirs. The lawyer, and only as such may I speak here, has only to establish that they are new, revolutionarily new. The laws regarding war and peace between states had no place for them—*could* not have any place for them. Thus they are criminal laws with retroactive force.[9]

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7 Norbert Frei, 'Der Nürnberger Prozeß und die Deutschen' in Wolfram Wette & Gerd R Ueberschär (ed), *Kriegsverbrechen im 20. Jahrhundert* (Wissenschaftliche Buchgesellschaft 2001) 477–492; see also Ronen Steinke, *The Politics of International Criminal Justice. German Perspectives from Nuremberg to The Hague* (Hart Publishing 2012) ('Steinke, *The Politics of International Criminal Justice. German Perspectives from Nuremberg to The Hague*') 40–61.

8 Norbert Frei, 'Der Nürnberger Prozeß und die Deutschen' (n 7) 478.

9 The quote is from a typescript of Jahrreiß's closing argument. It is part of his personal Nuremberg file that is now in the Archive of the University of Cologne. On Jahrreiß, see Annette Weinke, 'Hermann Jahrreiß (1894–1992): Vom Exponenten des völkerrechtlichen "Kriegseinsatzes" zum Verteidiger der deutschen Eliten in Nürnberg', in Steffen Augsberg & Andreas Funke (eds), *Kölner Juristen im 20. Jahrhundert* (Mohr Siebeck 2013) 163–195.

This, in essence, captured the official legal position that Germany initially took on Nuremberg. And in conformity with this position, Germany distanced herself from the often so-called 'Nuremberg-clause' in Art. 7 (2) of the European Convention on Human Rights that contains a carefully circumscribed exception from the *nullum crimen*-principle.

3 *Prevailing Scepticism until the End of the Cold War*

The German legal protest against Nuremberg had thus been placed on record. But what were the future prospects of West German international criminal policy at the time of the Cold War? Considering Germany's foreign policy emphasis on multilateralism and the rule of law in international relations, one could perhaps have expected Germany to take a more favourable stance towards international criminal law for the future. The first opportunity to take such a position at the international level came in 1978 when the Sixth Committee of the General Assembly of the United Nations resumed its work on the codification of international criminal law, a task it had abandoned in 1954. But when Germany took the floor in 1980, it spoke out against international criminal law without great diplomatic clouding. According to the record,[10] the German delegation voiced serious doubts about the usefulness of resuming the discussion about the Nuremberg principles. Whether it would be possible to pronounce rules of international criminal law that could gain support from the international community was deemed questionable. While the persisting German difficulties with the Nuremberg precedent are likely to have influenced this less than enthusiastic position, the perhaps more immediate explanation is that, at this moment in time, leading Western powers such as the United States of America, Canada and the United Kingdom were similarly disinclined to revitalize the Nuremberg and Tokyo *acquis*. It would thus take more time before Germany became ready for a new policy on international criminal law.

By and large, Germany's legal scholarship did not display a greater interest in the subject-matter than the country's political establishment. With the noteworthy exceptions of Hans-Heinrich Jescheck,[11] Otto Triffterer[12] and Herbert Jäger,[13] German criminal lawyers and criminologists did not turn their close

10 UNGA Sixth Committee (7 October 1980) UN Doc A/C.6/35/Sr. 12.

11 Hans-Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht. Eine Studie zu den Nürnberger Prozessen* (Röhrscheid Verlag 1952) *passim.*

12 Otto Triffterer, *Dogmatische Untersuchungen zur Entwicklung des Materiellen Völkerstrafrechts seit Nürnberg* (Eberhard Albert Verlag 1966) *passim.*

13 Herbert Jäger, *Makrokriminalität. Studien zur Kriminologie Kollektiver Gewalt* (Suhrkamp Verlag 1989) *passim.*

attention to the study of crimes under international law and the establishment of an international criminal jurisdiction. And prominent German public and public international lawyers did not make any attempt to conceal their outright policy objections to building on the Nuremberg precedent on international criminal law in general, and on the crime of initiating a war of aggression in particular. As late as in 1994, Helmut Quaritsch, a tireless critic, called the debates within the International Law Commission 'glass bead games by an international sect of lawyers'.[14] And in 1989, when the Cold War drew to a close, Wilhelm Grewe, the eminent historian on international law and the influential international legal adviser of the Foreign Office in Konrad Adenauer's days, articulated the following plainly negative assessment:

> The criminal prosecution of leading individuals for initiating a war of aggression was, as far as the past is concerned, a miscarriage of justice (a victim of which was Rudolf Heß, who, whatever one cares to think about his role in the Third Reich, was jailed for 40 years). As for the future, this was the wrong path to take. In so far as the other crimes listed in the London Statute are concerned, it seems to make little sense to continue to cling to the failed attempts and abandon oneself to the hope that one day there would indeed be a comprehensive international criminal law regime applied by an international criminal court.[15]

3 The German Position during the Negotiations on the Statute of the ICC

1 *The Background: The Evolution of the German Position on International Criminal Law and International Criminal Justice in the 1990s*

As we know, turbulent global developments since the 1990s caused the realist Grewe to be disproved by reality. It is fascinating to see how the German position towards international criminal law has changed in the course of this development.[16] To begin with, Germany was not among the driving forces

14 Helmut Quaritsch, *Carl Schmitt. Das international-rechtliche Verbrechen des Angriffskrieges und der Grundsatz 'nullum crimen, nulla poena sine lege'* (Duncker & Humblot 1994) 219.

15 Wilhem Grewe ,'Rückblick auf Nürnberg' in Kai Hailbronner and others (eds), *Festschrift für Karl Doehring* (Springer Verlag 1989) 248–89.

16 For a more detailed account, see Steinke, *The Politics of International Criminal Justice. German Perspectives from Nuremberg to The Hague* (n 7), 74–119 (with many detailed references); see also Kreß, 'Versailles-Nürnberg-Den Haag: Deutschland und das Völker-

when it came to the establishment of the two international criminal courts for the former Yugoslavia and Rwanda. In both cases, the United States, as in Nuremberg, was the key player. Even so, Germany fulfilled her obligation under the relevant Security Council resolution to co-operate with the Yugoslav tribunal. In fact, Germany made the ground-breaking first trial conducted before this tribunal possible, when it terminated its fairly advanced own proceedings against the Serbian defendant *Dusko Tadic* and surrendered him to The Hague. This important instance of early co-operation with the Yugoslav Tribunal indicated a new German openness towards international criminal justice, but in truth it was action upon request.

Since 1997, Germany has been showing her readiness to play an active role on international criminal justice. This new attitude had become possible because in the 1990s a consensus had emerged among all the leading political parties in the country to support the international criminal justice project. The charismatic Head of the Public International Law Section of Germany's Foreign Office, the late Hans-Peter Kaul, who would later become the first German judge at the ICC, most skilfully took advantage of the new political climate. He soon established Germany as a driving force within the group of like-minded States which supported the establishment of an effective permanent international criminal court.[17] If seen from a broader foreign policy perspective, it is remarkable that Germany not only developed a national policy position on the ICC, but was also prepared to defend that position where it deviated from the preferences of France, the United Kingdom and, most importantly, the United States of America. It is possible that the negotiations on the ICC were the first international negotiations touching upon high politics where Germany acted that way. And, the political consensus within Germany on that course of action has remained robust. In 2002, the Christian Democrat, Norbert Roettgen, stated as a member of an opposition party at the time:

> During this term of parliament we had many controversies on legal policy issues. Germany's commitment for an international order of criminal law and criminal justice was no and is no controversy, though, but constitutes a firm common ground of German legal and foreign policy.[18]

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strafrecht' (n 3) 38–51; Kreß, 'Versailles-Nuremberg-The Hague' (n 3) 28–36 (with many detailed references in each text).

17 Hans-Peter Kaul, 'Der Beitrag Deutschlands zum Völkerstrafrecht' in Christoph Safferling & Stefan Kirsch (eds), *Völkerstrafrechtspolitik. Praxis des Völkerstrafrechts* (Springer Verlag 2014) ('Kaul, 'Der Beitrag Deutschlands zum Völkerstrafrecht") 51–84.

18 Deutscher Bundestag, Plenarprotokoll 14/233, reprinted in Sascha Rolf Lüder & Thomas Vormbaum (eds), *Materialien zum Völkerstrafgesetzbuch. Dokumentation des Gesetzge-*

Hand in hand with this evolution of a new German attitude to the international criminal justice, Germany's perspective on Nuremberg also underwent a change. While the shortcomings of the Nuremberg proceedings that had figured so prominently in Germany's prior approach were not suddenly ignored, more and decisive emphasis was now placed on the fact that a judicial avenue had been chosen to address Germany's wars of aggression under Hitler despite all the challenges that this involved. And, eventually, Germany fully acknowledged that Nuremberg laid the potential for according more weight to the rule of law in future international relations.[19]

As regards the key elements of the German position, it is worth recalling that the latter was never directed to an uncritical extension of the subject matter of international criminal law *stricto sensu*. Quite to the contrary, Germany has consistently been advocating for the limitation of this body of law to the crime of aggression, genocide, crimes against humanity, and war crimes, including those committed in non-international armed conflict. In each case, Germany favoured definitions of the greatest possible precision, and opposed the lowering of general prerequisites of individual criminal responsibility. For example, the express reference to the principle of culpability in the Rules of Procedure and Evidence[20] is due to a German request. Germany was keen, however, to see that her rather narrow concept of international criminal law be construed with full recognition of the principle of universal equality before the law. In the German case, this important point of principle is supported by the historical experience of the Nuremberg precedent which, under the prevailing circumstances at the time, could not live up to this ideal. But in his opening speech, Jackson had stated emphatically, and with particular emphasis on the crime of aggression:

> The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment.[21]

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bungsverfahrens (Lit Verlag 2002) ('Lüder & Vormbaum, *Materialien zum Völkerstrafgesetzbuch. Dokumentation des Gesetzgebungsverfahrens*') 95.

19 In accordance with this fresh look at Nuremberg, Germany withdrew her reservation to Art 7 (2) of the European Convention on Human Rights on 5 October 2001.

20 Rule 145 (1) (a) of the Rules of Procedure and Evidence.

21 Secretariat of the International Military Tribunal (ed), *Trial of German Major War Criminals by the International Military Tribunal Sitting At Nuremberg Germany* (Vol II, Allied Control Authority for Germany 1947) 182.

At this point, Germany's reappraisal of Nuremberg becomes particularly clear. The element of victor's justice, which was inevitably present at the time, is not ignored. However, more constructively than in the past, German recognition is now, in line with Jackson's powerful statement of principle, turned into the postulation of 'equality before the law' as the guiding principle for the future. It would have flown into the face of the latter principle to establish the ICC as a 'permanent ad hoc tribunal' of the Security Council. Therefore Germany, together with the great majority of states, was in favour of empowering the international prosecutor to take up situations *proprio motu*, under the control only of the international judges.[22] Germany also—unsuccessfully, as is well known—advocated that the ICC should be vested with universal jurisdiction to ensure universal equality in the application of the law.[23] All this together constitutes the necessary background to fully appreciate the German position on the crime of aggression in Rome and thereafter.

2 *The Rome Conference*

Just before the Rome Conference,[24] Germany published a position paper on the forthcoming negotiations.[25] The three key messages regarding the crime of aggression were that Germany supports the inclusion of this crime within the jurisdiction of the Court, that the crime should be narrowly defined in line with the relevant historic precedents, and that the competence of the Security Council to determine acts of aggression should not be ignored as this would enhance the prospects of a successful outcome of the negotiations. While the two first pillars of this German position remained unchanged throughout the negotiations, Germany developed its position regarding the position of the Security Council in the course of the negotiations.

Already in 1997, Germany had explained its approach to the crime of aggression in significant detail.[26] She argued that not to include this crime would be a regression from existing customary international law, and would deprive the international community of a desirable instrument of deterrence and

22 Art 13(c) in conjunction with Art 15 of the ICC Statute.

23 Hans-Peter Kaul & Claus Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 YIHL 152.

24 For a detailed account of the Rome negotiations on the crime of aggression, see Gerd Westdickenberg & Oliver Fixson, 'Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes' in Jochen Abr Frowein and others (eds), *Liber amicorum Tono Eitel* (Springer Verlag 2003) 483–525.

25 Kaul, 'Der Beitrag Deutschlands zum Völkerstrafrecht' (n 17) 67.

26 Stefan Barriga & Claus Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (CUP 2012) ('Barriga & Kreß, *The Travaux Préparatoires of the Crime of Aggression*') 233.

prevention. The distinctive character of the crime of aggression was seen, she argued, in the serious violation of another State's territorial integrity through the use of military force, irrespective of the commission of other crimes under international law. With respect to the typical case where the crime of aggression does go hand in hand with war crimes, Germany identified the procedural advantage that it might be easier in certain instances to prove the leaders' responsibility for the war as such, rather than to attribute to them the responsibility for war crimes committed on the ground.

From 1997 onwards, Germany was in favour of limiting the substantive definition of the crime to the individual participation in a completed use of military force by one State against another one. She has also been consistently insisting on the absolute leadership character of the crime. In her first detailed proposal of December 1997,[27] Germany explained the need for a narrow definition of the State conduct element of the crime because of the imperative of avoiding, as far as possible, frivolous accusations of a political nature and avoiding any negative impact on the legitimate use of force in conformity with the Charter of the United Nations. Germany favoured 'a viable self-sustained definition'[28] which, in her view, excluded any constitutive substantive effect of a Security Council determination that an act of aggression had occurred.[29] Furthermore, Germany doubted the usefulness of referring to the acts of aggression, as listed in Art. 3 of the 1974 General Assembly definition of aggression, in order to define the State element.[30] In concrete terms, Germany suggested to define the State conduct element as

> an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations and resulted in the effective occupation by the armed forces of the attacking State or in the annexation by the use of force of the territory of another state or part thereof.[31]

When it came to the procedural role of the Security Council, Germany followed the proposal of the International Law Commission to make the proceedings for a crime of aggression dependent on the prior determination of an act of aggression by the Council. In December 1997, Germany was of the view that

27 *Ibid* 234.
28 *Ibid* 233.
29 *Ibid* 234.
30 *Ibid* 236.
31 *Ibid* 237.

such a solution was 'a merely declaratory clarification of the existing legal situation under the Charter'.[32]

In a slightly revised form, the German proposal was the last one that remained on the negotiation table in Rome,[33] but, as is well known, this proposal also did not meet with success. When the last hope of securing an agreement on the crime of aggression had faded away in the corridors of the World Health Organization in Rome, Germany was quick to support the proposal of the States forming the Non-Aligned Movement[34] that eventually became Art. 5 (1) (d) and Art. 5 (2) of the original ICC Statute.[35] The inclusion of the crime of aggression in the list of crimes under the Court's jurisdiction and the articulation of a kind of normative expectation that States Parties would strive towards the activation of this jurisdiction in the ultimate Rome compromise package should pave the way to the breakthrough that would materialise 12 years later in Kampala.

3 *The Preparatory Commission for the ICC: Germany's Informal Discussion Paper of November 2000*

In the Preparatory Commission for the ICC,[36] the German delegation made clear its determination not to treat Art. 5 (1) (d) and Art. 5 (2) as dead letters, but to move the discussion on the crime of aggression forward. For this purpose, Germany presented a new discussion paper on the crime of aggression, which was in fact the most detailed of all its written contributions to the negotiation process.[37]

The paper did not repeat the position voiced before and in Rome, namely that proceedings for the crime of aggression should be dependent on the determination of an act of aggression by the Security Council. Instead, the 2000 Paper placed all emphasis on the definition of the State conduct element of the crime. The paper stressed the need firmly to ground that definition 'on established customary law', and thereby to follow the same approach as had been taken when defining the other crimes within the Court's jurisdiction.[38] It was

32 *Ibid* 234.

33 *Ibid* 277.

34 *Ibid* 315.

35 Kaul, 'Der Beitrag Deutschlands zum Völkerstrafrecht' (n 17) 68.

36 For a detailed account of the negotiations in the Preparatory Commission, see Stefan Barriga, 'Negotiating the Amendments on the crime of aggression' in Barriga & Kreß, *The Travaux Préparatoires of the Crime of Aggression* (n 26) 8–14 ('Barriga, 'Negotiating the Amendments on the crime of aggression").

37 Barriga & Kreß, *The Travaux Préparatoires of the Crime of Aggression* (n 26) 367.

38 *Ibid* 368 (para 5), 374 (para 24 (2)).

then stated and explained in considerable detail that customary international law had not developed beyond the point of criminalizing the participation in a *war* of aggression.[39] While no decisive importance was attached to maintain the term 'war', it was argued that the substance of that term should be spelled out in the definition. In that context, and in a shift of emphasis compared with her proposal submitted to the Rome conference, Germany no longer suggested that the State use of force either had to result in military occupation or annexation or that such had to be the object of the use of force. Instead, the 2000 Paper stressed the need for the State's use of force to be an 'aggressive and large-scale armed attack on the territorial integrity of another State, clearly without any justification under international law'.[40] The paper went on to assert that such instances of a State use of force 'share the following characteristics':

> Such attacks are of a particular magnitude and dimension and of a frightening gravity and intensity.
>
> Such attacks regularly lead to the most serious consequences, such as extensive loss of life, extensive destruction, subjugation and exploitation of a population for a prolonged period of time.
>
> Such attacks regularly pursue objectives unacceptable to the international community as a whole, such as annexation, mass destruction, annihilation, deportation of forcible transfer of the population of the attacked State or parts thereof, or plundering of the attacked State, including its natural resources.[41]

The paper summarised 'that armed attacks which combine the above-mentioned characteristics are clearly not justified under international law' and that '(b)y the same token, such armed attacks occur "in manifest violation of the Charter of the United Nations" '.[42] The so-defined use of force must effectively occur, so the paper adds in line with the Germany's consistently held position. 'This means that preparatory acts or attempts without actually resulting in an aggressive, large-scale armed attack on the territorial integrity of another State should not fall within the scope of the crime of aggression.'[43]

The German position on the State conduct element, as articulated in the 2000 Paper, is interesting in several respects. Germany clearly articulated the need to

39 *Ibid* 370–73 (paras 16–22).

40 *Ibid* 369 (para 10).

41 *Ibid.*

42 *Ibid* (para 11).

43 *Ibid* 374 (para 24 (4)).

remain within the confines of customary international law, and expressed the view that such customary law required a definition of the State act element of the crime that is narrower than the concepts of 'use of force in contravention of Art. 2 (4) of the United Nations Charter' and 'act of aggression as listed in Art. 3 of the 1974 General Assembly definition of aggression.' Germany did not formulate the conviction that customary law required a military occupation or an annexation as a consequence of the use of force or as the latter's objective. She did, however, suggest that the use of force must be particularly serious in quantitative terms. In addition, Germany referred to certain reprehensible consequences or objectives of the use of force, and stated that the qualification of an armed attack as being in 'manifest violation of the Charter of the United Nations' results from the 'combination of these characteristics'. This displays the attempt to define the concepts of 'clearly without justification under international law' and 'manifest violation of the Charter of the United Nations' by reference to a quantitative ('intensity'/'gravity') and a qualitative ('serious consequences' or 'unacceptable objectives') threshold. In respect to the latter, Germany did not replace the originally preferred alternative between military occupation or annexation by another enumerative set of applications, but chose a potentially more inclusive, but less determinate approach by referring to a number of typical examples.

Despite the 2000 German Discussion Paper, the work done on the crime of aggression from February 1999 until July 2000 within the Preparatory Commission for the ICC did not advance the matter significantly. The July 2002 Coordinator's Paper,[44] which was the final outcome of this part of the negotiations, certainly brought the different aspects of the negotiations together in a useful structure. But the impressive number of options and brackets contained in the 2002 Paper dispelled any possible illusion about the difficult way ahead.

4 *The Special Working Group on the Crime of Aggression and the Princeton Process*

The necessary momentum to overcome these difficulties was only created within the Special Working Group on the Crime of Aggression between 2003 and 2009, and more particularly during the 'Princeton Process' between 2004 and 2007 that comprised a series of informal inter-sessional meetings under the auspices of the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School at Princeton University.[45] Under the masterful chairmanship of

44 *Ibid* 412.

45 For a detailed account of the negotiations within the Special Working Group and during the Princeton Prosess, see Barriga, 'Negotiating the Amendments on the crime of aggression' (n 36) 14–41.

Ambassador Christian Wenaweser from Liechtenstein, the Special Working Group, most importantly, was able to achieve the breakthrough with respect to the substantive definition of the crime.

At this point of the negotiations, Germany did not submit another discussion paper, but chose to contribute somewhat less visibly to the process of compromise-building. One member of the German delegation acted as a subcoordinator to help reaching agreement on the essentially technical legal question of the definition of the conduct of the individual perpetrator and on the interplay of this conduct requirement with the different forms of participations as listed in Art. 25 (3) of the ICC Statute.[46] With respect to the State conduct element, Germany displayed a spirit of compromise while insisting on the need to adopt a threshold which narrowed the definition in comparison with the State conduct described in Art. 2 (4) of the United Nations Charter.

By 2007, it had become clear that an overwhelming majority of delegations wished to refer to the 1974 General Assembly definition, including the latter's concept of 'act of aggression' as the basis of the State conduct element.[47] Although Germany maintained its sceptical view on such a reference within this specific context, she no longer opposed it taking into consideration the need to move forward to an ultimate compromise. But in view of her firmly held conviction that the crime of aggression should be defined in conformity with customary international law, Germany insisted that the reference to the General Assembly definition be qualified in two respects. First, no reference should be made to Arts. 2 and 4 of the latter definition, to avoid the impression that the Security Council could authoritatively determine the State conduct element. Second, the reference to Arts. 1 and 3 of the General Assembly definition should be qualified by a special threshold clause. The compromise, that emerged from the discussions within the Special Working Group, reflected both Germany's concerns. First, the phrase 'subject to and in accordance with provisions of article 2' in Art. 3 of the General Assembly definition was replaced by the words 'in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974'.[48] Second, the reference to the concept of 'act of aggression', as circumscribed in Arts. 1 and 3 of the General Assembly definition, was qualified by the words 'which, by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations'.[49]

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46 See the 2005 Discussion Paper 1, as reprinted in Barriga & Kreß, *The Travaux Préparatoires of the Crime of Aggression* (n 26) 471.

47 Barriga, 'Negotiating the Amendments on the crime of aggression' (n 36) 25.

48 *Ibid* 27.

49 *Ibid* 28–30.

The resemblance of this threshold clause with the language contained in Germany's 2002 Paper is obvious. This resemblance can be seen in the use of the word 'manifest' in both texts. It is also to be seen in the use of the word 'character' in addition to the words 'gravity' and 'scale', pointing to a qualitative as well as quantitative dimension of the threshold. While the German delegation had much preferred not to use the concept 'act of aggression' in order to define the State conduct element of the crime of aggression, she joined the compromise on the assumption that the essence of her position, as articulated in the 2000 Paper, that is the narrow definition of the crime of aggression in conformity with customary international law, was captured through the threshold clause.

5 *The Kampala Review Conference*

With one notable exception to which I shall return, the negotiations on the crime of aggression at the Kampala Review Conference from 31 May to 11 June 2010 centered around the three closely intertwined questions of the conditions of the Court's exercise of jurisdiction over the crime, the procedural role of the Security Council, and the entry into force of the amendments.[50] On all three issues, the work within the Special Working Group and during the Princeton Process had considerably advanced the understanding among delegations of the questions involved and to be decided. At the same time, however, the discussions had also revealed an extraordinary level of complexity, which was due to a combination of quite considerable textual ambiguity in Art. 5 (2) and Art. 121 of the ICC Statute, on the one hand, and sharply diverging policy preferences, on the other hand.[51] Predictably, it had proved impossible to overcome the differences among delegations before Kampala.

The essence of the Kampala compromise package on the three outstanding issues may be summarised as follows[52]: The amendments *enter into force for each State* party individually in accordance with the *first* sentence of Art. 121 (5) of the ICC Statute. However, *the Court may exercise its jurisdiction* only with respect to a crime of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties and after a decision to be taken by a two thirds majority of the members of the Assembly of States Parties to be taken after 1 January 2017, whichever event is later. In cases where the proceedings before the Court are triggered by a State Party referral or by

50 For a detailed account of the negotiations at the Kampala Review Conference, see Barriga, 'Negotiating the Amendments on the crime of aggression' (n 36) 46–57.

51 *Ibid* 30–46.

52 For the details, see arts 15 *bis* and 15 *ter* in conjunction with RC/Res. 6; Barriga & Kreß, *The Travaux Préparatoires of the Crime of Aggression* (n 26) 101.

the Prosecutor *proprio motu*, the Court's exercise of jurisdiction over the crime of aggression does not require the Security Council's 'green light'. In these two cases, the Court's exercise of jurisdiction is, however, limited *ratione personae*. The Court shall, first, not exercise its jurisdiction over crimes of aggression arising from an act of aggression committed by or against a *non*-State party. Second, where the crime of aggression arises from an act of aggression allegedly committed by a State Party against another State Party, and where the amendments have entered into force for the State Party which is the victim of the crime of aggression, the Court is still precluded from exercising its jurisdiction over the crime of aggression where the alleged aggressor State had previously declared not to accept the Court's exercise of jurisdiction. The jurisdictional regime adopted in Kampala is therefore *sui generis* in several important respects, and this includes a finely nuanced deviation from the jurisdictional constraints *ratione personae* as foreseen in the *second* sentence of Art. 121 (5) of the ICC Statute. Art. 5 (2) of the ICC Statute provides States Parties with the legal basis to devise such a jurisdiction regime *sui generis* for the crime of aggression because it empowered States Parties to adopt a provision 'setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime'.

In Kampala, Germany did not submit proposals on the three issues in question. Instead, the German delegation tried to assist the compromise-building process through the expression of a spirit of compromise in formal and informal consultations. Germany's flexibility was the result, first, from the recognition of the extraordinary legal and political complexity of the matter and, second, from the fact that she had developed her position in one important respect. In the course of the discussions within the Special Working Group, Germany had abandoned the belief that the determination of an act of aggression by the Security Council was a legal requirement, flowing from the Charter of the United Nations, for proceedings for a crime of aggression before the ICC.[53] From a legal policy perspective, Germany had come to recognize that the rejection of the idea of a Security Council monopoly with respect to criminal proceedings for a crime of aggression by the overwhelming majority of delegations was more in harmony with the idea of an equal application of international criminal law than the contrary position defended by the five permanent members of the Security Council.

53 Federal Foreign Office, *Explanatory Memorandum to the Act regarding the Amendments of 10 and 11 June 2010 to the Rome Statute of the International Criminal Court* (17 July 1998) ('Federal Foreign Office, *Explanatory Memorandum to the Act regarding the Amendments of 10 and 11 June 2010 to the Rome Statute of the International Criminal Court*') 12.

During the dramatic last days of the negotiations, the question of the substantive definition of the crime, which seemed to have been conclusively dealt with by the Special Working Group, somewhat surprisingly came back to the negotiation table for a short, but difficult moment. The United States of America, who had returned to the negotiations only shortly before Kampala,[54] had expressed a number of concerns regarding the draft substantive definition of a crime and had submitted a fairly long list of draft Understandings to have these concerns accommodated.[55] In light of the late hour, the American initiative was not met with enthusiasm by most delegations. On the other hand, there was a feeling that it would be unwise not to make a sincere effort to engage with the United States of America in order to broaden and solidify the consensus on such an important question of universal concern. It was within this spirit, that the German delegation accepted the invitation by the President of the Review Conference to act as the Focal Point for consultations. These consultations resulted in the adoption of the sixth and seventh Understandings regarding the substantive definition of the crime which helped preparing the ground for the successful overall result of the negotiations.[56]

4 The German View on the Kampala Compromise

In the Explanatory Memorandum to the German Bill of Ratification, the German Government called the agreement reached in Kampala 'a historical breakthrough' by which 'a major gap in international criminal law' has been closed.[57] The Government highlighted its satisfaction that the Kampala Review Conference adopted its important decision by consensus.[58] With respect to the substantive definition of the crime, the Memorandum emphasizes that 'not every use of force by States which is contrary to international law' will give rise to a crime of aggression. More specifically, the Government stated that the threshold clause is intended

54 Barriga, 'Negotiating the Amendments on the crime of aggression' (n 36) 44–45.

55 Barriga & Kreß, *The Travaux Préparatoires of the Crime of Aggression* (n 26) 751.

56 For a detailed account, see Claus Kreß and others, 'Negotiating the Understandings on the crime of aggression', in Barriga & Kreß, *The Travaux Préparatoires of the Crime of Aggression* (n 26) 94–97.

57 Federal Foreign Office, *Explanatory Memorandum to the Act regarding the Amendments of 10 and 11 June 2010 to the Rome Statute of the International Criminal Court* (n 53) 6.

58 *Ibid* 12.

> specifically not to include and hence not to criminalize as a crime of aggression actions whose legality is disputed—such as those committed in the course of humanitarian interventions—and situations in which the aggression is not of sufficient severity.[59]

The Memorandum does not explicitly deal with the view that not only the *first*, but also the *second* sentence of Art. 121 (5) of the ICC Statute applies to the crime of aggression, to the effect that *both* the aggressor *and* the victim State Party must have ratified or accepted the Kampala amendments as a prerequisite for the Court's exercise of jurisdiction over a crime of aggression arising out of the act of aggression committed by the former State against the latter. But, by saying that States Parties 'are able to exclude by declaration the jurisdiction of the ICC over the crime of aggression (also known as "opting out")',[60] the Memorandum seems to implicitly point in the direction of the *sui generis*-regime, as set out above.

The German Parliament approved the draft ratification bill unanimously, and on 3 June 2013 Germany deposited its instrument of ratification.

5 Some Preliminary Thoughts on the Question of Domestic Implementation

Germany has ratified the Kampala amendments without making a decision on the question of domestic implementation. Germany is one of the countries that had already included a provision on aggression in its national criminal code before the Kampala compromise was reached. In fact, Art. 26 of the 1949 German Constitution, as a lesson from the country's aggressive conduct in the Second World War, requires the criminalization of the preparation of a war of aggression. In accordance with this constitutional duty, section 80 of the German Criminal Code penalizes the preparation of a war of aggression with German participation, if such preparation leads to the concrete danger that Germany becomes involved in a war. Section 80 has been referred to in the important decisions of the Federal Prosecutor not to initiate criminal proceedings because of Germany's military action in Kosovo (1999) and Iraq (2003).[61] However, as of

59 *Ibid* 14.

60 *Ibid* 16.

61 On the latter decision, see Claus Kreß, 'The German Chief Federal Prosecutor's Decision not to Investigate the Alleged Crime of Preparing Aggression against Iraq' (2004) 2 JICJ 245.

yet, the provision has never been tested judicially. The Kampala compromise sheds new light on section 80 and it gives rise to a number of challenging questions with respect to Germany's legislation on the matter.

In 2002, Germany enacted her new Code of Crimes under International Law that codifies customary international criminal law against genocide, crimes against humanity, and war crimes, as well as a limited number of general principles.[62] The first question to be addressed by the German legislator therefore is whether the crime of aggression should make its way into this special Code. Such a legislative move would probably go hand in hand with the deletion of section 80 from the Criminal Code.

Section 80 of the German Criminal Code uses the traditional concept 'war of aggression'. The legislator could make use of the (possible) inclusion of the crime of aggression into the Code of Crimes under International Law in order to bring Germany's national law in line with the definition adopted in Kampala. This could also be used to clarify the absolute leadership character of the crime, which is not explicit from the text of section 80 of the Criminal Code.

One of the many ambiguities of section 80 of the Criminal Code relates to the question as to whether it is only *German* wars of aggression that are covered, or whether wars of aggression *against* Germany are also covered. Any domestic implementation of the Kampala compromise should clarify this important issue. This question is intertwined with the issue of jurisdiction. In its Code of Crimes under International Law, Germany has vested its courts with universal jurisdiction over crimes under international law, while limiting the exercise of this jurisdiction through a number of procedural criteria. A decision will have to be made whether the same or a special jurisdictional scheme shall apply to the crime of aggression.

Last but not least, thought should be given to the question of whether Germany should avail herself of her priority right under the ICC Statute to exercise jurisdiction over the crime of aggression in all cases. The fifth Understanding regarding the Kampala amendments[63] on the crime of aggression,

62 On the conceptual ground work, see Claus Kreß, *Vom Nutzen eines Völkerstrafgesetzbuchs* (Nomos Verlagsgesellschaft 2000) *passim*; for an overview about the content of the Code, see Gerhard Werle & Florian Jeßberger, 'International Criminal Law is Coming Home: The New German Code of Crimes Against International Law' (2002) 13 Crim LF 191; for the travaux préparatoires, see Lüder & Vormbaum, *Materialien zum Völkerstrafgesetzbuch. Dokumentation des Gesetzgebungsverfahrens* (n 18) *passim*; for an appraisal of the first 10 years of application, see Florian Jeßberger & Julia Geneuss (Hrsg), *Zehn Jahre Völkerstrafgesetzbuch. Bilanz und Perspektiven eines "deutschen Völkerstrafrechts"* (Nomos Verlagsgesellschaft 2013) *passim*.

63 Kreß, Barriga, Grover and von Holtzendorff in Barriga & Kreß, *The Travaux Préparatoires of the Crime of Aggression* (n 26) 751.

while not capable of changing the application of the complementarity regime under the ICC Statute, may be read as raising an implicit question-mark behind the wisdom of mechanically applying the principle of complementarity to the crime of aggression irrespective of the relevant jurisdictional basis in the given case. And, subsequent scholarly writing has explicitly addressed that question.[64] Therefore, should the decision be made to extend any new German legislation on the crime of aggression to the case where the country is the *victim* of an illegal use of force out of which a crime of aggression has arisen, thought should be given to the question whether such jurisdiction should be exercised as a matter of priority *vis-à-vis* the ICC.

Wisely, the Ministry of Justice, which is leading the conversation on these and other matters within the German government, has decided that, after the country's timely ratification of the Kampala amendments, there is no need to make any decision concerning these complex questions of legislative policy in a rush. Instead, the Ministry has made it clear that careful thought will be given to all the above-listed and several other issues to arrive at a well-considered and satisfactory national legislative choice.

6 Conclusion

This brings me to the end of my little journey through almost hundred years of German history in its connection with the international criminalization of aggression. The story extended from the failed attempt in 1919 to condemn Germany's Emperor William II for bringing about the First World War, to the country's unanimous parliamentary approval and early ratification of the Kampala compromise in 2013. Germany's active role in the negotiations on the crime of aggression in the years between 1997 and 2010, and her unequivocally positive reaction[65] to the outcome of these negotiations are in line with the country's

64 Beth van Schaack, 'Par in Parem Non Habet: Complementarity and the Crime of Aggression' (2012) 10 JICJ 133; Jennifer Trahan, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions' (2012) 45 Cornell Intl Law J 569.

65 The Kampala compromise has also attracted significant interest within German scholarship. While the shortcomings of the compromise are not ignored, German writers have by and large recognized that the agreement reached in 2010 constitutes a remarkable achievement; see Kai Ambos, 'The Crime of Aggression After Kampala' (2010) 53 German YB Int'l Law 463; Robert Heinsch, 'The Crime of Aggression After Kampala: Success or Burden for the Future?' (2010) 2 GoJIL 713; Claus Kreß & Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 JICJ 1179; Kirsten Schmalenbach, 'Das

positive approach to international criminal law in general since the 1990s. With respect to the crime of aggression, Germany, whose terrible wars of aggression under the Nazi-regime had given rise to the 'creative precedent' set in Nuremberg, has been negotiating in the spirit of the belief expressed by Robert Jackson on behalf of the United States of America at Nuremberg that the application of the international criminal law against aggression must be universalized if it is to serve a useful purpose.

Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen' (2010) 65 Juristen Zeitung 745; for a negative view, however, see Andreas Zimmermann, 'Amending the Amendment Provisions of the Rome Statute. The Kampala Compromise on the Crime of Aggression and the Law of Treaties' (2012) 10 JICJ 209.