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Crime of Aggression before Domestic Courts: Some Contemporary Challenges

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Summary: The article focuses on contemporary challenges concerning the domestic prosecution of the crime of aggression. These challenges have one common feature, that they deal with the scope of jurisdiction over crime of aggression at a domestic level. The author analyses applicability of jurisdictional immunity (based on the principle *pars in parem non habet iurisdictionem*), immunity of State officials, both personal (*ratione personae*) and material (*ratione materiae*), and finally also the availability of universal jurisdiction in relation to the crime of aggression. The contribution is built on the presumption that even though each category of crimes under international law has its unique characteristics, they all share some common definitional features, reflected among else in the famous Cassese's definition of crime under international law. The author argues that all crimes under international law are to be treated uniformly as much as possible, and therefore – relatedly – there should not be any unsubstantiated differences in standing of the crime of aggression comparing to standing of remaining categories of crimes under international law.

Keywords: crime of aggression, domestic prosecution, challenges, jurisdictional immunity, personal immunity, functional immunity, universal jurisdiction.

1 Introduction

Russia's aggression against Ukraine launched on 24th February 2022 renewed with unprecedented intensity a debate concerning prosecution of the crime of aggression either before the (reformed) International Criminal Court (ICC), newly established *ad hoc* tribunal of international or internationalized (hybrid) character, or before domestic courts.[1] The article focuses on this latter option of the decentralized prosecution of the crime of aggression at the domestic level.

Unsurprisingly, any such prosecution is far from being trouble-free. Quite the contrary, there are numerous challenges and pitfalls for domestic prosecu-

1 The availability of the ICC and possibility to establish the ad hoc tribunal for Ukraine is analyzed in the special volume of this journal. See IMOEDEMHE, Ovo. The International Criminal Court: Whether the Crime of Aggression in Ukraine. International and Comparative Law Review, 2023, vol. 23, no. 1, pp. 27–52.

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tion that potentially limit the scope of domestic jurisdiction over the crime of aggression. The author identifies three such challenges – be it jurisdictional immunity, immunity of State officials, and universal jurisdiction – and proposes arguments on how to deal with them and eventually overcome them in domestic adjudication. These obstacles are not entirely new;[2] nevertheless, they may be assessed in the light of recent events and developments, primarily in relation to the Russian invasion into Ukraine.

The contribution is built on the presumption that despite the fact that each category of crimes under international law has its unique characteristics (i.e., war nexus with respect to war crimes, specific intent in relation to genocide, widespread or systematic attack concerning crimes against humanity, and the incorporation of State conduct element into the definition of the crime of aggression), they all share some common definitional features, reflected among else in the famous Cassese's definition of crime under international law.[3] The author argues that all crimes under international law are to be treated uniformly as much as possible, and therefore – relatedly – there should not be any unsubstantiated differences in standing of the crime of aggression comparing to standing of remaining categories of crimes under international law.

The author understands this presumption (the principle of unity) is not generally accepted. According to P. Wrange, "*one cannot presume that the same legal consequences attach to each international crime*."[4] The uniform treatment has its obvious limitations and can hardly act as an omnipotent formula. One may even doubt whether this principle has any normative meaning at all. Still, it is used here as a subsidiary argument, based on historical, systematic, and teleological perception of international criminal law. Simply put, the principle of unity might be rebutted where there are cogent reasons to do so. From the methodological point of view, the conclusions are drawn on empirical arguments, assessment of State practice, and therefore are not deduced merely from preconceived ideas or wishful thinking of academics.[5]

2 See WRANGE, Pål. The Crime of Aggression, Domestic Prosecutions and Complementarity. In KRESS, Claus, BARRIGA, Stefan (eds). The Crime of Aggression: A Commentary. Oxford: Oxford University Press, 2017, p. 704.

3 According to A. Cassese, international crimes result from the cumulative presence of the following elements: a) violation of rules of customary international law; b) protection of universally shared values; c) availability of universal jurisdiction; and d) inapplicability of functional immunity. See CASSESE, Antonio, GAETA, Paola et al. Cassese's International Criminal Law. 3rd edition. Oxford: Oxford University Press, 2013, pp. 20–21.

4 Wrange, P., supra, p. 723.

5 The reference to preconceived ideas deals with the traditional question concerning the creation of customary international law. The possibilities are twofold here: a) deductive (value-based) approach, which is perspective, it does not look back, it is based on emerging values and interests which were considered only insufficiently in the pre-existing legal balance, it does not necessarily require a consistent pattern of previous practice; b) inductive approach, which is traditional method based on assumption that to determine the

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2 Some Contemporary Challenges Concerning Domestic Prosecution of the Crime of Aggression

2.1 Jurisdictional Immunity – pars in parem non habet iurisdictionem

The first challenge concerning the domestic prosecution of the crime of aggression before domestic courts, jurisdictional immunity, is very dramatic, as it has potential to negate domestic jurisdiction over this crime as such, except for the jurisdiction of the aggressor State. Jurisdictional immunity protects a State and its property from the jurisdiction of the courts of another State and refers to "*a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the municipal court of one State from adjudicating the disputes of another State.*" [6] Here, the dispute at stake would be an act of aggression by another State, which is the definitional feature of the crime of aggression.

It was exactly this inter-connection between the crime of aggression and the act of aggression, i.e., the link between crime under international law and conduct of the State, which led the ILC to conclude that:

> An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parent imperium non habet.* Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.[7]

existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris). See FAIX, Martin, SVAČEK, Ondřej. International Law on the Use of Force: Need for Methodological Debate. Czech Yearbook of Public and Private International Law, 2018, vol. 9, p. 104. The article is built on an inductive approach which conforms with the practice of the International Court of Justice (ICJ) and the International Law Commission (ILC). The most explicit stipulation rejecting the deductive approach can be found in the judgment rendered in the Gulf of Maine case (§ 111), where the ICJ ruled that "presence of customary rules can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas."

The reference to the wishful thinking of academics is inspired by the following text: DANIEL, Kobina Egyir. A Jus Cogens Human Rights Exception to Head of State Immunity: Fact, Fiction, or Wishful Thinking? In TLADI, Dire (ed). Peremptory Norms of General International Law (Jus Cogens). Leiden, Boston: BRILL, 2021, p. 740. This reference is probably an allusion to work of R. O'Keefe (see infra).

6 FOX, Hazel. The Law of State Immunity. 2nd edition. Oxford: Oxford University Press, 2008, p. 1.

7 ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentar-

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As dramatic as it might seem at first glance, this objection is quite easy to rebut. The ILC itself stressed that determination of State conduct would be merely of a preliminary character, i.e., this conclusion would have no direct or immediate effect for the aggressor State. More importantly, domestic courts do the same and assess State conduct with respect to other categories of crimes under international law.[8] In relation to war crimes, they must establish the existence of a war nexus, meaning the crime was committed in the context of and in association with the armed conflict. In relation to crimes against humanity, domestic courts must identify a contextual element, meaning the crime was committed as part of widespread or systematic attack against any civilian population.[9]

These types of conclusions are no less intrusive then the determination that there is an act of aggression attributable to the aggressor State, as courts are asked to establish that State A resorted to armed force against State B (in situation of an international armed conflict), or that the attack in the contextual element of crimes against humanity was done pursuant to or in furtherance of a State (or eventually also organizational) policy to commit such attack [Article 7(2)(a) of the Rome Statute].

In relation to the Russian invasion of Ukraine, domestic courts would be in relatively comfortable position given the total lack of persuasiveness of Russian arguments justifying resort to armed force against Ukraine.[10] The case of the Russian aggression is a clear-cut example raising no serious doubts about legal qualification what would make domestic court's life significantly easier.[11] Last but not least, the jurisdictional trap might be overcome here by the usage of available international pronouncement or determination of the act of aggression by Russia against Ukraine.[12]

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ies, 1996, p. 30, § 14. The ILC confirmed this position in 2022 – see ILC, Draft articles on Immunity of State officials from foreign criminal jurisdiction with commentaries, 2022, p. 239, § 21 (Commentary and Draft Articles).

8 Wrange, P., supra, pp. 713–714.

9 Similar conclusion is presented by M. Scharf who opines that "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." See SCHARF, Michael P. Universal Jurisdiction and the Crime of Aggression. Harvard International Law Journal, 2012, vol. 53, no. 2, p 389.

10 For assessment of these arguments see HOFFMANN, Tamás. War or peace? International legal issues Concerning the use of force in Ukraine. Hungarian Journal of Legal Studies, 2022, vol. 63, issue 3, pp. 206–235.

11 It is possible to argue that instances of more "controversial" use of force, including grey zone examples, would be more challenging for domestic courts as they were called to assess whether particular act of aggression by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations – see e.g., Czech Penal Code (Section 405a) providing for domestic definition of the crime of aggression which generally reflect the main components of Article 8bis of the Rome Statute.

12 See General Assembly resolution, 2 March 2022, A/ES-11/L.1. According to the resolution,

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It seems that portraying crime of aggression as a crime that is not suitable for domestic prosecution (except of the aggressor State) due to jurisdictional immunity concerns is not entirely convincing and has rather political than legal implications. In that respect, the proposed principle of unity should be applicable here as an aspect excluding unjustified differences in treatment between categories of crimes under international law.

2.2 Immunity of State officials

It is obvious that immunities of State officials relate to and have an impact on the scope of jurisdiction. As the ICJ swiftly pointed out, there is a close relationship between jurisdiction and immunity since immunity from foreign criminal jurisdiction can only be understood *vis-à-vis* the exercise of criminal jurisdiction.[13]

2.2.1 Personal Immunity

Personal immunity represents a procedural obstacle for prosecution of "troika" members during their term of office provided by customary international law, which encompasses both public and private acts. Personal immunity is absolute in its nature and therefore is fully applicable in relation to crimes under international law what is confirmed, among else, by the referential *Yerodia* case rendered by the ICJ. The absolute character of personal immunity was called into question only in relation to prosecution before international criminal tribunals but is firmly rooted in State practice concerning prosecution at domestic a level.[14] This position remained unchanged even in the light of the ongoing French attempts to prosecute Bashar al-Assad for crimes against humanity committed in Syria.[15] Personal immunity creates a bar to domestic prosecution of a sitting head

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the UN General Assembly deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter.

13 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, I.C.J. Reports 2002, p. 19, § 46.

14 The issue of application of personal immunities at international level, which is not subject to the presented article, has been widely discussed elsewhere. See e.g., this author's critical contribution on the ICC's stance: SVAČEK, Ondřej. Al-Bashir and the ICC – Tag, Hide-and-Seek…or Rather Blind Man's Bluff? In ŠTURMA, Pavel (ed). The Rome Statute of the ICC at Its Twentieth Anniversary. Leiden, Boston: BRILL, 2019, pp. 177–190.

15 See the arrest warrant issued in November 2023 by the Paris Judicial Court (Tribunal Judiciaire de Paris), which charged Assad with using prohibited chemical weapons against civilians in the city of Douma and the Eastern Ghouta region in 2013, resulting in the deaths of over 1 000 people. See LALLA, Miranda. Vie for the Big Guy: Developing Practice of Déja-Vu? Opinio Juris. [online]. Posted 27 November 2023, available at: http://opiniojuris.org/2023/11/27/vie-for-the-big-guy-developing-practice-or-deja-vu/ [visited 9 December 2023]. M. Lalla reminds that in 2001, the French Court of Cassation ruled against an order by the Court of Appeal of Paris in relation to the Libyan head of State, Muammar Gaddafi, with explanation that the decision to recommend the investigation disregarded customary law on the immunity granted to foreign heads of State.

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of State, head of government, or minister of foreign affairs for any crime under international law, be it a war crime, crime against humanity, crime of genocide, or crime of aggression. The principle of unity works here perfectly once again.

2.2.2 Functional Immunity

The applicability of the international crime exception in relation to functional immunity nevertheless remains a much hotter topic. In 2017, during its work on the topic of Immunity of State officials from foreign criminal jurisdiction, the ILC adopted the text of Article 7 with the list of crimes under international law in respect of which functional immunity is not applicable. This list encompasses the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance.[16] This outcome was adopted only after voting, which is a rather unusual method for adoption of draft articles.[17] The ILC took into consideration opposing views of some (eight) members of the Commission who disagreed that this exception exists at all given the alleged lack or relevant State practice,[18] which explains the usage of not entirely straightforward language in the attached commentary. The ILC refers here to "*[a] discernible trend towards limiting the applicability of immunity from jurisdiction ratione materiae in respect of certain types of behaviour that constitute crimes under international law*"[19] rather than a clear pattern of pre-existing practice; it also considers "*that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method*",[20] what indicates that the law concerning an exception from the functional immunity is in a state of flux at best.

The uncertainty, which might sound surprisingly for everybody who was "weaned on" referential treatises on ICL, where the inapplicability of functional immunity in respect to crimes under international law is taken as granted,[21] is further instigated by the divide of opinions on the character of functional immunity. It is therefore an open question whether functional immunities affect substantial responsibility or merely act as a procedural obstacle in criminal procee-

16 The list does not include the crime of aggression (see subchapter 1.2.2.1).

17 The text was adopted with 21 votes in favor, eight votes against and one abstention. See BUREŠ, Pavel. Recent Development of International Law Commission Work on Immunity of State Officials from Foreign Criminal Jurisdiction. Polish Review of International and European Law, 2021, vol. 10, no. 2, pp. 63–78.

18 Commentary, pp. 234–236, § 12.

19 Ibid, p. 232, § 9.

20 Ibid, p. 234, § 11.

21 According to G. Werle and F. Jessberger, the principle of inapplicability of functional immunity as long as crimes under international law are at issue firmly anchored in customary international law (see WERLE, Gerhard, JESSBERGER, Florian. Principles of International Criminal Law. 4th edition. Oxford: Oxford University Press, 2020, p. 316–317). Very clear conclusion is also presented by Cassese (see Cassese, A. et al., supra, pp. 241–248).

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dings.[22] R. O'Keefe stresses that functional immunity is exclusively a procedural institute (and has nothing to do with a determination on merit).[23] On the other hand, it is quite common to describe immunity *ratione materiae* as a substantive defense that prevents any individual criminal responsibility from arising, which is closely related to the principle of irrelevance of official capacity.[24] The ILC's Special Rapporteur for the topic of immunities, C. E. Hernández, adopted a somewhat middle path: the rapporteur noticed that the mere procedural nature of immunity *ratione materiae* is difficult to support in absolute terms.[25] This would be in line with origins of ICL when the irrelevance of official capacity (as substantive defense) and the non-applicability of immunities were not systematically distinguished.[26]

Be it as it may, any conclusion concerning an exception from functional immunity in respect to crimes under international law must stem from the empirical argument, i.e., it must be supported by the (pre)existing State practice. In agreement with O'Keefe,

> it is crucial not to substitute the wishful thinking of various scholars, certain members of the ILC, and a handful of states for positive customary international law, which at present appears to continue to support the upholding of immunity ratione materiae in the face of allegations of internationally criminal conduct.[27]

The author of this article opines that any other arguments, mostly of systematic character, supporting inapplicability of functional immunity in relation to crimes under international law, e.g., the normative hierarchy between *ius cogens* (crimes under international law) and hierarchically lower rules on immunity, disqualification of crimes under international law as acts of State (acts committed in a public capacity) for which immunity may be invoked, or the ability of universal jurisdiction to override the principle that one State will not intervene in the internal affairs of another, are not decisive.[28] Simply put, a conclusion on the

22 Commentary, p. 236.

23 O'KEEFE, Roger. International Criminal Law. Oxford: Oxford University Press, 2015, p. 447.

24 Casssese, A. et al., supra, pp. 240, pp. 318–319. See also the opinion of the Appeals Chamber in the Blaškić case (IT-95-14-ARI08 bis, 29 October 1997, § 38): "Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity."

25 HARTIG, Annegret Lucia. The Crime of Aggression: The Fall of the Supreme International Crime? In SAYAPIN, Sergey et al (eds). International Conflict and Security Law: A Research Handbook. The Hague: T. M. C. Asser Press, 2022, p. 1130. See also Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, A/CN.4/701, § 150.

26 Ibid.

27 O'Keefe, R., supra, p. 459.

28 Daniel, K. E., supra, pp. 748, 750, 753. All these arguments have their own problems. Brief-

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inapplicability of functional immunity in relation to crimes under international law must stem from the thorough analysis of the (pre)existing State practice.

Fortunately, such analysis is already available. In the recent decision of the German Federal Court of Justice (Court) concerning the case of a former member of the Afghan army, the Court arrived to conclusion that the exception from functional immunity in relation to war crimes committed by low-ranking (subordinate) State officials exists based on an extensive analysis of the legal sources as well as a careful consideration of the judicial decisions on the question.[29] The Court's methodology is very sound.

Firstly, it refers to post-conflict case law, starting with prosecution of WW2 criminals before domestic courts of Poland, France, the United Kingdom, the Netherlands, Norway, China, or the United States.[30] Then, it continues with examples of the prosecution of crimes committed in the former Yugoslavia,[31] and the present-day cases of the prosecution of former members of the Iraqi Army before the European courts.[32] The Court considers also Article 7 of the Charter of the International Military Tribunal, which – despite the critique by opponents that it only concerns international proceedings – is a precedent that guided courts in their effort to prosecute crimes under international law domestically.[33] The same holds true with reference to the ICTY's dictum from the *Blaškić* case that those responsible for such crimes cannot invoke (functional) immunity from *national* or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.[34]

The Court then continues with an enumeration of extensive domestic judicial practice and proves that national courts have on many occasions seen no obsta-

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ly, there is cogency in an argument, confirmed even by the ICJ, that ius cogens and immunity does not operate in same spheres and therefore cannot get into conflict at all; claim that crimes under international law are acts not committed in public capacity excludes responsibility of State and neglects the fact that these crimes are very often committed owing to abuse of sources and capacities of particular State function; finally, despite close connection between immunity and jurisdiction, these concepts are separated and must be treated in isolation.

29 Federal Court of Justice, Judgment of 28 January 2021, 3 StR 564/19 (Judgment).

30 Ibid, § 20. The Court refers to the UNWCC's Law Reports of Trials of War Criminals.

31 Ibid, § 21.

32 Ibid, § 22.

33 See EPIK, Aziz. No Functional Immunity for Crimes under International Law before Foreign Domestic Courts. An Unequivocal Message from the German Federal Court of Justice. Journal of International Criminal Justice, 2021, vol. 19, no. 5, p. 1274. As explained by Cassese, "in Nuremberg the principle of irrelevance of having acted in an official capacity was asserted as the necessary postulate for assertion of personal criminal liability for serious violations of international law amounting to international crimes." See Cassese, A. et al., supra, p. 247. Judgment, § 24.

34 Ibid, § 25.

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cle in deciding on crimes under international law.[35] Subsequently, it considers the ongoing work of the ILC stating that the project has not yet been completed, nevertheless stressing it does not alter the general rule of customary international law evidenced by standard practice and conviction that functional immunity is not applicable with regards to crimes under international law.[36] Last but not least, the Court refers to vast academic literature denying functional immunity for crimes under international law,[37] and distinguishes the cases of functional immunity from cases dealing with personal immunity,[38] or jurisdictional immunity of the State in civil proceedings.[39]

To sum up, given the number of precedents produced during the long period of time (already starting in 1945), the non-applicability of functional immunity for crimes under international law is currently justifiable as either being fully consistent with customary international law or at minimum contributing to a progressive legal development that has already gained very strong support in State practice.[40]

This conclusion should not be read in a limited fashion despite the relatively narrow focus of the Court, which explicitly considered the applicability of functional immunity only in relation to war crimes committed by subordinate State officials. The author of this article fails to see, why these conclusions should not have validity and relevance also with respect to the remaining categories of crimes under international law (see infra subchapter 1.2.2.1) and higher or even senior State officials.

At the same time, the precedential value of practice cited in the Court's judgment is not diminished by the fact, that in most of these cases the home State did not invoke functional immunity.[41] The opposing view, attributing precedential value only to cases where the home State invoked the functional immunity, respectively the view that "*non-invocation* [of functional immunity] *represents more of a waiver by the State entitled to invoke it than affirmation of an international crimes exception to functional immunity*",[42] is not persuasive and produces rather absurd results. It is built on the same "logic" as an argument that the victim State may exercise its inherent right to self-defense only if the aggressor State expressly proclaims it undertook the armed attack which is simply nonsense. The stance that what counts is only the case where functional immunity was

35 Ibid, §§ 26–34.
36 Ibid, §§ 35–37.
37 Ibid, § 38.
38 Ibid, § 40.
39 Ibid, §§ 41–43.
40 For similar conclusion see Dutch Advisory Committee on Public International Law, Advisory report no. 40 on challenges in prosecuting the crime of aggression, 12 September 2022, p. 12.
41 Commentary, p. 235, footnote 1015.
42 Daniel, K. E., supra, p. 779.

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expressly invoked, because the silence represents the (implicit) waiver of immunity, is also hardly compatible with a requirement that a waiver of right (immunity) must be real and not fictitious, what is reflected in Article 12 of the Draft Articles which requires that the waiver of immunity must always be express and in writing. It is therefore more logical to argue that States do not protest and do not invoke functional immunity, not because they implicitly strip their officials of functional immunity, but because they are aware that this immunity is not a bar for prosecution of crimes under international law at the domestic level and any objection in that respect would be just meaningless. Moreover, the question of functional immunity is considered in every criminal proceeding, even if it is not expressly invoked.[43] This conclusion is derived from the obligation of all prosecuting authorities to consider the jurisdictional framework *ex officio* as a legal question at every stage of the criminal proceedings.[44]

2.2.2.1 Functional Immunity in Relation to the Crime of Aggression

Finally, the question remains, whether the previous conclusion on the irrelevance of functional immunity in relation to crimes under international law also encompasses the crime of aggression? It has already been mentioned that the ILC excluded the crime of aggression from the list, which was entirely deliberate choice.

> [The ILC] took this decision in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of crime, given that it constitutes a crime of leaders.[45]

These reasons are not persuasive (the first one refers to the jurisdictional immunity whose relevance has already been rejected in the previous part of this text; the second argument has no legal validity nor normative character at all as it touches "only" upon the politics), and it comes as no surprise that it was swiftly rejected by some members of the ILC and at the least part of academia.[46]

The most challenging objection against the inclusion of the crime of aggression into the list of exceptions concerns the alleged lack of direct State practice on the non-applicability of functional immunity with respect to the crime of

43 Judgment, § 12.

44 The same requirement is applicable in the Czech criminal procedure – see DRAŠTÍK, Antonín, FENYK, Jaroslav et al. Trestní řád. Komentář [Code of Criminal Procedure. A Commentary]. Praha: Wolters Kluwer, 2017, p. 98.

45 Commentary, p. 239, § 21.

46 TLADI, Dire. The International Law Commission's recent work on exceptions to immunity: Charting the course for a brave new world in international law? Leiden Journal of International Law, 2019, vol. 32, no. 1, p. 180.

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aggression.[47] Still, the practice – in the opinion of the author is sufficient and extensive – might be drawn from domestic legislation criminalizing the aggression.[48] As pointed out by C. McDougall, there are 74 States criminalizing the crime of aggression at the domestic level, the overwhelming majority of them in circumstances where they are victim States.[49] Having in mind this particular issue deserves more detailed research, it might be argued that States did legislate on the crime of aggression with the aim not only to criminalize conduct of its own nationals, but also the conduct of foreign nationals (State officials) who participated in the act of aggression against this former State. It is not convincing that the victim State is barred from prosecuting the aggressor State's former leaders and may only hope the aggressor State will – naturally after the change of its political regime – step in. The crime of aggression in domestic legal orders is meaningful only if it provides protection both to the interests of other States or the international community (through the prosecution of the aggressor State's own nationals for the aggression against other States), and the State's own interest (through prosecution of foreign nationals – State officials). This aim would be difficult to achieve if the State officials of the aggressor State were excluded from the jurisdictional scope of the victim State.

These thoughts also deal with the fact that both the aggressor and victim State may exercise jurisdiction based on the territorial principle of jurisdiction.[50] If one accepts that the victim State's territorial jurisdiction is limited only to its own nationals, it practically disappears and has no real meaning. Finally, this interpretation of domestic regulation concerning the crime of aggression cannot be simply rejected by the argument that functional immunity has nothing to do with substantive criminal law reiterating that mere procedural nature of functional immunity is difficult to support in absolute terms.

Moreover, the Russian invasion into Ukraine might have a potentially catalyzing effect and induce more States to express their support towards the inclusion of the crime of aggression on the list. It remains to be seen what they will say in comments and observations to the Draft Articles adopted in the first reading (these comments should have been presented by 1 December 2023). This shift is already documented in the practice of the Czech Republic, which was originally, after the adoption of Article 7 of the Draft Articles, one of only three States who welcomed exclusion of the crime of aggression from the list, explaining that

47 Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, A/CN.4/701, § 222. For the overview of available judicial practice see Hartig, A. L., supra, p. 1131.

48 According to Conclusion 6(2) of the Draft conclusions on identification of customary international law, legislative acts represent form of State practice.

49 MCDOUGALL, Carrie. The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine. Journal of Conflict and Security Law, 2023, vol. 28, no. 2, p. 219.

50 MCDOUGALL, Carrie. The Crime of Aggression under the Rome Statute of the International Criminal Court. 2nd edition. Cambridge: Cambridge University Press, 2021, p. 378.

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aggression might be prosecuted only before international courts or courts of the aggressor State.[51] The original stance of the Czech Republic therefore reflected position of the ILC articulating the jurisdictional immunity of States. Nevertheless, times they are changing. In responses to the first reading of the Draft Articles, it suggested the Commission should seriously reconsider the issue and include the crime of aggression to the list of Article 7.[52]

Given the fact that there are no cogent reasons why the crime of aggression should be excluded from the list of exceptions to functional immunity – especially considering that domestic regulation on the crime of aggression might be interpreted in the manner that encompasses also foreign State nationals – the principle of unity might be used again.

2.3 Universal Jurisdiction

The majority of texts dealing with the availability of universal jurisdiction in relation to the crime of aggression uses mantra that exercise of universal jurisdiction in relation to this crime is *controversial* or *doubtful*.[53] The author of this article interprets this academic jargon to have only one valid meaning, i.e., that universal jurisdiction is simply not applicable in relation to the crime of aggression. Unlike with functional immunity, there is no strong momentum in State practice, that would rebut this conclusion. As pointed out by McDougall, only 18 States accept universal jurisdiction in their domestic legal order (penal regulations) over the crime of aggression which is barely enough for an assertion that there exists general State practice forming basis of customary international law in this area.[54] Therefore, the proposed principle of unity is inapplicable: despite the widely shared opinion that war crimes, crimes against humanity, and the crime of genocide are subject to universal jurisdiction, State practice does not support a similar conclusion in relation to the crime of aggression.

It is therefore quite challenging to explain the position of those States who accept universal jurisdiction over the crime of aggression. How their position conforms to international law? If the conclusion, derived from evaluation of existing State practice, is that international law does not authorize States to treat

51 Statement at 72nd Session of the General Assembly, Agenda Item 81, Report of the International Law Commission, 26 October 2017, p. 4. See Hartig, A. L., supra, p. 1131.

52 Comments of the Czech Republic on the International Law Commission's draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on first reading, 2023.

53 See e.g., Werle, G., Jessberger, F., supra, p. 97. CRYER, R. et al. An Introduction to International Criminal Law and Procedure. 3rd edition. Cambridge: Cambridge University Press, 2014, p. 57. McDougall, C., supra 50, p. 384. VAN SCHAACK, Beth. Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression. Journal of International Criminal Justice, 2012, vol. 10, no. 1, p. 144.

54 McDougall, C., supra 49, p. 214. Czech Republic does not exercise universal jurisdiction over the crime of aggression (see Section 8 of the Criminal Code).

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aggression as criminal act based on universality is taken as granted, does it mean that its prescription in criminal legislation, and its eventual application based on the principle of universality in a particular case is simply an international wrongful act? Does it mean that the Netherlands, Estonia, Latvia, or Poland, to give at least some examples, by prescribing crime of aggression in its domestic regulation on the universality basis[55] breaches international law? If yes, the same must hold even more true with respect to Lithuania who went one step further and articulated its prescriptive jurisdiction over crime of aggression (Article 110 of Criminal Code) in the investigation of Russia's criminal act of aggression against Ukraine (rightly on the universality basis).[56]

The international legal assessment of this (limited) practice produces only mixed results. There are four possibilities how to interpret it (and eventually defend its legality):

(1) *Lotus formula approach*. States might argue that approach to exercise of domestic jurisdiction in respect to any case which relates to acts which have taken place abroad corresponds to formula provided in the *Lotus* case rendered by the Permanent Court of International Justice in 1927. According to this stance, States may exercise domestic jurisdiction as they see fit, unless there is a prohibitive rule to the contrary (what prohibitive rule is certainly not existing in international law).[57] The problem behind this approach is that the Lotus formula has been widely criticized as obsolete or even an incorrect interpretation of international law. In his analysis of State practice, C. Ryngaert persuasively proves that under customary international law, States are not authorized to exercise their jurisdiction, unless they can rely on such permissive principles such as the territoriality, personality, protective, and universality principles.[58] It seems that the practice of States, formative of customary international law, confirms the completely opposite position than the one articulated in the *Lotus* case.

(2) *Full legality approach*. It is still possible to argue that universal jurisdiction applies in relation to all categories of crimes under international law, including the crime of aggression. This position would correspond to Scharf's analysis of customary international law with initial presumption "*that the Nuremberg trial*

55 See Article 8b of the Dutch International Crimes Act. The Netherlands exercises secondary universal jurisdiction over the crime of aggression. This means that either the suspect or the victim of this crime has Dutch nationality, or that the suspect is on Dutch territory. See EUROJUST. The crime of aggression in the national laws of EU Member States, Genocide Network Observer States and Ukraine. Genocide Network Paper. [online]. Published in October 2023, available at: https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-crime-of-aggression-national-laws.pdf [visited 9 December 2023].

56 HELLER, Kevin Jon. Options for Prosecuting Russian Aggression against Ukraine: A Critical Analysis. Journal of Genocide Research, 2023, p. 22.

57 PCIJ, SS Lotus, PCIJ Reports, Series A, No 10 (1927), pp. 18–19.

58 RYNGAERT, Cedric. Jurisdiction in International Law. 2nd edition. Oxford: Oxford University Press, 2015, p. 29.

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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."[59] Fortunately or not, this position does not have wide support both in theory and practice of international law.[60]

(3) *Justified illegality approach*. States might eventually assert that exercise of universal jurisdiction in relation to the crime of aggression is illegal but justified by individual or collective self-defense as the circumstance precluding wrongfulness of the act comprising of the authorization of prescriptive jurisdiction based on universality. It means that an aggressor State cannot require the full respect of its sovereign rights *vis-à-vis* its act of aggression and must stand in interference into these rights through exercise of universal jurisdiction over the crime of aggression.[61] The argument would follow that universal jurisdiction over the crime of aggression might be said to be related to breach of Article 2(4) of the UN Charter and corresponding customary international law on the prohibition of the use of force.

The inherent problem of this approach nevertheless lies in the fact that a State who exercises universal jurisdiction under the heading of self-defense must firstly accept that its own act is illegal which might eventually be politically inadmissible. Secondly, even if States were prepared to accept this qualification, they would be obliged to comply with all conditions for the lawful exercise of self-defense. Especially troubling would be the fulfilment of *ratione temporis* elements which broadly speaking dictate that once the armed attack is over, any defensive response must also be stopped.[62] According to J. A. Green, "*when the measures taken either by the Security Council, the victim state, or both have suitably resolved the situation, then any individual self-defence action must end.*"[63] It would be possible to argue that the post-conflict situation has not been *suitably resolved* – and therefore it would be possible to continue with prosecution of the crime of aggression based on universality – until settlement of territorial claims.[64] The mandate to exercise self-defense might therefore continue even after cessation of the armed attack by the aggressor State.[65] If for example the victim State would

59 Scharf, M. P., supra, p. 388.

60 See supra, footnote 53.

61 ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, p. 74, § 2. According to the ILC, self-defense may justify non-performance of certain obligations other than that under Article 2(4) of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. The idea was originally proposed as a possible legal basis for removal of immunity – see CORTEN, Olivier, KOUTROULIS, Vaios. Tribunal for the crime of aggression against Ukraine – a legal assessment. Brussels, EU, 2022, p. 29.

62 GREEN, James A. The ratione temporis elements of self-defense. Journal on the Use of Force and International Law, 2015, vol. 2, no. 1, p. 111.

63 Ibid, p. 113.

64 Ibid.

65 The requirements of the victim State might be even broader and include reparation for war damages, or repatriation of population transferred to territory of the aggressor State.

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seek to restore *status quo ante bellum*, any prosecution of the crime of aggression by the third State would remain intact. The mandate of such third States would nevertheless cease at the moment, when the victim State reaches settlement of territorial claims that satisfies its requirements. As a consequence, any ongoing prosecution for the crime of aggression based on universality must have been stopped at that moment.

(4) *Liberal legality approach*. From the reasons explained in the previous paragraph, it seems that reference to self-defense and admission that exercise of universal jurisdiction in the aggression cases is illegal is quite impractical. Still, the third States would retain the possibility to admit that their interpretation of customary international law concerning the exercise of universal jurisdiction over the crime of aggression is liberal. The problem, of course, is identifying the meaning of the *liberal approach* to interpretation of international law. The point is that States would not argue – unlike under the full legality approach – that there is a strong precedent in place they might rely on. Rather, they would stress the importance of development of international law in this field.[66]

The liberal approach would coincide with the deductive (value-based) approach on creation of customary international law described in the introductory part of this text. Interestingly, it has its precedent in the history of international criminal law, even (!) in relation to the principle of universality. In the *Eichmann* case, the Israeli Supreme Court affirmed Eichmann's conviction for crimes against humanity, war crimes, and genocide and justified Israel's assertion of jurisdiction saying that

> 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.[67]

66 This approach can be found in the report of the Dutch Advisory Committee on Public International Law on challenges in prosecuting the crime of aggression. See Advisory report no. 40, 12 September 2022, pp. 8–9. The Committee concluded that "a customary law norm that permits domestic jurisdiction over aggression in various scenarios may crystallise. The CAVV views such a development [that the crime of aggression can be prosecuted by States other than the aggressor State] as understandable, because it would ensure that the exercise of jurisdiction is aligned for all international crimes, which, like aggression, have a marked political dimension. The Netherlands can help to promote acceptance of this development, notably by (i) confirming its position, as currently codified in the International Crimes Act, regarding the possibility of exercising different forms of jurisdiction (including universality) over the crime of aggression."

67 Attorney General of the Government of Israel v Eichmann, Judgement of the Supreme Court of Israel, 29 May 1962.

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It means that the Supreme Court proposed a liberal interpretation of Article VI of the Genocide Convention (which entered into force just 10 years before Eichmann's conviction), which provides only for a mandatory territorial head of jurisdiction in relation to the crime of genocide, arguing that in meantime after entry into force of the Genocide Convention, a discrete international regulation of customary character providing a permissive a universal head of jurisdiction had evolved. The Israeli court came to this conclusion even though a number of precedents and cases of prosecution of *génocider* at domestic level between 1951–1961 were equivalent to zero.[68] The same liberal approach was adopted also by the ICC in the Al-Bashir saga; its Appeals Chamber's decision rendered in 2019 relying on customary international law as the legal basis for the removal of personal immunities of the sitting head of the third State may be accepted – given the lack of persuasive precedents confirming the adopted position – only and rightly – if the liberal (deductive) approach to the creation of customary international law is employed.

It has already been stressed that a deductive approach to the formation of customary international law has its limits. Among else, it should not be forgotten that the ICJ expressly rejected it in its case law.[69] It seems that the exercise of the universal jurisdiction over the crime of aggression should be applied only with great caution and definitively not as self-evident.

3 Conclusion

The article analyzed pitfalls and challenges concerning prosecution of the crime of aggression at a domestic level. It focused on the relevance of jurisdictional immunity (the principle *pars in parem non habet iurisdictionem*), position of immunity of State officials, both personal (*ratione personae*) and material (*ratione materiae*), and finally also on availability of universal jurisdiction in relation to the crime of aggression. It concluded that jurisdictional immunity does not pose a legal bar for the prosecution of the crime of aggression at a domestic level, despite the obvious political implications and potential to inflict destructive consequences to interstate relations. With respect to immunity of State officials, it provided that the principle of unity is applicable, meaning that the crime of aggression is being treated in the same fashion as the remaining categories of crimes under international law. It concluded that there exists a firmly rooted rule of customary international law that prevents the prosecution of sitting heads of state, heads of government, and ministers of foreign affairs for crimes under international law and defended the stance on the inapplicability of functional immunity in relation to all crimes under international law, also including the

68 See SCHABAS, William. Genocide and International Law. UN Audiovisual Library of International Law. [online]. Available at: https://legal.un.org/avl/ls/Schabas_CLP.html [visited 9 December 2023].

69 See supra, footnote 5.

crime of aggression. Finally, concerning the application of the universality principle, the article explained that – at the maximum – this head of jurisdiction is available only if a liberal (deductive) approach to creation of customary international law is accepted.

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