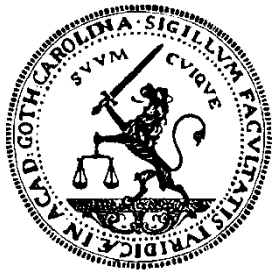

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Immunity and the Crime of Aggression

The Legal Possibilities and Implications of Prosecuting Heads of State for the Crime of Aggression in National Courts and the International Criminal Court

LAGF03 Essay in Legal Science

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Summary

Following the activation of the International Criminal Court's jurisdiction over the crime of aggression in July 2018, these acts are for the first time since the Nuremberg Tribunal possible to prosecute before an international court. The crime of aggression may only be conducted by persons in a position effectively to exercise control over or direct the political or military action of a State. This includes, but is not limited to, heads of state. This thesis examines the possibilities to prosecute heads of state in particular, under the crime aggression in the ICC. Article 27 of the Rome Statute states the irrelevance of official capacity when the Court exercises its jurisdiction. However, as the study finds, the legal system of immunity is not the only method of protecting heads of state from a court claiming jurisdiction.

The parallel rules in international customary law are also studied to be put in contrast to the rules of the ICC. As international crime is fought both in national and international courts, this study compares the two systems to each other. Understanding these rules of both the crime of aggression and immunity for heads of state gives insight into the different legal solutions at hand, and what factors that are balanced when conducting the fight against impunity.

The results show that the possibilities to prosecute a foreign head of state in a national court, as well as in the ICC are extremely limited. As the status of the crime of aggression as an international customary rule is controversial, it might be challenging for a state to claim jurisdiction over it. Even if overcoming this obstacle, foreign heads of state enjoy strong protection of immunity, both during and after their time in office. The possibilities for the ICC, on the other hand, seems to be limited by the lack of states accepting its jurisdiction over the crime of aggression. For the State Parties, it is still a sensitive matter when the ICC prosecute heads of state. However, the ICC's dependency on the UN Security Council to be able to exercise its jurisdiction over the crime of aggression might be the most uncertain factor.

Sammanfattning

Efter aktiveringen av Internationella brottmålsdomstolens jurisdiktion över aggressionsbrottet i juli 2018 är dessa gärningar för första gången sedan Nürnbergtribunalen möjliga att väcka åtal för i en internationell domstol. Aggressionsbrottet kan bara begås av personer i position att effektivt utöva kontroll över, eller styra politiska eller militära handlingar av en stat. Detta inkluderar, men inte enbart, stats- och regeringschefer. Denna studie undersöker möjligheterna att åtala stats- och regeringschefer för aggressionsbrott i Internationella brottmålsdomstolen. Artikel 27 i Romstadgan säger det vara irrelevant huruvida en person är en ämbetsman för att domstolen ska kunna utöva sin jurisdiktion. Men, som studien visar, är systemet för immunitet inte den enda metoden för att skydda stats- och regeringschefer från att bli åtalade.

Det parallella systemet i den internationella sedvanerätten studeras också i kontrast till Internationella brottmålsdomstolens regler. Eftersom internationella brott bekämpas både i nationella och internationella domstolar jämför denna studie de två systemen med varandra. Genom att förstå dessa regler, både rörande aggressionsbrottet och immunitet för stats- och regeringschefer, ges insikt om olika juridiska lösningar som finns att tillgå.

Studien visar att möjligheterna att åtala en utländsk stats- eller regeringschef i en nationell domstol såväl som i den Internationella brottmålsdomstolen, är väldigt begränsade. Eftersom aggressionsbrottets status som internationell sedvanerätt är kontroversiell, kan det vara svårt för en stat att göra anspråk på jurisdiktion över brottet. Även om den lyckas med detta, tillkommer ett starkt immunitetsskydd för utländska stats- och regeringschefer, både under och efter deras tid på posten. Möjligheterna för Internationella brottmålsdomstolen å andra sidan, verkar vara begränsade på grund av bristen av stater som accepterar domstolens jurisdiktion över aggressionsbrottet. Det är även en politiskt känslig fråga. Slutligen är domstolens beroende av FNs säkerhetsråd för att kunna utöva sin jurisdiktion över aggressionsbrottet den kanske mest osäkra faktorn.

Abbreviations

ASP	Assembly of States Parties to the Rome Statute of the ICC
AU	African Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of the former Yugoslavia
ILC	International Law Commission
ILC Draft Code on Crimes	The ILC Draft Code of Crimes against the Peace and Security of Mankind
IMT in Nuremberg	International Military Tribunal for the Major War Criminals, Nuremberg
IMT in Tokyo	International Military Tribunal for the Far East, Tokyo
Kampala Amendments	The Amendments to the Rome Statute of the ICC, Kampala, 11 June 2010

RCSL	Residual Court for Sierra Leone
Rome Statute	The Rome Statute of the International Criminal Court
SCSL	Special Court of Sierra Leone
UN Charter	The Charter of the United Nations and Statute of the International Court of Justice
UN	United Nations
UNGA	UN General Assembly
UNSC	UN Security Council

1 Introduction

1.1 Background

> "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[1]

ICL has been an expanding area within international public law over the decades following the Second World War. The first courts examining international crimes can be said to be in the IMTs in Nuremberg and Tokyo established after the war. Similar institutions were not formed until the 1990s with the ad hoc ICTY and ICTR. In 1998 the first permanent international criminal court, the ICC was established, becoming operable in 2002.[2] In contrast to international public law where the legal entity of relevance is usually states, ICL recognises prosecution of individuals as its primary concern.[3]

ICL is now practised in both national and international courts to ensure that perpetrators of certain abhorrent acts are held accountable. International courts' jurisdictions are limited to the most heinous acts known to man.[4] The ICC can prosecute these so-called core crimes: genocide, crimes against humanity, war crimes, and aggression.[5]

The crime of aggression is the most controversial of these crimes. It is regarded as an act of initiating war or in other ways, violate the UN Charter. The legislation holds the highest officials in a state accountable for these actions. It was prosecuted as "a crime against peace" in the IMTs in Nuremberg and Tokyo. However, it has never been included in the statutes of the ad hoc courts that followed. Nevertheless, it is by some understood as a

[1] *International Military Tribunal (Nuremberg), Judgment of 1 October 1946*, 421.
[2] Cassese et al. 4.
[3] Linderfalk 43 f.
[4] Kress 6.
[5] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90. (Rome Statute) art. 1.

crime under customary law, reflected in, e.g. the ILC Draft Code on Crimes from 1996.[6]

The crime of aggression was included in theory in the Rome Statute when establishing the ICC. However, an agreement on the definition was not reached until 2010, resulting in the Kampala Amendments. The activation of the Court's jurisdiction became effective 17 July 2018.[7] As of yet, no prosecution of aggression has materialised in the ICC.

Parallel to the development of ICL, the topic of prosecuting heads of state has been widely debated in the international legal community. The rules of immunity for this circle of people with regards to national courts are found in customary law. When it comes to immunity before international courts, there has been a development weakening the protection for heads of state.[8] Although these rules seem to be straightforward in, e.g. the Rome Statute article 27, there might be more to the issue when scratching the surface.

ICL and the question of immunity of state officials are highly politically sensitive, whilst the field is heavily based on the approval of the states participating in the different agreements. The law and its possibility to be implemented is thereby affected by several factors beyond the scope of the written provisions. As the ICC's jurisdiction over the crime of aggression was recently activated, it is of significant interest to understand the legal implications it entails. The development of the aspects of the crime of aggression, immunity for heads of state, and the relationship between them are the objects of research for this thesis.

1.2 Purpose and Research Question

The study aims to examine the crime of aggression under the ICC's jurisdiction and its relation to the notion of immunity for heads of state. As the group subject to the crime of aggression is limited to the highest-ranking state officials, it is of interest to examine how the parallel principles of

[6] Kress 6 ff. and Draft Code of Crimes against the Peace and Security of Mankind, (ILC Draft Code of Crimes) art. 8.
[7] ASP/16/Res.5.
[8] Cassese et al. 320 ff.

immunity for an essential part of this group are affected, to fully understand the impact of the crime of aggression. The legislation governing the ICC is the focal point of the thesis. However, an account for the crime and the rules of immunity in international customary law and its application in national courts, is also of interest. These will be presented in contrast to the Rome Statute to understand the full picture of the legal system. In summary, the study takes a critical approach to examining the solidity of the legal framework of the crime of aggression. The following research question will be answered to fulfil this purpose:

How does the crime of aggression, as an international customary rule in general and under the Rome Statute specifically, relate to the principles of immunity for heads of state?

1.3 Delimitations and Definitions

Through the purpose and research question, several delimitations are made to produce a relevant study within the scope of a bachelor thesis. The material researched and referred to is adapted similarly.

Initially, it is essential to clarify the distinction between national and international courts this thesis assumes. As other scholars similarly favour, the distinction is made depending on the character of the founding document of the court in question. [9]

International crime is narrowly defined as the core crimes directly regulated under international law: genocide, crimes against humanity, war crimes and aggression. The object of the thesis is to research the possibility for the ICC to *prosecute* the crime of aggression. Other international crimes will be left outside of the thesis. However, it is neither the definition of the crime itself nor its standing as an international customary rule that are the objects of research. An in-depth discussion thereof will, therefore, not be included in this thesis.

When speaking of jurisdiction, prescriptive jurisdiction is referred to if not stated otherwise. That is, a national or international court's authority to

[9] See e.g. Henriksen 307 and O'Keefe 87 f.

assert the applicability if its law to given persons. A distinction of the jurisdiction to adjudicate is deemed unnecessary when it comes to criminal law, as it is the realisation of the jurisdiction to prescribe. Jurisdiction to enforce does however not relate to jurisdiction to prescribe in the same manner, thus being two distinct questions.[10]

The question of immunity is solely related to the immunity enjoyed by heads of state. When focusing on heads of states, the notions of the special immunities also protecting heads of government, and ministers of foreign affairs are included.

1.4 Methodology and Theoretical Framework

The aspects of the crime of aggression will be researched from an international perspective with a focus on the legal development of the crime defined in the Rome Statute article 8*bis*.

The study is conducted through the dogmatic legal method while adopting an argumentation *de lege lata*. It is a form of legal analysis aimed to interpret current law and, thereby, determine the legal solution of the problem stated in section 1.2. The method is used to understand and explain current law, critically analyse it, and examine the identified legislation in relation to its purpose.[11]

A comparative method will somewhat be used between de different legal solutions identified in the research question. The method is motivated to further nuance the results from the dogmatic legal method, thereby gaining perspective on the legal solutions adopted by the Rome Statute.

1.5 Material

The main sources used in this study consists of generally accepted sources of international law. These are regarded to be the ones listed in the Statute of the ICJ article 38: international conventions; international custom; and general

[10] O'Keefe 5 f.
[11] Kleineman 25 ff.

principles of law. The first two mentioned are viewed as parallel and equally valid systems of international law. In the context of this study, it is also those that are of most relevance. Judicial decisions and teachings of most highly qualified publicists are acknowledged as secondary sources used to understand the primary sources already stated.[12]

The UN Charter and the Rome Statute are the central treaty law studied. Other conventions and treaties have been regarded when seen fit. It should be noted that the Rome Statute within itself regulates what legal sources are available for the ICC to use. These being similar to the already established sources above, with a focal point on the Statute itself, *inter alia*.[13]

International customary law is based on two things: a general constant and uniform custom in states' actions, and a general *opinio juris.* In recognition of these aspects, both legal sources, judicial decisions and literature have been used to understand the customary law. The ILC Draft Code on Crimes has consequently been of great importance as the ILC is a vital organ to clarify the customary law. However, it is only a draft code, thus not binding in its character.[14]

Since the crime of aggression has not been evaluated in a specific case before the ICC, no judicial decisions have been possible to study. To understand the possibilities to prosecute heads of state, cases doing so in other contexts have been studied to understand if conclusions drawn from these cases can be of value regarding the crime of aggression.

Other sources of value have been the documents produced by the Review Conference of the Rome Statute and Official Records of the ASP. These sources have been used to understand the development of the legislation.

[12] Linderfalk 26 ff.
[13] Rome Statute (n 5) art. 21.
[14] Linderfalk 27 ff.

1.6 Previous Research

The number of comprehensive works dealing with the crime of aggression is reasonably limited, which is compensated by a myriad of research published in different legal journals. The crime of aggression and the ICC is analysed and debated from several legal aspects, among other things: historical, regional and of its legitimacy.

As this thesis is not a literary study, it is neither interesting nor feasible to account for the full range of articles and literature on the subject. A few comprehensive, authoritative works have been selected accounting for the material referred to in the previous section, in compliance with the scope of this thesis. These works are presented in the bibliography below.

When researching the material, the question of immunity for heads of state and international crimes is a recurrent topic. There are a few articles relating it to the crime of aggression. This thesis is motivated by the recent activation of the ICC's jurisdiction over the crime of aggression. The topic is therefore highly suitable, as prosecution for the crime is no longer only possible in theory.

1.7 Outline

In the following sections, the aim and research question will be met by examining the different aspects of international law governing the critical elements of this study. First, an overview of the development of major international courts will be investigated, describing their key features and jurisdictions. Secondly, the crime of aggression will be examined under the light of both customary and treaty law. Thirdly, the principles and legislation regarding immunities of heads of state will be accounted for. Lastly, all these aspects will be tied together, answering the research question stated above.

2 The Development of International Courts and Tribunals

2.1 Governing Principles

International crimes, in general, may be prosecuted in either national or international courts. The jurisdiction of international courts is based on treaties and the approval of participating states. The fight against impunity is what sustains the field of ICL, meaning no individual should avoid liability of their criminal acts.[15] Whether the jurisdiction of an international court has primacy over a national court depends on its governing document.

The treaties that establish international courts are regarded as primary sources. They do, however, not affect each other, but can be a display of, or help to create customary law. The customary law is also a relevant source for the courts. Moreover, it is relied upon when international and national courts define an international crime.[16] The customary law and the treaty law are thereby somewhat intertwined.

2.2 Ad Hoc Tribunals

2.2.1 Jurisdiction

The IMTs in Nuremberg and Tokyo were the first of their kind, prosecuting grave crimes conducted in association with the Second World War.[17] It was

[15] Cassese et al. 3 ff.
[16] Henriksen 308 f.
[17] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945 (London Charter); Special Proclamation, Establishment of an International Military Tribunal for the Far East, 19 January 1946.

the IMT in Nuremberg that definitively recognised international law as authorising the prosecution of individuals, without the intermediary of national law.[18] The IMT in Nuremberg, similar to the IMT in Tokyo, had jurisdiction over crimes against peace, crimes against humanity and war crimes.[19] The latter also concluded that aggressive war constituted a crime under international law at the time.[20]

No similar court or tribunal was established again until 1994 when the ICTY was formed, accompanied by the ICTR in 1995. These ad hoc tribunals were founded to deal with cases arising from the specific contexts of atrocities committed in former Yugoslavia and Rwanda.[21] The tribunals were granted jurisdiction primacy to national courts for crimes against humanity and genocide, among others.[22]

The ICTY and ICTR were established by the UNSC under Chapter VII of the UN Charter.[23] Following this development, several ad hoc tribunals have been established over the last 25 years, e.g., the SCSL in 2002 and its successor RCSL.[24]

2.2.2 Notable Cases Against Heads of State

In RCSL the former President of Liberia was successfully prosecuted.[25] In the ICTY, former heads of state were indicted.[26] In 2016 former President of the Bosnian Serbs was found guilty of genocide, crimes against humanity, and

[18] Cassese et al. 3.
[19] London Charter (n 17); Special Proclamation, Establishment of an International Military Tribunal for the Far East, 19 January 1946.
[20] Henriksen 310.
[21] SC Res. 827 (25 May 1993), UN Doc. S/RES/827; SC Res. 935 (1 July 1994), UN Doc. S/RES/935.
[22] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, adopted on 25 May 1993 by Security Council resolution no. 827, as amended by later resolutions and (ICTY Statute); Statute of the International Tribunal of Rwanda (ICTR Statute).
[23] SC Res. 827 (25 May 1993), UN Doc. S/RES/827; SC Res. 935 (1 July 1994), UN Doc. S/RES/935.
[24] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.
[25] *Prosecutor v Charles Taylor*, Judgement, SCSL-03-01-T (30 May 2012).
[26] See *Prosecutor v Radovan Karadžić*, Initial Indictment, ICTY-95-5/18 (22 July 1995). and *Prosecutor v Slobodan Milošević et al.*, Initial Indictment, ICTY-99-37 (22 May 1999). However, Milošević died before the Tribunal could render its judgment.

war crimes.[27] The success of the ICTY has partly been regarded due to the cooperation of Serbia. ICTR was not as successful due to lack of corporation on the part of Rwanda.[28] The extent to which a state cooperates with an international court can, therefore, have importance for the court's material success even if it has formal jurisdiction.

2.3 The Permanent International Criminal Court

The ICC is the first permanent international criminal court ever established. It is governed by the Rome Statute, an interstate agreement adopted in 1998 which entered into force 1 July 2002.[29] The organisation is separate from the UN, but some connections are made through the possibilities to exercise its jurisdiction. The Rome Statute has 137 signatories with 123 State Parties which have ratified or later accessioned to it. The State Parties consist of 33 African, 28 Latin American and Caribbean, 25 Western European, 19 Asia-Pacific, and 18 Eastern European states. Notable states not being State Parties are the US, Russia, India, China, and several of the Middle Eastern States.[30]

The ICC's separation from the UN has been claimed to be an essential factor as to why so many states quickly wanted to be part of the new context the ICC provided. By not being subject to the UNSC, the ICC is not directly susceptible to problems arising from the veto power of the five permanent members of the UNSC, as it would have been if the Court was organised under the powers of the UN.[31]

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[27] *Prosecutor v Radovan Karadžić*, Judgement, ICTY-95-5/18 (24 March 2016).
[28] Henriksen 310 f.
[29] Rome Statute (n 5).
[30] United Nations Treaty Collection, Status of Treaties, Chapter XVIII Penal Matters, 10. Rome Statute of the International Criminal Court. Status as at: 15-05-2020. <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en> (accessed 25 May 2020).
[31] Schabas 25 f.

2.3.1 Jurisdiction and the Principle of Complementarity

The Rome Statute's first article states that ICC has "jurisdiction over persons for the most serious crimes of international concern". These being the core crimes: Genocide, crimes against humanity, war crimes and aggression.[32] To exercise its jurisdiction over the core crimes, a set of preconditions must be met under articles 12 and 13 of the Rome Statute. Primarily, being a State Party means that the state has accepted the Court's jurisdiction concerning crimes referred to in article 5. A non-State Party can also accept the Court's jurisdiction by a special declaration.[33]

To investigate an alleged crime, the Court and its Prosecutor must, in general, have the situation referred to it. The referral can be from a State Party**,** per article 14 or by the UNSC. The Prosecutor can also initiate an investigation on their own (*proprio motu)*, under article 15.[34] In that case, the Prosecutor needs to submit a request for authorisation of an investigation to the Pre-Trial Chamber.[35]

When a situation is referred by a State Party, or if a *proprio motu* investigation is at hand, the Court may only exercise its jurisdiction in two cases, based on territoriality or nationality in connection to a State Party.[36] If the UNSC refers a case to the Prosecutor following article 13(b), the conditions listed in article 12 do not have to be met. The Court may exercise its jurisdiction regardless of the state in question being party to the Rome Statute. This is because the referral is made under the powers of Chapter VII of the UN Charter.[37] The decisive factor is if the situation referred by the UNSC is conducted by a UN member state.[38]

[32] Rome Statute, (n 5) art 5.
[33] Ibid., art. 12.
[34] Ibid., art. 13.
[35] Ibid., art. 15(3).
[36] Ibid., art. 12(2).
[37] Henriksen 315.
[38] Charter of the United Nations, adopted at San Francisco, on 26 June 1945, (UN Charter) art. 25.

ICC is founded on the principle of complementarity. Meaning its jurisdiction is complementary to national jurisdiction.[39] Different from the ad hoc courts mentioned, the ICC has no authority obliging State Parties to refer cases to it. If a national investigation is initiated or has been executed by a state which has jurisdiction over it, the case is inadmissible before the ICC. The exception being, if the state in question is deemed unwilling or unable to genuinely conduct the investigation or prosecution.[40] International crimes are mainly supposed to be prosecuted in national courts. These are said to be able to prosecute both core crimes and other offences listed in several international conventions obliging the state to prosecute certain crimes based on universality.[41] However, no such convention has been established regarding the crime of aggression.

The ICC may not exercise its jurisdiction over crimes that were committed before the Rome Statute entered into force, or when a state became a party to the Statute unless it previously had made a declaration approving the Court's jurisdiction.[42]

As the Court's jurisdiction over the crime of aggression was defined and activated later than the rest of the Rome Statute, other provisions apply to it. These will be further specified under section 4.

2.3.2 Opposition to the ICC

The ICC has received criticism from both State Parties and non-State Parties. African states protested in what is perceived as an unjustified and allegedly politicised focus on prosecuting crimes committed in Africa, including those aimed at acting heads of state. In 2013, following the indictment of the incumbent President of Kenya, members of the AU issued strong protests and threatened to withdraw from the ICC.[43] The relations were further strained when the trial against the former President of the Ivory Coast commenced. In

[39] Rome Statute (n 5) art. 1.
[40] Ibid., art. 17.
[41] Henriksen 325 f; ILC Draft Code of Crimes (n 6) art. 8.
[42] Rome Statute (n 5) art. 11.
[43] African Union, Extraordinary Session of the Assembly of the African Union: Decisions and Declarations (12 October 2013), Ext/Assembly/AU/Decl.a-1, Addis Ababa, Ethiopia.

2016, Kenya proposed before the AU to initiate a withdrawal from the ICC, a proposition which several African countries supported.[44] Most of them have not issued any formal decision to withdraw. However, South Africa, Burundi and the Gambia followed with declaring their intention to withdraw.[45] South Africa and the Gambia has since then revoked their declarations.[46] Burundi however, went through with its withdrawal which came into effect 27 October 2017.[47]

As mentioned previously, several key states setting the agenda for the international community are not State Parties to the Rome Statute. The US, for example, even while being supportive of the creation of an international criminal court, has ultimately chosen not to be a State Party. It has at times, especially during the 2000s, even worked against the ICC through its position in the UNSC. Another part of its strategy was to promote and enter into bilateral agreements granting their nationals immunity from being prosecuted for actions made in foreign territory. This phase of antagonism characterised the Bush administration and stands out as a diplomatic defeat for the country.[48] However, the current Trump administration seems to have stirred up the conflict. *Inter alia*, the US has no intention to cooperate with the ICC after it opened an investigation of alleged war crimes in Afghanistan committed by US service members and intelligence.[49]

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[44] Agence France-Presse, "African Union members back Kenyan plan to leave ICC", The Guardian, published 1 February 2016 <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court> (accessed 25 May 2020).

[45] Informal summary by the President on the relationship between Africa and the International Criminal Court, ICC-ASP/15/36; Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth Session, The Hague, 16-24 November 2016, Official Records vol. 1 para. 32.

[46] Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixteenth session New York 4-14 December 2017, Official records vol. 1. para. 35.

[47] C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification).

[48] Schabas 25 ff.

[49] See e.g. Steve Holland: "Trump administration takes aim at International Criminal Court, PLO", published 10 September 2018, Reuters <https://www.reuters.com/article/us-usa-trump-icc-idUSKCN1LQ076> (accessed 25 May 2020) and Carol Morello: "U.S will not give visas to employees of the International Criminal Court", published 15 March 2019, The Washington Post <https://www.washingtonpost.com/world/national-security/us-will-not-give-visas-to-employees-of-the-international-criminal-court/2019/03/15/f44087d4-78df-494a-aa58-d91749eab9b2_story.html> (accessed 25 May 2020).

3 The Act of Aggression

3.1 National Jurisdiction over the Crime under International Customary Law

National jurisdiction over international crimes is a delicate matter in the field of public international law. Simplified, the question of debate in international law is whether a state has the authority to practice jurisdiction over acts committed outside its territory by non-nationals. International customary law, in general, governs the question of states' jurisdiction.[50] There are several accepted bases of jurisdiction that authorises states to criminalise certain conduct. The ones most uncontroversial are the bases of territoriality and nationality. Another more controversial base is the one referred to as universality.[51]

Universal jurisdiction comes from the idea that certain offences are so grave that any state may claim jurisdiction over it.[52] Some do not recognise a generally accepted definition of it in international or customary law.[53] However, a proposed definition for the developed principle in the criminal context is "prescriptive jurisdiction over offences committed extraterritorially by non-nationals against non-nationals, where the offence constitutes no threat to the fundamental interests of the prescribing state and does not give rise to effects within its territory." Thus, universality is a base used in the absence of any other recognised one.[54]

It is claimed that jurisdiction of crimes under international law by definition is universal. Its status thereof is in itself not dependant on national legislation, if it is detrimental to any state, or if it threatens its fundamental

[50] O'Keefe 3 f.
[51] Ibid. 9 ff.
[52] Ibid.
[53] See e.g. *Arrest Warrant* of 11 April 2000 (Democratic Republic of Congo v Belgium), ICJ Rep 2002, 165, para 44 (diss op Van Den Wyngaert) and 44, para 16 (diss op Gullaume).
[54] O'Keefe 17.

interests. At least since the Second World War, it has been widely considered that crimes directly under international customary law may be subject to states claiming universal jurisdiction. Genocide, war crimes and crimes against humanity seem to be the most widely accepted crimes that states may claim prescriptive jurisdiction over based on universality.[55]

At the IMTs in Nuremberg and Tokyo, the crime of aggression was prosecuted as a "crime against peace". It was doubtful if aggression constituted a crime under customary law at the time. Given their judgments, the IMTs claim that it was.[56] Aggression has always been a crime of controversy in the international field. It was, *inter alia*, not included in the jurisdiction of neither ICTY[57] nor ICTR[58]. However, it was included in the 1996 ILC Draft Code of Crimes.[59] The crime of aggression is nowadays, by some, regarded as a crime directly under international customary law, further enforced by its presence in the Rome Statute.[60] If the crime of aggression is seen to have this character, states might be able to claim jurisdiction over it based on universality.

3.2 The Crime in the Rome Statute

3.2.1 The Kampala Amendments

When establishing the Rome Statute, the crime of aggression was included in theory. An agreement of its definition and scope was not reached until 2010, resulting in the so-called Kampala Amendments, now inserted in the Rome Statute as article 8*bis*.[61] The Amendments resulted in the first-ever legally binding definition of the crime of aggression, which is regarded as a landmark

[55] O'Keefe p. 23 ff.
[56] Henriksen p. 310.
[57] ICTY Statute (n 22).
[58] ICTR Statute (n 22).
[59] ILC Draft Code on Crimes (n 46) art. 16.
[60] Linderfalk 36 f.
[61] C.N.651.2010.TREATIES-8 (Depositary Notification). Defined as: "(…) the planning, preparation, initiation or execution, by person in a position effectively to exercise control over or direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

decision for the international community.[62] The adoption of the definition took place in a 2010 Review Conference with justice experts and others highly legally skilled persons from 115 countries participating.[63]

The definition of the crime of aggression is based on UNGA's 1974 Definition of Aggression.[64] One significant difference is that the definition in the Rome Statute includes a higher threshold than its counterpart from 1974 with the requirement of the violation to be "manifest". Thus, all acts of aggression by the 1974 Definition do not constitute a crime according to the Rome Statute. The definition in the Statute also specified which circle of people that can be prosecuted – namely the absolute leadership of a state. Including, but not limited to, heads of state.[65]

Concerning the ICC's jurisdiction over aggression, special provisions have been inserted where the UNSC has decisive authority for carrying out an investigation.[66] These rules stand in contrast to the provisions governing the ICC's possibilities to exercise its jurisdiction over the other core crimes. The Prosecutor is obliged to ascertain whether the UNSC has declared if an act of aggression has been committed by the state in question before commencing an investigation *proprio motu* or by state referral.[67] However, a determination of an act of aggression by an organ outside the ICC shall be without prejudice to the Court's findings, ascertaining one aspect of its independence.[68] As with the other core crimes, the UNSC may itself refer a situation to the Court following articles 13(b) and 15*ter*. More on the exercise of jurisdiction will be accounted for in the next section.

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[62] See e.g. Bruha 142.
[63] The Coalition for the International Criminal Court, Report on the first review conference of the Rome Statute, 31 May-11 June 2010 Kampala, Uganda <http://www.iccnow.org/documents/RC_Report_finalweb.pdf> (accessed 25 May 2020).
[64] GA Res. 3314 (XXIX) (14 December 1974), UN Doc. A/RES/3314(XXIX), in the annex art. 1.
[65] Rome Statute (n 5) art. 8*bis.*
[66] Ibid. arts 15*bis* and 15*ter.*
[67] Ibid. art. 15*bis*(6).
[68] Ibid. art. 15*bis*(9).

3.2.2 Activating the Jurisdiction

When adopting the Kampala Amendments, it was decided that the ICC would be able to activate its jurisdiction over the crime when certain conditions were met. That is with respect to crimes of aggression committed one year after the ratification or acceptance of the Amendments by thirty State Parties, subject to a decision to be taken after 1 January 2017 by the majority of at least two-thirds majority of State Parties.[69] The thirtieth State Party ratified the Kampala Amendments on 26 June 2016.[70] In December 2017, the ASP adopted a resolution on the activation of the jurisdiction over the crime of aggression. The jurisdiction was consequentially activated 17 July 2018.[71] This means that only acts of aggression committed after this date falls in under the jurisdiction of the Court. Activating the jurisdiction is a milestone in international law. However, as of now, only 39 states are Parties to the Amendments: 15 Western European, ten Eastern European, ten South American, three Asia-Pacific States, and one from Africa.[72]

In cohesion to the consent-based principles of international law, the activation of the jurisdiction only entered into force for those states which have accepted the Amendments. Furthermore, in the case of a state referral or *proprio motu* investigation, the Court may not exercise its jurisdiction over the crime of aggression when committed by a national or on the territory of a State Party which has not ratified or accepted the Amendments. [73] However, if a State Party has accepted the Amendments, the Court may exercise its jurisdiction similarly to the other core crimes with respect to the provisions accounted for in articles 15*bis* and 15*ter*.[74]

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[69] Ibid. arts 15*bis*(2) and (3), 15*ter*(2) and (3) together with 121(3).
[70] ICC: "State of Palestine becomes thirtieth State to ratify the Kampala amendments on the crime of aggression", Press Release, 29 June 2016 <https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1225.aspx> (accessed 25 May 2020).
[71] ICC-ASP/16/Res.5.
[72] United Nations Treaty Collection, Status of Treaties, Chapter XVIII Penal Matters, 10. b Amendments on the crime of aggression to the Rome Statute of the International Criminal Court. Status as at 25 May 2020 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en> (accessed 25 May 2020).
[73] See ICC-ASP/16/Res.5 and the Rome Statute art. 121(5).
[74] Rome Statute (n 5) art. 15*bis*(4).

4 Immunity for Heads of State

Even though a court may have jurisdiction to prosecute a particular individual regarding a specific act, there might be other rules hindering it from doing so. One of these systems is the rules of immunity.[75]

4.1 Customary law and National Courts

The rules of immunity from foreign national jurisdictions for heads of states follow from international customary law.[76] Head of State, Head of Government, and Minister for Foreign Affairs constitute a select group, which enjoy a strong immunity from jurisdictions in other states.[77] It is important to note that the customary rules apply to states regarding foreign state officials. How a state chooses to deal with its own officials and ex-officials is a matter of national legislation.[78]

The question of immunity for high state officials has been widely discussed since the 1990s, especially when it comes to the most serious crimes of international law.[79] During the same period, Belgium adopted legislation enabling its national courts, *inter alia*, to issue a warrant of arrest on the incumbent Foreign Minister in Kongo-Kinshasa, claiming he was guilty of war crimes and crimes against humanity. The accused actions were related to a time before he took office. Kongo claimed that he was immune since he was Foreign Minister at the time of issuing the warrant. [80]

The case went to the ICJ, which stated in its judgment that it is possible to prosecute these highly ranked representatives in four cases. First, if they are prosecuted in their own state; secondly, if the home state waives the immunity to another state; thirdly, in a criminal prosecution before an international court; lastly, a foreign minister can be prosecuted after their term

[75] O'Keefe 405.
[76] Ibid. 406 ff.
[77] Henriksen 114.
[78] O'Keefe 406.
[79] Linderfalk 58 f.
[80] *Arrest Warrant of 11 April 2000 (Congo v Belgium),* Judgment [2002] ICJ.

expires, for public acts committed either prior or after the period of office, or for private acts committed during this period.[81] As long as a person is in this high-ranking office, they enjoy full and absolute immunity from foreign states' jurisdiction. The purpose of the immunity for the representative is for them to be able to fulfil their official function.[82] It is still unclear if a former official can be prosecuted in a foreign state for international crimes related to actions taken when in office, as an official.[83] The conclusions made about a minister of foreign affairs is regarded to be equally applied to heads of state.[84] If other high ranking state representatives enjoy a similar immunity is unclear.[85]

4.2 Immunity in International Courts

International courts typically specify that no immunity is granted for people due to their official capacity. Complete equality before the law is proclaimed. In the Rome Statute, the derogation of personal immunity is clearly stated.[86] Furthermore, no reservations may be made to the Statute.[87]

In *Arrest Warrant*, this principle was further proclaimed, stating: "An incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[88] This statement seems to have established a corresponding principle in international customary law. The SCSL, for example, referred to this principle when prosecuting the incumbent Head of State in Liberia.[89]

[81] *Arrest Warrant* (n 80), para. 61.
[82] Ibid. para. 53.
[83] Linderfalk 59.
[84] Cassese 320.
[85] Concepción Escobar Hernández, 'Second Report on the immunity of State officials from foreign criminal jurisdiction' (ILC, 2013), UN doc. A/CN.4/661, paras 56-68.
[86] Rome Statute (n 5) art. 27.
[87] Ibid. art. 120.
[88] *Arrest Warrant* (n 80) para 61.
[89] *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I (31 May 2004), paras 50-52.

This was further proclaimed by the ICC in 2011 when prosecuting the incumbent Head of State of Sudan.[90]

There are differing opinions on whether the reason to deny immunity in international courts is based on its international character or other grounds. One interpretation of the statement[91] is that the ICJ did not make the lifting of immunity contingent to an express or implicit provision in an international court's governing statute doing so. The immunity is according to this view, dependant on the international aspect of the court and whether it has jurisdiction over the case in question. This understanding aligns with the case of *Milosevic*[92], where the ICTY successfully issued his arrest warrant without anyone objecting he was immune as an incumbent Head of State.[93] Furthermore, there is no provision derogating personal immunities for heads of state in neither the UNSC resolution establishing the ICTY nor its Statute.[94]

The dominating understanding, however, which the ICC seems to have adopted, is that the revoking of personal immunity is based on the approval of the international court's jurisdiction given by states. This consent can be both explicit and implicit. The consent is given explicitly if a state has chosen to become a party to the treaty establishing the international court in question. I.e. in the case of the ICC, if the state is a party to the Rome Statute. The consent is given implicitly if the international court in question was established by the UNSC under its powers of Chapter VII of the UN Charter, due to the member states' obligation to comply with its decisions under article 25. This was the case for ICTY. It is the similar sentiment that authorises ICC to have jurisdiction over cases referred by the UNSC, regardless of the state being party to the Rome Statute. Therefore, the ICC was able to prosecute the Head of State in Sudan, even though Sudan has never been a State Party.[95]

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[90] *Prosecutor v Omar Hassan Ahmad al-Bashir*, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad al-Bashir, ICC-02/05-01/09 (13 December 2011), paras 18, 34-36.
[91] See quote in previous paragraph.
[92] *Prosecutor v Slobodan Milošević et al.*, Initial Indictment, ICTY-99-37 (22 May 1999).
[93] Cassese 320 ff.
[94] See SC Res. 827 (25 May 1993), UN Doc. S/RES/827 and ICTY Statute (n 25).
[95] O'Keefe 106 ff.

5 Conclusions

As shown in the previous sections, the relation between the crime of aggression and the rules of immunity for heads of state is not entirely straightforward, and the status of the crime itself is controversial.

5.1 International Customary Law

As an international customary rule, the standing of the crime of aggression is not clear. If a state is to claim jurisdiction over a crime occurring outside its territory, neither committed nor suffered by its national; the claim has to be based on universality. Universality as a basis in itself is also controversial, even though signs are showing its part of customary law. The possibility to prosecute the crime of aggression in national courts only exists if the act is to be regarded as a universal crime, i.e. part of international customary law.

However, even if jurisdiction is successfully claimed in a particular case, the exercise of it is further limited. The (alleged) provision in customary law of the crime of aggression only applies to persons in a position effectively to exercise control. Nevertheless, prosecuting foreign heads of state in a national court seems challenging. A head of state enjoys strong protection from this jurisdiction based on the customary rules of immunity. As an incumbent head of state, a person enjoys full and absolute immunity from foreign jurisdictions.

Even after the head of state leaves office, the public acts committed while in office are still protected by the immunity. Thus, an alleged act of aggression would probably be protected, as it most likely would be regarded as public and not a private act. However, a previous head of state might have had or will come to have other positions with such powers also included in the definition of the crime. If that is the case, a foreign state could maybe prosecute this person, for the public acts committed before or after being head of state, provided the other prerequisites constituting the crime of aggression is met.

5.2 The International Criminal Court

When it comes to the possibilities for the ICC to prosecute heads of state under the crime of aggression, the options are quite limited. The conspicuous factors being the few states having accepted the Amendments activating the Court's jurisdiction, and the short timeframe it has been active. When it comes to the question of immunity, the revoking thereof is clear in article 27 of the Rome Statute. A head of state does not enjoy immunity in the ICC. The authority of international courts to prosecute heads of states seems to have been accepted, seen in judgments rendered in ICJ, ICTY and ICC. However, whom the Court chooses to prosecute is still politically sensitive.

Moving forward, the ICC must balance its every step. The geographic spread of countries having accepted the Amendments is startling. The apparent struggle with its African State Parties and their threats of withdrawing from the Rome Statute shows how delicate the question of prosecuting heads of state is. If the ICC is to continue being legitimate and having an impact on international law, it is necessary that as many states as possible are parties to it and recognises its authority. Thus, there is a balance between staying true the Court's purpose of prosecuting persons for the most serious crimes of international concern by adhering to the rule of law and, on the other hand, keeping its State Parties interested in remaining parties, strengthening the Court's legitimacy. ICTY and ICTR also showed the importance of states participating for an international court to succeed.

Regardless of how many parties there are to the Kampala Amendments, the dependency on the UNSC is a critical factor when it comes to prosecuting the crime of aggression. Having to rely on the UNSC to declare an act of aggression for the ICC to open an investigation over the crime might be viewed as a safeguard. Since the crime is regarded as severe as it is, an accusation is not to be taken lightly. The filter of the authoritative UNSC might provide some security for states inclining to accept the Amendments. On the other hand, the authorisation of an investigation is now in the hands of a political organ, the UNSC, and not a judicial, as the Pre-Trial Chamber, as when initiating an investigation on the other core crimes. The UNSC

mandate also makes the possibilities investigating crimes of aggression dependant on the veto power of its permanent members. As two of those, Russia and US, are not State Parties, where at least the US actively have a history of working against the Court, the effectiveness of the legal solution in the Rome Statute article 15*bis*(6) is questionable.

5.3 Closing Remarks

To conclude, the possibilities of prosecuting heads of state for the crime of aggression are exceptionally limited, both in national courts and in the ICC. The modest possibilities of holding these people legally accountable do, however, not disqualify the normative meaning of this international legal development. When considering how the views of the validity of acts of aggression have shifted over the last century, the difference is astounding. At the end of the day, that is why the activation of the ICC's jurisdiction over the crime of aggression is revolutionary.

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