12. I would question whether, as ruled by the United States Military Tribunal in *United States of America v Ernst von Weizsäcker et al* at p 319 of its judgment of 11–13 April, 1949, “aggressive wars and invasions have, since time immemorial, been a violation of international law, even though specific sanctions were not provided.” It may, I think, be doubtful whether such wars were recognised in customary international law as a crime when the 20th century began. But whether that be so or not, it seems to me clear that such a crime was recognised by the time the century ended.

13. It is, I think, enough to identify the major milestones along the road leading to this conclusion. A draft Treaty of Mutual Assistance, sponsored by the League of Nations, described aggressive war as an international crime in 1923. In the following year the same description was used in the preamble to a protocol recommended by the League of Nations Assembly but not ratified. In 1927 the League of Nations Assembly unanimously adopted a preamble which used that description. The Pan-American Conference in 1928 unanimously resolved that “war of aggression constitutes an international crime against the human species”. In the same year the General Treaty for the Renunciation of War (94 LNTS 57, the “Kellogg-Briand Pact”) condemned recourse to war as an instrument of international policy.

14. The Second World War gave new impetus to this movement. The Charter of the United Nations, in its preamble and in article 2(4), set its face against the threat and use of force. Article 6 of the Charter of the International Military Tribunal [*textbook §8.5.B.*] established to try major war criminals of the European Axis at Nuremberg defined its jurisdiction as including

(a) Crimes against peace. Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

The International Military Tribunal convicted a number of defendants of offences under this head. By General Assembly Resolution 95(1) of 11 December 1946 the principles recognised by the Charter of the International Military Tribunal and its judgment were affirmed. The Charter of the International Military Tribunal for the Far East was, save for an immaterial difference of wording, to the same effect as article 6(a). Law No 10 of the Control Council for Germany (20 December 1945) recognised a crime against peace in very similar terms.

15. The condemnation of aggressive war found further expression in General Assembly Resolutions 2131(xx) of 21 December 1965, 2625(xxv) of 24 October 1970 and 3314 (xxix) of 14 December 1974, in the last of which the definition of an act of aggression in contravention of the Charter was approved as including:
(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 …

(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.

In 1954 the International Law Commission, in a Draft Code of Offences against the Peace and Security of Mankind, defined as such offences

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

16. In a further ILC draft code of 1996, article 1(2) declares that “Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.” Thus, as the commentary (paragraph (9)) makes clear, they are crimes “irrespective of the existence of any corresponding national law.” Article 2 of the code provides, as was established at Nuremberg, that individuals are personally responsible for crimes committed under international law. Article 16 addresses the crime of aggression and provides that

An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

Paragraph (14) of the commentary on article 8 makes plain that

An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State.

But article 16 establishes, as was held at Nuremberg and other post-war trials, that aggression is a leadership crime: it cannot be committed by minions and footsoldiers. Article 8, addressing jurisdiction, provides that jurisdiction over the crime of aggression shall rest with an international criminal court, but without precluding trial of its own nationals alleged to have committed that crime by a state whose leaders participated in an act of aggression.

17. In the Rome Statute of the International Criminal Court 1998 the jurisdiction of the court is limited by article 5 to “the most serious crimes of concern to the international community as a whole.” These are: the crime of genocide; crimes against humanity; war crimes; and the crime of aggression. But, by article 5(2), the court is not to exercise jurisdiction over the crime of aggression until a provision is adopted defining the
crime and setting out the conditions under which the court may exercise jurisdiction with respect to it.

18. In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v United States)* [a textbook §9.2 principle case] para 190, the prohibition on the use of force in article 2(4) of the United Nations Charter was accepted as jus cogens, a universally recognised principle of international law. As [Oxford] Professor Brownlie has observed ( *Principles of Public International Law*, 5th ed (1998), p 566), “whatever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law.”