

Universal Jurisdiction and the Crime of Aggression

Michael P. Scharf

TABLE OF CONTENTS

INTRODUCTION	358
I. BACKGROUND: THE CRIME OF AGGRESSION	360
A. <i>From Nuremberg to Kampala</i>	360
B. <i>The Kampala Amendments</i>	362
II. CUSTOMARY INTERNATIONAL LAW AND THE CRIME OF AGGRESSION	365
A. <i>Universal Jurisdiction: A Primer</i>	365
B. <i>The Nuremberg Precedent</i>	369
C. <i>Did Nuremberg Apply Universal Jurisdiction?</i>	374
D. <i>The Presumption of Legitimacy</i>	379
III. CONCERNS AND REMEDIES	381
A. <i>Pitfalls of Domestic Prosecution of Aggression</i>	381
B. <i>Are the Concerns Overstated?</i>	382
C. <i>Proposed Safeguards</i>	386
IV. CONCLUSION	388

Universal Jurisdiction and the Crime of Aggression

Michael P. Scharf*

In June 2010 in Kampala, Uganda, the states that are party to the Statute of the International Criminal Court agreed to amend the ICC Statute to add the crime of aggression to the Court's jurisdiction. One of the key compromises that made this possible was the adoption of a U.S.-proposed "understanding" which provided that the aggression amendment should not be interpreted as creating a right for national courts to prosecute the crime of aggression under universal jurisdiction. If, however, national courts already possess the right to do so under customary international law, stemming from the Nuremberg precedent, then the understanding will end up failing to protect U.S. officials from the specter of potential prosecution for the crime of aggression in foreign courts around the globe. To answer that question, this Article re-examines the historic sources and analyzes the subsequent developments to discern whether Nuremberg established aggression as a universal jurisdiction crime under customary international law.

INTRODUCTION

Universal jurisdiction is highly contentious.¹ The crime of aggression is extremely controversial.² Add the two together and the result is a combustible combination with the potential to profoundly affect the international order.

For two weeks in June 2010, the author of this Article served as an NGO delegate³ to the International Criminal Court Review Conference in

* Michael P. Scharf is the John Deaver Drinko-Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law. He served as Attorney-Adviser for Law Enforcement and Intelligence, and Attorney-Adviser for United Nations Affairs in the Office of Legal Adviser of the U.S. Department of State from 1989–1993. During a sabbatical in 2008, he served as Special Assistant to the Prosecutor of the U.N.-established Cambodia Genocide Tribunal. In 2005, Scharf and the Public International Law & Policy Group (PILPG), an NGO he co-founded and directs, were nominated for the Nobel Peace Prize by the Prosecutor of the Special Court for Sierra Leone for contributing to peace and justice in Western Africa.

1. As described in more detail, *infra* Part II.A, universal jurisdiction provides states the authority under international law to prosecute certain universally condemned crimes committed by foreign citizens in foreign territory. Reflecting the international ambivalence toward universal jurisdiction, in 2009, the African Group requested that the U.N. General Assembly include an item on its agenda entitled "the abuse of universal jurisdiction." Amnesty Int'l, *Universal Jurisdiction: UN General Assembly Should Support this Essential International Justice Tool*, at 5, IOR 53/015/2010 (Oct. 5, 2010), available at <http://www.amnesty.org/fr/library/info/IO53/015/2010/en> [hereinafter Amnesty Int'l, *UN Should Support*].

2. As described *infra* Part I.A, the crime of aggression is essentially the offense of using force against another state without justification under international law.

3. The author served as head of the Public International Law & Policy Group's six-person delegation to the Kampala Review Conference. In 2008, PILPG, Case Western Reserve University School of Law, and Ambassador Christian Wenaweser, the President of the ICC Assembly of States Parties, had co-sponsored an experts meeting in Cleveland on "The ICC and the Crime of Aggression," which helped develop the framework for the Kampala amendments. See *Report of the Cleveland Experts Meeting: The International Criminal Court and the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 429 (2009).

Kampala, Uganda, where the participating states agreed on a package of amendments that will likely enable the International Criminal Court (ICC) to exercise jurisdiction over the crime of aggression beginning in 2017.⁴ During intense negotiations at the Speke Resort and Conference Centre on the shores of Lake Victoria, the United States delegation expressed trepidation that the Kampala amendments might stimulate states to enact implementing statutes giving their domestic courts universal jurisdiction over the crime of aggression.⁵

From the United States' point of view, this was a serious concern given that five countries (Azerbaijan, Belarus, Bulgaria, the Czech Republic, and Estonia) already have enacted laws giving their courts universal jurisdiction over the crime of aggression.⁶ Moreover, eighteen countries have statutes giving their courts universal jurisdiction generically over "offenses against international law" under international treaties as well as customary international law.⁷ If aggression is viewed as falling into that category, these countries, too, will exercise universal jurisdiction over the crime.

In an attempt to avoid such an outcome, the United States and a few allies persuaded the delegates at Kampala to adopt an "understanding"⁸ to accompany the amendments, stipulating that "it is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State."⁹ This language, however, may have little dissuasive

4. The ICC is a permanent international tribunal established by a multilateral treaty, the Rome Statute of the International Criminal Court. The Statute was finalized at a Diplomatic Conference in Rome in July 1998 and entered into force upon ratification by the requisite sixtieth state on July 1, 2002. The Court sits in The Hague, Netherlands, and consists of an Office of the Prosecutor, eighteen judges divided into Pre-Trial, Trial, and Appeals Chambers, and a Registry. The body that elects the judges and prosecutors and oversees the Court is the Assembly of States Parties, which is made up of representatives of each state (currently 115) that has ratified or acceded to the Rome Statute.

5. Claus Kreß & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUSTICE 1179, 1216 (2010).

6. U.N. Secretary-General, *Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction*, at 29, U.N. Doc. A/65/181 (July 29, 2010) [hereinafter U.N. Secretary-General].

7. Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, at 1, IOR 53/004/2011 (Oct. 2011), available at <http://www.amnesty.org/en/library/info/IO53/004/2011/en> [hereinafter Amnesty Int'l, *Preliminary Survey*]; see also U.N. Secretary-General, *supra* note 6, at 11–12.

8. "Understandings" are sometimes used in multilateral negotiations to achieve interpretive gloss when there is opposition to making last-minute changes to the actual text. Because the Vienna Convention on the Law of Treaties stipulates that a treaty is to be interpreted within its context, an understanding officially adopted and appended to the text is to be accorded great interpretive weight. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

9. Res. RC/Res.6, Annex III, ¶ 5 (June 11, 2010). The Resolution specifically "adopt[s] the understandings regarding the interpretation of the above mentioned amendments contained in annex III of the present resolution." *Id.* ¶ 3. The adopted understandings therefore formed a critical component of the negotiated solution to various substantive difficulties and should be considered an important part of the *travaux préparatoires* (negotiating record) entitled to great weight in interpreting the aggression amendments consistent with the rule of treaty interpretation provided by Article 31 of the Vienna Convention on the Law of Treaties. Vienna Convention, *supra* note 8, art. 31.

effect if states were to find that they already have an existing right under customary international law¹⁰ to prosecute foreign nationals for the crime of aggression.¹¹

The purpose of this Article, therefore, is to discern whether aggression should be deemed an international crime subject to universal jurisdiction under existing customary international law. To set the stage for this analysis, the Article begins with a brief history and description of the Kampala aggression amendments. Next, it explores the foundations of the universal jurisdiction concept. This is followed by an assessment of whether the precedent of the 1945–46 Nuremberg trial established aggression as a universal jurisdiction crime under customary international law. There has been much debate over the years as to the nature of the Nuremberg Tribunal's authority; this Article re-examines the legal underpinnings of the Nuremberg precedent in light of its contemporary relevance to domestic prosecutions of the crime of aggression. Finally, the Article analyzes the potential pitfalls of prosecuting aggression domestically and considers whether such prosecutions should be constrained by a parallel system of safeguards, augmenting those enshrined in the Kampala amendments to the ICC Statute.

I. BACKGROUND: THE CRIME OF AGGRESSION

A. *From Nuremberg to Kampala*

The Chief Prosecutor of the Nuremberg trial, Robert Jackson, reported to the President of the United States that confirming and prosecuting the crime of aggression was the most important outcome of the Nuremberg trials.¹² The international community codified the prohibition on launching wars of aggression in the U.N. Charter¹³ and adopted by consensus a definition of the crime in 1974.¹⁴ Nevertheless, the modern international tribunals established by the Security Council were not provided jurisdiction over this crime; rather, the Council confined their jurisdiction to war crimes,

10. The Statute of the International Court of Justice (ICJ) provides that international law includes "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1179. As such, customary international law can create rights and obligations on states just in the same ways as treaties. For the ICJ's authoritative definition of customary international law, see *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

11. Several states that provided reports to the U.N. Secretary-General on universal jurisdiction in 2010 had taken the position that customary international law extended universal jurisdiction to the crime of aggression. U.N. Secretary-General, *supra* note 6, at 8–9.

12. Robert Jackson, Report to the President by Mr. Justice Jackson (Oct. 7, 1946), *available at* <http://avalon.law.yale.edu/imt/jack63.asp>.

13. U.N. Charter art. 2, para. 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." There are two exceptions to this prohibition: the inherent right of individual or collective self-defense (Article 51), and collective security measures authorized by the Security Council (the entirety of Chapter VII). U.N. Charter arts. 39–51.

14. G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

crimes against humanity, and genocide. The decision to exclude aggression reflected the drafters' recognition that aggression is a different species of offense as it is based on *jus ad bellum* (the legality of the war itself), whereas the crimes within the tribunals' jurisdiction are based on *jus in bello* (the legality of the conduct of the war). Moreover, the members of the Security Council viewed jurisdiction over aggression as antithetical to their interests in an era in which they, themselves, were constantly being accused of having committed acts of aggression throughout the world.¹⁵

Yet, at the 1988 Rome Diplomatic Conference to establish the ICC, three elderly Nuremberg prosecutors—Whitney Harris, Henry King, and Ben Ferencz—used their unique moral authority, formidable skills of persuasion, and dogged persistence to convince the delegates to include the crime of aggression in the Court's statute.¹⁶ Although Germany, Japan, and several non-aligned country delegations genuinely supported the inclusion of the crime of aggression,¹⁷ the outcome was widely viewed at the time as merely a symbolic victory in light of the wording that was adopted. Article 5(2) stipulates that before the Court can exercise jurisdiction over the crime of aggression, the states parties must adopt amendments at a Review Conference (pursuant to Article 121) setting forth a definition of aggression and the conditions under which the Court could exercise its jurisdiction over it.¹⁸ Though reluctantly assenting to the mention of the crime of aggression in the Court's Statute, many of the delegations were openly skeptical that the aggression amendments envisaged in Article 5(2) would ever be adopted.¹⁹ Nevertheless, shortly after the ICC came into force, the ICC parties formed a Special Working Group on the Crime of Aggression, which from 2003 to 2009 made slow progress toward an acceptable definition and

15. Professor Michael Glennon has written that had the crime of aggression applied to the United States during "the last several decades, every U.S. President since John F. Kennedy, hundreds of U.S. legislators and military leaders, as well as innumerable military and political leaders from other countries could have been subject to prosecution." Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 *YALE J. INT'L L.* 71, 73 (2010). Glennon cites as examples the 2008 Russian invasion of Georgia, the 2003 U.S. invasion of Iraq, the 2001 NATO invasion of Afghanistan, the 1999 NATO bombing operations against Serbia, the 1998 U.S. air strikes against Afghanistan and Sudan, the 1993 U.S. air strikes against Iraq, the 1989 U.S. invasion of Panama, the 1986 U.S. air strikes against Libya, the 1983 U.S. invasion of Grenada, the 1979 Soviet invasion of Afghanistan, the 1970 U.S. bombing of Cambodia, the 1965 U.S. invasion of the Dominican Republic, the 1962 U.S. blockade of Cuba, and the 1961 U.S. invasion of Cuba at the Bay of Pigs. *Id.* at 91–95.

16. Michael P. Scharf & Philip S. Hadji, *Forward and Dedication: The International Criminal Court and the Crime of Aggression*, 41 *CASE W. RES. J. INT'L L.* 267, 267 (2009).

17. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 26–27 (2001).

18. Rome Statute of the International Criminal Court arts. 5(2), 121 U.N. Doc. A/CONF.183/9, July 17, 1998 [hereinafter Rome Treaty], reprinted in CHERIF BASSIUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 40 (1998).

19. See Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 79, 84–85 (Roy S. Lee ed., 1999).

trigger mechanism for aggression, laying the foundations for eventual success at the Kampala Review Conference in June 2010.²⁰

B. *The Kampala Amendments*

The crime of aggression is now defined in new ICC Article 8 *bis* as “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”²¹ The meaning of “act of aggression” in turn is drawn directly from the list of seven acts enumerated in the 1974 General Assembly resolution defining aggression.²² Once the Kampala amendments enter into force (no sooner than January 1, 2017), the ICC can exercise jurisdiction over the crime of aggression committed by any state when the Security Council refers a situation to the Court. The Court can also exercise jurisdiction over the crime of aggression committed by states parties when either the Security Council has made a determination that an act of aggression has been committed or, where no determination is rendered by the Council within six months of an incident, the ICC’s Pre-Trial Division authorizes the Prosecutor to proceed with an investigation.²³

The consensus reached at Kampala in the early hours of June 12, 2010 was the result of four delicate compromises negotiated by the President of the Assembly of States Parties, Ambassador Christian Wenaweser of Liechtenstein, and his deputy, Stephen Barriga. The first of these compromises

20. Krefß & von Holtendorff, *supra* note 5, at 1184. For an account of the previous negotiations in the International Law Commission, as well as legal, special, ad hoc, and preparatory committees, and working and special working groups, see BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* (1975).

21. Res. RC/Res.6, *supra* note 9, Annex I, art. 8 *bis* (1).

22. *Id.* art. 8 *bis* (2):

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapon by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

23. *Id.* art. 15 *bis* (3).

recognizes that Article 2(4) of the U.N. Charter and the 1974 U.N. Definition of Aggression Resolution envision unlawful uses of force along a spectrum, with the crime of aggression at the far end of egregiousness. One group of delegations wanted to limit prosecutions to “flagrant” violations of the U.N. Charter, wars of aggression, unlawful uses of force, or acts of aggression geared toward occupying or annexing territory. A second group wanted no qualifier at all, “on the theory that every act of aggression should be subject to prosecution.”²⁴ The term “manifest” emerged as an acceptable qualifier that bridged the gap between the two groups.²⁵ As bolstered by an understanding proposed by the United States,²⁶ the term was meant to serve a “double function,” referring both to the character (the degree of clarity or ambiguity surrounding the illegality of the act of aggression) and the scale or gravity of the act.²⁷ The negotiating record suggests that the purpose of the qualifier was in part to exempt cases of military humanitarian intervention such as the 1999 NATO action in Kosovo.²⁸

The second compromise renders aggression a so-called “leadership crime.” Thus, the definition of aggression stipulates that this crime can only be committed by a “person in a position effectively to exercise control over or to direct the political or military action of a State.”²⁹ Unlike the other crimes within the ICC’s jurisdiction, this provision limits those who can be prosecuted for aggression to presidents, prime ministers, and top military leaders such as ministers of defense and commanding generals.³⁰

A third compromise related to exclusivity of a Security Council trigger. The delegations with permanent membership on the Security Council (states parties France and the United Kingdom, and observer delegations China, Russia, and the United States) wanted Security Council approval as a prerequisite for all aggression prosecutions, while most of the other delegations preferred giving that role to the Court’s Pre-Trial Division. To gain support

24. Beth Van Schaack, *Negotiating at the Interface of Power & Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT’L L. 506, 522 (2011).

25. *Id.*

26. Res. RC/Res.6, *supra* note 9, Annex III, ¶ 7 (“It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.”).

27. Krefß & von Holtendorff, *supra* note 5, at 1193.

28. Robert Heinsch, *The Crime of Aggression After Kampala: Success or Burden for the Future*, 2 GOETTINGEN J. INT’L L. 713, 730 (2010). When proposing the “manifest” understanding, the Head of the U.S. Delegation at Kampala, State Department Legal Adviser Harold Hongju Koh, told the Review Conference, “If Article 8 *bis* were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes that the Rome Statute is designed to deter—do not commit ‘manifest’ violations of the U.N. Charter within the meaning of Article 8 *bis*.” Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Statement at the Review Conference of the International Criminal Court (June 4, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/142665.htm> [hereinafter Koh Statement].

29. Res. RC/Res.6, *supra* note 9, Annex I, art. 8 *bis* (1).

30. Keith A. Petty, *Sixty Years in the Making: The Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT’L & COMP. L. REV. 531, 547 (2008).

for a Pre-Trial Division trigger, the latter delegates agreed first to an opt-out provision, enabling states parties to lodge a declaration preventing the ICC from ever applying the crime of aggression against them (except when the Security Council refers the case to the Court),³¹ and second, to a provision exempting non-party states from the aggression provisions (again with the exception of cases of Security Council referral).³²

The fourth and final compromise, which is the focus of this Article, related to domestic prosecutions of aggression. The Preamble of the ICC Statute recalls that it is the duty of national courts to exercise criminal jurisdiction over those responsible for international crimes.³³ The duty to prosecute international crimes, moreover, is not limited to the states in whose territories crimes have been committed or whose nationals were perpetrators; it applies to all states where perpetrators are found.³⁴ Under the ICC's so-called "complementarity principle," the ICC is to be a court of last resort, exercising its jurisdiction only when domestic courts are unable or unwilling to prosecute.³⁵ As a consequence of the duty to prosecute and complementarity principle, there has been a proliferation of national laws establishing universal jurisdiction over international crimes in the years since the adoption of the ICC Statute. In its 2011 survey of legislation around the world, Amnesty International documented that 145 countries have authorized their courts to exercise universal jurisdiction over the crimes within the ICC's jurisdiction: war crimes, crimes against humanity, and genocide.³⁶

The duty to exercise criminal jurisdiction is not limited to war crimes, crimes against humanity, and genocide; it ostensibly applies to all of the international crimes in the Court's Statute, including aggression, once the Kampala amendments enter into force. Moreover, since the Kampala amendments provide that the U.N. Security Council can refer a situation to

31. Res. RC/Res.6, *supra* note 9, Annex I, art. 15 *bis* (4) ("The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.").

32. *Id.* Annex I, art. 15 *bis* (5) ("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."). This provision is not applicable in the case of Security Council referrals.

33. The Preamble of the Rome Statute "affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." Rome Treaty, *supra* note 18, *pmbl.* It also "recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." *Id.*

34. *Id.*

35. The Preamble and Article 1 of the ICC Statute determine that the Court shall be complementary to national jurisdictions, while Article 17 provides that a case is inadmissible, unless those national jurisdictions appear to be unwilling or unable to enforce criminal justice. *Id.* *pmbl.*, arts. 1, 17.

36. Amnesty Int'l, *Preliminary Survey*, *supra* note 7, at 1; see also Amnesty Int'l, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, at 1, IOR 53/017/2001 (Sept. 2001), available at <http://www.amnesty.org/en/library/info/IO53/017/2001/en>, updated in Amnesty Int'l, *U.N. Should Support*, *supra* note 1.

the ICC involving a non-party state or a state party that has not accepted the Court's jurisdiction over the crime of aggression, even those states will have an interest in establishing universal jurisdiction over the crime of aggression in order to be able to invoke complementarity in cases of Security Council referral.³⁷

Thus, the United States "expressed its concern that 'States Parties will incorporate a definition [of aggression] into their domestic law, encouraging the possibility that, under expansive principles of jurisdiction, government officials will be prosecuted for alleged aggression in the courts of another state.'"³⁸ This led to the fourth compromise at Kampala, the adoption of an understanding providing that the aggression amendments "shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State."³⁹ The U.S.-proposed understanding is based on the view that states do not have an existing right under customary international law to exercise universal jurisdiction over the crime of aggression.⁴⁰ Part II examines the accuracy of that assessment.

II. CUSTOMARY INTERNATIONAL LAW AND THE CRIME OF AGGRESSION

A. *Universal Jurisdiction: A Primer*

The term "jurisdiction" refers to the legitimate assertion of authority to affect legal interests. Jurisdiction may describe the authority to make law applicable to certain persons, territories, or situations (prescriptive jurisdiction); the authority to subject certain persons, territories, or situations to judicial processes (adjudicatory jurisdiction); or the authority to compel compliance and to redress noncompliance (enforcement jurisdiction).⁴¹ There are five bases of jurisdiction recognized under international law: territorial (based on the location of the acts or effects), nationality (based on the citizenship of the accused), passive personality (based on the citizenship of the victim), protective (based on essential security interests), and universal.⁴²

37. See Laura Bingham, *Trying for a Just Result? The Hissene Habre Affair and Judicial Independence in Senegal*, 23 TEMP. INT'L & COMP. L.J. 77 (2009). When Belgium sought extradition from Senegal of the former president of Chad (Habre) for crimes against humanity, Senegal responded by asserting its own right to prosecute and attempted to do so, but the Senegal courts ruled that they did not have jurisdiction under Senegal's criminal laws and dismissed the case. Belgium then brought a case against Senegal before the ICJ, which is currently pending, arguing that Senegal must extradite since it was not able to prosecute. Similarly, in the case of Security Council referral to the ICC, a State where a suspect has taken up residence will need to ensure that its legislation enables it to prosecute the crime under universal jurisdiction or it will find itself in the situation facing Senegal.

38. Kreß & von Holtendorff, *supra* note 5, at 1216 (quoting Koh Statement, *supra* note 28).

39. Res. RC/Res.6, *supra* note 9, Annex III, ¶ 5.

40. See Koh Statement, *supra* note 28.

41. Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 786 (1988).

42. *Id.* at 786–88.

Universal jurisdiction provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim.⁴³ While other bases of jurisdiction require connections between the prosecuting state and the offense, the perpetrator, or the victim, the universality principle assumes that every state has a sufficient interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.⁴⁴

There are two premises underlying universal jurisdiction.⁴⁵ The first involves the gravity of the crime. Many of the crimes subject to the universality principle are so heinous in scope and degree that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender. The second involves the *locus delicti* (place of the act). Many of the crimes subject to the universality principle occur in territory over which no country has jurisdiction or in situations in which the territorial state is unlikely to exercise jurisdiction, because, for example, the perpetrators are state authorities or agents of the state.⁴⁶

The first widely accepted crime of universal jurisdiction was piracy. For more than three centuries, states have exercised jurisdiction over piratical acts on the high seas, "even when neither the pirates nor their victims [were] nationals of the prosecuting state."⁴⁷ Piracy's fundamental nature and consequences explained why it was subject to universal jurisdiction. Piracy often consists of heinous acts of violence or depredation, which are "committed indiscriminately against the vessels and nationals of numerous states."⁴⁸ Moreover, pirates can quickly flee across the seas, making pursuit by the authorities of particular victim states difficult.⁴⁹ In 1820, the U.S. Supreme Court upheld the exercise of universal jurisdiction by U.S. courts over piracy in *United States v. Smith*.⁵⁰ The Court reasoned that "pirates being *hostis humani generis* [enemies of all humankind], are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual

43. *Id.* at 788.

44. *Id.*

45. See Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425, 435 (1999).

46. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 407 n.156 (2000).

47. Randall, *supra* note 41, at 791. "Like other international criminals, pirates can retain their nationality and still be subject to universal jurisdiction." *Id.* at 794.

48. *Id.* at 794; see also Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 194 (1997).

49. Osofsky, *supra* note 48, at 194 n.18.

50. *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820). The Piracy Statute of 1819 provided, "if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and . . . shall afterwards be brought into or found in the United States, every such offender . . . shall, upon conviction . . . be punished with death." *Id.* at 147. The Supreme Court upheld this statute over the objection that it failed to define the crime with sufficient particularity. See *id.* at 162.

[defense] and safety of all.”⁵¹ In 2009, the Supreme Court of the Seychelles used nearly identical language in affirming that it could exercise universal jurisdiction over Somali pirates apprehended by third states in the Indian Ocean.⁵²

In the aftermath of the atrocities of the Second World War, the international community extended universal jurisdiction to war crimes and crimes against humanity. Trials of World War II war criminals based on this type of jurisdiction took place in international tribunals at Nuremberg and Tokyo,⁵³ as well as in domestic courts. Some individuals faced trial in the states in which they had committed their crimes, but others were tried by whatever state in which they were later captured, surrendered, or found—including such far-off countries as Canada⁵⁴ and Australia.⁵⁵ Thus, on the basis of universal jurisdiction, Israel tried Adolph Eichmann in 1961⁵⁶ and

51. *Id.* at 156. *Accord* United States v. Klinton, 18 U.S. (5 Wheat.) 144 (1820), in which the Supreme Court stated:

A pirate, being *hostis humani generis*, is of no nation or State. . . . All the States of the world are engaged in a tacit alliance against them. An offence committed by them against any individual nation, is an offence against all. It is punishable in the Courts of all. So, in the present case, the offence committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offence against the United States, which the Courts of this country are authorized and bound to punish.

Id. at 147–48.

52. Republic v. Mohamed Ahmed Dahir & Ten (10) [2010] SCSL 81 (Sey.).

53. After World War II, major Japanese war criminals were tried before the International Military Tribunal for the Far East (the Tokyo Tribunal), whose Charter was based largely on the Charter of the Nuremberg Tribunal. Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Charter dated January 19, 1946, amended April 26, 1946, T.I.A.S. 1589, 4 Bevans 20.

54. *See* R. v. Finta, [1994] 1 S.C.R. 701 (Can.) (reaffirming universal jurisdiction over crimes against humanity committed against Jews in Hungary during Second World War, but finding that the available evidence did not meet the requisite standard for such crimes).

55. *See* Polyukhovich v. Commonwealth (1991) 172 CLR 501 (Austl.) (reaffirming universal jurisdiction over crimes against humanity and war crimes committed against Jews in the Ukraine during Second World War).

56. Israel kidnapped Adolph Eichmann in Argentina and prosecuted him in Jerusalem in 1961 for crimes against humanity and war crimes. As chief of the Gestapo’s Jewish Section, Eichmann had primary responsibility over the persecution, deportation, and extermination of hundreds of thousands of Jews. Although the Security Council condemned Israel for violating Argentina’s territorial sovereignty in apprehending Eichmann, there was no averment that Israel lacked jurisdiction to try him. In upholding the District Court’s conviction and death sentence, the Supreme Court of Israel stated:

[T]here is full justification for applying here the principle of universal jurisdiction since the international character of “crimes against humanity” . . . dealt with in this case is no longer in doubt [T]he basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences . . . applies with even greater force to the above-mentioned crimes Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.

Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 299, 304 [1962] (Isr.).

John Demjanjuk in 1988⁵⁷ for Nazi atrocities committed before Israel even existed as a state.

In the years since the Nuremberg and Tokyo prosecutions, there have been several notable domestic prosecutions based on universal jurisdiction outside the context of World War II atrocities.⁵⁸ The United Kingdom, for example, relied on universal jurisdiction authorizing the extradition of former President of Chile, Augusto Pinochet, to Spain for acts of torture committed in Chile in the 1980s;⁵⁹ courts of Denmark and Germany have relied on universal jurisdiction in trying Croatian and Bosnian Serb nationals for war crimes and crimes against humanity committed in Bosnia in 1992;⁶⁰ courts in Belgium and Canada have invoked universal jurisdiction as a basis for prosecuting persons involved in the atrocities in Rwanda in 1994;⁶¹ and

57. The United States granted Israel's request for the extradition of John Demjanjuk, a retired auto worker accused of being the infamous Treblinka Nazi death camp guard "Ivan the Terrible." See *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985). The Court held that Israel had the right to try Demjanjuk under universal jurisdiction for crimes committed at the Treblinka concentration camp during 1942 or 1943, prior to the establishment of the Israeli State. See *id.* at 582–83. Demjanjuk was found guilty and sentenced to death for crimes against humanity by the Israeli court, but his conviction was subsequently overturned when new evidence discovered after the collapse of the Soviet Union was considered by the Israeli Supreme Court. See *CrimA 347/88, Demjanjuk v. State of Israel*, IstrSC 221, 395–96 (1993); Mordechai Kremnitzer, *The Demjanjuk Case*, in *WAR CRIMES IN INTERNATIONAL LAW* 321, 323 (Yoram Dinstejn & Mala Tabory eds., 1996). Ultimately, Demjanjuk was tried, convicted, and sentenced to five years imprisonment by Germany in 2011 on charges stemming from his participation in crimes at a different concentration camp (Sobibor). Janet Stobart, *Nazi Camp Guard Gets 5-Year Sentence in Germany*, L.A. TIMES, May 13, 2011, at A3.

58. Since World War II, there have been prosecutions or investigations for crimes under international law based on universal jurisdiction in seventeen states (Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, and the United States). Amnesty Int'l, *UN Should Support*, *supra* note 1, at 29.

59. In the Pinochet Case, the U.K. House of Lords found the former President of Chile extraditable to Spain for prosecution under universal jurisdiction enshrined in the Torture Convention. *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, [2000] 1 A.C. 147 (H.L.). Any state with jurisdiction (whether based on territorial jurisdiction, nationality jurisdiction, or universal jurisdiction) may request extradition. Where requests are made from states with differing bases of jurisdiction, the requested state has discretion to decide where to extradite; there is no hierarchy of jurisdictional basis.

60. In the 1994 case of *Director of Public Prosecutions v. T*, the defendant was tried by a Denmark court for war crimes committed against Bosnians in the territory of the former Yugoslavia. See Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 341 (1999). On April 30, 1999, the German Federal Supreme Court upheld the conviction of a Bosnian Serb convicted for committing acts of genocide in Bosnia. See *German Federal Supreme Court Upholds its Jurisdiction to Prosecute Serb National for Genocide Based on his Role in "Ethnic Cleansing" that Occurred in Bosnia and Herzegovina*, 5 INT'L L. UPDATE 52 (May 1999). A press release on this case—Number 39/1999—is available on the German Federal Supreme Court's website: www.unikarlsruhe.de/-bgh. The U.S. Court of Appeals for the Second Circuit similarly relied on universal jurisdiction in a tort case arising under the Alien Tort Claims Act and the Torture Victim Protection Act against Radovan Karadžić, the Bosnian Serb leader accused of crimes against humanity and war crimes in Bosnia. See *Kadic v. Karadžić*, 70 F.3d 232, 240 (2d Cir. 1995).

61. Désiré Munyaneza was tried and found guilty in Canada in 2009 of seven counts of genocide, crimes against humanity, and war crimes committed in Rwanda and sentenced to life in prison. See R. c. Munyaneza, [2009] R.J.Q. 1432 (Can.); see also Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 577 (1995) (noting that while several of the warrants involved the killing of Belgian peacekeepers, one of the warrants was issued against a Rwandan responsible for massacres of other Rwandans in Rwanda).

the United States employed universal jurisdiction in prosecuting Charles Taylor Jr. for torture committed in Sierra Leone in the 1990s.⁶²

B. *The Nuremberg Precedent*

Courts and commentators often cite the Nuremberg precedent as crystalizing universal jurisdiction for international crimes under customary international law.⁶³ It is significant that Nuremberg did not confine itself to war crimes and crimes against humanity; it also applied its jurisdiction to the crime of aggression (then known as “crimes against peace”), which it considered the most important crime within its jurisdiction. The Nuremberg Tribunal concluded, “[t]o 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.”⁶⁴ In his report to the President of the United States, Nuremberg Prosecutor Robert Jackson stated that at Nuremberg the prohibition of aggressive war, by force of “a judicial precedent,” had become “a law with a sanction.”⁶⁵

The Charter establishing the Nuremberg Tribunal, its subject matter jurisdiction, and its procedures, was negotiated by the United States, France, the United Kingdom, and the Soviet Union between June 26 and August 8, 1945.⁶⁶ The Charter provided the Tribunal jurisdiction over war crimes, crimes against humanity, and “crimes against peace,” which it defined as the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participating in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.”⁶⁷ Nineteen other states signed onto the Charter, rendering

62. *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) (upholding a ninety-seven year sentence for conviction of acts of torture committed by a citizen of Liberia against other citizens of Liberia in the territory of Liberia). The United States has statutes granting its courts universal jurisdiction over grave breaches of the Geneva Conventions, genocide, torture, the recruitment or use of child soldiers, and trafficking in persons. Amnesty Int’l, *UN Should Support*, *supra* note 1, at 18 (notes 28–30).

63. *Prosecutor v. Tadić*, Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 62 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *Prosecutor v. Ntuyuhaga*, Case No. ICTR-96-40-T, Decision on the Prosecutor’s Motion to Withdraw the Indictment (Int’l Crim. Trib. for Rwanda Mar. 18, 1999); *Prosecutor v. Kallon and Kamara*, Case Nos. SCSL-2004-15 AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty ¶¶ 67–71 (Special Ct. for Sierra Leone, Mar. 13, 2004); *cf.* Case No. STL-11-01/1 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging ¶ 103 (Special Trib. for Leb. Feb. 16, 2011) (citing *Tadić* for test for establishing a crime under customary international law).

64. *Trial of the Major War Criminals, Judgment and Sentences* (Int’l Mil. Trib. Oct. 1, 1946), *reprinted in* 41 AM. J. INT’L L. 172, 186 (1947).

65. Jackson, *supra* note 12.

66. London Agreement of 8 August 1945, Charter of the International Military Tribunal, and the Nuremberg Tribunal’s Rules of Procedure, *reprinted in* 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 675–91 (1995).

67. *Id.* at 678.

the Nuremberg Tribunal a truly international judicial institution.⁶⁸ The trial of twenty-two high-ranking Nazi leaders commenced on November 20, 1945. Ten months later on October 1, 1946, the Tribunal issued its judgment, finding nineteen of the defendants guilty, including twelve for the crime of aggression. The judgment of the Nuremberg Tribunal paved the way for the trial of over a thousand other German political and military officers, businessmen, doctors, and jurists under Control Council Law No. 10 “by military tribunals in occupied zones in Germany and in the liberated or allied nations.”⁶⁹ The crime of aggression was prosecuted by American Tribunals at Nuremberg in the *I.G. Farben, Krupp, High Command*, and *Ministries* cases,⁷⁰ as well as by the Supreme National Tribunal of Poland in the *Greiser* case, and the Chinese War Crimes Military Tribunal in the *Sakai* case.⁷¹

Although the Nuremberg trials were criticized for prosecuting crimes that were not at the time clearly established in international law, the Nuremberg principles, including the substantive crimes applied by the Tribunal, quickly ripened into customary international law.⁷² The United Nations’ International Law Commission (ILC) has recognized that the Nuremberg Charter, Control Council Law Number 10, and the post-World War II war crimes trials gave birth to the entire paradigm of individual criminal responsibility under international law.⁷³ Prior to Nuremberg, the only subjects of international law were states, and what a state did to its own citizens within its own borders was its own business. Nuremberg fundamen-

68. Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay. *Id.*

69. MICHAEL P. SCHARF, *BALKAN JUSTICE* 10 (1997). On December 20, 1945, the Allied Control Council of Germany, composed of the Commanders-in-Chief of the occupying forces of each of the Four Powers, issued Control Council Law No. 10, which was intended to “establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.” See Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 *IND. INT’L & COMP. L. REV.* 1, 8 (1992). CCL 10 and the Rules of Procedure for the CCL 10 proceedings are reproduced in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 494–502 (1998). By its terms, CCL 10 made the London Agreement and Nuremberg Charter an “integral part” of the law, and provided for the creation of tribunals established by the four occupying Powers in their zones of control in Germany to try the remaining German economic, political, military, legal, and medical leaders accused of war crimes and crimes against humanity. *Id.* CCL 10 arts. 1, 3. General Telford Taylor, the Chief Prosecutor of the U.S. CCL 10 trials, has written that the trials “were held under a comparable authorization from the same four powers that signed the London Charter.” TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 81 (1970).

70. Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 *CASE W. RES. J. INT’L L.* 291, 296 (2009).

71. *Id.* at 299.

72. See Jens Ohlin, *Aggression*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 236 (Antonio Cassese ed., 2009).

73. See Rep. of the Int’l Law Comm’n on the Work of its Forty-Fifth Session, May 6–July 26, 1993, 19, U.N. Doc. A/48/10; GAOR, 48th Sess., Supp. No. 10 [hereinafter *ILC Forty-Fifth Report*], available at <http://www.un.org/law/ilc/index.htm>. The ILC was established by the U.N. General Assembly to codify customary international law and propose treaties for the progressive development of international law.

tally altered that conception.⁷⁴ The ILC has described the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the “cornerstone of international criminal law” and the “enduring legacy of the Charter and Judgment of the Nuremberg Tribunal.”⁷⁵ Drawing from the writings of Professor Bruce Ackerman, who used the phrase “constitutional moment” to describe the New Deal transformation in American constitutional law,⁷⁶ some international law scholars have portrayed Nuremberg as a “constitutional moment for international law.”⁷⁷ Others have used the term “Grotian Moment” to describe the accelerated formation of customary international law that grew out of the Nuremberg precedent.⁷⁸

On December 11, 1946, in one of the first actions of the newly formed United Nations, the U.N. General Assembly unanimously affirmed the principles from the Nuremberg Charter and judgments in Resolution 95(I).⁷⁹ This G.A. Resolution had all the hallmarks of a resolution entitled to great weight as a declaration of customary international law: it was labeled an “affirmation” of legal principles; it dealt with inherently legal questions; it was passed by a unanimous vote; and none of the members

74. See Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 13 (2002).

75. See ILC *Forty-Fifth Report*, *supra* note 73, at 19.

76. See generally BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984).

77. Leila Nadya Sadat, *Enemy Combatants After Hamdan v. Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206–07 (2007).

78. Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT'L L. REV. 1, 9 (2004) (describing history's Grotian moments, including the Peace of Westphalia, the Nuremberg Charter, and the U.N. Charter); Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439, 444 (2010) (defining Grotian moment as “a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance”).

79. Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. GAOR, 1st Sess., U.N. Doc A/236, at 1144 (Dec. 11, 1946). The Resolution states in whole:

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

expressed the position that it was merely a political statement.⁸⁰ The General Assembly has subsequently confirmed that no statute of limitations or amnesty may be applied to bar prosecution of such crimes and that all states have a duty to cooperate in their prosecution.⁸¹

The International Court of Justice,⁸² the International Criminal Tribunal for the Former Yugoslavia,⁸³ the European Court of Human Rights,⁸⁴ and several domestic courts⁸⁵ have cited the General Assembly Resolution affirming the principles of the Nuremberg Charter and judgments as an authoritative declaration of customary international law. Referring to General Assembly Resolution 95 (I), the Israeli Supreme Court stated in the 1962 *Eichmann* case that “if fifty-eight nations [i.e., all of the members of the United Nations at that time] unanimously agree on a statement of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law.”⁸⁶ Most recently, in 2006, the

80. Scharf, *supra* note 78, at 454.

81. See, e.g., G.A. Res. 2312 (XXII), U.N. GAOR, 22d Sess., Supp. No. 16, U.N. Doc. A/6716, at 81 (Dec. 14, 1967) (saying that states shall not grant asylum to any person “to whom there are serious reasons for considering that he has committed . . . a war crime or crime against humanity”); G.A. Res. 2712 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8233, at 78–79 (Dec. 14, 1970), reprinted in M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 698 (1992) (adopted by a vote of fifty-five in favor to four against with thirty-three abstentions) (condemning war crimes and crimes against humanity and calling upon the states concerned to bring to trial persons guilty of such crimes); G.A. Res. 2840 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8592, at 88 (Dec. 18, 1971) (adopted by a vote of seventy-one in favor to none against with forty-two abstentions) (affirming that a state’s refusal “to cooperate in the arrest, extradition, trial and punishment” of persons accused or convicted of war crimes or crimes against humanity is “contrary to the United Nations Charter and to generally recognized norms of international law”); G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 79 (Dec. 3, 1973), reprinted in BASSIOUNI, *supra*, at 701–02 (adopted by a vote of ninety-four in favor to none against with twenty-nine abstentions) (stating that war crimes and crimes against humanity “shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”).

82. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 172 (July 9).

83. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 623 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Tadić, Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 62 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

84. The European Court of Human Rights recognized the “universal validity” of the Nuremberg principles in *Kolk & Kislyiy v. Estonia*, in which it stated: “Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, inter alia, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission.” *Kolk & Kislyiy v. Estonia*, Decision on Admissibility, 17 January 2006.

85. The General Assembly resolution affirming the Nuremberg Principles has been cited as evidence of customary international law in cases in Canada, Bosnia, France, and Israel. See R. v. Finta, [1994] S.C.R. 701 (Can.); Prosecutor v. Ivica Vrdoljak, Court of Bosnia and Herzegovina (July 10, 2008); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT’L L. 289 (1994) (summarizing Touvier and Barbie cases in French courts).

86. *Eichmann*, *supra* note 56, at 297 (quoting XXV BRIT. Y.B. INT’L L., I, 24 (1948), para. 11).

High Court of Justice of England and Wales confirmed that, based on the Nuremberg precedent, the crime of aggression had crystallized into a crime under customary international law.⁸⁷

In 1996, the International Law Commission finished its decades-long project of drafting the Code of Crimes against the Peace and Security of Mankind. Article 16 of that document confirmed that the crime of aggression constitutes a crime under international law, though it did not spell out the elements of the crime.⁸⁸ Its failure to do so have led some commentators to conclude that unlike the other offenses tried at Nuremberg, the crime of aggression was not sufficiently defined by the Nuremberg Tribunal or subsequent developments to have gained the status of a customary international law crime.⁸⁹ It may be significant in this context that mention of aggression is conspicuously absent from the U.N. General Assembly's 1973 "Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity," which provides for universal jurisdiction over war crimes and crimes against humanity.⁹⁰

Former U.S. Ambassador at Large for War Crimes Issues, David Scheffer, stated that on the eve of the Kampala ICC Review Conference, "[a]ggression had to be more sharply defined than the U.N. Charter's prohibition of 'the threat or use of force against the territorial integrity or political independence of any state,' which describes everything from pinprick attacks to massive invasions."⁹¹ Others have observed that the 1974 U.N. Definition of Aggression was designed only to act as a guide for the Security Council and could not be used for prosecution.⁹² In particular, they take exception to Article 4 of the 1974 Resolution, which provides that "[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."⁹³

This approach, however, is not unique to the crime of aggression. Crimes against humanity as defined in the statutes of the ad hoc tribunals and ICC have a comparable "semi-open" clause. Thus, Article 7(1)(K) of the ICC Statute speaks of "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."⁹⁴ Moreover, the concern is undercut by the historic treatment of piracy, the precursor to the modern crimes of universal jurisdiction. Al-

87. *R. v. Jones et al.* [2006] UKHL 16, sections 12 and 19 (Lord Bingham), 44 and 59 (Lord Hoffmann), 96 (Lord Rodger), 97 (Lord Carswell) and 99 (Lord Mance).

88. U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10, Art. 16 (July 26, 1996).

89. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 168 (2008).

90. G.A. Res. 3074 (XXVIII), 28 U.N. GAOR, 30th Sess., Supp. No. 30A, U.N. Doc. A/9030/Add.1, ¶¶ 1, 5 (Dec. 3, 1973).

91. David Scheffer, *Aggression is Now a Crime*, INT'L HERALD TRIBUNE, July 1, 2010.

92. Weisbord, *supra* note 89, at 168.

93. G.A. Res. 3314 (XXIX), U.N. GAOR 29th Sess., Supp. No. 31, Annex to UN Doc. A/ES/3314, ¶ 4 (Dec. 14, 1974).

94. Rome Treaty, *supra* note 18, art. 7(1)(K).

though piracy is the oldest of the crimes of universal jurisdiction recognized under customary international law, until quite recently, there was no authoritative definition of piracy. "It was not settled, for example, whether *animus furandi*, an intent to rob, was a necessary element, whether acts by insurgents seeking to overthrow their government should be exempt, as were acts by state vessels and by recognized belligerents, and whether the act had to be by one ship against another or could be on the same ship."⁹⁵ The historic debate over the definition of the crime of piracy indicates that disagreement over the scope or contours of an international crime does not deprive the offense of its character as an offense subject to universal jurisdiction.

C. *Did Nuremberg Apply Universal Jurisdiction?*

While there exists a great deal of authority for the proposition that the Nuremberg principles have ripened into customary international law, and that the principles recognize aggression as an international crime, there remains the question of whether the exercise of universal jurisdiction over this crime has a basis in customary international law. The answer hinges on whether Nuremberg should be viewed as having applied a collective form of universal jurisdiction delegated by the countries that ratified the London Agreement establishing the Nuremberg Tribunal, or whether it should instead be viewed as a court of the occupying powers applying the territorial jurisdiction of Germany over the accused Nazis. If the latter is the case, then Nuremberg and its Control Council Law 10 progeny would not provide a customary international law basis for the domestic assertion of universal jurisdiction over the crime of aggression.

The latter position finds support in the fact that the four Allied states that established the Nuremberg tribunal had assumed supreme authority in Germany. As stated in the Berlin Declaration of June 5, 1945:

[T]he Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority.⁹⁶

95. Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 272-73 (1988).

96. Berlin Declaration, June 5, 1945, 60 Stat. 1649, 1650; see also Agreement Between the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom and the Provisional Government of the French Republic on Certain Additional Requirements To Be Imposed on Germany, Sept. 20, 1945, 3 Bevans 1254 (delineating further the powers to be exercised by the Allies including prosecutions for war crimes).

From this language, some commentators have concluded that the “Nuremberg tribunal prosecutions were actually an exercise of national jurisdiction by the effective German sovereign, the Allies.”⁹⁷

Yet, there are several reasons to conclude that the better (or at least equally valid) view was that Nuremberg was an international tribunal applying universal jurisdiction. To begin with, in his seminal 1946 article on the Nuremberg tribunal, Professor Egon Schwelb listed the following features that evince that the Nuremberg tribunal was not a mere occupation court, but rather an international judicial body applying universal jurisdiction over the Axis country war criminals: (a) the London Agreement designated the court the “International” Military Tribunal; (b) the preamble of the agreement stressed that the four signatories were “acting in the interests of all the United Nations”; (c) the agreement gave any government of the United Nations the right to accede to it, and nineteen countries did so; (d) the agreement did not restrict the tribunal’s jurisdiction to German war criminals, but rather gave the Tribunal the right to prosecute major war criminals of all other European Axis countries; and (e) the agreement stipulated that the determination of the tribunal that a group or organization was criminal was binding in proceedings before courts of the many signatory states.⁹⁸

Moreover, it is telling that the opening statements of both the U.S. Prosecutor Robert Jackson⁹⁹ and U.K. Prosecutor Sir Hartley Shawcross¹⁰⁰ drew an analogy between the right to prosecute pirates under universal jurisdiction and the legitimacy of the Nuremberg Tribunal’s exercise of jurisdiction over war crimes, crimes against humanity, and the crime of aggression. Like piracy, the Nazi offenses during the war involved heinous atrocities, and

97. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non Party States*, 64 L. & CONTEMP. PROBS. 13, 38 (2001). As Hans Kelsen stated, “the criminal prosecution of Germans for illegal acts of their state could have been based on national law, enacted for this purpose by the competent authorities. These authorities were the four occupant powers exercising their joint sovereignty in a condominium over the territory and the population of subjugated Germany through the Control Council as the legitimate successor of the last German Government.” Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT’L L.Q. 153, 167 (1947). Similarly, Georg Schwarzenberger concluded that in substance, [the Nuremberg] Tribunal is a “municipal” tribunal of “extraordinary jurisdiction” which “the four [contracting] Powers” share in common. Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT L. PROBS. 263, 290–91 (1950); see also Georg Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329, 334–35 (1947).

98. Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 208–09 (1946).

99. See ROBERT. H. JACKSON, THE NÜRNBERG CASE 88 (1971) (“The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under International Law, is old and well established. That is what illegal warfare is.”).

100. See 3 Trial of the Major War Criminals Before the International Military Tribunal 106 (1947) (“Nor is the principle of individual international responsibility for offenses against the law of nations altogether new. It has been applied not only to pirates. The entire law relating to war crimes, as distinct from the crime of war, is based upon the principle of responsibility.”).

were typically committed in locations where they would not be punished through other bases of jurisdiction.¹⁰¹

In addition, the Nuremberg judgment contains an oft-cited passage indicating that the court itself perceived that its jurisdiction was based on universal jurisdiction:

The signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.¹⁰²

While this passage can be read in varying ways, it is of particular significance that the definitive report on the Nuremberg trials submitted by the U.N. Secretary-General in 1949 concluded that Nuremberg's jurisdiction was analogous to the exercise of universal jurisdiction over piracy.¹⁰³

Fifty years later, in its Report to the Security Council, the U.N. Commission of Experts on Violations of International Humanitarian Law in the Former Yugoslavia reaffirmed the United Nations' view that Nuremberg had applied universal jurisdiction delegated by the states who were parties to the London Agreement.¹⁰⁴

101. See Randall, *supra* note 41, at 793; see also Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 194 (1945). Colonel Willard Cowles wrote at the time of the establishment of the Nuremberg Tribunal that:

Basically, war crimes are very similar to piratical acts, except that they take place usually on land rather than at sea. In both situations there is, broadly speaking, a lack of any adequate judicial system operating on the spot where the crime takes place—in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war. As regards both piratical acts and war crimes there is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.

102. 22 Trial of the Major War Criminals: The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany 444 (1950).

103. The Secretary-General explained:

It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each of them. The Court may, in other words, have intended to assimilate the said crimes, in regard to jurisdiction, to such offences as the counterfeiting of currency. On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every state. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation. But it must be conceded, at the same time, that the phrase "right thus to set up special courts to administer law" is too vague to admit of definite conclusion.

U.N. Doc. A/CN.4/5, U.N. Sales No. 1949V.7, at 80 (1949) (memorandum submitted by the Secretary General).

104. The Commission of Experts concluded: "States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nurem-

If the Nuremberg judgment itself was somewhat vague about the underpinnings of the court's jurisdiction, it is noteworthy that the Control Council Law Number Ten Tribunals¹⁰⁵ unambiguously referred to the application of universal jurisdiction in their judgments. A prominent example is the case of *In re List*, which involved the prosecution of German officers who had commanded the execution of hundreds of thousands of civilians in Greece, Yugoslavia, and Albania.¹⁰⁶ In describing the basis of its jurisdiction to punish such offenses, the U.S. Control Council Law Ten tribunal in Nuremberg indicated that the defendants had committed international crimes that were universally recognized under existing customary and treaty law.¹⁰⁷ The tribunal explained that "an international crime is . . . an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."¹⁰⁸ The tribunal concluded that a state that captures the perpetrator of such crimes either may "surrender the alleged criminal to the state where the offense was committed, or . . . retain the alleged criminal for trial under its own legal processes."¹⁰⁹ Other decisions rendered by the Control Council Law Ten Tribunals that similarly invoke universal jurisdiction include the *Hadamar Trial* of 1945,¹¹⁰ the *Zyklon B* case of 1946,¹¹¹ and the *Einsatzgruppen* case of 1948.¹¹² Based on these precedents, the U.S. Court of Appeals for

berg International Military Tribunal may be said to have derived its jurisdiction from such a combination of national jurisdiction of the States parties to the London Agreement setting up that Tribunal." Interim Rep. of the Indep. Comm'n of Experts Established Pursuant to Security Council Resolution 780 (1992), ¶ 73, U.N. Doc. S/25274 (Jan. 26, 1993), reprinted in MORRIS & SCHARF, *supra* note 66, at 311.

105. See *supra* note 69 and accompanying text.

106. 11 Trials of War Criminals 759 (1946–49) (U.S. Mil. Trib. Nuremberg 1948). *In re List* is known as the Hostage Case because civilians were taken hostage and then killed.

107. *Id.* at 1235.

108. *Id.* at 1241.

109. *Id.* at 1242.

110. 1 Law Reports of Trials of War Criminals 46 (1949) (U.S. Mil. Commission - Wisbaden 1945). In asserting the universality principle as one of its bases of jurisdiction in a case involving allegations that the defendants had executed by lethal injection nearly 500 Polish and Russian civilians at a sanatorium in Hadamar, Germany, the United States Military Commission in the Hadamar Trial case claimed jurisdiction irrespective of the nationalities of the defendants and their victims and "of the place where the offense was committed, particularly where, for some reason, the criminal would otherwise go unpunished." *Id.* at 53. The prosecution had argued that "an offense against the laws of war is a violation of the law of nations and a matter of general interest and concern War crimes are now recognized as of special concern to the United Nations, which states in the real sense represent the civilized world." Trial of Afons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber, and Philipp Blum 9 (The Hadamar Trial) (Earl W. Kintner ed., 1949) (reply by the prosecutor).

111. 1 Law Reports of Trials of War Criminals 93 (1949) (British Mil. Ct. - Hamburg 1946). In a case involving three German industrialists charged with having knowingly supplied poison gas used for the extermination of Allied nations (which did not include British victims), the British military court in Hamburg noted that jurisdictional support derived from the universality principle, under which every state has jurisdiction to punish war criminals. See *id.* at 103.

112. The *Einsatzgruppen* case involved the trial before a U.S. Tribunal in Nuremberg of the commanders of killing squads that shadowed the German troops advancing into Poland and Russia. Citing the universality principle as one of the bases for the tribunal's jurisdiction, the tribunal stated:

the Sixth Circuit asserted in *Demjanjuk v. Petrovsky* that “it is generally agreed that the establishment of these [World War II] tribunals and their proceedings were based on universal jurisdiction.”¹¹³

Despite these authoritative statements, some commentators argue that the Nuremberg and Tokyo trials were based not on universal jurisdiction or even the territorial principle of jurisdiction exercised by Occupying Powers, but “actually operated with the consent of the state of nationality of the defendants, even though such consent arose from the defeat of Germany and Japan, respectively.”¹¹⁴ Yet, in none of the judgments of the Nuremberg trials do the judicial opinions cite the consent of Germany as the basis for the tribunals’ jurisdiction. The absence of any reference to Germany’s consent was explained by the late Professor Henry King, who had served as one of the prosecutors at Nuremberg, in the following terms: “It should be noted that the German armies surrendered unconditionally to the Allies on May 8, 1945. There was no sovereign German government which they dealt in the surrender arrangements.”¹¹⁵ Writing in 1945, Professor Hans Kelsen pointed out that the occupying Powers never sought to conclude a peace treaty with Germany (which could have included a provision consenting to trial of German war criminals), because at the end of the war no such government existed “since the state of peace has been *de facto* achieved by Germany’s disappearance as a sovereign state.”¹¹⁶

The legal foundation of the Nuremberg tribunal contrasts with that of the Tokyo tribunal, which was established with the consent of the Japanese government, which continued to exist after the war.¹¹⁷ Thus, John Pritch-

They are being tried because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation . . . It is the essence of criminal justice that the offended community inquires into the offense involved . . . There is no authority which denies any belligerent nation jurisdiction over individuals in its actual custody charged with violation of international law. And if a single nation may legally take jurisdiction in such instances, with what more reason may a number of nations agree, in the interest of justice, to try alleged violations of the international code of war?

United States v. Otto Oblendorf, reprinted in IV Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 462 (1950).

113. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (referring to the IMT and CCL10 tribunals).

114. Morris, *supra* note 97, at 36–37.

115. Henry T. King, Jr., *The Limitations of Sovereignty from Nuremberg to Sarajevo*, 20 CAN.-U.S. L.J. 167, 168 (1994).

116. Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT’L L. 518, 524 (1945). Kelsen further explains: “By abolishing the last government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolishment of the Doenitz government, Germany has ceased to exist as a state in the sense of international law.” *Id.* at 519.

117. “Thus it was a matter of pivotal importance during the Trial, that as the two contending sides were well aware, the Japanese civil power was not extinguished with the end of hostilities.” R. John Pritchard, *The International Military Tribunal for the Far East and its Contemporary Resonances: A General Preface to the Collection*, in THE TOKYO MAJOR WAR CRIMES TRIAL xxxii (J. Pritchard ed., 1998). Pritchard further notes that “[t]he Special Proclamation that brought the International Military Tribunal for the Far East into existence claimed that by the Instrument of Surrender ‘the authority of the Emperor

ard, the foremost expert on the Tokyo tribunal, writes, “[t]he legitimacy of the Tokyo trial, unlike its Nuremberg counterpart, depended not only upon the number and variety of states that took part in the trial but more crucially upon the express consent of the Japanese state to submit itself to the jurisdiction of such a court, relinquishing or at least sharing a degree or two of sovereignty in the process.”¹¹⁸

D. *The Presumption of Legitimacy*

While the case for characterizing Nuremberg as a court applying universal jurisdiction is a strong one, we need not definitively decide the age-old debate since Nuremberg could have been based on multiple and overlapping types of jurisdiction. Thus, Professor Roger Clark writes, “[t]he power of the Allies to set up the Tribunal may be said to flow either from their authority as the *de facto* territorial rulers of a defeated Germany, or more congenially, as exercising the authority of the international community operating on a type of universal jurisdiction.”¹¹⁹ Professor Schwelb similarly concluded:

If the Tribunal based the legislative powers of the signatories of the Charter on the unconditional surrender of Germany and the right to legislate for occupied territory, it did not exclude the construction that the Nuremberg proceedings had, in addition to this territorial basis, also a wider foundation in the provisions of international law and the Court the standing of an international judicial body.¹²⁰

As such, it is reasonable for states to conclude that Nuremberg and its progeny provide a customary international law basis for prosecuting the crime of aggression under universal jurisdiction.

In concluding this section, it is useful to consider the burden that applies to the claim that a domestic application of extraterritorial jurisdiction is incompatible with international law. One must start with the venerable 1927 case of the *S.S. Lotus*. In one of the most frequently quoted passages of the Permanent Court of International Justice’s jurisprudence, the predecessor to the International Court of Justice stated that “[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, [international law] leaves them in this respect a

and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers.’” *Id.*

118. *Id.* at xxxi.

119. Roger Clark, *Nuremberg and Tokyo in Contemporary Perspective*, in *THE LAW OF WAR CRIMES, NATIONAL AND INTERNATIONAL APPROACHES* 172 (Timothy L. H. McCormack & Gerry J. Simpson eds., 1997).

120. Schwelb, *supra* note 98, at 210.

wide measure of discretion which is only limited in certain cases by prohibitive rules."¹²¹

The *Lotus* case concerned a dispute between France and Turkey about whether Turkey had jurisdiction to try a French sailor for negligence on the high seas. A French vessel had run into a Turkish vessel, causing the death of Turkish citizens. When the French vessel anchored at a Turkish port, Turkey took custody over and prosecuted the French watch officer for criminal manslaughter. France argued that the flag state alone had jurisdiction in such cases and that Turkey could not legitimately try a French citizen under international law since it could not "point to some title to jurisdiction recognized by international law."¹²² The PCIJ rejected France's argument, ruling that the exercise of extraterritorial jurisdiction is presumptively valid and that France had the burden of proving that Turkey's assertion of jurisdiction violated some prohibitive rule of international law.¹²³

In his separate opinion in the *Arrest Warrant* case, ICJ Judge Koroma characterized the 1927 *Lotus* decision as "the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies."¹²⁴ It is particularly noteworthy to our discussion, however, that the U.S. government cited the *Lotus* principle to justify its prosecution of German war criminals after World War II. In response to the defense's argument in the *Hadamard Trial*¹²⁵ that no international legal authority existed that would permit an occupying power's military tribunals to try offenders whose crimes were committed prior to the occupation, the United States argued that "the principle of the *Lotus Case*, applied to the case before this Commission, means that the jurisdiction of the Commission, as a question of international law, need be denied only upon a showing that there is a generally accepted rule of international law which would prohibit the exercise of such jurisdiction."¹²⁶ In light of the *Lotus* principle, those who seek to argue that the exercise of domestic universal jurisdiction over the crime of aggression is invalid must surmount a large hurdle.

121. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18. The only prohibitive rule mentioned by the Permanent Court in the *Lotus* case is that criminal jurisdiction should not be exercised, without permission, within the territory of another State.

122. *Id.* at 19.

123. *See id.*

124. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 3, 88 ¶ 51 (Feb. 14) (separate opinion of Koroma, J.).

125. 1 Law Reports of Trials of War Criminals 46 (1949). The case involved claims that the defendants and their underlings had executed by lethal injection nearly 400 Polish and Russian civilians at a sanatorium in Hadamar, Germany.

126. Charles H. Taylor, Memorandum, Has the Commission Jurisdiction to Hear and Determine the Hadamar Case?, U.S. JAGD Document (declassified on June 19, 1979), cited in Michael P. Scharf, *The ICC's Jurisdiction Over Non Party States*, 64 L. & CONTEMP. PROB. 67, 73 n.31 (2001).

III. CONCERNS AND REMEDIES

A. *Pitfalls of Domestic Prosecution of Aggression*

A well-meaning state may seek to assert universal jurisdiction over a foreign suspect accused of masterminding an act of aggression as a way of bringing the case to the attention of the international community and inducing the state of nationality or residence to prosecute the perpetrator. Spain's proceedings against Augusto Pinochet and Belgium's proceedings against Hissene Habre prompted Chile and Senegal, respectively, to undertake their own prosecutions of those former leaders.¹²⁷ According to a comprehensive study of universal jurisdiction prosecutions, "universal jurisdiction defendants who have gone to trial are primarily Nazis, former Yugoslavs, and Rwandans. That is, they are the type of defendants that the international community has most clearly agreed should be prosecuted and punished and that their own states of nationality have not defended."¹²⁸

Yet, there are several potential pitfalls inherent in prosecuting aggression in national courts under universal jurisdiction. The first is that such prosecutions may be so politically sensitive that they cannot be fairly tried and the attempt to do so would undermine efforts at restoring or maintaining international peace. To try foreign leaders for aggression is to prosecute their nation's foreign and military policy in a court of law.¹²⁹ Richard Goldstone, the first chief prosecutor of the Yugoslavia Tribunal, pointed out that prosecuting the crime of aggression would require prosecuting the decision to go to war, "which is inherently a profoundly political decision."¹³⁰ International politics are then played out in the courts of individual states, with potentially detrimental results to international relations.

Assertions of universal jurisdiction—even an indictment—can enable one state to intimidate and harass another state or its officials as a form of "lawfare."¹³¹ Even well-intentioned prosecutions can have deleterious effects on international diplomacy. An indictment or judgment would carry moral weight, which could affect negotiations between the relevant parties and the international community. A victim state may not want the perpetrator prosecuted out of concern that an indictment or trial might antagonize the situation or might frustrate efforts to resolve the dispute through diplomatic channels.

127. See generally Bingham, *supra* note 37; Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 36 (2011).

128. Langer, *supra* note 127, at 2.

129. David Scheffer, *Aggression is Now a Crime*, INT'L HERALD TRIB., July 2, 2010.

130. Richard Goldstone, *Prosecuting Aggression*, INT'L HERALD TRIB., May 27, 2010.

131. See *Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting*, 43 CASE W. RES. J. INT'L L. 11, 12 (2011) (defining "lawfare" as "a strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational result").

In addition, there is the possibility of state legislatures defining aggression in a way that differs from the definition in the amended ICC Statute or of national courts interpreting the crime in novel ways. In either scenario, greater confusion among the international community would ensue.

B. Are the Concerns Overstated?

The concerns enumerated above, while genuine, are not unique to the crime of aggression. For example, some allegations of war crimes, such as deployment of weapons or recourse to certain methods of warfare causing superfluous suffering or disproportionate casualties to civilians, may reflect state policy just as much as the crime of aggression. Moreover, in prosecutions for crimes against humanity, individuals are indicted for official acts that are “pursuant to or in furtherance of a state or organizational policy to commit such attack.”¹³² Similarly, genocide is often prosecuted as a crime reflecting state policy. While aggression in Article 8 *bis* contemplates state action against another state whereas genocide and crimes against humanity contemplate state action against individuals, in both instances the defendants are often state officials accused of acting within their official capacity against another state and its nationals. Thus, in assessing the real risks of universal jurisdiction over the crime of aggression, one must ask: is it significantly more detrimental for a national court to rule that a state unlawfully used force against another country than for it to rule that the state pursued a policy of genocide and crimes against humanity against its own or foreign citizens? And is it significantly more detrimental for a national court to misapply the definition of aggression than to misapply the definition of genocide or crimes against humanity?

Moreover, national prosecutions for aggression may actually be less likely to interfere with diplomatic relations than prosecution before the ICC. Once a case goes to the ICC, the involved states all but lose the ability to negotiate a nonjudicial settlement.¹³³ In contrast, states have negotiated dismissal of national criminal prosecutions, which disrupted their relations. One striking example of this is the United States’ success in persuading Belgium to terminate proceedings against former U.S. and Israeli officials.¹³⁴ Even less powerful states can exercise diplomatic leverage to protect their officials or former officials by threatening economic reprisals, especially if they have substantial corporate investments in the prosecuting state.¹³⁵

132. Rome Treaty, *supra* note 18, art. 7.2.a.

133. Pursuant to Article 16 of the ICC Statute, states can urge the Security Council to adopt a resolution deferring the case, but unsuccessful attempts by the Organization of African Unity to do so in the context of Sudan and Kenya have shown the difficulties of shutting down an ICC investigation once it has been launched.

134. Wolfgang Kaleck, *Territory Without Boundaries: Universal Jurisdiction: From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT’L L. 927, 933–36 (2009).

135. Langer, *supra* note 127, at 7.

Finally, because the crime of aggression is a leadership offense, nearly all cases would be shielded from domestic prosecution by the doctrine of head of state immunity.¹³⁶ The doctrine has its roots in the notion, made famous in Louis XIV's declaration, "L'etat, c'est moi," that heads of state personify their state.¹³⁷ In the 2002 Belgian *Arrest Warrant* case, the International Court of Justice confirmed that head of state immunity applies to heads of state, heads of government, and other high level officials such as the foreign minister whose functions require that the official be free to participate in international meetings and negotiations on the state's behalf.¹³⁸ The court held that officials in these positions are entitled while in office to immunity from prosecution in a foreign state even for acts that constitute international crimes.¹³⁹ It therefore ordered Belgium to rescind its arrest warrant for the sitting Foreign Minister of the Congo, who had been accused of crimes against humanity.

The immunity of a sitting head of state is known as immunity *ratione personae* (personal immunity), whereas the immunity of former heads of state is characterized as *immunity ratione materiae* (functional immunity). As to the latter form of immunity, in dicta, the ICJ stated that former heads of state and other former high ranking officials are entitled to immunity only for their official acts while in office; their immunity does not extend to private acts. One noted international criminal law textbook observed that the court's focus on "private" versus "official acts" has been "widely criticized and does not correspond to past and current practice in this field."¹⁴⁰ It seems self evident that international crimes are not as a rule "private acts" since commission of such crimes usually involves using or abusing the perpetrator's official status. By its nature, this would always be the case with the crime of aggression, and therefore under the dicta of the *Arrest Warrant* case, the perpetrators would have continuing immunity in national courts even after leaving office.

In their joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans, and Buergenthal maintained that international crimes are not to be regarded as "official acts" because they cannot legitimately be committed

136. U.N. Secretary-General, *supra* note 6, ¶¶ 88–89.

137. *Arrest Warrant* of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 88 ¶ 80 (Feb. 14) (separate opinion of Higgins, Kooijmans, & Buergenthal, JJ.). While head of state immunity springs from the same sources—sovereignty and comity—as foreign sovereign immunity, the former is not subject to many of the exceptions (most notably the commercial act exception) that are applicable to civil suits against the state.

138. *Id.* ¶ 53. English courts have applied head of state immunity to a case involving the sitting Minister of Defense of Israel and the Minister of Commerce of China. HAZEL FOX, *THE LAW OF STATE IMMUNITY* 671 (2008).

139. *Arrest Warrant* of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 88 ¶ 54–55 (Feb. 14).

140. ANTONIO CASSESE, *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 368 (2009).

under the cloak of state authority.¹⁴¹ There are three difficulties with this legal fiction, however. First, aggression, genocide, crimes against humanity, and other international crimes are usually carried out as official acts that represent state policy. Second, if these acts are to be deemed private acts or *ultra vires* acts then they may no longer be attributable to the state.¹⁴² Third, the ICJ recently rejected this argument as applied to foreign sovereign immunity in *Jurisdictional Immunities (Germany v. Italy)*, finding that the gravity of the crime has no bearing on whether the acts were official.¹⁴³ Despite its drawbacks, however, this legal fiction “may be the best way to read the ICJ judgment so as to avoid destroying principles of individual criminal responsibility.”¹⁴⁴ Thus, in the recent *Jurisdictional Immunities* case, the ICJ went out of its way to say that “the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the state is not in issue in the present case.”¹⁴⁵ It remains to be seen whether courts will follow the Higgins/Kooijmans/Burgenthal approach in the criminal context, and thereby deem former heads of state and high-level officials accused of the crime of aggression as prosecutable in domestic courts.¹⁴⁶ At a minimum, however, incumbent heads of state and high-level officials would not be domestically prosecutable for the crime of aggression.

Human rights advocates saw the ICJ’s holding in the *Arrest Warrant* case as a setback, since Article 7 of the Nuremberg Charter stipulates that “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”¹⁴⁷ The Nuremberg Tribunal judgment, the Tokyo Tribunal judgment, as well as the judgments of the Control Council Law cases echoed this clause, and foreign ministers of Japan and Germany are among the numerous former state officials who were tried

141. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, 89 ¶ 85 (Feb. 14) (separate opinion of Higgins, Kooijmans, & Burgenthal, JJ.); see also *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1470–72 (9th Cir. 1994).

142. Rep. of the Int’l Law Comm’n, 53d Sess., April 23–June 1, July 2–Aug. 10, 40 ¶ 6, U.N. Doc. A/56/10; GAOR 53d Sess., Supp. No. 10 (2001) (“State is responsible for the acts of its rulers . . . so far as the acts are done in their official capacity”).

143. *Jurisdictional Immunities of the State (Ger. v. It.)*, 2012 I.C.J. 3, 37 ¶ 91 (Feb. 2012) (“The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States.”).

144. David S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court*, 20 AM. U. INT’L L. REV. 7, 29 (2004) (citing Michael P. Scharf, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 378–79 (2001)).

145. *Jurisdictional Immunities of the State (Ger. v. It.)*, 2012 I.C.J. 3, 37 ¶ 91 (Feb. 2012).

146. One commentator has concluded, “Although still somewhat in flux, it seems settled that domestic courts can exercise jurisdiction over former Heads of State for violations of international criminal law they committed while in office.” Lucas Buzzard, *Holding an Arsonist’s Feet to the Fire? – The Legality and Enforceability of the ICC’s Arrest Warrant for Sudanese President Omar Al-Bashir*, 24 AM. U. INT’L L. REV. 897, 916 (2009) (citing several scholars).

147. Charter of the International Military Tribunal, *supra* note 66, art. 7.

and convicted for actions committed during their incumbency. The International Law Commission subsequently reaffirmed this principle in its enumeration of the “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal,” and in its “Draft Code of Crimes Against Peace and Security of Mankind.”¹⁴⁸ While an argument could be made based on these authorities that head of state immunity is fundamentally incompatible with the notion that serious international crimes must not go unpunished,¹⁴⁹ the ICJ accepted the applicability of the Nuremberg exception to head of state immunity only as applied before “certain international criminal courts.”¹⁵⁰

It is notable that the ICJ recognized in the *Arrest Warrant* case that states can waive the immunity of their former heads of state and other high level officials.¹⁵¹ The House of Lords in *Pinochet* interpreted Chile’s ratification of the Torture Convention as an implicit waiver of head of state immunity.¹⁵² Consistent with these precedents, a few scholars have taken the position that a state’s ratification of the ICC statute is equivalent to waiving head of state immunity before both the ICC and the domestic courts of the other parties to the ICC statute.¹⁵³ This interpretation would significantly curtail the application of head of state immunity to domestic prosecutions of the crime of aggression, at least with respect to accused officials from states that are parties to the ICC.

This inventive interpretation is based on Article 27 of the ICC statute, which provides that neither the official capacity nor the international immunities of an accused are relevant considerations in proceedings before the Court.¹⁵⁴ By its terms, however, Article 27 only applies to proceedings

148. Rep. of the Int’l Law Comm’n, 2d Sess., Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950); Rep. of the Int’l Law Comm’n, 48th Sess., Draft Code of Crimes Against the Peace and Security of Mankind ¶ 50 (1996).

149. Consistent with this view, in *Pinochet*, Lord Millett stated that “[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose,” and Lord Philips stated that “no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime.” *R. v. Bow Street Metro. Stipendiary Magistrate ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 827 (H.L.), 38 I.L.M. 430 (1999).

150. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, ¶ 61 (Feb. 2002).

151. *Id.* ¶ 61.

152. *R. v. Bow Street Metro. Stipendiary Magistrate ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 272 (H.L.), 38 I.L.M. 430 (1999).

153. Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIM. L.F. 429, 452 (2001); Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation, in ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION* 113, 136 (1999) (Fr.) (quoting Article 27(2) of the ICC statute).

154. Article 27 provides:

(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

before the ICC, not to domestic proceedings. Moreover, Article 27 must be read with Article 98 of the ICC statute, which prohibits the court from requesting a state to arrest and surrender a third party national if doing so would violate the requested state's obligations under international law with respect to the state or diplomatic immunity of a person.¹⁵⁵ The interplay between these two provisions has been subject of debate in the context of attempts to enforce the ICC's arrest warrant for the sitting head of state of Sudan, Mohamed Al Bashir.¹⁵⁶ In December 2011, the ICC Trial Chamber ruled that head of state immunity may not be invoked to excuse Malawi's failure to arrest and surrender Al Bashir to the ICC,¹⁵⁷ but it is not clear that the ICC statute would also strip Al Bashir of head of state immunity if a state party were to elect to prosecute him in its own courts, especially since Sudan is not a party to the ICC statute.

C. Proposed Safeguards

ICJ Judge Guillaume in his separate opinion in the *Arrest Warrant* case expressed concern that the multiple domestic assertions of universal jurisdiction over an offense risks "total judicial chaos."¹⁵⁸ To avoid that prospect in relation to the crime of aggression, it would be well for national courts to adopt the constraint that universal jurisdiction should be asserted only if:

- (1) The Security Council has determined that aggression has occurred or referred a situation of aggression to the ICC, or the Pre-Trial Chamber has authorized the Prosecutor to investigate a crime of aggression; and
- (2) It appears that the states that would have territorial and nationality-based jurisdiction are unable or unwilling to prosecute.¹⁵⁹

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Rome Treaty, *supra* note 18, art. 27.

155. Article 98 provides: "The Court may not proceed with a request for surrender or assistance which would require the requested States to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity." *Id.* art. 98.

156. Jennifer Falligant, *The Prosecution of Sudanese President Al Bashir: Why a Security Council Deferral Would Harm the Legitimacy of the International Criminal Court*, 27 WIS. INT'L L.J. 727, 746, 749 (2010); *Kenya Defends Decision to Host Sudanese Leader*, BBC MONITORING AFRICA, FROM THE DAILY NATION, NAIROBI, Aug. 30, 2010; *South Africa Legally Rebuts AU Resolution on Arresting Bashir*, SUDAN TRIB., Aug. 4, 2009.

157. See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-139, Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests (Dec. 12, 2011).

158. *Arrest Warrant of 11 April 2000* (Dem. Congo v. Belg.), 2002 I.C.J., 43 (Feb. 14) (separate opinion of President Guillaume).

159. Kai Ambos, *Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the "Torture Memos" be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 CASE W. RES. J. INT'L L. 405, 422-23 (2009).

Based on the so-called “subsidiarity” approach to universal jurisdiction of several countries,¹⁶⁰ this scheme would prevent an overload of the domestic judiciary, avoid forum shopping, and limit criminal proceedings to reasonable cases.¹⁶¹

Moreover, cases of universal jurisdiction over the crime of aggression should be brought only by government prosecutors as opposed to by victims or NGOs representing victims, as some states permit. In the United Kingdom, prosecutors cannot bring a case under universal jurisdiction without the consent of the Attorney General. Such an approach would enable the prosecuting government to ensure “that public interest considerations, including issues of international comity, can be taken into account in decisions to proceed with such prosecutions.”¹⁶²

In addition, cases of universal jurisdiction over the crime of aggression should never be tried in absentia,¹⁶³ though investigations and indictments in absentia may be acceptable. In the Belgian *Arrest Warrant* case, the judges diverged (in dicta) as to whether a state must wait until a perpetrator is found in its territory to institute criminal proceedings leading to an indictment or arrest warrant under universal jurisdiction.¹⁶⁴ In Germany and the Netherlands, “an investigation may begin without the suspect being present but a resulting trial cannot be held” in absentia.¹⁶⁵ In contrast, under Belgium’s revised universal jurisdiction legislation, a suspect must either be a resident of the country or present in its territory in order for authorities to launch an investigation.¹⁶⁶ The latter approach all but guarantees that the state will never prosecute the crime of aggression involving a foreign leader temporarily present in the country.

Finally, domestic courts applying the crime of aggression should take a cautious approach to the requirement that acts be “manifest violations,” limiting their jurisdiction to the most serious acts of aggression and excluding cases falling within a gray area, consistent with the approach enshrined in the Kampala amendments to the ICC Statute.

160. Harmen van der Wilt, *Universal Jurisdiction Under Attack*, 9 J. INT’L CRIM. JUST. 1043, 1055–56 (2011).

161. *Id.* at 423; U.N. Secretary-General, *supra* note 6, art. 5.

162. *United Kingdom Materials on International Law 2010*, 81 BRIT. Y.B. INT’L L. 649 (2011).

163. *Accord* U.N. Secretary-General, *supra* note 6, ¶¶ 16, 77.

164. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 6–9, 12–13, 59–60, 79–85 (Feb. 14) (President Guillaume and Judge Rezek believed that international law only authorizes universal jurisdiction “properly so called” over piracy, while Judges Higgins, Kooijmans, and Buergenthal maintained that international law does not prohibit such jurisdiction for other serious international crimes).

165. Wolfgang Kaleck, *Territory without Boundaries: Universal Jurisdiction: From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT’L L. 927, 959 (2009).

166. *Id.* at 959–60.

IV. CONCLUSION

The adoption of the crime of aggression at the Kampala ICC Review Conference has been heralded as one of the major developments in international law in modern times. Great developments are never risk free, and the United States was right to be concerned that an unintended consequence of Kampala would be a proliferation of state laws providing for universal jurisdiction over the crime of aggression. But the above analysis suggests that the U.S.-proposed understanding may do little to prevent that from occurring.

Eight years before the Kampala Review Conference, *ad litem* ICJ Judge Van den Wyngaert of Belgium wrote in her opinion in the Belgian *Arrest Warrant* case:

The Rome Statute does not establish a *new* legal basis for third States to introduce universal jurisdiction. It does not prohibit it but does not authorize it either. This means that, as far as crimes in the Rome Statute are concerned (war crimes, crimes against humanity, genocide and in the future perhaps aggression and other crimes), pre-existing sources of international law retain their importance.¹⁶⁷

Consistent with Judge Van den Wyngaert's observation, this Article has documented that the Nuremberg trial and its progeny crystallized the right under customary international law of states to exercise universal jurisdiction over the crimes within the Nuremberg Charter, including aggression, and therefore an interpretative statement that the Kampala amendments should not be considered as creating such a right is without import. As a consequence, many states seeking to be able to take full advantage of the complementarity principle will likely treat the new crime of aggression as they have the others, subjecting it to universal jurisdiction in their implementing legislation.

The author recognizes the potential applicability to this issue of the quantum physics concept of the "observer effect," which posits that observing a phenomenon by necessity changes it. However, the purpose of this Article was neither to advocate for domestic prosecutions of the crime of aggression nor to encourage countries to adopt laws enabling their courts to prosecute the crime domestically, though that may be the inexorable result of a scholarly publication that authoritatively establishes their right under international law to do so. Rather, this project was motivated by a desire to explore

167. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, ¶ 66 (Feb. 14) (dissenting opinion of Van den Wyngaert, J.).

the contemporary relevance of Nuremberg and to warn the ICC state parties against misplaced reliance on an ineffectual contrivance.¹⁶⁸

If the United States and its allies truly want to prevent the Kampala amendments from prompting states to add the crime of aggression to the offenses subject to their universal jurisdiction, they should seek an amendment to the Kampala text that renders the crime of aggression subject to the exclusive jurisdiction of the ICC. Such an amendment will not prevent non-parties from prosecuting the crime of aggression, but it would apply to the 121 states (i.e., the parties to the ICC statute) that are most likely to adopt universal jurisdiction for the crime. In the years before a final decision is made to bring the Aggression Amendments into force, there will be opportunities to consider adoption of an exclusive jurisdiction amendment in one form or another.

Yet, in the final analysis, it might not be worth the political capital to seek such an amendment if, as demonstrated above, the hazards of domestic prosecutions of aggression have been overstated. While charges of aggression may put a state's foreign policies on trial, all of the offenses within the jurisdiction of the ICC can require a court to adjudicate the lawfulness of state policies and official actions at the highest levels. Therefore, the risks of destructive consequences to state relations are not unique to domestic trials of the crime of aggression. Furthermore, those risks can be minimized if states incorporate the reasonable safeguards set forth in this Article to avoid abuse.

168. The author is reminded of the Bush Administration's ill-conceived attempt to circumvent the need to obtain implementing legislation from Congress by issuing an Executive Memo to the State of Texas, ordering Texas to stay the execution of a Mexican citizen in accordance with the International Court of Justice's ruling in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12. This gimmicky approach ended in failure when the U.S. Supreme Court ruled in *Medellin v. Texas*, 552 U.S. 491 (2008), that an act of Congress was necessary to implement the non-self-executing treaties at issue in the case (the ICJ Statute and the Vienna Convention on Consular Relations).

