

Justiciability, Complementarity and Immunity: Reflections on the crime of aggression

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1. Introduction

Some 70 years after the first and, so far the only, criminal prosecutions pertaining to the 'supreme international crime'¹ took place,² the activation of the – long dormant – jurisdiction of the International Criminal Court (ICC) over the crime of aggression appears imminent. At the time of writing, 32 States Parties had ratified the Kampala Amendments on the Crime of Aggression,³ thus exceeding the 30 ratifications required for the Court to exercise jurisdiction pursuant to Articles 15bis(2) and 15ter(2) of the ICC Rome Statute (RS).⁴ The moment of truth will arrive somewhere after 1 January 2017, when the Assembly of States Parties will need to adopt a decision (by consensus or at least by a two-thirds majority) affirming the Court's jurisdiction.⁵

As the activation of Articles 8bis, 15bis and 15ter RS is drawing ever nearer, the debate over the prosecution of the crime of aggression – which had never really disappeared – has again taken off with renewed vigour. Illustrative in this regard is an article by Harold Koh and Todd Buchwald – respectively former Legal Adviser and former Assistant Legal Adviser to the US Department of State – in the 2015(3) issue of the *American Journal of International Law* in which the authors identify several shortcomings and uncertainties in the Kampala Amendments, which they urge should be addressed ahead of the activation of the Court's jurisdiction.⁶ The

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1 International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, reproduced in (1947) 41 *AJIL*, p. 172, at 186.

2 Note: 12 people were found guilty of crimes against the peace at the Nuremberg trial, and another 25 at the Tokyo trial. Two more defendants were convicted on this basis in the follow-up trials at Nuremberg based on Control Council Law No. 10. G. Werle & F. Jeßberger, *Principles of International Criminal Law* (2014), p. 1445. On other prosecutions touching upon crimes against the peace that were conducted in the wake of the Second World War, see: R. Clark, 'The Crime of Aggression', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 778, at 795.

3 See Resolution RC/Res.6, The crime of aggression, adopted by consensus at the 13th plenary meeting of the ICC Assembly of States Parties at Kampala, 11 June 2010, reproduced in S. Barriga & C. Kreß (eds.), *The Travaux préparatoires of the Crime of Aggression* (2012), pp. 101-107; *UNTS*, 8 May 2013, No. 38544.

4 Note: Palestine was the 30th State Party to ratify the amendments. In light of the ongoing debate over the status of Palestine vis-à-vis the Rome Statute, this temporarily led to questions as to whether the submission by Palestine of its instrument of accession of the Kampala Amendment on 26 June 2016 ought to be counted towards the necessary quorum of 30 ratifications (answering in the affirmative, see: A. Zimmerman, '29+1 = 30 – The Kampala Amendment on the Crime of Aggression and the Recent Accession by Palestine', *EJIL:Talk!*, 29 June 2016, available at <<http://www.ejiltalk.org/29-1-30-the-kampala-amendment-on-the-crime-of-aggression-and-the-recent-accession-by-palestine/>>, last visited 20 January 2017). As of late 2016, however, the Kampala Amendments had also been ratified by Chile and the Netherlands, with several other States Parties to the Rome Statute reportedly in the process of ratifying the amendments.

5 Statute of the International Criminal Court, UN Doc A/Conf.183/9 (1998) (hereinafter Rome Statute), Art. 15bis(3) Rome Statute: '[t]he Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.'; Art. 121(3) Rome Statute.

6 H. Koh & T. Buchwald, 'The Crime of Aggression: The United States Perspective', (2015) 109 *AJIL*, p. 257.

article gave rise inter alia to an outspoken rebuke in the same journal – in unusually strong language⁷ – by Alain Pellet, who denounced (most of) the reservations uttered by Koh and Buchwald as ‘paradoxical, if not pathetic’. Pellet accused both of ‘tilting at windmills’ by drawing attention to artificial or ancillary questions, while observing that the inflation of issues of minor or superficial importance also suggested a ‘kiss of death’ ambition,⁸ i.e. an underlying agenda to derail the process notwithstanding the Kampala consensus.

Various flaws and imperfections of the Kampala Resolution have attracted substantial scholarly attention, including, for instance, the controversial amendment procedure chosen at Kampala, the referral to the UN General Assembly Definition of Aggression,⁹ or the elusiveness of the requirement that an act of aggression should ‘by its character’ constitute a ‘manifest’ violation of the UN Charter (Article 8bis(1) Rome Statute). The present essay will not engage with these criticisms, but will instead focus on the argument made by some (whether explicitly or implicitly) that the crime of aggression is inherently non-justiciable, on the one hand, as well as the critique that the activation of the ICC’s jurisdiction over the crime of aggression will have a detrimental effect by inspiring (highly politicized) prosecutions of alleged ‘aggressors’ before the national courts of third States – prosecutions which are allegedly incompatible with the *par in parem non habet imperium* axiom. The validity of each critique is briefly explored in Section 2. Section 3 concludes.

2. After Kampala – questions of justiciability, complementarity and immunity

What’s done, cannot be undone (Shakespeare, *Macbeth*)

2.1. Aggression, a crime like no other?

Underlying much of the debate pertaining to the ICC’s jurisdiction over the crime of aggression is a lingering feeling with certain scholars and policy-makers that aggression is a crime like no other and accordingly cannot be treated in a similar fashion as the so-called ‘atrocities crimes’ (war crimes, genocide and crimes against humanity). Key in this context are the distinguishing features of the crime of aggression as a ‘leadership crime’, which can be committed *only* by the political and military leaders of a State (whereas atrocities crimes can be committed also by lower-ranking officials and/or by (members of) non-State groups), and, most fundamentally, the fact that it *necessarily* presupposes a prior finding that the State has committed a breach of international law, notably by committing an ‘act of aggression’ (whereas atrocities crimes do not require a prior finding of State responsibility). Accordingly, it is argued that third States cannot and should not engage in domestic prosecutions against alleged ‘aggressors’, since this would imply that they would sit in judgment over their sovereign equals, in breach of the fundamental principle of *par in parem imperium non habet*. Nor should an international court do so, inter alia because the founding fathers of the United Nations allegedly intended to reserve the competence to find the existence of an ‘act of aggression’ for the UN Security Council.

While we will briefly come back to these elements below, it is submitted that the different perception of aggression is perhaps better explained, not so much by the alleged distinguishing features mentioned above, but rather by the ‘procedural’ component of the rules governing the recourse to force. After all, military interventions that would otherwise be contrary to Article 2(4) UN Charter will in principle not give rise to illegal conduct if they are approved by the UN Security Council, acting under Chapter VII of the Charter, or by the territorial State’s *de jure* authorities. Within certain limits, the territorial State can indeed consent to military intervention on its soil (but not, for instance, many would argue, if the goal is to support a government involved in a civil war).¹⁰ What is more, military interventions can be sanctioned, not only by

7 It is noted, however, that the *American Journal of International Law* has had its fair share of scholarly duels e.g. over the legality of the use of force. For a personal favourite, see Farer’s response to D’Amato with regard to the permissibility of pro-democratic intervention: T. Farer, ‘Panama: beyond the Charter paradigm’, (1990) 84 *AJIL*, p. 503, at 515, note 9.

8 A. Pellet, ‘Response to Koh and Buchwald’s Article: Don Quixote and Sancho Panza tilt at windmills’, (2015) 109 *AJIL*, p. 557, at 568-569.

9 GA Res. 3314 (XXIX), 14 December 1974.

10 Further, see e.g.: E. de Wet, ‘The modern practice of intervention by invitation in Africa and its implications for the prohibition of the use of force’, (2015) 26 *EJIL*, p. 979; L. Doswald-Beck, ‘The legal validity of military intervention by invitation of the Government’, (1985) 56 *BYBIL*, p. 189; G. Nolte, *Eingreifen auf Einladung: zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (1999).

the territorial State (the ‘victim’ – so to speak), but also by the UN Security Council. The Council can indeed sanction a variety of military interventions, whether of a humanitarian or ‘pro-democratic’ nature (including interventions leading to regime change) – although it arguably cannot sanction territorial annexation or purely punitive forcible actions. Clearly, this is fundamentally different for atrocity crimes, the commission of which can *under no circumstances* be ‘authorized’ by the UN Security Council (or State authorities). Accordingly, and perhaps sub-consciously, the rules governing the use of force are to a certain extent perceived not to be of the same ‘fundamentally norm-creating’¹¹ character as, say, the rules prohibiting genocide or torture. After all, the argument goes, should we truly regard a political leader as being guilty of the crime of aggression, ‘merely’ because a single permanent member prevented a military intervention from being authorized by the Security Council (whereas a different vote would have meant there would not have been any wrongful conduct on the part of the intervening State to begin with)?¹²

Added to this is the perverse tendency on the part of those on the sidelines to surgically detach the political decision-making process leading up to the launch of a military intervention from the destruction, loss of life (among civilians AND combatants) and other mayhem (e.g. political chaos, economic breakdown, ...) that frequently follows – a tendency that is all the stronger where certain consequences are further removed in time from the beginning of the intervention and/or the causal link with the intervention is less firmly established. This is also reflected in the dominant normative account which views the crime of aggression as a wrong against a foreign State, a political crime, which plays exclusively at the ‘macro’ level¹³ and which ‘yields an abstract harm’,¹⁴ rather than as a compound of wrongs against individuals (civilians and combatants), that entails ‘the slaughter of *human* life, the infliction of *human* suffering, and the erosion of *human* security.’¹⁵

In the end, the sobering conclusion is that various scholars continue to believe that aggression should not be regarded as an international crime at all, let alone as the ‘supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.’¹⁶ These persistent sentiments call for some observations in relation to issues of justiciability, complementarity and immunity.

2.2. Persistent opposition to the crime of aggression’s justiciability

Inasmuch as they were adopted by consensus at the plenary meeting of the (then 111-Member) ICC Assembly of States Parties, one might have expected the Kampala Amendments to be the final word on the inherent justiciability of aggression as a crime under international law, and to put to rest critiques that the ICC is fundamentally incompetent to prosecute crimes of aggression. Clearly, this has not been the case. Koh and Buchwald, for example, recently reiterated the view that ‘[a]ggression determinations are fundamentally different in kind [from determinations of atrocity crimes]: they fundamentally require a political assessment and political management.’¹⁷ And, in the words of Rostow, ‘[d]eterminations of aggression are political and rightly so.’¹⁸

Comments such as these are reminiscent of the *Nicaragua* case, where the United States went to great lengths to demonstrate that the Court was unfit to assess the legality of the US intervention in Nicaragua.

11 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, ICJ Reports (1969), p. 3, at p. 42.

12 Dannenbaum, for instance, regards the ‘procedural requirement of Council authorization’ as ‘[imposing] a political and epistemic check (...) to block (...) pretextual interventions’. T. Dannenbaum, ‘Why have we criminalized aggressive war?’, (2016) 126 *Yale Law Journal*, forthcoming, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760520>, Section 4.2 (last visited 20 January 2017).

13 This is the view set forth by Walzer. See M. Walzer, *Just and Unjust Wars* (1977), pp. 55 et seq. In a similar vein: D. Luban, ‘Just War and Human Rights’, (1980) 9 *Phil & Pub Aff’s*, p. 160, at 161; E. Creegan, ‘Justified uses of force and the crime of aggression’, (2012) 10 *JICJ*, p. 59, at 59-68, 81-82 (referring to ‘our awareness of the fundamentally evil nature of all human rights crimes and the fact that these crimes require serious, pervasive human suffering before the [ICC’s] jurisdiction is triggered. While genocide, crimes against humanity and war crimes are inexcusable abuses, aggression, by contrast, is a more political crime (...) The harm of aggression is the insult to a state’s territorial independence and sovereignty, itself a political idea.’).

14 Creegan, *supra* note 13, p. 59.

15 In this sense, see Dannenbaum, *supra* note 12 (in particular Section 3.2). For another critique of the ‘Walzerian’ approach, see J. McMahan, *Killing in War* (2009).

16 International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, reproduced in (1947) 41 *AJIL*, p. 172, at 186.

17 Koh & Buchwald, *supra* note 6, p. 263.

18 N. Rostow, ‘The International Criminal Court, Aggression and Other Matters: A Response to Koh and Buchwald’, (2016) 109 *AJIL Unbound*, p. 230, at 232.

Despite having itself brought cases involving the use of force before the ICJ in the 1950s,¹⁹ the US indeed claimed at the time of the proceedings that the case involved an inherently political problem that was not appropriate for a judicial solution. According to the State Department: ‘The [ICJ] was never intended to resolve issues of collective security and self-defence and is patently unsuited for such a role.’²⁰ As is well known, the Court rejected these objections²¹ and proceeded to a ruling on the merits. Since then, the Court has in several cases²² pronounced directly or indirectly on the compatibility of State conduct with the rules governing the use of force – as have a number of arbitral tribunals.²³ What is more, while respondent States have continued to raise various challenges to admissibility in these cases, e.g. pertaining to the indispensable parties requirement (on which, see also *infra*) or the difficulties concerning the collection of evidence, the allegedly ‘political’ nature of the dispute has no longer been raised in contentious cases before the ICJ.²⁴ It is firmly established then – and rightly so – that the legality of a State’s recourse to (armed) force is not automatically removed from judicial scrutiny, but can be judged by an international court or tribunal (provided, of course, that its jurisdiction has been duly consented to). It is somewhat puzzling then why, if States can be found to incur international responsibility for breaching the prohibition on the use of force (and, arguably, for committing ‘acts of aggression’), some still find it opportune to contest that it is possible for an international court to pronounce on an individual’s criminal responsibility for the crime of aggression.

This is all the more so inasmuch as the post-War precedent of criminal prosecution of individual ‘aggressors’ long predates the first finding of State responsibility for a breach of the prohibition on the use of force.²⁵ At a press briefing following the Kampala conference, the then US Legal Adviser Harold Koh actually took pride in the fact that ‘as the country of Nuremberg prosecutor Justice Jackson, we are the only country that has successfully prosecuted the crime of aggression’.²⁶ The United States did not seem to think back in 1945-1946 that aggression was inherently political and non-justiciable.²⁷ Rather, the United States supported the prosecution of Nazi leaders for crimes against the peace in spite of serious concerns at the time as to the compatibility of these prosecutions with the *nullum crimen sine lege* principle.²⁸ Again, it is puzzling then to see how some continue to explicitly or implicitly question the justiciability of the crime

19 A point which the Court could not resist from highlighting in the *Nicaragua* case: ‘It is relevant also to observe that while the United States is arguing today that because of the alleged ongoing armed conflict between the two States the matter could not be brought to the International Court of Justice but should be referred to the Security Council, in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft ; the only reason the cases were not dealt with by the Court was that each of the Respondent States indicated that it had not accepted the jurisdiction of the Court (...).’ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment (admissibility) of 26 November 1984, ICJ Reports (1984), p. 392, at para. 97.

20 See the Statement by the US State Department of 18 January 1985 on the US Withdrawal from the ICJ proceedings in *Nicaragua*, reprinted in (1985) 24 *ILM*, p. 246.

21 *Nicaragua*, *supra* note 19, paras. 91-99.

22 See in particular: *Corfu Channel (United Kingdom v. Albania)*, Judgment of 9 April 1949, ICJ Reports (1949), p. 4; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 27 June 1986, ICJ Reports (1986), p. 14; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, ICJ Reports (2003), p. 161; *Legal Consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion of 9 July 2004, ICJ Reports (2004), p.163; *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, ICJ Reports (2005), p. 116.

23 Ethiopia-Eritrea Claims Commission, Partial Award *Jus ad Bellum*, Ethiopia Claims 1-8, 19 December 2005, (2006) 45 *ILM*, p. 430; *Guyana and Suriname*, Arbitral Award of 17 September 2007, (2008) 47 *ILM*, p. 166.

24 Note: occasionally, States have invoked the allegedly ‘political’ character of a request for an advisory opinion from the ICJ to challenge the admissibility of such a request. It is established case law of the ICJ, however, that ‘the fact that a question has political aspects does not suffice to deprive it of its character as a legal question. Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely (...) an assessment of an act by reference to international law.’ See e.g., *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Reports (2010), p. 415 (and the case law cited). See also *ibid.*, para. 35 (in relation to the Court’s discretion to refuse a request for an advisory opinion: ‘Nor does the Court consider that it should refuse to respond to the General Assembly’s request on the basis of suggestions (...) that its opinion might lead to adverse political consequences.’).

25 The first such finding can be found in the 1986 *Nicaragua* Judgment (*supra* note 19). In the *Corfu Channel* case, the Court simply found the United Kingdom responsible for having violated Albania’s sovereignty (*supra* note 22, p. 36).

26 Quoted in (2010) 104 *AJIL*, pp. 513-514.

27 Note: Some prosecutors involved in the post-war proceedings nonetheless later admitted to having conflicting feelings about their participation in the prosecution of crimes against the peace, in particular in light of the fact that the Allied Powers had done ‘some of the very things’ they were prosecuting the leaders of the Axis powers for. See e.g. Esbrook, ‘Exempting Humanitarian Intervention from the ICC’s Definition of the Crime of Aggression: Ten Procedural Options for 2017’, (2015) 53 *VJIL*, p. 791, at 799, note 43.

28 E.g. Werle & Jeßberger, *supra* note 2, p. 1446; D. Kacker, ‘Coming full circle: the Rome Statute and the Crime of Aggression’, (2010) 33 *Suffolk Transnat’l L. Rev.*, pp. 260-261.

of aggression when the international criminal nature of (wars of) aggression has in the meantime been affirmed in a variety of international instruments²⁹ (remedying earlier concerns pertaining to the *nullum crimen* principle) and considering that the UK House of Lords, for instance, in 2006, confirmed that ‘the core elements of the crime of aggression [are] understood (...) with sufficient clarity to permit the lawful trial (...) of those accused of this most serious crime.’³⁰ In the end, the large majority of legal doctrine agrees that the crime of aggression is an international crime with individual responsibility.³¹

Some scholars do not go as far as to argue that the crime of aggression is inherently non-justiciable – which presupposes a disavowal *inter alia* of the Nuremberg precedent –, but instead present what one could call ‘light’ versions of the justiciability critique. Thus, it is argued that only the Security Council can determine the existence of a State ‘act of aggression’, which is a prerequisite for finding a crime of aggression. A variant holds that the ICC is incompetent to judge sovereign States. Others insist that the ICC is prohibited from examining the legality of the conduct of non-consenting States. Still others draw the policy card and claim that the political risk is too great for the International Criminal Court to meddle with ‘questions of ultimate power’ (to paraphrase Dean Acheson).³² Each of these reservations merits brief consideration.

A first ‘light’ version of the justiciability critique holds that prosecution over the crime of aggression should be possible only after a prior determination by the Security Council that a State ‘act of aggression’ has been committed. The underlying argument again is that such prosecution presupposes a proper finding of a State ‘act of aggression’, a competence which ‘the Charter has traditionally assigned to the Security Council’³³ – put differently, a competence which the founding fathers of the UN allegedly intended to reserve to the UN Security Council.³⁴ In a nutshell, leaving aside the fact that Security Council resolutions referring to ‘(acts of) aggression’ remain rare and that no such resolution has been adopted since 1990,³⁵ such interpretation ascribes to Article 39 UN Charter a meaning which the founding fathers of the UN never intended. Article 39 UN Charter is an institutional provision, which determines the situations in which the Security Council may decide to take enforcement action. Such enforcement action is not limited to situations where there has been a prior breach of international law. A ‘threat to the peace’, for instance, does not necessarily presuppose the occurrence of internationally wrongful conduct (States do not incur international responsibility for committing ‘threats to the peace’ ...). In a similar vein, the determination of an ‘act of aggression’ by the Security Council has always been regarded as a fundamentally political,

29 Consider in particular the ‘Principles of International Law recognized by the Nuremberg Tribunal’, GA Res. 95(1), 11 December 1946; the ‘Friendly Relations Declaration’, GA Res. 2625(XXV), 24 October 1970 (first principle); and the ‘Definition of Aggression’, GA Res. 3314 (XXIX), 14 December 1974 (Art. 5(2)). Consider also: International Law Commission (ILC), ‘Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal’, *Yearbook of the International Law Commission* (1950), Vol. II, para. 97, Principle VII; ILC, ‘Draft Code of Offences against the Peace and Security of Mankind’, *Yearbook of the International Law Commission* (1954), Vol. II, Art. 2; ILC, ‘Draft Code of Crimes against the Peace and Security of Mankind’, *Yearbook of the International Law Commission* (1996), Vol. II, Art. 16.

30 UK House of Lords, *R. v. Jones*, Judgment of 29 March 2006, (2006) UKHL 16, para. 19. The House of Lords rectified an earlier ruling of the Court of Appeal which held, by reference to the ongoing difficulties in the negotiations on the jurisdiction of the ICC for crimes of aggression, that it was difficult to see ‘how it can be said that there is (...) a firmly established rule of international law which establishes a crime of aggression which can be translated into domestic law (...) where there is no consensus as to an essential element of the crime.’ Court of Appeal for England and Wales, *Jones et al.*, (2004) EWCA 1981, paras. 42-43.

31 See: P. Wrangé, ‘The crime of aggression, domestic prosecutions and complementarity’, in C. Kreß & S. Barriga (eds.), *The Crime of Aggression: a Commentary, Vol. I* (2017), pp. 704-751, at 708 (with further references) (‘Most, if not all, commentators agree that the crime of aggression already is an international crime with individual responsibility.’ Wrangé also observes that ‘during the negotiating process, no state disputed the status of the crime of aggression as an international crime.’)

32 D. Acheson, ‘Remarks’, (1963) 57 *ASIL Proceedings*, p. 13, at 14.

33 Koh & Buchwald, *supra* note 6, p. 263.

34 See in this sense, the statements by France and China in explanation of their position before the adoption of Resolution RC/Res.6 on the crime of aggression at the Kampala conference, reproduced in Barriga & Kreß, *supra*, note 3, p. 811 (France: ‘In article 15 bis, paragraph 8, the text restricts the role of the United Nations Security Council and contravenes the Charter of the United Nations under the terms of which the Security Council alone shall determine the existence of an act of aggression.’), p. 814 (China).

35 For rare examples, see e.g. SC Res. 573(1985), 4 October 1985; SC Res 577(1985), 6 December 1985. Strapatsas identifies 34 Security Council resolutions adopted between 1973 and 1990 containing a determination of an (act of) aggression. Twenty-eight of these resolutions were addressed at the apartheid regimes of South Africa and Southern Rhodesia. The last finding of an ‘aggressive act’ dates back to Resolution 667(1990) (following Iraq’s invasion of Kuwait). Since then, there have been only two Presidential Statements making a passing reference to the concept of ‘aggression’ (UN Doc. S/PRST/2005/10, 2 March 2005; UN Doc. S/PRST/2006/4, 25 January 2006). Both Presidential Statements used the term in connection with non-State attacks against UN peacekeepers. See: N. Strapatsas, ‘The practice of the Security Council regarding the concept of aggression’, in Kreß & Barriga, *supra* note 31, pp. 178-213, at 180-182, 201-202.

rather than a judicial, finding,³⁶ let alone that the absence of such a determination should *a priori* preclude an actual judicial organ from inquiring into the legality of a State's recourse to force. This has been amply affirmed in the case law of the ICJ (it may be noted that, even at the time of the post-War prosecutions, no one seemed to think that prosecutions pertaining to crimes against the peace presupposed some form of formal approval by the newly-established UN Security Council). As mentioned before, the ICJ has on several occasions examined the compatibility of State conduct with the Charter and/or customary rules on the use of force.³⁷ More generally, the ICJ has repeatedly asserted that, in accordance with Article 24 UN Charter, the Security Council's competence in relation to the maintenance of international peace and security is not 'exclusive'.³⁸ This non-exclusive character is also borne out by the fact that the UN General Assembly has on numerous occasions pronounced on the legality of inter-State uses of force.³⁹ It follows that the pre-Kampala debate as to whether a Security Council determination that an act of aggression has been committed should be a precondition for the ICC to exercise jurisdiction is better regarded as a *policy* debate.⁴⁰ In the margin, there is, moreover, something fundamentally paradoxical in the position of some, such as Koh, who, one the one hand, reject a formalist reading of the UN Charter, based on a 'statist' understanding of State sovereignty that would preclude humanitarian interventions by individual States absent authorization from the UN Security Council, while nonetheless hiding behind the primacy of the UN Security Council when it comes to the justiciability of the crime of aggression.

A second version holds that the determination of an 'act of aggression' should belong to the Security Council, not because it is inherently political, but rather because, as Pellet, for instance, emphasizes, 'it is not the ICC's function to judge sovereign States'.⁴¹ Article 1 RS effectively makes clear that the ICC has 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern'. No reference is made to possible jurisdiction *vis-à-vis* States. Article 25(4) RS moreover adds that 'no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'.

At the same time, the critique of Pellet and others is not fully convincing. Clearly, when the ICC (or an ad hoc international criminal tribunal) is called upon to examine whether a private individual, in particular a member of a non-State armed group, has committed atrocity crimes, it is not judging sovereign States. Indeed, while the conduct of the individual concerned may or may not be imputable to a State, in such scenarios the ICC (or ad hoc tribunal) need not, and arguably should not, take a position on the matter, 'since its jurisdiction is criminal and extends over persons only'.⁴² Nonetheless, it is evident that whenever the ICC is determining whether a State organ (be it a low-ranking soldier or a political or military leader) has committed genocide, war crimes or crimes against humanity, even if it is not explicitly pronouncing on the matter, it is indirectly/*de facto* making a finding of State responsibility as well – for the simple reason that the conduct of State organs is in principle imputable to the State, even if it is *ultra vires*.⁴³ It may moreover

36 N. Krisch, 'Article 39', in B. Simma et al. (eds), *The Charter of the United Nations: a Commentary*, Vol. II (3rd ed., 2012), p. 1272, at para. 44. Note: the distinction between 'threats to the peace', 'breaches of the peace' and 'acts of aggression' was inspired in part by a desire to distinguish between situations where the Security Council would be 'obliged to act', and those where the Council would be free to choose whether or not to take action. In the end, however, the drafters of the Charter chose to grant the Security Council the greatest possible freedom in deciding on the existence of either of these thresholds and on deciding whether or not to take action. Suggestions to define the concept of an 'act of aggression' were dismissed. *The United Nations Conference on International Organization. Selected Documents* (1946), pp. 763-764.

37 See the cases cited *supra*, note 22.

38 E.g., *Unilateral Declaration of Independence in respect of Kosovo*, *supra* note 24, p. 420; *Palestinian Wall*, *supra*, note 22, pp. 148-151; *Certain expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Reports (1962), p. 151, at 163.

39 See e.g., UN Doc. A/RES/38/7, 2 November 1983 (concerning the US intervention in Grenada). Akande moreover identifies six occasions where the General Assembly has found 'aggressive acts', 'acts of aggression' or 'aggression' to have been committed. D. Akande, 'Prosecuting aggression: the consent problem and the role of the Security Council', Oxford Legal Research Paper Series, Paper No. 10/2011, available at <<http://www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf>> (last visited 21 January 2017), p. 9, note 26.

40 Akande, *supra* note 39, p. 9. See also: A. Coracini & P. Wrangé, 'The specificity of the crime of aggression', in Kreß & Barriga, *supra* note 31, pp. 307-350, at 325.

41 Pellet, *supra* note 8, p. 562.

42 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports (2007), p. 43, para. 403.

43 Cf. Art. 7 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission* (2001), Vol. II.

be observed in this context that, like aggression, genocide and crimes against humanity are by nature crimes that presuppose the collective involvement of a multitude of individuals, including the involvement of persons in a leadership position.⁴⁴ Pellet recognizes as much, by admitting that the ICC may well be called upon to judge an individual accused of genocide whose conduct is imputable to the State. Yet, he insists that there is a significant difference, in that ‘the Charter expressly confers on the Security Council the responsibility to determine the existence of an act of aggression, whereas it does nothing of the kind concerning genocide.’⁴⁵ Thus, Pellet eventually falls back on the previous argument, according to which the Charter grants the Security Council allegedly *exclusive* competence to determine an ‘act of aggression’ (since ‘acts of aggression’ are *explicitly* mentioned in Article 39 UN Charter, whereas ‘genocide’ and ‘crimes against humanity’ – even if they may well qualify as ‘threats to the peace’ – are not). As mentioned above, this argument fails to convince.

Some object that, even if ICC rulings pertaining to crimes permitted by State officials also amount to a *de facto* finding of State responsibility, a fundamental difference remains in that, in order to find a crime of aggression, the ICC must follow a two-tier approach, and must first make an *explicit* finding that a State has committed an act of aggression.⁴⁶ No such *explicit* finding of State responsibility is required in respect of the atrocity crimes – rather, it may at most be implicit. While this difference cannot be ignored, its impact should arguably not be exaggerated either. First, it is worth stressing that this two-tier approach was not the inevitable result of the inherent features of ‘aggression’, but was the result of the choices made throughout the drafting process of the Kampala Resolution.⁴⁷ Thus, instead of separating out the State act of aggression, on the one hand, and the individual involvement therein of a person in a leadership position, on the other, it would equally have been possible to merge the two steps into one, so that the determination of a State act of aggression would be implicit, rather than explicit. By way of illustration, such is the approach adopted in the definition of ‘crimes against peace’ in the Charter of the Nuremberg Tribunal.⁴⁸ In a similar vein, several national codes criminalize, for instance, ‘planning or preparing an aggressive war’, without demanding a prior and separate finding of State responsibility for an ‘act of aggression’.⁴⁹ One may regret that the drafters did not opt for such a ‘one-step’ approach, which would have been more consistent with the other crimes within the ICC’s jurisdiction. Second, as a matter of principle, States are of course free to create international courts and tribunals upon which they confer, by way of delegation,⁵⁰ jurisdiction vis-à-vis States and/or individuals. Accordingly, even if the ICC was established first and foremost to establish individual criminal responsibility for international crimes, it is difficult to understand why the ICC should be prevented from pronouncing on a State’s responsibility for an act of aggression – in a manner which does not create legal consequences in terms of State liability⁵¹ – , if that is what States Parties to the Rome Statute effectively agreed to.

This final argument nonetheless raises a third and related critique, pertaining to the so-called ‘consent problem’.⁵² This critique essentially holds that the ICC can only find an ‘act of aggression’ where the State concerned has actually consented to the Court’s jurisdiction. To support this position, proponents cite

44 Consider e.g. Coracini & Wrangé, *supra* note 40, pp. 314-315 (suggesting that the atrocity crimes ‘are usually (albeit not necessarily) committed on behalf of or with the involvement of a state’ and that state involvement is a ‘common factor’); Wrangé, *supra* note 31, p. 714.

45 Pellet, *supra* note 8, p. 562.

46 See on this: Akande, *supra* note 39, pp. 16-17; Coracini & Wrangé, *supra* note 40, pp. 312 et seq.

47 In a similar vein, see e.g.: Coracini & Wrangé, *supra*, note 40, p. 308.

48 Art. 6 of the Charter of the International Military Tribunal (82 UNTS 280) defines ‘crimes against peace’ as the ‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.’

49 See e.g., Art. 122(1) of the Belarusian Criminal Code, Arts. 404-405 of the Georgian Criminal Code or Art. 160 of the Kazakhstani Criminal Code. Materials reproduced in ‘Selected national laws and regional instruments on the crime of aggression’, in C. Kreß & S. Barriga (eds.), *The Crime of Aggression: a Commentary, Vol. II* (2017), pp. 1079-1114.

50 For a discussion of the delegation theory, as applied to the ICC, see: D. Akande, ‘The jurisdiction of the International Criminal Court over nationals of non-parties: legal basis and limits’, (2003) 1 *JICJ*, p. 618. See also: C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013), pp. 236-237.

51 Consider also McDougall, *supra* note 50, pp. 245-245: ‘In terms of the “consequences” for States of ICC findings, it is, therefore, not possible to distinguish the crime of aggression from other Rome Statute crimes.’ McDougall acknowledges that ICC aggression rulings might have political, as opposed to legal consequences for States, ‘but this falls outside the *Monetary Gold* principle’.

52 Further, see: Akande, *supra* note 39.

the ‘*Monetary Gold*’ principle, according to which an international court must abstain from deciding a case where the rights and obligations of a non-consenting third State form ‘the very subject-matter’ of the case.⁵³ A few cursory observations are in order. First, even if we were to assume that the *Monetary Gold* principle applies when the ICC is exercising jurisdiction over the crime of aggression on the basis of Article 15bis RS (State referral or *proprio motu*),⁵⁴ it must be recalled that the Rome Statute and the Kampala Amendments contain a range of mechanisms that restrict the Court’s jurisdiction in respect of non-consenting aggressor States.⁵⁵ The cumulative impact of these provisions is that the ICC is prevented from exercising jurisdiction on the basis of State referral or *proprio motu* where the aggressor State is not a party to the Rome Statute, or when it is a State Party that has lodged an opt-out declaration pursuant to Article 15bis(4) RS.⁵⁶ Second, if the relevant provisions are interpreted as permitting the ICC to exercise jurisdiction pursuant to Article 15bis RS when the aggressor State has not ratified the Kampala Amendments nor lodged an opt-out declaration (specifically, where the victim State has ratified the amendments),⁵⁷ is the *Monetary Gold* principle infringed? Akande, for one, takes the view that, in light of Article 121(5) RS, such (aggressor) State must indeed be regarded as a ‘non-consenting State’, and answers in the affirmative.⁵⁸ Against this view, it may be questioned whether a State Party to the Rome Statute, which has deliberately refrained from lodging an opt-out declaration can be regarded as ‘non-consenting’ for present purposes (even if it has not ratified the Kampala Amendments), and/or whether such a State’s rights and obligations form ‘the very subject-matter’ of the case before the ICC. A parallel can arguably be drawn with the advisory jurisprudence of the ICJ. On the one hand, the ICJ has stated that ‘the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character’, in particular when this would have ‘the effect of circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent’.⁵⁹ On the other hand, the ICJ has never refused to render an advisory opinion due to a lack of consent, even in cases (such as the *Palestinian Wall* case⁶⁰), where the Court undeniably pronounced on the rights and obligations of individual States.⁶¹ In the ICJ’s *Peace Treaties* Opinion, this approach was ostensibly justified by reference to the ‘advisory’ character of the Court’s opinions and the fact that they have ‘as such, (...) no binding force’.⁶² It must be conceded that the PCIJ has on one occasion refused to render an advisory opinion due to a lack of consent, notably in the *Eastern Carelia* case, which involved an ongoing dispute between Finland and the Soviet Union. Yet, this different approach in the *Eastern Carelia* case can be explained by the fact that the PCIJ was asked to pronounce on the rights and obligations of the Soviet Union, which was not a Member of the

53 *Case of the Monetary Gold removed from Rome in 1943* (Italy v. France, UK and USA), Judgment of 15 June 1954, ICJ Reports (1954), p. 19, at 33; *Case concerning East Timor* (Portugal v Australia), Judgment of 30 June 1995, ICJ Reports (1995), p. 90, at para. 26. According to Akande, the *Monetary Gold* principle poses no problem in respect of other atrocity crimes, since the ICC need not engage in making determinations about a State’s legal responsibility in order to convict an individual of war crimes, crimes against humanity or genocide. By contrast, determining State responsibility for aggression is a ‘prerequisite’ for finding a crime of aggression. Akande, supra, note 39, pp. 15-17. See also McDougall, supra note 50, pp. 235-237.

54 Arguing that the principle applies to ICC prosecutions *proprio motu* or based on State referral, see: Akande, supra note 39, pp. 17 et seq. (note, Akande concedes that no problems arise pursuant to the *Monetary Gold* principle in the case of Security Council referral (ibid., pp. 35-38). Arguing that the principle does not apply, see e.g. Wrangle, supra note 31, pp. 712-714; McDougall, supra note 50, p. 245; Coracini & Wrangle, supra note 40, p. 315 (questioning whether the principle applies to international criminal courts and tribunals).

55 See in particular Art. 15bis(4) Rome Statute (allowing for States Parties to ‘opt out’ of the ICC’s jurisdiction in respect of the crime of aggression), Art. 15bis(5) Rome Statute (‘In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.’), in conjunction with Art. 121(5) Rome Statute (‘In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.’).

56 For a schematic overview, see McDougall, supra note 50, p. 261.

57 On the interpretation of Art. 15bis RS in conjunction with Art. 121(5) RS, see further: McDougall, supra note 50, pp. 234 et seq.; S. Barriga & N. Blokker, ‘Conditions for the exercise of jurisdiction based on state referrals and *proprio motu* investigations’, in Kreß & Barriga, supra note 31, pp. 652-674.

58 Akande, supra note 39, pp. 15-17, 26-28 (according to Akande, when finding a State act of aggression, the Court would ‘find itself in a manner which was practically no different to determining an inter-State dispute’. Akande moreover draws attention to Art. 121(5) RS, according to which amendments to the Rome Statute will enter into force only for those States which accept the amendment).

59 *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports (1975), p. 12, paras. 32-33.

60 *Palestinian Wall*, supra note 22.

61 In a similar vein, Akande, supra note 39, p. 23.

62 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, ICJ Reports (1950), p. 65, at 71. In a similar vein, see: ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (‘Request for Advisory Opinion submitted to the Tribunal’), Advisory Opinion of 2 April 2015, Case No. 21, para. 76.

League of Nations to begin with.⁶³ For present purposes then, it could be argued that whenever the ICC exercises jurisdiction under Article 15bis RS in connection with an aggressor State that is a State Party to the Rome Statute, but which has not ratified the Kampala Amendments nor lodged an opt-out declaration, the situation is more akin to the *Peace Treaties* scenario than to the *Monetary Gold* scenario or the *Eastern Carelia* scenario. The reason for this is twofold. First, the aggressor State is a State Party to the ICC Rome Statute and has agreed, as a matter of principle, to the exercise of the jurisdiction of the Court in respect of the crime of aggression pursuant to Article 5(2) Rome Statute. Second, as is also confirmed by Article 25(4) RS, a finding of an ‘act of aggression’ by the ICC has – to paraphrase the *Peace Treaties* Opinion – ‘no binding force’ of its own for the aggressor State.⁶⁴ In the end, it must be emphasized that the critique relating to the ‘consent problem’ does not challenge the justiciability of the crime of aggression as such, nor the authority of the ICC to adjudicate the crime, but only challenges the ‘scope’ of the ICC’s jurisdiction.

Finally, it is no secret that the activation of the Court’s jurisdiction over the crime of aggression may inject it in treacherous political waters, and may test its legitimacy and credibility. Koh and Buchwald illustrate this by reference to the hypothetical scenario of two warring States, finally ready to sign a peace treaty, yet each insisting on assurances that their leaders will not be prosecuted for having started the war.⁶⁵ The authors question whether ‘claims of justice [should] obstruct peace’.⁶⁶ At the same time, it is difficult to see how this situation is fundamentally different from the conclusion of a peace agreement ending a non-international armed conflict and providing for broad amnesty for war crimes. Both scenarios raise similar questions pertaining to the permissibility and international recognition of amnesties.⁶⁷ Of course, the likelihood that the prosecution of ‘aggressors’ will provoke political reactions is overall greater than with the prosecution of atrocity crimes. Yet, as is the case for the other reservations discussed above, this is a difference in degree, not a difference in nature.⁶⁸ The political exposure is not exclusive to the crime of aggression. The previous record of the ad hoc tribunals and the ICC indeed suggests that the prosecution of high-ranking officials, including sitting Heads of State, for crimes against humanity, can be just as politically sensitive as the prosecution of the leader of a (State or non-State) armed group for genocide. Yet, in these cases, the justiciability of the crimes concerned is not fundamentally in dispute, and the (potential) political backlash is not generally seen as a valid reason why the international community should tolerate impunity *in perpetuum*. Why, then, should it be different for the crime of aggression?

2.3. Complementarity and immunity

An important reason why some have expressed concern over the Kampala Resolution and the impending activation of the ICC’s jurisdiction over the crime of aggression concerns the ‘spill-over’ effect⁶⁹ to the national level, in particular the fact that a growing number of States may adopt domestic legislation criminalizing the crime of aggression. States may do so in order to make sure, in accordance with the complementarity principle, that political or military leaders can be tried before their own national courts, rather than face justice in The Hague.⁷⁰ If such a prosecution at the national level of one’s own nationals – unlikely though it may be – does not give rise to objections, the prospect of States establishing and exercising similar criminal jurisdiction vis-à-vis nationals of third States is highly controversial. Since the adoption of the Kampala Resolution, eight countries have effectively (at the time of writing) adopted amendments to their

63 In a similar vein, Akande, *supra* note 39, p. 24.

64 Thus, Coracini and Wrangé note that ‘the “very subject-matter” of a criminal judgment would remain a verdict against an individual’. Coracini & Wrangé, *supra* note 40, p. 316; Wrangé, *supra* note 31, p. 713.

65 Koh & Buchwald, *supra* note 6, p. 274.

66 *Ibid.*

67 On amnesty for war crimes, see e.g. Y. Naqvi, ‘Amnesty for war crimes: defining the limits of international recognition’, (2003) 85 *IRRC*, No. 851, p. 583.

68 For a more elaborate rebuke of suggestions that the crime of aggression is ‘different’ or ‘special’ in comparison to the other core crimes, see: Coracini & Wrangé, *supra* note 40, pp. 307-350 (see in particular pp. 331 et seq. in respect of the ‘political’ character of the crime of aggression). See also: M.P. Scharf, ‘Universal jurisdiction and the crime of aggression’, (2012) 53 *Harvard ILJ*, p. 357, at 382 (noting that the concerns are ‘not unique to the crime of aggression’).

69 Koh & Buchwald, *supra* note 6, p. 274.

70 B. Van Schaack, ‘Par in parem imperium non habet’, (2012) 10 *JICJ*, p. 133, at 154.

Criminal Code, incorporating the crime of aggression.⁷¹ What is more, all of these provisions explicitly or implicitly use the Rome Statute definition as the international standard reference (albeit that there are also major differences between the various provisions).⁷² Influenced by civil society campaigns, other countries may well follow suit.

It is clear that the crime of aggression does not easily fit with the ICC's complementarity concept.⁷³ Indeed, whereas prosecutions of political or military leaders suspected of international crimes before their own national courts have generally been the exception, rather than the rule, it is particularly naïve to expect a proliferation of prosecutions against suspected 'aggressors' before their own national courts. Thus, while several countries had domestic provisions criminalizing aggression well before the Kampala conference, the crime of aggression has remained a paper tiger ever since the last of the Nuremberg proceedings. Since 1949, there has not been a single indictment on this basis.⁷⁴ In Germany, the Federal Public Prosecutor rejected requests to commence criminal proceedings against members of the government in relation to the German participation in Operation Allied Force, as well as for granting the US and its allies in the 2003 Iraq war overflight rights and allowing them to transport troops and supplies through Germany.⁷⁵ Similarly, requests to instigate criminal proceedings against government members for involvement in the Iraq war were declared inadmissible in Spain and Belgium.⁷⁶ The Statute of the 'Iraqi Special Tribunal' did include among the bases for jurisdiction 'the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of [Iraqi] Law Number 7 of 1958, as amended' (Article 14(c) of the Statute)⁷⁷ (a reference to 'aggression' was carefully avoided in light of the contested legal basis of the US-led intervention). Eventually, however, Saddam Hussein was hanged before a case under Article 14(c) got underway.⁷⁸

In all, the trend towards greater *parliamentary* involvement (at least in Western liberal States) in decisions pertaining to the deployment of armed forces abroad,⁷⁹ as well as to a growing degree of *post facto* political accountability,⁸⁰ has not translated into greater *judicial* scrutiny of government decisions relating to military

71 The countries concerned are Luxembourg, Slovenia, Croatia, the Czech Republic, Ecuador, Samoa, Austria and the former Yugoslav Republic of Macedonia. A. Coracini, '(Extended) Synopsis: The Crime of Aggression under Domestic Criminal Law', in Kreß & Barriga, *supra* note 49, pp. 1038, 1040-1041. Coracini finds 38 States and two regional organizations that have adopted legislation related to aggression, including nine post-Kampala examples of national provisions on the crime of aggression. She also refers to another six States expected to adopt national legislation (at the time of writing).

72 *Ibid.*, p. 1071.

73 Even if the matter did not receive much attention in the negotiations leading up to the Kampala conference, the application of the complementarity principle to the crime of aggression raises a number of delicate issues. One source of concern pertains to the possibility of 'incomplete concurrence' if a domestic court were to prosecute atrocity crimes, but not the crime of aggression. See on this: Van Schaack, *supra* note 70.

74 See e.g. D. Zolo, 'Who is afraid of punishing aggressors?: on the double-track approach to international criminal justice', (2007) 5 *JICJ*, p. 799.

75 The Federal Prosecutor rejected these requests on the basis of a strict interpretation of the domestic crime of 'preparing a war of aggression' under Art. 80 of the German Criminal Code. See C. Kreß, 'The German Chief Federal Prosecutor's Decision not to investigate the alleged crime of preparing aggression against Iraq', (2004) 2 *JICJ*, p. 231.

76 See M. Bothe & A. Fischer-Lescano, 'The dimensions of domestic constitutional and statutory limits on the use of military force', in M. Bothe et al. (eds.), *Redefining sovereignty: the use of force after the Cold War* (2005), p. 206. Note: in the UK, the Attorney-General Lord Goldsmith warned on the eve of the Iraq intervention in 2003 that 'aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognized by the common law which can be prosecuted in the U.K. Courts.' Note from Lord Goldsmith, UK Attorney-General to UK Prime Minister Tony Blair, 7 March 2003, available at <<http://www.comw.org/warreport/fulltext/0303goldsmith1441.pdf>>, § 34 (last visited 21 January 2017). Against this, the House of Lords later held that international crimes are not automatically assimilated into English law, but require statutory enactment by Parliament. See: UK House of Lords, *R. v. Jones*, Judgment of 29 March 2006, (2006) UKHL 16, paras. 23 et seq. Further: C. Villarino Villa, 'The crime of aggression before the House of Lords', (2006) 4 *JICJ*, p. 876.

77 Statute of the Iraqi Special Tribunal, 10 December 2003, (2004) 43 *ILM* 231.

78 See e.g. N. Weisbord, 'Prosecuting Aggression', (2008) 49 *Harvard ILJ*, p. 164, at 172; I. Baudisch, 'Germany v. N. Decision N 2 WD 12. 04', (2006) 100 *AJIL*, p. 911, at 911-917.

79 See e.g. L. Fislser Damrosch et al., 'Is There a General Trend in Constitutional Democracies Toward Parliamentary Control over War-and-Peace Decisions?', (1996) 90 *ASIL Proceedings*, p. 36, at 36; L. Fislser Damrosch, 'Democratization of Foreign Policy and International Law, 1914-2014', (2014-15) 21 *ILSA Journal of International and Comparative Law*, p. 281, at 287-288.

80 This trend is illustrated by the 'Davids Commission' (in the Netherlands), the Chilcott Inquiry (in the UK), and various other national inquiries into the Iraq war. See e.g.: the Netherlands, Commissie van Onderzoek Irak, *Rapport Commissie van Onderzoek Besluitvorming Irak* (2010), available at <<https://www.rijksoverheid.nl/documenten/rapporten/2010/01/12/rapport-commissie-davids>> (last visited 21 January 2017). On the UK's Iraq Inquiry (or 'Chilcott Inquiry'), see <<http://www.iraqinquiry.org.uk/>> (last visited 21 January 2017).

intervention abroad (save in Germany⁸¹), let alone in criminal prosecutions against possible ‘aggressors’. The growing number of domestic criminal codes incorporating the crime of aggression are unlikely to alter this. National courts are indeed traditionally reluctant to review ‘battlefield decisions’, especially when they concern high-ranking officials.⁸² According to Lord Hoffman, ‘the making of war and peace and the disposition of the armed forces has always been regarded as a discretionary power of the Crown into the exercise of which the Courts will not enquire’.⁸³ The same aversion is echoed in the ruling of the US Court of Appeals in the *El-Shifa Pharmaceutical Plant* case: ‘Courts are not a forum for second-guessing the merits of foreign policy and national security decisions textually committed to political branches’.⁸⁴ And even if the coming to power of a new government may exceptionally pave the way for national prosecutions against former political or military leaders with blood on their hands, there is a further reason why such prosecutions – in spite of the catharsis effect they might occasionally produce – are even more unlikely with regard to the crime of aggression, than with regard to atrocity crimes, or at least atrocity crimes committed in the context of a non-international armed conflict. The reason for this is that a national court finding a (former) leader guilty of aggression would *ipso facto* also be recognizing the country’s international responsibility vis-à-vis the victim State. Such a self-incriminating effect hardly makes prosecution at the national level an attractive option (especially inasmuch as a breach of the *jus ad bellum* makes a State liable for all consequences that could reasonably be foreseen at the outset,⁸⁵ and may thus result in a liability that is exponentially larger than with regard to grave breaches of the law of armed conflict that are imputable to the State).

It follows from the foregoing that, contrary to what is the case for the atrocity crimes, the complementarity principle is not perceived as an escape route, or a safety valve, to avoid proceedings against one’s nationals before the ICC in respect of the crime of aggression. This is one of the factors explaining why States chose to introduce various restrictions to prevent the Court from prosecuting leaders from non-consenting States for the crime of aggression (save in the scenario of a Security Council referral).⁸⁶

These ‘consent-based’ mechanisms do not come into play, of course, with regard to domestic proceedings against nationals of third States who are suspected of having committed the crime of aggression. Although no such precedents have yet occurred since the late 1940s,⁸⁷ several scholars have expressed concerns over the growing number of criminal codes criminalizing aggression and, concomitantly, the increased likelihood of proceedings against alleged aggressors before the national courts of victim States and other third States.⁸⁸ Such proceedings are perceived to contravene the fundamental principle of sovereign equality and are feared to engender serious implications for international relations and international peace and security.⁸⁹

81 The German case is fairly unique in that the Constitutional Court has on multiple occasions verified whether the executive branch complied with its duty to have military operations approved by Parliament. See, for example: Germany, *Judgment of the Bundesverfassungsgericht of 7 May 2008*, 2 BvE 1/03, Absatz-Nr. (1-92) (finding that the engagement of German AWACS aircraft in the NATO operation ‘Display Deterrence’ should have been authorized by Parliament); *Judgment of the Bundesverfassungsgericht of 23 September 2015*, 2 BvEe 6/11, ECLI:DE:BVerfG:2015:es20150923.2bve000611 (finding that the government was not obliged to retrospectively seek the *Bundestag*’s approval of the completed evacuation of German citizens from Libya in early 2011).

82 In a similar sense: Wrange, *supra* note 31, pp. 721, 724-725.

83 UK House of Lords, *R. v. Jones*, Judgment of 29 March 2006, (2006) UKHL 16, Opinion of Lord Hoffman, para. 65.

84 US Court of Appeals, District of Columbia Circuit, *El-Shifa Pharmaceutical Industries Co. v. U.S.*, 27 March 2009, 559 F.3d 578.

85 Eritrea-Ethiopia Claims Commission, Final Award, Ethiopia’s Damages Claims, 17 August 2009, reproduced in S.D. Murphy et al., *Litigating war: arbitration of civil injury by the Eritrea-Ethiopia Claims Commission* (2013), Annex 16, p. 661, at para. 289. Further: L. Castagnetti, ‘The damages awards of the Eritrea-Ethiopia Claims Commission: war damages and reparations for violation of Jus ad Bellum’, (2009) 19 *Italian Yb. I.L.*, p. 279; M. Krajewski, ‘Schadenersatz wegen Verletzungen des Gewaltverbots als ius post bellum am Beispiel der Eritrea-Ethiopia Claims Commission’, (2012) 72 *Z.a.ö.R.V.*, pp. 147-176.

86 See *supra*, note 55 and the accompanying text.

87 According to Clark, ‘[i]n terms of state practice, what must have been victim state jurisdiction was exercised by the Republic of China in Nanking against Japanese generals in at least three cases, notably that of Takashi Sakai. Poland exercised what was either victim state or universal jurisdiction in the Greiser case. The USSR convicted numerous German generals for illegal activity that included crimes against peace.’ Clark, *supra* note 2, p. 795. See also: Van Schaack, *supra* note 70, pp. 137-141, 144-145.

88 Koh & Buchwald, *supra* note 6, pp. 274-275; J. Veroff, ‘Reconciling the crime of aggression and complementarity: unaddressed tensions and a way forward’, (2016) 125 *Yale Law Journal*, p. 730. Consider also: N. Strapatsas, ‘Complementarity and aggression: a ticking time bomb?’, in C. Stahn & L. van den Herik (eds.), *Future perspectives on International Criminal Justice* (2010), p. 450.

89 E.g., Koh & Buchwald, *supra* note 6, p. 275. Strapatsas even goes as far as to suggest (unconvincingly) that the desire to domestically prosecute the aggressor could motivate an aggressed state to prolong an armed conflict. Strapatsas, *supra* note 88, p. 473.

Note: in relation to possible prosecution before the national courts of third States other than the victim State, there has also been considerable debate as to whether the crime of aggression lends itself to the exercise of universal jurisdiction. This debate is beyond the scope of the present paper. Writing in 2012, Van Schaack for one concludes that ‘current law does not provide strong support for the exercise of domestic jurisdiction over the crime of aggression, a fortiori, pursuant to universal jurisdiction’ (although she concedes

This was also the position of the ILC in its 1996 draft Code of Crimes against the Peace and Security of Mankind.⁹⁰ Given the risk of ‘serious implications for international relations and international peace and security’, the ILC indeed took the view that jurisdiction over the crime of aggression ought to rest exclusively with an international criminal court, with the exclusion of national courts – save for the national courts of the State whose leaders allegedly participated in the act of aggression.⁹¹

In the wake of the Kampala Review Conference, several proposals have been made, including some ranging from the unproductive to the absurd, to take measures prior to the activation of the ICC’s jurisdiction in order to eliminate or mitigate the risks of domestic prosecution before the courts of third States (including one proposal which would have the ICC Chief Prosecutor issue an official statement ‘discouraging domestic incorporation’ of the crime of aggression).⁹² Others, however, have instead expressed sympathy for the victim’s interest in holding third-State leaders responsible for crimes of aggression.⁹³

In the present author’s view, the prospect of criminal proceedings in Tehran against Israeli leaders with regard to military operations in Gaza or in southern Lebanon is hardly appealing, as is, for that matter, the prospect of criminal proceedings in Kiev, conducted *in absentia*, against Russian leaders pertaining to the annexation of Crimea. For present purposes, however, we will limit ourselves to some cursory observations.

It is correct that the prosecution of non-nationals for the crime of aggression before domestic courts is at first sight difficult to reconcile with the principle of sovereign equality and the *par in parem* axiom⁹⁴ – as was also acknowledged by the ILC in the Commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind.⁹⁵ First, inasmuch as a crime of aggression presupposes a State act of aggression, such proceedings indeed imply that the domestic courts of one country sit in judgment upon the State acts of other countries.⁹⁶ Such conduct would appear to be at odds with State immunity from jurisdiction, which also – as the ICJ confirmed – extends to grave breaches of international law and to breaches of peremptory norms.⁹⁷ Second and related, the prosecution of individual ‘aggressors’ would also seem to be at odds with the (derived) immunity *ratione materiae* of State officials.

As far as the latter immunity is concerned, it is clear that, inasmuch as the crime of aggression is a ‘crime of leaders’, which can be committed only by ‘a person in a position effectively to exercise control over or to direct the political or military action of a State’, it must undoubtedly be regarded as ‘an act performed in an official capacity’.⁹⁸ Yet, the same also appears to be true in respect of several other international crimes. As ILC Special Rapporteur Escobar Hernández observed in her Fourth Report on the immunity of State officials from foreign criminal jurisdiction, ‘the argument that torture, enforced disappearances, extrajudicial killings, ethnic cleansing, genocide, crimes against humanity and war crimes are devoid of any official or functional

that it remains to be seen if the trend will change ‘now that a consensus definition of the crime has emerged’). Van Schaack, *supra* note 70, pp. 144-145. At the same time, it is observed that various national criminal codes effectively foresee the application of forms of extraterritorial jurisdiction ‘that clearly are or could be understood as forms of universal jurisdiction to the crime of aggression’ (Coracini, *supra* note 71, pp. 1068-1069). Arguing that ‘the Nuremberg trial and its progeny crystallized the right under customary international law of states to exercise universal jurisdiction’ over the crime of aggression, see: Scharf, *supra* note 68. In a similar vein, Wrangle, *supra* note 31, pp. 718-720.

90 ILC, ‘Draft Code of Crimes against the Peace and Security of Mankind – with commentaries’, *Yearbook of the International Law Commission* (1996), Vol. II, Art. 8, Commentary para. 14.

91 *Ibid.*, Art. 8, see also paras. 14-15 of the Commentary to Art. 8. According to the ILC, the prosecution of an individual for the crime of aggression by the national courts of the State concerned could be ‘essential to a process of national reconciliation’. Moreover, such prosecution ‘would not have the same negative consequences for international relations or international peace and security’, as national courts of such a State could determine the responsibility of a leader for the crime of aggression ‘without being required to also consider the question of aggression by another State’.

92 See Veroff, *supra* note 88, pp. 764-765. Veroff proposes four possible interventions: ‘The States parties should (1) establish exclusive ICC jurisdiction or primacy over the crime of aggression; (2) urge the ICC’s Chief Prosecutor to issue an official statement discouraging domestic incorporation; (3) encourage domestic prosecutions for ordinary crimes instead of aggression; and (4) generate a multifactor list to guide domestic prosecutions to avoid the most problematic prosecutions and mitigate the associated harms.’

93 E.g. Pellet, *supra* note 8, p. 564. According to Clark, ‘many members of the SWGCA were comfortable with victim state (...) jurisdiction’. Clark, *supra* note 2, p. 795.

94 As well as, in those common-law countries practising it, with the act-of-State doctrine.

95 ILC, ‘Draft Code of Crimes against the Peace and Security of Mankind – with commentaries’, *Yearbook of the International Law Commission* (1996), Vol. II, paras. 14-15 of the Commentary to Art. 8.

96 E.g. Koh & Buchwald, *supra* note 6, p. 274; Van Schaack, *supra* note 70, p. 149.

97 *Jurisdictional Immunities of the State (Germany/Italy/Greece intervening)*, Judgment of 3 February 2012, ICJ Reports (2012), p. 99.

98 See ILC, Special Rapporteur Concepción Escobar Hernández, Fourth Report on the immunity of State officials from foreign criminal jurisdiction, 29 May 2015, UN Doc A/CN.4/686, para. 73.

dimension in relation to the State is at odds with the facts'.⁹⁹ As noted above, whenever national courts pronounce on the individual criminal responsibility of an official (or former official) from a third State for, say, war crimes, they are *de facto* taking a stance on the responsibility of the latter State (since the conduct of the official is in principle imputable to that State, even if conducted *ultra vires*). It follows that such a prosecution creates the same tension with the *par in parem* principle which the prosecution of the crime of aggression before the national courts of third States ostensibly gives rise to. What is more, under the UN Convention against Torture (CAT) and the UN Convention on Enforced Disappearances (CED), the official character is a constitutive element of the prohibited acts which States are required to criminalize and prosecute.¹⁰⁰ In spite of this, there is undoubtedly a degree of support in legal doctrine, as well as in State practice, for the view that (former) high-ranking officials – other than those endowed with absolute personal immunity during their time in office – cannot hide behind their material immunity from jurisdiction to escape prosecution for various international crimes, such as torture and genocide.¹⁰¹ By way of illustration, 'Draft Article 7', put forward by ILC Special Rapporteur Escobar Hernández in her Fifth Report on the immunity of State officials from foreign criminal jurisdiction expressly states that immunity shall not apply in respect of '[g]enocide, crimes against humanity, war crimes, torture and enforced disappearances'.¹⁰²

Of course, the assumption here is also that the prosecution of foreign officials for certain international crimes is not incompatible with State immunity from jurisdiction either. In other words, the (unspoken) assumption is that even if the conviction of a foreign official by a national court for an international crime entails a *de facto* finding of State responsibility, such a finding does not of itself give rise to a breach of State immunity. Why, then, would this be different in respect of the crime of aggression? As mentioned before, it has been argued in this context that the crime of aggression is different – even from those crimes, such as enforced disappearances under the CED, where the official character is an indispensable element – because the national court would be pronouncing explicitly/directly, instead of implicitly/indirectly, on the responsibility of a third State. Whether such an intermediary finding, which does not have direct legal consequences for the third State, qualifies as an exercise of jurisdiction vis-à-vis the latter State, in breach of its immunity from jurisdiction, is open to debate.¹⁰³ If the answer would be positive, a breach of State immunity could arguably be avoided by abandoning the two-tier approach put forward in Article 8bis RS, and instead adopting national legislation defining the crime of aggression in a manner that 'merges' the

99 See *ibid.*, paras. 121-126. See also *ibid.*, paras. 61-77 (referring inter alia to the fact that, under the 1984 Convention against Torture, 'the official status of the act is an undeniable component of torture'). While a divergent view holds that the perpetration of a crime under international law cannot be qualified as an official act, but must be treated as a private act for which no immunity is accorded, Kreicker observes that: 'this artificial attempt to set aside state immunity, which has rightly been rejected by the ICJ and by a clear majority in literature, ignores the obvious fact that crimes under international law are typically committed in the exercise of military and police power – that is, sovereign power.' See: H. Kreicker, 'Immunities', in Kreß & Barriga, *supra* note 31, pp. 675-703, at 680 (with further references in respect of both opposite views). In a similar vein: Scharf, *supra*, note 68, pp. 383-384.

100 *Pro memorie*: the Convention against Torture (CAT) defines 'torture' as 'any act by which severe pain or suffering (...), is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' (emphasis added) (Art. 1(1)). Art. 2 of the Convention on Enforced Disappearances (CED) defines enforced disappearance as 'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.' (emphasis added). Both Conventions require States Parties to exercise jurisdiction on the basis of the territoriality principle, the active personality principle and permit the exercise of jurisdiction on the basis of the passive personality principle. In addition, in respect of alleged offenders present on the State's territory, both Conventions establish an '*aut dedere, aut judicare*' duty. Art. 5 CAT, Art. 9 CED.

101 Further: see R. Pedretti, *Immunity of heads of State and State officials for international crimes* (2014). Note that this argument is not limited to international crimes for which there is an explicit treaty obligation to exercise some form of criminal jurisdiction (in particular torture and enforced disappearances), but is also made in respect of crimes where no such treaty exists (as yet) (e.g., crimes against humanity). See also: Kreicker, *supra* note 99, p. 681 ('State practice supports a customary international law exception to the general functional immunity in cases of crimes under international law, as is evidenced by many court decisions. A clear majority in scholarly writing also supports the existence of such an immunity exception.'). The contrary view was nonetheless defended inter alia by former ILC Special Rapporteur Roman Kolodkin. See *ibid.*, pp. 682-683.

102 ILC, Special Rapporteur Concepción Escobar Hernández, Fifth Report on the immunity of State officials from foreign criminal jurisdiction, 14 June 2016, UN Doc A/CN.4/701, para. 248.

103 Uncertainty remains as to the threshold for qualifying State conduct as an exercise of 'jurisdiction' vis-à-vis another State from an immunity perspective. For an analysis, see e.g. N. Angelet, 'Les juges belges face aux actes des organisations internationales', in A. Lagerwall (ed.), *Les juges belges face aux actes adoptés par les Etats étrangers et les organisations internationales* (2016), pp. 13-51.

individual conduct and the collective act (similar to what is the case for the definitions of torture and enforced disappearances in the CAT and the CED).¹⁰⁴ This is, for instance, the approach adopted in Article 13 of the Arab Draft Model Law for the Crimes falling within the jurisdiction of the ICC, as well as in several older national laws criminalizing aggression/aggressive war.¹⁰⁵ It is admitted, however, that recent national legislation often adopts the two-step approach of Article 8bis RS. On a different note, while an in-depth assessment of immunity law is beyond the scope of the present paper, it is worth observing that States are not necessarily consistent in their approach with respect to the jurisdictional immunity of States and foreign officials, and their deference to the *par in parem* axiom.¹⁰⁶ By way of illustration, while the US position would seem to be that it enjoys jurisdictional immunity before foreign courts with regard to a US drone strike killing a taxi driver in Pakistan, with regard to weapons supplies to Syrian rebel groups, or with regard to its military interventions in Syria and elsewhere, its Foreign Sovereign Immunities Act (FSIA) contains an exception in respect of countries which the US Department of State has unilaterally decided to qualify as 'state sponsors of terrorism'.¹⁰⁷ The so-called 'terrorism exception' to the FSIA would permit litigation against the Syrian regime for providing funds to Hezbollah, and has, for instance, been used to seize USD 2 billion in Iranian assets inter alia because of Iranian funding and assistance to Islamic Jihad in Gaza.¹⁰⁸

The main message here is again that the 'crime of aggression' is not *fundamentally* or *intrinsically* different from various other international crimes, which (when committed by (former) State organs) may equally qualify as 'acts performed in an official capacity',¹⁰⁹ but which part of this legal doctrine can be prosecuted without giving rise to insurmountable obstacles from an immunities perspective.

In the end, even if the complementarity principle may constitute an incentive for domestic legislation,¹¹⁰ the peripheral problem pertaining to the possibility and prospect of domestic prosecution against non-nationals over the crime of aggression transcends the treaty context of the ICC Rome Statute and the activation of the ICC's jurisdiction with respect to this crime. It is a general international law problem that merits greater attention in particular in the context of the International Law Commission's ongoing work on the immunity of State officials.

As mentioned above, in her Fifth Report on the immunity of State officials from foreign criminal jurisdiction of June 2016, ILC Special Rapporteur Escobar Hernández takes the view that material immunity does not apply in respect of '[g]enocide, crimes against humanity, war crimes, torture and enforced disappearances'.¹¹¹ Interestingly, 'the crime of aggression' is not included in the list, thus signalling that, in

104 As mentioned above, the two-tier approach in Art. 8bis RS was not the inevitable result of the inherent features of 'aggression', but was the result of the choices made throughout the drafting process of the Kampala Resolution. See *supra*.

105 See the overview of 'Selected national laws and regional instruments on the crime of aggression', in Kreß & Barriga, *supra* note 49, p. 1111.

106 Wrangé draws attention, for instance, to the fact that States routinely pronounce themselves on the legality or otherwise of acts by foreign States, and occasionally impose sanctions against other States for violations of international law. Wrangé, *supra* note 31, p. 714. On a different note, State immunity is generally not (or no longer) regarded as absolute. Reference can be made in this context to the 'territorial tort' exception, which is enshrined e.g. in Art. 19 of the UN Convention on Immunities of States and their property (UN Doc. A/RES/5938).

107 28 U.S.C. § 1605A. At the time of writing, the list of 'State sponsors of terrorism' comprised three countries: Iran, Sudan and Syria (Cuba was removed from the list in 2015). See: <<http://www.state.gov/j/ct/list/c14151.htm>> (last visited 22 January 2017). Further: D.P. Stewart, *The Foreign Sovereign Immunities Act: a guide for judges* (2013), available at <[http://www.fjc.gov/public/pdf.nsf/lookup/fsiaguide2013.pdf/\\$file/fsiaguide2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/fsiaguide2013.pdf/$file/fsiaguide2013.pdf)> (last visited 22 January 2017). A similar terrorism exception is included in the Canadian State Immunities Act, R.S.C. 1985, c. S-18, s.6.1. See also: V. Grandaubert, 'Is there a place for sovereign immunity in the fight against terrorism? The US Supreme Court says 'no' in Bank Markazi v. Peterson', EJIL Talk!, 19 May 2019, available at <<http://www.ejiltalk.org/is-there-a-place-for-sovereign-immunity-in-the-fight-against-terrorism-the-us-supreme-court-says-no-in-bank-markazi-v-peterson/>> (last visited 22 January 2017); M. Dodge, 'Does JASTA violate international law?', Just Security, 30 September 2016, available at <<https://www.justsecurity.org/33325/jasta-violate-international-law-2/>> (last visited 22 January 2017).

108 Further, see: O.F. Kittrie, *Lawfare* (2016), pp. 70-80. Note: on 14 June 2016, Iran filed an application with the ICJ against the United States in respect of these acts, available at <<http://www.icj.org/docket/files/164/19038.pdf>> (last visited 23 January 2017). The case (*Certain Iranian Assets*) was still pending at the time of writing.

109 See *supra*, note 99.

110 In this sense: Clark, *supra*, note 2, p. 794. More cautious, see e.g. Werle & Jeßberger, *supra*, note 2, p. 1491.

111 *Supra*, note 102.

the Special Rapporteur's view, a customary international law exception to immunity has not yet emerged in respect of this crime.¹¹² The Special Rapporteur cites several reasons to account for this:¹¹³

'the Court's jurisdiction over this crime is optional and not automatic, as is the case with the other international crimes; the Commission itself already indicated in the draft Code of Crimes against the Peace and Security of Mankind of 1996 that the crime of aggression must be entrusted primarily to international courts and tribunals, given the political implications it could have for the stability of relations between States; there are very few pieces of national criminal legislation that address this crime; and, lastly, there do not appear to be any cases of State practice in which the crime of aggression has been characterized as a limitation or an exception to the exercise of immunity, at either the legislative or the judicial level.'

The reasoning of the Rapporteur is only partially convincing.¹¹⁴ It seems to ignore that there have been at least a few examples of victim State jurisdiction over the crime of aggression,¹¹⁵ and that the number of criminal codes incorporating the crime of aggression is on the rise (and that these criminal codes constitute State practice suggesting that material immunity does not necessarily apply to the crime of aggression).

Whether or not the crime of aggression is eventually included in the list of acts for which the immunity shield is pierced may well have a significant impact on the debate in legal doctrine, and on future State practice. At the time of writing, there appeared to be little appetite among the ILC members for removing immunity for crimes of aggression.¹¹⁶ It also remains to be seen how a future ILC Draft will be received in the Sixth Committee of the UN General Assembly. Whatever the outcome, it is submitted that the controversy concerning the possible prosecution of the crime of aggression at the national level should not be allowed to weigh in on, let alone derail, the final activation of the ICC's jurisdiction. *Pro memorie*, several countries criminalized aggression at the domestic level long before the adoption of the Rome Statute. Furthermore, as 'Understanding 5' adopted by the Assembly of States Parties in 2010 (pursuant to a US proposal) stresses, the Kampala Amendments should 'not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State'.¹¹⁷ This is all that needs to be said on the matter in the ICC context.

3. Concluding thoughts

At least symbolically, the full activation of the ICC jurisdiction over the crime of aggression will be a defining moment in the development of the international legal order, completing a process that was started in Versailles at the end of the First World War and which reached its point of no return at the 2010 Kampala Review Conference. It is surprising to see then how lukewarm (or downright critical) many (if not most) international lawyers are about the prospect of the ICC prosecuting alleged 'aggressors'. The reasons for this lukewarm reception are manifold of course. They include inter alia concerns about the definitional uncertainties left open by the Kampala definition of aggression, scepticism about the competence and

112 Note: In theory, Draft Art. 7 put forth in the Fifth Report of Special Rapporteur Escobar Hernández would nonetheless seem to leave the door open for the exercise of jurisdiction over alleged aggressors by the victim State through the so-called 'territorial tort exception'. Para. 1(iii) of the Draft Article indeed suggests that immunity will not apply to '[c]rimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.' (ibid., pp. 88-89, 95). Given the Special Rapporteur's position on the crime of aggression elsewhere in the report (see *infra*), it seems unlikely that this opening was deliberate. In any case, it would appear to be absurd to permit victim State jurisdiction over alleged aggressors, but only vis-à-vis State officials who were present in the territory of the victim State at the time the crime of aggression was committed.

113 Ibid., para. 222.

114 For the contrary position, according to which there is no immunity *ratione materiae* in respect of the crime of aggression, see e.g. Kreicker, *supra* note 99, pp. 683-684; Wrangle, *supra* note 31, p. 723.

115 See *supra*, note 87.

116 Based on the presentation by ILC Rapporteur Concepcion Hernandez during a presentation on 15 December 2016 in Ghent (conference on *International Immunities: Law in a State of Flux?*).

117 Resolution RC/Res.6, *supra*, note 3, Annex III, 'Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression'. Consider also: Werle & Jeßberger, *supra* note 2, p. 1491 (stating that the Understanding was to make clear that 'for the crime of aggression, in contrast to the other core crimes, the principle of complementarity does not aim for the most comprehensive domestic prosecution possible'). According to Van Schaack, the Understandings express 'a subtle preference that the states parties do not incorporate the crime into their domestic codes'. Van Schaack, *supra* note 70, pp. 135, 159-161.

authority of the ICC judges to interpret and apply the international legal framework governing the use of force, concerns over the collection of evidence,¹¹⁸ etc. Many scholars also see the ICC's jurisdiction over the crime of aggression as a Trojan horse, fearing that the exercise of such jurisdiction will erode the legitimacy of, and political support for, the Court (a prospect that is particularly dire at a time when the ICC is suffering an unprecedented crisis of legitimacy inter alia in the wake of the South African withdrawal from the Rome Statute in October 2016). The latter position brings to mind the concern expressed in the wake of the ICJ's *Nicaragua* case – which led the United States to revoke its declaration accepting compulsory jurisdiction – that the Court's entry into the realm of 'high politics' would harm its prestige and negatively impact its caseload.¹¹⁹ In reality, however, it seems that the opposite has proved true.¹²⁰ Criticism of pro-Western bias on behalf of the ICJ has faded and several countries have brought cases before the Court which either directly involved the use of force or which dealt with boundary disputes in situations of armed conflict.¹²¹ Whether the same will be true for the International Criminal Court only time can tell.

The present essay does not pretend to provide an answer to all (or even most) of the concerns pertaining to the impending activation of the ICC's jurisdiction over the crime of aggression. Instead, we have essentially limited ourselves to two points. First, we have taken aim at the lingering argument that the crime of aggression is inherently non-justiciable, as well as at 'light' versions of this justiciability critique (which hold, for instance, that only the Security Council can determine the existence of (an act of) aggression, or that the ICC should refrain from judging sovereign States – even if only indirectly). Second, we have taken a closer look at claims that the activation of the ICC's jurisdiction over the crime of aggression simultaneously creates an incentive for the prosecution of alleged aggressors at the national level (and for the introduction of domestic legislation paving the way for such prosecutions) in a manner which is incompatible with the international immunities of States and foreign officials. Here, we argued that the possibility of such domestic prosecutions transcends the treaty context of the ICC Rome Statute. It is a general international law problem that merits greater attention in particular in the context of the ILC's ongoing work on the immunity of State officials. It should not, however, be allowed to derail the final activation of the ICC's jurisdiction.

The activation of the jurisdiction over the crime of aggression is bound to present the ICC and, specifically the ICC Prosecutor, with daunting challenges. Perhaps the most fundamental obstacle consists of the lingering taboo that envelopes the notion of the 'crime of aggression'. This taboo is evident from the dominant, but flawed, perception that aggression is no more than a wrong against a foreign State, a political crime, which plays exclusively at the 'macro' level¹²² and which 'yields an abstract harm',¹²³ and which should therefore not be placed on an equal footing with the atrocity crimes, rather than as a compound of wrongs against individuals (civilians and combatants alike) that entails 'the slaughter of *human* life, the infliction of *human* suffering, and the erosion of *human* security'.¹²⁴ It is only by picking up the Nuremberg legacy and implementing Article 8bis Rome Statute that the International Criminal Court will bring about a much needed *changement d'esprit* in this regard. ■

118 Consider e.g. the concern expressed in this respect by Norway upon the adoption of the Kampala Resolution, statement reprinted in Barriga & Kreß, supra note 3, p. 813.

119 C. Gray, 'The Use and abuse of the International Court of Justice: Cases concerning the use of force after *Nicaragua*', (2003) 14 *EJIL*, p. 867, at 885 et seq.

120 Ibid.

121 E.g., *Case concerning the territorial dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 February 1994, ICJ Reports (1994), pp. 6-41; *Case concerning the land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment of 10 October 2002, ICJ Reports (2002), p. 303.

122 This is the view set forth by Walzer. See M. Walzer, *Just and Unjust Wars* (1977), pp. 55 et seq. In a similar vein: D. Luban, 'Just War and Human Rights', (1980) 9 *Phil & Pub Aff's*, p. 160, at 161; E. Creegan, 'Justified uses of force and the crime of aggression', (2012) 10 *JICJ*, p. 59, at 59-68, 81-82.

123 Creegan, supra note 13, p. 59.

124 In this sense, see Dannenbaum, supra note 12 (in particular Section 3.2). For another critique of the 'Walzerian' approach, see J. McMahan, *Killing in War* (2009). On the position of individuals as victims of the crime of aggression, see further: E. Pobjie, 'Victims of the crime of aggression', in Kreß & Barriga, supra note 31, pp. 816-859.