

PRACTICAL IMPLICATIONS OF THE *ACTUS REUS* ELEMENTS OF THE CRIME OF AGGRESSION FOR LEADERSHIP DIRECTED INTELLIGENCE COLLECTION AND DISSEMINATION

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I. INTRODUCTION

The value of intelligence gathering in safeguarding a state's interests cannot be overstated. The need for collection, production, and dissemination of intelligence-based information in order to predict and monitor the intentions, capabilities, and activities of other states is vital to a state's decision-making in matters of national security.¹ Information gleaned from intelligence is meant to be a tool used by decision makers to inform their choices on policy direction. However, there is danger in the prospect that if captured by policy objectives rather than informing them, decision makers could harness and direct this tool to support and justify preconceived policy decisions. While there will always be preconceived policy decisions and most may be benign, what if that preconceived decision is an aggressive one? What if intelligence is used for a hostile action, for example, to make the case for aggressive war, where a military conflict is waged without the justification of self-defense? Suppose that the intelligence was not just used to support decisions, but rather was directed and shaped by leadership elements in order to justify plans of aggressive armed action directed against another state. Is there an existing remedy that could dissuade this type of action?

This very scenario arose during the Iraq war. Both the United Kingdom (U.K.) and the United States (U.S.) sought out and directed the collection, assessment, and dissemination of what was, in part, unreliable intelligence, in order to justify policy goals of military action in Iraq.² Policy formulation led intelligence production, rather than being informed by it. The resulting intelligence was utilized in various ways, including making the case for war in the international arena and contributing to attempts at promoting and justifying the military and psychological preparation for military action with citizens domestically. While intelligence-related activities are historically and notoriously unregulated with regard to matters of international law, this comment seeks to demonstrate that under the proposed crime of aggression, the use of the products of intelligence should not be unregulated. Rather, the use of the products of intelligence will

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1. INDEP. TASK FORCE, COUNCIL ON FOREIGN RELATIONS, MAKING INTELLIGENCE SMARTER: THE FUTURE OF U.S. INTELLIGENCE 1 (1996).

2. See *infra* Section III.D (discussing whether intelligence collection and use is an act of planning or preparation under the crime of aggression).

likely be subject to international regulation under practices that have existed since the Nuremberg Charter.³ As stated above, an area that may provide oversight on the use of intelligence, if not the overall intelligence process, is the crime of aggression, which has historical underpinnings in the Nuremberg Charter's crimes against peace.⁴

Prior to Nuremberg, aggressive war was considered a state action for which individuals had no liability.⁵ However, under the Nuremberg Charter, crimes against peace were adopted as an international crime that focused on individual liability.⁶ It was under crimes against peace that the conduct verbs of planning, preparation, and initiation were originally adopted as a charge against individuals.⁷ This language allowed acts of planning and preparation to be categorized as chargeable acts of crimes against peace.⁸ The use of intelligence may be subject to judicial scrutiny in international law under these conduct verbs, which remain in the International Criminal Court's (ICC) definition of the crime of aggression. In determining whether planning and preparation were crimes against peace, prosecutors at the Nuremberg Trials⁹ considered evidence such as statements from Hitler, which detailed the use of "a propagandist cause for starting the war."¹⁰ If intelligence is used by individuals in leadership to produce propagandist causes for aggressive war, this may subject the conduct of leadership-directed intelligence operations to the new standards of aggression that will come into force in 2017 under the ICC's crime of aggression.¹¹

Unfortunately, during the Nuremberg Trials, the International Military Tribunal (IMT) failed to provide generic language for dealing with crimes against peace.¹² The IMT dealt only with the factual situations of charged individuals as

3. *See generally* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 [hereinafter Nuremberg Charter]. The Nuremberg Charter is the agreement made between the Allied Powers to prosecute war crimes of the European Axis following Allied victory in Europe, also establishing the Nuremberg International Military Tribunal. *Id.*

4. *See* Henry T. King Jr., *Nuremberg and Crimes Against Peace*, 41 CASE W. RES. J. INT'L L. 273, 273 (2009) (asserting the Nuremberg aggressive-war charge, crimes against peace, provide a useful context for defining crimes of aggression).

5. *Id.* at 273.

6. *Id.* at 273–74.

7. *See* Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (defining crimes against peace as "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").

8. "Planning, preparation, initiation and waging of a war of aggression" were the conduct verbs in the crime against peace. *Id.* For the purposes of this paper and in order to examine the relation between intelligence operations, the focus is placed on planning and preparation.

9. "Nuremberg Trials" and "Tribunal" are not synonymous. "Nuremberg Trials" refer to the findings in the cases themselves, while "Nuremberg Tribunal" refers to the body that administrated the cases.

10. King, *supra* note 4, at 275–76.

11. *Kampala Amendments*, PARLIAMENTARIANS FOR GLOBAL ACTION, <http://www.pgacti.org/programmes/ilhr/icc-kampala.html> (last visited Oct. 27, 2016).

12. King, *supra* note 4, at 276.

opposed to providing criteria to evaluate crimes against peace.¹³ Because of this failure of elaboration and the correlating uncertainty as to application, efforts to define, adopt, and enact the crime of aggression in the ICC have proven difficult.

Even prior to the adoption of the Rome Statute, which established the ICC,¹⁴ contentious debate surrounded the topic of the crime of aggression, so much so that over ten years lapsed between the drafting of the Statute and when a definition for the crime could be agreed upon.¹⁵ A consensus for the definition was agreed upon in Resolution 6 at the Review Conference in Kampala, Uganda, in 2010.¹⁶ This consensus suggests a growing international accord and acceptance of the idea of ending impunity for states that resort to acts of aggression as an instrument of national policy. However, questions continue to revolve around the actual operation of this amendment to the Statute and how the crime will be applied.

Many of these questions have been extensively reviewed, focusing on a range of subjects, including the vagueness and breadth of the definition of the crime of aggression.¹⁷ This comment, however, narrows the focus to the doctrinal acts of individual perpetrators of the crime, and the specific state act as set out in Article 8 *bis*, paragraph 1 of the definition. It further narrows the question to an examination of the culpable conduct linking the individual to the collective act in an effort to determine whether the specific behavior of leadership-directed intelligence collection would qualify as an *actus reus* falling under the scope of the conduct verbs of the crime of aggression.

Due to the necessary thirty ICC States Parties having ratified the Kampala Amendments by 2016,¹⁸ jurisdictional implementation of the crime of aggression may occur soon after 2017. Although the crime of aggression was closely

13. See *id.* at 276–77 (explaining that the IMT did not elaborate on the prerequisites for convicting particular individuals on aggression, such as level of involvement, placement within the hierarchy, action taken, degree of knowledge, and stage of involvement).

14. See Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 38544 [hereinafter Rome Statute] (establishing the first International Criminal Court and defining crimes within the jurisdiction of the Court, the rules of procedure, and the mechanisms for States to cooperate with the ICC).

15. *The Crime of Aggression*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=aggression> (last visited Oct. 27, 2016).

16. See Review Conference of the Rome Statute, *The Crime of Aggression*, Resolution RC/Res.6, (June 11, 2010) (defining the crime of aggression and setting forth the elements of the crime).

17. See Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 86–98 (2010) (examining the vagueness and breadth of the definition of the crime of aggression); but see Jennifer Trahan, *A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon*, 33 U. PA. J. INT'L J. 907, 940–47 (2012) (describing and examining the exhaustiveness of the listed acts of aggression); see also Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 99–109 (2011) (exploring gaps, ambiguities, and contradictions within the crime's definition and evaluating the range of ways international judges might interpret the definition).

18. See *Kampala Amendments*, *supra* note 11 (explaining that the Kampala Amendments define the crime of aggression).

negotiated, the final version¹⁹ was adopted with language that closely tracks the language used for “crimes against peace” prosecuted at Nuremberg.²⁰ The Rome Statute’s conduct verbs of planning, preparation, initiation, and execution are seemingly straightforward, but due to the failure of the IMT to provide a generic framework under which to evaluate these conduct verbs, the question of how they operate in the modern context of planning and preparation for war requires analysis. This comment examines the application of the crime of aggression to intelligence collection. More specifically, it theorizes that under the conduct verbs of planning and preparation, leadership-directed intelligence operations and dissemination for the purpose of promoting aggressive war may be subject to judicial scrutiny and prosecution under the ICC’s crime of aggression.

The fact that certain acts of leadership-directed intelligence could become subject to judicial scrutiny may necessitate dialogue between states regarding the permissibility and conduct of intelligence within the international community and could be a motivating factor in adopting an international legal framework for this information gathering function. In the meantime, an examination of the legal viability of intelligence gathering in light of the crime of aggression, becomes necessary due to the growing prevalence of intelligence as justification for military operations against both state and non-state actors. This comment provides an examination of the possible intersection between the crime of aggression and the legal viability of intelligence gathering.

Part II of this comment begins the examination of this subject matter by delving into the definition of the crime of aggression, looking specifically at the Special Working Group on the Crime of Aggression’s (SWGCA) discussions and negotiations concerning the elements of the *actus reus* and the meaning of planning, preparation, initiation, or execution within Article 8 *bis*, paragraph 1.²¹ Part III undertakes an examination of intelligence with a review of collection methods.²² Specifically, Section A reviews the historical treatment of various types of intelligence collection by the international community,²³ while Section B reviews the evolution of customary international law and treaties regarding this subject matter.²⁴ Section C examines the use of intelligence, particularly its use to justify military action. Finally, Section D seeks to discern if, after the ICC has jurisdiction to prosecute crimes of aggression, intelligence collection and its subsequent use can and will be viewed as an act of planning, preparation, initiation, and execution and thus prosecutable if conducted in conjunction with an act of aggression.²⁵ In this section, a predictive case study based on the pending crime of aggression is performed on the U.K.’s actions concerning directed

19. Resolution RC/Res.6, *supra* note 16, art. 8 *bis*.

20. Charter of the International Military Tribunal art. 6(a); *see infra* pp. 8–9 (laying out the definition of crimes against peace under the Nuremberg Charter).

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Section III.A.

24. *See infra* Section III.B.

25. *See infra* Section III.C.

intelligence collection and use prior to, and leading into, the Iraq war.²⁶ The actions of the British government and intelligence community are reviewed and contrasted with prior actions adjudged as crimes against peace during the Nuremberg tribunal in an effort to determine what previously constituted planning and preparation, and whether actions similar to those of the leadership of the U.K. are likely to constitute a crime of aggression under Article 8 *bis*. Finally, Part IV contends that these acts could be viewed as an *actus reus* under the crime of aggression, and theorizes the actions of leadership in directing intelligence collection and dissemination for the purpose of making a case for war could potentially subject these persons to prosecution under the crime of aggression after its entry into force. This may necessitate the need for international engagement on the conduct of intelligence operations and its use. However, it is more likely that states will simply be more judicious in the manner in which they utilize and disseminate intelligence product.²⁷ As a review of the treaties and customary international law was previously undertaken, Part IV will seek only to determine if additional treaties and international agreements are necessary regarding the use of intelligence collection, and whether any existing framework is already in place that may lay a foundation for the regulation of this subject matter.

II. AN EXAMINATION INTO THE DEFINITION OF THE CRIME OF AGGRESSION AND THE SWGCA'S NEGOTIATIONS AND DISCUSSIONS SURROUNDING ARTICLE 8 *BIS*, PARAGRAPH 1

A. *Defining the Crime of Aggression*

The current construction of the crime of aggression is derived from the definition of crimes against peace prosecuted before the International Military Tribunals at Nuremberg and Tokyo following World War II.²⁸ As stated in the introduction, the Nuremberg Charter instituted the concept of holding individuals responsible for aggressive war when it created crimes against peace.²⁹ The Charter defined “crimes against peace” as “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.”³⁰ During the Nuremberg trials, the IMT convicted eight of the twenty-two defendants for both charges of participation in

26. See *infra* Part III. Though the U.S. had a similar policy regarding the Iraq war to the U.K.'s, this comment only addresses the U.K.'s actions as it is a party to the ICC and the U.S. is not. See *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 2, 2016) (listing the State Parties to the Rome Statute and listing the U.K., but not the U.S., as a state party).

27. See *infra* Part IV.

28. Jennifer Trahan, *The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT'L CRIM. L. REV. 49, 53–59 (2011).

29. King, *supra* note 4, at 273.

30. Nuremberg Charter, *supra* note 3.

the common plan or conspiracy and the planning and waging of war.³¹ The IMT convicted three more defendants of the planning and waging of war solely.³² However, the judgment failed to distinguish the evidentiary distinctions relied upon under the two counts and addressed individual involvement of each defendant without providing generic language for evaluating aggression.³³ Following this trial, there were twelve subsequent trials at Nuremberg.³⁴ In these trials, none of the individuals were found guilty of crimes against peace but five of the members of the ministries were convicted.³⁵

Following the Nuremberg trials, the Cold War began.³⁶ During this period, there was no punishment for the crime of aggression, and for nearly twenty-one years, three successive United Nations (U.N.) General Assembly Special Committees attempted to define aggression with no success.³⁷ This was in part due to the influences of the Soviet Union and the U.S., which pushed for competing definitions of aggression that reflected their respective values and stances at the time.³⁸ Finally, in 1974, a U.N. committee produced a draft definition of aggression, which contained a non-exhaustive list of seven acts of aggression.³⁹ This definition was ineffective in providing grounds for prosecution, as some delegations in the U.N. insisted that the definition was simply guidance to the U.N. Security Council and not a basis for prosecution or for criminalizing aggression.⁴⁰ The debate over the definition of aggression continued through the drafting and adoption of the Rome Statute and was part of the discussion in the SWGCA.⁴¹

During the drafting and adoption of the Rome Statute, states agreed that aggression was a serious crime over which the ICC would have jurisdiction.⁴² However, no definition could be reached during the Statute's drafting at the Rome Conference due to inter-state disagreement; instead, negotiating states agreed that the Court would not be able to exercise jurisdiction until a state could agree upon a definition.⁴³ As continued work was necessary, the Assembly of States Parties (ASP) created the SWGCA, which met during both ASP meetings and during informal inter-sessional meetings at Princeton University between 2003 and 2009.⁴⁴

31. Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 543–44 (2007).

32. *Id.*

33. *Id.*; King, *supra* note 4, at 276.

34. King, *supra* note 4, at 277.

35. *Id.*

36. *Id.* at 278.

37. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 166 (2008).

38. *Id.* at 166–67.

39. See G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974) (embracing the work of the Special Committee on the Question of Defining Aggression and referring the U.N. Security Council and the world at large to an operable definition of aggression).

40. Weisbord, *supra* note 37, at 168.

41. *Id.* at 170–76.

42. *Id.* at 171.

43. *Id.*

44. *Id.* at 161, 175–76.

The purpose of the SWGCA was to “negotiate, draft, and submit a proposal for consideration at the first Review Conference of the Rome Statute.”⁴⁵ Following years of contentious meetings about the definition of the crime of aggression, in February of 2009, the SWGCA reached the definition that was adopted at the Review Conference of the Rome Statute.⁴⁶ The definition states:

For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁴⁷

This definition closely resembles the one contained in the Nuremberg Charter that created the International Military Tribunal at Nuremberg.⁴⁸ The language of the crime of aggression makes it a crime solely of leadership that “shall only apply to a person in a position effectively to exercise control over or to direct the political or military action of a State.”⁴⁹ However, while the initiation or execution of an act of aggression by an individual in a position of leadership may be easily determined, the acts that encompass the planning or preparation for an act of aggression are not so apparent.⁵⁰ The Nuremberg Tribunal, which prosecuted individuals for crimes against peace, “failed to meaningfully operationalize or apply the conduct verbs in the [Nuremberg] Charter’s definition of crimes against peace.”⁵¹ Because of this, modern acts constituting planning and preparation are yet to be determined, and will therefore be within the province of the judges of the ICC to determine.⁵²

B. Planning, Preparation, Initiation or Execution: The History of the Conduct Verbs

As modern acts of planning and preparation will be subject to judicial determination under the crime of aggression, it is important to determine what leadership acts could potentially fall under the conduct verbs contained in the definition of the crime of aggression. In the definition, the conduct elements of the

45. *Id.* at 175–176.

46. Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT’L L. 517, 521 (2011).

47. Resolution RC/Res.6, *supra* note 16, art. 8 *bis*, ¶ 1.

48. See Charter of the International Military Tribunal, *supra* note 7 (“Crimes Against Peace [are] 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 [war crimes or crimes against humanity]”); *but see* Trahan, *supra* note 28, at 58, n.31 (noting the Nuremberg Charter only covers “war” while Resolution 6 covers “act[s]” and that the question of whether only a war of aggression should be covered was debated within the SWGCA, which ultimately rejected this idea as too restrictive as it did not allow the crime of aggression to cover incursions not amounting to a full scale war).

49. Trahan, *supra* note 28, at 57.

50. Weisbord, *supra* note 17, at 105–06.

51. *Id.* at 106.

52. *Id.*

crime of aggression set forth in Article 8 *bis*, paragraph 1 were considered by the SWGCA to be sufficiently clear as to not require a mental element.⁵³ Throughout the ASP meetings and the SWGCA's informal Princeton inter-sessional meetings, discussions on the conduct element of the crime of aggression did not focus on the planning, preparation, initiation, or execution language. Rather, they focused on whether to exclude the applicability of the Rome Statute's article on individual criminal responsibility and add language defining individual conduct specifically within the crime of aggression.⁵⁴ In fact, by 2009, "there [was] a near consensus among SWGCA delegates that [the] 'planning, preparation, initiation and execution'" language was "the culpable conduct" meant to link the individual leader to the collective act of aggression.⁵⁵

However, an acceptance of the modern conduct verbs in the definition of the crime of aggression as sufficient may be premature based on the historical failure to consistently operationalize and/or apply the Nuremberg Charter's conduct verbs to the behavior of individual defendants in the historical context of the Nuremberg Tribunal.⁵⁶ It has been opined that the conduct verbs are too abstract to guide judicial interpretation and produce consistent application throughout judgments due to the diversity of leadership activity.⁵⁷

The difficulty behind conceptualizing the conduct of planning and preparation is evident in the application of these verbs during the Nuremberg Tribunal.⁵⁸ In order to show planning, the Tribunal required that the evidence establish the continued common planning to prepare and wage war.⁵⁹ According to Noah Weisbord, an Associate Professor of Law at Florida International University and an advisor to the SWGCA,⁶⁰ planning was defined "predominantly along the shallow lines of attendance at Hitler's key meetings in order for the tribunal to establish the minimum *mens rea* of knowledge of Hitler's aggressive plans."⁶¹

53. See SPECIAL WORKING GRP. ON THE CRIME OF AGGRESSION, INT'L CRIM. CT., INFORMAL INTER-SESSIONAL MEETING ON THE CRIME OF AGGRESSION (JUNE 2009), *reprinted in* THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2009, at 21, 25 (Stefan Barriga, Wolfgang Danspeckgruber & Christian Wenaweser eds., 2009) (explaining the default mental element contained in article 30, ¶ 2(a) of the Rome Statute stating that intent is where a person "means to engage in the conduct"); see also Barriga, *supra* note 46, at 521 (indicating that the Special Working Group's definition of crime of aggression would apply).

54. SPECIAL WORKING GRP. ON THE CRIME OF AGGRESSION, *supra* note 53, at 184.

55. Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. INT'L & COMP. L. 1, 49 (2009).

56. *Id.* at 49–51. Noah Weisbord stated the replacement of the conduct verb waging with execution was decided upon because execution was a better fit with act of aggression or armed attack and the two terms captured similar conduct. *Id.* at 51.

57. *Id.* at 51.

58. *Id.* at 49–51; see 1 INT'L MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 224–26 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf (discussing the Law as to the Common Plan of Conspiracy).

59. INT'L MILITARY TRIBUNAL, *supra* note 58, at 225.

60. Weisbord, *supra* note 55, at 49.

61. *Id.* at 51; see also INT'L MILITARY TRIBUNAL, *supra* note 58, at 279–80, 282–86, 288–

However, the conduct of planning was not only adjudged to occur prior to the act, but also throughout the acts of aggression.⁶² This raises the question of when planning ends and execution begins.⁶³

The conduct verb “preparation” offers an equal level of consternation in its employment due to the innumerable acts that could be deemed to fall under this verb. In the Nuremberg trials, acts as remote as the writing of *Mein Kampf*, for example, were considered preparation.⁶⁴ In the section entitled “*Preparation for Aggression*”, the Tribunal stated, “*Mein Kampf* is not to be regarded as a mere literary exercise, nor as an inflexible policy or plan incapable of modification. Its importance lies in the unmistakable attitude of aggression. . . .”⁶⁵ However, the scope of what can be considered an act of preparation is boundless, as can be seen in the examples cited in the Nuremberg Tribunal alone. The court held various acts constituted preparation, such as: 1) acts of directing an economy towards preparation and equipment of the military machine;⁶⁶ 2) promoting the military, economic, and psychological preparations for war;⁶⁷ 3) handling party matters and approving legislation suggested by the different Reichs Ministers;⁶⁸ and 4) preparing plans of attack.⁶⁹ But these are certainly not the only acts that can be described under the preparation element. Prior to the passing of the crime of aggression amendments in Resolution 6, two propositions were suggested by Noah Weisbord.⁷⁰ It was suggested that the drafters might include a list of culpable behaviors for each conduct verb. The list was not to be restrictive in nature, but rather to offer guidance and increased specificity to the ICC judges.⁷¹ The SWGCA, however, chose the alternative of leaving interpretation of the conduct verbs to the judges, as the verbs were considered to be sufficiently clear.⁷²

While the exact scope of the conduct verbs of the crime of aggression are still undefined and it remains the province of the ICC judges to define what acts

89, 294–95, 302 (discussing the planning element of individual defendants’ actions and demonstrating that planning amounted to being within Hitler’s inner circle of advisers, being connected with the formulation of the policies which led to war, or being present at the important conferences when Hitler explained his decisions to his leaders).

62. See INT’L MILITARY TRIBUNAL, *supra* note 58, at 192 (“The invasion of Austria was pre-meditated aggressive step in furthering the plan to wage aggressive wars against other countries”); see also Weisbord, *supra* note 55, at 52 (“Clearly, the invasion of Austria was necessary and preliminary step in Hitler’s grand plan to conquer Europe, but it was also an act of aggression itself.”).

63. See Weisbord, *supra* note 55, at 52 (noting that Hitler’s declaration of war against Austria made it unclear when preparation ended, and the Second World War began).

64. *Id.*

65. INT’L MILITARY TRIBUNAL, *supra* note 58, at 188.

66. *Id.* at 35.

67. *Id.* at 70.

68. *Id.* at 282–83.

69. See *id.* at 294 (noting the Nazi party had planned to attack Norway).

70. Weisbord, *supra* note 55, at 53.

71. *Id.*

72. *Id.*

constitute planning, preparation, initiation, or execution, it remains to be seen exactly how the ICC will construe these broad conduct verbs. Specifically, for the purposes of this comment, the question arises whether actions of intelligence collection, especially leadership-directed intelligence collection for the purpose of making the case for war, fall within the conduct verbs and, by extension, the ICC's jurisdiction under the crime of aggression.

III. THE INTELLIGENCE COLLECTION AND WHETHER THE DIRECTION OF SUCH COLLECTION CONSTITUTE AN ACT OF PLANNING OR PREPARATION UNDER THE CRIME OF AGGRESSION

To determine if intelligence activities may be subject to judicial scrutiny and prosecution under the crime of aggression, a rudimentary understanding of intelligence and the legal framework, or lack thereof, surrounding the conduct of intelligence is necessary. Intelligence collection, analysis, utilization, and dissemination have been performed by nearly every sovereign state for purposes of information gathering, while decried by these same states as violations of sovereignty when used against them.⁷³ Historically, international law did not directly control of these activities, especially non-intrusive intelligence activities, with the exception of various intelligence sharing treaties.⁷⁴ Additionally, years of state practice indicate a grudging acceptance of intelligence collection.⁷⁵ However, the forthcoming crime of aggression may prohibit conduct, including the direction of intelligence activities as acts of planning or preparation and the subsequent use of intelligence for promoting the military, economic, and psychological preparation for war, and subject this behavior to judicial scrutiny and possible prosecution.

As will be discussed subsequently, intelligence collection has historically been an area of wide state practice denoting a normative context for which little international law regulating the practice exists.⁷⁶

Traditional approaches to the question of the legitimacy of spying, when asked, typically settle on one of two positions: either collecting secret intelligence remains illegal despite consistent practice, or apparent tolerance has led to a 'deep but reluctant admission of the lawfulness of

73. See Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1072 (2006) ("Most domestic legal systems thus seek to prohibit intelligence gathering by foreign agents while protecting the state's own capacity to conduct such activities abroad").

74. See *id.* ("This is due in part to the nonreflexive manner in which governments approach the subject: we and our friends merely gather information: you and your type violate sovereignty.").

75. See Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 293 (2015) ("States have tended to regulate the surveillance of their own citizens more stringently than that of foreign nationals.").

76. See Chesterman, *supra* note 73 (finding that domestic legal systems "seek to prohibit intelligence gathering by foreign agents while protecting the state's own capacity to conduct such activities"); see also A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595, 596 (2007) ("[E]spionage is neither legal nor illegal under international law").

such intelligence gathering, when conducted within customary normative limits.⁷⁷

These opposite positions are often simultaneously followed in a state's policy regarding intelligence. While cross-border intelligence collection activity is generally domestically prohibited as a violation of state sovereignty, a state's own capacity to exercise the same abroad is protected within the state's legal system.⁷⁸ However, the subject of intelligence collection continues to be approached indirectly from an international law standpoint.⁷⁹ Despite the vague legal status of intelligence collection in international law, with the possibility of the crime of aggression coming into force, the planning and preparation conduct verbs of the crime of aggression necessitate an understanding of the defining qualities of intelligence collection and its subsequent use in order to determine if this activity can be subsumed under these conduct verbs.

Intelligence does not have one standard definition, but has been defined by Martin Bimfort, a CIA counterintelligence officer, as:

the collecting and processing of that information about foreign countries and their agents which is needed by a government for its foreign policy and for national security, the conduct of non-attributable activities abroad to facilitate the implementation of foreign policy, and the protection of both process and product, as well as persons and organizations concerned with these, against unauthorized disclosure.⁸⁰

However, Carl Von Clausewitz, a Prussian general and military theorist, has said the following of intelligence:

A great part of the information obtained in war is contradictory, a still greater part is false, and by far the greatest part is of a doubtful character. What is required of an officer is a certain degree of discrimination, which only knowledge of men and things good judgment can give. The law of probability must be his guide.⁸¹

For this very reason, it is important that the leadership in government views and assesses several different sources of information and processes decisions based on good judgment of a total assessment of information sources including different intelligence sources.

The intelligence-driven collection and processing of information is gathered via various methods, of which there are five main forms.⁸² These forms of

77. Chesterman, *supra* note 73, at 1074–75.

78. *Id.* at 1072.

79. *See id.* at 1072, n.4 (noting that “[t]he majority exception to this is a small number of classified agreements governing intelligence-sharing between allies”).

80. Martin T. Bimfort, *A Definition of Intelligence*, 2 *STUDIES IN INTELLIGENCE* 76, 78 (1958), https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol2no4/html/v02i4a08p_0001.htm.

81. CARL VON CLAUSEWITZ, 2 *ON WAR* 162 (Anatol Rapoport J. J. Graham trans., Penguin Classics 1982) (1873).

82. Fed. Bureau of Investigation, *Intelligence Collection Disciplines*, <https://www.fbi.gov/about-us/intelligence/disciplines> (last visited Oct. 28, 2016).

collection are known as the intelligence collection disciplines and include:⁸³ 1) Human Intelligence (HUMINT), the collection of information by human sources; 2) Signals Intelligence (SIGINT), the collection of electronic transmissions and its subtype (COMINT), which refers to the interception of communications between parties; 3) Imagery Intelligence (IMINT), or photo intelligence, which is collected by both aerial platforms and imagery satellites; 4) Measurement and Signatures Intelligence (MASINT), which is a collection discipline that focuses on weapon capabilities and industrial activity and gathers information from IMINT and SIGINT collection systems; and 5) Open-Source Intelligence (OSINT), which seeks information from a broad array of information and sources that are generally publicly available such as media, professional and academic records, and public data.⁸⁴

A. A Brief Historical Survey of the Legal Treatment of Intelligence Collection within the International Community

While historical accounts show that states have gathered intelligence throughout history,⁸⁵ the collection of that intelligence has been an activity that is practiced, but decried, in the vast majority of states.⁸⁶ Currently, states' domestic legal systems seek to prohibit intelligence gathering by foreign states, while protecting their own capacity to conduct intelligence gathering abroad.⁸⁷ However, a long history of intelligence collection activities by varying states seems to be at odds with the objections to the practice.⁸⁸ As early as 1625, Dutch jurist Hugo Grotius' summations on the law of intelligence operations concluded that spying was generally permitted by the laws of states.⁸⁹ While Grotius' summation spoke to the subject of international legality, regulation of intelligence activities, specifically in peacetime, has consistently been held to be within the province of domestic law.⁹⁰

The regulation of wartime intelligence activities has also been an issue for states throughout history. During the U.S. Civil War, the Lieber Code was drafted, marking the first attempt to codify modern laws of armed conflict.⁹¹ This Code condemned a person who "secretly, in disguise or under false pretenses, seeks information with the intention of communicating to the enemy," to be punished by

83. *Id.*

84. *Id.*

85. See RODNEY CARLISLE, ENCYCLOPEDIA OF INTELLIGENCE AND COUNTERINTELLIGENCE (Golson Books 2005) (examining the common practice of different states utilizing intelligence collection throughout history).

86. Chesterman, *supra* note 73, at 1072.

87. *Id.*

88. See generally CARLISLE, *supra* note 85.

89. See Glenn Sulmasy & John Yoo, *Counterintuitive: Intelligence Operations and International Law*, 28 MICH. J. INT'L L. 625, 627 (2006) (citing HUGO GROTIUS, 3 THE LAW OF WAR AND PEACE ch. IV, xviii (F. Kelsey trans., Oxford 1925)) (1625) (asserting the use of spies is beyond doubt permitted by the laws of states).

90. *Id.*

91. Chesterman, *supra* note 73, at 1078.

hanging.⁹² However, under the same code, “[a] successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor.”⁹³ The Declaration of Brussels largely reproduced the idea of the Lieber Code, while expanding it to consider “ruses of war” and the measures necessary for obtaining permissible information.⁹⁴ However, under the Lieber Code, a person who acted clandestinely or on false pretenses to obtain information received no protection from the laws of the capturing army.⁹⁵ Alternatively, a spy who was able to rejoin his own army was to be treated as a prisoner of war.⁹⁶ Subsequently, the Hague Regulations again reproduced the text of the preceding documents, but expanded the protection of spies by noting that even a spy taken in the act cannot be punished without a trial.⁹⁷ Further treatment on the subject of wartime espionage was undertaken in the Geneva Convention of 1949,⁹⁸ and in the Additional Protocol I of 1977 to the Geneva Conventions.⁹⁹ However, the specified sections of the Geneva Convention treaties focus on the treatment of spies and do not speak to a regulatory framework for the activity of spies or the collection of intelligence, leaving these areas virtually untouched by international law.

B. Evolution of the International Community’s Legal Treatment of Acts of Intelligence Collection.

While the previous section provides a historical treatment on the subject matter of legal regulation of espionage, it speaks almost exclusively to the regulation of spies and HUMINT related intelligence collection.¹⁰⁰ It appears that little regulation exists regarding the use of cross-border non-intrusive intelligence

92. Instructions for the Government of the Armies of the United States in the Field (Lieber Code), art. 88 (Apr. 24, 1863), <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

93. *Id.* art. 104.

94. Chesterman, *supra* note 73, at 1079.

95. Declaration of Brussels Concerning the Laws and Customs of War, art. 14, 19–20 (Aug. 27, 1874) (never entered into force), <https://www.icrc.org/applic/ihl/ihl.nsf/ART/135-70014?OpenDocument>.

96. *Id.* art. 21.

97. Hague Convention No. II, Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 30 (July 29, 1899), 32 Stat. 1803, 187 Consol. T.S. No. 456.

98. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”).

99. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 46, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978); see also Sulmasy & Yoo, *supra* note 89, at 626 (describing Additional Protocol I of 1977 to the Geneva Conventions as a worthwhile reference for understanding wartime intelligence activity regulation).

100. See *infra* Section III.A.

collection such as SIGINT, IMINT, and MASINT.¹⁰¹ In an examination of regulations and treaties governing these areas of intelligence collection that are historically unregulated by formal treaties in international law, the law must be viewed in three distinct parts: the domestic law of the target state, the domestic law of the acting state, and public international law.¹⁰² These forms of non-intrusive intelligence collection appear to either be accepted as ruses of war or neither addressed nor prohibited by international conventions.¹⁰³ Guidance for regulation and restriction of some of these non-intrusive intelligence collection methods may be found in the customary norm of non-intervention.¹⁰⁴ As these non-intrusive acts of intelligence collection generally are not considered to rise to the level of an armed attack, rules and methods of regulation must be sought outside of treaties addressing the law of war.¹⁰⁵ Thus, international law must turn either to general principles, specific treaties and agreements addressing intelligence collection and use, or violations of customary international law and specific norms such as the norm of non-intervention.¹⁰⁶

1. General Principles

While general principles of international law regarding intelligence are vague, some international law scholars stated intelligence gathering during peacetime “is not considered wrong morally, politically or legally.”¹⁰⁷ In fact, international law contains no prohibitions against espionage, and punishment has only been meted out domestically for espionage and intelligence operations that are conducted against national interests.¹⁰⁸ Furthermore, while intelligence gathering may violate principles of territorial integrity and political independence,¹⁰⁹ it is widely accepted that espionage is a sovereign right of a nation-state.¹¹⁰ Thus, general principles of international law offer little guidance on the conduct of intelligence activity and even less on legal regulation of the same. As Afsheen John Radsan, an Associate Professor of Law at Mitchell Hamline School of Law and an assistant general counsel at the CIA from 2002–2004,¹¹¹ opined, “[e]spionage exists between the

101. Chesterman, *supra* note 73, at 1081.

102. *Id.* at 1077.

103. *Id.* at 1081.

104. *Id.*

105. *Id.*

106. *See* Statute of the International Court of Justice art. 38 ¶ 1 (listing international conventions, international custom, and general principles of law as sources of international law). General principles refers to law recognized by “civilized” nations. *Id.* International custom is defined as the general practice of states that is recognized to be law. *Id.*

107. Sulmasy & Yoo, *supra* note 89, at 628 (quoting 1 L. OPPENHEIM INTERNATIONAL LAW 862 (H. Lauterpacht ed., 8th ed. 1955)).

108. *Id.* (citing W. Hays Parks, *The International Law of Intelligence Collection*, in NATIONAL SECURITY LAW 433–34 (John Norton Moore & Robert F. Turner eds., 1999)).

109. *See infra* Section III.B.3.

110. Sulmasy & Yoo, *supra* note 89, at 628.

111. Radsan, *supra* note 76, at 595.

tectonic plates of legal systems.”¹¹² Espionage is neither legal nor illegal under the general principles of international law.¹¹³ Because of the ambiguous status of these general principles, the conduct of intelligence collection should be further examined under the light of treaties and customary international law.

2. Treaties

Within the confines of international law, some forms of HUMINT, while not explicitly authorized under any treaty, are conducted in compliance with a number of arms control agreements.¹¹⁴ Many of these treaties, such as the Treaty on Intermediate Range Nuclear Forces (INF), the Strategic Arms Reduction Treaty (START), and the Bilateral Agreement between the United States and Russia on Chemical Weapons, have required intrusive onsite inspections, thereby allowing for HUMINT gathering.¹¹⁵ Other treaties, such as the Peaceful Nuclear Explosions Treaty (PNET), the Threshold Test Ban Treaty (TTBT), the Open Skies Treaty (OS), and the Anti-Ballistic Missile Treaty and SALT I Agreement, authorize the non-intrusive collection of information through the use of technical collection capabilities such as IMINT and MASINT.¹¹⁶ The Anti-Ballistic Missile Treaty and SALT I Agreement, for example, provide a treaty implicitly authorizing intelligence collection by national technical means of verification.¹¹⁷

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.
2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.
3. Each Party undertakes not to use deliberate concealment

112. *Id.* at 596.

113. *Id.*

114. See *Intelligence Collection Activities and Disciplines*, OPERATIONS SECURITY INTELLIGENCE THREAT HANDBOOK, <http://fas.org/irp/nsa/ioss/threat96/part02.htm> (last visited Nov. 2, 2016) (“[i]ntrusive on-site inspection activities required under some arms agreements provide a significant opportunity for HUMINT collection at facilities of great importance to the national security of the United States”).

115. BOOZ ALLEN & HAMILTON INC., OPERATIONS SECURITY INTELLIGENCE THREAT HANDBOOK, FEDERATION OF AMERICAN SCIENTISTS (1996), <http://fas.org/irp/nsa/ioss/threat96/part02.htm>.

116. *Id.*; see also Ernesto J. Sanchez, *Intelligence Collection, Covert Operations, and International Law*, ASS’N OF FORMER INTELLIGENCE OFFICERS 4 (Oct. 8, 2014), https://www.afio.com/publications/SANCHEZ%20Enesto_Intelligence%20and%20International%20Law%20DRAFT%202014Oct08.pdf (explaining how the Anti-Ballistic Missile Treaty and SALT I Agreement allows the collection of intelligence in relation to assessing compliance with arms control obligations).

117. See Chesterman, *supra* note 73 (noting that both the Anti-Ballistic Missile Treaty and the SALT I Agreement embraced the euphemism “national technical means of verification” for the intelligence activities of two parties).

measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.¹¹⁸

Thus, although international law may lack explicit authorizations of the use of cross-border non-intrusive intelligence collection techniques, these paragraphs suggest States implicitly authorize such collection.

In addition to intelligence collection under arms control treaties, bilateral and multilateral intelligence sharing agreements have become increasingly prevalent. The increased use of multilateral intelligence sharing alliances and agreements evince the concept that the international community has come to regard intelligence collection as an increasingly accepted aspect of foreign policy.¹¹⁹ One example of an originally bilateral intelligence sharing agreement is the U.K.–U.S. Intelligence Agreement (UKUSA).¹²⁰ This agreement between the U.S. Communications Intelligence Board and the London Signal Intelligence Board was put in place to govern the unrestricted exchange of communications intelligence matters.¹²¹ This agreement of intelligence sharing, also known as The Five Eyes Agreement,¹²² was originally signed in 1947 between the original signatories and was expanded to include Australia, Canada, and New Zealand the following year.¹²³ Outside of the context of bilateral and multilateral agreements, intelligence

118. *Id.* (citing Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XII, May 26, 1972, 23 U.S.T. 3435). Although in force October 3, 1972, the U.S. announced its withdrawal on Dec. 14, 2001. *Id.*; Interim Agreement on Certain Measures With Respect to the Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., art. V, May 26, 1972, 23 U.S.T. 3463 (in force Oct. 3, 1972). In the SALT I Agreement, the words “Interim Agreement” are substituted for “Treaty” in paragraph 3. Interim Agreement on Certain Measures With Respect to the Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., art. V., May 26, 1972, 23 U.S.T. 3463 (in force Oct. 3, 1972), <http://www.state.gov/t/ac/trt/4795.htm> [hereinafter SALT I Agreement]. *Cf.* Treaty on the Limitation of Strategic Offensive Arms, U.S.- U.S.S.R., art. XV, June 18, 1979, Sen. Exec. Doc. No. Y, 96th Cong., 1st Sess. (1979) (unratified), <http://www.state.gov/t/ac/trt/5195.htm>. Similar provisions were included in a General Assembly resolution providing basic provisions for a treaty prohibiting nuclear weapons testing. G.A. Res. 37/85, U.N. GAOR, 37th Sess., Annex, arts. 6–8, U.N. Doc. A/RES/37/85 (Dec. 9, 1982).

119. Chesterman, *supra* note 73, at 1093.

120. U.K.– U.S. Communications Intelligence Agreement, May 10, 1955, https://www.nsa.gov/news-features/declassified-documents/ukusa/assets/files/new_ukusa_agree_10may55.pdf [hereinafter UKUSA Agreement].

121. *Id.* at §§ 1–2.

122. *The Five Eyes*, PRIVACY INTERNATIONAL, <https://www.privacyinternational.org/node/51> (last visited Oct. 27, 2016).

123. Chesterman, *supra* note 73, at 1093 (citing JEFFREY T. RICHELSON & DESMOND BALL, THE TIES THAT BIND INTELLIGENCE COOPERATION BETWEEN THE UKUSA COUNTRIES—THE UNITED KINGDOM, THE UNITED STATES OF AMERICA, CANADA, AUSTRALIA, AND NEW ZEALAND (1985)). The agreement forms the basis for a signals intelligence alliance that links the collection capacities of the NSA, Britain’s Government Communications Headquarters, Australia’s Defence Signals Directorate, the Canadian Communications Security Establishment, and New Zealand’s Government Communications Security Bureau. Comparable to the burden sharing by the United States and Britain in the Second World War, the five UKUSA countries assumed responsibility for overseeing surveillance of different parts of the globe. They also

sharing exists between trusted governments with common interest, between countries with specific interests, such as nuclear powers, and opportunistically between countries without formal or informal intelligence sharing relationships.¹²⁴ While multilateral intelligence sharing is not the norm, the growth of ad hoc intelligence sharing in multilateral forums has grown significantly.¹²⁵ This growth affects both the rules governing the use of intelligence and suggests the establishment of an emerging norm within the international intelligence community.¹²⁶

3. Customary International Law

In addition to treaties and emerging norms, intelligence collection is governed by customary international law, such as the rules of sovereignty surrounding the concept of non-intervention.¹²⁷ The Permanent Court of International Justice pronounced the rule of non-intervention in *S.S. Lotus* stating: “. . . the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”¹²⁸ This norm of non-intervention imposes restrictions on the exercise of state power in the territory of another State. The norm would apply to HUMINT operations requiring unauthorized entry into or the use of sovereign territory.¹²⁹ But what is the extent of what is considered sovereign territory? Relevant conventions and treaties exist answering some of these questions, such as the U.N. Convention on the Law of the Sea.¹³⁰ This Convention, covering the dimensions of territorial waters, states “[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters to an adjacent belt of sea, described as

agreed to adopt common procedures for identifying targets, collecting intelligence, and maintaining security; on this basis, they would normally share raw signals intelligence as well as end product reports and analyses. *Id.*

124. *Id.* at 1093–94.

125. *Id.* at 1095.

126. *Id.*

127. *Id.* at 1098. “Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties.” *Customary International Law* LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/customary_international_law (last visited Oct. 28, 2016). Evidence of customary international law includes what is said in treaties and other international instruments. Silke Sahl, *Researching Customary International Law, State Practice, and the Pronouncement of States regarding International Law*, HAUSER GLOBAL LAW SCHOOL PROGRAM (July 2016), http://www.nyulawglobal.org/globalex/Customary_International_Law1.html#_Evidence_of_Customary (quoting Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6 (6th ed.) (2003)).

128. *The S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 45 (Sept. 7).

129. Chesterman, *supra* note 73, at 1082.

130. *See* United Nations Convention on the Law of the Sea, Part II, Dec. 10, 1982, 1833 U.N.T.S. 397, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (discussing various agreements concerning the usage of maritime territory, including sovereign territory, fishing capabilities, travel and economic benefits).

territorial sea.”¹³¹ The provision prohibits ships engaging in “any act aimed at collecting information to the prejudice of the defence or security of the coastal State.”¹³² Beyond the territorial limits of the adjacent belt, however, no prohibitions are mentioned.¹³³

Another treaty, entitled the Chicago Convention on International Civil Aviation (Chicago Convention), governs the territorial sovereignty of a state’s airspace above its territory.¹³⁴ Similar to the Convention on the Law of the Sea, the Chicago Convention recognizes that every State has complete and exclusive sovereignty over the airspace above its territory.¹³⁵ Article 3 of the Chicago Convention prohibits state aircraft of a contracting State from flying over the territory of another state or landing thereon without authorization.¹³⁶ However, no prohibitions on collection of intelligence exist outside of the territorial airspace of a state.¹³⁷

As can be seen, there are clear gaps in the prohibitions governing violations of territorial sovereignty in areas that have conventions defining them. In addition to these gaps, there are arenas in which intelligence may operate that provide little or no restrictions to sovereignty. As discussed in Section B’s treatment on the various types of intelligence collection, IMINT may be conducted from either aerial surveillance platforms or from satellite platforms.¹³⁸ There are currently no conventions that institute prohibitions on surveillance from satellites in orbit.¹³⁹ In fact, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space ensures that outer space is not subject to national appropriations by claim of sovereignty, by means of use or occupation, or by any other means.¹⁴⁰ The fact that there is no prohibition on surveillance satellites or intelligence collection supports the idea of an emerging norm of intelligence collection in that no state has protested the use of these platforms.¹⁴¹

C. Utilizing intelligence

The collection of intelligence discussed above is merely a step in the intelligence process. While important in its own right, for the purposes of the discussion relating to the potential of prosecution under the crime of aggression, the most important aspect of intelligence collection is its subsequent use.

131. *Id.* Part II, § 1, art. 2(1).

132. *Id.* art. 19.

133. *See generally id.*

134. Convention on International Civil Aviation, art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, http://www.icao.int/publications/Documents/7300_cons.pdf.

135. *Id.* Part I, chap. I, art. I.

136. *Id.* art. 3.

137. *See generally id.*

138. *See supra* Section III.B.

139. *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (containing no provisions governing satellites).

140. *Id.* art. II.

141. Chesterman, *supra* note 73, at 1085.

Intelligence is used in many ways after its collection. Within the context of the international community, intelligence has been used as a basis for coercive actions, which perhaps indicates the emergence of a legal framework for utilizing intelligence.¹⁴² The U.N. Security Council has used its coercive powers to freeze the assets of individual terrorist financiers and to issue indictments before international tribunals.¹⁴³ And it is possible that states may use intelligence to justify military action, thereby raising issues of whether doing so comports with the crime of aggression.¹⁴⁴

Intelligence has previously been used in the context of attempting to seek support or authorization for military operations before the U.N. Security Council.¹⁴⁵ A prominent example of this occurred prior to initiation of operations against Iraq in 2003.¹⁴⁶ Colin Powell, the U.S. Secretary of State at the time, utilized intelligence data consisting of satellite images, radio intercepts, and first-hand accounts to state with certainty that Saddam Hussein's regime was manufacturing weapons of mass destruction in contravention to Security Council Resolutions.¹⁴⁷ The Security Council did not act on these reports and declined to give the U.S. and U.K. the resolutions they sought, which would have established a benchmark test for Iraqi compliance.¹⁴⁸ Instead, efforts to obtain further diplomatic negotiations were suspended following President Bush's observations that "some permanent members of the Security Council ha[d] publicly announced they will veto any resolution that compels the disarmament of Iraq."¹⁴⁹

Just as intelligence was used to justify military operations before the U.N. prior to the Iraq War, it has also been used within state domestic decision-making to make the case for international action. An example of this can be seen within British policy after the Bush Administration took office in the U.S.¹⁵⁰ Prior to the Bush Administration taking office, the British policy toward Iraq was one of containment.¹⁵¹ However, following the assumption of office of the newly elected administration in the U.S., policy in the U.K. began to change.¹⁵² In *The Politics of*

142. *Id.* at 1101.

143. *Id.* at 1111.

144. *See id.* at 1103-04 (intuiting that policymakers may use intelligence to support their decisions of military actions).

145. *Id.* at 1100.

146. *Id.*

147. Chesterman, *supra* note 73, at 1100.

148. The veracity behind the intelligence-backed assertions is not at direct issue in this paper; however, a state leadership's use of gathered intelligence based on policy objectives and desired results may be directly implicated under the conduct verbs planning and preparation. *See id.* (finding that legal questions arose on how the U.S. came to hold intelligence that was so detailed that war was the necessary compliment).

149. White House, *U.S. Has Clear Authority to Use Force Against Iraq: Report in Connection with Presidential Determination Under Public Law*, IRAQ WATCH, 107-243 (Mar. 19, 2003) <http://www.iraqwatch.org/government/US/WH/wh-determination-031903.htm>.

150. CHARLOTTE PEEVERS, *THE POLITICS OF JUSTIFYING FORCE*, 136-137 (2013).

151. *Id.* at 136.

152. *Id.*

Justifying Force, Charlotte Peevers, a lawyer and an academic, explains that this change occurred based on two factors.¹⁵³ The first factor was the U.K.'s commitment to following U.S. policy, and the second factor "was the demonstrable shift in the tenor of intelligence produced for government, particularly throughout 2002."¹⁵⁴

The British government's reliance on this intelligence seemed to follow private policy formulation and discussion between government ministers and officials.¹⁵⁵ In fact, it appeared that policy formulation was leading intelligence production, rather than being informed by it, resulting in a misperception of the threat posed by Iraq and the Saddam Hussein regime.¹⁵⁶ Intelligence was thus being used to justify, rather than inform, decision-making.¹⁵⁷ The Committee responsible for the *Review of Intelligence on Weapons of Mass Destruction* accurately stated that "the process of assessing intelligence 'must be informed by an understanding of policy makers' requirements for information, but must avoid being so captured by policy objectives that it reports the world as policy makers would wish it to be rather than as it is.'"¹⁵⁸ Moreover, as discussed below, the direction of intelligence in order to justify military operations could likely be construed as an act of aggression under the conduct verbs of planning and preparation.

The issue, therefore, is whether this intelligence, used to justify a use of force not authorized by the Security Council, might be considered an act of planning or preparation in light of the newly adopted crime of aggression. Referring back to the previous examples related to the Iraq War, the U.S., the U.K., Australia, and Poland relied on their own *ex ante* determination that a threat to international peace and security existed, which justified the use of armed force against Iraq and the Hussein Regime.¹⁵⁹ If, for the purposes of a hypothetical examination, one could identify the military actions of this or any coalition of states as crimes of aggression, would the direction and subsequent use of intelligence collection regarding Iraq be considered planning or preparation under the conduct verbs?

D. Is the Direction of Intelligence Collection and its Subsequent Use an Act of Planning or Preparation under the Crime of Aggression?

Investigation under the crime of aggression requires a determination that an act of aggression occurred by the Security Council.¹⁶⁰ Following that

153. *Id.*

154. *Id.*

155. *See id.* (asserting that discussions between a small number of government Ministers and officials on private policy formulation was not led by reliance on intelligence).

156. PEEVERS, *supra* note 150, at 136 (2013).

157. PRIVY COUNSELLORS, THE REPORT OF THE IRAQ INQUIRY EXECUTIVE SUMMARY 44 (2016), http://www.iraqinquiry.org.uk/media/246416/the-report-of-the-iraq-inquiry_executive-summary.pdf.

158. PEEVERS, *supra* note 150, at 137.

159. *See* Chesterman, *supra* note 73, at 1100 (discussing that, aside from the intelligence being fabricated, the basis for invasion was only evidence that Hussein was manufacturing WMD, not that he had actually used them).

160. Rome Statute, *supra* note 14, art. 15 *bis*, ¶ 6–8. The statute states that if no

determination, the evaluation of a crime of aggression must involve an additional determination that the perpetrator, in a position effectively to exercise control over or to direct the political or military action of a State, “plann[ed], prepar[ed], initiat[ed] or execut[ed]” an “act of aggression which by its character, gravity and scale, constitute[d] a manifest violation of the Charter of the United Nations.”¹⁶¹ As stated in section B, the conduct verbs are taken nearly verbatim from the Nuremberg Charter and retain the same ambiguities that were problematic in the application of these conduct verbs during the Nuremberg trials.¹⁶² There, “planning” was not defined, but rather appeared to be judged based on knowledge of Hitler’s aggressive plans.¹⁶³ In *War, Aggression and Self Defence*, Professor Yoram Dinstein provides a functional definition that will be used for the purposes of this discussion. Dinstein states that “[p]lanning consists of the formulation of a design or scheme for the specific war of aggression. . . .”¹⁶⁴ The meaning of the conduct verb “preparation” is equally difficult to ascertain due to the wide scope of its application in the Nuremberg Trials.¹⁶⁵ However, Dinstein defines “preparation” as “the various steps taken to implement the plan before the actual outbreak of hostilities.”¹⁶⁶

It is under this definition of preparation that the conduct of intelligence collection and its subsequent use is most analogous to the actions for which the Nuremberg defendants were found guilty.¹⁶⁷ In the Nuremberg Trials, preparatory actions such as directing an economy towards preparation and equipping of the military machine, promoting the military, economic, and psychological preparations for war, handling party matters and approving legislation suggested by the different Reich’s Ministers, and preparing of plans of attack, were all examples of conduct of preparation.¹⁶⁸ Assessed intelligence has been used for the purposes of informing policy decisions.¹⁶⁹ However, when the direction of intelligence production is for the purposes of justifying policy and obtaining

determination by the Security Council is made within 6 months, the ICC Prosecutor may proceed with an investigation in respect of a crime of aggression provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16. *Id.*

161. Rome Statute, *supra* note 14, art. 8 *bis*, ¶ 1.

162. *See* Weisbord, *supra* note 55, at 51; *see also* INT’L MILITARY TRIBUNAL, *supra* note 58, at 224–26 (discussing the law as to the common plan or conspiracy as applied to the Nuremberg Trials).

163. Weisbord, *supra* note 55, at 51.

164. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 141 (2011) (internal quotations omitted).

165. Weisbord, *supra* note 55, at 51. Some applications included the determination that *Mein Kampf*, Hitler’s meetings with his high ranking military commanders, and his plans to invade surrounding countries all constituted preparation. *Id.* at 51–52.

166. DINSTEIN, *supra* note 164, at 141 (internal quotations omitted).

167. *Id.*

168. INT’L MILITARY TRIBUNAL, *supra* note 58, at 35, 70, 283, 294.

169. *See, e.g.*, Chesterman, *supra* note 73, at 1102–03.

support through public presentation, it may very well fall under the preparatory action of promoting the military and psychological preparations for war.

1. Direction of British Intelligence as an Act of Planning and Preparation in the Iraq War

The use of intelligence for promoting preparations for war was evidenced in Charlotte Peevers' book *The Politics of Justifying Force* and within the text of the Report of the Iraq Inquiry.¹⁷⁰ Peevers focused on British policy in regards to Iraq leading up to the war.¹⁷¹ Her review of evidential records and media reporting evidenced a demonstrable shift in the tenor of intelligence produced, which appeared to be directed by policy decisions rather than having policy decisions be informed by the collected intelligence.¹⁷² Additionally, according to the Report of the Iraq Inquiry, "[i]ntelligence and assessments were used to prepare materials to be used to support Government statements in a way which conveyed certainty without acknowledging the limitations of the intelligence."¹⁷³

Moreover, one of the reviewed evidentiary records, The Chilcot Inquiry, considered British involvement in Iraq.¹⁷⁴ This inquiry examined, among other things, the nature of the government dealings with intelligence officials that led to this shift.¹⁷⁵ Through this examination, it is apparent that not only was there an increase in the tenor of the intelligence following meetings between intelligence and government ministers, but also the evidence given at the Chilcot Inquiry indicated that the quality of intelligence appeared to change during policy consolidation among government officials in 2002.¹⁷⁶ The intelligence gathered following the shift in tenor seemed to have been actively sought, both in the U.S. and the U.K., from sources in foreign jurisdictions, which lacked credibility.¹⁷⁷ The inquiry revealed that "[f]ollowing a meeting between President Bush and Blair in April 2002 at Crawford, [M16 Chief Sir Richard Dearlove] had a meeting with the Prime Minister concerning the alleged links between Iraq and Al-Qaida."¹⁷⁸ According to Dearlove's evidence, intelligence indicated that no cooperation existed between the two.¹⁷⁹ He further stated that during the summer of 2002, intelligence reflecting the same was built up. However, when the September

170. PEEVERS, *supra* note 150, at 136; PRIVY COUNSELLORS, *supra* note 157, at 44. The Chilcot Inquiry was an inquiry by a committee of Privy Counsellors that considered the period from the summer of 2001 to the end of July 2009, including the run-up to the conflict in Iraq, the military action and its aftermath. The Inquiry considered the U.K.'s involvement in Iraq, including the way decisions were made and actions taken, to establish what happened and to identify the lessons that could be learned. *Id.*

171. PEEVERS, *supra* note 150, at 136.

172. *Id.*

173. PRIVY COUNSELLORS, *supra* note 157, at 44..

174. *Id.*

175. *Id.*

176. PEEVERS, *supra* note 150, at 137.

177. *Id.*

178. *Id.*

179. *Id.*

Dossier,¹⁸⁰ produced for the purpose of making the case for war, was disseminated, there was more substance available than had been expected based upon previous collection.¹⁸¹ The report of the Chilcot Inquiry, published on July 6, 2016, concluded that “[t]he judgement about the severity of the threat posed by Iraq’s weapons of mass destruction – WMD – were presented with a certainty that was not justified.”¹⁸² The upcoming sections analyze the British use of intelligence and examine them against the elements of the crime of aggression in order to detail the manner in which intelligence was presented to make the case for war.

2. Analysis of the Elements of the Crime of Aggression

Prosecution under the crime of aggression was not available during the Iraq War and the ICC will be unable to exercise jurisdiction over the crime of aggression until after January 1, 2017, subject to a decision by the same majority of States Parties as is required for the adoption of an amendment to the Rome Statute.¹⁸³ However, the actions of the leadership of the British government, their interaction with and direction of intelligence collection, and the subsequent use of that intelligence presents an opportunity to examine how the ICC may evaluate leadership-directed intelligence operations under Article 8 *bis*’s crime of aggression.

Recall first that a crime of aggression requires the “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”¹⁸⁴ In order to show planning, the Nuremberg Tribunal required that the evidence establish the continued common planning to prepare and wage war.¹⁸⁵ A similar finding of evidence establishing the continued planning to prepare and wage war will likely be required to prove the commission of the crime of aggression under the Rome Statute. This paragraph of Article 8 *bis* contains several elements that must be satisfied for a person to have committed a crime of aggression.¹⁸⁶ The following section evaluates the applicability of these elements towards members of the British government.

a. Leadership Element

In the example cited in subsection 1, British intelligence gathering appeared

180. See *infra* Section III.D.2.

181. See *id.* (explaining that those in charge of producing the Dossier were aware of its purpose in arguing for war).

182. *Statement by Sir John Chilcot: July 6, 2016*, THE IRAQ INQUIRY (July 6, 2016), <http://www.iraqinquiry.org.uk/media/247010/2016-09-06-sir-john-chilcots-public-statement.pdf>.

183. Rome Statute, *supra* note 14, art. 15 *bis*, ¶ 3.

184. *Id.* art. 8 *bis*, ¶ 1.

185. See *supra* Section II.B (discussing the difficulty of conceptualizing conduct verbs during the Nuremberg Tribunal); INT’L MILITARY TRIBUNAL, *supra* note 58, at 225.

186. See Rome Statute, *supra* note 14, art. 8 *bis*, ¶ 1. (indicating that there are six elements related to the perpetrator’s actions as well as the nature of the act of aggression).

to be directed by leadership elements composed of government ministers and the intelligence community.¹⁸⁷ The leadership element of the crime of aggression states that the planning, preparation, initiation, or execution be perpetrated by a person in a position effectively to exercise control over or to direct the political or military action of a State. The testimony of the Director General of Intelligence Major General Laurie during the Chilcot Inquiry indicates that those involved in the production of the intelligence-based Dossier knew that the production of this document was for the purpose of making the case for war.¹⁸⁸ Furthermore the Major General indicated that those producing the Dossier were given direction that the document was for this purpose.¹⁸⁹ In his statement, Laurie asserted that in his position he was one level removed from the discussions in the Cabinet Office and the Joint Intelligence Committee.¹⁹⁰ He further asserted that the Chief of Defence Intelligence, Air Marshall Sir Joe French, attended those meetings and would “come back from such meetings with feedback and fresh requirements.”¹⁹¹ Describing the interactions between Air Marshall Sir Joe French and himself, Laurie stated that French was under pressure to find evidence of planes, missiles, or equipment that related to Weapons of Mass Destruction (WMD).¹⁹² It was also indicated that the wording in the final Dossier was carefully developed to make the best case possible for war out of scarce and inconclusive intelligence.¹⁹³

The leadership element of the crime of aggression is met if the “person is in a position effectively to exercise control over or to direct the political or military action of a State.”¹⁹⁴ This element is more narrowly focused than the three other crimes within the jurisdiction of the ICC.¹⁹⁵ This crime focuses on top political and military leaders for the purpose of ensuring protection from the use of force against the sovereignty, territorial integrity, or political independence of another state.¹⁹⁶ As the crime generally presupposes state action against another state, this action can only be directed by those in a leadership position within a state and would necessarily encompass heads of States and military leaders, such as ministers of

187. See *infra* Section III.D.2.a.

188. See Transcript of Major General Michael Laurie, THE IRAQ INQUIRY, at 6 (June 3, 2010) <http://www.iraqinquiry.org.uk/media/98169/2010-06-03-Transcript-Laurie-S1-declassified.pdf> [hereinafter Transcript of Major General Michael Laurie] (testifying that in February/March of 2002, the purpose of the Dossier was already to make a case for war and that pressure was felt during the following summer to obtain additional intelligence to support this objective).

189. Major General Michael Laurie, *Submission*, THE IRAQ INQUIRY (May 12, 2011), <http://www.iraqinquiry.org.uk/media/96006/2010-01-27-Statement-Laurie.pdf> [hereinafter *Submission*].

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Rome Statute, *supra* note 14, art. 8 *bis*, ¶ 1.

195. See Robert Heinsch, *The Crime of Aggression After Kampala: Success or Burden for the Future?*, 2 GOETTINGEN J. INT'L L. 713, 721–22 (2010) (distinguishing crimes of aggression from war crimes, crimes against humanity, and genocide by highlighting that the latter three do not share the limitation concerning the group of people who are able to commit the crime).

196. *Id.* at 722.

defense or generals in command of armed forces.¹⁹⁷

In an examination of the U.K.'s intelligence direction discussed above, it would appear that, were the crime of aggression available as a means of prosecution, several individuals could be implicated under the leadership clause of this crime. Based on the discussion above, the known parties that would likely be implicated under the crime of aggression, if these acts of leadership-directed intelligence collection and dissemination for the purpose of making the case for war had been committed after the ICC assumed jurisdiction for this crime, could include the Prime Minister, government ministers, and those directing the Joint Intelligence Committee.¹⁹⁸ According to Peevers, the publicly available evidence indicated a clear government policy of regime change and that secret preparations for war had begun as early as March 2002.¹⁹⁹ While these actions are not acts of aggression themselves, it remains to be seen whether, when evaluated, these actions could be acts of planning or preparation for an act of aggression.²⁰⁰ What remains would be the ICC's examination of this issue to determine if these actions would constitute promotion of the military, economic, and psychological preparations for war. As the actions were for the indicated purpose of making the case for war to both Parliament and the British people,²⁰¹ the conclusion that the production of the Dossier was for the purpose of promoting psychological preparation for war is certainly one that would be worthy of consideration by the ICC.

b. Conduct Element: Planning, Preparations, Initiation, or Execution

Given that the conduct verbs remain without explicit definitions, it is certainly conceivable to view intelligence collection and utilization as fitting comfortably under the well-crafted definitions of both planning and preparation provided by Dinstein and discussed above.²⁰² Under Dinstein's definition, "planning consists of 'the formulation of a design or scheme for the specific war of aggression.'"²⁰³ In the Nuremberg Trials, planning appeared to be focused around attendance at Hitler's key meetings in order for the Tribunal to establish the minimum *mens rea* of knowledge of Hitler's aggressive plans.²⁰⁴ Viewing planning from both the definitional and practical perspectives, evidence would need to be presented, which showed that in the context of the directed British intelligence collection it was a part of the formulation of a design or scheme for a specific war of aggression and

197. *Id.*

198. See Heinsch, *supra* note 195, at 721-22.

199. PEEVERS, *supra* note 150, at 138.

200. See Rome Statute, *supra* note 14, art. 8 *bis*, ¶ 1 (stating "planning or preparation" is an element for crime of aggression).

201. Transcript of Major General Michael Laurie, *supra* note 188, at 6.

202. See DINSTEIN, *supra* note 164, at 141 (providing a functional definition for the "planning" element); *infra* Section III.D.

203. DINSTEIN, *supra* note 164, at 141.

204. See Weisbord, *supra* note 37, at 164 (indicating that Nuremberg called for the investigation of Nazi leaders who helped plan or prepare in the war of aggression).

that certain political and military members of the leadership attended meetings during which such planning was conducted.²⁰⁵ Based on the information released as a part of the Chilcot Inquiry, the Butler report, and information discussed by Peevers, it seems that both Dinstein's definition and the Tribunal's application of the conduct verb "planning" may be satisfied.

Evidence to show planning must consist of the formulation of a design or scheme for the specific war.²⁰⁶ While perhaps not overtly acknowledged as planning for a specific war of aggression, evidence of the U.K.'s clear government policy of regime change and secret preparations for war can be shown to exist as early as March 2002.²⁰⁷ However, the issue considered here is narrower than the British government's planning for the war. Rather, it must be considered how leadership-directed intelligence, contributed to the planning and preparation of an act of aggression.

In the context of Iraq, evidence indicates that by July 2002, British officials were of the opinion that the U.S. wished to begin a military campaign by late 2002.²⁰⁸ Believing it unrealistic that any military operations would begin before early 2003, British government officials suggested that intelligence and facts needed to be fixed around a policy which demonstrated the threat posed by Saddam Hussein.²⁰⁹ Intelligence was to provide substance that could be used to frame the issue and persuade public opinion of the necessity of military operations due to the threat of Iraq.²¹⁰ As was stated by the Defense Secretary:

[I]f we were going to be able to make out a case for war against Iraq, we were going to have to publish the material. Of course we published the material if you recall in relation to Afghanistan for the same reason. . . . Otherwise we would have just faced day in and day out a constant complaint that we had no basis, that we had no proper reason.²¹¹

As stated above, the production of intelligence capable of performing this feat had been sought as early as February 2002 and was to be presented through a Dossier that would make the case for war.²¹² While the conclusion in the Butler report stated that the Dossier was not intended to make the case for a particular course of action in Iraq, evidence exists which could indicate that the Dossier was utilized by Prime Minister Blair to make the case that Iraq posed a real and immediate threat to the U.K. and to the international community, thereby justifying

205. See DINSTEIN, *supra* note 164, at 141 (defining planning as plotting for a specific war of aggression during which specific steps are performed before and during the hostility to implement the plan).

206. *Id.*

207. PEEVERS, *supra* note 150, at 138.

208. *Id.* at 140.

209. *Id.*

210. *Id.* at 144.

211. COMMITTEE OF PRIVY COUNSELLORS, REVIEW OF INTELLIGENCE ON WEAPONS OF MASS DESTRUCTION, 2004, HC 898, ¶ 316 (U.K.) [hereinafter Butler Report].

212. See *id.* at ¶ 244 (indicating that the February Joint Intelligence Committee's (JIC's) report in 2002 stated that Iraq could produce biological weapons within days).

the use of force advocated within the policy shifts of the U.S. and the U.K.²¹³ Prior to the release of the Dossier, there were calls for Parliamentary debate as to the potential departure from multilateralism in reaction to the Prime Minister's statement that action against Iraq would not require a new U.N. Security Council Resolution.²¹⁴ The Dossier sought to bolster the Prime Minister's position that force was justified by referring to key facts, including intelligence-based claims that chemical and biological weapons could be launched by Iraq within 45 minutes.²¹⁵ The release of this document fostered a great deal of public debate about the threat posed by Iraq.²¹⁶

While the production of this Dossier failed to invoke the intended response from the public of support for military action against Iraq, a report on the British Intelligence assessment of Iraq's WMD, entitled the Butler Report of 2004, presented evidence which clearly stated that the government's view on the role of the Dossier was to make the case for international action against the threat posed by Iraq.²¹⁷ This Report stated the following regarding the Joint Intelligence Committee's (JIC's) production of the Dossier:²¹⁸

The advantage to the Government of associating the JIC's name with the dossier was the badge of objectivity that it brought with it and the credibility which this would give to the document. We have noted that Mr Alastair Campbell said in his minute to the Chairman of the JIC on 9 September, following a meeting to discuss the drafting of the dossier:

The first point is that this must be, and be seen to be the work of you and your team, and that its credibility depends fundamentally on that.²¹⁹

The report further stated that the government wanted the Dossier to be a document upon which it could draw support for its policy positions, whereas the JIC sought to offer the report as a dispassionate assessment of intelligence and other material on Iraqi nuclear, biological, chemical, and ballistic missile programs.²²⁰ Additional evidence was presented that indicated that the purpose of the Dossier was to make the case for war against Iraq.²²¹ In his private testimony before the Chilcot Inquiry, General Laurie testified that the first and unreleased version of the Dossier was rejected in February/March of 2002 because the

213. PEEVERS, *supra* note 150, at 166.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 167.

218. *Id.*

219. Butler Report, *supra* note 211, at ¶ 323.

220. *Id.* at ¶ 327.

221. See Transcript of Major General Michael Laurie, *supra* note 188, at 13–14 (describing how the purpose to make a case for war was not only inferred but also known based on specific conversations and had policy momentum behind it, and how supportive intelligence was conveyed as a certainty rather than cautious observation).

evidence presented failed to make the case for war.²²² Although the Prime Minister's Director of Communications and Strategy, Alastair Campbell, stated that the Dossier was not produced to make the case for war, General Laurie directly contradicted this by saying that "those involved in its production saw it exactly as that, and that was the direction we were given."²²³ Furthermore, Laurie described the intense pressure to produce additional intelligence for the subsequent Dossier, following the initial rejection, which was placed on the intelligence community because the February/March Dossier had failed to make a convincing case for war.²²⁴

Despite the contentions of Alastair Campbell, the use of the September version of the Dossier by Prime Minister Blair could certainly evince the idea that it was produced for the purpose of making the case for war.²²⁵ In Blair's presentation of the Dossier before Parliament, he stated that the evidence demonstrated the threat posed by Iraq beyond doubt, and stated that the gravity of the threat had pushed the government into the unprecedented action of disclosing the JIC assessment.²²⁶

The actions of certain elements of British political and military leaders may also be defined as acts of preparation, in addition to planning, under Dinstein's definitions provided above.²²⁷ When viewing preparation as the various steps taken to implement the plan before the actual outbreak of hostilities, it must again be noted that the purpose of the Dossier was to make the case for war. Thus the steps taken in the preparation of the final September Dossier must be examined.

According to a report by the head of MI6,²²⁸ Sir Richard Dearlove, military action was seen as inevitable and intelligence and facts were being fixed around this policy.²²⁹ As an example of the policy of military action fixing facts and intelligence around the policy objective, Jonathon Powell, Chief of Staff to the Prime Minister Tony Blair, stated that a case needed to be made and a "Rolls

222. *Submission, supra* note 189.

223. PEEVERS, *supra* note 150, at 167.

224. *See* Transcript of Major General Michael Laurie, *supra* note 188, at 6 (testifying that the February/March 2002 Dossier was rejected for not being strong enough, and that there was a subsequent buildup of pressure the following summer to collect additional intelligence).

225. *See* PEEVERS, *supra* note 150, at 167 (noting that when Blair presented the Dossier in September 2002 it was a case-making presentation).

226. *Id.* at 167–68.

227. *See id.* (discussing that the planning is based on the meeting of government officials and intelligence officials to create a dossier made to argue for war).

228. M16 is the British Secret Intelligence Service, in charge of gathering global intelligence to protect the U.K. BBC Panorama, *The Spies who Fooled the World*, YOUTUBE, (Mar. 27, 2013), <https://www.youtube.com/watch?v=p3K9twuuU7g> (last visited Oct. 12, 2016).

229. *See* Alan Doig, et al., *Marching in time: alliance politics, synchrony and the case for war in Iraq, 2002–2003*, 61 AUSTL. J. OF INT'L AFF. 23–40 (2007) ("Intelligence-sharing between the three countries constituted an echo chamber in which each misperception of the threat from Saddam reinforced the others' conviction that war was necessary."); *see also* BBC Panorama, *supra* note 228 (documenting how the intelligence used to justify the war was based on fabrication and how months before the war highly-placed sources close to Saddam Hussein informed the CIA and M16 that Iraq did not have an active WMD program).

Royce information campaign” needed to be mounted as part of the road map to eliminate Saddam Hussein.²³⁰

In fact, Major General Laurie submitted that in the drafting of the final Dossier, “every fact was managed to make it as strong as possible, the final statements reaching beyond the conclusions intelligence assessments would normally draw from such facts.”²³¹ He further concluded that it was known that the purpose of the Dossier was to make a case for war, rather than setting out the available intelligence.²³² For this purpose, the wording was developed to make the best case possible out of scarce and inconclusive intelligence.²³³ Conversely, the Privy Counsellors of the Chilcot Inquiry made the point that the diplomatic and political background was complicated, and that no formal decision to invade Iraq had been made.²³⁴ In their queries to Laurie, they contended that the objective may have been to put “maximum pressure on the Saddam regime by building up military capability and threat.”²³⁵ However, in response to the question of whether there was specific direction to make the case for war, Laurie responded that Joe French spoke of making such a case.²³⁶

This interaction and the apparent differing views of the purpose of the September Dossier evince some of the difficulties that would likely arise in making a showing of the conduct of preparation for a specific war of aggression.²³⁷ While the action of directing the use of intelligence, rather than the collection of the same, may have been predicated on making the case for war, the point can and has been made that the intelligence was being utilized merely to make a presentation of an argument that would build political and diplomatic pressure on the Saddam regime.²³⁸ The difficulty would be to show the mental element required under Article 30 of the Rome Statute.²³⁹ Under Article 30, a person is only criminally liable if the material elements of a crime are committed with intent and knowledge.²⁴⁰ For intent to be established the person must intend to engage in the conduct and the person must intend to cause the consequence or must be aware that

230. Jonathon Powell, *Memo to Prime Minister*, THE IRAQ INQUIRY (July 19, 2002), <http://www.iraqinquiry.org.uk/media/50772/Powell-to-Blair-19July2002-minute.pdf>.

231. *Submission*, *supra* note 189.

232. *See id.* (providing support that Laurie stated in his submission that the purpose was to make an argument for war).

233. *Id.*

234. *See* Transcript of Major General Michael Laurie, *supra* note 188, at 13 (quoting the Chairman as stating that there was no formalized decision to invade Iraq but there was a need to bring Iraq into compliance with the U.N. Security Council).

235. *Id.*

236. *Id.* at 14.

237. *See supra* Section III.D.1 (describing the definition of preparation).

238. *See* Transcript of Major General Michael Laurie, *supra* note 188, at 13 (indicating that Laurie admitted the objective was only to put maximum pressure on the Saddam regime and not to start a war).

239. Rome Statute, *supra* note 14, art. 30.

240. *Id.*

it will occur in the ordinary course of events.²⁴¹ As evidenced by the Butler Report, a showing that those in leadership who directed and utilized intelligence for the purpose of making the case for war or for the purpose of promoting the military, economic, and psychological preparations for war is difficult to make.²⁴² This difficulty is evident despite contentions that intelligence was used to justify a war of choice and frame it as a war of necessity.²⁴³ However, despite the difficulty, sufficient evidence exists to show that the leadership directed intelligence collection and dissemination for the purpose of making the case for war would meet the definitions of both planning and preparation. As stated above, the difficulty would be in proving the *mens rea* of those who could be charged as individual defendants.

c. Act of Aggression Element

A crime of aggression cannot consist merely of the conduct of a person or group of persons in a leadership position.²⁴⁴ In order for a crime of aggression to exist, “the planning, preparation, initiation or execution” of an act of aggression must take place.²⁴⁵ An act of aggression requires 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 U.N. Charter.²⁴⁶ While this comment does not endorse the contention that the U.S./U.K. military operations in Iraq were acts of aggression, the military operations that took place in Iraq, if undertaken for the purpose of regime change, would clearly be unlawful and inconsistent with the U.N. Charter.²⁴⁷ Article 8 *bis* contains a non-exhaustive list of acts of armed force which qualify as aggression, some of which could be applicable to U.S./U.K. military operations within Iraq.²⁴⁸ The acts from this list most applicable to the military operations in Iraq that could qualify as acts of aggression are the following.²⁴⁹

- (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

241. *Id.*

242. *See* Butler Report, *supra* note 211 (assessing the intelligence available to the U.K. government and the U.K.’s use of the intelligence).

243. *See* BBC Panorama, *supra* note 228 (opining on the use of intelligence to make the case for war by Director of French Foreign Intelligence, Pierre Brochand).

244. *See* Rome Statute, *supra* note 14, art. 8 *bis* (arguing for the necessity of going beyond the person in charge to exercise effective control over crime of aggression).

245. *Id.*

246. *Id.*

247. *See* Jack Straw, Supplementary Memorandum submitted to the Iraq Inquiry 8 (February 2010) (“[N]either self-defence [sic] nor overwhelming humanitarian necessity could provide a proper legal base for a possible invasion of Iraq.”).

248. *See* Rome Statute, *supra* note 14, art. 8 *bis* (defining the crime of aggression and setting forth the elements of the crime).

249. *Id.*

another State or the use of any weapons by a State against the territory 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,²⁵⁰

If determined to be inconsistent with the U.N. Charter, such acts would qualify as the requisite acts of aggression that resulted from the crime of aggression by a person or persons in a position to effectively exercise control over or to direct the political or military action of a state.²⁵¹ Under article 39 of the U.N. Charter, the Security Council is charged with making the determination of acts of aggression,²⁵² which are by definition inconsistent with the U.N. Charter.²⁵³ However, if the Prosecutor of the ICC were to conclude there is a reasonable basis to proceed with an investigation with respect to a crime of aggression, the Prosecutor must ascertain whether the Security Council has made such a determination and notify the Secretary-General of the situation.²⁵⁴ If the Security Council has made a determination of an act of aggression, the Prosecutor may proceed.²⁵⁵ If no such determination is made within six months, the Prosecutor may proceed if the Pre-Trial Chamber of the ICC authorizes an investigation and the Security Council has not decided against it.²⁵⁶

d. Awareness of Factual Circumstances Establishing Such a Use of Force was Inconsistent with the U.N. Charter

Element four of the crime of aggression requires the perpetrator to have knowledge of the factual circumstances that establish that the act of aggression itself was inconsistent with the U.N. Charter.²⁵⁷ In order to satisfy this element, evidence would be required which established the accused's knowledge of the fact that the use of force which constituted the act of aggression was inconsistent with the U.N. Charter.²⁵⁸ While this requires the establishment of a mental element and a showing of an accused's thought processes, only knowledge of factual circumstances are required, not a legal evaluation.²⁵⁹

In the context of U.S./U.K. military operations, a great deal of evidence has been put forth in both the Butler Report and through testimony and evidence submitted during the Chilcot Inquiry demonstrating knowledge that war for the

250. *Id.* art. 8 *bis*, ¶ 2.

251. *Id.* art. 8 *bis*.

252. U.N. Charter art. 39.

253. G.A. Res. 3314 (XXIX), *supra* note 39.

254. Rome Statute, *supra* note 14, at art. 15 *bis*, ¶ 2.

255. *Id.* ¶ 3.

256. *Id.* ¶ 4.

257. Resolution RC/Res.6, *supra* note 16.

258. *Id.*; *see also* Coordinator of the Working Group on the Crime of Aggression, Report of the Working Group on the Crime of Aggression (9 June 2009) (reporting on the Working Group's meetings and discussions of crimes of aggression and solutions).

259. Coordinator of the Working Group on the Crime of Aggression, *supra* note 258; *see also* Resolution RC/Res.6, *supra* note 16 (indicating no requirement for legal evaluation).

purpose of regime change would be clearly unlawful and thus inconsistent with the U.N. Charter.²⁶⁰ However, even if the crime of aggression was available as a means of prosecution during these military operations, one of the difficulties in efforts to prosecute would be in showing that the purpose or intent of the planning, preparation, initiation, or execution of the act of aggression was regime change, as opposed to planning and preparation for cited purposes such as efforts to apply maximum pressure on the Saddam regime by building up military capability and threat.²⁶¹ This could perhaps be shown through presentation of evidence demonstrating U.K. knowledge that military action for the purpose of regime change was unlawful²⁶² or of the rejection of legal advice stating that use of force to ensure U.N. Security Council compliance would amount to a crime of aggression.²⁶³ Additionally, evidence such as Jonathon Powell's letter to the Prime Minister demonstrating the creation of a plan for regime change would be particularly persuasive in showing both the planning and preparation for an act of aggression which was inconsistent with the U.N. Charter.²⁶⁴ However, the presence of opposing views as to the lawfulness of military action in Iraq, such as those raised by Foreign Secretary Jack Straw, may indicate a lack of knowledge of factual circumstances which establish that the act of aggression itself was inconsistent with the U.N. Charter.²⁶⁵

e. Character Gravity and Scale Constituted a Manifest Violation of the U.N. Charter

The fifth element of this crime functions as the threshold element to the act of aggression.²⁶⁶ This element requires that the act of aggression constitutes a manifest violation of the U.N. Charter.²⁶⁷ The term "manifest" within Article 8 is somewhat vague but was chosen after the rejection of alternate terms such as "serious" or "flagrant".²⁶⁸ In his work *Second Thoughts on the Crime of Aggression*, Andreas Paulus, a Professor of International and Public Law, examines the term "manifest" in the context of the Vienna Convention on the Law of Treaties and juxtaposes the treaty meaning with the lexical meaning contained in the Oxford Dictionary.²⁶⁹ The Vienna Convention on the Law of Treaties states that "a violation of domestic law can be invoked as manifest 'if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good

260. Straw, *supra* note 247, ¶ 8.

261. See *supra* note 230 and accompanying text.

262. *Id.*

263. Straw, *supra* note 247, ¶ 16.

264. See *supra* note 230 and accompanying text.

265. See Straw, *supra* note 247 (advocating for the position that there were opposing viewpoints about the legality of military intervention in Iraq)

266. Coordinator of the Working Group on the Crime of Aggression, *supra* note 258, at 7.

267. Resolution RC/Res.6, *supra* note 16.

268. Andreas Paulus, *Second Thoughts on the Crime of Aggression*, 20 EUROPEAN J. INT'L L. 1117, 1121 (2009).

269. *Id.*

faith.”²⁷⁰ This treaty parallels the definition contained in the *Oxford English Dictionary*, which defines the term “manifest” as “clearly revealed to the eye, mind, or judgment; open to view or comprehension; obvious.”²⁷¹

Based on these definitions, it appears that the use of this threshold element in the crime of aggression was meant to exclude borderline cases from ICC adjudication.²⁷² It refers to clear or obvious violations of the U.N. Charter and can be established through the listed characteristics of scale, gravity and character of the violation.²⁷³ While these characteristics are not explicitly defined, in the context of the U.S./U.K. military operations in Iraq, the contention that these characteristics were met is bolstered by the statement of Secretary-General Kofi Annan that the Iraq war was illegal and not in conformity with the U.N. Charter.²⁷⁴ If the war was illegal, it would certainly appear that the requirements of character, scale, and gravity were met, as the military operations conducted fall expressly into those acts designated as acts of aggression in Article 8 *bis*(2).²⁷⁵ While the need to address this element of the crime of aggression may arise in some situations where cases are not clear violations of the Charter, it does not appear that more than a cursory review of the U.N. Charter would be needed to show that the U.S./U.K. military operations in Iraq, if undertaken for the purpose of regime change, could constitute a manifest violation of Article 2 paragraph 4 of the U.N. Charter.²⁷⁶

f. Awareness of Factual Circumstances Establishing such a Manifest Violation of the U.N. Charter

Element six, the final element of the crime of aggression, creates the specific

270. *Id.*; The Vienna Convention on the Law of Treaties, 27 Jan. 1980, art. 46(2), 1155 U.N.T.S. 331.

271. Paulus, *supra* note 268 (quoting Oxford English Dictionary Online (June 2009), <http://dictionary.oed.com> (last visited Oct. 11, 2009)).

272. Mary Ellen O’Connell & Mirakmal Niyazmatov, *What is Aggression: Comparing the Jus ad Bellum and the ICC Statute*, 10 J. INT’L. CRIM. JUST. 189, 201 (2012).

273. *Id.* at 203–204.

274. See Ewan MacAskill & Julian Borger, *Iraq war was illegal and breached UN charter, says Annan*, THE GUARDIAN (Sept. 16, 2004), <http://www.theguardian.com/world/2004/sep/16/iraq.iraq> (discussing statement of U.N. Secretary-General Kofi Annan that Iraq war was illegal and not in conformity with the U.N. Charter); see also John H. Kim, *The Crime of Aggression Against Iraq*, CODE PINK ARCHIVES (2005), <http://www.codepinkarchive.org/downloads/CrimeofAggression-Iraq2.pdf> (stating the military invasion of Iraq violated the U.N. Charter); Nicole J.S. Davies, *The Crime of War: From Nuremberg to Fallujah: A review of current international law regarding wars of aggression*, THIRD WORLD TRAVELER (Feb. 2005), http://www.thirdworldtraveler.com/International_War_Crimes/Nuremberg_Fallujah.html (referring to Annan informing BBC that Iraq invasion was illegal under international law). *But see* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq and International Law*, 97 A. J. INT’L L. 557, 557 (2003) (stating that preemptive action in Iraq was lawful).

275. See *supra* Section III.D.

276. “All 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 the Purposes of the United Nations.” U.N. Charter art. 2, ¶ 4.

mental element requirement for element five.²⁷⁷ The required knowledge for this element is in addition to the knowledge that an act of aggression is inconsistent with the U.N. Charter that is required under element four.²⁷⁸ The reasoning behind this requirement is to ensure that an accused person has the requisite knowledge that a use of force is not only an act of aggression but also that act of aggression was a manifest violation of the U.N. Charter based upon the character, gravity, and scale.²⁷⁹ The term “manifest violation” is an objective qualification and ensures that the determination of that qualification is a matter for court determination.²⁸⁰ However, this determination requires the assessment of the character, gravity, and scale to ensure borderline cases that are not manifest violations are not prosecuted as crimes of aggression.²⁸¹ In the non-paper, the coordinator of the Working Group on the Crime of Aggression provided an example of an act of aggression that by its character, gravity, and scale did not amount to an act of aggression:²⁸² “[f]or example, an accused may be aware of a movement of some troops across a State border but not aware of the scale of the attack.”²⁸³ The high threshold of the crime of aggression is created by the combined terms in the phrase “by its character, gravity, and scale, constitute a manifest violation.”²⁸⁴ This phrase is buttressed by Understanding 7 of the crime of aggression Resolution 6.²⁸⁵ The Understanding states that no one component can be significant enough to satisfy the “manifest” standard by itself.²⁸⁶ Thus, more than one of the three components must be present to justify the manifest violation.²⁸⁷

Based purely upon military operations, the characteristics of the military operations likely meet the high threshold requirements establishing a manifest violation of the U.N. Charter. The U.S./U.K. military operations in Iraq could arguably be characterized by at least three of the seven acts of aggression listed in Article 8 *bis*:

- (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;

...

277. Coordinator of the Working Group on the Crime of Aggression, *supra* note 258, at 7.

278. *Id.*

279. *Id.*

280. *Id.*

281. *See id.* (arguing for different elements required to be determined as manifest of violation).

282. *Id.*

283. Coordinator of the Working Group on the Crime of Aggression, *supra* note 258, at 7.

284. *Id.*

285. Resolution RC/Res.6, *supra* note 16.

286. *Id.*

287. *Id.*

(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 . . .²⁸⁸

The use of armed force by a coalition of U.S., U.K., Australian, and Polish troops against the sovereignty, territorial integrity or political independence of Iraq began on March 21, 2003 with a massive air assault on Iraq in violation of Article 8 *bis*(2)(b).²⁸⁹ During the invasion, nearly 29,200 munitions were dropped as a part of the aerial campaign.²⁹⁰ This bombardment was followed by the subsequent invasion and attack by the armed forces of the coalition on Iraqi territory during which military troop levels within the coalition forces were approximately 173,000 at the start of the conflict.²⁹¹ This invasion involved the use of armed force against the sovereignty, territorial integrity, or political independence of Iraq,²⁹² and was an attack on the armed forces of a State on the land, sea, or air forces, or marine and air fleets of another State²⁹³ on a massive scale that resulted in regime change.²⁹⁴ The military operations considered here appear to lack the character and are likely of too great a scale to be considered a borderline case such as a border incursion.²⁹⁵ Rather, they bear the characteristics of actions that would constitute a manifest violation of the U.N. Charter and thus would likely be open to prosecution had they occurred after the crime of aggression's entry into force.²⁹⁶

IV. CONCLUSION

With the growth of the international intelligence community, the acceptance of many intelligence activities through implicit authorization, and the multilateral sharing of intelligence data discussed above, the view that intelligence collection is emerging as a norm may be an accurate assessment worthy of review. However, it appears likely that after the ICC is able to exercise jurisdiction over the crime of

288. Rome Statute, *supra* note 14, art. 8 *bis*.

289. *See A day of sirens, bombs, smoke and fires: 'Shock and awe' phase is underway*, CNN.COM (Mar. 21, 2003, 7:14 AM), <http://edition.cnn.com/2003/WORLD/meast/03/21/sprj.iq.aday/> (describing damages done to Iraq by the Coalition attacks); *see also* Rome Statute, *supra* note 14, art. 8 *bis*, ¶ 2(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"). The Coalition invaded Iraq and deposed the Ba'athist government of Saddam Hussein.

290. T. MICHAEL MOSELEY, LT. GEN. USAF COMMANDER, OPERATION IRAQI FREEDOM: BY THE NUMBERS, ASSESSMENT AND ANALYSIS DIVISION 11 (Apr. 30, 2003), http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf.

291. MICHAEL E. O'HANLON & IAN LIVINGSTON, IRAQ INDEX TRACKING VARIABLES OF RECONSTRUCTION & SECURITY IN POST-SADDAM IRAQ 13 (Jan. 31, 2011), <http://www.brookings.edu/~media/Centers/saban/iraq-index/index20120131.PDF>.

292. Rome Statute, *supra* note 14, art. 8 *bis*, ¶ 2(a).

293. *Id.*

294. *See* KENNETH KATZMAN, CONG. RESEARCH SERV., RL31339, IRAQ: U.S. REGIME CHANGE EFFORTS AND POST-SADDAM GOVERNANCE 1 (2004), <http://fpc.state.gov/documents/organization/38004.pdf> (stating the Saddam regime was overthrown and replaced with a new regime).

295. Coordinator of the Working Group on the Crime of Aggression, *supra* note 258, at 7.

296. Rome Statute, *supra* note 14, art. 8 *bis*, ¶ 1.

aggression, and intelligence developed for the purpose of planning, preparation, initiation, or execution of acts of aggression may be subject to prosecution.²⁹⁷ If a person controls or directs an act of aggression through the political or military action of a state, based on its character, gravity and scale, the act would be a manifest violation of the U.N. Charter, the direction of such intelligence could constitute a crime subject to ICC jurisdiction if an act of aggression actually occurred. An examination of a crime of aggression based on intelligence direction, collection, and use would require a case by case inquiry.²⁹⁸ This inquiry would necessarily entail an examination of the person directing such activities, the reasons behind the directing of the collection, and evidence of why such direction occurred.²⁹⁹ If the direction for the use of intelligence was predicated on a policy decision of making a case for war in such a way that is an action promoting the military, economic, and psychological preparations for war, then based upon the historical context of the Nuremberg Trials and the current definition and the elements of the crime, this action would fall under the jurisdiction of the ICC as a crime of aggression.

While it is likely that the actions of leadership in directing intelligence collection and dissemination for the purpose of making a case for war could potentially subject these persons to prosecution under the crime of aggression after its entry into force, this possibility presupposes the use of intelligence to enter an aggressive war that is inconsistent with the U.N. Charter.³⁰⁰ This, however, does not create a new prohibition on intelligence use or dissemination. It simply requires the government intelligence users to carefully consider information sources and formulate policy based upon intelligence rather than fixing facts and directing intelligence to support desired policy. While the possibility of the scrutiny of the international legal community over intelligence-based decision-making could influence states to consider discussions over a framework to regulate intelligence collection and dissemination rather than allow this activity to become subject to examination and adjudication by ICC judges, it is not likely that considerations of these discussions are forthcoming prior to the 2017 date when this activity could become subject to such scrutiny.

297. *Id.*

298. *See, e.g.,* Straw, *supra* note 247.

299. *Id.*

300. G.A. Res. 3314 (XXIX), *supra* note 39.