

7-1-2016

Closing Impunity Gaps for the Crime of Aggression

Jocelyn Getgen Kestenbaum

Follow this and additional works at: <https://chicagounbound.uchicago.edu/cjil>

Recommended Citation

Kestenbaum, Jocelyn Getgen (2016) "Closing Impunity Gaps for the Crime of Aggression," *Chicago Journal of International Law*. Vol. 17: No. 1, Article 2.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol17/iss1/2>

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in Chicago Journal of International Law by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Closing Impunity Gaps for the Crime of Aggression

Jocelyn Getgen Kestenbaum*

Abstract

As stated at Nuremberg, the crime of aggression is the “supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” International instruments clearly and repeatedly have outlawed initiating wars of aggression and other illegal uses of armed force. States parties recently have defined and codified the crime in the Rome Statute of the International Criminal Court (ICC) and delineated the scope of the ICC’s jurisdiction over aggression. Although the ICC is an important mechanism for accountability and justice, it is not certain when it will be able to adjudicate the crime of aggression. Moreover, the ICC will not have jurisdiction to prosecute all individuals who wage aggressive war, nor will it be free of political cooptation by states parties interested in quashing attempts to seek justice for acts of aggression committed by their leaders. Consequently, advocates combating impunity for international crimes should continue to view the ICC as a court of last resort, especially for prosecuting cases of aggression. Despite the many legal and political challenges, primary responsibility for prosecuting individuals for the use of armed force in violation of the U.N. Charter—the crime of aggression—should still rest with national courts.

Once aggression is criminalized at the domestic level, three types of extraterritorial jurisdiction—passive nationality jurisdiction, protective jurisdiction, and universal jurisdiction—are avenues for enabling criminal prosecution of leaders who illegally use armed force. This Article examines each of these principles, their potential, and the challenges inherent in prosecuting the crime of aggression in national courts. In addition, it supports scholars’ arguments for expanding national-level jurisdiction over crimes of aggression committed domestically and internationally, finding that the crime of aggression is among the ‘core’ international crimes demanding accountability at the domestic level. It challenges arguments put forth by some scholars that

* The author would like to thank Benjamin B. Ferencz for his comments and feedback in writing this article. His inspiring and unwavering sense of justice toward ending aggressive war is second to none. The author would also like to thank Professors Carolyn Patty Blum, Gabor Rona, Deborah Pearlstein, Eda Katherine Tinto, Binny Miller, and Warren Binford, as well as Federica D’Alessandra and the NYU Writer’s Workshop participants for their invaluable comments on earlier drafts. Additionally, the author thanks the CJIL student editors for their thoughtful and excellent editing.

national legislatures and prosecutors should not criminalize or prosecute individuals who wage aggressive war and finds that domesticating international criminal law, including outlawing the crime of aggression, is essential to achieve more effective prosecution of aggression. Unless additional exceptions are made to the current legal structures, however, the challenges of bringing perpetrators of aggressive war to justice under domestic law are considerable. Individual states, therefore, should (1) exercise jurisdiction and prosecute the crime whenever possible, and (2) consider ways to widen domestic avenues for justice in cases of aggression.

Table of Contents

I. Introduction.....	53
II. Crime of Aggression under International Law	57
A. From Nuremberg to Kampala and Beyond.....	57
B. A Crime Different from Other Core Crimes.....	62
1. State act of aggression.	62
2. Jus ad bellum v. jus in bello.	62
3. Leadership element.	63
III. Adjudicating the International Crime of Aggression in Domestic Courts....	64
A. Territorial Jurisdiction, Including Territorial Effects	65
B. Extraterritorial Jurisdiction.....	66
1. Active and passive nationality jurisdictions.....	67
2. Protective jurisdiction.....	68
3. Universal jurisdiction.....	69
IV. Domestic Jurisdictions and the Crime of Aggression: An Impossible Relationship?	72
A. State Sovereignty and Par in Pare Non Habet Imperium	72
B. Challenges to Domestic Prosecutions of the Crime of Aggression	75
1. Politicization of aggression trials.	75
2. Aggressor state incentive to shield individual aggressors from punishment.....	75
3. Victim state's inability to prosecute and lack of incentives for third-party states.....	76
4. Jurisdictional immunities of high-ranking government officials.....	77
5. Act of State and Political Question Doctrines.....	78
V. Conclusion.....	79

I. INTRODUCTION

Nuremberg was a watershed moment for holding individuals accountable for waging aggressive war. From 1946 to 1948, the Nuremberg International Military Tribunal and the International Tribunal for the Far East tried and convicted several individuals for “crimes against peace,”¹ the legal term for what international law today defines as the crime of aggression.² Crimes against peace included the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances.”³ At the end of World War II, the crime of aggression was coined the “supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁴

Since then, however, courts have not enforced the international crime of aggression, even though states and their leaders have continued to engage in the illegal use of armed force against other states in violation of the U.N. Charter.⁵ The lack of a clear definition for the crime of aggression, the politics of the Cold

¹ One particular defendant, the head of the Nazi Party Chancellery, Rudolf Hess, was convicted solely of conspiring to commit crimes against peace. Hess was found to have used his official position to take part in the political planning of wars of aggression. “As deputy to the Führer, Hess was the top man in the Nazi Party with responsibility for handling all Party matters, and authority to make decisions in Hitler’s name on all questions of Party leadership . . . Hess was an informed and willing participant in German aggression against Austria, Czechoslovakia, and Poland.” *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 275-76 (1947) [hereinafter International Military Tribunal (Nuremberg)].

² Charter of the International Military Tribunal, annexed to the London Agreement on War Criminals, art. 6(a), Aug. 8, 1945, 59 Stat. 1546, 1547, 82 U.N.T.S. 284, 288 [hereinafter Nuremberg Charter]. Rudolf Hess was sentenced to life imprisonment. Eleven other defendants were also convicted of crimes against peace—Göring, Ribbentrop, Keitel, Rosenberg, Frick, Funk, Dönitz, Raeder, Jodl, Seyss-Inquart, and Neurath. *See generally* International Military Tribunal (Nuremberg), *supra* note 1; Charter of the International Military Tribunal for the Far East, art. 5, Jan. 19, 1946, T.I.A.S. No. 1589 [hereinafter Tokyo Tribunal], <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0020.pdf>.

³ Nuremberg Charter, *supra* note 2, art. 6(a).

⁴ International Military Tribunal (Nuremberg), *supra* note 1, at 186. At the time, the crime of aggression was established as a “crime against peace,” but the concept has remained essentially the same in terms of individual criminal accountability. *See* International Military Tribunal (Nuremberg), *supra* note 1, at 186. *Cf.* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁵ U.N. Charter arts. 2(3)–(4). *See, for example*, Claus Kreß, *The Iraqi Special Tribunal and the Crime of Aggression*, 2 J. INT’L CRIM. JUST. 347, 347 (2004) (stating that legal scholars agree that Iraq’s invasion of Kuwait to annex its territory amounted to a war of aggression); Michael J. Glennon, *The Blank Prose Crime of Aggression*, 35 YALE J. INT’L L. 71, 73, 91-95 (2010) (finding that every U.S. President since John F. Kennedy could have been subject to prosecution for the crime of aggression, citing several examples, including the 1961 U.S. invasion of Cuba at the Bay of Pigs, the 1983 U.S. invasion of Grenada, and the 2003 U.S. invasion of Iraq).

War and post-Cold War world order, and the evolving nature of conflict have contributed to this 70-year hiatus in justice and accountability for aggression.⁶

Current events, however, demonstrate a pressing need to criminalize aggression in order to deter leaders from waging aggressive war. Most recently, in 2014, Russian forces deliberately invaded Ukrainian territory on several occasions, seizing or blockading various airports and other strategic sites, and occupying and then annexing Crimea.⁷ These acts are likely to be found in violation of the U.N. Charter's prohibition of the use of force⁸ and other international agreements.⁹ These events come at a moment when the states parties to the International Criminal Court (ICC) have furthered the anti-aggression agenda by agreeing on a definition of the crime and a future potential international mechanism for accountability.¹⁰ It is unlikely, however, that Russian leaders responsible for such acts will ever face trial for waging aggressive war. How, then, can the international community work toward closing the impunity gaps for crimes of aggression?

During the Rome Conference negotiations over the scope of the international crimes to be covered by the ICC, the most contentious discussions

⁶ See, for example, Glennon, *supra* note 5, at 91–95.

⁷ See, for example, Mark Maddell, G7 Warns Russia on 'Annexing' Crimea, BBC (Mar. 12, 2014), <http://www.bbc.com/news/world-europe-26547138>; Russian armed forces seize Crimea as Putin threatens wide military invasion of Ukraine, KYIV POST (Mar. 2, 2014), <http://www.kyivpost.com/content/ukraine/tensions-rise-in-armed-standoff-in-crimea-between-ukrainian-and-russian-backed-forces-337942.html>.

⁸ The U.N. Charter prohibits the use of force except in cases of self-defense or Security Council authorization. U.N. Charter arts. 2(3)–(4) & 51 (Article 2(3) mandates member states to “. . . settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” Article 2(4) requires that states “. . . 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.” Article 51 enumerates exceptions to the prohibition, noting that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”); see Peter M. Olsen, *The Lawfulness of Russian Use of Force in Crimea*, 53 MIL. L. & L. WAR REV. 17, 19 & 39 (2014) (arguing that Russia's use of force in Crimea was unlawful and illegal); Ruwanthika Gunaratne, *Debate map: Ukraine/Crimea*, PUBLIC INT'L LAW, <https://ruwanthikagunaratne.wordpress.com/2014/03/14/oup-debate-map-on-crimea/> (listing many sources on various sides of the debate).

⁹ MEMORANDUM ON SECURITY ASSURANCES IN CONNECTION WITH UKRAINE'S ACCESSION TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS, U.N. Doc. A/49/765 (Dec. 19, 1994), https://www.msz.gov.pl/en/p/wiednobwe_at_s_en/news/memorandum_on_security_assurances_in_connection_with_ukraine_s_accession_to_the_treaty_on_the_npt?printMode=true.

¹⁰ ASSEMBLY OF STATES PARTIES RES. RC/RES.6, ANNEX III, 22 (JUNE 11, 2010), <http://crimeofaggression.info/documents/6/Review-Conference-official-records-ENG.pdf> [hereinafter *Kampala Amendments*].

revolved around the crime of aggression.¹¹ The Rome Statute of the ICC enumerates the crime of aggression as a “core” international crime, i.e. one of the “most serious crimes of concern to the international community.”¹² Eight years later, the ICC’s Assembly of States Parties (ASP) adopted the Kampala Amendments, which define the crime of aggression, outline the ICC’s jurisdiction over the crime,¹³ and determine the procedure and conditions for its entry into force.¹⁴

Although the ICC is an important mechanism for international accountability, it is uncertain when it will be able to adjudicate the crime of aggression. Moreover, it will not have jurisdiction to prosecute all individuals who wage aggressive war, nor will it be free of political cooptation by states parties interested in quashing attempts to seek justice for acts of aggression committed by their leaders. These jurisdictional limitations at the international level also elevate the importance of domestic jurisdictions in prosecuting the crime of aggression.¹⁵

As with all contested political debates, the final definition and jurisdictional preconditions of the crime, although reached by consensus, were the product of many compromises among states parties. Even after reaching such compromises, states parties must still individually ratify and vote to activate the ICC’s jurisdiction over the crime sometime after January 2017.¹⁶ For advocates combating impunity for international crimes, the ICC is a court of last resort, including for the crime of aggression. Primary responsibility for prosecuting the crime of aggression still

¹¹ See Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT’L L. 82, 85 (2011).

¹² Rome Statute, *supra* note 4, art. 5(1).

¹³ Kampala Amendments, *supra* note 10. The Rome Statute contains complex provisions on the conditions for the exercise of jurisdiction over the crime of aggression. The ICC can take action against alleged perpetrators of aggression once 30 states parties ratify the Kampala Amendments and the ASP decide by a two-thirds majority to activate the ICC’s jurisdiction. After January 1, 2017, the ICC can begin investigating and prosecuting the crime of aggression if either: (1) the U.N. Security Council refers the situation to the ICC; or (2) a state party refers a situation or the Prosecutor starts an investigation *proprio motu*, the states involved in the situation are parties to the Rome Statute, at least one of the states involved has ratified the amendment, and the alleged aggressor state party has not opted out of the ICC’s jurisdiction over the crime of aggression. See Rome Statute, *supra* note 4, art. 13(b)–(c).

¹⁴ Kampala Amendments, *supra* note 10; THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 3 (Stefan Barriga & Claus Kreß eds., 2012). The compromise includes a clause that prevents the ICC from exercising jurisdiction over the crime of aggression immediately. Instead, the ASP will have to make a further decision to activate the ICC’s jurisdiction no earlier than 2017. Also, one year must have passed since the 30th ratification before the ICC can exercise its jurisdiction over the crime of aggression. Kampala Amendments, *supra* note 10, art. 15 *bis* ¶¶ 2, 3.

¹⁵ *But see* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT’L L. 257, 262–273 (2015).

¹⁶ Kampala Amendments, *supra* note 10, art. 15 *bis* ¶ 3.

rests with national courts.¹⁷ Moreover, the Kampala Amendments have resulted in less power, authority, and independence over the crime of aggression for the ICC as compared to other core international crimes over which the ICC has jurisdiction. This decrease in power, authority, and independence is because the ICC must defer to a U.N. Security Council decision as to whether a state has committed an act of aggression.¹⁸ What is more, the ICC's jurisdiction generally does not extend to states that have not ratified the Rome Statute, and many of the more powerful states that stand accused of using illegal armed force are not states parties to the Rome Statute. The challenge is to find a narrow window of possibility within politics, sovereignty, and law where domestic legal systems can and will exercise jurisdiction over the crime of aggression.

This Article examines that narrow window of possibility for combating impunity for waging aggressive war. Section II briefly traces the development of the crime of aggression under customary international law and the ICC. Section III discusses types of territorial and extraterritorial jurisdiction—passive personality jurisdiction, protective jurisdiction, and universal jurisdiction—that are possible alternate avenues for adjudicating the crime of aggression at the national level. Section IV then addresses the numerous challenges to domestic prosecutions of aggression under these types of extraterritorial jurisdiction, owing to the legal obstacles and potential for politicization of the crime's prosecution *inter alia*.

Ultimately, this Article supports and extends scholars' arguments for expanding national criminal jurisdiction, finding that the crime of aggression also must be considered among the "core" international crimes in need of accountability mechanisms at the domestic level. It challenges the arguments put forth by some scholars that national jurisdictions should not criminalize or prosecute individuals who wage aggressive war and finds that domesticating international criminal law, including the crime of aggression, is part of the evolving international acceptance of human rights and condemnation of impunity for the most heinous international crimes. In the end, this Article concludes by recognizing that it will still be difficult to convict perpetrators of aggression at the domestic and international levels and offers suggestions toward overcoming challenges to prosecuting the crime of aggression.

¹⁷ See *infra* note 70; Rome Statute, art. 17 (Only when a state is unable or unwilling to prosecute for international crimes under its jurisdiction will the Court exercise its jurisdiction under the principle of complementarity.).

¹⁸ Kampala Amendments, *supra* note 10, art. 15 *bis* ¶ 6.

II. CRIME OF AGGRESSION UNDER INTERNATIONAL LAW

A. From Nuremberg to Kampala and Beyond

The Rome Conference was not the first time the international community of states criminalized aggression. The modern notion that states should settle disputes peacefully before resorting to war dates back to the Peace of Westphalia of 1648,¹⁹ and the definition of aggression as both a violation of international law and an international crime has been evolving since the early 20th century.²⁰

International law first specifically prohibited states from engaging in aggressive war with the Kellogg-Briand Peace Pact of 1928.²¹ Individual criminal responsibility for aggressive war making began even earlier when, after World War I, the Versailles Treaty of 1919 established a special tribunal to hold the German Kaiser criminally liable for “a supreme offence against the international morality and the sanctity of treaties.”²² Less than three decades later, the International Military Tribunal at Nuremberg prosecuted Nazi war criminals for “crimes against peace,”²³ finding aggression to be a crime under customary international law.²⁴ The Allied powers also convened military tribunals in Germany and the Far East, prosecuting individuals for committing “crimes against peace.”²⁵

Defining “aggression” has been a challenge for the international community since World War II. Adopted in 1945, the U.N. Charter prohibits the use of force

¹⁹ MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE, CASES AND MATERIAL* 127–29 (2d ed. 2009).

²⁰ See generally BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* (1975); OSCAR SOLERA, *DEFINING THE CRIME OF AGGRESSION* (2007).

²¹ General Treaty for Renunciation of War as an Instrument of National Policy art. I, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

²² Treaty of Versailles art. 227, June 28, 1919. The Kaiser fled to the Netherlands, which refused to extradite him to the tribunal finding that it was applying ex post facto law. See Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L. J. 161, 162 (2008) (citing Benjamin B. Ferencz, *From Nuremberg to Rome: A Personal Account*, in JUSTICE FOR CRIMES AGAINST HUMANITY 31, 31 (Mark Lattimer & Phillippe Sands eds., 2003)).

²³ “Crimes against Peace” was defined as “planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex art. VI(a), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288.

²⁴ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 October 1945–1 October 1946 (1947-1949), Vol. XXII International Military Tribunal 427 (1948), available at www.loc.gov//rr/frd/Military_Law/NT_major-war-criminals.html; International Military Tribunal (Nuremberg), *supra* note 1, at 186.

²⁵ Control Council Law No. 10, art. II, Dec. 20, 1945, *reprinted in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at xvi (1949); see Weisbord, *supra* note 22, at 165.

except in cases of self-defense or Security Council authorization,²⁶ and mentions aggression twice: first, one of the purposes of the United Nations is to suppress state acts of aggression and second, one of the Chapter VII powers of the Security Council is to determine state acts of aggression and to take action to restore international peace and security.²⁷ Aggression as a violation of international law, however, remained undefined²⁸ until the U.N. General Assembly in 1946 reaffirmed its definition under the Nuremberg Charter.²⁹

The definition has been interpreted to mean that the use of force in “serious violation” of the U.N. Charter is illegal and is *prima facie* evidence of an act of aggression.³⁰ Although scholars debate what is considered a “serious violation” of article 2(4) of the Charter, they usually argue for expanding the acceptable circumstances under which a state can resort to using military intervention or force against another state.³¹ Additionally, use of armed force for humanitarian purposes, although not expressly permitted in the U.N. Charter, is gaining acceptance among U.N. member states as a norm under the Responsibility to Protect (R2P) doctrine.³²

Similar to the problems of defining state responsibility for acts of aggression, the crime of aggression has faced definitional challenges. The U.N. General Assembly set up three Special Committees on the Question of Defining Aggression in the 1970s, but none succeeded in defining the crime.³³ The Cold

²⁶ U.N. Charter art. 2(4), 51.

²⁷ U.N. Charter art. 1(1), 39.

²⁸ See SOLERA, *supra* note 20, at 63.

²⁹ Weisbord, *supra* note 22, at 165.

³⁰ U.N. Charter art. 2(4); Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314(XXIX) at 143 (Dec. 14, 1974) [hereinafter Definition of Aggression].

³¹ CHRISTIAN HENDERSON, THE PERSISTENT ADVOCATE AND THE USE OF FORCE: THE IMPACT OF THE UNITED STATES UPON THE “JUS AD BELLUM” IN THE POST-COLD WAR ERA 198 (2010).

³² INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [hereinafter ICISS Report]; 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome Document]. *Cf.* Koh & Buchwald, *supra* note 15, at 258 (discussing problems related to the definition of the crime of aggression and humanitarian assistance, and positing that the U.S. views humanitarian intervention as a controversial concept). The Responsibility to Protect, or R2P, is a new international security and human rights norm to address the international community’s failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity. See 2005 World Summit Outcome Document, ¶¶ 138–39.

³³ Weisbord, *supra* note 22, at 165; Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance?*, 10 J. INT’L L. & ECON. 701, 707 (1975); see generally Report of the Special Committee on the Question of Defining Aggression, U.N. Doc. A/9619 GAOR, 29th Sess., Supp. No. 19 (1974); Report of the Special Committee on the Question of Defining Aggression, U.N. Doc. A/9019 GAOR, 28th Sess., Supp. No. 19 (1973); Report of the Special Committee on the

War and individual state interests thwarted advancement of efforts to define the crime under international law.³⁴ Finally, in 1974, a fourth U.N. Special Committee on the Question of Defining Aggression³⁵ drafted a definition that was unanimously adopted by the General Assembly without a vote.³⁶ In addition to defining aggression, the Resolution includes a non-exhaustive list of acts of aggression³⁷ while explicitly excluding peoples' right to self-determination from

Question of Defining Aggression, U.N. Doc. A/8719 GAOR, 27th Sess., Supp. No. 19 (1972); Report of Special Committee on the Question of Defining Aggression, U.N. Doc. A/8419 GAOR, 26th Sess., Supp. No. 19 (1971); Report of the Special Committee on the Question of Defining Aggression, U.N. Doc. A/8019 GAOR, 25th Sess., Supp. No. 19 (1970); Report of the Special Committee on the Question of Defining Aggression, U.N. Doc. A/7620 GAOR, 24th Sess., Supp. No. 19 (1969); Report of the Special Comm. on the Question of Defining Aggression, U.N. Doc. A/7402 GAOR, 23d Sess., Supp. No. 19 (1968); G.A. Res. 2330 (XXII), U.N. Doc. A/6988 GAOR, 22d Sess. (Dec. 18, 1967) (thirty-five members); G.A. Res. 895 (IX), U.N. Doc. A/RES/895(IX) (Dec. 4, 1954) (nineteen members); G.A. Res. 378/(V)(B), U.N. Doc. A/RES/378(V) (Nov. 17, 1950) (fifteen members).

³⁴ Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1181–82 (2010); Ferencz, *supra* note 33, at 708.

³⁵ G.A. Res. 2330 (XXII), U.N. Doc. A/RES/2330 (Dec. 18, 1967); Weisbord, *supra* note 22, at 168.

³⁶ Definition of Aggression, *supra* note 30, at 143.

³⁷ *Id.* Articles 3 and 4 read:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(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;

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

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

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

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

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

Article 4: The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Id. arts. 3 & 4.

the list.³⁸

Article 16 of the International Law Commission (ILC)'s 1996 draft Code of Crimes against the Peace and Security of Mankind reaffirmed the crime of aggression as a crime under international law.³⁹ Although the General Assembly had mandated the establishment of an international criminal code and court to try international crimes, including aggression, states and others argued that the General Assembly's definition of state aggression was meant strictly as guidance for the U.N. Security Council and was not binding law to hold individuals accountable for the crime of aggression.⁴⁰ At the same time, none of the international or internationalized tribunals established between the 1990s and the ICC's establishment—not even the Iraqi Special Tribunal⁴¹—included the crime of aggression within the scope of its jurisdiction.⁴²

States parties' widespread acceptance of the ICC's jurisdiction over aggression generally led to the inclusion of the crime among the list of core crimes in the original text of the Rome Statute.⁴³ However, states parties could not agree on the crime's definition, nor could they decide on the Security Council's role, if any, with respect to the crime.⁴⁴ This division led to the compromise solution to include the crime of aggression but preclude any exercise of jurisdiction until states parties agreed on a definition and the conditions under which the ICC's jurisdiction would attach.⁴⁵ Then, shortly after the Rome Statute's entry into force, the ASP established the Special Working Group on the Crime of Aggression

³⁸ *Id.* art. 3 (defining Aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . .”).

³⁹ Rep. of the Int'l L. Comm'n, 48th Sess., May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10, at 83–85 (Jan. 1, 1996).

⁴⁰ Weisbord, *supra* note 22, at 168 (2008) (citing Benjamin Ferencz, *Defining Aggression: where it Stands and Where It's Going*, 66 AM. J. INT'L L. 491, 493 (1972)). *But see* M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace*, in INTERNATIONAL CRIMINAL LAW 313, 315–16 (M. Cherif Bassiouni ed., 2d ed. 1999) (noting that “by implication and with reference to the historical context of preventing and punishing aggressive war, that definition could be used as a basis for the criminalization of aggression”).

⁴¹ Kreß, *supra* note 5, at 347–48.

⁴² Kreß & Holtendorff, *supra* note 34, at 1181.

⁴³ Rome Statute, *supra* note 4, art. 5.

⁴⁴ *See* Koh & Buchwald, *supra* note 15, at 261–63; Kreß & Holtendorff, *supra* note 34, at 1182.

⁴⁵ Rome Statute, *supra* note 4, arts. 5(1)(d), 5(2) (stating that the ICC has jurisdiction over the crime of aggression but that it “shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”).

(SWGCA) to complete the tasks left unfinished in Rome.⁴⁶ In 2009, the SWGCA submitted its proposed definition and jurisdictional conditions for the crime of aggression,⁴⁷ which formed the basis of the Kampala compromise one year later.

In 2010, at the first Review Conference on the Rome Statute, the ASP adopted by consensus Resolution RC/Res. 6 on “[t]he crime of aggression,”⁴⁸ amending the Rome Statute to both define the crime and establish the conditions for the ICC to exercise jurisdiction over it.⁴⁹ Paragraph 1 of the Rome Statute’s Article 8 *bis* reads:

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.⁵⁰

The Rome Statute’s definition of the crime of aggression departs from previous definitions of individual criminal responsibility for “crimes against peace” or aggression in important ways, including: (1) linking the crime of aggression to an *act* of aggression as opposed to a *war* of aggression, and (2) developing a threshold test requiring a *manifest* violation of the U.N. Charter.⁵¹ Previous definitions of aggression under General Assembly Resolution 3314 and the Nuremberg Charter outline criminal responsibility with regard to *wars* of aggression, as opposed to *acts* of aggression.⁵² Consequently, the Rome Statute definition expands the scope of state acts that could give rise to individual liability for the crime of aggression. In a different respect, the scope could be seen as narrower because the act must be, by its “character, gravity and scale,” a “manifest” violation of the U.N. Charter.⁵³ Thus, not all illegal uses of armed force

⁴⁶ ICC-ASP/I/Res. 1 adopted by consensus at the 3d. Plenary Meeting on Sept. 9, 2002, ICC-ASP/I/3, 328.

⁴⁷ Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 621, 621 & 640 (Roberto Bellelli ed., 2010).

⁴⁸ Kampala Amendments, *supra* note 10, art. 8 *bis*.

⁴⁹ *Id.*

⁵⁰ Rome Statute, *supra* note 4, art. 8 *bis* (1).

⁵¹ *Id.*

⁵² See Definition of Aggression, *supra* note 30, art. 5(2) (“A war of aggression is a crime against international peace.”); Nuremberg Charter, *supra* note 2, art. 6; see also Tokyo Tribunal, *supra* note 2, art. 5.

⁵³ *But see* Koh & Buchwald, *supra* note 15, at 270 (arguing that “standard definitions of the word ‘manifest’ suggest something that is evident, obvious, apparent, or plain, without necessarily connoting the egregiousness or flagrance that would ordinarily be considered essential to distinguish aggression for which individual criminal liability might lie from other illegal uses of force”).

or state acts of aggression would qualify as acts that give rise to individual criminal liability for aggression under the Rome Statute definition.

The ICC's actual exercise of jurisdiction will not take effect until there is a separate decision after January 1, 2017 taken by the majority of states parties "only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty states parties."⁵⁴ In the meantime, customary international law and codification of customary international law in domestic criminal laws are the current viable legal avenues for prosecuting the crime of aggression.⁵⁵

B. A Crime Different from Other Core Crimes

Combating impunity for the crime of aggression requires an analysis of domestic jurisdiction and customary international law. However, aggression is an exceptional crime that must first be understood in relation to other international crimes.

1. State act of aggression.

In addition to enforcement constraints at the international level outlined above, the crime of aggression is substantively different from other core international crimes—war crimes, crimes against humanity, and genocide—in that aggression is explicitly tied to state acts of aggression.⁵⁶ As a result, determining whether a defendant perpetrated the crime of aggression depends on a finding of a state act of aggression, as only states can violate the U.N. Charter. Other core international crimes do not require state action as an element of the crime.⁵⁷ Consequently, such requirements pose additional challenges, explained in Section III.B *infra*, to prosecuting the crime of aggression at the national level as compared with other core international crimes.

2. Jus ad bellum v. jus in bello.

In addition to the crime of aggression being explicitly tied to a state act of aggression, aggression is different from other core crimes in that it generally relates to the legality of the resort to war itself (*jus ad bellum*) rather than the legality of

⁵⁴ Kampala Amendments, *supra* note 10, arts. 15 *bis* (2–3), 15 *ter* (2–3); Review Conference of the Rome Statute of the International Criminal Court, ICC Doc. RC/11 (2010).

⁵⁵ See Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* 138 (2002).

⁵⁶ Rome Statute, *supra* note 4, art. 8(1) *bis*; Kampala Amendments, *supra* note 14, art. 8 *bis*. See Koh & Buchwald, *supra* note 15, at 262 (arguing that the prosecution of an individual for aggression necessarily turned on a prior determination that a state act of aggression occurred and, therefore, that the Security Council would need to make that determination).

⁵⁷ Rome Statute, *supra* note 4, arts. 5–8.

conduct during war (*jus in bello*).⁵⁸ The crime of aggression holds perpetrators to account for the preparatory action, decision, and acts related to initiating acts of aggression or a war of aggression, i.e. the use of armed force by one state against the sovereignty, territorial integrity, or political independence of another state.⁵⁹ In contrast, war crimes are acts committed in violation of the laws or customs of war, or international humanitarian law,⁶⁰ while crimes against humanity and genocide can happen during war or peacetime.⁶¹

3. Leadership element.

Furthermore, at least with regard to the ICC, the crime of aggression is understood as strictly a government leadership crime.⁶² The Rome Statute definition, which generally reflects Nuremberg precedent,⁶³ requires that the accused be “a person in a position effectively to exercise control over or to direct the political or military action of a State.”⁶⁴ Ordinary soldiers who serve in the military of an aggressor state and non-governmental actors will not be criminally liable for aggression under the Rome Statute.⁶⁵ Although customary international law⁶⁶ does not explicitly limit those capable of perpetrating aggression to high-

⁵⁸ See MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 88 (2013) (stating that the decision, at least in part, to exclude aggression in modern international criminal tribunals’ statutes reflected a recognition that aggression was a different species of offense).

⁵⁹ Rome Statute, *supra* note 4, art. 8(1) *bis*; Kampala Amendments, *supra* note 14, art. 8 *bis*.

⁶⁰ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces and the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, and CIL.

⁶¹ See Rome Statute, *supra* note 4, art. 7.

⁶² Kevin Jon Heller, Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression, 18 EURO. J. INT’L L. 477, 477–97 (2007); Claus Kreß, The Crime of Aggression Before the First Review of the ICC Statute, 20 LEIDEN J. INT’L L. 851, 855 (2007).

⁶³ *But see* Heller, *supra* note 62 at 477–97 (arguing that the jurisprudence from Nuremberg applied a ‘shape or influence’ rather than a ‘control or direct’ requirement in prosecuting the crime of aggression); Kreß, *supra* note 6262, at 855.

⁶⁴ Rome Statute, *supra* note 4, art. 8 *bis*; Kampala Amendments, *supra* note 14, art. 8 *bis*.

⁶⁵ Nor will ordinary soldiers be held to account as aiders or abettors of aggression. See Rome Statute, *supra* note 4, art. 25(3) *bis*.

⁶⁶ Customary international law is a binding source of public international law consisting of “general practice accepted as law.” Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. For a rule to be considered law under customary international law, two elements must be present: (1) state practice and (2) the belief that such practice is required as

ranking public officials, Nuremberg case law incorporates the leadership requirement as an implicit component of the crime by implicating the prosecution only of individuals with the greatest responsibility.⁶⁷ In contrast, low-ranking soldiers and private citizens can be held criminally liable for war crimes, crimes against humanity, and genocide.⁶⁸

For these and other political reasons, the international community has treated the crime of aggression as different and exceptional in nature. As a result, its definition and evolution has taken a separate trajectory from that of other core international crimes. Aggression, however, must still be viewed as a core international crime. As with other core international crimes, the principle of complementarity⁶⁹ dictates that it is the primary duty of national courts to investigate and prosecute individuals who wage aggressive war.⁷⁰ Section III looks at possible jurisdictional avenues for combating impunity for international crimes, including the crime of aggression, at the national level.

III. ADJUDICATING THE INTERNATIONAL CRIME OF AGGRESSION IN DOMESTIC COURTS

International criminal law contemplates two mechanisms for the enforcement of international crimes: national courts (indirect enforcement) and international criminal tribunals (direct enforcement).⁷¹ Thus, domestic courts with enabling statutes can prosecute any and all international crimes. Indeed, in crime of aggression cases, unless and until the ICC jurisdiction attaches sometime after 2017, there are no international mechanisms for prosecuting individuals for aggression.

a matter of law (*opinio juris*). The North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

⁶⁷ Astrid Reisinger Coracini, *Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 725, 741 (Carsten Stahn & Göran Sluiter eds., 2009).

⁶⁸ See, for example, Rome Statute, *supra* note 4.

⁶⁹ See generally John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 41 (Roy S. Lee ed., 1999).

⁷⁰ The principle of complementarity at the ICC is the notion that the ICC is a court of last resort, prosecuting international crimes only when a State is unable or unwilling to do so. See Rome Statute, *supra* note 4, at Preamble ¶ 10, art. 17. The Rome Statute specifically defers to state sovereignty by declaring the importance of ICC jurisdiction as complementing national jurisdictions. “[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” *Id.*, at Preamble ¶ 6.

⁷¹ See Coracini, *supra* note 67, at 727.

A. Territorial Jurisdiction, Including Territorial Effects

In principle, domestic courts are the ideal venue for prosecuting crimes, including international crimes. Given that the crimes occur in a particular local jurisdiction, the perpetrators, victims, witnesses and evidence are most likely to be found in that jurisdiction.⁷² Additionally, the place where the crime has been committed is the place in which the accused—unless the defendant is a foreigner—can most likely be found. Moreover, criminal trials serve expressive, cathartic and conciliatory functions for the victims and affected communities; these effects are arguably greater when the trials are held near the situs of the crimes.⁷³ Even with the advent of the International Criminal Court, the principle of complementarity dictates that the ICC supplement, but not replace, genuine criminal legal proceedings against accused persons in national courts.⁷⁴

In order to prosecute and punish the perpetrators of international crimes at the domestic level, however, states must have: (1) laws criminalizing the alleged criminal conduct at the time of commission, (2) the will to prosecute, and (3) provisions determining jurisdiction.⁷⁵ Traditional links for criminal jurisdiction to attach include principles of territoriality (the alleged criminal acts or omissions took place on the state's territory)⁷⁶ and active nationality (national criminal laws apply extraterritorially when a state's national allegedly commits criminal acts or omissions abroad).⁷⁷ For the core international crimes, however, actual prosecution under these traditional jurisdictional links is rare because of the systemic nature of the crimes⁷⁸ and the involvement of state officials as perpetrators.⁷⁹ In other words, because the state and individual state actors are largely responsible for committing war crimes, crimes against humanity, genocide

⁷² ANTONIO CASSESE ET AL., *INTERNATIONAL CRIMINAL LAW* 275 (3d ed. 2013). *See also* Coracini, *supra* note 67, at 727 (noting that the place where the crime has been committed is referred to as *locus delicti commissi*).

⁷³ *See generally* Sheri P. Rosenberg, *The Audacity of Hope: International Criminal Law, Mass Atrocity Crimes, and Prevention*, in *RECONSTRUCTING ATROCITY PREVENTION* 151 (Sheri P. Rosenberg, Tibi Galis, & Alex Zucker eds., 2016). *See also id.*, at 162 (discussing the origins of expressivism and its relevance in international criminal law); CASSESE ET AL., *supra* note 72, at 275.

⁷⁴ Rome Statute, *supra* note 4, art. 17.

⁷⁵ *See, for example*, CASSESE ET AL., *supra* note 72, at 271.

⁷⁶ *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7) [hereinafter Lotus Case].

⁷⁷ CASSESE ET AL., *supra* note 72, at 271.

⁷⁸ *See* Bert V.A. Röling, *The Significance of the Laws of War*, in *CURRENT PROBLEMS OF INTERNATIONAL LAW* 133, 137-39 (Antonio Cassese ed., 1975).

⁷⁹ *See* Paola Gaeta, *The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 596-606 (Antonio Cassese ed., 2012).

and initiating wars of aggression, the state rarely has any interest in prosecuting perpetrators in positions of state power.

In theory, international law gives primacy to states willing and able to prosecute their own nationals for aggression against another state. In practice, this is not likely to happen given the lack of political will to prosecute high-level officials, unless a change in government opens a possibility for justice in transition and true accountability for past crimes. Furthermore, the victim's state has a territorial link to prosecute as well given that the crime also occurs in its territory, or given that the effects are felt in the victim state.⁸⁰ The devastation and lack of institutional infrastructure as a consequence of war, however, may prevent a victim's state from being able to prosecute perpetrators of the aggression.

Thus, accountability in international criminal law generally—and aggression specifically—at the national level necessitates expanded notions of jurisdiction beyond the traditional criminal jurisdiction links of territoriality and active personality.⁸¹ Specifically, national courts can look to extraterritorial bases of jurisdiction. In the *SS Lotus* case, the Permanent International Court of Justice (PICJ) declared that “the principle of the territorial character of criminal law is fundamental . . . [but] is not an absolute principle of international law.”⁸² Aggression by definition involves two or more states engaging in cross-border activities; therefore, several bases of jurisdiction may be invoked to prosecute individuals at the domestic level.⁸³

B. Extraterritorial Jurisdiction

The international law bases for states' exercise of extraterritorial criminal jurisdiction⁸⁴ are derived from both customary and treaty law. Generally, all forms of extraterritorial jurisdiction stem from the notion that certain conduct outside the territory of the state creates a juridical link between the individual and the state, regardless of the nationality of the perpetrator or victim of the crime.⁸⁵

⁸⁰ See, for example, *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”).

⁸¹ See Gaeta, *supra* note 79, at 596.

⁸² *Lotus Case*, *supra* note 76, at 20.

⁸³ Coracini, *supra* note 67, at 750.

⁸⁴ This Article is specifically referring to “prescriptive” or legislative jurisdiction (as opposed to “enforcement” or adjudicative jurisdiction). CASSESE ET AL., *supra* note 72, at 278.

⁸⁵ Noah Bialostozky, *Extraterritoriality and National Security: Protective Jurisdiction as a Circumstance Precluding Wrongfulness*, 52 COLUM. J. TRANSNAT'L L. 617, 620 (2014) (citing Draft Convention on Jurisdiction With Respect to Crime, 29 AM. J. INT'L L. SUPP. 435, 555 (1935)).

Customary international law permits extraterritorial jurisdiction for international criminal prosecutions on the basis of the protective principle, the active and passive personality principles, and the universality principle.⁸⁶

Protective jurisdiction allows states to prosecute suspects of crimes that are a threat to that state's national security.⁸⁷ In addition, state practice indicates that the passive personality principle has been an accepted justification for international criminal law jurisdiction to attach.⁸⁸ Passive nationality jurisdiction allows a state to prosecute crimes committed abroad against the state's nationals.⁸⁹

Finally, under the universality principle, treaty law explicitly and implicitly permits extraterritorial jurisdiction.⁹⁰ Universal jurisdiction enables states to prosecute and try—under certain conditions—suspects of international crimes regardless of where the crimes were committed and what the nationality of the perpetrators and victims are. The following subsections will look at jurisdiction under these three domestic avenues for prosecuting international crimes.

1. Active and passive nationality jurisdictions.

A state has active and passive nationality jurisdiction, or jurisdiction over crimes committed abroad by or against its nationals. Active personality jurisdiction is based on the notion that a state's nationals must comply with domestic and international laws whether at home or abroad.⁹¹ Passive nationality jurisdiction is rooted in the ideas that a state needs to protect its nationals outside of the state's territory and that a state does not trust foreign states' exercise of jurisdiction over its nationals.⁹² In either case, jurisdiction is expanded beyond the territory of the state in order to prosecute crimes committed by or against a state's nationals regardless of where the crimes were committed.

⁸⁶ See Harold G. Maier, *Jurisdictional Rules in Customary International Law*, in EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 64, 67-68 (Karl M. Meessen ed., 1996).

⁸⁷ CASSESE ET AL., *supra* note 72, at 273.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See, for example, Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. Customary international law is less settled on this matter. See JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 456 & 467-70 (8th ed., 2012). *But see, for example*, Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, July-Aug. 2001, at 86 (giving a broad general critique of universal jurisdiction); Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Winter 2003, at 47-49 (discussing the general concept of universal jurisdiction and warning that it has the potential to engender international conflict).

⁹¹ CASSESE ET AL., *supra* note 72, at 276.

⁹² *Id.*, at 277.

For active nationality jurisdiction, states often prosecute their own nationals for what they consider criminal acts, whether or not such acts are crimes in the territorial state.⁹³ In contrast, for passive nationality jurisdiction, states usually require that the “double incrimination” principle be satisfied, i.e. the offense is criminalized in both the victim state and the territorial state.⁹⁴ The double incrimination principle falls away, however, where the crime is prohibited under international law because states no longer look to two separate domestic criminal codes but, rather, to international criminal law.

2. Protective jurisdiction.

Customary international law also allows for extraterritorial jurisdiction under the protective principle. The protective principle is the notion that states possess jurisdiction over a crime committed abroad by any individual when the crime jeopardizes the state’s “national security interests.”⁹⁵ National laws prescribing protective jurisdiction are generally seen as security exceptions and are grounded in self-defense because states view foreign states’ laws as inadequate to punish perpetrators for offenses committed against the security interests of other states.⁹⁶

International criminal law academics have argued that the protective principle is mostly irrelevant to international crimes because states do not consider these crimes as directly relevant to, or affecting, their national interests without a territorial link.⁹⁷ Aggression, however, is considered a threat to international peace

⁹³ *Id.*, at 276.

⁹⁴ *Id.*, at 277.

⁹⁵ Protective jurisdiction is understood to enable a state to exercise jurisdiction over extraterritorial conduct that is deemed prejudicial to its essential interests, including territorial integrity, political independence, and security. *See* Draft Convention on Jurisdiction With Respect to Crime, 29 AM. J. INT’L L. SUPP. 435, 555 (1935); CASSESE ET AL., *supra* note 72, at 273; Bruno Simma & Andreas Th. Müller, *Exercise and Limits of Jurisdiction*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 134, 143 (James Crawford & Martti Koskenniemi eds., 2012) (“[I]t has long been recognised that certain interests of states are so essential that acts directed against them qualify as sufficiently close to prompt those states’ jurisdiction.”); Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT’L L. 853, 859 (2002).

⁹⁶ Bialostozky, *supra* note 85, at 620 (citing League of Nations Report, *supra* note 26, at 257–58; Manuel R. García-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567, 569 (1958)) (indicating that states in Europe and Latin America that asserted protective jurisdiction in the 19th century did so as exceptions based on the principle of self-defense for acts directed against the security of the state); Maier, *supra* note 86, at 69 (“To conclude otherwise would put every state at the mercy of every person acting in every other state when the government at the *situs* of the acts has no self-interest in preventing those acts.”).

⁹⁷ *See* CASSESE ET AL., *supra* note 72, at 278.

and security⁹⁸ and therefore is potentially a national security concern to all states, especially states sharing borders with the aggressor and victim states. Thus, it is realistic to consider the possible use of protective jurisdiction to prosecute the crime of aggression at the domestic level, regardless of the *situs* of the alleged crime and nationality of the accused.

3. Universal jurisdiction.

For international crimes, states can also invoke universal jurisdiction.⁹⁹ Under the universality principle, two kinds of jurisdiction have been found: “absolute” and “conditional” universal jurisdiction. In a state with absolute universal jurisdiction, jurisdiction may attach over individuals accused of international crimes regardless of the accused or victim’s nationality, the place where the crime was committed, or where the defendant is presently located.¹⁰⁰ Under conditional universal jurisdiction, a state must first have the accused in custody before acquiring criminal jurisdiction and initiating a criminal investigation.¹⁰¹ In either case, universal jurisdiction is jurisdiction based solely on the nature of the crime—a crime that offends all of humanity—and not based on traditional jurisdictional links.

Even though universal jurisdiction has gained widespread recognition, disagreement persists as to the need for a jurisdictional link to the forum state (i.e., through the physical presence of the accused in the territory of the forum state, or the victim being a national of the forum state) for any jurisdiction, whether involving adjudication or enforcement, to attach.¹⁰² Even if the state acquires jurisdiction without the presence of the accused, most states do not allow trials in absentia.¹⁰³ Therefore, the accused must still enter the territory of the state, either voluntarily or involuntarily (i.e. through extradition), with universal jurisdiction to initiate trial proceedings.¹⁰⁴

⁹⁸ See Definition of Aggression, *supra* note 30, 143.

⁹⁹ See, for example, Coracini, *supra* note 67, at 729; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 155 (2011); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 63 & 68 (1996). See also PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf. [hereinafter Princeton Principles]. But see, for example, ALEXANDER ZAHAR & GÖRAN SLUTTER, INTERNATIONAL CRIMINAL LAW 498 (2008).

¹⁰⁰ Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 788 (1988); see, for example, CASSESE ET AL., *supra* note 7372, at 278.

¹⁰¹ See, for example, *id.*

¹⁰² U.N. Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, U.N. Doc. A/65/181 (July 29, 2010).

¹⁰³ See, for example, Organic Law on the Judiciary art. 23 (B.O.E. 1985, 157) (Spain) (noting that criminal acts are “punishable in the place of enforcement”).

¹⁰⁴ CASSESE ET AL., *supra* note 72, at 278.

Traditionally, universal jurisdiction implied an option, not an obligation, to prosecute those accused of committing the most serious crimes of international law.¹⁰⁵ Today, however, the universality principle has evolved to include state obligations—in particular, the duty to prosecute or extradite those accused of committing the most serious crimes of international law.¹⁰⁶ As international law evolves, the contracting and increasingly limited nature of state sovereignty combined with the moral imperative to combat impunity for international crimes has made the principle of universality a more widely accepted form of jurisdiction that creates a duty to prosecute the most serious international crimes, regardless of the territory in which they are committed.¹⁰⁷

With regard to universal jurisdiction, ensuring compliance with the principle of legality is a concern. Although international crimes, including aggression, are crimes under customary international law at the time the offenses are committed, the accused must also know the penalties for the crime per the principle of nullum

¹⁰⁵ United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁰⁶ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Chapter VIII art. 50 & Chapter IX art. 50, Aug. 12, 1949, 75 U.N.T.S. 3 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 51, Aug. 12, 1949, 75 U.N.T.S. 3 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 75 U.N.T.S. 3 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146–47, Aug. 12, 1949, 75 U.N.T.S. 3 [hereinafter Geneva Convention IV]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (1984). *But see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 306 (7th ed. 2008) (distinguishing the principle of universality from the duty to prosecute or extradite, finding that “[i]n so far as the invocation of the principle of universality in cases apart from war crimes and crimes against humanity creates misgivings, it may be important to maintain the distinction”).

¹⁰⁷ Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 395 (2001); see Rome Statute, *supra* note 4, at Preamble ¶ 6 (stating that there is a “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”). There is still plenty of controversy about the reach of universal jurisdiction. Belgium and Spain, for example, have recently rolled back their universal jurisdiction statutes after international criticism, especially from states whose leaders were investigated or indicted for war crimes and crimes against humanity. See CODE PÉNAL [C.PÉN], arts. 3–4 (Belg.); Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions [Law of June 16, 1993], June 16, 1993, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 5, 1993 (Belg.); Loi relative à la répression des violations graves du droit international humanitaire [Law of February 10, 1999], Feb. 10, 1999, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 23, 1999 (Belg.); See Loi relative à la répression des violations graves du droit international humanitaire [Law of Aug. 5, 2003], Aug. 5, 2003, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 7, 2003 (Belg.); Organic Law on the Judiciary, *supra* note 103, art. 23(4). Similarly, the U.S. Supreme Court has limited the country’s civil universal jurisdiction remedies under the Alien Tort Statute (ATS). *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

crimen, nulla poena sin lege.¹⁰⁸ And penalties under universal jurisdiction statutes for the same crimes may vary from state to state.¹⁰⁹ Thus, perpetrators may not be aware of the penalties for crimes when committed in certain states. Other scholars, however, find that the scope of nullum crimen, nulla poena sin lege should not extend to conduct that the international community universally condemns.¹¹⁰ In this view, all actors are on notice that their conduct is criminal and punishable under international criminal law.

Finally, although universal jurisdiction generally covers the most serious crimes of international law, states and experts differ as to the list of crimes included within its scope.¹¹¹ Some argue that piracy is the only international crime falling under universal jurisdiction,¹¹² while others find a host of international crimes, including all core international crimes, as crimes for which universal jurisdiction may attach.¹¹³ With regard to the crime of aggression, authoritative sources like the ICJ in the Barcelona traction case,¹¹⁴ and other non-binding but authoritative international authorities, such as the *Princeton Principles on Universal Jurisdiction*, include aggression and “crimes against peace” among the list of imperative erga omnes norms¹¹⁵ and “serious crimes under international law” subject to universal jurisdiction.¹¹⁶

¹⁰⁸ CASSESE ET AL., *supra* note 72, at 279.

¹⁰⁹ Compare Alien Tort Statute of the United States (offering civil penalties for international crimes), with Spain’s Universal Jurisdiction statute allowing for criminal penalties. See *supra*, note 107 & note 103, respectively.

¹¹⁰ See, for example, Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT’L CRIM. JUST. 830, 835 (2006).

¹¹¹ See Brown, *supra* note 107, at 384.

¹¹² See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundations*, 45 HARV. INT’L L. J. 183, 230 (2004) (finding that Swiss philosopher Emerich de Vattel’s position was to oppose the application of universal jurisdiction beyond piracy).

¹¹³ See David J. Bederian, *International Law Frameworks 24–25* (2d ed. 2006).

¹¹⁴ *Barcelona Traction Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 46, at 33 (Feb. 5).

¹¹⁵ *Id.* Skeptics, however, point out that just because a norm is erga omnes does not necessarily confer a right of states to prosecute under universal jurisdiction. See PATRYCJA GRZEBYK, CRIMINAL RESPONSIBILITY FOR THE CRIME OF AGGRESSION 219 (2013).

¹¹⁶ *Princeton Principles*, *supra* note 99, at 23. The specific crime of aggression, however, was excluded in favor of its Nuremberg predecessor given the difficulties in defining the crime. *Id.*, at 39 et seq. The participants on the Princeton Project discussed “crimes against peace” at length, finding that, “[w]hile many argue that aggression constitutes the most serious international crime, others contend that defining the crime of ‘aggression’ is in practice extremely difficult and divisive. In the end, ‘crimes against peace’ were included, despite some disagreement, in part in order to recall the wording of Article 6(a) of the Nuremberg Charter.” *Id.*, at 47. Interestingly, however, piracy has always been considered a crime subject to universal jurisdiction despite its definitional problems. See Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269, 272–73 (1988).

Given that the international community of states has now defined the crime of aggression under the Rome Statute, it is more likely that the crime as defined by the ICC would broadly be considered subject to universal jurisdiction—and perhaps included on an updated version of the *Princeton Principles*' list of serious crimes. Furthermore, the categories of crimes alleged at Nuremberg have largely been accepted as customary international law, and scholars have found that the International Military Tribunal was applying the principle of universality when prosecuting World War II war criminals.¹¹⁷

Thus, theoretically, the crime of aggression can be prosecuted in domestic courts under various types of jurisdiction. Protective and universal jurisdiction, although the most contentious forms of jurisdiction for prosecuting international crimes domestically, are probably the most promising given that the aggressor and victim states face nearly insurmountable practical challenges in bringing leaders to account before national courts for waging aggressive war.

IV. DOMESTIC JURISDICTIONS AND THE CRIME OF AGGRESSION: AN IMPOSSIBLE RELATIONSHIP?

Practically, however, it is difficult to combat impunity for the crime of aggression at the international and domestic levels, even in those states with territorial or nationality links. The following Section explores both the necessity and the inherent challenges to successfully prosecuting individuals at the national level for crimes of aggression. That said, ensuring some mechanisms for prosecuting the crime of aggression is imperative to ending impunity for perpetrators of aggression.

A. State Sovereignty and *Par in Parem Non Habet Imperium*

The International Law Commission (ILC) found that “the crime of aggression was inherently unsuitable for trial by national courts and should instead be dealt with only by an international court” when drafting the 1996 Draft Code of Crimes Against Peace and Security of Mankind.¹¹⁸ The only exception was in cases in which the aggressor-state—i.e., a state that committed an act of

¹¹⁷ See Carly Nyst, *Solidarity in a Disaggregated World: Universal Jurisdiction and the Evolution of Sovereignty*, 8 J. INT'L L. & INT'L REL. 36, 40 (2012); Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L. J. 357, 375 (2012) (citing ROBERT H. JACKSON, THE NÜREMBERG CASE 88 (1971) (“The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under International Law, is old and well established. That is what illegal warfare is.”)). *But see, for example*, Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 38 (2001).

¹¹⁸ Rep. of the Int'l Law Comm'n, 48th Sess., May 2–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10, at 39 (1996).

aggression—prosecuted its own nationals for the crime.¹¹⁹ Even when the aggressor-state chose to prosecute its own nationals, the ILC determined that the international criminal court could re-try the case if national proceedings were found to be not independent or impartial, and were instead an attempt to shield the accused from punishment.¹²⁰

The reasoning behind this decision was that one state's national courts determining whether another state had committed an act of aggression was considered contrary to the international principle of *par in parem non habet imperium* (equals, or sovereigns, do not have authority over one another).¹²¹ Moreover, such national court determinations, the ILC purported, would have serious implications for international relations and international peace and security.¹²²

International law scholars and jurists have criticized the ILC's view as contrary to legitimate, fundamental principles of criminal jurisdiction, including territoriality.¹²³ Other scholars have argued that giving absolute primacy to international tribunals runs counter to the ICC's principle of complementarity—that the ICC exercises jurisdiction only when states are unwilling or unable to seek justice for international crimes at the national level.¹²⁴

Moreover, when adjudicating international crimes or grave breaches of international humanitarian law, domestic courts often rule that certain acts of state occurred. Domestic courts determine whether states commit widespread and systematic attacks against civilian populations, whether armed conflicts are international or non-international in nature,¹²⁵ or whether genocide occurred against a population. In 2013, for instance, a Guatemalan court tried and convicted ex-President General José Efraín Ríos Montt of crimes against humanity and

¹¹⁹ *Id.*, at 42, 49.

¹²⁰ *Id.*, at 50, art. 8(15) (commentary), art. 12(2)(a)(ii).

¹²¹ Coracini, *supra* note 67, at 730.

¹²² Draft Code of Crimes Against the Peace and Security of Mankind, Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, U.N. Doc. A/51/10, at 30 (1996).

¹²³ Lotus Case, *supra* note 76, at 20. *See, for example*, Nidal Nabil Jurdi, *The Domestic Prosecution of the Crime of Aggression after the International Criminal Court Review Conference: Possibilities and Alternatives* 14 MELB. J. INT'L L. 129, 134–5 (2013); Nicolaos Strapatsas, *Complementarity and Aggression: A Ticking Time Bomb?*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 450, 454 (Carsten Stahn & Larissa van den Herik eds., 2010); Coracini, *supra* note 67, at 725, 731. *But see* Beth Van Schaack, *Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression*, 10 J. INT'L CRIM. JUST. 133–34 (2012) (arguing that the ICC should be allowed to exercise a *de facto* primacy over the crime of aggression).

¹²⁴ Rome Statute, *supra* note 4, art. 17; *see* Pål Wrange, *The Crime of Aggression and Complementarity*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 591, 593–594 (Roberto Bellelli ed., 2010).

¹²⁵ *See, for example*, Jurdi, *supra* note 123, at 136; Coracini, *supra* note 67, at 725, 731.

genocide.¹²⁶ And it is shortsighted to think that prosecuting aggression, and not perpetrating acts of aggression in and of itself, would necessarily destabilize international peace and security. In fact, the stated purpose of combating impunity for international crimes is to deter future international crimes, including aggression.

Thus, the ILC's view of aggression departed from international customary law and state practice,¹²⁷ ignoring the role that national courts have always played in combating impunity for international crimes. Even when the Allied Powers granted jurisdiction to the International Military Tribunal at Nuremberg, conferring such power never precluded national courts from bringing perpetrators of crimes of aggression—or crimes against peace as they were referred to at the time—to justice.¹²⁸ In Kampala, the ILC view was not expressly adopted, which allows for the application of the complementarity regime to the crime of aggression under the Rome Statute.¹²⁹

Furthermore, international legal norms have shifted away from absolute notions of state sovereignty. In fact, it is this specific threat to state sovereignty that gives victim states, or those acting upon its behalf, the legitimacy to bring perpetrators of international crimes to justice. Consequently, the ILC adopted a retrogressive approach to state sovereignty and acts of state doctrine, an approach that has been losing ground since Nuremberg.¹³⁰ Indeed, the prevailing norms have evolved to ensure that leaders who commit international crimes do not benefit or hide behind the protection of state immunities.¹³¹ Thus, interpretations of international law that ignore or exclude domestic prosecutions flout accepted international criminal law principles and international law's progressive evolution toward valuing justice over other interests (for example, immediate peace) that might allow for impunity for such crimes.

¹²⁶ Judgment of Constitutional Court of Guatemala in *State v. Ríos Montt and Rodríguez Sánchez*, Case File 1904-2013, Decision of 20 May 2013. The case was partially annulled on procedural due process grounds, but no one contested the legitimacy of the national court to rule on whether genocide or crimes against humanity occurred. *Id.* Furthermore, the Chinese War Crimes Military Tribunal of the Ministry of National Defence, in Nanking, tried and convicted World War II military commander Takashi Sakai for crimes against peace (the crime of aggression) for his participation in aggressive war making against China. *Trial of Takashi Satai*, Chinese War Crimes Tribunals of the Ministry of National Defence, Nanking, 29 Aug. 1946, in *LRTWC*, Vol. XIV, 1–2. In order to do so, the court found that Japan engaged in a war of aggression. *Id.*

¹²⁷ For a detailed description of post-World War II prosecutions involving aggression, see Strapatsas, *supra* note 123, at 450, 454–56.

¹²⁸ Nuremberg Charter, *supra* note 2; Strapatsas, *supra* note 123, at 450, 454.

¹²⁹ See generally Kampala Amendments, *supra* note 10.

¹³⁰ Jurdi, *supra* note 123, at 136.

¹³¹ Strapatsas, *supra* note 123, at 450, 454.

B. Challenges to Domestic Prosecutions of the Crime of Aggression

1. Politicization of aggression trials.

Although a state has jurisdiction to determine whether another state's officials committed an act of aggression and to hold those responsible for the crime of aggression in domestic courts, serious challenges still exist to prosecuting aggression at the domestic level. Because criminality attaches to the architects and not simply to direct perpetrators of crimes and, as the line between politics and the rule of law blurs, combating impunity becomes a more difficult task to undertake. By definition, the crime of aggression involves official state acts at the highest levels, and individual-level responsibility for aggression arises out of a state's responsibility for acts of aggression.¹³² Thus, technical legal challenges like the act of state or political acts doctrines, combined with a lack of state willingness (or ability, as often is the case for the victim state) to prosecute the crime, create serious challenges to successful prosecution under any form of jurisdiction at the national level. Additionally, politicization of any attempt to seek justice for the crime of aggression may prevent successful prosecutions or taint the outcomes of aggression trials.

2. Aggressor state incentive to shield individual aggressors from punishment.

Given that acts of aggression are initiated in the aggressor state's territory, the aggressor state has the power to exercise jurisdiction over the perpetrator of the crime of aggression.¹³³ As explained *supra*, however, there are no incentives on the part of government officials to prosecute themselves or their superiors for such crimes. In fact, states have incentives to shield alleged aggressors from punishment and to protect evidence necessary to prove the elements of the crime, citing national security considerations. Under these circumstances, it is difficult to contemplate a case in which prosecution in the aggressor state would occur freely and impartially.

Indeed, the only circumstances under which an aggression prosecution could occur in the aggressor state may be a regime change where the previous government's policies were unpopular and there is political and popular will to account for past crimes.¹³⁴ Although this small window of opportunity also exists with regard to other core international crimes, aggression's character as strictly a

¹³² See Kampala Amendments, *supra* note 10, art. 8 *bis*.

¹³³ See Lotus Case, *supra* note 76, at 86.

¹³⁴ See GRZEBYK, *supra* note 115, at 218 (finding that “[c]ourts of the aggressor state can only bring the perpetrators of the crime of aggression to justice if the aggression fails to achieve its intended outcomes, and the regime responsible for the aggression collapses”).

leadership crime makes it even less likely that the aggressor state will be willing or able to prosecute and punish perpetrators.

3. Victim state's inability to prosecute and lack of incentives for third-party states.

Under territorial, passive personality, or protective principles, the victim state may also exercise jurisdiction over the crime of aggression. Here, however, state institutions may not be capable of carrying forth a meaningful trial after suffering an attack on the state's territory.¹³⁵ Furthermore, if the victim state loses to the aggressor state, negotiated peace agreements or new national policies may prohibit the victim state from prosecuting the aggressor state's officials.¹³⁶ If the victim state is willing and able to prosecute, a trial of an aggressor state's leader may be seen as nothing more than victor's justice.

In addition, even if third-party states have the adjudicative power to try alleged aggressors via protective or universal jurisdiction, a third-party state has few justified incentives beyond a moral imperative to bring criminal charges against state officials of a foreign state. A third-party state may have increased incentive to prosecute if, for example, nationals of a third-party state were victims of the aggressive acts, the state's national security interests were threatened by spillover effects of the conflict, or there were indications that the aggressor state planned to wage a war of aggression against the third-party state at some point in the future. Other incentives, such as political ties, geopolitical alliances, or retributive justice for past harms, may corrupt the legitimacy of any attempt to try alleged aggressors in a third-party state's courts.

Unless more states enact legislation to empower their courts to prosecute the crime of aggression,¹³⁷ however, rationales would not be sufficient for a third-party state to successfully bring an end to impunity for the crime. Additional hurdles for successful prosecution exist even when a state has adjudicative authority to prosecute because courts will likely need to request extradition of perpetrators.¹³⁸

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ There are current efforts to domesticize the core international crimes, including aggression, in national criminal legal systems globally. *See, for example*, THE GLOBAL CAMPAIGN FOR RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION, <http://crimeofaggression.info> (last visited May 1, 2016).

¹³⁸ Extradition may not be granted, thereby preventing prosecution, especially in cases in which the deciding state finds that the crime is a political offense or in the case in which dual criminality does not exist. *See* European Convention on Extradition arts. 1(2), 2(1), Dec. 13, 1957, 359 U.N.T.S. 273; Inter-American Convention on Extradition arts. 3–4, Feb. 25, 1981, 1752 O.A.S.T.S. 191.

4. Jurisdictional immunities of high-ranking government officials.

Aggression is a leadership crime; thus, all domestic prosecutions of international crimes must still overcome jurisdictional immunities for high-ranking government officials. In the Case Concerning the Arrest Warrant of 11 April 2000 (Arrest Warrant Case), the International Court of Justice (ICJ) found that customary international law grants immunity to incumbent government leaders from criminal prosecution before national courts when accused of committing war crimes or crimes against humanity.¹³⁹ Four exceptions exist, however, to this general rule of immunity: the official can be prosecuted (1) if the government official's own state decides to prosecute; (2) if the official's own state waives immunity for another state to prosecute him; (3) before an international court; and (4) for private acts either prior to or after office, or once the official is no longer in office.¹⁴⁰

In the case of aggression, the aggressor state can always prosecute its own officials or waive immunity of the official from prosecution before another state's court for acts of aggression. The victim state can only prosecute individuals either in the event that the aggressor state waives immunity or holds trials in absentia. Furthermore, any domestic court with jurisdiction could find, as scholars have asserted, that international crimes are private acts as opposed to official state acts. In contrast to other core international crimes, however, high-ranking officials cannot commit aggression without state action as part of official state policy.¹⁴¹

One solution to this challenge that the crime of aggression poses with regard to immunities for high-ranking officials is for domestic jurisdictions to carve out an explicit exception for acts of aggression. Indeed, states could pass legislation ensuring that an act of aggression is regarded as illegal state action (as opposed to private action) in addition to being an international crime. In a state with such an immunities exception, high-ranking officials accused of committing aggression would not enjoy immunity from prosecution as a matter of law. Although enforcement would remain a challenge, domestic laws carving out exceptions for acts of aggression would adequately put would-be aggressors on notice, prohibiting leaders from abusing state power to conduct aggressive wars counter to the U.N. Charter.

¹³⁹ See generally Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) [hereinafter Arrest Warrant Case].

¹⁴⁰ *Id.* ¶ 61.

¹⁴¹ *Id.* ¶ 36 (dissenting opinion of Judge ad hoc Van den Wyngaert).

5. Act of State and Political Question Doctrines.

Unlike war crimes, genocide, and crimes against humanity, for which individual criminal responsibility may be independent of the existence of state responsibility, the crime of aggression is closely connected with the resort to force by a state. Domestic courts have upheld the act of state doctrine as a jurisdictional bar and defense against prosecution for international crimes, including the crime of aggression.¹⁴² Closely related to jurisdictional immunities, the act of state doctrine finds that national courts of any state do not have jurisdiction to adjudicate claims relating to acts done by another state in the exercise of its sovereign power, including engaging in war, negotiating peace, and annexing territory.¹⁴³ As one court noted:

[t]he legality of an act done by a foreign State cannot be tried by the courts of another State; and although this rule is subject to exceptions in a case where the State has acted as an individual or as a civil person, no exception can be raised when the basis of the action against the State is the exercise of the State's sovereign powers.¹⁴⁴

In these cases, any act of aggression would be considered an act *jure imperii*, or a public act of state, triggering the act of state doctrine. Accordingly, a victim state could not exercise jurisdiction over high-level officials allegedly committing aggression without the aggressor state's waiver unless a competent body had declared the act an act of aggression,¹⁴⁵ thereby pronouncing on the crime's main element. Without such a declaration, the only other options for domestic prosecution would be in the aggressor state's courts or a court exercising universal jurisdiction to adjudicate the crime under the principle of complementarity.

Although third-party states have many obstacles to successful prosecutions of the crime of aggression, universal jurisdiction should be seen as a promising avenue around act of state and political question doctrines in aggression prosecutions. Third-party states with universal jurisdiction statutes enabling their

¹⁴² The National Navigation Company of Egypt *Contra Tavoularidis*, Nov. 9, 1927, *Gazette* Vol. XIX, p. 251 (1927-1929) 4 I.L.R. 173. *But see* Tokyo Tribunal, *supra* note 2.

¹⁴³ *See, for example*, Attorney-General v. Nissan, [1969] UKHL 3, [1970] A.C. 179 (H.L.) ¶ 263 (appeal and cross appeal judgment); Johnstone v. Pedlar, [1921] UKHL 1, [1921] 2 A.C. 262 (H.L.) 271; Buron v. Denman 2 Exch. 167 (1848); Controller and Auditor-General v. Davison [1996] 2 N.Z.L.R. 278 (CA); New South Wales v. Commonwealth (1975) 135 C.L.R. 377, 388 (Austl.); 8 A.L.R. 1, 28; The Queen v. Seven Named Accused, Supreme Court, Pitcairn Island, April 19, 2004, in 127 I.L.R. 266-67, 287-88.

¹⁴⁴ The National Navigation Company of Egypt *Contra Tavoularidis*, *supra* note 142, at 251.

¹⁴⁵ By definition, a declaration of an act of aggression by the Security Council will have determined that an act of state had occurred. *See* Definition of Aggression, *supra* note 30, at 143 (defining Aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . .").

courts to prosecute individuals for crimes of aggression are, in effect, stepping in and prosecuting for courts in the alleged aggressor state when that state is unwilling or unable to prosecute domestically the high-ranking officials who allegedly committed aggression.¹⁴⁶ Given the principle of complementarity, an aggressor state at any point theoretically could become willing and/or able to prosecute its leaders for the crime of aggression, in which case the act of state and political question doctrines would not apply. Accordingly, act of state and political question doctrines do not apply in prosecutions by third-party states acting under universal jurisdiction.

V. CONCLUSION

Unless and until the ICC begins to exercise jurisdiction over aggression sometime after January 2017, the crime of aggression can only be prosecuted at the national level in domestic courts. Although states parties to the ICC may soon empower the ICC with jurisdiction over the crime of aggression, past practice and experience of the ICC has demonstrated that real limitations exist to successfully prosecuting crimes of aggression in a way that ensures justice and deters future international crimes. As a result, utilizing domestic avenues for ending impunity are critical if we are ever to see accountability for the crime of aggression.

Even when domestic prosecutions are feasible, however, considerable political and practical challenges remain. These challenges must be recognized and overcome if international law is to continue to evolve in favor of a world order that values rule of law over rule by force. Exceptions to jurisdictional immunities for high-ranking officials, or to the act of state and political question doctrines, for example, could go a long way to help domestic prosecutions. Indeed, the international community has come a long way—from Nuremberg to Kampala—to ensure that impunity for international crimes is not absolute. The continued search to end impunity for all international crimes, including the crime of aggression, must continue until perpetrators are held to account.

¹⁴⁶ See *supra* note 70.