

Par in Parem Imperium Non Habet

Complementarity and the Crime of Aggression

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Abstract

The principle of complementarity undergirds the International Criminal Court's (ICC) admissibility regime. And yet, in the negotiations leading up to the 2010 Review Conference, delegates did not fully focus on the potential for the addition of the crime of aggression to destabilize the Court's complementarity regime. The only guidance from the Assembly of States Parties came in the form of two interpretive Understandings that express a subtle preference that the states parties do not incorporate the crime into their domestic codes. If states parties heed this call, which they should, the Court will face situations in which there is incomplete concurrence between the prosecuting state's domestic law and the ICC Statute given that few states have codified the crime of aggression. Under prevailing interpretations of the principle of complementarity, however, a case would be admissible before the Court if a domestic court were prosecuting atrocity crimes, but not the crime of aggression. This article argues that the Prosecutor should therefore announce in advance of the amendments' activation the intention to stay his or her hand in the event that genuine domestic prosecutions are going forward on the basis of charges of genocide, crimes against humanity, or war crimes, even if potential domestic aggression charges are not available, are legally barred, or are not forthcoming. The only exception to this general approach should be in cases in which the crime of aggression is the primary or central charge to arise out of a particular situation, such that atrocity crimes are non-existent or largely peripheral. The article thus advocates that the ICC be allowed to exercise a de facto primacy over the crime of aggression

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vis-à-vis domestic courts, which will retain the ability to take the lead on prosecuting the atrocity crimes. Such a division of labour between the ICC and domestic courts will ensure that to the extent that the crime of aggression is ever prosecuted, it is done in an international, rather than domestic, forum pursuant to a consensus penal definition and a negotiated jurisdictional regime.

1. Introduction

As a foundational premise, the International Criminal Court (ICC or the Court) is meant to supplement, not supplant, national prosecutions of international crimes. This overarching objective is reflected in the principle of complementarity, which states that a case is inadmissible before the ICC if it is being prosecuted domestically in any national court with jurisdiction unless the domestic proceedings have been launched for the purpose of shielding the accused from accountability or are otherwise a sham.¹ The Pre-Trial Chamber of the ICC has so far interpreted the principle of complementarity according to a same person/same conduct test: the Court will stay its hand if a domestic court is prosecuting the same suspect for the same impugned conduct, regardless of how the crime is legally characterized. Thus, the Chamber considers itself to be empowered to proceed with a case unless there is a fair degree of concurrence between the pending domestic charges and potential ICC charges.

The principle of complementarity assumes that states have both prescriptive and adjudicative jurisdiction over conduct that rises to the level of an international crime. The former concept requires states to have incorporated the relevant international crimes into their domestic codes or to have penalized analogous and lesser included offences, such as murder, rape and torture. The latter assumes an available basis of jurisdiction, such as territorial, nationality or even — as is permissible with respect to many international crimes — universal jurisdiction. The newly codified crime of aggression² calls both of these assumptions into question.

At the moment, very few states can prosecute this crime domestically under any jurisdictional basis.³ And, most atrocity crimes and ordinary domestic crimes do not proscribe the same conduct as the crime of aggression. As a result, in a situation involving allegations that an individual committed both the crime of aggression and a war crime, most domestic courts would be able to prosecute the latter crime but not the former one. The same person/same

1 Art. 17 ICCSt.

2 Resolution RC/Res. 6, adopted at the 13th plenary meeting of the first Review Conference of the Rome Statute, 11 June 2010, by consensus, available online at <http://www.icc-cpi.int/Menus/ASP/Sessions/Official+Records/Review+Conference.htm> (visited 12 January 2012) (hereinafter, 'Res. 6').

3 See generally, A. Reisinger Coracini, 'Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute's Complementarity Regime', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) 735 (cataloguing the few national codes containing the crime of aggression).

conduct test would then countenance the ICC's assertion of jurisdiction, if and when the Assembly of State Parties (ASP) decides to activate the aggression amendments. Preempting domestic court jurisdiction under these circumstances might ultimately undermine the very purpose behind the principle of complementarity — the promotion of genuine domestic prosecutions of international crimes.⁴

In the negotiations preceding the 2010 Review Conference in Kampala, Uganda, delegates engaged in the multilateral negotiations surrounding the crime of aggression and its jurisdictional regime did not focus on the potential for the addition of the crime of aggression in the ICC Statute to destabilize the Court's complementarity regime.⁵ Indeed, it was ultimately decided to leave the default complementarity regime intact vis-à-vis the crime of aggression. In two interpretive Understandings (4 and 5) contained in the resolution adopting the final amendments to the Statute, however, delegates both expressed a subtle preference that states parties not incorporate the crime of aggression into their domestic codes and insisted that the amendments create no legal obligation or authorization to do so.⁶ This suggestion creates a dilemma: if states parties heed this caution, the Court will inevitably be faced with situations in which there is incomplete concurrence between the prosecuting state's domestic law and the ICC Statute such that complementarity would dictate that the Court assert jurisdiction. States parties may thus be tempted to codify the crime of aggression in order to preserve their ability to exercise domestic jurisdiction over situations involving ICC crimes, thus undermining the intent of the Understandings.

This article on complementarity and aggression addresses this dilemma on the basis of two premises. The first is that the ASP and the rest of the international community should, as a general rule, discourage domestic prosecutions

4 To be sure, the ICC would not necessarily fully divest domestic courts of jurisdiction if it were to proceed with a prosecution under these circumstances. Rather, a negotiation would ensue between the ICC and the state to determine the sequencing of prosecution. See Arts 89(4) and 94 ICCSt. However, it is doubtful that a state would expend judicial resources on a parallel prosecution once the ICC steps in.

5 See N. Strapatsas, 'Complementarity & Aggression: A Ticking Time Bomb', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press, 2010) 450, at 456.

6 Res. 6, Annex III, Understandings 4 and 5, read as follows:
Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

for the crime of aggression because such cases will not proceed according to the consensus regime adopted by the ASP and have the potential to exacerbate international tensions. The one circumstance in which such prosecutions might be appropriate is when a state prosecutes its own citizen(s) for launching an act of aggression pursuant to the active nationality principle of jurisdiction. For both legal and policy reasons, states other than the nationality state — including victim states, other implicated states, and third party states exercising extraordinary bases of jurisdiction — should in general refrain from such prosecutions so that cases involving the crime of aggression proceed almost exclusively before the ICC. A second supposition of this article is that the ASP and the rest of the international community should continue to encourage domestic prosecutions for the so-called atrocity crimes — war crimes, crimes against humanity, and genocide — in keeping with the foundational principle of complementarity and states' treaty-based and customary international law obligations to prosecute these international crimes.

These two premises are in obvious tension with each other. This article suggests one way they can be reconciled in the absence of further guidance from the ASP. It presents a model for the way in which the ICC Prosecutor should evaluate crime bases in which atrocity crimes are committed following, or in connection with, an act of aggression. It argues that when genuine domestic prosecutions are going forward on the basis of charges of genocide, crimes against humanity, or war crimes, the Prosecutor should not endeavour to prosecute the same suspects just because domestic aggression charges are not available under the law, are legally barred, or are not forthcoming.⁷ In other words, if a case would otherwise be inadmissible pursuant to Article 17, it should not be pursued in the ICC on the sole ground that the state that has jurisdiction over it is not prosecuting the person concerned for conduct that may constitute the crime of aggression.

This article accepts one exception to this general approach to harmonizing the principle of complementarity with the preference for assertions of international jurisdiction over the crime of aggression. This exception involves the scenario in which the crime of aggression is the primary or central charge to arise out of a particular situation such that atrocity crimes are non-existent or largely peripheral. Under these circumstances, the Prosecutor should consider opening an investigation into the situation even if other secondary charges are pending domestically.

If the approach outlined here is implemented, the Court will appropriately assume a posture of *de facto* exclusivity over the crime of aggression *vis-à-vis* domestic courts, which will retain the ability to take the lead on prosecuting atrocity crimes. Such a division of labour between the ICC and domestic courts will continue to encourage domestic prosecutions in keeping with the ideal of positive complementarity, reinforce the recognized duty of states to prosecute international crimes, and avoid overburdening the ICC with cases

7 See Strapatras, *supra* note 5, at 464–473 (noting that domestic prosecutions for aggression may be barred by act of state or political question doctrines).

that could otherwise proceed effectively in a domestic forum. It will also ensure that to the extent that the crime of aggression is ever prosecuted beyond the nationality state, it is done in an international, rather than domestic, forum. Instituting a de facto exclusivity before the ICC over the crime of aggression will enable the Court to develop an institutional competency vis-à-vis this controversial crime under a consensus penal definition and subject to appropriate political and judicial controls. It will also channel such prosecutions into an international institution, thus shielding state courts from making the highly political determination that another state committed an act of aggression. That said, granting domestic courts the leeway to pursue atrocity crimes where aggression charges may also be warranted will inevitably slow the Court's ability to develop the anti-aggression norm.

The division of labour proposed here can be implemented through a policy of prosecutorial discretion in the absence of further amendments to the Statute, developments in case law, or additional guidance or Understandings from the ASP.⁸ Prior to the activation of the aggression amendments, the Office of the Prosecutor (OTP) should develop and announce a general policy of allowing cases to go forward in domestic courts when genuine prosecutions for the atrocity crimes are pending there, even when aggression charges may also be appropriate. Disseminating this policy well in advance of the activation of the aggression amendments will energize the ASP's Understandings and discourage states from codifying the crime of aggression in an effort to protect their right to exercise domestic jurisdiction and enjoy the privilege of complementarity.

2. Jurisdiction over the Crime of Aggression in Domestic Courts

Up to this point in time, the crime of aggression has been noticeably absent in the penal codes of the nations of the world. Most domestic courts lack jurisdiction — under any jurisdictional basis — over the crime of aggression *stricto sensu*, and there is little purely domestic jurisprudence involving the crime. The only exception is found in some post-World War II cases whose jurisdictional basis is contested and which offer an uncertain precedent for the notion that domestic courts can, and indeed should, prosecute the crime of aggression. Of the few states that today allow for the crime to be prosecuted domestically, only some also enable such prosecutions pursuant to extraordinary

8 Art. 17 ICCSt. could be amended, for example, to read something to the effect that: 'If a case is otherwise inadmissible pursuant to paragraph 1, it shall not be deemed admissible where the state which had jurisdiction over it has not tried the person concerned for conduct that may constitute the crime referred to in article 8 *bis*.' Or, the concept of 'inability' could be further defined to mean that 'the fact that a state has not codified the crime of aggression in its domestic code shall not constitute inability for the purposes of this provision'. These options were not fully explored in the lead up to the Review Conference.

bases of jurisdiction, such as universal jurisdiction. Absent an express aggression provision, there are few domestic analogies to the crime that might be deemed to cover the same conduct as would be covered by an aggression charge before the ICC. All this suggests little in the way of state practice or *opinio juris* in favour of the exercise of domestic jurisdiction over the crime of aggression.

A. Post-World War II Case Law

The post-World War II period was a fertile time for aggression prosecutions.⁹ In parallel with the work of the international military tribunals at Nuremberg and in Tokyo — which were designed to prosecute the major war criminals ‘whose offences [had] no geographical limitation’¹⁰ — the victorious Allies promulgated Control Council Law No. 10 (CCL 10) to govern the prosecution of lesser war criminals.¹¹ CCL 10 defined crimes against the peace (the crime of aggression in the lexicon of the era) almost identically to the corresponding provision in the Nuremberg Charter except that the definition included the initiation of an ‘invasion’ along with a ‘war of aggression’ and the list of acts was non-exhaustive.¹²

Between them, the United States and France hosted five such trials.¹³ Even though France was not explicitly deemed subject to a German war of aggression, at least according to the Nuremberg Tribunal,¹⁴ German actions in inter alia Poland, Norway and the ex-Soviet Union were deemed to rise to the level

9 For a discussion of post-World War II prosecutions for the crime of aggression, see generally United Nations (UN), *Historical Review of Developments Relating to Aggression* (2003) (summarizing cases before the Nuremberg and Tokyo tribunals as well as subsequent trials in the Allies’ zones of occupation); M. Lippmann, ‘The History, Development, and Decline of Crimes against Peace’, 36 *George Washington International Law Review* (2004) 957; and T. Weigend, ‘In general a principle of justice: The Debate on the “Crime against Peace” in the Wake of the Nuremberg Judgment’ in this issue of the *Journal*.

10 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, 8 August 1945, available online at <http://avalon.law.yale.edu/imt/imtchart.asp> (visited 20 December 2011) (hereinafter, ‘TMT Charter’).

11 Control Council, Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, available online at <http://avalon.law.yale.edu/imt/imt10.asp> (visited 20 December 2011) (hereinafter: ‘CCL 10’).

12 *Ibid.*, at Art. II(1)(a).

13 See e.g. *U.S. v. Krauch et al.*, VIII Trials of War Criminals Before the Nuremberg Military Tribunals (hereinafter, ‘TWC’) (1952) I, 1125–1126 (acquitting principals of the corporation of the commission of crimes against the peace on the grounds that assisting in the process of German rearmament per se did not constitute aggression and the defendants were not part of Hitler’s inner circle).

14 In the *Ministries* case, however, the military tribunal did consider France to be a victim of German aggression. K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011), at 180. See *U.S. v. von Weizsaecker et al.*, XII TWC (1949) 13, at 419.

of a war of aggression.¹⁵ Whether trials held under CCL 10 are to be considered domestic or international proceedings remains somewhat contested.¹⁶ An argument can be made that these trials were essentially extensions of the work of the Nuremberg Tribunal. The quadripartite CCL 10 was drafted to give effect to the Moscow Declaration of 1943¹⁷ (in which the United States, the United Kingdom, and the Soviet Union pledged at armistice to prosecute German officers, soldiers, and Nazi party members in the courts of the countries in which their atrocities were committed or in an international tribunal) and the London Agreement of 1945¹⁸ (establishing the Nuremberg Tribunal). That said, although CCL 10 was jointly enacted, trials convened under its authority proceeded in the Allies' respective zones of occupation and were run solely by a single responsible state.

If these trials are considered domestic proceedings, the operative jurisdictional basis remains equally uncertain. The allied states that prosecuted individuals in military tribunals pursuant to CCL 10 were occupying powers, essentially holding German sovereignty in trust.¹⁹ This arrangement suggests a form of derivative nationality, passive personality, territoriality or protective jurisdiction. CCL 10 also contemplated the transfer of individuals to other countries in which crimes were committed for prosecution pursuant to the territorial principle of jurisdiction.²⁰ In the event of competing requests for a particular suspect, the state of nationality was to receive preference.²¹ Still, these trials are at times cited as examples of universal jurisdiction.²² Indeed, the Nuremberg Tribunal itself implied that the crimes in the Charter give rise to universal jurisdiction²³ when it noted that the signatories of the Charter:

15 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 1 October 1946, reprinted in 41 *American Journal of International Law (AJIL)* (1947) 172, at 192–197 (discussing acts of aggression against Austria and Czechoslovakia), 197–203 (discussing war of aggression in Poland), 203–207 (Denmark and Norway), 207–209 (Belgium, The Netherlands and Luxembourg), 209–211 (Yugoslavia and Greece), and 211–213 (USSR) (hereinafter, 'Nuremberg Judgment'). Even the finding that Germany committed aggression against the United States was of a different order. *Ibid.*, at 213–214 (finding Germany's declaration of war and support of Japan to constitute an act of aggression against the United States).

16 See E. Schwelb, 'Crimes Against Humanity', 23 *British Year Book of International Law* (1946) 178, at 218 (considering the tribunals convened pursuant to CCL 10 to be local courts administering municipal law enacted by the occupation authorities).

17 Joint Four-Nation Declaration (October 1943), available online at <http://avalon.law.yale.edu/wwii/moscow.asp> (visited 20 December 2011).

18 London Agreement of 8 August 1945, available online at <http://avalon.law.yale.edu/imt/imtchart.asp> (visited 20 December 2011).

19 See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers (1945), available online at <http://avalon.law.yale.edu/wwii/ger01.asp> (visited 20 December 2011).

20 Art. IV(2) CCL 10.

21 Art. IV(3) CCL 10.

22 See e.g. M.P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard Journal of International Law* (forthcoming 2012) (on file with the author).

23 See UN Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, UN Doc. A/CN.4/5 (1949), at 79–80, available online at <http://untreaty.un.org/ilc/documentation/english/acn4.5.pdf> (visited 20 December 2011) ('it is also possible ... that the

'have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law'.²⁴

Another handful of post-World War II cases proceeded in purely domestic courts exercising either territorial or protective bases of jurisdiction.²⁵ The Chinese War Crimes Military Tribunal of the Ministry of National Defence in Nanking tried Takashi Sakai for crimes against the peace for participating in the Japanese war of aggression against China.²⁶ Poland prosecuted at least two individuals for crimes against the peace.²⁷ One had been a citizen of the Free City of Danzig who helped implement the German reabsorption of the city and was tried for aggression before the Supreme National Tribunal of Poland.²⁸ Another prosecution proceeded against a Polish national before a provincial court in Warsaw.²⁹

Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation.')

24 Nuremberg Judgment, *supra* note 15, at 216.

25 In the immediate post-World War II period, Australia drafted a domestic statute (the War Crimes Act of 1945, No. 48/1945) that enumerated crimes against the peace as a war crime, although it staged no prosecutions. Australia was not designated as a victim state by the Nuremberg or Tokyo Tribunal, so it could be argued that the statute contemplated a form of universal jurisdiction. However, the prosecution of crimes committed against non-residents was allowed only if the victim was a subject of Great Britain or an allied nation, or with the consent of the Governor-General. See Australian Law Concerning Trials of War Criminals by Military Courts, reprinted in V Law Reports of Trials of War Criminals, (Ann.) (1948) (hereinafter, 'LRTWC'), at 94–98. Some of the US regulations issued allowed for the prosecution of crimes against the peace (e.g. in the Pacific Theatre). See United States Law and Practice Concerning Trials of War Criminals by Military Commissions, Military Government Courts and Military Tribunals, III LRTWC, 103–113. By comparison, the British Royal Warrant allowed only for assertions of jurisdiction over war crimes, *stricto sensu*. Art. 1, The War Office, Royal Warrant, Regulations for the Trial of War Criminals, 0160/2498, A.O. 81/1945, available online at <http://avalon.law.yale.edu/imt/imtroyal.asp> (visited 20 December 2011).

26 See *Trial of Takashi Sakai*, XIV LRTWC (1949) I, at 5–7. The Chinese 'Law Governing the Trial of War Criminals' (enacted 24 October 1946) is discussed here: XIV LRTWC (1949) 152–160.

27 The 'Polish Law Concerning the Trials of War Criminals' is discussed here: VII LRTWC (Ann.) (1946) 82–91. This legislation includes no crimes against the peace provision per se, but individuals could be prosecuted for domestic crimes against 'the security and integrity of the state'. *Ibid.*, at 90. There was, however, a provision criminalizing the instigation of war. *Ibid.*

28 See *Trial of Gauleiter Artu Greiser*, XIII LRTWC (1949) 70, at 74–78, 104–105. The Free City of Danzig (now Gdansk) enjoyed the status of a semi-autonomous city-state by virtue of the Treaty of Versailles. It was eventually reincorporated into Germany following Germany's 1939 invasion of Poland.

29 *In re Koch*, File No. IV K.311/58 (Voivodship Court for the Voivodship of Warsaw), 9 March 1959, (unpubl.), *aff'd*, File No. I K.508/59 (Supreme Court) (in Polish), reprinted in 30 *International Law Review* (1966) 496. Koch — administrative head of certain German occupied territory in Poland — was charged with crimes against humanity, war crimes, and crimes against the peace for his role in facilitating the occupation (at 505). He was tried in Poland on application of the extradition clause in the Moscow Declaration, which provided that individuals were to be prosecuted in the countries in which they committed their crimes (at 511).

Before drawing any firm conclusions from these cases, it is important to note they were all initiated in the afterglow of the Nuremberg/Tokyo proceedings — which were themselves *sui generis* — and all preceded the development of modern doctrines of foreign sovereign immunity and universal jurisdiction. In any case, the jurisdictional basis of these cases is ambiguous enough that it is hard to draw any firm conclusions from them as to the propriety of domestic aggression prosecutions today, particularly pursuant to extraordinary bases of jurisdiction. And, as the analysis below will reveal, states generally did not codify these results in the immediate aftermath of World War II or during the universal jurisdiction renaissance in the 1990s, suggesting that these cases are somewhat of a jurisprudential dead end.

B. The Crime of Aggression in Domestic Penal Codes

The post-World War II proceedings inspired a number of states to incorporate international crimes into their domestic penal codes. Crimes against the peace, however, are not well represented in this endeavour. One study of 90 domestic penal codes³⁰ reveals approximately two dozen penal codes containing some definition of a crime of aggression loosely premised on the definition of crimes against the peace contained within the Nuremberg and Tokyo Charters.³¹ Most of these crimes appear in the penal codes of the states of central Asia and eastern Europe³² and most definitions hinge on the waging or planning of a ‘war of aggression’³³ in keeping with the World War II approach.³⁴ Many such codes lack a rigorous penal definition setting forth the standard material and mental elements. A few states also penalize other forms of responsibility, such as incitement to commit aggression.³⁵ Some penal code

30 Reisinger Coracini, *supra* note 3, at 734.

31 See Art. 5(a) Special Proclamation of General MacArthur, the Supreme Commander for the Allied Powers, 14 January 1946.

32 Reisinger Coracini, *supra* note 3, at 734. Additionally, Art. 14 of the Statute of the Iraqi Higher Criminal Court incorporates an Iraqi domestic crime that resembles a crime of aggression: ‘The abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958.’ Law of the Iraqi Higher Criminal Court, Al-Waqaeah al-Iraqia (Iraqi Official Gazette) 4006 of 18 October 2005, at 13. Saddam Hussein was executed before any such charges vis-à-vis the First Gulf War in Kuwait could be levelled against him.

33 For example, the Armenian penal code in Chapter 33 codifies a number of crimes against peace and human security including the waging of ‘aggressive war’ (a concept left undefined) in Art. 384, and issuing public calls for ‘aggressive war’ in Art. 385. Armenian Criminal Code, Arts 384–389, available online at <http://www.legislationline.org/documents/section/criminal-codes/country/45> (visited 20 December 2011).

34 This position is also reflected in Art. 5(2), GA Res. 3314 (XXIX), 14 December 1974, which states that: ‘[a] war of aggression is a crime against international peace’. By contrast, CCL 10 criminalized the launch of an ‘invasion’ in addition to a war of aggression, which provided a basis to convict two defendants for their participation in the invasion of Czechoslovakia. See *U.S. v. von Weizsaecker et al.*, XIV TWC (1949) 13, at 867, 869.

35 See e.g. Polish Criminal Code Art. 117(3), available online at <http://www.legislationline.org/documents/section/criminal-codes/country/10> (in Polish) (visited 20 December 2011).

sections render the crime of aggression prosecutable only to the extent that it was committed in violation of an international treaty;³⁶ others are drafted to protect sovereign values rather than individual rights.³⁷ For example, in the German penal code section entitled ‘Crimes Against the Peace of Nations’, Section 80 (‘Preparation of a War of Aggression’) states:

Whoever prepares a war of aggression ... in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.³⁸

So defined, the crime of aggression may only be prosecuted when the German state is involved.³⁹

To the extent that domestic codes do contain a provision on the crime of aggression, in most cases prosecutions are limited to territoriality⁴⁰ or nationality⁴¹ principles of jurisdiction. A few states allow for the exercise of universal jurisdiction over all crimes that are prohibited by customary international law (and it is often argued that crimes against the peace are so prohibited),⁴²

36 For example, Art. 91 of the Estonian Penal Code states: ‘A person leading or participating in preparations for a war of aggression directed by one state against another state or war violating international agreements or security guarantees provided by the state, or a representative of the state who threatens to start a war of aggression, shall be punished by 3 to 12 years’ imprisonment.’ Art. 92 prohibits propaganda for war followed by provisions addressing war crimes, piracy, and terrorism. Estonian Criminal Code, Arts 91–92, available online at <http://www.legislationline.org/documents/section/criminal-codes/country/33> (visited 20 December 2011).

37 The French code prohibits at Art. 412–1 attacks consisting of the ‘commission of one or more acts of violence liable to endanger the institutions of the Republic or violate the integrity of the national territory’. Code Pénal, available online at <http://www.legifrance.gouv.fr/html/codes/traduits/code.penalsoman.htm> (visited 20 December 2011).

38 Strafgesetzbuch (StGB), Bundesgesetzblatt I, 13 November 1998, at 3322, § 80, available online at <http://www.iuscomp.org/gla/statutes/StGB.htm> (visited 20 December 2011). Section 80a (‘Incitement to a War of Aggression’) continues: ‘Whosoever publicly incites to a war of aggression (section 80) in a meeting or through the dissemination of written materials ... within the Federal Republic of Germany shall be liable to imprisonment from three months to five years.’ *Ibid.*, at § 80a.

39 See C. Kreß, ‘The German Chief Federal Prosecutor’s Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq’, 2 *JICJ* (2004) 245, at 246.

40 See e.g. Art. 14 of the Armenian code, allowing for the prosecution of all crimes when committed on the territory of the Republic. Armenian Criminal Code, *supra* note 33.

41 See e.g. Krivicni Zakon Bosne i Hercegovine (KZBiH) (Criminal Code of Bosnia and Herzegovina), Art. 123, Službeni glasnik Bosne i Hercegovine (Official Gazette of Bosnia and Herzegovina), No. 37/03, 2003, available online at <http://www.iccnw.org/documents/criminal-code-of-bih.pdf> (visited 20 December 2011).

42 See *R. v. Jones et al.* [2006] UKHL 16 (considering the crime of aggression to be part of customary international law). See also Reisinger Coracini, *supra* note 3, at 725 (‘The crime of aggression is a crime under customary international law.’); D. Donat Cattin, ‘Brief Commentary to the 2010 Amendments to the Rome Statute of the International Criminal Court (ICC) Concerning the Crime of Aggression’ (arguing that the prohibition against aggression constitutes *jus cogens*) (on file with author), at 3.

or that threaten the peace and security of humankind.⁴³ Only a handful of states are specifically empowered to assert universal jurisdiction over the crime of aggression *per se*.⁴⁴

Notwithstanding this dearth of state practice and *opinio juris*,⁴⁵ some commentators assume somewhat unreflectively that the crime of aggression is subject to universal jurisdiction before domestic courts.⁴⁶ They often ground their claim on the World War II precedents,⁴⁷ reflecting a common conflation of the principles of international jurisdiction and universal jurisdiction⁴⁸ and overlooking the fact that the post-war tribunals more likely exercised an alternative form of jurisdiction, such as passive personality or protective jurisdiction.⁴⁹ The Princeton Principles on Universal Jurisdiction also list crimes against the peace as one of the crimes over which states may assert

43 For example, Art. 11(3) of the Moldovan Criminal Code allows for universal jurisdiction over 'crimes [that] are adverse to the interests of the Republic of Moldova or to the peace and security of humanity, or constitute war crimes including crimes set forth in the international treaties to which the Republic of Moldova is a party'. Moldovan Criminal Code, Art. 11(3), available online at <http://www.legislationline.org/documents/section/criminal-codes/country/14> (visited 20 December 2011). See also Bulgarian Criminal Code, Art. 6, available online at <http://www.legislationline.org/documents/section/criminal-codes/country/39> (visited 20 December 2011).

44 For example, Art. 5 of the penal code of Portugal expressly allows for the assertion of universal jurisdiction over incitement to aggression. Related crimes include recruiting members of the Portuguese armed forces in a war against a foreign state and the use of mercenaries. See Portuguese Penal Code, Art. 236, available online at <http://www.portolegal.com/CPENAL.htm> (visited 20 December 2011).

45 R.S. Clark, 'Complementarity and the Crime of Aggression', in C. Stahn and M.M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II (Cambridge University Press, 2011) 721, at 731 ('It is very doubtful that under current customary law it can be asserted unequivocally that aggression "is" subject to universal jurisdiction.').

46 See G. Kirk McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. I (Kluwer, 2000), at 57–58; Z. Mills, 'Does the World Need Knights Errant to Combat Enemies of All Mankind? Universal Jurisdiction, Connecting Links, and Civil Liability', 66 *Washington and Lee Law Review* (2009) 1315, at 1322.

47 Scharf, *supra* note 22, argues that aggression is subject to universal jurisdiction by virtue of the fact that the Nuremberg, Tokyo, and other post-World War II tribunals prosecuted the crime pursuant to universal jurisdiction. This assumption also appears in the *Pinochet* proceedings. Lord Millet in his speech wrote that '[t]he Trials of German and Japanese war criminals following World War II were based on the principle of universal jurisdiction.' *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97 (H.L.) (*per* L. Millet). This reasoning remains *dicta* as it was not contemplated that General Pinochet would be prosecuted for the crime of aggression.

48 Newton, for one, argues: '[T]he ICC is not a court of universal jurisdiction. Universal jurisdiction in its pure form is an all inclusive form of jurisdiction which empowers national courts operating on a horizontal plane of authority to investigate and/or prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim, or the absence of any links to the state where the court is located.' See M. Newton, 'The Complementarity Conundrum: Are We Watching Evolution or Evisceration?' 8 *Santa Clara Journal of International Law* (2010) 117, at 128.

49 The protective principle is implicated given that the crime of aggression is often deemed to protect sovereign values.

universal jurisdiction,⁵⁰ although this was controversial among the group of experts involved in that initiative.⁵¹ A more defensible conclusion is that current law does not provide strong support for the exercise of domestic jurisdiction over the crime of aggression, *a fortiori* pursuant to universal jurisdiction.

C. Domestic Jurisprudence Involving the Crime of Aggression

Beyond the immediate post-World War II period, there are no domestic criminal prosecutions for the commission of crimes against the peace, although the crime has arisen tangentially in some domestic jurisprudence. For example, as a member of the North Atlantic Treaty Organization, Germany participated in Operation Allied Force in Kosovo, the collective effort to protect Kosovars from Serbian atrocities. A German court rejected claims brought by German politicians under the code provision prohibiting aggression in connection with the intervention. The case was dismissed for lack of standing,⁵² and other requests to investigate were denied.⁵³ As one commentator noted in regard to the German proceedings:

Aggressive war was distinguished from a mere violation of the prohibition on the use of force by the specific intent required, namely to disturb the peaceful coexistence of peoples. Thus, the benign motives of NATO action were deemed to be sufficient to exculpate the German government — an argument usually not sustained under German criminal law.⁵⁴

Similar complaints involving the Second Gulf War were also rejected in light of Germany's minimal involvement in that war.⁵⁵

The crime of aggression was also central to the British House of Lords case of *R. v. Jones*.⁵⁶ The issue arose in *Jones* when individuals being prosecuted for

50 Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (2001), Principle 2(1). But see *The Cairo-Arusha Principles on Universal Jurisdiction In Respect of Gross Human Rights Offences: An African Perspective*, available online at <http://www.kituocha.katiba.org/index2.php?option=com.docman&task=doc.view&gid=116&Itemid=27> (visited 20 December 2011) (not listing the crime of aggression).

51 See S. Macedo, 'Commentary', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004) 26, at 30 ('While 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 [in the Princeton Principles' list], despite some disagreement, in part in order to recall the wording of Article 6(a) of the Nuremberg Charter.').

52 Bundesverfassungsgericht (BVerfG) (German Federal Constitutional Court), 25 March 1999, in 2 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 5 (1999), available online at <http://www.bverfg.de/entscheidungen/es19990325.2bve000599.html> (visited 20 December 2011).

53 See A.L. Paulus, 'Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis', 50 *Wayne Law Review* (2004) 1, at 27.

54 *Ibid.*

55 *Ibid.*, at 29 (noting United States' use of German bases and air space during Operation Iraqi Freedom). See generally Kreß, *supra* note 39, at 247–249 (discussing prosecutorial reasoning).

56 *R. v. Jones et al.* [2006] UKHL 16. See generally C. Villarino Villa, 'The Crime of Aggression before the House of Lords — Chronicle of a Death Foretold', 4 *JICJ* (2006) 866. See generally R. Clark,

aggravated trespass and criminal damage in connection with efforts to impede British involvement in the Iraq War argued that they were attempting to prevent the commission of a crime, namely, an act of aggression. The House of Lords affirmed the unavailability of the defence. Lord Bingham of Cornhill determined that customary international law recognized the crime of aggression as evidenced by treaties dating to the 1920s, the Nuremberg and Tokyo proceedings, and the ICC negotiations.⁵⁷ He rejected the proposition, however, that customary international law crimes were automatically assimilated into domestic law so as to trigger the articulated defence.⁵⁸ Lord Hoffman noted that the liability of individuals for the crime of aggression is secondary to the acts of a state, and the courts should not enquire into the 'discretionary power' of the state to use force.⁵⁹ Lord Mance in his speech noted that not all public international law crimes are, or should be, incorporated into the domestic penal code.⁶⁰ On the basis of this collective reasoning, the appeals were dismissed.

This survey suggests that there is little empirical support for domestic prosecutions of the crime of aggression under any jurisdictional basis. In particular, it renders the claim that aggression is currently subject to universal jurisdiction very difficult to sustain under a rigorous application of the classic formula for customary international law: consistent state practice coupled with *opinio juris*. Although states have generally not codified the crime of aggression in their penal codes in the past, it remains to be seen if this trend will continue now that a consensus definition of the crime has emerged.

D. The Lack of Analogous Crimes in Domestic Law

Absent an express provision penalizing the crime of aggression, there are few domestic offences that might serve as a charging substitute. To be sure, some war-related charges (treason, sedition, insurrection, war crimes, violations of neutrality acts, or espionage) might be deemed to cover the same incident as an aggression charge before the ICC. These crimes may not, however, cover the same conduct proscribed by the definition of aggression: 'the planning, preparation, initiation or execution ... of an act of aggression'.⁶¹ In addition, many of these crimes are geared toward repressing internal dissention or non-state action, rather than a state's cross-border aggressive activity, and so would not implicate the ICC prohibition of aggression.

Using United States law as an example, several domestic laws could conceivably address the same incident as an aggression charge, but not precisely the

'Aggression: A Crime Under Domestic Law?' *New Zealand Law Journal* (2006) 349; R. Cryer, 'Aggression at the Court of Appeal', 10 *Journal of Conflict and Security Law* (2005) 209.

57 *R. v. Jones et al.* [2006] UKHL 16, §§ 12, 19.

58 *Ibid.*, § 31.

59 *Ibid.*, § 65.

60 *Ibid.*, § 102.

61 Res. 6, Annex I, Art. 8bis(1).

same conduct. Treason is constitutionally defined at Article III(3) as ‘levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort.’⁶² It is statutorily limited to individuals owing allegiance to the United States and so would not likely cover foreign nationals engaged in an armed conflict against the United States; nor would it reach the US nationals engaged in an armed conflict abroad.⁶³ More promising, the crime of seditious conspiracy, which does not require this showing of allegiance,⁶⁴ prohibits engaging in a conspiracy to levy war against the United States:

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against [it] ... they shall each be fined under this title or imprisoned not more than twenty years, or both.⁶⁵

The Neutrality Act would likely not reach the same conduct as the aggression amendments for lack of state action.⁶⁶ The Espionage Act penalizes only the gathering or transmitting of national defence information.⁶⁷ Many other war-related provisions in the US law do not provide for criminal penalties. For example, the Insurrection Act of 1807 is a non-penal provision authorizing the President to employ state militia or armed forces to suppress rebellion.⁶⁸ The Alien Enemies Act allows the President to deport resident aliens if their home countries are at war with the United States.⁶⁹

Certain terrorism crimes might encompass some of the same conduct that would give rise to an aggression charge. Under the US law, for example, it is a federal crime to commit an act of terrorism transcending national

62 US Const., Art. III(3).

63 18 U.S.C. § 2381 allows for the prosecution of those who ‘owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere’. US citizen Adam Yahye Gadahn has been indicted for treason in connection with terrorist activities and providing aid and comfort to Al Qaeda. See Federal Bureau of Investigations, *Most Wanted Terrorists*, available online at <http://www.fbi.gov/wanted/wanted.terrorists/adam-yahiye-gadahn> (visited 20 December 2011).

64 *U.S. v. Rahman*, 189 F.3d 88, 113 (2d Cir. 1999) (noting differences in elements between the crimes of treason and seditious conspiracy — including the requirement of a breach of allegiance for treason — in a case involving the 1993 World Trade Centre bombing).

65 18 U.S.C. § 2384. The commission of either treason or this offence can also result in the loss of US citizenship. 8 U.S.C. § 1481.

66 18 U.S.C. § 960. That Act reads: ‘Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.’

67 18 U.S.C. §§ 793–794.

68 10 U.S.C. § 331 *et seq.*

69 50 U.S.C. §§ 21–24. This statute is a vestige of the infamous Alien & Sedition Acts. See generally G. Fehlings, ‘Storm on the Constitution: The First Deportation Law’, 10 *Tulsa Journal of Comparative and International Law* (2002) 63, at 75 (explaining the differences between the Alien Act and the Alien Enemies Act).

boundaries.⁷⁰ One can imagine an act of aggression giving rise to domestic charges of using weapons of mass destruction (which are broadly defined),⁷¹ engaging in terrorist bombings,⁷² or employing certain prohibited weapons.⁷³ That said, these crimes might be more likely charged against low- or mid-level operatives who would not satisfy the leadership clause of the ICC's aggression definition. Moreover, many terrorism crimes do not apply to the activities of armed forces during an armed conflict or activities undertaken by the military forces of a state in the exercise of their official duties, which would likely exclude acts of state aggression as defined by the ICC Statute.⁷⁴

Even most war crimes charges will not condemn the same conduct as the crime of aggression in keeping with the longstanding conceptual distinction between the *jus ad bellum* (the rules governing the resort to armed force) and the *jus in bello* (the rules governing the conduct of hostilities). By way of exception, the conduct underlying certain means and methods charges derivative of Hague law⁷⁵ might dovetail with the conduct underlying the 'execution' of an act of aggression (as opposed to, for example, the planning or preparation of an act of aggression).⁷⁶ Finally, some standard domestic crimes might also be prosecutable in the event that a state commits an act of aggression. Presumably, domestic prosecutors could level charges involving many crimes of violence (murder, torture, criminal damage, etc.) against an individual who might also be charged with committing the crime of aggression before the ICC so long as any extraterritoriality requirement was satisfied.⁷⁷ These charges might cover the same conduct as the execution of an act of aggression against another state.

70 18 U.S.C. § 2332b. The statute applies, however, only to acts of international terrorism committed against any person or property within the United States. *Ibid.*, § 2332b(a)(1).

71 18 U.S.C. § 2332a. This statute protects, inter alia, US nationals and US property inside or outside the United States. *Ibid.*, § 2332a(a). It also allows for the prosecution of US nationals who use weapons of mass destruction abroad. *Ibid.*, § 2332a(b).

72 18 U.S.C. § 2332f. This offence applies to property within the United States, § 2332f(b)(1), and to terrorist bombings in which the victim or perpetrator is a US national or in which the perpetrator is found in the United States. *Ibid.*, § 2332f(b)(2). It also applies where 'the offence is committed in an attempt to compel the US to do or abstain from doing any act.' *Ibid.*, § 2332f(b)(2)(D).

73 See e.g. 19 U.S.C. § 2332h (prohibiting the use of radiological dispersal devices).

74 *Ibid.*, § 2332f(d). For a discussion of US terrorism laws generally, see B. Van Schaack, 'Finding the Tort of Terrorism in International Law', 28 *The Review of Litigation* (2008) 381.

75 See e.g. Art. 8(2)(b)(i) ICCSt. (penalizing '[i]ntentionally directing attacks against the civilian population as such ...').

76 An act of aggression may constitute the widespread and systematic attack serving as a jurisdictional predicate to the crimes against humanity charge. The defendant's conduct, however, would have to entail the commission of one of the enumerated acts that constitute crimes against humanity (murder, etc.).

77 For example, 18 U.S.C. § 1116 criminalizes the commission of murder or manslaughter against foreign officials, official guests, or internationally protected persons. There is extraterritorial jurisdiction, inter alia, where the offender is a national of the United States or is afterwards found in the United States. *Ibid.*, § 1116(c).

3. Problems with Domestic Prosecutions for the Crime of Aggression

As discussed above, states have generally not endeavoured to assert national jurisdiction over the crime of aggression. This no doubt reflects the limited legal support for such proceedings provided by the post-World War II precedent and contemporary law. In addition, there are cogent policy rationales for eschewing domestic prosecutions, especially beyond the nationality state.⁷⁸ These rationales remain compelling even with the codification of the crime of aggression in the ICC Statute.⁷⁹

For one, the intense difficulty in reaching a consensus definition of the crime of aggression and an operative jurisdictional regime reveals the extent to which the crime raises acute sovereignty concerns.⁸⁰ The enduring controversy over the crime stems from the fact that, especially as formulated for purposes of the ICC,⁸¹ the crime involves more than simply the conduct of an individual defendant; it directly implicates state action as well in a way that

78 There may also be impartiality concerns when the courts of the nationality state adjudicate aggression charges that hinge on a finding that a predecessor government engaged in an act of aggression. I am indebted to Sean Murphy for this observation.

79 The United States raised some of these concerns in an intervention in Kampala:

A third risk is that of unjustified domestic prosecutions. Too little attention has yet been paid to the question of how, if at all, the principle of complementarity would apply to the crime of aggression. The definition does little to limit the risk that State Parties will incorporate a definition — particularly one we believe is flawed — into their domestic law, encouraging the possibility that under expansive principles of jurisdiction, government officials will be prosecuted for alleged aggression in the courts of another state. Even if states incorporate an acceptable definition into their domestic law, it is not clear whether or when it is appropriate for one state to bring its neighbor's leaders before its domestic courts for the crime of aggression. Such domestic prosecutions would not be subject to any of the filters under consideration here, and would ask the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security.

Harold Hongju Koh, *Statement at the Review Conference of the International Criminal Court*, 4 June 2010, available online at <http://www.state.gov/s/l/releases/remarks/142665.htm> (visited 20 December 2011).

80 For discussion of the protracted negotiations surrounding the crime, see S. Barriga et al. (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (Lynn Rienner Publishers, 2009); J. Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', 11 *International Criminal Law Review* (2011) 49; and B. Van Schaack, 'Negotiating at the Interface of Power & Law: The Crime of Aggression', 49 *Columbia Journal of Transnational Law* (2011) 505.

81 The Charters governing the post-World War II prosecutions defined aggression differently. The Nuremberg Charter defined aggression as the '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'. IMT Charter, *supra* note 10, Art. 6(a).

other international crimes do not.⁸² Since the early days of the International Law Commission's (ILC) Draft Code of Crimes Against the Peace and Security of Mankind,⁸³ individual responsibility for the crime of aggression has been intrinsically and inextricably linked to the commission of aggression by a state.⁸⁴ Indeed, the definition of the crime that is slated to be added to the ICC Statute will require a showing of proof beyond a reasonable doubt that a state committed an act of aggression as a predicate to assigning individual criminal responsibility.⁸⁵ The act of aggression committed by a state is thus an express element of the offence.⁸⁶ As such, domestic courts hearing aggression cases not involving their own nationals will essentially be sitting in judgment over the acts of a co-equal sovereign. The need to rule on the commission state's act of aggression implicates the principle of foreign sovereign immunity and its underlying philosophy, the maxim *par in parem imperium non habet* ('an equal has no power over an equal'). Justiciability concerns abound where domestic courts find themselves evaluating the legality of a foreign state's decision to use force.⁸⁷

82 Res. 6, Annex I, Art. 8bis(2) (listing state acts of aggression).

83 See II *Yearbook of the International Law Commission* 151 (1954) (defining acts of aggression with reference to state action). Indeed, as late as 1984, the International Law Commission (ILC) was still considering whether the Draft Code would acknowledge the criminal responsibility of states in addition to that of individuals. See I *Yearbook of the International Law Commission* 5 (1984); *ibid.*, at 13 (noting that a war of aggression was an act by a state). The centrality of state action remained constant throughout the ILC's work on the crime of aggression. See *Report of the International Law Commission on the Work of its Forty-Eighth Session*, GAOR 51st Sess., Suppl. No. 10, UN Doc. A/51/10, at 83, available online at <http://untreaty.un.org/ilc/reports/english/A.51.10.pdf> (visited 20 December 2011) (hereinafter, '1996 Draft Code Report').

84 1996 Draft Code Report, *supra* note 83, at 30 ('[A]ggression attributed to a state is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State'). As Lord Bingham reasoned in *Jones*:

A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty's Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law.

R. v. Jones et al., [2006] UKHL 16, § 30.

85 Res. 6, Annex I, Art. 8bis(2).

86 Res. 6, Annex II, Amendments to the Elements of Crimes, Element 3 ('The act of aggression ... was committed'). The crime of aggression can be conceptualized as a result crime in that the *actus reus* is defined in terms of a prohibited consequence.

87 See e.g. *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (rejecting case by Libyan nationals arguing for the illegality of US and British airstrikes on Libya). Domestic courts will even refrain from evaluating decisions to use force by their own state on non-justiciability grounds. In the United States, see e.g. *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973) (dismissing complaint

While the domestic prosecution of all international crimes may strain international relations, prosecuting the crime of aggression domestically in situations other than following a change of regime⁸⁸ will inevitably generate intense charges of politicization from within and outside the prosecuting state.⁸⁹ Domestic aggression cases will no doubt exacerbate relations between states involved in situations already disrupted by a putative act of aggression.⁹⁰ Third states will inevitably take sides, and retaliatory charges in the nature of ‘lawfare’ may be levelled against the officials of the charging state.⁹¹ Politicized

filed by member of the armed forces seeking to bar military actions without congressional authorization in Vietnam); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (same with respect to Cambodia). Beyond the United States, see e.g. *Sakata v. Japan* (‘Sunakawa Case’), Case No. 1959, 13 Keishu 3224 (Sup. Ct. GB Dec. 16, 1959), translated in C.J. Milhaupt et al. (eds), *The Japanese Legal System: Cases, Codes, and Commentary* (Foundation Press, 2006), at 213–216 (case challenging the establishment of the Self Defence Forces dismissed on political question grounds). Several cases proceeded in Europe challenging involvement in Operation Desert Storm or Operation Iraqi Freedom. See e.g. Grundlovskomiteen 2003 vedr. Irak-krigen, *Press Release from the High Court of Eastern Denmark*, 11 April 2007, available online at <http://www.gk2003.dk/inenglish.pressrelease.2007april11.html> (visited 20 December 2011) (announcing dismissal of case on standing grounds); *Horgan v. An Taoiseach*, [2003] 2 ILRM 357 (Ir) (dismissing case on justiciability grounds); Conseil d’État, No. 321470, 15 October 2008 (Fr) (holding that the decision to maintain troops abroad qualified as a non-justiciable *acte de gouvernement*).

88 A good example of a statute limiting jurisdiction to the state’s own nationals may be found in draft legislation from New Zealand. See International Non-Aggression and Lawful Use of Force Bill (Member’s Bill), Parliament of New Zealand (2009), available online at <http://www.legislation.govt.nz/bill/member/2009/0062/latest/DLM2252903.html> (visited 20 December 2011). This draft text provided:

- (1) It is unlawful for a New Zealand leader to plan, prepare, initiate or execute an act of aggression which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, in the event that such an act of aggression is committed.
- (2) Every person who breaches subsection (1) commits the crime of aggression, and is liable on conviction on indictment to a maximum sentence of 10 years’ imprisonment.

Ibid., at § 5. The bill was defeated 64–58 at its first reading in Parliament (apparently due in part to the requirement that the Attorney General be consulted before any proposed troop commitment), and has not been reintroduced. See [2009] 657 NZPD 6818 (N.Z.), available online at <http://www.parliament.nz/NR/rdonlyres/44B784A0-529B-4EA4-99FD-ADCD27D36400/191021/49HansD.200909295.pdf> (visited 20 December 2011).

89 T. McHenry, ‘Complementarity Issues’, 2011 *ASIL Proceedings* (forthcoming 2012) 153, at 155. Even where prosecutors are not part of the executive branch, aggression charges are likely to be viewed as politically motivated.

90 Murphy argues: ‘If [aggression] is criminalized in national law then, when a conflict erupts, each side presumably will indict and perhaps prosecute the leaders of the other side for aggression. How will that help matters? Doing so would seem simply to raise the stakes for both sides in not backing down and not finding a political solution to the conflict. ... [If] third states ... proceed with prosecutions ... [i]s it really better?’ S. Murphy, *The Crime of Aggression as Adopted by the ICC First Review Conference: A Step Forward?* 15 October 2010, at 10–11 (unpublished manuscript on file with the author). The situations involving Georgia and Russia, North and South Korea, India and Pakistan, and Ethiopia and Somalia, provide a handful of examples of situations unlikely to be pacified by domestic prosecutions for the crime of aggression.

91 See generally C.J. Dunlap, Jr., ‘Lawfare Today: A Perspective’, 3 *Yale Journal of International Affairs* (2008) 147.

trials may generate calls that the ICC should step in to protect a defendant from an over-zealous national prosecutor.⁹²

Domestic prosecutions for the crime of aggression will not benefit from the procedural regime — including painstakingly negotiated judicial and political controls — established by the ASP to manage prosecutions of the crime of aggression.⁹³ When an investigation is triggered by either a state party referral or a *proprio motu* investigation by the Prosecutor pursuant to Articles 13(a) and (c) of the ICC Statute, the crime of aggression will be subject to two alternative jurisdictional filters — the Security Council and the Pre-Trial Division of the Court, which operate in tandem — to determine whether the predicate act of state aggression has occurred.⁹⁴ Neither pre-trial determination is subsequently binding on the Court, which will establish the existence of an act of aggression anew at trial under the terms of the Statute and the penal burden of proof.⁹⁵ This pre-trial determination, however, will undoubtedly exert considerable evidentiary pull. Once a prosecution is initiated by any means, the Court is also subject to further oversight by the Security Council,⁹⁶ which can defer prosecutions for the crime when they might exacerbate breaches of international peace and security or otherwise interfere with measures undertaken by the Council pursuant to the United Nations Charter. None of these procedural hurdles would apply to domestic prosecutions for the crime of aggression unless specifically incorporated into domestic law.⁹⁷

Prosecutions before the Court will apply a consensus penal definition, complete with enumerated elements⁹⁸ and carefully negotiated interpretive

92 K.J. Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process', 17 *Criminal Law Forum* (2006) 255 (exploring whether the ICC could assert jurisdiction where a state will not guarantee due process to an accused).

93 P. Wrangle, 'The Principle of Complementarity under the Rome Statute and its Interplay with the Crime of Aggression', in R. Belleli (ed.), *Proceedings of the Conference on International Criminal Justice*, Turin, May 14–18, 2007, 57, at 59, § 13, ('Many States would probably not feel duty-bound under international law to wait for a decision by the Council.').

94 See Res. 6, Annex I, O.P. 3.

95 Res. 6, Annex I, Art. 15bis(9). See also Art. 66(3) ICCSt. ('In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt').

96 Art. 16 ICCSt. Theoretically, of course, the Security Council could also order a UN member to halt a domestic prosecution for the crime of aggression on the ground that the proceedings constituted a threat to international peace and security. See UN Charter, Art. 41. P. Wrangle, 'The Crime of Aggression and Complementarity', in R. Belleli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate, 2010) 591, at 603 (querying whether the Security Council could *ex ante* restrict the right to prosecute the crime of aggression domestically in a broad 'law making' resolution).

97 Indeed, if a state is intent on codifying the crime of aggression, at a minimum it should consider limiting prosecutions to situations in which the Security Council has declared the commission of an act of aggression by the relevant state. See Wrangle, *supra* note 93, at 60, § 14 (noting that states might 'unilaterally take a cautious approach, due to a perceived need of political legitimacy through the backing of the Council.').; also, Wrangle, *supra* note 96, at 601–603 (noting that there is no legal requirement that states await a Security Council determination, but that they could agree between themselves to restrict the right of domestic jurisdiction).

98 Res. 6, Annex II.

understandings.⁹⁹ Legislators incorporating the crime into national penal codes may drop or change definitional elements of the crime, enabling more expansive prosecutions than have been deemed acceptable by the ASP. For example, states may not adopt the leadership element,¹⁰⁰ which significantly limits the calibre of defendants who may be prosecuted before the ICC.¹⁰¹ Removing that element may render national legislators and policymakers, military officers with operational or tactical command, or even foot soldiers vulnerable to prosecution for the crime. In the alternative, states may tinker with, or even eliminate, the threshold qualifier ‘manifest’, which is meant to prevent the ICC from pursuing cases that are not sufficiently grave or that involve state conduct whose illegality under the United Nations Charter framework is uncertain.¹⁰² More drastically, perhaps, states may allow for prosecutions for attempted aggression¹⁰³ or they may drop the predicate requirement that there be proof beyond a reasonable doubt that a state committed an act of aggression, perhaps on the ground that it is inappropriate for one state to make such an adjudication vis-à-vis another state.¹⁰⁴ Removing this condition precedent may unfairly subject government officials to prosecution for the crime of aggression even in the absence of a determination that their state committed an act of aggression. This result would deprive defendants of the defence that no act of aggression was committed. Legislators may even extend the notion of the crime of aggression to non-state action and actors, well beyond what is contemplated by the amendments to the ICC Statute.¹⁰⁵ To be

99 Res. 6, Annex III. Some uncertainty remains over the authoritativeness of these Understandings. See K.J. Heller, ‘The Uncertain Legal Status of the Aggression Understandings’, in this issue of the *Journal*.

100 The crime of aggression will only be chargeable before the ICC against ‘persons in a position effectively to exercise control over or to direct the political or military action of a State’. See Res. 6, Annex I, O.P. 5 (setting forth proposed amendment to Art. 25). It is not clear if this element is inherent to the crime of aggression or a jurisdictional limitation applicable only to the ICC. The ILC assumed it was inherent to the offence. See ILC, *Report of the International Law Commission on the Work of its Second Session, 5 June to 29 July 1950*, UN Doc. A/1316, at 13.

101 See Reisinger Coracini, *supra* note 3, at 736 (noting that many domestic statutes do not limit their reach to individuals occupying a leadership position).

102 Art. 8bis(1) defines the crime of aggression as ‘the planning, preparation, initiation or execution ... of an act of aggression which, by its character, gravity and scale, constitutes a *manifest violation of the Charter of the United Nations*’. (Emphasis added). The interpretive Understandings reinforce this gravity threshold, but would not bind states engaged in domestic prosecutions.

103 The ICC will have jurisdiction only if the act of aggression is actually consummated. For debates over the inclusion of attempts to commit aggression, see Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, ICC-ASP/3/SWGCA/INF.1 (June 2004), reprinted in Barriga et al., *supra* note 80, at 198, 204.

104 See Donat Cattin, *supra* note 42, at 4 (arguing that ‘domestic criminal courts are simply mandated to apply the principle of individual criminal responsibility, not principles of State responsibility that would relate to acts of States, including aggressive wars.’).

105 It was always contemplated that the crime of aggression would be defined in terms of state action. See generally B. Van Schaack, ‘The Grass That Gets Trampled When Elephants Fight: Will the Codification of the Crime of Aggression Protect Women?’

sure, national legislators have a fair amount of leeway in incorporating international law into their domestic systems, and limitations cannot be presumed.¹⁰⁶ That said, the crime of aggression is one area of international law in which the ASP and the rest of the international community should particularly guard against fragmentation and incoherence.¹⁰⁷

Finally, domestic prosecutions will face a host of logistical and practical problems that may be more acute in the aggression context than with respect to other international crimes. These include how to gain access to classified information, how to address the state secrets doctrine and assertions of executive privileges,¹⁰⁸ how to gain custody of an accused, and how to obtain cooperation from third states.¹⁰⁹ These obstacles will complicate prosecutions and strain the mutual cooperation regimes in place between states. By virtue of Article 27,¹¹⁰ the ICC is not impeded by common law personal or sovereign immunities, such as head of state immunity,¹¹¹ diplomatic immunity¹¹² and their analogues.¹¹³ Presumably, if states retain the leadership clause in domestic definitions of the crime, many domestic cases will be barred by these immunity doctrines.¹¹⁴ There may, however, be a category of individual who would be vulnerable to prosecution because he or she satisfies the leadership clause by virtue of occupying 'a position effectively to exercise control over or to direct the political or military action of a State', but would not be entitled to any form of common law immunity. Nor is the ICC bound by abstention or non-justiciability doctrines that might complicate domestic proceedings, such as the act of state¹¹⁵ and political question doctrines.¹¹⁶

15 *UCLA Journal of International Law and Foreign Affairs* (2012) (forthcoming) (arguing that the definition of aggression contains blind spots that do not reflect the diversity of threats to international peace and security in contemporary international relations).

106 *The Case of the S.S. "Lotus" (France v. Turkey)*, 1927 P.C.I.J. (Ser. A) No. 10 (7 September 1927).

107 See ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006.

108 See Art. 72 ICCSt. ('Protection of National Security Information').

109 McHenry, *supra* note 89, at 155. To be sure, these concerns are applicable in many extraterritorial prosecutions for international crimes. The need to prove that a state committed an act of aggression, however, suggests special challenges.

110 Art. 27 ICCSt. ('Irrelevance of Official Capacity').

111 See generally *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97 (H.L.) (discussing head of state and other immunities).

112 Vienna Convention on Diplomatic Relations, Art. 31, 18 April 1961, 500 UNTS 95.

113 See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 ICJ 3, at 54 (14 February 2001) (extending head of state immunity to an incumbent Minister of Foreign Affairs).

114 Wrangle, *supra* note 93, at 58, § 6.

115 But see Wrangle, *supra* note 96, at 595 (opining that the act of state doctrine covers only actions taken within the territory of a state and that acts of aggression by definition cross international borders).

116 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 2005, §§ 23–25 (rejecting political question doctrine as a defence to prosecution).

A. *The Temptation to Codify the Crime of Aggression*

Notwithstanding these concerns, given the lack of express provisions condemning the crime of aggression, or obvious analogues thereto, as states parties ratify or accept the aggression amendments, they will inevitably consider whether to domesticate the crime of aggression.¹¹⁷ There is no express requirement within the ICC Statute obliging states parties to harmonize their domestic penal codes with the treaty.¹¹⁸ The Preamble affirms that the prosecution of serious crimes should be effectively prosecuted by ‘taking measures at the national level’ and ‘enhancing international cooperation’;¹¹⁹ recalls that ‘it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’;¹²⁰ and emphasizes that the ICC is to be ‘complementary to national criminal jurisdictions’.¹²¹ These preambular provisions recall pre-existing obligations under general international law rather than create new treaty-based obligations. Indeed, the latter clause is directed at ‘every State’ (and not just states parties), implying that no new duties are created by the Statute. The only mandatory language regarding domestic legislation in the treaty concerns state cooperation¹²² and the obligation to assert jurisdiction over offences against the administration of justice.¹²³

Although the domestic incorporation of ICC crimes is not mandated, as part of the process of ratification, states parties have tended to update their penal codes to be largely consistent with the ICC Statute. One of the most important reasons for doing so is to ensure that they may take full advantage of the principle of complementarity. The principle of complementarity may thus encourage states to codify the crime of aggression in order to preserve their domestic

117 Indeed, non-party states may also contemplate codification in order to preserve their ability to exercise domestic jurisdiction.

118 R. Rastan, ‘Complementarity: Contest or Collaboration’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 83, at 93 (noting that the Rome Statute ‘does not require domestication of the applicable crimes by way of implementing legislation’ but that the Statute’s admissibility provisions will nonetheless require the Court ‘to engage in a qualitative assessment over the adequacy of national law to repress the conduct alleged by the Prosecutor’). But see J. Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *JICJ* (2003) 86, at 92–94 (arguing an implied obligation to codify the ICC crimes to effectuate the object and purpose of the ICCSt).

119 Preambular clause 4, ICCSt. (‘Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’).

120 *Ibid.*, at clause 6.

121 *Ibid.*, at clause 10. While this language calls for domestic prosecutions, it falls just shy of an express endorsement of the exercise of universal jurisdiction over ICC crimes.

122 The Statute requires states parties to enact procedures in national law to enable them to cooperate with the Court, especially with respect to the arrest and surrender of suspects. See Arts 88 and 89(1) ICCSt.

123 Art. 70(4)(a) ICCSt.

prosecutorial capacities and priorities.¹²⁴ The ASP addressed this potential eventuality in interpretive Understandings adopted alongside the definition of aggression, as discussed in the next section.

4. Complementarity and Aggression

Given the legal and policy concerns outlined above about domestic prosecutions for the crime of aggression, it would have been ideal had the ASP endeavoured to grant the ICC exclusive jurisdiction over the crime of aggression. This was the approach the ILC originally adopted in early drafts of the ICC Statute. In the negotiations leading up to the 2010 Review Conference, however, negotiators decided, with little actual debate, that the crime of aggression would be subject to the principle of complementarity to the same extent as the atrocity crimes. Nonetheless, in the negotiated Understandings, negotiators cautioned against incorporating the crime into the world's penal codes. This approach reflects a recognition that the principle of complementarity might apply differently to the crime of aggression than it does to other atrocity crimes.

A. The Principle of Complementarity

By way of background, the ICC Statute envisions situations of concurrent jurisdiction between the Court and domestic courts at two points: when a state is in the process of prosecuting an individual pursuant to its domestic law and when a state has already prosecuted a potential ICC defendant.¹²⁵ The first situation implicates the principle of complementarity. The latter requires a consideration of the principle of *ne bis in idem*, or double jeopardy.¹²⁶

The unit of analysis for the principle of complementarity is a 'case', which implies the identification of particular criminal conduct by a particular

124 See Kleffner, *supra* note 118, at 90 (positing a 'normative force of complementarity' and arguing that the principle of complementarity encourages all states to incorporate the ICC crimes).

125 Arts 17–19 ICCSt. For a cogent discussion of the question of concurrence of charges at the various stages of a prosecution, see R. Rastan, 'Situations and Cases: Defining the Parameters', in C. Stahn and M.M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice, Vol. I* (Cambridge University Press, 2011) 421, at 437–444.

126 Art. 20 ICCSt. Although outside the scope of this article, it is worth considering whether double jeopardy would attach to a domestic prosecution for war crimes or crimes against humanity vis-à-vis the ICC if the crime of aggression was also implicated. According to the principle of upward *ne bis in idem*, the Court is barred from prosecuting defendants for the same conduct (as compared to the same crime, the unit of analysis for downward *ne bis in idem*) for which they stood trial in a domestic court. See generally L.E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis In Idem*', 8 *Santa Clara Journal of International Law* (2010) 165.

suspect.¹²⁷ Indeed, in a draft policy statement, the Prosecutor has indicated that the complementarity analysis requires a case-specific assessment and does not involve the Court passing judgment on a national judicial system as a whole.¹²⁸ Thus, once the Prosecutor identifies a case that he or she intends to prosecute (encompassing a particular crime or crime base and a particular suspect), the Prosecutor must examine whether any national authorities are conducting or have conducted proceedings in relation to the same person for the same conduct.¹²⁹ Theoretically, for this same conduct test, if a domestic court were prosecuting an individual for ordinary murder, the Court should not proceed with charges of wilful killing as a war crime or murder as a crime against humanity. Or, if a domestic court were prosecuting an individual for killing civilians as a war crime, the Court should not prosecute the same individual for the crime against humanity of murder. Whether complementarity is appropriately premised on the same conduct test or rather the precise labelling of an offence has led to a sharp divergence of scholarly opinion that awaits clarification from the Court.¹³⁰

It is clear that an ongoing domestic prosecution may not necessarily trigger deferral by the Court for other crimes that may be charged against the same individual for the totality of his or her conduct. The *Lubanga* case provides a stark example of the way in which the Court can assert jurisdiction when

127 See Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, *Lubanga Dyilo* (ICC-01/04-01/06-8-US-Corr), Pre-Trial Chamber I, 10 February 2006 (hereinafter, '*Lubanga Dyilo*'), at § 31 ('it is a condition *sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.'). Decision on the Prosecution Application Under Article 58(7) of the Statute, *Ahmad Harun and Ali Kushayb* (ICC-02/05-01/07), Pre-Trial Chamber I, 27 April 2007, § 24. See also ICC, OTP, *Policy Paper on Preliminary Examinations (Draft)* (4 October 2010), available online at <http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP.Draftpolicypaperonpreliminaryexaminations04101.pdf> (hereinafter, '2010 Draft Policy Paper'), at 10 (defining 'case' to encompass 'an identified set of incidents, individuals and charges') (visited 7 November 2011).

128 See 2010 Draft Policy Paper, *supra* note 127, at 10.

129 Several defendants being prosecuted in connection with the Kenya situation have argued that the definition of a 'case' for the purposes of an admissibility challenge should be broader than the same person/same conduct test, which applies to *ne bis in idem* cases, because the charges confirmed might differ from those presented at the summons stage. See Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Ruto et al.* (ICC-01/09-01/11-101), Pre-Trial Chamber II, 30 May 2011, § 21. This issue, and the approach the ICC should take vis-à-vis the labelling of crimes as ordinary or international, is the subject of appeal in the Kenya admissibility challenge.

130 See Newton, *supra* note 48, at 150 (noting that an ICC Prosecutor could 'use the form of domestic charges as a pretext to exert ICC authority.'). Some scholars have asserted what Heller describes as the 'hard mirror thesis', which posits that a domestic prosecutor's characterization of an international crime as an ordinary crime would per se indicate unwillingness or inability on the part of the state and thus render a case admissible. K.J. Heller, 'A Sentence-Based Theory of Complementarity', available online at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1857428> (visited 21 December 2011). See e.g. D. Sedman, 'Should the Prosecution of Ordinary Crimes in Domestic Jurisdictions Satisfy the Complementarity Principle?' in Stahn and Van den Herik (eds), *supra* note 5, 266.

there is an incongruity between the operative domestic charges and the charges sought by the ICC Prosecutor.¹³¹ In 2005, the Democratic Republic of Congo was ostensibly prosecuting Thomas Lubanga Dyilo for crimes against humanity, genocide, and other grave crimes;¹³² nonetheless, the Prosecutor sought to indict him for the crime of conscripting and using children in armed conflict — arguably a lesser crime than the charges pending before the domestic courts.¹³³ In its admissibility ruling, the Pre-Trial Chamber held that because none of the domestic charges encompassed the use of child soldiers, the case was admissible.¹³⁴ This example suggests that for complementarity to render a case inadmissible before the ICC, there must be a high degree of concurrence between the domestic charging instrument and the ICC indictment under contemplation.

B. The Application of Complementarity to the Crime of Aggression

Although complementarity has been central to the ICC since its inception, the application of the principle to the crime of aggression has raised special concerns.¹³⁵ The ILC in its work on precursors to the ICC Statute treated the crime of aggression differently than the other core crimes when it came to complementarity. Article 8 of the 1996 Draft Code of Offences Against the Peace and Security of Mankind, entitled 'Establishment of Jurisdiction', stated as follows:

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes

131 *Lubanga Dyilo*, *supra* note 127; Annex I to Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga Dyilo* (ICC-01/04-01/06-8-Corr), 28 February 2005.

132 See *Lubanga Dyilo*, *supra* note 127, at §§ 33, 36 (setting forth pending domestic charges). It is unclear from the record how much progress had been made on pursuing these charges or if they were filed primarily to provide a basis for justifying the continued detention of the accused.

133 Decision on the Confirmation of Charges, *Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, §§ 30–40.

134 *Lubanga*, *supra* note 127, §§ 38–40. See W.A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', 6 *JICJ* (2008) 731, at 741–745 (critiquing assertion of jurisdiction under the circumstances). The Court also noted that there had been virtual inaction with respect to the charges at issue. See *Lubanga*, *supra* note 127, § 34 (noting letter from the DRC indicating it would be unable to proceed with initial charges). See generally Rastan, *supra* note 125, at 446, note 76 (arguing that the DRC was not actively prosecuting Lubanga Dyilo for any charges and that the Court was correct in taking the case on that ground). This confirmation of admissibility may also reflect the reality that a compliant DRC was willing to outsource Lubanga Dyilo's prosecution, and Court personnel were hungry for their first case. See Schabas, *ibid.*, at 744.

135 See M.M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', 23 *Michigan Journal of International Law* (2002) 869, at 973, notes 406–407 (arguing that the principle of complementarity would not apply to the crime of aggression).

set out in articles 17 [genocide], 18 [crimes against humanity], 19 [crimes against UN personnel] and 20 [war crimes], irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 [aggression] shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.¹³⁶

This text thus envisioned jurisdiction over the crime of aggression to be all but exclusive before the future international court.¹³⁷ The only exception contemplated was in the case of a state prosecuting its own nationals for the crime, presumably after a change of regime.¹³⁸ This provision thus excluded the exercise of jurisdiction by the victim state exercising territorial, protective, or passive personality jurisdiction as well as by third states.¹³⁹ The ILC's commentary explained its approach as follows:

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. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.¹⁴⁰

Similarly, Article 9 of the 1996 Draft Code excluded the crime of aggression from the extradition regime envisioned by the draft text: 'Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in

136 1996 Draft Code Report, *supra* note 83, at 27. See also ILC, *Report of the International Law Commission on the work of its forty-seventh session (2 May–21 July 1995)*, UN Doc. A/50/10, at 22 (noting the argument that 'the crime of aggression was inherently unsuitable for trial by national courts and should instead be dealt with only by an international court'). The ILC would also have established more express duties on states parties to codify ICC crimes and acknowledged the propriety of universal jurisdiction over the atrocity crimes. *Ibid.*, at 29.

137 The commentary makes clear that the Commission considered that international law already entitled any state party to exercise jurisdiction over an individual allegedly responsible for war crimes, crimes against humanity or genocide. 1996 Draft Code Report, *supra* note 83, at 29.

138 This jurisdiction was framed as permissive. 1996 Draft Code Report, *supra* note 83, at 32.

139 *Ibid.*, at 30 (noting the text's 'singular exception' for the exercise of nationality jurisdiction by the state that committed the act of aggression).

140 *Ibid.*, at 30. The report also notes that the nationality state 'is the only State which could determine the responsibility of a leader for the crime of aggression without being required to also consider the question of aggression by another State. ... [T]he exercise of national jurisdiction by a State with respect to the responsibility of its nationals for aggression would not have the same negative consequences for international relations or international peace and security as the exercise of national jurisdiction in the same respect.' *Ibid.*, at 30. From the records, it is unclear if the ILC considered itself to be codifying existing international law on this point. *Ibid.* Wrangé, *supra* note 96, at 599 (opining that the ILC adopted a more restrictive view on policy grounds).

article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.¹⁴¹ The aggression provision, then contained within Article 16, is not listed.¹⁴² This regime thus eliminated pure territorial jurisdiction over the crime — the most standard ground for exercising criminal law jurisdiction.¹⁴³

Contrary to the approach of the ILC, the Special Working Group on the Crime of Aggression¹⁴⁴ concluded that the principle of complementarity would ostensibly apply *mutatis mutandis* to the crime of aggression.¹⁴⁵ During the pre-Review Conference negotiations, delegates indicated that it would be for the Court to interpret the relevant provisions.¹⁴⁶ In Kampala, however, this issue was revisited in interpretive Understandings that were ultimately attached to the final adopting resolution.¹⁴⁷ The final text built on existing language in the Review Conference materials concerning the propriety of the exercise of domestic jurisdiction over the crime of aggression in the event an amendment to the Statute was adopted. In Kampala, the first Conference Room Paper on the Crime of Aggression contained a draft Understanding to the effect that:

4bis. It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or

141 *Ibid.*, at 30.

142 As an indirect damper on the exercise of domestic jurisdiction over the crime of aggression, the ASP might also have adopted language to the effect that states party would not seek or grant the extradition of individuals generally, or alternatively on the basis of a ground other than nationality jurisdiction, if they are to be prosecuted for the crime of aggression. See Art. 90 ICCSt. (governing competing requests for jurisdiction). This approach was not contemplated.

143 But see Strapatsas, *supra* note 5, at 453 (noting that ‘an aggressed state ... has every legal right to exercise its criminal jurisdiction over the crime of aggression by virtue of the “territorial character of criminal law”’).

144 As early as 2004, delegates acknowledged they might have to revisit the complementarity provisions once a definition of aggression was reached. See Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, Doc. ICC-ASP/3/SWGCA/INE1 (June 2004), in Barriga et al., *supra* note 80, at 198, 201–202. However, little attention was paid to this issue during the negotiations given delegates’ preoccupation with defining the crime and devising an appropriate jurisdictional framework. See Strapatsas, *supra* note 5, at 450 (noting mixed signals within the aggression amendments *travaux* as to the applicability of the principle of complementarity to aggression).

145 Report of the inter-sessional meeting of the Special Working Group on the Crime of Aggression, Doc. ICC-ASP/3/25 (2004) (hereinafter, ‘2004 Report’), in Barriga et al., *supra* note 80, at 198, 201–202 (‘There was general agreement that no problems seemed to arise from the current provisions [on complementarity] being applicable to the crime of aggression.’).

146 *Ibid.*, at 202.

147 Res. 6, Annex III. For a deeper discussion of the Understandings, see C. Kreß et al., ‘Negotiating the Understandings on the Crime of Aggression’, in S. Barriga and C. Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2011) 81.

obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.¹⁴⁸

The original formulation of this Understanding accomplished several purposes: it identified the definition of the crime as relevant to the ICC only; it did not authorize or require domestic incorporation of the crime; and, it did not parse between the various bases of extraterritorial jurisdiction, but simply indicated that the amendments to the Statute should not be cited as a legal basis for states to assert domestic jurisdiction over individuals accused of orchestrating an act of aggression committed by another state. The reference to 'by another state' implies that the exercise of active nationality jurisdiction was considered less problematic.

During the Kampala negotiations, the United States delegation proposed three changes to this language: (1) The addition of a reference to 'act of aggression' in the first sentence alongside 'crime of aggression'; (2) the inclusion of an assertion that the aggression amendments do not constitute a definition of these terms under customary international law; and (3) a separation of the third sentence into a separate Understanding (and a removal of the word 'therefore') to reflect the fact that this statement addresses a different concern than the first two sentences of this text (i.e. the issues of definition versus jurisdictional competency). In an intervention in a plenary session, a member of the United States delegation explained that the point of the first two of these proposed changes was to further emphasize that the amendments would be adopted solely for the purpose of prosecutions under the Rome Statute and that there is a divergence of views among states about as to whether the definitions of 'crime of aggression' in Article 8*bis*(1) and 'act of aggression' in Article 8*bis*(2) reflect customary international law.¹⁴⁹ The ultimate goal of these proposals was to undermine any tendency to refer to these definitions as evidence of existing customary international law or any progressive development of the law. The last change was meant to signal a separate point: that ratification or acceptance of the amendments will not empower or oblige states to incorporate the crime of aggression into their domestic codes or to launch domestic prosecutions for the crime.

Claus Kreß of the German delegation moderated a breakout session on these proposals in which delegates embraced the same consensus-oriented approach that governed the plenary sessions. To be sure, the complete dynamics of the negotiations remain opaque, but the proposed language in 4*bis* met with little public discussion or resistance, except in so far as the words 'customary international law' were ultimately not included in the final text. The new language

148 Annex III, Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.1, 5 June 2010. This language was drawn from a prior Non-Paper by the Chair circulated in advance of the Review Conference. See Non-Paper by the Chair: Further Elements for a Solution on the Crime of Aggression, RC/WGCA/2, 25 May 2010. Art. 10 ICCSt. states that nothing in Part 2 (concerned with jurisdiction, admissibility, and applicable law) is meant to influence 'existing or developing rules of international law for purposes other than this Statute'.

149 Intervention by William Lietzau, Deputy Assistant Secretary of Defense, United States, 7 June 2010 (unpublished) (on file with the author).

of Understanding 4*bis* later appeared in a Non-Paper by the President.¹⁵⁰ In the final package of amendments, the two elements of 4*bis* (definition and jurisdiction) were bifurcated into separate Understandings:

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.¹⁵¹

These Understandings should discourage,¹⁵² but would not preclude, states from harmonizing their penal codes with any new aggression provisions and from launching domestic aggression prosecutions. At a minimum, Understanding 5 would preclude a state from citing the aggression amendments as support for the extension of domestic jurisdiction over crimes of aggression committed by non-nationals.

5. A Prosecutorial Policy

Given that few states now possess the ability to prosecute the crime of aggression domestically, concurrent jurisdiction between the world's penal codes and the ICC Statute will not exist if and when the Court's ability to prosecute crime of aggression is activated. And, the definitions of most domestic and international crimes will not cover the same conduct penalized by the prohibition against aggression. Without amendments to domestic law, the Court could find itself in a position of preempting the prosecutorial efforts of domestic courts — notwithstanding credible atrocity crime charges — on the sole ground that potential aggression charges are lacking for whatever reason.¹⁵³ To avoid this assertion of ICC jurisdiction, states parties and other concerned

150 Non-paper by the President of the Assembly, *Draft Resolution: The crime of aggression*, 10 June 2010.

151 Res. 6, Annex III.

152 See C. Kreß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *JICJ* (2010) 1179, at 1216 (noting that the fifth Understanding apparently discourages states from codifying the crime of aggression, except perhaps pursuant to the active personality principle).

153 To be sure, none of the cases to arise out of the current situations before the ICC implicates the crime of aggression, although situations no longer under consideration (such as Iraq) may have. The crime could also be relevant to future cases from Central Africa as well as other situations still in the wings (such as Georgia, Palestine, and Korea). See ICC, *OTP, Communications, Referrals and Preliminary Examinations*, available online at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> (visited 7 November 2011).

states may be tempted to amend their penal codes to include the crime of aggression, notwithstanding Understandings 4 and 5. This result would enable — and perhaps encourage — domestic prosecutions for the crime of aggression with all of their attendant concerns.

It is possible to both promote the principle of positive complementarity¹⁵⁴ and encourage states to live up to their treaty- and customary international law-based obligations to prosecute international crimes,¹⁵⁵ while still respecting the ethos behind Understandings 4 and 5. When a wartime crime base is the subject of a credible domestic investigation and prosecution — for one of the atrocity crimes or their domestic analogues — the ICC should generally stay its hand even if aggression charges are not forthcoming or available.¹⁵⁶ This will prioritize the exercise of domestic jurisdiction in keeping with positive complementarity and preserve Court resources for situations in which no state is credibly asserting its penal jurisdiction over a situation.

This approach is amenable to an exception that can be accommodated within the existing treaty text and the aggression amendments. This exception concerns situations in which an act of aggression is the primary violation of international criminal law arising out of a particular situation. This would be the case, for example, following so-called ‘clean’ wars — armed conflicts fought largely in compliance with humanitarian law.¹⁵⁷ In these cases, it would be appropriate for the ICC Prosecutor to consider asserting ICC jurisdiction in order to enforce the prohibition of aggression. Going forward with this narrow set of cases would ensure that the crux of the potential defendant’s criminal conduct is subject to prosecution. It would also enable the ICC to

154 See ICC, OTP, *Report on Prosecutorial Strategy*, 5 September 2006, available online at <http://www.fidh.org/IMG/pdf/OTPPProsecutorialStrategy.2006-2009.pdf> (visited 7 November 2011), (noting that the OTP encourages genuine national proceedings where possible).

155 Rastan, *supra* note 118, at 105 (noting treaty and/or customary obligations to prosecute international crimes).

156 This approach finds affinity with Heller’s sentence-based theory of complementarity, which focuses not on the particular charges brought, but the sentence awarded. See Heller, *supra* note 130, at 2 (arguing that ‘any national prosecution of an ordinary crime satisfies the principle of complementarity as long as it results in a sentence equal to, or longer than, the sentence the perpetrator would receive from the ICC’).

157 The 26 March 2010 torpedo attack on the South Korean Warship *Cheonan* provides a useful example. See N. Loader, ‘Investigation concludes North Korean missile sunk the Cheonan killing 46’, *Asian Correspondent*, 21 May 2010, available online at <http://us.asiancorrespondent.com/video/investigation-concludes-north-korea.htm> (visited 7 November 2011). The attack appears to be a classic case of bilateral aggression, with a clear victim state and a clear aggressor state. The victims were 46 crewmembers; no civilians were injured. Assuming the attack exceeds the necessary threshold with respect to ‘character, gravity, and scale’ of Art. 8bis(1), which it may not on its own unless the long history of tensions between the two nations are taken into account, aggression would be the only chargeable crime. The attack could not be charged as a war crime (for lack of an armed conflict or victim with protected person status) or crime against humanity (for lack of an attack against a civilian population). Nonetheless, this situation is already under consideration by the ICC’s Prosecutor. See ICC Prosecutor: *alleged war crimes in the territory of the Republic of Korea under preliminary examination*, 6 December 2010, available online at <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Korea/> (visited 7 November 2011).

develop the anti-aggression norm with a consensus definition of the crime and subject to a carefully negotiated jurisdictional regime.

Although not mandated by the ICC's complementarity regime, a general deferral to the exercise of domestic jurisdiction when all-but-aggression charges are being pursued can be effectively accomplished through a policy of prosecutorial discretion.¹⁵⁸ As he has done in the past,¹⁵⁹ the Prosecutor should announce such a policy well in advance of 2017 in order to reassure states parties and other concerned states that the Court will not readily assert jurisdiction concurrent to domestic courts just because the prosecuting state lacks the ability to prosecute the crime of aggression per se. In this way, the Prosecutor can contribute to the implementation of Understandings 4 and 5 within the framework of the principle of complementarity. That said, the ASP should also consider promulgating a more express Understanding to solidify this approach and the appropriate division of labour between the ICC and domestic courts in the aggression context.

6. Conclusion

Notwithstanding the current dearth of domestic precedent involving the crime of aggression, as a consequence of ratifying or adopting the amendments to the ICC Statute, the world's legislatures may be tempted to amend their domestic penal codes to include the crime of aggression alongside the other ICC crimes. This might, in turn, enable or even encourage domestic prosecutions for aggression under either the traditional bases of jurisdiction or even pursuant to more extraordinary grounds — a state of affairs fraught with legal and political problems.

If the approach advocated herein is implemented, the Court will exercise a de facto exclusivity over the crime of aggression without undermining domestic prosecutions of the atrocity crimes. Concentrating prosecutions of the crime of aggression before the ICC has the benefit of guaranteeing to defendants that they will be prosecuted under a consensus international definition subject to the judicial controls and mechanisms of political oversight endorsed by the ASP. Such prosecutions before an international body will also be less likely to jeopardize international relations by having the courts of one state sit in judgment over the acts of a co-equal sovereign.

158 Art. 53 ICCSt. envisions prosecutorial discretion in the interests of justice.

159 The OTP has circulated a number of draft and policy papers setting forth its approach to its mandate. See OTP, *Office of the Prosecutor, Policies and Strategies*, available online at <http://www2.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/> (visited 7 November 2011). The Prosecutor also regularly addresses the ASP and other multilateral institutions, such as the Security Council. But see A. Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *AJIL* (2003) 510, at 541 (arguing that the ICC Prosecutor should issue prosecutorial guidelines to enhance transparency, legitimacy, and accountability).

In 2012, the Court will undergo an unprecedented turnover of its core professional staff, including the appointment of a new Chief Prosecutor¹⁶⁰ alongside six new judges and a new President of the ASP.¹⁶¹ As such, it will fall to the new Prosecutor, Fatou Bensouda, to develop her Office's policy toward the crime of aggression. Since the ASP may activate the crime of aggression on the new Prosecutor's watch, disseminating a policy on the crime of aggression should be one of the first priorities of the new Prosecutor. This will signal to members of the ASP that they need not domesticate the crime of aggression in order to enjoy the privilege of complementarity.

160 The Prosecutor is elected by the ASP for a nine-year term (Art. 42(4) ICCSt.).

161 See B. Van Schaack, 'Major Staff Turnover Anticipated at ICC', blogspot at *IntLawGrrls*, 16 March 2011, available online at <http://intlawgrrls.blogspot.com/2011/03/major-staff-turnover-anticipated-at-icc.html> (visited 7 November 2011).