



Universiteit  
Leiden  
The Netherlands

## **The crime of aggression and public international law**

Wong, M.S.

### **Citation**

Wong, M. S. (2016, April 14). *The crime of aggression and public international law*. Retrieved from <https://hdl.handle.net/1887/38952>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/38952>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/38952> holds various files of this Leiden University dissertation.

**Author:** Wong, Meagan Shanzhen

**Title:** The crime of aggression and public international law

**Issue Date:** 2016-04-14

## Chapter VII. Prosecution of the crime of aggression at domestic courts

### 7.1. Introduction

Domestic courts represent an enforcement mechanism against the crime of aggression. As mentioned in the previous chapter, complementarity ensures that in situations where the ICC and domestic courts have concurrent jurisdiction over the crime of aggression, the latter should have the priority of prosecution. It has been pointed out that this preserves the legal interests of the State Party, by allowing it to retain its competence to prosecute the crime. That said, it has been argued that complementarity should not apply to the crime of aggression,<sup>882</sup> which suggests that prosecution of the crime should not take place in domestic courts. For example, Van Schaack generally discourages the ASP and the rest of the international community from domestic prosecutions of the crime of aggression and argues ‘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.’<sup>883</sup> The underlying hypothesis of this argument is that domestic courts are not competent forum for prosecuting the crime of aggression, thus the ICC should have *de facto* exclusive jurisdiction. This was the position of the ILC in the Draft Code of Crimes. In its Report to the General Assembly, it was stated that ‘the crime of aggression was inherently unsuitable for trial by national courts and should instead be dealt with only by an international court.’<sup>884</sup> As such, the proposed framework of enforcement against the crime of

---

<sup>882</sup> See Jennifer Trahan, ‘Is Complementarity the Right Approach for the International Criminal Court’s Crime of Aggression? Considering the Problem of “Overzealous” National Court Prosecutions’ (2012) 45 Cornell International Law Journal 569; Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (n 15); see also Pal Wrangé, ‘The Crime of Aggression and Complementarity’, *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate 2010); Roger Clark, ‘Complementarity and the Crime of Aggression’, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Nicolaos Strapatsas, ‘Complementarity and Aggression: A Ticking Time Bomb?’ in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010).

<sup>883</sup> Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (n 15) 137.

<sup>884</sup> Report of the International Law Commission on the work of its forty-seventh session, 2 May to 21 July 1995 (A/50/10), Yearbook of the International Law Commission, 1996, vol.II(2), at 39.

aggression was that the ICC should have exclusive *de facto* jurisdiction, thereby serving as the sole enforcement mechanism.

As the hypothesis that the ICC should have *de facto* jurisdiction over the crime of aggression is contrary to the premise of this dissertation that international law relies on both the ICC and domestic courts as enforcement mechanisms against the crime of aggression, the question of domestic prosecution will be addressed as a preliminary issue (section 7.2). This Chapter will proceed to examine, and then challenge the underlying rationale put forward by the ILC (section 7.2.1) as to why domestic courts are not competent forum for prosecution (with the exception of the aggressor state wishing to initiate proceedings). In addition, recent developments will also be presented to demonstrate why the position of the ILC in the Draft Code of Crimes is not sustainable. Thus, it is substantiated that domestic courts are competent forum for the prosecution of aggression. From this premise, the legal interests of the forum state may be contemplated (section 7.2.2).

The Chapter will then continue to examine other concerns that arise (section 7.3) with respect to determining the state act element of the crime (section 7.3.1) and the elements of individual conduct (section 7.3.2) and whether and to what extent they may be overcome. The final section (section 7.4) focuses on the procedural bars that come into play, and contemplates whether and to what extent they may be overcome.

It should be clarified from the outset that this Chapter focuses on domestic prosecution for the crime of aggression from a legal analysis, leaving aside political considerations or ramifications. As such, the question is to be differentiated from ‘should the crime of aggression be prosecuted in domestic courts,’ as the latter appears to be more of a policy question as opposed to legal question.

## **7.2. The question of domestic prosecution**

It has been questioned whether domestic courts are competent *fora* to prosecute the crime of aggression. The hypothesis is that the ICC should have *de facto* exclusive jurisdiction over the crime of aggression.<sup>885</sup> As such, complementarity is not entirely applicable to the crime of aggression.<sup>886</sup>

---

<sup>885</sup> In general see Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (n 15); see also Article 8, Draft Code of Crimes.

<sup>886</sup> *ibid* 155; see also Trahan (n 882).

This section will now examine and challenge this hypothesis to demonstrate that it is not sustainable. It is submitted that domestic courts are indeed competent *fora* with respect to prosecution; thus complementarity is applicable to the crime of aggression in the same way as it is to the other core crimes in Article 5(1) of the Rome Statute.

### *7.2.1 The International Law Commission and the 1996 Draft Code of Crimes against the Peace and Security of Mankind*

In the Draft Code of Crimes, Article 8 stipulates:

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

Thus, two separate jurisdictional regimes are proposed: jurisdiction for the crimes contained in Articles 17 to 20 (genocide, crimes against humanity, crimes against UN and associated personnel and war crimes) and jurisdiction for the crime set out in Article 16 (crime of aggression). The former refers to concurrent jurisdiction of an international criminal court and jurisdiction of national courts for the crime of genocide, crimes against humanity, crimes against UN and associated personnel and war crimes (the “other crimes”) predicated on universal jurisdiction (‘irrespective of where or by whom those crimes were committed’), whilst the latter envisages an exclusive jurisdiction of an international criminal court with regard to the crime of aggression, with the singular exception of the aggressor state trying its nationals.

In the Commentaries to the Draft Code of Crimes, an explanation for the different jurisdictional regimes was provided:

This principle of exclusive jurisdiction is the result of the unique character of the crime of aggression in the sense that the responsibility of an individual for participation in this crime is established by his participation in a sufficiently

serious violation of the prohibition of certain conduct by States contained in Article 2, paragraph 4 of the Charter of the United Nations. The aggression 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. 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*.<sup>887</sup>

Two main points can be ascertained. First, the state act of aggression is a necessary pre-requisite in order to determine individual criminal responsibility for the crime of aggression. Second, as the domestic court of one State has to consider whether another State has violated Article 2(4) of the UN Charter, this would violate the principle *par in parem imperium non habet* (also phrased as “*par in parem non habet imperium*”); this can be broadly understood to mean that one state cannot exercise jurisdiction over acts committed by another state, as “one State has no power over another.”<sup>888</sup>

The consideration of the legality of the use of force with respect to Article 2(4) UN Charter does not appear to be the reason why the ILC believed that the international court should have exclusive jurisdiction over the crime of aggression because there was no objection to a State whose leaders participated in the act of aggression from carrying out proceedings:

---

<sup>887</sup> Commentaries on the Draft Code of Crimes, 30.

<sup>888</sup> See Yoram Dinstein, ‘Par in Parem Non Habet Imperium’ [1966] Israel Law Review 407, 413–415; Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (n 15) 149; Kelsen writes that ‘sovereignty is sometimes defined as supreme “power.” In this connection, power means the same as authority, namely legal power, the competence to impose duties and confer rights’, Hans Kelsen, *Peace Through Law* (2008 Reprint of first edition 1944) 35.

this is the only State which could determine the responsibility of such a leader for the crime of aggression without being required to also consider the question of aggression by another State.<sup>889</sup>

Thus, the problem appears to be the consideration of the forum state of the legality of the use of force by another state and the issue of *par in parem non habet imperium*. Van Schaack refers to this issue as a problem with domestic prosecution for the crime of aggression, which is why the ICC should assume the ‘posture of de facto exclusivity over the crime of aggression vis-à-vis domestic courts.’<sup>890</sup> She writes:

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’).<sup>891</sup>

Yet, she neglects to contemplate or elaborate further how *par in parem imperium non habet* shall apply with respect to the crime of aggression,<sup>892</sup> and more importantly whether or not this is a non-derogable principle. Thus, the question is whether *par in parem non habet imperium* serves as an insurmountable procedural barrier for prosecution of the crime of aggression in domestic courts. This question will be discussed separately later in this Chapter (section 7.3.1). At present, it is not necessary to examine *par in parem imperium non habet* in order to discredit the hypothesis that the ICC should have *de facto* exclusive jurisdiction on the basis that domestic courts are not competent *fora*. Three other reasons can be identified as to why the aforementioned position of the ILC in the Draft Code of Crimes is unsustainable.

---

<sup>889</sup> Commentaries on the Draft Code of Crimes, 30.

<sup>890</sup> Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (n 15) 136.

<sup>891</sup> *ibid* 149.

<sup>892</sup> Van Schaack submits that ‘prosecuting the crime of aggression domestically in situations other than following a change in regime will inevitably generate intense charges of politicization from within and outside the prosecuting state. Domestic aggression cases will no doubt exacerbate relations between states involved in situations already disrupted by a putative act of aggression’, *ibid* 150.

First, regardless of whether *par in parem non habet imperium* may arise in domestic proceedings, the competence of states to codify the crime of aggression into domestic legislation is not affected. Each State has the discretion to codify the crime of aggression into its domestic legislation, which includes the jurisdictional scope that it wishes to prescribe over this crime.

Second, some states have actually codified the crime of aggression in their domestic criminal legislation.<sup>893</sup> In an extensive comparative study of domestic legislation pertaining to the crime of aggression, Reisinger Coracini identified that all states that have the crime of aggression in their national legislation have incorporated jurisdiction under the territorial principle,<sup>894</sup> the protective principle,<sup>895</sup> and even the universality principle.<sup>896</sup> With respect to the universality principle, she observes that a number of legislations provide ‘blanket universal jurisdiction clauses’ that allow ‘prosecution of non-nationals for crimes committed abroad against foreigners, if such crimes are proscribed by a recognized<sup>897</sup> norm of international law or an international treaty binding upon that state.’<sup>898</sup>

---

<sup>893</sup> See Reisinger Coracini, ‘National Legislation on Individual Responsibility for Conduct Amounting to Aggression’ (n 431) 547–578; Reisinger-Coracini has observed that the following countries have codified aggression as a crime within their criminal codes: Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina (criminal codes of the Federation, Brcko District and Republika Srpska), Bulgaria, Croatia, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Macedonia, Moldova, Mongolia, Montenegro, Poland, Russian Federation, Serbia, Slovakia, Slovenia, Tajikistan, Ukraine, Uzbekistan, at footnote 29.

<sup>894</sup> She observes that ‘every state, which is the victim of an act of aggression, may establish jurisdiction on the principle of territoriality’, *ibid* 564.

<sup>895</sup> She observes that ‘a number of states provide for jurisdiction upon the protective principle, where that state’s interests are violated’ and refers as examples to Art.15(3)(2) Armenian criminal code; Art.132 Bosnian criminal code (Brcko district); Art.9 Estonian criminal code; Art.5(3) Georgian criminal code; Art.6, para.4, Kazakh criminal code [footnote 128], *ibid*.

<sup>896</sup> e.g., Article 11(3) Moldovan Criminal Code states: If not convicted in a foreign state, foreign citizens and stateless persons without permanent domiciles in the territory of the Republic of Moldova who commit crimes outside the territory of the Republic of Moldova shall be criminally liable under this Code and shall be subject to criminal liability in the territory of the Republic of Moldova provided that the crimes committed 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; Article 6(1) Bulgarian Criminal Code states: foreign citizens who have committed abroad crimes against peace and humanity, whereby the interests of another state or foreign citizens have been affected’, *ibid* 564–565.

<sup>897</sup> *ibid* 564.

<sup>898</sup> Reisinger Coracini refers to Art.15(3)(1) Armenian criminal code; para.8 Estonian criminal code; Art.5(2) and (3) Georgian criminal code, Art.6, para.4 Kazakh criminal code; Art.15(2) Tajik criminal code in footnote 136; She subsequently elaborates that ‘depending on the specific formulation and interpretation of such a clause, it may apply to the crime of aggression as a crime under customary law, or as a crime defined by treaty law, if the state in



Third, a significant development that clearly departs from the position of the ILC is that the Review Conference did not establish that the ICC should have exclusive jurisdiction for the crime of aggression. In the drafting process, during the negotiations of the SWGA, the concept of complementarity was touched upon, albeit somewhat briefly.<sup>899</sup> According to the 2004 Princeton Report, ‘there was general agreement that no problems seemed to arise from the current provisions being applicable to the crime of aggression’<sup>900</sup> and that concerns ‘could be addressed through interpretation of the provisions of the Statute and therefore no amendments would be required.’<sup>901</sup> It was concluded that:

Articles 17, 18, and 19 were applicable in their current wording and the points raised merited being revised once agreement had been reached on the definition of aggression and the conditions for exercise of the Court’s jurisdiction.<sup>902</sup>

The significance of this is that by agreeing that complementarity should apply to the crime of aggression in the same way as the other crimes in Article 5(1) of the Rome Statute, it is inferred that domestic courts may retain their position as the primary forum of prosecution.<sup>903</sup> The Review Conference had not intended for the ICC to have *de facto* exclusive jurisdiction over the crime of aggression.

---

question is a party to the London Agreement or the Rome Statute. In the latter case, the prerequisite prescription might already be met, since the Statute confirms the existence of individual criminal responsibility for the crime of aggression and lists it as one of the “most serious crimes of concern to the international community as a whole” falling within the jurisdiction of the ICC. From a more cautious approach, complete international proscription may only be assumed, once a provision on aggression is adopted and binding upon a State Party. Some states however, do not only require the international prescription of the crime in this context, but only accept the establishment of universal jurisdiction if explicitly foreseen by an international treaty obligation’, *ibid* 565.

<sup>899</sup> See Princeton Report (2004) paras. 20 – 27; Wrange (n 882) 592.

<sup>900</sup> Princeton Report (2004), para 21.

<sup>901</sup> Princeton Report (2004), para 26.

<sup>902</sup> Princeton Report (2004), para.27.

<sup>903</sup> Clark is of the opinion that the complementarity doctrine applies as it does in respect of the other crimes under the jurisdiction of the ICC, see Clark, ‘Complementarity and the Crime of Aggression’ (n 882).

In the light of these developments, it is submitted that the correct legal position is that both domestic courts and the ICC may have concurrent jurisdiction for the crime of aggression.<sup>904</sup>

### *7.2.2. The legal interests of the forum state*

In Part II of this dissertation, it was submitted that prosecution of the crime of aggression in domestic courts by the aggressed state is directly representative of its legal interests, as the court is enforcing sanctions against a duty-bearer for failure to comply with international obligations. Also, there is symbolic significance in the State or Crown bringing an action directly against the perpetrator of the crime for wrongful conduct committed against the state. In Chapter V, it was also discussed that it may be possible for domestic courts to make reparation orders against the defendant in addition to a successful conviction. However, the focus of this Chapter will be prosecution for the purposes of establishing individual criminal responsibility – and not individual civil responsibility.

The starting point is that the aggressed state has a legal interest to be the forum state for the prosecution of the crime of aggression. This is because the alleged perpetrator of the crime of aggression has acted in breach of duty to comply with obligations owed to it to refrain from the relevant prohibited conduct. Suffice it to say, if the aggressed state intends to act as the forum state, the crime of aggression must already be prescribed in its domestic legislation under the territorial principle of jurisdiction at the time when the crime was committed.

That said, the aggressor state also has a legal interest to be the forum state for the prosecution of the crime of aggression if the alleged perpetrator is a national. Indeed, it is hardly contestable that a state has a legal interest to prosecute its nationals for wrongful conduct in breach of domestic legislation. For this to be possible, the crime of aggression must be prescribed in domestic legislation under the nationality principle of jurisdiction. It is worth noting that domestic prosecution of the crime of aggression in the aggressor state may be considered as satisfaction (Article 37, ARSIWA) under international law for the aggressed state.<sup>905</sup>

---

<sup>904</sup> See Wrangé (n 882) 599.

<sup>905</sup> Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair Decision of

Therefore, both the aggressor state and the aggressed state have a legal interest to be the forum state for the prosecution of the crime of aggression. It is not within the compass of this section to examine which forum is more convenient or whether the legal interests of one state to act as the forum state should prevail over the other. Aside from the domestic and international political ramifications of domestic prosecution of the crime of aggression in both potential forums, there are also practical difficulties. Examples of the latter include factors such as fact-finding and gathering evidence, finding witnesses, arrest of the alleged perpetrator – especially if the forum state is the aggressed state, resources and judicial infrastructure. That said, such practical difficulties are not unique only to the crime of aggression and could also easily arise with respect to the other core crimes.

An interesting aspect to be considered is the question of whether a bystander state may have a legal interest to act as a forum for the prosecution of the crime of aggression under the universality principle, i.e. to exercise universal jurisdiction. Presumably, the bystander state intending to prosecute has already prescribed the universality principle as a base for jurisdiction in its domestic legislation, and wishes to exercise universal jurisdiction over the crime of aggression.<sup>906</sup>

As there has been no direct injury or wrong committed against the bystander state, it may be rather difficult to argue that there is a legal interest under international law to prosecute the individual for committing the crime of aggression against the aggressed state. As argued by Akande:

when domestic courts prosecute for aggression they are not acting in the collective interest. [...] domestic courts prosecuting for aggression are exercising a form of self help and are acting to protect domestic interests.<sup>907</sup>

A contrary argument can be made that the obligations owed by the duty-bearer to refrain from conduct pertaining to the crime of aggression is owed to the international community as a whole. Thus, enforcement against the responsible individual for the

---

30 April 1990, Reports of International Arbitral Awards, 30 April 1990, Volume XX, 215-284 (hereinafter “The Rainbow Warrior Case”), 272; see also Commentaries on ARSIWA, 106.

<sup>906</sup> See Reisinger Coracini, ‘National Legislation on Individual Responsibility for Conduct Amounting to Aggression’ (n 431) 564–565.

<sup>907</sup> Akande, ‘Prosecuting Aggression: The Consent Problem and the Role of the Security Council’ (n 753) 35.

breach of such wrongful conduct is in the interests of the international community. It is not the place of this Chapter to discuss enforcement measures for violations of obligations *erga omnes*. Instead, the angle that will be focused upon is whether there is universal jurisdiction under international law for the crime of aggression.<sup>908</sup>

Scharf examines the legal status of the IMT trial at Nuremberg as whether this ‘should be viewed as having applied a collective form of establishing the Nuremberg Tribunal, or whether it should instead be viewed as a court of the occupying powers applying the territorial jurisdiction of Germany over the accused Nazis.’<sup>909</sup> He finds the former type of jurisdiction more convincing,<sup>910</sup> and continues to submit that ‘it is reasonable for states to conclude that Nuremberg and its progeny provide a customary international law basis for prosecuting the crime of aggression under universal jurisdiction.’<sup>911</sup> He further relies upon the Lotus principle,<sup>912</sup> stating that ‘those who seek to argue that the exercise of domestic universal jurisdiction over the crime of aggression is invalid must surmount a large hurdle.’<sup>913</sup>

However, this does not seem to be so readily accepted. Clark for example, appears to disagree with Scharf, as he submits that:

It is very doubtful that under current customary law it can be asserted unequivocally that aggression ‘is’ subject to universal jurisdiction.<sup>914</sup>

Akande similarly expresses that ‘there is no rule (and indeed no precedent) which permits universal domestic jurisdiction for aggression.’<sup>915</sup> Yet, this does not

---

<sup>908</sup> See Michael P Scharf, ‘Universal Jurisdiction and the Crime of Aggression’ (2012) 53 Harvard International Law Journal 358, 358; Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 Journal of International Criminal Justice 735, 745; Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press 2010) 115–139; Clark, ‘Complementarity and the Crime of Aggression’ (n 882) 730–732.

<sup>909</sup> Scharf (n 908) 374.

<sup>910</sup> *ibid* 375–379.

<sup>911</sup> *ibid* 379.

<sup>912</sup> The Court held that ‘far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, [international law] leaves them in this respect a wide measures of discretion which is only limited in certain cases by prohibitive rules,’ S.S. Lotus (Fr. Turk.), 1927 PCIJ (Ser.A) No.10, at 18.

<sup>913</sup> Scharf (n 908) 380.

<sup>914</sup> Clark, ‘Complementarity and the Crime of Aggression’ (n 882) 731–736.

<sup>915</sup> Akande, ‘Prosecuting Aggression: The Consent Problem and the Role of the Security Council’ (n 753) 35.

necessarily mean that the crime of aggression falls into a separate legal category as an international crime than the other crimes. In my view, the same norms of customary international law that criminalise the conduct relating to the other core crimes also apply to the crime of aggression. However, it can be said that these norms of customary international law are more developed for the other crimes and more specific (e.g. through state practice and codification in Statutes of international courts & tribunals; and treaties) and have given rise to a rule of extraterritorial jurisdiction under international law.

For example, there are treaties that give rise to individual criminal responsibility for some international crimes, e.g. the Convention against Torture (1984). These treaties can be said to provide a rule for extraterritorial jurisdiction for the crimes they prescribe between States Parties.<sup>916</sup> Although such rule of extraterritorial jurisdiction is only applicable between State Parties to the particular treaty as they have consented to such jurisdiction for the specified crime, these treaties may nonetheless be considered as part of state practice that there is universal jurisdiction for such crimes.<sup>917</sup> At present, there are no such multilateral treaties that criminalise nor confer a rule of extraterritorial jurisdiction for the crime of aggression.

---

<sup>916</sup> Such treaties may confer specific rules of jurisdiction for the specified crime by imposing an obligation upon state parties to codify the crime into domestic legislation, e.g. Articles 2, 4, 5 Convention against Torture 1984; or general obligations on State Parties to codify the crime into national legislation, e.g. Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide. Such treaties may also provide an obligation to extradite or prosecute in circumstances where an alleged perpetrator is in their territory, e.g. Articles 7 and 8 Convention against Torture 1984; see also Cherif Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' (1983) 15 *Case Western Journal of International Law* 27, 27.

<sup>917</sup> Akehurst writes that 'treaties are part of State practice and can create customary rule if the requirement of *opinio juris* are met, e.g. if the treaty or its *travaux préparatoires* contain a claim that the treaty is declaratory of pre-existing customary law. Sometimes a treaty which is not accompanied by *opinio juris* may nevertheless be imitated in subsequent practice; but in such cases it is the subsequent practice (accompanied by *opinio juris*), and not the treaty, which creates customary rules', Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 *British Yearbook of International Law* 1, 53; In the Eichmann case, the court held that, 'the abhorrent crimes defined in [the Israeli Law] are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law, is, in the absence of an International Criminal Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and bring the criminals to trial. The jurisdiction to try crimes under international law is universal.' (1986) 36 *ILR* 18, 26.

Nevertheless, this rule is still emerging for the crime of aggression as pointed out by Clark that ‘universal jurisdiction for the crime of aggression, is thus a work in progress and we are just at the beginning.’<sup>918</sup> At present, there is very limited practice of states that have prescribed the universality principle in relation to the crime of aggression.<sup>919</sup> Thus, it is presumed that a bystander state has a legal interest in being the forum state as part of the international community of states as a whole; however, it is left open as to whether bystander states may exercise universal jurisdiction over the crime of aggression.

The next question is how this relates to complementarity and prosecution at the ICC. As discussed in the previous chapter, complementarity is representative of preserving the legal interests of states parties by allowing them to retain priority of prosecution in situations of concurrent jurisdiction. Article 17 of the Rome Statute is not specific with regard to which state needs to have jurisdiction over a case in order for the case to be inadmissible. Thus, it is presumed that in a situation of aggression, the states which may have jurisdiction over the case for purposes of Article 17 of the Rome Statute, are the aggressed state and the aggressor state. This means that in situations of concurrent jurisdiction, the aggressor state or aggressed state has the priority of prosecution. It is left open as to whether a bystander state may be considered as a state for the purposes of Article 17 of the Rome Statute.

### **7.3. Concerns that arise with respect to domestic prosecution for the crime of aggression**

The substantive elements of the crime of aggression involve the state act element of the crime and the elements of the crime pertaining to individual conduct. The domestic court that is undertaking proceedings will have to deal with both these substantive elements of the crime, upon which, some concerns arise. In relation to the state act element of the crime, the first concern revolves around whether the act of aggression needs to be determined by the Security Council prior to a domestic court

---

<sup>918</sup> Clark, ‘Complementarity and the Crime of Aggression’ (n 882) 735.

<sup>919</sup> Astrid Reisinger Coracini, ‘Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute’s Complementarity Regime’ in Carsten Stahn and Goran Sluiter (eds), *The ICC’s Emerging Practice: The Court At Five Years* (2009) 564–565.

initiating proceedings.<sup>920</sup> The second concern is the issue of the determination of an act of aggression and *par in parem non habet imperium*.

With respect to the elements of crime pertaining to individual conduct, there is the question of the potential scope of perpetrators that can be prosecuted for the crime of aggression. In particular, whether the leadership element is a necessary prerequisite for determining the scope of perpetrators. Concomitant to the scope of perpetrators is the question of immunities of foreign state officials in criminal jurisdictions, and whether and to what extent this procedural bar may be overcome.

### 7.3.1. *The state act element of the crime*

i. Is there a need for external determination of an act of aggression by the Security Council?

As discussed in the previous Chapter, one of the most contentious issues during the negotiations leading up to Kampala was the role of the Security Council in determining the state act element of the crime, i.e. an act of aggression. The final result was the adoption at Kampala of specific procedural conditions relating to determining the existence of an act of aggression pursuant to Article 15 *bis*(6) – Article 15 *bis*(9). This raises the question of whether domestic prosecution should also be subject to a specific procedural mechanism that encompasses the Security Council with respect to determining the state act element of the crime.

The following submission by Van Schaack will serve as the starting point for this discussion:

Domestic prosecution 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.<sup>921</sup>

This was submitted as a reason why domestic prosecution for the crime of aggression is problematic. In my view, her criticism is rather unfounded. The ‘painstakingly

---

<sup>920</sup> Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (n 15) 151.

<sup>921</sup> *ibid* 215.

negotiated judicial and political controls’ that she refers is presumably the mechanism pursuant to Articles 15 *bis* (6) – Article 15 *bis* (8), which facilitates the primary position of the Security Council to determine the act of aggression, followed by a six months delay before the Pre-Trial Division can authorize an investigation. Domestic courts simply do not benefit or need to benefit from this ‘painstakingly negotiated judicial and political controls’ because such mechanism is non-applicable.

There is a fundamental difference between domestic courts and the ICC: the former is an enforcement mechanism within the relevant State, whilst the latter is an enforcement mechanism created by a multilateral treaty.

Furthermore, Article 5(2) Rome Statute explicitly provided that any conditions for the exercise of jurisdiction must be consistent with the purposes of the UN Charter. As such, it is Article 5(2) Rome Statute that gave rise to the ‘painstakingly negotiated judicial and political controls’ to manage to prosecutions of the crime of aggression at the ICC – it is unlikely that there is a somewhat similar provision in the constitution of the relevant state with respect to domestic prosecution of the crime of aggression.

First and foremost, the decision whether to prosecute a crime as grave as the crime of aggression is made by the State wishing to initiate proceedings in accordance with the underlying constitutional and administrative standards and procedures: it is an entirely internal process. In comparison, the ICC also has its own internal procedures with respect to the admissibility and initiation of investigations and proceedings. Therefore, both enforcement mechanisms operate on entirely different levels and a ‘painstakingly negotiated judicial and political control’ that applies to an international institution has no relevance to a domestic enforcement mechanism.

Furthermore, and more importantly, domestic courts do not have a relationship with the Security Council, or with the Pre-Trial Division of the ICC. As pointed out by Cassese, the Security Council:

has no primary and exclusive responsibility in the field of international criminal liability of individuals (be they state officials or agents of a non-state entity) for aggression. It follows that a decision of the Security Council condemning actions by states as aggression may have no direct impact on courts empowered to adjudicate crimes of aggression. Courts are free to make



any finding in this matter regardless of what is decided by the Security Council in the area of state misconduct and consequent responsibility.<sup>922</sup>

Wrange has also argued that:

It would be quite difficult to argue that current international law requires that a SC decision is a procedural condition for states to prosecute the crime of aggression. (...) I cannot really see how one could formulate an argument that it would be an existing procedural requirement for domestic prosecutions. Either national legal systems have jurisdiction, or they do not; general international law cannot possibly require that states defer to an institution created by a treaty.<sup>923</sup>

Domestic prosecution of the crime of aggression, like other international crimes is considered as internal affairs of a State. As such, the Security Council is unlikely to intervene in any form of domestic proceedings. States do not have any obligations to confer a role to the Security Council to determine the existence of an act of aggression as a pre-requisite for domestic prosecution for the crime of aggression. By contrast, the Security Council may defer prosecutions for the crime at the ICC because Article 16 of the Rome Statute governs such competence. Also, the determination of an act of aggression under Article 39 of the UN Charter is different than the determination for the purposes of ascertaining the state act element of the crime. This is because determination under Article 39 of the UN Charter is for purposes of authorizing collective enforcement measures under Chapter VII for the maintenance of international peace and security, whilst, on the other hand, determination to ascertain the state act element of the crime is a retrospective decision strictly for the purposes of prosecuting the relevant individual. As such, the latter does not fall within the ambit of Article 39 of the UN Charter.

This however, does not mean that domestic courts may not make references to any prior findings by the Security Council or the General Assembly of the existence of an act of aggression. For example, the sequence of events is that one of the UN organs had determined the existence of an act of aggression; and post-conflict, either

---

<sup>922</sup> Cassese (n 226) 846.

<sup>923</sup> Wrange (n 882) 602.

aggressor or aggressed state has decided to initiate proceedings against the perpetrator. In this situation, the state wishing to prosecute may rely on the findings by the Security Council or General Assembly to demonstrate the existence of an act of aggression. This may help to carry an element of persuasion that it is in the public interest to conduct such proceedings. Although such external findings may be persuasive and helpful to establish the state act element of the crime, they should be without prejudice to the findings of the domestic court with respect to fact-finding and the consideration of the legality of the use of force to avoid affecting the due process rights of the defendant.

Another hypothetical situation could arise where the ICJ has determined that an act of aggression has occurred in an Advisory Opinion about the legality of the use of force in the particular situation, or in a Contentious Case between the aggressor state and the aggressed state as to the legality of the use of force. As a result of this finding, either aggressor or aggressed state may then wish to initiate proceedings against the perpetrator. The State wishing to prosecute may then rely on the findings of the ICJ to argue the existence of the aggression. Once again, this should be without prejudice to the findings of the domestic court.

If domestic courts choose to rely on previous findings by external UN organs to determine the existence of an act of aggression, this should be regarded as permissive as opposed to obligatory. External UN organs are not expected or required to form any part of the determination process and thus do not and should not play any direct role in helping domestic courts prosecute the crime of aggression. As pointed out by Cassese:

one of the merits of the distinction between two different regimes of responsibility lies in, among other things, enabling courts that try persons accused of aggression legitimately to embrace a judicial approach which may differ from political stand taken by international political bodies such as the UNSC.<sup>924</sup>

---

<sup>924</sup> Cassese (n 226) 846.

ii. Determining an act of aggression and *par in parem non habet imperium*

As mentioned above (section.7.2.1) the ILC submitted *par in parem non habet imperium* as the underlying reason why domestic courts are incompetent fora for prosecution of the crime of aggression. The question was raised as to whether *par in parem non habet imperium* serves as an insurmountable procedural barrier for prosecution of the crime of aggression in domestic courts.

The first step is to examine the meaning of *par in parem non habet imperium*. Although the origins of this Latin phrase can be traced all the way back to canon law,<sup>925</sup> in a more contemporary context its literal meaning can be understood as ‘one State has no power over another.’<sup>926</sup> Yet, power in the present context is not so helpful as the underlying issue is the exercise of jurisdiction by the forum state over an act committed by a foreign state. Thus, it is more relevant to understand *par in parem non habet imperium* as ‘one state shall not have jurisdiction over another state.’<sup>927</sup> That said, there are situations when the forum state would have competence over the act of the foreign state in question because there is a jurisdictional nexus with the perpetrator of the crime. It would then appear that there are two competing legal interests: the forum state to exercise jurisdictional competence; and the foreign state to have its official acts precluded from the jurisdiction of the former.

In the present context, the states with the competing interests are the aggressor state and the aggressed states. Despite the lack of current state practice of the domestic prosecution of the crime of aggression, it should be noted that every state that has codified the crime of aggression in its domestic legislation has included the territorial principle of jurisdiction.<sup>928</sup> Thus, not only has the perpetrator allegedly

---

<sup>925</sup> Dinstein, ‘Par in Parem Non Habet Imperium’ (n 888) 407–408.

<sup>926</sup> *ibid* 413–415; Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (n 15) 149.

<sup>927</sup> Kelsen, *Peace Through Law* (n 888) 35; Dinstein, ‘Par in Parem Non Habet Imperium’ (n 888) 416.; Lord Wright in *Compania Naviera Vascongado v S.S. Cristina* states that ‘the principle “par in parem non habet imperium”, no State can claim jurisdiction over another Sovereign State.” *Compania Naviera Vascongado v S.S. Cristina* [1938] A.C 485 at 502; In *Jones v Saudi Arabia*, Lord Bingham stated that ‘based on the old principle par in parem non habet imperium, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state’, *Jones v Saudi Arabia*, [2006] UKHL 26, para.14.

<sup>928</sup> Reisinger Coracini, ‘National Legislation on Individual Responsibility for Conduct Amounting to Aggression’ (n 431) 564.

committed an international crime, but also a domestic crime pursuant to the criminal code of the aggressed state. There is no dispute that when a crime has been committed on (or against) the territory of the forum state, there is a legal interest for the state in question to prosecute the individual regardless of his/her nationality. This is known as the territorial competence (jurisdiction) of the forum state. It is this rule of territorial jurisdiction that will come into conflict with *par in parem non habet imperium*.

When contemplating the underlying norms, the conflict is between the norms that attach specific sanctions on individuals for violations of international law to refrain from the crime of aggression and the norms that give rise to sovereign equality of states. It is suggested that the former should prevail, as these norms are more specific and of customary international law nature (*lex specialis* principle).<sup>929</sup> In other words, because customary international law attaches sanctions directly on individuals in the event of breach of obligations to refrain from conduct relating to an act of aggression, these norms should prevail over the norms that give rise to sovereign equality of states. This is consistent with Kelsen's submission that *par in parem non habet imperium*, as a rule of positive international law, is subject to some exceptions which must be established by 'special rules of customary or contractual international law.'<sup>930</sup> Thus, the more specific rule of territorial jurisdiction should prevail over *par in parem non habet imperium*, which means that the latter is not applicable when the forum state is the aggressed state.

In addition to the *lex specialis* principle, there are other reasons, in my view, as to why *par in parem non habet imperium* should not come into play when the forum state is the aggressed state. First, *par in parem non habet imperium* which preserves the sovereign equality of states, cannot logically apply when the forum state is the aggressed state because it would deprive the state from its sovereign prerogative as the rights-holder of the enjoyment of the protection of the norms that criminalise aggression from its legal interest to enforce legal consequences against the duty-bearer of these norms for wrongful conduct committed against its territory. It is submitted that domestic prosecution of the crime of aggression is a form of self-help

---

<sup>929</sup> Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1975) 47 British Yearbook of International Law 273, 274–275; see also Niels Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' 23 American University International Law Review 275, 287.

<sup>930</sup> Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (n 299) 159.

by the aggressed state as it is representative of the enforcement of legal consequences against a legal personality that has committed wrongful conduct against it.

Second, *par in parem non habet imperium* should not apply in situations when the aggressed state is the forum state as this would inhibit an enforcement mechanism that international law relies upon from carrying out sanctions against an individual who has acted in breach of duty to refrain from conduct pursuant to the crime of aggression. Thus, this would also paradoxically undermine the sovereign equality of states because the aggressed state is precluded from exercising its legal interest under international law to enforce legal consequences against the individual(s) responsible for committing a crime against its territory.

Suffice it to say, this is rather conceptual, and it is ultimately for the forum state to decide whether this procedural bar to jurisdiction should apply in domestic proceedings against the crime of aggression.

### *7.3.2. The elements of the crime pertaining to individual conduct: the question of the leadership element*

The leadership element has been examined throughout this dissertation and need not be repeated here. The question is whether the leadership element is a necessary pre-requisite for an individual to be prosecuted at a domestic court for the crime of aggression.<sup>931</sup> According to the study conducted by Reisinger Coracini, states that have codified the crime of aggression in their domestic legislation have been mainly silent about the leadership element.<sup>932</sup> This appears to be consistent with customary international law, as neither the IMT Charter nor Control Council Law No.10 explicitly provided a leadership element. At the IMT, each defendant was assessed on a case-by-case basis, primarily with respect to his relationship with Hitler, followed

---

<sup>931</sup> Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' (n 431) 553,555.

<sup>932</sup> *ibid* 553; she further observes that 'an implicit reference to criminal responsibility of persons in a superior position can be found in the criminal codes of Montenegro and Serbia. Next to any person who "calls for or instigates aggressive war", "anyone who orders waging war" is liable for punishment.' (Art.442 Montenegrin criminal code, Art 386 Serbian criminal code) Comparably, the Croatian criminal code specifies waging a war of aggression as "commanding an armed action of one state against the sovereignty, territorial integrity or political independence of another state." (Article 157(3) Croatian Criminal Code). The conduct verbs "order" and "command" imply the existence of a hierarchical, superior-subordinate relationship and thus limit criminal responsibility to persons in a position to give such orders or commands", also that Estonia expressly punishes 'a representative of the state who threatens to start a war of aggression' (Para.91 Estonian criminal code).

by the scope of the underlying powers that his official position entailed. At the NMT, the underlying pre-requisite for the leadership element was that the individual must be in a position on the policy level, where they could *inter alia* “formulate and execute policies” (*Farben*); and/or to “shape or influence” policies (*High Command*). It is also worth remembering that the Krupp Tribunal did not rule out industrialists from being on the policy level.<sup>933</sup> Although there is no leadership element *per se* that forms a substantive element of the definition of the crime in customary international law, the findings of the NMT may nevertheless be instructive in determining the scope of perpetrators that can be prosecuted in a domestic court.

In Chapter III, it was discussed how the Kampala Amendments put forward a narrower scope of perpetrators than Nuremberg by creating a leadership element that constituted a substantive part of the definition, i.e. ‘a person in a position effectively to exercise control over or to direct the political or military action of a State.’ Post-Kampala, some States Parties have implemented domestic legislation incorporating the Kampala Amendments verbatim;<sup>934</sup> therefore including the leadership element.<sup>935</sup> For these states, the leadership element is a necessary pre-requisite for an individual to be prosecuted in a domestic court, as it is a substantial part of the definition of the crime. Although there is no legal requirement for States Parties to implement the Rome Statute, or the Kampala Amendments, into their domestic legislation, it is perhaps in the interests of the ratifying State Party to do so because complementarity works on a same perpetrator same crime basis. If the defendant prosecuted in a domestic court of a State Party that has jurisdiction over the crime of aggression may not satisfy the leadership element in the Kampala Amendments, the situation may still be admissible to the ICC with an indictment against another accused.

In general, it can be presumed that a broader scope of perpetrators may be prosecuted at domestic courts (customary international law) than at the ICC (Kampala Amendments).<sup>936</sup> The discretion is ultimately for States whether to incorporate a leadership element into their domestic legislation or to leave it open, which means

---

<sup>933</sup> Heller observes that there was no explanation as to why industrialists were held to a different *mens rea* than other types of defendants, Heller (n 336) 196.

<sup>934</sup> See Meagan Wong, Germany and Botswana ratify the Kampala Amendments on the crime of aggression, at <http://www.ejiltalk.org/germany-and-botswana-ratify-the-kampala-amendments-on-the-crime-of-aggression-7-ratifications-23-more-ratifications-to-go>.

<sup>935</sup> e.g. Article 103 Slovenian Criminal Code.

<sup>936</sup> See Heller (n 336).

that domestic courts may prosecute a broader scope of perpetrators than the ICC.<sup>937</sup> Be that as it may, customary international law is sufficiently clear that only individuals who have high-level positions within the political or military action of a State may be prosecuted for the crime of aggression.<sup>938</sup> Also, customary international law does not exclude non-state actors from the scope of perpetrators that may be responsible for the crime of aggression.<sup>939</sup>

#### **7.4. The question of immunities of state officials for international crimes in foreign domestic courts**

Immunities of state officials in foreign domestic courts can be seen as a derivative from the international law doctrine of state immunity.<sup>940</sup> The idea is that a domestic court is precluded from exercising jurisdiction over a foreign state official either because (a) his/her official position in the hierarchy of a state is symbolic of state sovereignty; or his/her official position requires inviolability in foreign domestic courts for smooth facilitation of international relations; (b) the act in question was committed in the official capacity of a state. The former is known as *immunity ratione personae* (personal immunity); whilst the latter is known as *immunity ratione materiae* (functional immunity). Both nuances of immunity of state officials will be examined with particular reference to how they may apply to domestic prosecution for the crime of aggression; and whether and to what extent they may be overcome. It should be noted from the outset that the present analysis refers specifically to immunities of states officials in the context of criminal jurisdiction, and not civil jurisdiction.

---

<sup>937</sup> For a criticism of this, see Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 148–154.

<sup>938</sup> Article 16 of the Draft Code of Crimes against the Peace and Security of Mankind stipulates 'an individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiating or waging of aggression committed by a State shall be responsible for a crime of aggression.' In the Commentary, it was explained that 'these terms must be understood in the broad sense, that is to say, as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nurnberg Tribunal, which stated that 'Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen', Commentaries on the Draft Code of Crimes, 43.

<sup>939</sup> Cassese (n 618) 846.; for a criticism, see Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 152.

<sup>940</sup> Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 American Journal of International Law 407, 409.

As a preliminary issue, it is important to understand the relationship between immunities of state officials in foreign domestic courts and jurisdiction. Both are separate concepts and should not be conflated.<sup>941</sup> Jurisdiction in this context means that the crime in question has already been prescribed in the domestic legislation of the forum state; and that the relevant domestic court is able to exercise jurisdiction over the defendant.<sup>942</sup> Immunities, as such, imply an exception from the jurisdictional competence of the forum state.<sup>943</sup> This was expressed in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case at the ICJ:

"Immunity" is the common shorthand phrase for "immunity from jurisdiction". If there is no jurisdiction en principe, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. [...]  
"Immunity" and "jurisdiction" are inextricably linked.<sup>944</sup>

Indeed, for procedural convenience, a court may decide to view jurisdiction and the concomitant immunities from this jurisdiction for foreign state officials simultaneously, and/or the latter before the former.<sup>945</sup> Alternatively, as pointed out by Douglas, 'more often than not [...], the forum court considers the question of entitlement to state immunity before the question of jurisdiction.'<sup>946</sup> He submits that 'this practice is undesirable because it places undue pressure on the test for state immunity by denying the doctrine of jurisdiction in international law its role as a filter on the cases that can properly be subject to the adjudicative competence of the forum state's courts.'<sup>947</sup>

Regardless, the procedural approach by domestic courts should not detract from the underlying issue that the forum state must have adjudicatory jurisdiction before

---

<sup>941</sup> Ibid 407; Alexander Orakhelashvili, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (2011) 22 *European Journal of International Law* 849, 852.

<sup>942</sup> Zachary Douglas, 'State Immunity for the Acts of State Officials' (2012) 82 *British Yearbook of International Law* 281, 297–301.

<sup>943</sup> *ibid* 299.

<sup>944</sup> *Arrest Warrant* of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, [Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal], 64.

<sup>945</sup> Douglas (n 942) 297.

<sup>946</sup> *ibid* 285.

<sup>947</sup> *ibid* 344.



the state official invokes immunity.<sup>948</sup> Simply put, if there is no jurisdiction, then immunities cannot be pleaded, as there is nothing to be immune from.

#### 7.4.1. Immunity *Ratione Personae*

Certain state officials are able to plead immunity from jurisdiction of a foreign domestic court by virtue of their official status in the government. Immunity *ratione personae* is attached directly to the particular official position for the entirety of the duration that the state official remains in office.<sup>949</sup> The nature of this immunity encompasses an absolute exception to both civil and criminal jurisdiction in a foreign domestic court for acts committed both in public and private capacity.<sup>950</sup> In other words, a state official that is able to plead immunity *ratione personae* is exempted from any form of proceeding in a foreign domestic court for acts that he/she may have committed in the official capacity of a state, and/or acts committed in private. Such acts could be committed prior to entry to office or during term.

The ICJ in the *Arrest Warrants* case identified these state officials as ‘holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs.’<sup>951</sup> The inclusion of Ministers for Foreign Affairs in this category of state officials has been subject to criticism.<sup>952</sup> It need not be answered here whether customary international law provides *immunity ratione personae* for Ministers of Foreign Affairs.<sup>953</sup> That said, it is worth noting that the Dutch Expert Report on the Immunity of Foreign State Officials has included Ministers of Foreign Affairs within the Categories of Persons that enjoy personal immunity.<sup>954</sup> Thus, it can be inferred that in practice, states would likely recognise that *immunity ratione personae* applies to Ministers of Foreign Affairs.

There appear to be two broad rationales for this nuance of immunity. First, the state official has attained a position in the hierarchy of a state that is symbolic of state

---

<sup>948</sup> *ibid* 297.

<sup>949</sup> Akande, ‘International Law Immunities and the International Criminal Court’ (n 940) 409.

<sup>950</sup> Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2011) 21 *European Journal of International Law* 815, 819–820.

<sup>951</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, (hereinafter “Arrest Warrant case”), 3, para.51

<sup>952</sup> Akande, ‘International Law Immunities and the International Criminal Court’ (n 940) 412.

<sup>953</sup> Akande and Shah (n 950) 824–825.

<sup>954</sup> Advisory Committee on Issues of Public International Law, Advisory Report on the Immunity of State Officials, Advisory Report No.20, the Hague May 2011 (Hereinafter “Dutch Expert Report on Immunities”) Section 4, 28-30.

sovereignty.<sup>955</sup> The arrest, prosecution and subsequent punishment of serving Heads of State and/or Heads of Government will effectively interfere with the internal governance of the foreign state.<sup>956</sup> Second, this type of immunity provides for the smooth facilitation of diplomatic relations, as these state officials need to be able to carry out their tasks in foreign states without the possibility or risk of being arrested and prosecuted.<sup>957</sup> This was held by the ICJ in the *Arrest Warrants* case, where it was concluded that ‘the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.’<sup>958</sup>

As the crime of aggression is a leadership crime, it is very likely that the defendant will belong to this particular category of state officials that may plead immunity *ratione personae* in the domestic courts of the forum state.

#### 7.4.2. Immunity *Ratione Materiae*

In addition to immunity *ratione personae*, customary international law also confers immunity *ratione materiae* on state officials from jurisdiction of the forum state when the act or crime in question was committed in the official capacity of the state.<sup>959</sup> For purposes of this dissertation, such acts shall be known as “sovereign acts.” When it is established that an act is a sovereign act, norms relating to jurisdiction provide an exception from the jurisdiction of the forum state for the state official. The Appeals Chamber of the ICTY had observed:

[State] officials are the mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State.

In other words, State officials cannot suffer the consequences of wrongful acts

---

<sup>955</sup> R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No.3) [2000] 1 A.C. 147 (hereinafter “Pinochet No.3”), as per Lord Millett at 269

<sup>956</sup> See Akande and Shah (n 950) 824.

<sup>957</sup> The ICJ noted that immunities under customary international law for Ministers for Foreign Affairs is ‘to ensure the effective performance of their functions on behalf of their respective States.’ Arrest Warrant Case (n 951) para.53.

<sup>958</sup> Arrest Warrants Case (n 951) para. 54.

<sup>959</sup> Akande and Shah (n 950) 826.

which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called ‘functional immunity’. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.<sup>960</sup>

The norms that give rise to this type of immunity are attached to the sovereign act rather than the status of the official, which is why state officials that have acted in the capacity of the state may plead this immunity even if they no longer hold office, e.g., former heads of states and former state leaders. Non-state officials that have acted on behalf of the state and are indicted for conduct that can be considered as sovereign acts of the foreign state may also arguably plead this type of immunity.<sup>961</sup>

The common understanding is that prosecution of the individual may be the indirect exercise of jurisdiction by the forum state over the foreign state, as there is the need to assess the legality of the conduct in question – which was committed in official state capacity.<sup>962</sup> Indeed, if the act is a sovereign act, it is attributable to the State, which implies state responsibility. This is how there is a clash between interests of the forum state (territorial competence) and the foreign state (non-interference with *acta jure imperii*). The norms that give rise to state immunity come into play and create an exception to jurisdiction over the individual to preclude the forum state from calling upon the responsibility of the state for the act in question, allowing the sovereignty of the foreign state to prevail.

Douglas points out that by pleading immunity *ratione materiae*, the state official is effectively implying that the proper defendant in the proceeding should be the State.<sup>963</sup> Thus, in addition to acting as a procedural bar to jurisdiction of the forum state, immunity *ratione materiae* also has the effect of serving as a defence for the

---

<sup>960</sup> *Prosecutor v Blaskic* (Objection to the Issue of Subpoena duces Tecum) IT-95-14-AR 108 (1997), 110 ILR (1997) 607, at 707, para.38.

<sup>961</sup> Akande and Shah (n 950) 825; see also Akande, ‘International Law Immunities and the International Criminal Court’ (n 940) 412–413.

<sup>962</sup> In *Zoersch v Waldock*, it was held that ‘a foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be ‘en poste’ at the date of his suit’, *Zoersch v Waldock* [1964] 1 WLR 675, at 692.

<sup>963</sup> Douglas writes that ‘where foreign state officials are the named defendants, they can only benefit from their state’s jurisdictional immunity if the foreign state itself is, by operation of a rule of law, the proper defendant in the action’, Douglas (n 942) 321.

defendant as ‘it indicates that the individual office is not to be held legally responsible for acts, that, in effect, are those of the state.’<sup>964</sup>

However, it must be clarified that although immunity *ratione materiae* may serve as a defence in the particular case to which it applies, it does not have a substantive effect because it does not exonerate the individual from his/her criminal responsibility.<sup>965</sup> The effect is procedural in nature because it implies that the domestic court is not the appropriate forum for proceedings. The state official may be prosecuted in either the foreign state or an international court or tribunal that has jurisdiction over the crime and individual.

Immunity *ratione materiae* only applies to the court of the forum state that has decided to adhere to the norms that provide an exception to jurisdiction, and only upon the relevant individual. Thus, if other individuals are also accused, they may be prosecuted if the forum state has jurisdictional competence. The emerging trend appears to be that immunity *ratione materiae* does not apply with respect to prosecution for international crimes.<sup>966</sup> Three broad theories have been identified as the reason why state officials may no longer successfully plead immunity *ratione materiae* if it is alleged that they have committed international crimes:

- i) International crimes cannot be considered as sovereign acts committed by the state for the purposes of immunity *ratione materiae*;<sup>967</sup>
- ii) The prohibition of international crimes has attained *jus cogens* status;<sup>968</sup>
- iii) There is universal jurisdiction over international crimes (genocide, war crimes, crimes against humanity, torture), and the rule of extraterritorial jurisdiction will prevail over immunity.<sup>969</sup>

---

<sup>964</sup> Akande and Shah (n 950) 817.

<sup>965</sup> Arrest Warrants Case (n 951) para 60.

<sup>966</sup> Dutch Expert Report on Immunities (n 954) 17-20; for a different view, see Bing Bing Jia, ‘The Immunity of State Officials for International Crimes Revisited’ (2012) 10 Journal of International Criminal Justice 1303; Akande, ‘International Law Immunities and the International Criminal Court’ (n 940) 413–414.

<sup>967</sup> Pinochet No.3 (n 955) as per Lord-Browne Wilkinson (205); Lord Hutton (263).

<sup>968</sup> See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, 99 (hereinafter “Jurisdictional Immunities of the State”) para.80.

<sup>969</sup> Pinochet No.3 (n 955) as per Lord Philipps 190; see also Akande and Shah (n 950) 828.

i. International crimes cannot be considered as sovereign acts committed by the state for the purposes of immunity *ratione materiae*

If the conduct in question, i.e. the international crime, is not considered as a sovereign act of the foreign state, it follows that the state official may not plead immunity *ratione materiae* as there is no legal basis for doing so. The idea is that the act in question is an international crime, thus it is automatically ruled out as a sovereign act to detach the act in question from the norms that attract an exception to jurisdiction over the state official. Simply put, if international crimes are not recognized as sovereign acts, there is no immunity *ratione materiae*.

The argument is that acts that are inherently regarded as unlawful under international law cannot simultaneously be recognized as sovereign acts for the purposes of immunity *ratione materiae*. This is because international law cannot simultaneously prohibit certain acts and yet attach immunity to such acts. Therefore, it is only logical that acts that are violations of international law should not be regarded as official functions of the state. This was expressed by some of the Lords from the House of Lords in the UK, in the case, *Pinochet No.3*.<sup>970</sup> Lord Browne-Wilkinson questioned ‘how can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?’<sup>971</sup> Similarly, Lord Hutton said:

The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime.<sup>972</sup>

This reasoning is *prima facie* problematic and contrary to the purposes of immunity *ratione materiae*. This immunity serves to preclude the forum state from considering a sovereign act of the foreign state regardless of the legality of the act in question. If the criterion for the recognition as a sovereign act is that the underlying act must be

---

<sup>970</sup> *Pinochet No.3* (n 955).

<sup>971</sup> *Pinochet No.3* (n 955) *ibid* 205.

<sup>972</sup> *Pinochet No.3* (n 955) *ibid* 262; see also Douglas (n 942) 323–324, 338.

lawful under international law, then the foreign state's interests for an exception to jurisdiction can only prevail if the conduct is lawful. This suggests that the norms that allow an exception to jurisdiction are predicated upon the lawfulness of the conduct of the foreign state. This is incorrect.

In general, the determining factor whether the act/crime in question is a sovereign act is not and should not be predicated upon the legality of the conduct under domestic or international law. Instead, the purpose behind such acts should be considered pursuant to how they were executed.<sup>973</sup> Thus, the criteria should be to examine the nature of the act in question as to whether it was committed in official capacity and not whether the conduct was the result of breach of obligations placed directly on individuals. Furthermore, the step towards ascertaining that the act in question is an international crime may still involve considering the legality of the act in question, which is contrary to the purposes of immunity *ratione materiae* if the interests of the foreign state are concerned.

Overall, it is submitted that international crimes should be considered as sovereign acts, provided they satisfy the common test that the act in question was conducted by the state official in the capacity of his/her duties under the authority of the foreign state. It is inherently the underlying nature of how and why the act was committed that determines whether an act is a sovereign act, and not its status under international law. Bearing in mind that the state act element of the crime is a necessary pre-requisite of the crime of aggression, it is questionable as to whether the crime of aggression can be disregarded entirely as a sovereign act. This is because an act of aggression is part of the substantive definition of the crime and must be established prior to the ascertainment of individual criminal responsibility.

Furthermore, regardless of the legality of the use of force of the aggressor state, one would struggle to argue that the initiation, planning, preparation and waging an act of aggression was not committed by the defendant in the official capacity of the aggressor state or in public power. As the act of aggression encompasses the machinery of a state, it is difficult to suggest that the method of the individual who initiated, planned, prepared or waged an act of aggression was not conducted in the official capacity of the state and/or that such actions are not to be considered as official functions of his/her position.

---

<sup>973</sup> Akande and Shah (n 950) 832.

ii. The prohibition of international crimes is *jus cogens*

There are two broad arguments. First, an international crime amounts to a violation of peremptory norms, hence it cannot be recognised as a sovereign act.<sup>974</sup> However, it is not for the forum state to predicate immunity *ratione materiae* on the legal status of the sovereign act, but on the underlying nature of the act being committed in the official capacity of the State. If the forum state does not recognise the norms of immunity *ratione materiae* on the basis that the breach of peremptory norms does not amount to a sovereign act(s), it is inherently making an assessment of conduct of the foreign state. This is contrary to the norms that give rise to immunity *ratione materiae* in the first place.

Second, the norms that prohibit international crimes are *jus cogens*, which would prevail and ‘overcome all inconsistent rules of international law providing for immunity.’<sup>975</sup> Lord Millett put forward a similar argument in Pinochet No.3:

international law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.<sup>976</sup>

However, the question is whether the *jus cogens* norms that prohibit international crimes really come into direct conflict with the norms that provide an exception to jurisdiction over state officials.<sup>977</sup> The former applies directly against individuals to refrain from international crimes, from which no derogation can be made (substantive in nature), whilst the latter applies to the rule of jurisdiction to create an exception for the state official (procedural in nature). One set of norms applies directly against towards the individual, whilst the other set of norms applies to the rules of jurisdiction of the forum state.

---

<sup>974</sup> Orakhelashvili, *Peremptory Norms in International Law* (n 143) 325; see also Douglas (n 942) 341–342.

<sup>975</sup> Akande and Shah (n 950) 828.; this was one of the arguments submitted by Italy at the ICJ, in *Jurisdictional Immunities of the State* (n 973) 34.

<sup>976</sup> Pinochet No.3 (n 955) 278.

<sup>977</sup> *Jurisdictional Immunities of the State* (n 968) 140, para.93; see also Jia (n 966) 1315.

As such, there is no actual conflict of norms, as ‘two sets of rules address different matters.’<sup>978</sup> The ICJ held:

The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.<sup>979</sup>

This reflects an argument made earlier by Fox:

[s]tate immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.<sup>980</sup>

It should be clarified that the prosecution of international crimes is not *jus cogens*.<sup>981</sup> Orakhelashvili is of the contrary opinion that ‘*jus cogens* norms relating to international crimes do not just prohibit the relevant conduct but also criminalize it with peremptory effect once the criminality of conduct is part of *jus cogens*, so are the rules regarding prosecution.’<sup>982</sup> However, it is not convincing that the rules regarding prosecution of international crimes constitute *jus cogens*. As observed by Jia, ‘state practice has yet to recognise any obligation *erga omnes* to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law.’<sup>983</sup> Orakhelashvili further elaborates that:

---

<sup>978</sup> Jurisdictional Immunities of the State (n 968) 140, para 93.

<sup>979</sup> Ibid.

<sup>980</sup> Hazel Fox, *The Law of State Immunity* (2nd edn, Oxford University Press 2008) 525.

<sup>981</sup> Akande and Shah (n 950) 836.

<sup>982</sup> Orakhelashvili, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah’ (n 941) 851–852.

<sup>983</sup> Jia (n 966) 1315.; see also Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili’ (2011) 22 *European Journal of International Law* 857, 860.



Preventing, through immunity, the injured entity from claiming remedies for the breach of *jus cogens* is therefore substantially more than erecting a procedural bar – it is essentially a denial of the normative status of the substantive rule that has been violated. An abstractly valid prescription that cannot produce legal effect in relation to violation is simply not a legal rule.<sup>984</sup>

According to his argument, if the aggressed state is prevented from claiming a remedy, i.e. prosecuting the perpetrator for the crime of aggression, immunity has the effect of being more than a procedural bar because it denies the substantive effect of executing a sanction against an individual for committing an international crime.<sup>985</sup> I disagree. As held by the ICJ in the Arrest Warrants Case:

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.<sup>986</sup>

Last but not least, Orakhelashvili had also observed that ‘the courts which uphold the state immunity for breaches of peremptory norms mostly ignore the question of the nature of the act in question and do not address it.’<sup>987</sup> Although he intended for this to be a criticism, my view is that the approach of these courts is consistent with the purposes of immunity *ratione materiae*. The underlying basis for whether an act is a sovereign act is not predicated on its compliance with obligation *erga omnes*, but instead the purpose and method of how it was facilitated with respect to the foreign state.

---

<sup>984</sup> Orakhelashvili, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah’ (n 941) 852.

<sup>985</sup> Orakhelashvili goes one step further to suggest that immunity inevitably gives rise to impunity, see Orakhelashvili, *Peremptory Norms in International Law* (n 143) 358.

<sup>986</sup> Arrest Warrants Case (n 951) para 60.

<sup>987</sup> Orakhelashvili, *Peremptory Norms in International Law* (n 143) 326.

iii. There is universal jurisdiction over international crimes

This was expressed by Lord Phillips in Pinochet (No.3):

International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that State immunity *ratione materiae* can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one State will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail ... once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.<sup>988</sup>

Thus, when there is universal jurisdiction over international crimes, the rule of extraterritorial jurisdiction may prevail over the norms that provide an exception to jurisdiction over the individual for acts done in an official capacity.<sup>989</sup>

However, it is questionable as to whether this argument is relevant to the crime of aggression, as it is still undecided whether international law provides a rule of extraterritorial jurisdiction for the crime of aggression.<sup>990</sup> Therefore, the question is whether a rule of territorial jurisdiction may also prevail over immunity *ratione materiae*. Returning to the underlying rationale, the reason a rule of jurisdiction prevails over the norms that provide an exception to jurisdiction for the purposes of immunity *ratione materiae*, is the need to establish individual criminal responsibility.<sup>991</sup> As submitted by Akande and Shah, ‘the newer rule of attribution supersedes the earlier principle of immunity which seeks to protect non-responsibility.’<sup>992</sup> From this premise, it can be argued that the rule of territorial jurisdiction should also be able to prevail over the norms that provide an exception to jurisdiction for the purposes of immunity *ratione materiae*.

---

<sup>988</sup> Pinochet No.3 (n.955) 190.

<sup>989</sup> see Akande and Shah (n 950) 843.

<sup>990</sup> Akande has expressed that he does not believe that there is universal jurisdiction for the crime of aggression, Akande, ‘Prosecuting Aggression: The Consent Problem and the Role of the Security Council’ (n 753) 35.

<sup>991</sup> Dutch Expert Report on Immunities (n 954) 19.

<sup>992</sup> Akande and Shah (n 950) 840.

In my view, as customary international law allows sanctions to be executed against the relevant duty-bearers for the failure to comply with their duty to refrain from international crimes, it is logical that procedural rules like immunities over state officials for sovereign acts should not apply in a domestic court whereby the forum state has the jurisdiction to determine upon the substantive nature of the act in question for the purposes of enforcement. Thus, in a situation where the forum state is the aggressed state, an argument can be made that immunity *ratione materiae* is non-applicable to the defendant because international law relies on the domestic court as an enforcement mechanism to exercise sanctions against the duty-bearer for failure to comply with international obligations.<sup>993</sup> Furthermore, this is in the legal interests of the aggressed state.

### **7.5. Domestic prosecution of the crime of aggression: overcoming procedural bars**

This Chapter has focused upon two procedural bars that come into play: *par in parem non habet imperium*; and immunities from jurisdiction for state officials. The former acts as a procedural bar that precludes the forum state from exercising jurisdiction over the legality of the act of aggression, whilst the latter precludes a state from exercising jurisdiction over an individual that has participated in conduct relating to the alleged act because of the nature of his/her position in government (immunity *ratione personae*) or the nature of the act committed (immunity *ratione materiae*). It is important to understand that there must first be jurisdiction before either type of immunities may be pleaded, i.e. that the forum state is in a position to initiate proceedings against the defendant for the crime of aggression.

With respect to the first barrier, it is submitted that if *par in parem non habet imperium* acts as a procedural bar in situations when the forum state is the aggressed state, this would paradoxically undermine its sovereignty because it is inherently precluded from its *modus operandi* to enforce legal consequences against the individual who has committed a crime against its territory. Thus, it has been submitted that *par in parem non habet imperium* cannot logically co-exist with a rule of jurisdiction under the territorial principle (section 7.3.1.ii). The underlying argument is predicated upon the jurisdictional nexus between the victim state and the

---

<sup>993</sup> Douglas (n 942) 338.

individual for committing the crime of aggression against its territory. It is important to note that ‘sitting in judgment over the acts of a co-equal sovereign,’<sup>994</sup> when considering the legality of the use of force during the prosecution of the crime of aggression is to satisfy the state act element of the crime and not to enforce legal consequences against the aggressor state.

If and upon overcoming *par in parem non habet imperium*, jurisdiction can be established, the forum court may then have to decide whether to allow an exception to jurisdiction over the state official by applying the norms that give rise to either immunity *ratione personae* or immunity *ratione materiae*. As aggression is essentially a leadership crime, it is likely that the individuals who may be prosecuted will be able to plead immunity *ratione personae* by virtue of their position in government being a symbolic representation of the state. Alternatively, if the individual does not fall within the category of those who may plead immunity *ratione personae*, they may be able to plead immunity *ratione materiae*.

It is submitted that the norms that give rise to immunity *ratione personae* will apply as an exception to jurisdiction from the forum court regardless of whether or not customary international law provides a rule of jurisdiction over the individual for the relevant crime. This should not be interpreted to trivialize the significance of the rule of jurisdiction over the individual, but rather to give precedence to the principle of non-intervention of the domestic affairs of a foreign state. The arrest, detainment, prosecution and subsequent imprisonment of a State leader represent an intervention in the domestic political structure of a foreign State. Such inviolability should not be interpreted as impunity, as it merely suggests that the present relevant domestic forum is not the appropriate forum for prosecution. An alternative forum, such as the domestic court of the foreign state and/or the ICC may be contemplated. Of course, whether prosecution can actually take place in the domestic court of the foreign state and/or the ICC may not always be likely.

On the other hand, it is suggested that the norms that give rise to immunity *ratione materiae* may not be applicable in situations where the defendant is indicted for an international crime. This is because a newer, and more specific rule of

---

<sup>994</sup> Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (n 15) 149; for an account of when states have ‘sat in judgment’ over other states, see Strapatsas (n 882) 455–456.

customary international law that attaches sanctions against an individual for the crime of aggression should be allowed to prevail over the rule of immunity *ratione materiae*.

It should be clarified that these norms exist on different levels. The rule(s) of jurisdiction that allow sanctions to be exercised against individuals is substantive in nature. International law relies on this rule of jurisdiction to enforce sanctions against the individual. On the other hand, the norms that allow exceptions from jurisdiction are procedural in nature as there is no actual substantive effect on the legality of the conduct or responsibility of the individual. It can therefore be said that the norms that provide a rule of jurisdiction do not directly affect the norms that allow an exception to jurisdiction because one is substantial in nature, and the other is procedural.

In theory, if the domestic court of the aggressed state or bystander state is contemplating whether to allow an exception to jurisdiction for the state official, then it is already presumed or satisfied that there is a rule of jurisdiction. This rule of jurisdiction, be it territorial or extraterritorial, allows sanctions to be executed against the individual. Thus, it can be assumed to prevail over the norms that give rise to *par in parem non habet imperium*. Likewise, this rule of jurisdiction should also prevail over the norms that give rise to immunity *ratione materiae*. For international law to be internally consistent, the rule of jurisdiction that attaches sanctions directly against the individual for the crime of aggression, it is suggested that this rule overcomes both *par in parem non habet imperium* and *immunity ratione materiae*. This way, domestic courts may fulfill their role as enforcement mechanisms against the norms that criminalise aggression.

## **7.6. Conclusion**

This Chapter has challenged and rejected the hypothesis that domestic courts are incompetent fora for prosecution of the crime of aggression and that the ICC should have *de facto* exclusive jurisdiction. As such, it is submitted that both domestic courts and the ICC serve as enforcement mechanisms under international law against the norms that criminalise aggression.

Both aggressor state and aggressed state may serve as the forum state for the prosecution of the crime of aggression. With respect to the former, the legal interest can be established under the nationality principle, while the legal interest of the latter may be established under the territoriality principle. It can also be said that

prosecution in domestic courts of the aggressor state may amount to satisfaction for the aggressed state. Thus, the legal interests of the aggressed state are still represented even when the forum state is the aggressor state.

It is submitted that unlike the ICC, there is no need for a pre-determination of an act of aggression by the Security Council for a domestic court to prosecute the crime of aggression. Be that as it may, if the Security Council or General Assembly has determined the existence of an act of aggression, the forum state may rely on these findings as grounds to initiate proceedings against the relevant perpetrator of the crime of aggression. Thus, such determinations may carry persuasive value with respect to establishing the state act element of the crime of aggression.

It is also argued that *par in parem non habet imperium* is not necessarily an insurmountable procedural bar to domestic prosecution for the crime of aggression. In a more specific context whereby the forum state is the aggressed state, *par in parem non habet imperium* cannot logically apply as the victim of the crime of aggression is then precluded from enforcing legal consequences against an individual for wrongful conduct committed against its sovereignty and territorial integrity. Thus, this would paradoxically undermine the sovereign equality of states on a judicial level as it precludes a state (aggressed) from exercising its legal interests under international law to enforce sanctions against an individual responsible for committing a crime against its territory. It is suggested that *par in parem non habet imperium* should not be applicable in domestic courts when the forum state has a legal interest in enforcing sanctions (criminal) against the perpetrator. That said, this is a rather conceptual argument, and it is ultimately for the forum state to decide in practice whether this procedural bar to jurisdiction should apply.

As there is no strict requirement for States Parties who have ratified the Kampala to implement the amendments into their domestic legislation, it is questionable as to whether States Parties will choose to incorporate the leadership element within Article 8 *bis*(1) into their criminal codes. As such, it appears that there is a broader scope of perpetrators that can be prosecuted in domestic courts than at the ICC, which may arguably even encompass non-state actors. Be that as it may, the general presumption is that the crime of aggression is a leadership crime, which suggests that only state officials of the highest capacities will be prosecuted. Thus, it is likely that immunities of state officials will come into play. If the defendant may plead *immunity ratione personae*, this nuance of immunities would afford full immunity from the criminal

jurisdiction of the forum state. With respect to *immunity ratione materiae*, it is argued that in situations whereby the forum state is the aggressed state, immunity *ratione materiae* is non-applicable to the defendant as the forum state has a legal interest in the enforcement of sanctions (criminal) for the failure to comply with international obligations to refrain from conduct relating to the crime of aggression.

It is submitted that the jurisdictional rule concomitant to the legal interest of the aggressed state to enforce sanctions (criminal) against the perpetrator of the crime of aggression should prevail over the procedural bars to jurisdiction. The question, which was left open, is whether a bystander state may have a legal interest to act as a forum for the prosecution of the crime of aggression under the universality principle, i.e. to exercise universal jurisdiction.

Aside from the domestic and international political ramifications of prosecution of the crime of aggression in a domestic criminal court, there are also practical difficulties. Examples of the latter include factors such as fact-finding and gathering evidence, finding witnesses, arrest of the alleged perpetrator – especially if the forum state is the aggressed state, resources and judicial infrastructure. That said, such practical difficulties are not unique only to the crime of aggression and could also easily arise with respect to the other core crimes.

Although at present, it is rather unlikely that domestic prosecution for the crime of aggression may take place, some states have the crime of aggression in their domestic codes while some States Parties have adopted the Kampala Amendments, which means that in situations of concurrent jurisdiction, they will have the priority of prosecution. Domestic prosecution for the crime of aggression may indeed become a reality one day.