

2005

What Are The Contours Of The Crime Of Aggression In International Law As It Would Apply To The Iraqi Attack On Iran And Iraqi Attack On Kuwait? What Defenses Are Uniquely Available With Respect To This Crime?

Katherine Mowat

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**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB**

**MEMORANDUM FOR THE
IRAQI SPECIAL TRIBUNAL**

ISSUES:

**WHAT ARE THE CONTOURS OF THE CRIME OF AGGRESSION IN
INTERNATIONAL LAW AS IT WOULD APPLY TO THE IRAQI ATTACK ON
IRAN AND IRAQI ATTACK ON KUWAIT? WHAT DEFENSES ARE UNIQUELY
AVAILABLE WITH RESPECT TO THIS CRIME?**

Prepared by Katherine Mowat
Fall 2005

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues¹

The Iraqi Special Tribunal (“the Court” or “IST”), also known as the Iraqi High Criminal Court or the Iraqi Higher Criminal Court, has jurisdiction over cases involving “[t]he abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.”² On September 17, 1980, Iraq claimed that the Iranian Shat al-Arab waterway was part of Iraq, and, on September 22, 1980, Iraq invaded Iran. A decade later, on August 2, 1990, Iraq invaded Kuwait, and, on August 8, 1990, Iraq declared the annexation of Kuwait to the state of Iraq. This memorandum examines whether either of these Iraqi invasions constitutes the crime of aggression, which the IST has jurisdiction to try as outlined in Article 14 (c) of the Statute of the Iraqi Special Tribunal (“IST Statute”).

B. Summary of Conclusions

1. Article 14(c) of the Statute of the Iraqi Special Tribunal Establishes a Prohibition Against State Aggression.

The Iraqi Special Tribunal has jurisdiction over cases involving “[t]he abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.”³ The recognition, in Article 1 of Law Number 7 of

¹ ISSUE: What are the contours of the crime of aggression in international law as it would apply to the Iraqi attack on Iran and the Iraqi attack on Kuwait? What defenses are uniquely available with respect to this crime?

² See Statute of the Iraqi Special Tribunal, art. 14(c), at http://www.cpa-iraq.org/human_rights/Statute.htm [hereinafter IST Statute] [Reproduced in the accompanying notebook at Tab 31].

³ *Id.*

1958, of behavior that plots “against the security of the State” reinforces the similarities between Article 14(c) of the IST Statute and the definition of the state crime of aggression from international legal precedent.

2. The Iraqi Invasion of Iran May Constitute a State Crime of Aggression.

Article 2(4) of the United Nations (U.N.) Charter prohibits a U.N. member state’s threat or use of force against the “territorial integrity or political independence” of any other state.⁴ However, the U.N. recognizes that a state may threaten or use force when the U.N. Security Council approves or when the state must defend itself from another state’s armed attack.⁵ General Assembly (G.A.) Resolution 3314 provides a definition of “aggression.”⁶ The International Court of Justice has looked to this definition as a source representing customary international law.⁷

Iraq’s invasion of Iran and Iraq’s annexation of the Shatt al-Arab are actions fitting under the G.A. Resolution 3314 definition of state aggression. The Security Council did not approve Iraq’s invasion of Iran. Therefore, to justify invading Iran, Iraq must establish that Iraq’s invasion of Iran was self-defense or another exception to the Article 2(4) prohibition against threat or use of force against another state. A claim that Iraq used force against Iran in self-defense may succeed because assassination attempts can trigger the legitimate use of self-defense. However, the continuing boundary dispute between Iraq and Iran did not trigger the right to self-defense. Iraq’s claim of

⁴ U.N. CHARTER art. 2, para. 4. [Reproduced in the accompanying notebook at Tab 33].

⁵ U.N. CHARTER art. 51. [Reproduced in the accompanying notebook at Tab 36].

⁶ G.A. Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/9631 (1974) (quoted *infra*, notes 50-51) [hereinafter Res. 3314] [Reproduced in the accompanying notebook at Tab 9].

⁷ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. Lexis 4, 215-216 (June 27, 1986) [hereinafter *Nicar. v. U.S.*] [Reproduced in the accompanying notebook at Tab 37].

anticipatory self-defense ultimately fails because any threat that Iran posed did not necessitate an immediate use of force and because Iraq's invasion of Iran and annexation of the Shatt al-Arab was not proportional to any threat that Iran presented to Iraq.

3. The Iraqi Invasion of Kuwait Constituted a State Crime of Aggression.

Iraq's invasion and annexation of Kuwait are actions fitting under the G.A. Resolution 3314 definition of state aggression. As with Iraq's invasion of Iran, the U.N. did not approve Iraq's invasion of Kuwait. Rather, the U.N. Security Council immediately and specifically demanded that Iraq cease its invasion of Kuwait.⁸ Therefore, Iraq must show that its invasion of Kuwait was a valid act of self-defense, anticipatory self-defense, or, possibly, humanitarian intervention. Iraq's invasion of Kuwait did not meet the requirements for any of these exceptions.⁹ Additionally, Iraq's use of force against Kuwait was not necessary or proportional to any immediate threat that Kuwait presented to Iraq.

4. Article 14(c) of the Statute of the Iraqi Special Tribunal Establishes Jurisdiction Over Crimes Roughly Equivalent to the Crime of Aggression.

The language of Article 14(c) of the IST Statute, combined with the language of Article 1 of Law Number 7 of 1958, establishes the IST's jurisdiction over crimes roughly equivalent to the crime of aggression. The IST Statute prohibits direct or participatory actions¹⁰ that might lead to Iraq's use of force in one of the prohibited acts

⁸ S.C. Res. 660., U.N. Doc. S/RES/660 (Aug. 2, 1990) [Reproduced in the accompanying notebook at Tab 17].

⁹ See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 41 (1991) [Reproduced in the accompanying notebook at Tab 48].

¹⁰ Article 1 of Law Number 7 of 1958, Iraq, e-mail from Michael A. Newton to Michael Scharf on September 30, 2005. (a plotter against the security of the State is anyone who used "his influence in committing or participating in any acts mentioned below") [Reproduced in the accompanying notebook at Tab 1].

listed in Article 1 of Law Number 7 of 1958.¹¹ This prohibition of direct and participatory actions leading to acts of force against another state echoes the Nuremberg Charter's definition of crimes of aggression.¹² Also, the list in Article 1 of Law Number 7 of 1958, which prohibits specific uses of force, resembles and, at times, parallels, the list of actions that the General Assembly designated as acts of aggression in Article 3 of its Resolution 3314 definition of aggression.¹³

5. Under Article 14(c) of Statute of the Iraqi Special Tribunal, the Iraqi Special Tribunal May Not Be Able to Prosecute Members of the Former Regime for the Crime of Aggression for the Invasion of Iran Because Iran is Not an Arab State.

Before an individual may be culpable for the crime of aggression, the adjudicator must find that the individual's state has committed the state crime of aggression against another state.¹⁴ If the IST finds that Iraq's invasion of Iran was a state crime of aggression, in violation of Article 14(c) of the IST Statute, then the IST may prosecute officials for the crime of aggression for their participation in the state crime.

Article 14(c) of the IST Statute and Article 1 of Law Number 7 of 1958 give the IST jurisdiction to prosecute individuals only for Iraqi invasions of "Arab countries."¹⁵

¹¹ *Id.*

¹² Charter of the International Military Tribunal (1945), at www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm (Nuremberg Charter) [Reproduced in the accompanying notebook at Tab 2].

¹³ Res. 3314, *supra* note 6. [Reproduced in the accompanying notebook at Tab 9].

¹⁴ Mohammed M. Goma, *The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime*, in *THE ICC AND THE CRIME OF AGGRESSION* 55, 65 (Mauro Politi & Giuseppe Nesi eds., 2004) [Reproduced in the accompanying notebook at Tab 46].

¹⁵ IST Statute, *supra* note 2, at art. 14. [Reproduced in the accompanying notebook at Tab 30]; Article 1(a) of Law Number 7 of 1958, *supra* note 10 (The text of Article 1(b) does not include punctuation.) [Reproduced in the accompanying notebook at Tab 1].

Since the international community does not identify Iran as an Arab state, and since Iran does not share the territory, language, or culture of other Arab states, Iran is arguably not an Arab state. Therefore, the IST may not have jurisdiction to prosecute members of the Former Regime for the crime of aggression for Iraq's invasion of Iran.

6. Under Article 14(c) of Statute of the Iraqi Special Tribunal, the Iraqi Special Tribunal Can Prosecute Members of the Former Regime for the Crime of Aggression for the Invasion of Kuwait.

Before an individual may be culpable for the crime of aggression, the adjudicator must find that the individual's state has committed the state crime of aggression against another state.¹⁶ The IST can find that Iraq committed the state crime of aggression, in violation of Article 14(c) of the IST Statute and Article 1 of Law Number 7 of 1958, when it invaded Kuwait because Kuwait is an Arab state. Therefore, the IST may prosecute officials for the crime of aggression for their participation in Iraq's commission of the state crime of aggression.

The IST can apply the statutory elements of Article 14 (c) of the IST Statute, in compliance with Article 1 of Law Number 7 of 1958. Because of the equivalence of Article 14 (c)'s prohibition to the international prohibition against the use of force, the IST may consider international legal precedent in determining the outcome of specific cases.

7. The Statute of the Iraqi Special Tribunal Rejects the Defenses of Head of State Immunity, Obedience to Government Orders, and Obedience to Superior Orders, and Does Not Grant the *Tu Quoque* Defense.

¹⁶ Gomaa, *note* 14, at 65 [Reproduced in the accompanying notebook at Tab 46].

The IST Statute's limitations on defenses follow the precedent of international bodies. Adopting the standard of the Nuremberg Charter and the Rome Statute, the IST Statute does not grant head of state immunity. Following the rationale of the *High Command* case, tried by a post-World War II tribunal,¹⁷ the IST Statute does not extend a defense, but may allow mitigation of punishment, to those who committed prohibited acts in obedience to government orders. The IST Statute echoes the Nuremberg Charter in its refusal to extend obedience to superior orders as a defense. Finally, the IST fails to specially extend the defense of *Tu Quoque*.

II. BACKGROUND

A. Factual Background

On September 17, 1980, Iraq declared that the Shatt al-Arab region of Iran was part of Iraq's territory.¹⁸ A few days later, on September 22, 1980, Iraq launched a full military invasion of Iran, with the primary goal of regaining possession of the Shatt al-Arab region at the opening of the Persian Gulf. This Iraqi invasion occurred at a time of great internal conflict within Iran.¹⁹

Within the week, the U.N. Security Council demanded that Iraq and Iran cease fighting.²⁰ Although Iraq was prepared to end fighting in 1982,²¹ Iran's continued

¹⁷ United States of America v. Wilhelm von Leeb et al. (the High Command case) Judgment, 27, 28 October 1948, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1950, vol. XI, 462-697, at 508. [hereinafter *High Command* case] [Reproduced in the accompanying notebook at Tab 40].

¹⁸ Wikipedia, *Iran-Iraq War*, at http://en.wikipedia.org/wiki/Iran-Iraq_War [Reproduced in the accompanying notebook at Tab 67].

¹⁹ *Country Profiles: Iran*, THE MIDDLE EAST, CONGRESSIONAL QUARTERLY INC. 220 (8th ed. 1995). [Reproduced in the accompanying notebook at Tab 43].

²⁰ S.C. Res. 479., U.N. Doc. S/RES/479 (September 28, 1980) [Reproduced in the accompanying notebook at Tab 14].

attempt to overthrow the Iraqi government prolonged the war.²² The Iran-Iraq War finally ended with the signing of a cease-fire on August 20, 1988.

At the conclusion of the Iran-Iraq War, Iraq owed a total of \$80 billion to other nations,²³ with a debt from \$14 billion²⁴ to \$20 billion²⁵ to Kuwait, alone. Despite this weakness, Saddam Hussein emerged from the conflict with a stronger military and a greater reputation among other Arab leaders.²⁶

In considering an invasion of Kuwait at that time, Iraq had everything to gain (including erasing large war debts and gaining up to 10% of the world's oil production capabilities) and little to lose (Kuwait's military had little chance against Iraq's massive and war-strengthened forces). Therefore, Iraq invaded Kuwait on August 2, 1990. On August 8, 1990, Saddam Hussein declared that parts of Kuwait were an annexation of the Iraqi province of Basra and that the remainder of Kuwait constituted the 19th province of Iraq.²⁷

Most western nations, including the United States, eventually supported Iraq during the Iran-Iraq War. In contrast, the international community did not support Iraq's invasion of Kuwait. On the day of the Iraqi invasion, the United States and Kuwait

²¹ See *Country Profiles: Iran*, *supra* note 19, at 220 [Reproduced in the accompanying notebook at Tab 43].

²² Wikipedia, *Iran-Iraq War*, *supra* note 18 [Reproduced in the accompanying notebook at Tab 67].

²³ *Country Profiles: Iraq*, THE MIDDLE EAST, CONGRESSIONAL QUARTERLY INC. 228, 234 (8th ed. 1995) [Reproduced in the accompanying notebook at Tab 44].

²⁴ Wikipedia, *Iran-Iraq War*, *supra* note 18 [Reproduced in the accompanying notebook at Tab 67].

²⁵ *Country Profiles: Iraq*, *supra* note 23, at 234 [Reproduced in the accompanying notebook at Tab 44].

²⁶ *Id.* at 234.

²⁷ See Wikipedia, *Gulf War*, at http://en.wikipedia.org/wiki/Gulf_War [Reproduced in the accompanying notebook at Tab 66].

successfully pressured the U.N. Security Council to pass Resolution 660. Resolution 660 condemned Iraq's invasion and demanded that Iraq withdraw immediately.²⁸ The following day, the League of Arab States passed a similar resolution.²⁹ Saddam refused to comply with international pressure to cease Iraq's invasion of Kuwait. Therefore, on January 16, the United States, operating under international authority³⁰ and U.S. Congressional authority, led a coalition of states³¹ in an invasion of Iraq.

After having successfully driven the Iraqi military from Kuwait, the coalition ended its offensive against Iraq on February 28, 1991- a mere 100 hours after the beginning of the coalition's ground attack.³² In November of 1994, the Iraqi National Assembly finally voted to accept the internationally recognized border between Iraq and Kuwait.³³

B. Background of the Definition of Aggression

²⁸ S.C. Res. 660., U.N. Doc. S/RES/660 (Aug. 2, 1990) [Reproduced in the accompanying notebook at Tab 17].

²⁹ See Wikipedia, *Gulf War*, *supra* note 27 [Reproduced in the accompanying notebook at Tab 66].

³⁰ S.C. Res. 678., U.N. Doc. S/RES/678 (November 29, 1990) [Reproduced in the accompanying notebook at Tab 28].

³¹ See Wikipedia, *Gulf War*, *supra* note 27. (The U.S.-led coalition of thirty-four states included Afghanistan, Argentina, Australia, Bahrain, Bangladesh, Canada, Czechoslovakia, Denmark, Egypt, France, Germany, Greece, Hungary, Honduras, Italy, Kuwait, Morocco, The Netherlands, Niger, Norway, Oman, Pakistan, Poland, Portugal, Qatar, Saudi Arabia, Senegal, South Korea, Spain, Syria, Turkey, the United Arab Emirates, the United Kingdom, and the United States.) [Reproduced in the accompanying notebook at Tab 66].

³² BARRY E. CARTER PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, *INTERNATIONAL LAW* 1050 (4TH ED. 2003) [Reproduced in the accompanying notebook at Tab 42].

³³ *Id.* at 1052.

The international community has formally recognized a preference for peaceful resolution of inter-state disputes, rather than the use of force, since as early as 1907.³⁴ After World War I, several powers enacted the Kellogg-Briand Pact, which prohibits war and establishes pacific means as the only legitimate means to end international disputes.³⁵

After World War II, the International Military Tribunal at Nuremberg prosecuted twenty-two defendants for crimes against peace, convicting twelve defendants.³⁶ The Nuremberg Charter defines crimes against peace as: “namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”³⁷ The United Nations General Assembly³⁸ and the International Law Commission (ILC)³⁹ later recognized and validated this definition.

³⁴ See *Laws of War: Pacific Settlement of International Disputes (Hague I)* Art. 1 and Art. 2 October 18, 1907. (adhering states included Prussia, the United States, Argentina, Austria, Bohemia, Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, the Dominican Republic, Ecuador, Spain, France, the United Kingdom, India, the Hellenes, Guatemala, Haiti, Italy, Japan, Luxembourg, Nassau, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Roumania, Russia, Salvador, Servia, Siam, Sweden, Switzerland, the Ottoman Empire, Uruguay, and Venezuela) [Reproduced in the accompanying notebook at Tab 11].

³⁵ See *The General Treaty for the Renunciation of War (the Kellogg-Briand Pact)* Aug. 27, 1928, available at <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm> (adhering states included Afghanistan, Albania, Austria, Bulgaria, China, Cuba, Denmark, the Dominican Republic, Egypt, Estonia, Ethiopia, Finland, Guatemala, Hungary, Iceland, Latvia, Liberia, Lithuania, the Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Rumania, Russia, Kingdom of the Serbs, Croats and Slovenes, Siam, Spain, Sweden, and Turkey) [Reproduced in the accompanying notebook at Tab 10].

³⁶ HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION PNJCC/2002/WGCA/L.1 and Add. 1. 34 (United Nations 2003). [hereinafter HISTORICAL REVIEW] [Reproduced in the accompanying notebook at Tab 49].

³⁷ Nuremberg Charter, *supra* note 12, at Art. 6 (a) [Reproduced in the accompanying notebook at Tab 2].

³⁸ See G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1. (1946). (generally affirming the principles of Nuremberg) [Reproduced in the accompanying notebook at Tab 8].

³⁹ See *Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, International Law Commission, *Report of the International Law Commission on the work of its second session*, 5 June to 29 July 1950 (A/1316) (1950). (Principle VI(a) validates Article

In December of 1945, the Control Council for Germany enacted Control Council Number 10, which allowed for the prosecution of German criminals whom the Nuremberg Tribunal did not prosecute.⁴⁰ Control Council Number 10 recognizes crimes against peace, which it describes as:

*Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.*⁴¹

Pursuant to Control Council Number 10, the United States established American Military Tribunals, which prosecuted four German defendants for crimes against peace.⁴² The French government also created a tribunal pursuant to Control Council Number 10. This French Tribunal conducted one trial that prosecuted for crimes against peace.⁴³

The International Military Tribunal for the Far East (“the Tokyo Tribunal”) also recognized the crime of aggression,⁴⁴ ultimately charging twenty-five defendants with various counts of crimes against peace.⁴⁵ The Charter of the Tokyo Tribunal defines crimes against peace in language similar to that of the Nuremberg Charter. It describes

6(a) of the Nuremberg Charter, which defines crimes against peace) [hereinafter ILC Principles of Nurnberg] [Reproduced in the accompanying notebook at Tab 12].

⁴⁰ HISTORICAL REVIEW, *supra* note 34 [Reproduced in the accompanying notebook at Tab 49].

⁴¹ See Control Council Law No. 10 Art. II (1), at <http://www1.umn.edu/humanrts/instree/ccno10.htm>. [hereinafter Control Council Law No. 10] [Reproduced in the accompanying notebook at Tab 4].

⁴² HISTORICAL REVIEW, *supra* note 34 [Reproduced in the accompanying notebook at Tab 49].

⁴³ See *Id.*

⁴⁴ Charter of the International Military Tribunal for the Far East Art. 5. (1950), at <http://www.yale.edu/lawweb/avalon/imtfech.htm>. [hereinafter Tokyo Charter] [Reproduced in the accompanying notebook at Tab 3].

⁴⁵ HISTORICAL REVIEW, *supra* note 34 [Reproduced in the accompanying notebook at Tab 49].

crimes against peace as: “Namely, *the* planning, preparation, initiation or waging of a *declared or undeclared* war of aggression, or a war in violation of international *law*, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;”⁴⁶

In 1954, the ILC drafted a Code of Offenses against the Peace and Security of Mankind. This draft prohibits acts of aggression, “including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.”⁴⁷ The draft also states that one state’s annexation of another state’s territory is an offence against the peace and security of mankind.⁴⁸

In more recent years, debate has surrounded the definition of the crime of aggression. In 1974, the General Assembly recognized a definition of aggression, which states that “[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations as set out in this Definition.”⁴⁹ In 1996, the ILC issued a new Draft Code of Offences against the Peace and Security of Mankind, which specifically defined the individual crime of aggression. The 1996

⁴⁶ Tokyo Charter, *See supra* note 44, at art. 5(a), (emphasis added to those words of the Tokyo definition not present in the Nuremberg definition) [Reproduced in the accompanying notebook at Tab 3].

⁴⁷ *Draft Code of Crimes Against the Peace and Security of Mankind*, 1954, International Law Commission, *Report of the International Law Commission*, available at <http://www.un.org/law/ilc/texts/offfra.htm> [hereinafter 1954 ILC Draft Code] [Reproduced in the accompanying notebook at Tab 5].

⁴⁸ *Id* at Article 2(8).

⁴⁹ Res. 3314, *supra* note 6. at Article 1, *see also infra* note 57 for a list of acts that qualify as acts of aggression [Reproduced in the accompanying notebook at Tab 9].

definition states that “[a]n individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.”⁵⁰

Despite the General Assembly’s 1974 definition of aggression and the ILC’s 1954 and 1996 prohibitions against aggression, none of the statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY), neither the International Criminal Tribunal for Rwanda (ICTR), nor the Special Court for Sierra Leone (SC-SL) recognize the crime of aggression in their statutes.⁵¹ The ICTY Statute’s failure to include jurisdiction over the crime of aggression may be related to the bombing campaign of the North Atlantic Treaty Organization (NATO). The United States and NATO bombed Kosovo without the authorization of the U.N. Security Council, claiming humanitarian intervention as a legal justification for the use of force.⁵²

The Rome Statute, established in 1998, gives the International Criminal Court jurisdiction over the crime of aggression.⁵³ However, controversy surrounding a precise

⁵⁰ *Draft Code of Crimes Against the Peace and Security of Mankind*, 1996, International Law Commission, *Report of the International Law Commission*, at <http://www.un.org/law/ilc/texts/dcodefra.htm> (Article 16 defines the crime of aggression.) [hereinafter 1996 ILC Draft Code] [Reproduced in the accompanying notebook at Tab 6].

⁵¹ *See* Statute of the Int’l Criminal Trib. for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., U.N. Doc. S/RES/955 (1994). [Reproduced in the accompanying notebook at Tab 29]; *see* Statute of the Int’l Criminal Trib. for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998) [Reproduced in the accompanying notebook at Tab 29]; *see* Statute of the Special Court for Sierra Leone, January 16, 2002, at <http://www.sc-sl.org/scsl-statute.html> [Reproduced in the accompanying notebook at Tab 30].

⁵² Wikipedia, *Kosovo War*, available at http://en.wikipedia.org/wiki/Kosovo_War [Reproduced in the accompanying notebook at Tab 68].

⁵³ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 5(1)(d) (1998). [hereinafter Rome Statute] [Reproduced in the accompanying notebook at Tab 13].

definition delayed the inclusion of a precise definition of the crime of aggression until a later date.⁵⁴ The United Nations has been working on a definition, but, thus far, has been unsuccessful in gaining approval for inclusion in the Rome Statute. Although the ICC has projected that it will adopt a definition of the crime of aggression by 2009, Philippe Kirsch, President of the ICC, now believes that meeting this goal is unlikely.⁵⁵

Although the international community is currently debating a precise definition of aggression for jurisdiction under the International Criminal Court, the statutes and decisions of the Nuremberg Tribunal, of the Tokyo Tribunal, and of the Control Council Number 10 tribunals provide ample precedent of customary international law. The United Nations General Assembly endorsed the Nuremberg definition of crimes against peace.⁵⁶ Although the Security Council has not yet ratified the ILC's 1996 Draft Code for Crimes Against Peace, the Draft's definition of the crime of aggression is also a good source of customary international law. Additionally, the International Court of Justice has considered the General Assembly's definition of aggression in Resolution 3314⁵⁷ to be a legitimate source of customary international law.⁵⁸ More conclusively, the Charter

⁵⁴ *Id.* at art. 5(2).

⁵⁵ Philippe Kirsch, President of the International Criminal Court, speech at Case Western Reserve University School of Law (November 7, 2005). [notes reproduced in the accompanying notebook at Tab 60].

⁵⁶ G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1. (1946). (generally affirming the principles of Nuremberg). [Reproduced in the accompanying notebook at Tab 8]; *ILC Principles of Nurnberg*, *supra* note 38, at Principle VI(a) (validates Article 6(a) of the Nuremberg Charter, which defines crimes against peace) [Reproduced in the accompanying notebook at Tab 12].

⁵⁷ Res. 3314, *supra* note 6 [Reproduced in the accompanying notebook at Tab 9].

⁵⁸ *See Nicar. v. U.S.*, *supra* note 7, at 215-216 (considering G.A. Resolution 3314(g) to fairly represent customary international law) [Reproduced in the accompanying notebook at Tab 7].

of the United Nations⁵⁹ is international treaty law, which establishes the criteria that define the crime of aggression.

III. STATE AGGRESSION

A. International Proscription Against State Aggression

5. International Definition of State Aggression

The Charter of the United Nations prohibits all member states from threatening to use force and from using force against the “territorial integrity or political independence” of any other state.⁶⁰ Article 2(6) of the U.N. Charter imposes a responsibility on the United Nations to ensure that non-U.N. member states also comply with the Charter, to the extent necessary to ensure “international peace and security.”⁶¹ The United Nations has recognized that a state’s “use of armed force” against another state’s “sovereignty, territorial integrity or political independence” constitutes aggression.⁶² An act of aggression includes any of the following:

- (a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

⁵⁹ See U.N. CHARTER art. 2, para. 4 [Reproduced in the accompanying notebook at Tab 33].

⁶⁰ *Id.*

⁶¹ *Id.* at art. 2, para. 6. (“The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”) [Reproduced in the accompanying notebook at Tab 33]; See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 86 (3d ed. 2001) [Reproduced in the accompanying notebook at Tab 45].

⁶² Res. 3314, *supra* note 6 [Reproduced in the accompanying notebook at Tab 9].

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The 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;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁶³

2. Exceptions to the Prohibition Against Aggression

States may use force against other states in certain lawful circumstances.⁶⁴ Legal justification for a state threatening or using force includes obtaining UN Security Council approval⁶⁵ and exercising the state right of individual or collective self-defense.⁶⁶

a. Security Council Approval of the Use of Force

⁶³ *Id.*

⁶⁴ See G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/8018 (1970). [Reproduced in the accompanying notebook at Tab 7]; See *Nicar. v. U.S.*, *supra* note 7, at 213-214. (customary international law recognizes legal use of force in some situations) [Reproduced in the accompanying notebook at Tab 37].

⁶⁵ See U.N. CHARTER art. 39 [Reproduced in the accompanying notebook at Tab 35].

⁶⁶ See U.N. CHARTER art. 51 [Reproduced in the accompanying notebook at Tab 36].

The U.N. Charter mandates that, rather than seeking to resolve inter-state disputes through the use of force, states must first seek peaceful resolution with the assistance of the U.N. Security Council.⁶⁷ Article 39 of the U.N. Charter grants the Security Council the authority to approve a state's use of force against another state.⁶⁸ The Security Council also has the authority to determine when a state has committed an act of aggression against another state.⁶⁹ Although a state's first use of armed force against another state is *prima facie* evidence of the crime of aggression,⁷⁰ the Security Council may find that the circumstances of a situation indicate that a state has not committed an act of aggression.⁷¹

b. Self-Defense

Article 51 of the U.N. Charter recognizes that, until the Security Council has the opportunity to designate a state's illegal action as aggression, an invaded state may individually or collectively defend itself.⁷² An act of armed force or an act of aggression against the state triggers this right of self-defense.⁷³

⁶⁷ U.N. CHARTER art. 33. (State parties should resolve disputes through “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”) [Reproduced in the accompanying notebook at Tab 34].

⁶⁸ See U.N. CHARTER art. 39 [Reproduced in the accompanying notebook at Tab 35].

⁶⁹ Res. 3314, *supra* note 6 [Reproduced in the accompanying notebook at Tab 9].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² U.N. CHARTER art. 51 [Reproduced in the accompanying notebook at Tab 36].

⁷³ See *Nicar. v. U.S.*, *supra* note 7, at 215 [Reproduced in the accompanying notebook at Tab 37].

Only the attacked state may invoke the right of self-defense.⁷⁴ To invoke this right, the attacked state must declare that it is the victim of another state's act of aggression.⁷⁵ Customary international law does not permit other states to exercise the right to collectively defend an attacked state, until the attacked state has requested the help of the other states.⁷⁶ Once the invaded state has invoked the right of self-defense, the invaded state gains the legal justification to use force against the illegally invading state.⁷⁷

c. Anticipatory Self-Defense

Some states claim a right to self-defense *before* another state launches an armed attack. This principle, "anticipatory self-defense," declares that a state has the right to threaten or to use force against another state, if the state fears the threat of an immediate armed attack.⁷⁸

The *Caroline* incident of 1837 established the modern right of anticipatory self-defense.⁷⁹ In 1837, American sympathizers aboard the U.S. steamboat, the *S.S. Caroline*, harbored Canadians who were rebelling against England, the ruling state over Canada. While the steamboat was docked in U.S. territory, royal Canadian forces seized and

⁷⁴ See *Id.* at 216.

⁷⁵ See *Id.*

⁷⁶ See *Id.*

⁷⁷ See J. L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 877 (1947) ("The right of self-defense is, in such circumstances, a right to resort to war.") [Reproduced in the accompanying notebook at Tab 53].

⁷⁸ Ian Brownlie, *International Law and the Activities of Armed Bands*, INT'L & COM. L.Q. 712, 732 (1958) (quoting letter from Webster to Fox, April 24, 1841) [Reproduced in the accompanying notebook at Tab 52].

⁷⁹ See Wikipedia, *Caroline Affair*, available at http://en.wikipedia.org/wiki/Anticipatory_self-defense [Reproduced in the accompanying notebook at Tab 65].

burned the U.S. steamboat, sending the *S.S. Caroline* over Niagara Falls and killing one American.⁸⁰ In retaliation, the United States burned the British steamer, *Sir Robert Peel*, when it was in U.S. territory.⁸¹ The dispute ultimately ended with the signing of the Webster-Ashburton Treaty.⁸²

U.S. Secretary of State Daniel Webster's response to the *Caroline* incident established the requirements that anticipatory self-defense be immediate, necessary, and proportional. In 1841, Webster argued that for England's attack on the *S.S. Caroline* to have been a legitimate act of anticipatory self-defense against the U.S., England must show that there was a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation."⁸³ Additionally, any threatened state must limit its anticipatory self-defense to that force, which is necessary to protect the state and proportional to the impending aggression of the other state.⁸⁴

Since the *Caroline* incident, the principle of anticipatory self-defense has continued as customary international law. Several states have successfully claimed anticipatory self-defense as justification for the use of force.⁸⁵ One example of a state's legitimate claim of anticipatory self-defense was Israel's pre-emptive attack against the

⁸⁰ Sarah Champion, *Anticipatory (Pre-emptive) Self-defence: The Need for a Modern Approach*, ROYAL MILITARY COLLEGE, CANADA, available at <http://www.usafa.af.mil/jscope/JSCOPE05/Champion05.html> [Reproduced in the accompanying notebook at Tab 56].

⁸¹ *Id.*

⁸² See Wikipedia, *Caroline Affair*, *supra* note 79 [Reproduced in the accompanying notebook at Tab 65].

⁸³ Brownlie, *supra* note 78, at 732 [Reproduced in the accompanying notebook at Tab 52].

⁸⁴ CARTER, *supra* note 32, at 1020 [Reproduced in the accompanying notebook at Tab 42].

⁸⁵ Brownlie, *supra* note 78, at 732-733 (legitimate use of force in response to attacks by armed bands: the United States in Mexico (1916), the Soviet Union in Outer Mongolia (1921), the Soviet Union in Manchuria (1929), France in Tunisia (1958)) [Reproduced in the accompanying notebook at Tab 52].

Egyptian army at the beginning of the 1967 Six-Day War. Egypt had visibly gathered its forces at the borders of Israel, with the plan of invading the small state.⁸⁶ In contrast, the Security Council found Israel's 1981 bombing of an Iraqi nuclear reactor to be an illegal use of pre-emptive force because the threat was not as imminent and because Israel had failed to exhaust peaceful means before resorting to the use of force.⁸⁷

Some experts believe that the Nuremberg Tribunal recognized the legitimacy of anticipatory self-defense.⁸⁸ For example, the Nuremberg Tribunal rejected the factual basis of Germany's argument that Germany had attacked the Soviet Union in expectation of the USSR's imminent invasion into Germany. The Nuremberg Tribunal doubted that this concern was ever a motivation for Germany's decision to invade the U.S.S.R.⁸⁹ Similarly, the Tokyo Tribunal considered but rejected Japan's claim that its invasion of the Netherlands East Indies was legal because Japan had anticipated that the Netherlands would use force against Japan in the future.⁹⁰

⁸⁶ Champion, *supra* note 80 [Reproduced in the accompanying notebook at Tab 56].

⁸⁷ *See Id.*

⁸⁸ IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 258 (1981). [Reproduced in the accompanying notebook at Tab 41].

⁸⁹ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg, Germany, 1947), at <http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm> [hereinafter *Nuremberg Judgment*] [Reproduced in the accompanying notebook at Tab 38].

⁹⁰ BROWNLIE, *supra* note 88, at 258 (citing LOUIS B. SOHN, CASES ON UNITED NATIONS LAW 915 (1967) (At the time that Japan invaded, the Netherlands had declared war on Japan. Nevertheless, the Tokyo Tribunal found that Japan was not justified in its invasion.)) [Reproduced in the accompanying notebook at Tab 41].

Recently, the United States 2003 invasion of Iraq has raised many questions regarding at what point a state can invade another state when it suspects that the other state is preparing for invasion.⁹¹

d. Humanitarian Intervention

Most states believe that states have the right to use force in situations of human rights violations.⁹² However, the United Nations does not formally recognize humanitarian intervention as a legitimate justification for the use of force, absent Security Council approval.⁹³ Where humanitarian intervention is a sufficient justification for the use of force against another state, the force is limited to that force which is necessary to stop the violations against human life.⁹⁴ Humanitarian intervention is not sufficient justification for a state to conquer another state's government, even if necessary to save innocent lives.⁹⁵

e. Illegitimate Claims of Justification for the Use of Force

The U.N. Charter and customary international law do not allow states to respond to attacks with armed reprisals.⁹⁶ Reprisals are different from self-defense in that reprisals serve to retaliate against the original offending state. Reprisals are not necessary

⁹¹ See generally Wikipedia, *Preventive War*, available at http://en.wikipedia.org/wiki/Preventive_war [Reproduced in the accompanying notebook at Tab 69].

⁹² See Henkin, *supra* note 9, at 41 [Reproduced in the accompanying notebook at Tab 48].

⁹³ U.N. CHARTER art. 51 [Reproduced in the accompanying notebook at Tab 36].

⁹⁴ *Id.*

⁹⁵ *Id.* at 42.

⁹⁶ Jack M. Beard, *America's New War on Terror: the Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POLY. 559, 584 (2002) [Reproduced in the accompanying notebook at Tab 51]; BROWNIE, *supra* note 88, at 281 [Reproduced in the accompanying notebook at Tab 41].

or proportional and do not occur in the face of an immediate threat or use of force of the other state.

The international legal community also has rejected state claims of intervention to support the self-determination of nationals, intervention to defeat socialism, and intervention to promote democracy.⁹⁷

B. Article 14(c) of the Statute of the Iraqi Special Tribunal Presumes that Iraq Should Refrain From the Use of Force Against Another Arab State.

Article 14(c) of the IST Statute presumes that Iraq should refrain from the use of force against another Arab state. Article 14(c) states that the IST shall have power to prosecute individuals who have committed “the abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.”⁹⁸

The Article 14(c) language criminalizing the promotion of “the threat of war or the use of the armed forces of Iraq against an Arab country,” echoes the U.N. Charter’s proscription against the threatening or using force against another state. Article 2(4) of the U.N. Charter states that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with Purposes of the United Nations.”⁹⁹

Article 1 of Law Number 7 of 1958 reinforces the similarities between Article 14(c) of the IST Statute and the international prohibition against state aggression. Article 1 of Law Number 7 of 1958 states that:

⁹⁷ *Id.* at 42-44.

⁹⁸ IST Statute, *supra* note 2, at art. 14(c) [Reproduced in the accompanying notebook at Tab 31].

⁹⁹ U.N. CHARTER, art. 2, para. 4 [Reproduced in the accompanying notebook at Tab 33].

Any person holding a public position, or who was a member of parliament or was called upon to carry out a public service and who used his influence in committing or participating in any of the acts mentioned below shall be considered a plotter against the security of the State:

- (a) directing the country's policy against the national interest by bringing the country nearer the danger of war or making it a war area.
- (b) Using the country's armed forces against the brotherly Arab countries threatening to use such forces or instigating foreign powers to jeopardize its security or plotting to overthrow the existing regime or interfere [sic] in their internal affairs against its own interests or spending money for plotting against them or giving refuge to the plotters against them or attacking in international fields or through publications their heads of States.¹⁰⁰

Article 1 of Law Number 7 of 1958 designates offenders as “plotter[s] against the security of the State.”¹⁰¹ Article 1 continues to criminalize policy that would bring Iraq closer to war or make Iraq a “war area.”¹⁰² Article 1 also prohibits using, or “threatening to use” Iraq’s armed forces against “brotherly Arab countries.”¹⁰³ Thus, Article 1 of Law Number 7 of 1958 parallels the international prohibition against the threat or use of force, as expressed in Article 2(4) of the U.N. Charter.

The list of prohibited acts included in Article 1(b) of Law Number 7 of 1958 significantly overlaps G.A. Resolution 3314’s list of acts amounting to state aggression.¹⁰⁴ Article 1(b) prohibits the use of Iraq’s armed forces against other Arab

¹⁰⁰ Article 1(a) of Law Number 7 of 1958, *supra* note 10 (The text of Article 1(b) does not include punctuation.) [Reproduced in the accompanying notebook at Tab 1].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (Article 1(b) does not prohibit each act that G.A. Resolution 3314 designates as aggression, Article 1(b)’s list includes some acts that G.A. Resolution 3314 does not mention.); *See Res. 3314, supra* note 6. at

states.¹⁰⁵ This prohibition is analogous to Article 3(a) of Resolution 3314, which declares that a state's "invasion or attack" against another state constitutes aggression.¹⁰⁶

Under Article 1(b), the IST may also prosecute defendants for acts that Resolution 3314 does not specifically recognize as aggression. Both statutes contain lists of prohibited acts under a general proscription against the threat or use of force. However, Article 1(b) of Law Number 7 prohibits some acts that Resolution 3314's definition of aggression does not designate as aggression.¹⁰⁷ Article 1(b) prohibits individuals, acting as agents of the Iraqi government, from "instigating foreign powers to jeopardise" the security of that foreign Arab state, from "plotting to overthrow the existing regime" of a foreign Arab state, and from interfering in the internal affairs of another Arab state against the interest of that Arab state.¹⁰⁸ Article 1(b) also prohibits individuals, acting as agents of the Iraqi government, from spending money to plot against a foreign Arab state, from "giving refuge to the plotters against" a foreign Arab state, and from "attacking in international fields or through publications" the heads of states of foreign Arab states.¹⁰⁹ None of these prohibitions is included in G.A. Resolution 3314.¹¹⁰

art. 3 [Reproduced in the accompanying notebook at Tab 9]; *See* Res. 3314, *supra* note 61 and surrounding text for G.A. Resolution 3314's list of acts which constitute aggression [Reproduced in the accompanying notebook at Tab 9].

¹⁰⁵ Article 1(a) of Law Number 7 of 1958, *supra* note 10 [Reproduced in the accompanying notebook at Tab 1].

¹⁰⁶ Res. 3314, *supra* note 6, at art. 3 [Reproduced in the accompanying notebook at Tab 9].

¹⁰⁷ Article 1(a) of Law Number 7 of 1958, *supra* note 10. [Reproduced in the accompanying notebook at Tab 1].

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Res. 3314, *supra* note 6, at art. 3 [Reproduced in the accompanying notebook at Tab 9].

C. The Iraqi Invasion of Iran Arguably Constituted a State Crime of Aggression

1. Iraq Used Force, Amounting to Aggression, Against Iran.

Iraq's invasion of Iran involved one or more acts of aggression, according to G.A. Resolution 3314's definition.¹¹¹ Under Article 3(a) of Resolution 3314, Iraq's military invasion of Iran on September 22, 1980 constituted an act of aggression because Iraq's armed forces invaded or attacked the territory of Iran.¹¹² Additionally, Iraq's claimed annexation of the Shatt Al-Arab region on September 17, 1980,¹¹³ qualifies an act of aggression, under Article 3(a).¹¹⁴

Article 3(b) of Resolution 3314 states that the "bombardment" of a state's armed forces "against the territory of another State or the use of any weapons by a State against the territory of another State" constitutes aggression.¹¹⁵ In its military invasion and continued use of force against Iran, Iraq used weapons in air attacks against Iranian cities and used chemical weapons and biological weapons.¹¹⁶ Therefore, Iraq's use of military force and use of weapons against Iran constituted aggression.

Article 3(d) of Resolution 3314 states that the attacks of one state's armed forces against the "land, sea or air forces" of another state are acts of aggression.¹¹⁷ Iraq's

¹¹¹ *Id.*

¹¹² *Id.* at art. 3(a) ("the invasion or attack by the armed forces of a State of the territory of another State").

¹¹³ Wikipedia, *Iran-Iraq War*, *supra* note 18 [Reproduced in the accompanying notebook at Tab 67].

¹¹⁴ Res. 3314, *supra* note 6, at art. 3(a) ("[A]nnexation by the use of force of the territory of another State or part thereof" constitutes an armed attack constituting aggression.) [Reproduced in the accompanying notebook at Tab 9].

¹¹⁵ *Id.* at art. 3(b).

¹¹⁶ See *Country Profiles: Iraq*, *supra* note 23, at 234 [Reproduced in the accompanying notebook at Tab 44]; See also Wikipedia, *Iran-Iraq War*, *supra* note 18 [Reproduced in the accompanying notebook at Tab 67].

invasion and continued use of force against Iran involved Iraqi armed forces striking against Iranian land, sea, and air forces. Therefore, under Article 3(d) of Resolution 3314, Iraq committed aggression against Iran.

Finally, Article 3(g) of Resolution 3314 states that sending groups of armed bands into the territory of another state to commit any of the prohibited acts listed in Resolution 3314(c) constitutes aggression.¹¹⁸ Certainly, Iraq's blatant use of military force against the territory of Iran is not in dispute. However, any sending of unofficial bands of armed individuals into Iran would also constitute aggression under Article 3(g).

However, members of the Former Regime may successfully argue that Iraq did not commit acts of aggression toward Iran beyond 1982. After initial success, Iraq began losing to Iran's strong military response to Iraq's invasion. In June 1982, Saddam Hussein retreated to Iraqi territory and called for a cease fire, which Iran refused.¹¹⁹ In July 1982, the Security Council again called for a cease-fire and called for both states to withdraw to "internationally recognized boundaries."¹²⁰ Iraq agreed, but the prevailing Iran refused. Although a court may find that Iraq performed acts of aggression after Iraq offered a cease-fire in 1982, according to G.A. Resolution 3314's definition of aggression, the continued military threat of Iran to Iraq after 1982 may have justified any use of force that Iraq used against Iran.

2. The International Community Condemned Iraq's Invasion of Iran, Thus Indicating that Iraq's Use of Force Against Iran Was Illegitimate.

¹¹⁷ Res. 3314, *supra* note 6. at art. 3.(d) [Reproduced in the accompanying notebook at Tab 9].

¹¹⁸ *Id.* at art. 3(d).

¹¹⁹ *Id.*

¹²⁰ S.C. Res. 514. U.N. Doc. S/RES/514 (July 12 1982). [Reproduced in the accompanying notebook at Tab 15].

Members of the Former Regime may argue that they cannot be culpable for the crime of aggression because the international community has not recognized Iraq's invasion of Iran as a war of aggression. However, pursuant to the Security Council Resolution 598 mandate to report to the Security Council regarding establishing an impartial body to consider responsibility for the Iran-Iraq War,¹²¹ Secretary-General Perez de Cuellar issued a report to the Security Council on December 9, 1991. In this report, the Secretary General referred to Iraq's attack on Iran as "Iraq's aggression on Iran."¹²² The Secretary General stated that Iraq applied an "illegal use of force" against Iran in "disregard for the territorial integrity" of Iran.¹²³ He also said that Iraq's explanations for invading Iran do not satisfy the U.N. Charter or international law.¹²⁴ The Secretary General's report lends further support to the conclusion that Iraq's invasion of Iran was aggression.

3. Iraq's Invasion of Iran May Fall Under A Legitimate Exception to the General Prohibition Against Aggression.

a. The U.N. Security Council Did Not Grant its Approval to Iraq's Use of Force.

¹²¹ S.C. Res. 598. U.N. SCOR, 42nd Sess., U.N. Doc. S/RES/598 (July 20, 1987) at para. 6 [Reproduced in the accompanying notebook at Tab 16].

¹²² *Further Report of the Secretary-General on the Implementation of Security Council Resolution 598* (1987), para. 7, U.N. Doc. S/23273 (December 9, 1991) Reproduced in the accompanying notebook at Tab 57].

¹²³ *Id.* at para. 5. and para. 6.

¹²⁴ *Id.* at para. 6. and para. 7.

Iraq did not gain the U.N. Security Council's permission to invade Iran on September 22, 1980. On the contrary, on September 28, 1980, six days after Iraq invaded, the Security Council passed Resolution 479. Resolution 479 demanded that both Iraq and Iran cease using force against one another.¹²⁵

Without the approval of the Security Council, the only legal justifications for Iraq's invasion of Iran would be a legitimate claim of self-defense¹²⁶ or a legitimate claim of anticipatory self-defense.¹²⁷

b. Defendants May Succeed in Arguing that Iraq's Invasion of Iran Was a Legitimate Act of Self-Defense.

Self-defense is a viable claim for Iraq *only* if Iran had committed an act of aggression against Iraq's "territorial integrity or political independence"¹²⁸ *prior* to Iraq's September 1980 invasion into the Shatt al-Arab region.¹²⁹

One possible argument that the Former Regime may raise is that Iran committed acts of aggression during the border dispute between Iran and Iraq. While it is true that Iraq and Iran have been involved in a border dispute for several generations,¹³⁰ Resolution 3314 does not recognize a mere border dispute as sufficient justification for the use of armed force against another state.¹³¹

¹²⁵ S.C. Res. 479., U.N. Doc. S/RES/479 (September 28, 1980) [Reproduced in the accompanying notebook at Tab 14].

¹²⁶ U.N. CHARTER art. 51 [Reproduced in the accompanying notebook at Tab 36].

¹²⁷ See Brownlie, *supra* note 78, at 732 [Reproduced in the accompanying notebook at Tab 52].

¹²⁸ U.N. CHARTER art. 2. para. 4 [Reproduced in the accompanying notebook at Tab 33].

¹²⁹ U.N. CHARTER art. 51 [Reproduced in the accompanying notebook at Tab 36].

¹³⁰ Wikipedia, *Iran-Iraq War*, *supra* note 18 [Reproduced in the accompanying notebook at Tab 67].

¹³¹ Res. 3314, *supra* note 6 [Reproduced in the accompanying notebook at Tab 9].

The Former Regime may succeed in arguing that Iraq invaded Iran in response to an Iranian threat of force against the Iraqi government. When Iraq launched its full invasion of Iran, it claimed that Iran was responsible for a recent assassination attempt against Iraqi Foreign Minister Tariq Aziz.¹³² State responses to acts of terrorism lead to confusion regarding whether the state response is a legitimate act of self-defense or an illegal act of reprisal.¹³³ However, defendants will likely point to the United States' response of force to a 1993 assassination attempt against former President H.W. Bush.

In April of 1993, Iraqi intelligence services aided in an assassination attempt against former President George H.W. Bush, who was visiting Iraq. According to President Clinton, the bomb would have decimated a 400-yard radius in the middle of Kuwait City, leading to the killing of hundreds of civilians.¹³⁴ In June of 1993, President Clinton authorized the deployment of twenty-three Tomahawk cruise missiles into intelligence headquarters in Baghdad.¹³⁵ The United States claimed the justification of self-defense,¹³⁶ and the Security Council did not condemn the U.S. bombings as aggression.

Defendants for the crime of aggression will likely argue that an Iranian assassination attempt against Iraqi Foreign Minister Tariq Aziz justified Iraq's use of

¹³² Wikipedia, *Iran-Iraq War*, *supra* note 18 [Reproduced in the accompanying notebook at Tab 67].

¹³³ CARTER, *supra* note 32, at 1020 [Reproduced in the accompanying notebook at Tab 42].

¹³⁴ *Attack on Iraq Called a Success*, PALM BEACH POST, June 28, 1993. [Reproduced in the accompanying notebook at Tab 54].

¹³⁵ *Id.*

¹³⁶ *U.S. Missiles Slam Baghdad Retaliation for Scheme to Kill Bush, Clinton Says*, ARIZONA REPUBLIC/GAZETTE, June 27, 1993 [Reproduced in the accompanying notebook at Tab 63].

force against Iran, just as the 1993 assassination attempt on the life of George H.W. Bush justified the United States' 1993 bombing of Baghdad.

The precedent set by the 1993 U.S. bombing of Baghdad does show that a response of force to an assassination attempt is not necessarily an act of aggression. However, after the U.S. bombed Baghdad in June of 1993, Iraqi Ambassador to the U.N. Nizar Hamdoun, called the U.S. bombing an “act of aggression” and “a breach of international law.”¹³⁷

c. Iraq's Invasion of Iran Does Not Qualify as an Act of Anticipatory Self-Defense.

Defendants also may argue that anticipatory self-defense justified Iraq's invasion of Iran. For this argument to succeed, the *Caroline* doctrine requires that Iraq show that Iran presented a threat that necessitated Iraq's immediate use of force.¹³⁸

Arguably, both Iran and Iraq had great incentive to increase their power in the oil rich Arabic region. Iraqi concern over the possibility of future Iranian invasion may have been reasonable. However, any Iranian threat to Iraqi's territorial integrity at the time of the Iraqi invasion was not imminent.

At the time of the Iraqi invasion, Iran had recently experienced the Iranian Revolution and was still dealing with internal conflict.¹³⁹ Iran was certainly not in a strong position from which to embark on quests to gain more territory. Rather, the

¹³⁷ Victoria Graham, *U.S. Seeks Approval in U.N. on Iraq Raid*, THE ASSOCIATED PRESS, June 28, 1993 [Reproduced in the accompanying notebook at Tab 58].

¹³⁸ See Brownlie, *supra* note 78, at 732 and accompanying text [Reproduced in the accompanying notebook at Tab 52].

¹³⁹ *Country Profiles: Iran*, *supra* note 19, at 216 [Reproduced in the accompanying notebook at Tab 43].

opposite was true. Rather than being in a position of ominous threat to Iraq, Iran seemed to be in a position of weakness when Iraq attacked.¹⁴⁰

4. Iraq's Invasion of Iran Exceeded the Limits of the Legal Use of Force.

Even if Iran had presented an immediate threat necessitating Iraq to defend itself, Iraq's use of force was not proportional to any threat that Iran presented to Iraq. A border dispute and a (claimed) assassination attempt did not justify Iraq's launch of a full military attack or Iraq's annexation of the Shatt al-Arab to Iraq.

While the U.S. responded to an assassination attempt against President George H.W. Bush with an act of force, this response of force was proportional to the threat against the United States. In response to a planned bombing that would have killed President Bush and hundreds of civilians, the United States sent twenty-three missiles into Baghdad, targeting the intelligence services that had planned the assassination attempt.¹⁴¹ Contrast this measured response of the United States to the continued military invasion of Iraq into Iran, ultimately resulting in the deaths of thousands of Iranians and Iraqis.¹⁴² Iraq violated international law in its grossly disproportional response to any real threat of force or use of force that Iran committed against Iraq.

D. The Iraqi Invasion of Kuwait Constituted a State Crime of Aggression.

¹⁴⁰ *Id.* at 220.

¹⁴¹ *Attack on Iraq Called a Success*, *supra* note 134 [Reproduced in the accompanying notebook at Tab 54].

¹⁴² *See generally* Wikipedia, *Iran-Iraq War*, *supra* note 18 [Reproduced in the accompanying notebook at Tab 66].

1. Iraq Used Force, Amounting to Aggression, Against Kuwait.

The Iraqi Invasion of Kuwait Constituted Aggression, under the U.N.'s Definition of Aggression in G.A. Resolution 3314. Iraq's military invasion of Kuwait on August 2, 1990, constituted aggression under Article 3(a).¹⁴³ Iraq's August 8, 1990, claim to annex Kuwait to Iraq also qualifies an act of aggression, under Article 3(a).¹⁴⁴ Article 3(b) establishes that Iraq's use of armed forces and weapons against Kuwait was aggression.¹⁴⁵ The attacks of Iraqi armed forces against Kuwaiti land, sea, and air forces were acts of aggression, according to Article 3(d).¹⁴⁶ Finally, under Article 3(g) of Resolution 3314, any unofficial bands of armed force that Iraq sent into Kuwait also constitute aggression.¹⁴⁷

2. The International Community Condemned Iraq's Invasion of Kuwait, Thus Indicating the Illegality of Iraq's Use of Force Against Kuwait.

The international community overwhelmingly condemned Iraq's invasion of Kuwait. Although the Security Council did not classify the invasion as an act of aggression,¹⁴⁸ the Security Council passed Resolution 660 on August 2, 1990, the very day of the invasion. Resolution 660 condemned Iraq's invasion of Kuwait, saying that

¹⁴³ Res. 3314, *supra* note 6 at 3(a). ("the invasion or attack by the armed forces of a State of the territory of another State") [Reproduced in the accompanying notebook at Tab 9].

¹⁴⁴ *Id.* ("[A]nnexation by the use of force of the territory of another State or part thereof" constitutes an armed attack constituting aggression.)

¹⁴⁵ *Id.* at art. 3(b).

¹⁴⁶ *Id.* at art. 3(d).

¹⁴⁷ *Id.*

¹⁴⁸ Kirsch, *supra* note 55 [Reproduced in the accompanying notebook at Tab 56].

the invasion was a “breach of international peace and security.”¹⁴⁹ As the military conflict continued, the Security Council passed additional resolutions strengthening its demand that Iraq cease its use of force against Kuwait.¹⁵⁰

Individual states and regional allegiances also rejected Iraq’s use of force against Kuwait. On August 2, 1990, the United States joined with the United Kingdom in freezing Iraqi assets and stopping purchases of Iraqi oil.¹⁵¹ The League of Arab States passed a resolution on August 3, 1990 that echoed S.C. Resolution 660’s condemnation of the Iraqi invasion.¹⁵² The Soviet Union and the United States condemned the Iraqi invasion and declared an international arms embargo against Iraq.¹⁵³ The European community likewise expressed its disapproval by economically sanctioning Iraq.¹⁵⁴

¹⁴⁹ S.C. Res. 660., U.N. Doc. S/RES/660 (Aug. 2, 1990) [Reproduced in the accompanying notebook at Tab 17].

¹⁵⁰ See S.C. Res. 661., U.N. Doc. S/RES/661 (Aug. 6, 1990). [Reproduced in the accompanying notebook at Tab 18]; S.C. Res. 662., U.N. Doc. S/RES/662 (Aug. 9, 1990). [Reproduced in the accompanying notebook at Tab 19]; S.C. Res. 664., U.N. Doc. S/RES/664 (Aug. 18, 1990). [Reproduced in the accompanying notebook at Tab 20]; S.C. Res. 665., U.N. Doc. S/RES/665 (Aug. 25, 1990). [Reproduced in the accompanying notebook at Tab 21]; S.C. Res. 666., U.N. Doc. S/RES/666 (Sept. 13, 1990). [Reproduced in the accompanying notebook at Tab 22]; S.C. Res. 667., U.N. Doc. S/RES/667 (Sept. 16, 1990). [Reproduced in the accompanying notebook at Tab 23]; S.C. Res. 669., U.N. Doc. S/RES/669 (Sept. 24, 1990). [Reproduced in the accompanying notebook at Tab 24]; S.C. Res. 670., U.N. Doc. S/RES/670 (Sept. 25, 1990). [Reproduced in the accompanying notebook at Tab 25]; S.C. Res. 674., U.N. Doc. S/RES/674 (Oct. 29, 1990). [Reproduced in the accompanying notebook at Tab 26]; S.C. Res. 677., U.N. Doc. S/RES/677 (Nov. 28, 1990) [Reproduced in the accompanying notebook at Tab 27].

¹⁵¹ David Travers, *A Chronology of Events, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 3* (ed. Peter Rowe 1993) [Reproduced in the accompanying notebook at Tab 50].

¹⁵² See Wikipedia, *Gulf War*, supra note 27 [Reproduced in the accompanying notebook at Tab 66].

¹⁵³ Travers, supra note 151, note at 3 [Reproduced in the accompanying notebook at Tab 50].

¹⁵⁴ *Id.*

3. Iraq's Invasion of Kuwait Did Not Fall Under Any of the Legitimate Exceptions to the General Prohibition Against Aggression.

a. The U.N. Security Council Did Not Grant its Approval to Iraq's Use of Force.

Since the Security Council did not approve Iraq's use of force against Kuwait, but rather quite adamantly opposed it,¹⁵⁵ Iraq's use of force against Kuwait could find justification only in a legitimate claim of self-defense,¹⁵⁶ in a legitimate claim of anticipatory self-defense, or possibly, in a claim of humanitarian intervention.¹⁵⁷ Members of the Former Regime will argue that Iraq acted in compliance with international law because Iraq's invasion fell under one of these recognized exceptions.

b. Iraq's Invasion of Kuwait Does Not Qualify as a Conventional Act of Self-Defense.

A legitimate self-defense claim must show that Kuwait committed acts of aggression prior to Iraq's invasion and annexation of Kuwait.¹⁵⁸ Saddam Hussein claimed that Kuwait had waged an economic war against Iraq because Kuwait had stolen oil from Iraqi soil through "slant drilling."¹⁵⁹ However, according to G.A. Resolution 3314, international law does not recognize economic warfare as an act of aggression.¹⁶⁰ Therefore, under Article 51 of the U.N. Charter, Iraq cannot claim the exception of self-defense.

¹⁵⁵ S.C. Res. 660., U.N. Doc. S/RES/660 (Aug. 2, 1990) [Reproduced in the accompanying notebook at Tab 17].

¹⁵⁶ U.N. CHARTER art. 51 [Reproduced in the accompanying notebook at Tab 36].

¹⁵⁷ See Henkin, *supra* note 9, at 41 [Reproduced in the accompanying notebook at Tab 47].

¹⁵⁸ U.N. CHARTER art. 51 [Reproduced in the accompanying notebook at Tab 36].

¹⁵⁹ See Wikipedia, *Gulf War*, *supra* note 27 [Reproduced in the accompanying notebook at Tab 66].

¹⁶⁰ Res. 3314, *supra* note 6 [Reproduced in the accompanying notebook at Tab 9].

c. Iraq's Invasion of Kuwait Does Not Qualify as an Act of Anticipatory Self-Defense.

Claims that Iraq invaded Kuwait in an act of anticipatory self-defense will fail. At the time of the invasion in August of 1990, Iraq's military far outnumbered Kuwait's forces. Iraq had recently emerged from an eight-year war with Iran, which had left Iraq with greater numbers of internationally-provided weapons and a war-fortified military. Kuwait, on the other hand, had a significantly smaller military. Iraq had little reason to fear an imminent Kuwaiti act of aggression against Iraq.

d. Iraq's Invasion of Kuwait Does Not Qualify as an Act of Humanitarian Intervention.

Iraq's claim that humanitarian intervention justified Iraq's invasion of Kuwait cannot succeed. When Iraq invaded Kuwait, Iraq claimed to be freeing the Kuwaiti people from the tyranny of the ruling Sabah family.¹⁶¹ The Former Regime said that it would help organize free elections in Kuwait.¹⁶²

However, this promise to bring "freedom" to the Kuwaiti people did not materialize. Mere days after invading, Iraq declared the annexation of Kuwait to Iraq. Additionally, the fact that Iraqis looted and brutalized the Kuwait people undermines any Iraqi claim that the invasion was for humanitarian purposes.¹⁶³

Iraq also claimed that it had justification for invading Kuwait because British imperialism had illegitimately taken Kuwait from Iraqi territory during England's sovereignty over the region.¹⁶⁴ The U.N. Charter requires parties to seek peaceful

¹⁶¹ CARTER, *supra* note 34 at 1045 (2003) [Reproduced in the accompanying notebook at Tab 42].

¹⁶² *Id.*

¹⁶³ *Id.*

resolution of any inter-state disputes.¹⁶⁵ Since international law does not recognize an exception for the pursuit of former territory,¹⁶⁶ this requirement applies to boundary disputes, and Iraq's claim that its invasion of Kuwait was a legitimate reclaiming of former territory falls short.

4. Iraq's Invasion of Kuwait Exceeded the Limits of the Legal Use of Force.

If a court finds that Kuwait presented a legitimate and imminent threat to Iraqi territorial integrity, a claim of anticipatory self-defense still fails because launching a full invasion and annexing Kuwait to Iraq were not necessary or proportional to any threat from Kuwait. Kuwait presented no military threat creating the "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation."¹⁶⁷ Also, a military invasion of the small state was a not proportional use of force than that necessary to meet, even an imminent, threat that Kuwait had waged "economic warfare"¹⁶⁸ on Iraq.

IV. INDIVIDUAL CULPABILITY FOR THE CRIME OF AGGRESSION

A. International Definition for the Individual Crime of Aggression

Before an individual may be culpable for the crime of aggression, the adjudicator must find that the individual's state has committed the state crime of aggression against another state.¹⁶⁹ When the ICC begins prosecuting individuals for the crime of

¹⁶⁴ See Wikipedia, *Gulf War*, *supra* note 27. [Reproduced in the accompanying notebook at Tab 66].

¹⁶⁵ U.N. CHARTER art. 2, para. 3 [Reproduced in the accompanying notebook at Tab 33].

¹⁶⁶ See U.N. CHARTER art. 51 [Reproduced in the accompanying notebook at Tab 36].

¹⁶⁷ Brownlie, *supra* note 78, at 732 [Reproduced in the accompanying notebook at Tab 52].

¹⁶⁸ See Wikipedia, *Gulf War*, *supra* note 27 [Reproduced in the accompanying notebook at Tab 66].

¹⁶⁹ Goma, *supra* note 14, at 65 [Reproduced in the accompanying notebook at Tab 46].

aggression, it will look to decisions of the Security Council, the General Assembly, or the International Court of Justice to first determine that the state has committed a crime of aggression. However, the Security Council believes that only the Security Council has the authority to determine that a state has committed aggression.¹⁷⁰ Only after establishing that the state has committed aggression against another state, will the ICC consider the individual culpability for the crime of aggression.¹⁷¹

1. *Ratione Materiae*

The primary sources of authority for the individual crime of aggression are the Nuremberg Charter and the Nuremberg Judgments.¹⁷² The Nuremberg Charter defines individual crimes against peace as the planning, preparing, initiating, or waging a war of aggression or a war that violates “international treaties, agreements or assurances.”¹⁷³

The actions that entail planning, preparing, initiating, and waging may seem to overlap, but these terms describe separate stages of a scheme of aggression.¹⁷⁴ Planning is the stage in which the offender formulates “a design or scheme for a specific war of aggression.”¹⁷⁵ Preparing includes “the various steps taken to implement the plan.”¹⁷⁶

¹⁷⁰ See Kirsch, *supra* note 55 [Reproduced in the accompanying notebook at Tab 60].

¹⁷¹ Goma, *supra* note 14, at 76-77 [Reproduced in the accompanying notebook at Tab 46].

¹⁷² *Id.* at 65, fn 33.

¹⁷³ Nuremberg Charter, *supra* note 12, at art. 6(a) [Reproduced in the accompanying notebook at Tab 2].

¹⁷⁴ DINSTEIN, *supra* note 61, at 120 [Reproduced in the accompanying notebook at Tab 44].

¹⁷⁵ MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 455 (1959) [Reproduced in the accompanying notebook at Tab 47].

¹⁷⁶ *Id.*

Initiation entails actions that begin the war, and waging includes actions that occur during the war.¹⁷⁷

All significant modern precedents that recognize crimes of aggression list participation in a larger scheme of aggression as sufficient grounds for criminal culpability. Article 6(a) of the Nuremberg Charter includes “participation in a common plan or conspiracy” to commit the prohibited actions as an individual crime of aggression.¹⁷⁸ Article 16 of the Draft Code of Crimes Against the Peace and Security of Mankind (“1996 Draft Code”) states that “an individual who...actively participates in or orders the planning, preparing, initiation or waging of aggression...shall be held responsible for the crime of aggression.”¹⁷⁹

2. *Ratione Personae*

Once the IST has established that Iraq has committed acts of aggression, the Court may consider the specific culpability of individuals for the crime of aggression.

Initially, international law did not require that the offender hold a position of authority. The Nuremberg Charter extends conviction to “leaders, organizers, instigators, and accomplices” who participated in any of the prohibited activities that define the crime of aggression.¹⁸⁰ Congruently, the Charter of the International Military Tribunal

¹⁷⁷ DINSTEIN, *supra* note 61, at 121. [Reproduced in the accompanying notebook at Tab 44].

¹⁷⁸ Nuremberg Charter, *supra* note 12, at art. 6(a) [Reproduced in the accompanying notebook at Tab 2]; *See also* ILC Principles of Nurnberg, *supra* note 38, at Principle VI(a) [Reproduced in the accompanying notebook at Tab 12]; *See also* Tokyo Charter, *supra* note 44 at art. 5 [Reproduced in the accompanying notebook at Tab 3]; *See also* Control Council Law No. 10, *supra* note 41, at Art. II [Reproduced in the accompanying notebook at Tab 4].

¹⁷⁹ *See 1996 ILC Draft Code*, *supra* note 50, at art. 16 [Reproduced in the accompanying notebook at Tab 6].

¹⁸⁰ *See* Nuremberg Charter, *supra* note 12, at art. 6 [Reproduced in the accompanying notebook at Tab 2].

for the Far East¹⁸¹ and Control Council Law No. 10 do not include requirements that culpable individuals hold a position of authority.¹⁸² The International Law Commission also failed to recognize a requirement that individuals culpable of crimes of aggression hold positions of authority.¹⁸³ Many critics opposed the broad language of the Nuremberg Charter, which seemed to allow for prosecution of even the common foot soldier who fought on behalf of Nazi Germany.¹⁸⁴

In correction of the previously broad language, current customary international law limits prosecution of the crime of aggression to those who held positions of authority in the government or the military of the offending state. Under the authority of Control Council Law No. 10, an American Military Tribunal held, in the *High Command* case, that only those “individuals at the policy-making level” could be guilty for the crime of aggression.¹⁸⁵ The *High Command* tribunal elaborated that only those officials who were in positions “to shape or influence the policy” leading to an aggressive war could be culpable for crimes against peace.¹⁸⁶ Another American Military Tribunal, in the *I.G. Farben* case, limited culpability to policy-makers and policy-executors in the government,

¹⁸¹ See also Tokyo Charter, *supra* note 44, at art. 5 [Reproduced in the accompanying notebook at Tab 3].

¹⁸² See Control Council Law No. 10, *supra* note 41, at Art. II [Reproduced in the accompanying notebook at Tab 4].

¹⁸³ ILC Principles of Nurnberg, *supra* note 39 [Reproduced in the accompanying notebook at Tab 12].

¹⁸⁴ DINSTEIN, *supra* note 61, at 122 [Reproduced in the accompanying notebook at Tab 45].

¹⁸⁵ The *High Command* case, *supra* note 17, at 486 [Reproduced in the accompanying notebook at Tab 40].

¹⁸⁶ *Id.* at 488.

the military, or industries.¹⁸⁷ Finally, the 1996 ILC Draft Code includes a requirement that the individual culpable of the crime of aggression be a “leader or organizer.”¹⁸⁸

3. *Mens Rea*

To impose criminal culpability, the IST must find that an individual’s conduct fulfills the requirements of *mens rea*, in addition to fulfilling the elements of *actus reus* of the crime of aggression. Article 30 of the Rome Statute declares that *mens rea* is a necessary component of criminal culpability:

1. *Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*
2. *For the purposes of this article, a person has intent where:*
 - a. *In relation to conduct, that person means to engage in the conduct;*
 - b. *In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.*
3. *For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.*¹⁸⁹

The requisite *mens rea* for the crime of aggression is an intent to use aggression against another state.¹⁹⁰ A state’s mere preparation to use force is not sufficient to

¹⁸⁷ United States of America v. Carl Krauch et al. (the *I.G. Farben* case). Judgment, 29, 30 July 1948, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1952, vol. VIII, pp. 1081. [hereinafter *I.G. Farben* case] [Reproduced in the accompanying notebook at Tab 39].

¹⁸⁸ See 1996 ILC Draft Code, *supra* note 50, at art. 16 [Reproduced in the accompanying notebook at Tab 6].

¹⁸⁹ See Rome Statute, *supra* note 53, at art. 30 [Reproduced in the accompanying notebook at Tab 13].

¹⁹⁰ The *High Command* case, *supra* note 17, at 488 [Reproduced in the accompanying notebook at Tab 40].

constitute aggression, absent the intent to commit aggression.¹⁹¹ However, the requisite intent to commit aggression need be present in the minds of only a few officials. Other officials at the policy-making level need only have knowledge of the scheme to engage in aggression, to be culpable for the crime of aggression.¹⁹²

The Nuremberg Tribunal held that rearmament does not constitute aggression, unless officials intend the rearmament to assist in a plan of a war of aggression.¹⁹³ Similarly, the Tokyo Tribunal emphasized that a goal of acquiring control or domination over another state is characteristic of waging a war of aggression.¹⁹⁴

B. Article 14(c) of the Statute of the Iraqi Special Tribunal Establishes Jurisdiction Over Crimes Roughly Equivalent to the Individual Crime of Aggression.

Article 14(c) of the IST Statute, together with Article I of Law Number 7 of 1958, establishes the elements of a crime that fit the international definition of the crime of aggression. Echoing the Nuremberg Charter, the IST Statute clearly prohibits direct or participatory actions¹⁹⁵ that might lead Iraq to use force in one of the prohibited acts listed in Article 1 of Law Number 7 of 1958.¹⁹⁶

In congruence with international legal precedent, the IST Statute requires that the culpable individual hold a position of authority. Article 1 of Law Number 7 of 1958

¹⁹¹ DINSTEIN, *supra* note 61, at 126 [Reproduced in the accompanying notebook at Tab 45].

¹⁹² *Id.*

¹⁹³ *Nuremberg Judgment*, *supra* note 89, at 309 [Reproduced in the accompanying notebook at Tab 38].

¹⁹⁴ BROWNLIE, *supra* note 88, at 208 [Reproduced in the accompanying notebook at Tab 41].

¹⁹⁵ Article 1 of Law Number 7 of 1958, *supra* note 10. (a plotter against the security of the State is anyone who used “his influence in committing or participating in any acts mentioned below”) [Reproduced in the accompanying notebook at Tab 1].

¹⁹⁶ *Id.*

enables the Iraqi Special Tribunal to find culpable offending public officials, parliament members, or those who performed a public service for the Iraqi government.¹⁹⁷

C. Under Article 14(c) of Statute of the Iraqi Special Tribunal, the Iraqi Special Tribunal May Not Be Able to Prosecute Members of the Former Regime for the Crime of Aggression for the Invasion of Iran Because Iran is Not an Arab State.

Although the IST can also arguably find that Iraq's invasion of Iran was an act of aggression based on international legal precedent,¹⁹⁸ the IST does not have jurisdiction to prosecute individuals for Iraqi invasions of states that are not Arab states. Article 14(c) of the IST Statute and Article 1 of Law Number 7 of 1958 give the IST jurisdiction to prosecute individuals only for Iraqi invasions of "Arab countries."¹⁹⁹

The international community does not view Iran as an Arab state. Iran is not presently, nor has it ever been, a member of the League of Arab States.²⁰⁰ Additionally, only 3% of Iranians consider themselves to be Arabic.²⁰¹

Iran is arguably not an Arab state because Iran does not meet all the criteria of Arab states. One element that defines an Arab state is a sharing a central history of "the

¹⁹⁷ *Id.*

¹⁹⁸ See discussions and conclusions regarding Iraq's invasion of Iran, *supra*.

¹⁹⁹ IST Statute, *supra* note 2, at art. 14. [Reproduced in the accompanying notebook at Tab 30]; Article 1(a) of Law Number 7 of 1958, *supra* note 10 (The text of Article 1(b) does not include punctuation.) [Reproduced in the accompanying notebook at Tab 1].

²⁰⁰ League of Arab Nations, available at http://www.arableagueonline.org/arableague/index_en.jsp [no reproduction in the accompanying notebook]; see also Wikipedia, *Arab World*, at http://en.wikipedia.org/wiki/Arab_world [Reproduced in the accompanying notebook at Tab 64].

²⁰¹ *Background Note: Iran*, U.S. Department of State, at <http://www.state.gov/r/pa/ei/bgn/5314.htm> [Reproduced in the accompanying notebook at Tab 55].

mission of Muhammad.”²⁰² The IST may argue that Iran is Arabic by virtue of sharing Islam with the majority of Arab states. However, religion is only one of several factors that a state must have to be Arab.²⁰³ Islam, alone, is an insufficient basis for a designation of “Arabic,” as evidenced by the common recognition of “Arab Christians.”²⁰⁴ Additionally, even Iran’s practice of Islam differs from the majority of the Arabic world. The predominant observance of the Islamic religion in Iran is Shi’a,²⁰⁵ while the majority of Arab states practice Sunni Islam.²⁰⁶

Other criteria that determine whether or not a state is Arab are “a common territory, language, and culture.”²⁰⁷ Iran does not share these other Arab characteristics. Unlike any of the Arab states, Iran is part of the land mass of Asia. Iran’s predominant language is Persian, with Arabic composing only 1% of spoken languages in Iran.²⁰⁸ Also, citizens of Iran largely do not identify with the Arab culture, with Persians composing 51% of Iran’s population and Arabs composing only 3% of the state’s population.²⁰⁹

²⁰² Chris Suellentrop, *Is Iran an Arab Country?* at <http://www.slate.com/id/1008394/> (quoting Sir Hamilton Gibb) [Reproduced in the accompanying notebook at Tab 62].

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Background Note: Iran*, *supra* note 201 (89% of Iran is Shi’a Muslim and 9% Sunni Muslim) [Reproduced in the accompanying notebook at Tab 55].

²⁰⁶ Suellentrop, *supra* note 192 [Reproduced in the accompanying notebook at Tab 62].

²⁰⁷ *Id.* (quoting BERNARD LEWIS, *THE ARABS IN HISTORY*).

²⁰⁸ *Background Note: Iran*, *supra* note 201 [Reproduced in the accompanying notebook at Tab 55].

²⁰⁹ *Id.*

D. Under Article 14(c) of Statute of the Iraqi Special Tribunal, the Iraqi Special Tribunal Can Prosecute Members of the Former Regime for the Crime of Aggression for the Invasion of Kuwait.

The Iraqi Special Tribunal may prosecute Iraqi authority figures for the crime of aggression for Iraq's invasion and annexation of Kuwait. After reaching a conclusion that Iraq committed the state crime of aggression in its invasion into Iraq or in its invasion into Kuwait, the Court may consider the culpability of individuals who participated in that state crime.²¹⁰

Since the IST can arguably find that Iraq's invasions of Kuwait were state acts of aggression,²¹¹ the IST may find individuals culpable. The IST will then consider the evidence and facts to determine whether each individual's actions amounted to the individual crime of aggression, as described in Article 14(c) of the IST Statute.

V. DEFENSES

A. Available Defenses

Defendants that the Iraqi Special Tribunal prosecutes for the crime of aggression will depend primarily on claims that Iraq did not commit state aggression against Iran and that Iraq did not commit state aggression against Kuwait.

Even if the state has committed a crime of aggression, an accused individual still may argue that he or she is not guilty via other defenses. Individual defenses available to criminal defendants in the IST may reflect the Rome Statute. Article 31 of the Rome Statute recognizes several defenses for individual criminality, which include mental incapacity; intoxication; necessary defense of self, of another person, or of property; and

²¹⁰ Gomaa, *supra* note 14, at 65 [Reproduced in the accompanying notebook at Tab 46].

²¹¹ See discussions and conclusions regarding Iraq's invasion of Kuwait, *supra*.

duress.²¹² Additionally, international law recognizes the defenses of mistake of law²¹³ and mistake of fact.²¹⁴

B. Impermissible Defenses

1. The Statute of the Iraqi Special Tribunal Specifically Rejects Head of State Immunity as a Defense.

International legal precedent does not recognize head of state immunity for the crime of aggression. Article 7 of the Nuremberg Charter states that the Nuremberg Tribunal would not grant immunity to a head of state or mitigate an individual's punishment because the individual committed the prohibited actions as a head of state or as another government official.²¹⁵ The Rome Statute also clearly disavows head of state immunity.²¹⁶

Similarly, the Statute of the IST does not allow head of state immunity. Article 15(c) states that an individual's official position "as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the dissolved Ba'ath Party Command or Government will not relieve the individual of culpability and will not mitigate a culpable individual's punishment."²¹⁷

²¹² Rome Statute, *supra* note 53, at art. 31 para. 1 [Reproduced in the accompanying notebook at Tab 13].

²¹³ *Id.* at art. 32 para. 2.

²¹⁴ *Id.* at art. 31 para. 1.

²¹⁵ *Nuremberg Judgment*, *supra* note 89 [Reproduced in the accompanying notebook at Tab 38].

²¹⁶ Rome Statute, *supra* note 53, at art. 27 para. 1. ("This statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.") [Reproduced in the accompanying notebook at Tab 13].

²¹⁷ IST Statute, *supra* note 2, at art. 15(c) [Reproduced in the accompanying notebook at Tab 31].

2. The Statute of the Iraqi Special Tribunal Specifically Rejects Obedience to National Law as a Defense.

International legal precedent allows for the defense of obedience to national law. Where domestic law contradicts international criminal law, the citizen must obey the international laws.²¹⁸ The American Military Tribunal that decided the *High Command* case stated that “[a] directive to violate international criminal law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.”²¹⁹

The Iraqi Special Tribunal also does not extend this defense to defendants. Article 15(e) of the Statute of the IST states that the fact that a defendant’s actions were in compliance with a government order will not relieve that defendant of criminal culpability.²²⁰ However, the Court may mitigate the punishment of defendant who acted in obedience to government orders.²²¹

3. The Statute of the Iraqi Special Tribunal Specifically Rejects Obedience to Orders as a Defense.

The Nuremberg Charter stated that it would not extend criminal immunity to individuals who had acted pursuant to superior orders. However, the Charter allowed obedience to superior orders to be a mitigating factor in determining punishment.²²² Recently, the International Law Commission upheld Nuremberg’s denial of a criminal

²¹⁸ DINSTEIN, *supra* note 61, at 128 [Reproduced in the accompanying notebook at Tab 45].

²¹⁹ The *High Command* case, *supra* note 17, at 508 [Reproduced in the accompanying notebook at Tab 40].

²²⁰ IST Statute, *supra* note 2 at art. 15(e) [Reproduced in the accompanying notebook at Tab 31].

²²¹ *Id.*

²²² Nuremberg Charter, *supra* note 12 at art. 8 [Reproduced in the accompanying notebook at Tab 2].

defense based on obedience to orders.²²³ The International Criminal Court grants immunity to inferiors obeying superior orders, only when three conditions are present: the individual “was under a legal obligation to obey orders of the government or the superior;” the individual “did not know that the order was unlawful;” and “the order was not manifestly unlawful.”²²⁴

Article 15(e) of the IST Statute bans the criminal defense that an accused individual performed prohibited acts in obedience to superior orders.²²⁵ However, the IST may mitigate the punishment for such actions.²²⁶

4. The Charter of the Iraqi Special Tribunal Does Not Recognize a *Tu Quoque* Defense.

The *Tu Quoque* defense is the argument that a defendant cannot be convicted for a crime for which the prosecuting party is also culpable. While the IST does not specifically reject a *Tu Quoque* defense, the IST also fails to grant the *Tu Quoque* defense.²²⁷ International precedent regarding the viability of the *Tu Quoque* defense is mixed. The Federal Supreme Court of Germany recognized the defense in 1960.²²⁸ However, more recently, the ICTY has dismissed the defense.²²⁹ Defendants here may

²²³ *ILC 1996 Draft Code, supra* note 50, at art. 16 [Reproduced in the accompanying notebook at Tab 6].

²²⁴ Rome Statute, *supra* note 53, at art. 33. para. 1 [Reproduced in the accompanying notebook at Tab 13].

²²⁵ IST Statute, *supra* note 2, at art. 15(e) [Reproduced in the accompanying notebook at Tab 31].

²²⁶ *Id.*

²²⁷ *Id.* at art. 15.

²²⁸ Michael Scharf, *Can the Defendants Raise the "Tu Quoque" Defense? Grotian Moment: The Saddam Hussein Trial Blog*, November 22nd, 2005, at <http://lawwww.case.edu/grotian-moment-blog/> [Reproduced in the accompanying notebook at Tab 61].

²²⁹ *Id.* (quoting The ICTY in *Prosecutor v. Kupreskic*, “the *Tu Quoque* defense has been ‘universally rejected’” and “‘there is in fact no support either in State practice or in the opinions of publicists for the validity of such a defense.’”)

attempt to raise the *Tu Quoque* argument that the United States use of force in the invasion of Iraq was illegal, and, therefore, the IST may not try and convict members of the Former Regime for the invasions of Iran and Kuwait. However, this argument should fail because Iraq, rather than the U.S., will be prosecuting members of the Former Regime.²³⁰

VI. CONCLUSION

The language of Article 14(c) of the IST Statute, combined with the language of Article 1 of Law Number 7 of 1958, closely tracks international legal precedents prohibiting the state crime of aggression. Therefore, the IST prohibits acts of state aggression.

Iraq's claims of justification of the invasions of Iran and Kuwait fail. Because Iraq's invasion of Iran was not approved by the Security Council, did not meet the requirements of self-defense, and did not meet the requirements of anticipatory self-defense, Iraq's invasion of Iran and its annexation of the Shat al-Arab region constituted the state crime of aggression. The same absence of defenses applies to Iraq's invasion and annexation of Kuwait. Additionally, Iraq's claim of humanitarian intervention in Kuwait fails. For these reasons, Iraq's invasion of Kuwait also constituted the state crime of aggression.

The language of Article 14(c) of the IST Statute, combined with the language of Article 1 of Law Number 7 of 1958, establishes the IST's jurisdiction over crimes roughly equivalent to the crime of aggression. Thus, the IST may find that Iraq committed the state crime of aggression when it invaded Iran and when it invaded Kuwait,

²³⁰ *Id.*

the IST may prosecute officials for the crime of aggression for their participation in Iraq's commission of the state crime of aggression.

Finally, the IST does not recognize head of state immunity, obedience to government orders, or obedience to superior orders as defenses, so those defenses would not be available to officials charged with these the crime of aggression.