

# Prosecuting Aggression Domestically while Respecting the Principle of ‘Sovereign Equality’ – A Scottish Model

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## Abstract

Options or approaches for dealing with the problem of respecting the principle of ‘sovereign equality’ whilst conducting a domestic prosecution of an individual for participation in the commission of a crime of aggression, where the ‘prosecuting state’ is not itself also the state accused of committing the associated ‘state act’ of aggression. Followed by an examination of the specific issues raised in the model case of domestic statutory incorporation in Scotland, a process with which the author is currently engaged.

**Keywords:** aggression, crime of, Rome Statute, International Criminal Court, national implementation, domestic incorporation, universal jurisdiction, Scotland, sovereign equality, *Par in Parem Imperium non Habet*, non-justiciability, legal fiction

## 1. Outline

I shall begin my examination of this topic with a review of the broad based and generic principles, as derived from both international law sources and then thereafter from recent English case law precedent applicable here in the UK. However, my intention is then to apply these principles to the specific and practical example case of the domestic incorporation of the “crime of aggression”, as now defined by article 8bis (see below) of the Rome Statute (the “Rome Statute”) for the establishment of an International Criminal Court (“ICC”)(1998) into the ICC (Scotland) Act 2001, by amendment thereof by the Scottish Parliament. This is not merely because I feel it is important to anchor, what might otherwise be in some danger of becoming an overly esoteric and theoretical discourse, into the bedrock of a practical application; but also and more especially, because I am in point of fact currently engaged in the exercise of advising the Scottish Government on this topic with respect to measures for achieving this very act of legislative incorporation.<sup>1</sup> In so doing I’ll give some analysis of several of the predictable legislative issues and jurisdictional impediments which can be foreseen, but concentrating on the main topic of achieving consistency with the domestic common law and international customary law principle of ‘Sovereign Equality’.

## 2. Introduction

The “crime of aggression”, as set forth in both international customary and treaty law, has had a long and complex history of diplomatic and judicial evolution since, at least, the Treaty (Pact) of Paris in 1929<sup>2</sup>, through to the post World War II International Military War Crimes Tribunal (“IMWCT”) held in Nuremberg (1945-6) and its subsequent ‘sister’ tribunal for the Far East theatre of War in Tokyo. This was followed by years of interminable negotiations and reports in the annals of the United Nations, in particular in the work of the International Law Commission (“ILC”), and also of an *Ad Hoc* Committee culminating in all too rare resolutions<sup>3</sup>. Up to the present day where international agreement on a precise definition, for the purposes of the exercise of jurisdiction by the ICC, in respect of the prosecution of an individual indictee accused of a personal

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<sup>2</sup> Prior to this even at the end of the First World War, by way of further example, Art.227 of the Treaty of Versailles provided that “*The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.*”

<sup>3</sup> The notable and arguably singular success being Resolution 3314 of the XXIXth UN General Assembly (1974) in the Annex to which a Definition of the State Act (re Aggression) was adopted, the principal practical purpose of which, however, was merely to serve as an advisory text for the advice and assistance of the Security Council, when in the exercise of Chapter VII powers by them, but who in the event, have never even so much as made any further textual reference to it in any subsequent ‘Situation Resolutions’ of their own.

relevant participation in the commission of such a crime, was adopted, at the first review conference of the Rome Statute, held in Kampala, only as recently as June 2010. That definition is now to be found at a new article 8*bis*, as inserted into the Rome Statute, as follows:

**“ARTICLE 8 *bis***

**Crime of aggression**

1. For the purpose of this Statute, “crime of aggression” means the 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.
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
  - 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 weapons 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.”

As a fairly rudimentary examination of the structure of this definition reveals, it is a *sine qua non* of any practical approach to the determination of the issue, as to whether an individual natural human being has been a culpable participant in the commission of this crime, to establish whether or not there has, as it were in the first place, been an actual ‘state act’ of aggression, as committed by the forces of the state, through which that individual is accused of having acted in a ‘leadership capacity’<sup>4</sup>. Terminologically, and following the language now of this new definition, hereinafter the ‘individual conduct’ crime element (as under §1 above) will hereafter be termed “crime of aggression”, whilst the ‘State Act element’ (as under §2 above) will hereafter be termed “act of aggression”.

As a consequence, therefore, there is an unavoidable need, whenever faced with the task of prosecuting an individual for a crime of aggression, for the tribunal forum, whether constituted at the national or international level, to also establish, even potentially as a pre-condition, whether there has first been an act of aggression committed. Inevitably then, and certainly wherever this does in fact occur at a national or domestic tribunal level, it is this element of the prosecutorial trial process which then fully engages the issue of the application of the principle or doctrine of the so-called “sovereign equality” of states, often referred to by the maxim *Par in Parem Imperium non Habet*, which loosely translated means no more than ‘an equal has no power over an equal’. An effect of which it to say that the domestic judicial institutions (i.e. courts) of one state, ought not to adjudicate upon, yet alone sit in judgment over, the legality or otherwise ‘lawfulness’ of the official actions of another state, for to do so would be an affront to the dignity and equality which should be afforded to the recognition of the

<sup>4</sup> Meaning thereby was “in a position effectively to exercise control over or to direct the political or military action” of the State concerned (as per §1 of the art.8*bis* definition above)

separate but equal sovereign status of that other state. It is sometimes said that this ‘principle’ is a feature of the broader doctrine whereby nation states afford each other a wider margin of discretion to each other’s sovereign acts, because it is in the common interests of the community of nations to so act, pursuant to the application of the general notion of the ‘Comity of Nations’.

When applied to the case of the crime of aggression, however, I hazard to suggest that there are in effect two distinguishable schools of thought as to the applicability of this principle, and thus, as to whether there is then in point of fact any true ‘conflict of laws’ situation which arises in the case of such a domestic prosecution. The “*erga omnes*” or ‘universal jurisdiction’ school, on the one hand, and the “*Par in Parem Imperium non Habet*” or ‘sovereign equality’ school, on the other.

The former holds that it is now recognised as a matter of well established customary international law (“CIL”) that the crime of aggression is such a serious and egregious breach of minimal standards of international conduct, that it has long attracted the status of *jus cogens* (or a peremptory norm of CIL) from which it is argued that it follows it also attracts the standard of universal application or ‘*erga omnes*’, and meaning thereby that it applies to all states equally and furthermore that it is in the mutual interest of all states equally to prevent and punish its commission. From this there then derives the next logical step, though a leap too far for some, that it is a crime which attracts, or certainly can attract, a so-called unconditional ‘universal jurisdiction’, meaning that any state is entitled to prosecute and punish those whom it finds to have been culpable of committing it, whenever and wherever in the world that was done. In particular, irrespective as to whether, the prosecuting state can establish any particular jurisdictional premise based in theories of territoriality (of the place where the crime occurred) or nationality (of the person or persons accused of committing it) as separately underpinning or justifying its exercise of jurisdiction in that regard.

The latter school holds to the contrary that, irrespective as to whether or not one regards ‘aggression’ as attracting the status of *jus cogens*, the important point to note is that, being guided by the accepted combined influence of *opinio juris* when coupled with states’ practice, the ‘universal practice’ (certainly since the end of the Second World War) has been for this crime to be prosecuted in, and only in, an international tribunal forum. Either, that constituted by reason of a true multi-lateral treaty settlement, such as putatively would be represented by the ICC itself as, if and when it ever exercises the jurisdiction now incorporated into its Statute at Kampala<sup>5</sup>; or equally, such as historically was represented by the IMWCT at Nuremberg. There the four constituting powers derived their *vires* from their status as ‘occupying’ powers and thus were able to assert a jurisdiction, with respect to crimes committed by German nationals but in European War Theatre territories, based on theories of both relevant territoriality and vicarious or ‘custodial’ or ‘paternal’ nationality, where they as occupying military powers enjoyed a ‘temporary’ jurisdiction, including judicially, over German nationals.

### 3. International Law Sources

#### 3.1 Universal Jurisdictional School

There seems to be little continuing dispute that the crime of aggression, as the modern equivalent or inheritor of the Nuremberg term ‘a crime against peace’ now enjoys a status as ‘*jus cogens*’ or peremptory norm of customary international law (“CIL”), and indeed there are few I think who would deny that it is also ‘*erga omnes*’ or applicable as against all states<sup>6</sup>. The relevant, though admittedly somewhat over-worn quote from IMWCT Nuremberg, but one which I think still bears reiteration and which so clearly established the view of the Tribunal, as to the fundamental or peremptory character of the crime, is of course, as follows:

“The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”<sup>7</sup>

<sup>5</sup> As to the agreed limits on the future exercise of jurisdiction by the Court itself over this crime see now at the new Article 15bis & 15ter also incorporated by amendment into the Statute at Kampala.

<sup>6</sup> Most especially since the judgement of the ICJ in *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v the United States) Judgement of the Court on the Merits [24 May 1980] ICJ Rep [1980] 3 : see esp. @ para.188 on the Court’s judgement as to CIL effect of Art2(4) of the UN Charter, setting out the corollary prohibition on 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*”

<sup>7</sup> Judgment of 1 October 1946, *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November-1 October 1946, Vol. 1, p. 186).

On December 11, 1946, the United Nations General Assembly unanimously affirmed the "*principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal*,"<sup>8</sup> thereby "*codifying the jurisdictional right of all [s]tates to prosecute the offenses addressed by the IMT [Nuremberg Tribunal]*,"<sup>9</sup> namely war crimes, crimes against humanity, and the crime of aggression *ex nom.* "crime against peace". 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.<sup>10</sup> The area in dispute, however, continues to be with respect to the further contention that it is a crime which attracts a true or unconditional 'universal jurisdiction' as with the case of "war crimes" or "crimes against humanity", although there are undoubtedly many who maintain that by now all of the principal 'Nuremberg Crimes' ought to be regarded as attracting the status of 'universal jurisdiction'.

Certainly, when various leading international academic and judicial experts convened in conference in Princeton University in January 2001 to set out agreed principles on the application of the doctrine of universal jurisdiction to certain core crimes within the body of criminal CIL<sup>11</sup> they included the Nuremberg "*crime against peace*" within their list of crimes to be so treated<sup>12</sup>. However, this has not been without adverse criticism<sup>13</sup> and even those who cite these principles as supportive of a universal jurisdiction for aggression<sup>14</sup> do so whilst accepting that, with respect to this particular crime, these 'Principles' were formulated at a point in time when there was little to point to by way of a workable agreed definition, which most would concede would surely be a pre-requisite to any practical universal jurisdictional application. Or else they were doubtful, prior to Kampala, as to whether even the ICC would be permitted to prosecute for aggression, absent any express consent by the UN Security Council. Whether this situation is now transformed by reason of the actual settlement reached at Kampala, as set out in article 8*bis* of the Rome Statute (*as above*), is yet to be fully clarified<sup>15</sup>.

### 3.2 National Jurisdictional School

Article 8 of the UN International Law Commission's revised second draft Report on a "Code of Crimes against the Peace & Security of Mankind" (1996)<sup>16</sup> contrariwise takes a very clearly more restrictive view in the matter.

#### "Article 8 - Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 *..[Aggression]..* shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article."

The official 'Commentary' attached to this Article further sets out more fully the precise rationale of the ILC for providing here that the 'crime of aggression' should in future be triable only at the international tribunal level, with the sole exception of the case where the accused individual(s), are themselves nationals of the very

<sup>8</sup> G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946).

<sup>9</sup> See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, @ 834 (1988)

<sup>10</sup> See, e.g., Declaration on Territorial Asylum, G.A. Res. 2312, 22 U.N. GAOR Supp. No. 16, at 81, U.N. Doc. A/6716 (1967) ("states shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a war crime or crime against humanity"); United Nations Resolution on War Criminals, G.A. Res. 2712, 25 U.N. GAOR Supp. No. 28, at 78-79, U.N. Doc. A/8028 (1970). Although *Quare*: does the term "war crime" or the general principle include or exclude the crime of aggression.

<sup>11</sup> "*Princeton Principles on Universal Jurisdiction*", convened under the sponsorships and co-operation of the Woodrow Wilson School of Public and International Affairs, the International Commission of Jurists, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the Netherlands Institute of Human Rights.

<sup>12</sup> See *id.* @ Principle 2(1)(4) and Commentary @p.47 citing article 6(a) Nuremberg Charter (1945)

<sup>13</sup> 51 See S. Macedo, 'Commentary', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004) 26, at 30

<sup>14</sup> '*Does the World Need Knights Errant to Combat Enemies of All Mankind? Universal Jurisdiction, Connecting Links, and Civil Liability*', by Zachary Mills @ 66 *Washington and Lee Law Review* (2009) 1315, at 1322. See also G. Kirk McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. I (Kluwer, 2000), at 57-58.

<sup>15</sup> For instance compare Michael P. Scharf "*The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position*", 64 *Law & Contemp. Probs.* 67 (Winter 2001) @ p.85 with his more recent '*Universal Jurisdiction and the Crime of Aggression*', 53 *Harvard Journal of International Law* (forthcoming 2012)

<sup>16</sup> International Law Commission Report, 1996 : Chapter II "Draft Code of crimes Against the Peace and Security of Mankind" historically instrumental in bringing about the 1998 Rome Conference for the ICC.

[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1996\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1996_v2_p2_e.pdf)

prosecuting state itself. In brief this rationale relies on the effect of the 'sovereign equality' principle but adds the warning that "... *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.*"<sup>17</sup>

This precedent then undoubtedly played an important role in the force of the argument presented in the negotiations at Kampala by the delegation of the United States<sup>18</sup>, for the inclusion of at least one of the additional 'Understandings' which it wanted to see attached to the 'aggression resolution', precisely in order to 'condition or contextualise' the scope and application of the amendment to be incorporated thereby. In this regard two of the 'Understandings' annexed to the Kampala Resolution, were then of particular relevance. Understandings #4 & #5 in Annex III to Kampala Resolution, are as follows:-

**"Domestic jurisdiction over the crime of aggression"**

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. 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. "

The extent to which those participating in the US delegation actually believed that these 'understandings' would have effect, even way beyond their plain text construction, but by way of some more subtle implication or maybe even mere inference instead, is a matter of some debate. Take, for instance, the view of Prof. Beth van Schaak<sup>19</sup>, one of their number, as expressed in a recent article, as follows :

<sup>17</sup> "Commentary ....

(13) The second and third provisions of the present article comprise a separate jurisdictional regime for the crime of aggression set out in article 16. This jurisdictional regime provides for the exclusive jurisdiction of an international criminal court for the crime of aggression with the singular exception of the national jurisdiction of the State which has committed aggression over its own nationals.

....

(14) .... This principle of exclusive jurisdiction is the result of the unique character of the crime of aggression in the sense that the responsibility of an individual for participation in this crime is established by his participation in a sufficiently serious violation of the prohibition of certain conduct by States contained in Article 2, paragraph 4 of the United Nations Charter. The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. 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.

(15) The third provision of the present article recognizes a singular national court jurisdiction exception to the otherwise exclusive jurisdiction of an international criminal court under the second jurisdictional regime for the crime of aggression. The only State that could try an individual for the crime of aggression in its national courts under this provision is the State referred to in article 16, namely the State whose leaders participated in the act of aggression. This is the only State which could determine the responsibility of such a leader for the crime of aggression without being required to also consider the question of aggression by another State. Thus, the national courts of such a State could determine the responsibility of an individual for the crime of aggression under the present Code or under such relevant provisions of national criminal law as may be applicable. The determination of the responsibility of the leaders for their participation in the crime of aggression by the national courts of the State concerned may be essential to a process of national reconciliation. In addition, the exercise of national jurisdiction by a State with respect to the responsibility of its nationals for aggression would not have the same negative consequences for international relations or international peace and security as the exercise of national jurisdiction in the same respect. ....

Since the national court jurisdiction for the crime of aggression, as a limited exception to the otherwise exclusive jurisdiction of an international criminal court, is formulated in permissive rather than obligatory terms, there is no corresponding obligation for a State party to establish the jurisdiction of its national courts with respect to this crime under the present article. "

(emphasis by way of underlining added)

<sup>18</sup> Although the United States was not then and is not now a State Party to the Rome Statute, the negotiations at Kampala were made open to participation by all members of the United Nations, indeed to all states world-wide (one of whom the Cook Islands is a State Party to the Rome Statute though not itself a member state of the UN). This was done precisely in the interests of obtaining as broad based an international consensus as possible on the appropriate amendment of a Statute of such universal application and interest to the global community at large.

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“In two interpretive Understandings (4 and 5) contained in the resolution adopting the final amendments to the Statute, however, delegates both expressed a subtle preference that states parties not incorporate the crime of aggression into their domestic codes and insisted that the amendments create no legal obligation or authorization to do so.”<sup>20</sup>

With the greatest of respect to the learned Professor the subtlety of the preference she perceives in the effect or intent of these Understandings, frankly passes my understanding of them. As respects Understanding #4, as it states itself, it does nothing more than confirm the application of art.10 of the Rome Statute<sup>21</sup>, a general provision clarifying the limited interpretive scope of the Statute itself, to the effect of the Kampala Amendments as well.

As respects Understanding #5, in the first place the fact of the matter is that nowhere in the Rome Statute is there any obligation, either express or otherwise, for States Party to create any domestic jurisdiction incorporating any of the crimes, or more precisely criminal jurisdictions, thereby conferred on the ICC itself. It was instead a fundamental aspect of the agreement on the ‘complementarity principle’ agreed at Rome, that it was to be left to the States Parties to determine for themselves if, and if so to what extent, their internal or domestic criminal codes needed to be revised or updated to reflect that of the ICC as set out in the Statute. This would be done in the knowledge that, where that domestic jurisdiction failed in the event to match or at least ‘complement’ that of the ICC, then the provisions of art.17, on the admissibility of a case to the ICC instead, by reasons of the ‘inability’ of the State Party to prosecute domestically, could be thereby triggered. Accordingly, the fact that this Understanding clarifies that there is no such ‘obligation’ to similarly incorporate the crime of aggression domestically either is actually wholly otiose, as that was already the position with respect to the other existing ICC crimes in any event. A fundamental reason, I suggest, why the U.S. was able to achieve agreement to these largely irrelevant and insignificant “Understandings” in the first place.

Secondly, the reference to the expression “*with respect to an act of aggression committed by another State*” (emphasis added) means that, even in this limited sense in which this Understanding had effect, if any, it was itself further intentionally limited to reflect the ‘national jurisdictional’ exception, re domestic jurisdiction over the crime of aggression, as already noted above in relation to the Art.8 provisions of the ILC’s (1996) Draft Code. The notion that either, or both together, of these Understandings expresses instead any ‘preference’ against any domestic incorporation whatsoever, of the crime of aggression, even when limited to a national jurisdiction exception alone, I find is frankly simply unwarranted.

That said, however, in the end whilst I should surely want to live in world where the strident and compelling language of the Nuremberg Judgment on the character and nature of the crime of aggression, or rather “crime against peace” as the drafters of the Nuremberg Charter preferred to then express it, would by now have produced a corresponding international agreement on, at least an optional if not an obligatory application of, a ‘universal jurisdiction’ for the punishment of this ‘supreme crime’ in CIL; I am compelled instead to draw the conclusion that, as at present, alas this is not the current position under international law. Rather, I regretfully concur with the conclusion of Prof. Roger Clark<sup>22</sup> to the effect that “*It is very doubtful that under current customary law it can be asserted unequivocally that aggression “is” subject to universal jurisdiction*”<sup>23</sup>

#### 4. Common Law Sources and the Doctrine of ‘Non-Justiciability’

I now turn to examine what learning on this topic one can gain from, at least the more recent history of, English case law precedent in the area. In doing so, I will attempt to justify the conclusion that, whilst the prosecution on a charge of committing a crime of aggression, before a British criminal court, of someone in a former ‘leadership’ role in a foreign sovereign power, necessarily requires that court to inquire into and make a determination as to the commission of an ‘act of aggression’ as committed by that foreign power ; nonetheless, the factors identified in that case law would, perhaps somewhat surprisingly, tend to weigh heavily in favour of there being such a common law jurisdiction to do so.

Within the lexicon of the English common law the term which perhaps most closely describes the notion of the

<sup>20</sup> See ‘*Par in Parem Imperium Non Habet : Complementarity and the Crime of Aggression*’ J.I.C.J. 10<sup>th</sup> Anniversary Special Issue : Aggression – After Kampala (Mar 2012) p.133 @ 135.

<sup>21</sup> “*Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute*”

<sup>22</sup> Rutgers University School of Law, New Jersey and Legal Delegate for the State of Samoa to the ICC ASP Special Working Group on the Crime of Aggression.

<sup>23</sup> R.S. Clark, ‘*Complementarity and the Crime of Aggression*’, in C. Stahn and M.M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II (Cambridge University Press, 2011) Chpt.23 p.721, at 731.

inability, or perhaps rather ‘inappropriateness’, of the domestic courts of one state investigating into, and adjudicating upon, the official actions of another is that of “non-justiciability”. This somewhat ungainly term has perhaps also far wider and further application than only just in relation to the issues which concern this subject matter. However, it is clear that it applies equally as well to this, as perhaps to other grounds, for so-called non-justiciability or non-cognisability. I have come across both equally ungainly terms.

In *Buttes Gas & Oil Inc. versus Hammer & Oths.* [1982]<sup>24</sup> the issue arose out of a dispute between two competing Californian oil exploration companies, as to which had the valid and lawful right to explore for oil reserves off the coast of certain islands (Abu Musa) in the Persian Gulf. The Plaintiffs alleged certain slanderous assertions and aspersions had been made by the Defendants, to the effect that the Emir of Shajar, in the United Arab Emirates, had been bribed into making a false and unlawful Royal Decree extending the territorial control of his state over the waters in question. The Government of Iran subsequently asserted its own counter-claim to the rights in connection with the waters, in two successive diplomatic notices, and finally Her Majesty’s Government, acting as Trucial States agents for a third party, the Emirate of Umm al-Quwain, took action by naval forces to exert the separate rights of that Emir to substantially the same claim. It was essentially conceded that a resolution to the plaintiff’s action would unavoidably involve the British Courts in inquiring into and reaching, at least a preliminary determination, as to the validity and lawfulness of these competing territorial or rather littoral claims. In upholding the appeal, and ordering all proceedings to be stayed, Lord Wilberforce in the House held (@938 A-B) as follows :-

“It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are - to follow the Fifth Circuit Court of Appeals - no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man’s land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were “unlawful” under international law.”

This notion of the “no manageable standards” explanation then subsequently became something of a mantra to explain and justify the application of the doctrine to this area of non-adjudication on, or rather the non-justiciability of, the official acts of foreign states. However, when the matter came back before the House, in 2002, things had seemingly changed somewhat in spite of the facts of the case deriving again from the same old underlying cause, the desire for Persian Gulf oil.

In *Kuwait Airways Corp (KAC) versus Iraqi Airways Co. (IAC)* following the invasion and subsequent occupation of the Emirate of Kuwait by Iraq in August of 1990 the Iraqi Government directed the defendant IAC to fly ten of the claimant KAC’s commercial jet liner aircraft from Kuwait to Iraq. On 17 September the Iraqi Revolutionary Command Council passed Resolution 369, which purported to dissolve the claimant KAC and transfer all of its assets, including the aircraft, to the defendant. Thereafter the defendant treated the aircraft as its own, incorporating them into its own fleet and using them for its own flights. When the first Gulf War was over KAC brought an action in the British courts for damages in respect of the aircraft it had lost and others that were damaged etc. and for unlawful conversion of the whole fleet.

In the Commercial Court Mance J. (as he then was) gave judgment for KAC on the merits of the substantive claim. When IAC appealed to the Court of Appeal, Brooke L.J. giving the extensive judgment of that Court<sup>25</sup>, stretching to no less than 673 paragraphs, fully reviewed the existing case law authorities on the application of the principle of sovereign equality (see @ para. 317 et seq.) and concluded as follows :-

“ 317 In our judgment, these authorities indicate that English law is seeking to balance (at least) three separate insights as to the appropriate role of national courts when faced with reliance on foreign legislative or executive acts by way of defence to what might otherwise be a wrong for which those courts are called upon to provide a remedy.”

<sup>24</sup> *Buttes Gas and Oil Co. v Hammer (Nos. 2 & 3)* [1982] A.C. 888

<sup>25</sup> *Kuwait Airways Corporation v. Iraqi Airways Company (Nos 4 and 5)* (Court of Appeal) [2001] 3 W.L.R. 1117

And it is in relation to the first of these principles, or 'insights', where he makes observations which might be thought to be of particular relevance to the case where the state action invoked for the exceptional inquiry by the British courts, is no less than in relation to an allegation of a state act of aggression committed by it, as follows :-

318. First, there is the *prima facie* rule that a foreign sovereign is to be accorded that absolute authority which is vested in him to act within his own territory as a sovereign acts. This rule reflects concepts of both private and public international law as to territorial sovereignty. As such, we think that the rule is founded primarily on a view as to the comity of nations, rather than on concern as to giving offence to the foreign sovereign or as to the absence of judicial standards (see *Buck v Attorney-General* [1965] Ch 745 per Diplock LJ at p 770). We say this because, if the sovereign purports to act outside his territory, or even if he acts within it in a penal or discriminatory way and a claimant then seeks to found his claim on that sovereign act, the English court vindicates to itself the right in the first case not to recognise and in the second case not to enforce it.

This shows that embarrassment about sitting in judgment on the acts of a foreign sovereign is not *per se* the cause \*846 of judicial restraint in this context. Rather, each sovereign says to the other: 'We will respect your territorial sovereignty. But there can be no offence if we do not recognise your extra-territorial or exorbitant acts.' "

This, it is submitted, is then bound to be especially relevant as an exception to the general rule of non-justiciability where the case concerns an allegation of an act of international aggression, where the act concerned is both, of necessity, (a) not limited to conduct undertaken only within the territorial jurisdiction of the foreign state concerned but must involve, by definition, an extra-territorial act, and (b) is equally an exorbitant penal act of the most obvious character, indeed by definition a criminal act under *jus cogens* CIL.

Having lost in the Court of Appeal on the substantive issue IAC then appealed again this time to the House of Lords. In the leading opinion of the Committee, Lord Nicholls of Birkenhead, dismissing that appeal, and having reviewed the application of the earlier opinion of Lord Wilberforce in *Buttes Gas*<sup>26</sup>, then immediately went to say (@ para. 26 *et seq.*)<sup>27</sup> as follows :-

"26 This is not to say an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law. Lord Wilberforce himself accepted this in the *Buttes* case, at p 931d. Nor does the "non- \*1081 justiciable" principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the *Buttes* litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome not in doubt. That is the present case. "

<sup>26</sup> " 24. On behalf of IAC Mr Donaldson submitted that the public policy exception to the recognition of provisions of foreign law is limited to infringements of human rights. The allegation in the present action is breach of international law by Iraq. But breach of international law by a state is not, and should not be, a ground for refusing to recognise a foreign decree. An English court will not sit in judgment on the sovereign acts of a foreign government or state. It will not adjudicate upon the legality, validity or acceptability of such acts, either under domestic law or international law. For a court to do so would offend against the principle that the courts will not adjudicate upon the transactions of foreign sovereign states. This principle is not discretionary. It is inherent in the very nature of the judicial process: see *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888, 932. KAC's argument, this submission by IAC continued, invites the court to determine whether the invasion of Kuwait by Iraq, followed by the removal of the ten aircraft from Kuwait to Iraq and their transfer to IAC, was unlawful under international law. The courts below were wrong to accede to this invitation.

25. My Lords, this submission seeks to press the non-justiciability principle too far. Undoubtedly there may be cases, of which the *Buttes* case is an illustration, where the issues are such that the court has, in the words of Lord Wilberforce, at p 938, "no judicial or manageable standards by which to judge [the] issues":

"the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law."

This was Lord Wilberforce's conclusion regarding the important inter-state and other issues arising in that case: see his summary, at p 937. "

<sup>27</sup> *Kuwait Airways Corporation v. Iraqi Airways Company* (Nos 4 and 5) [2002] 2 AC 883



Finally, on the allied matter of the 'public policy' considerations raised by the issue as to whether or not the British Courts were bound to recognise, and even uphold, the legal effect of the Iraqi RCC Resolution, Lord Nicholls then had this to say almost immediately thereafter (see @ para. 29) as follows :-

"29 I have already noted that Iraq's invasion of Kuwait and seizure of its assets were a gross violation of established rules of international law of fundamental importance. A breach of international law of this seriousness is a matter of deep concern to the worldwide community of nations. This is evidenced by the urgency with which the UN Security Council considered this incident and by its successive resolutions. Such a fundamental breach of international law can properly cause the courts of this country to say that, like the confiscatory decree of the Nazi government of Germany in 1941, a law depriving those whose property has been plundered of the ownership of their property in favour of the aggressor's own citizens will not be enforced or recognised in proceedings in this country. Enforcement or recognition of this law would be manifestly contrary to the public policy of English law. For good measure, enforcement or recognition would also be contrary to this country's obligations under the UN Charter. Further, it would sit uneasily with the almost universal condemnation of Iraq's behaviour and with the military action, in which this country participated, taken against Iraq to compel its withdrawal from Kuwait."<sup>28</sup>

In the next case which came before the House, although only some four years later, Iraq and aggression yet again features centrally. As to whether the underlying causes were still related to the grasp for Persian Gulf Oil is a matter I must leave to the reader. In *Regina versus Jones & Milling et al.* [2006]<sup>29</sup> the issue of the domestic non-justiciability of the crime of aggression arose even more directly on point. A number of non-violent direct action peace protestors had taken action at the RAF Fairford airbase in Gloucestershire, trespassing onto the base with the intention of disabling certain of the USAF B-52 Bombers then temporarily stationed there. This occurred just prior to their subsequent deployment in the notorious "shock and awe" bombardment of Baghdad opening the Second Gulf War on 20 March 2003. They had sought, but had been denied, leave of their trial judge for permission to put before the jury a statutory law defence justification<sup>30</sup> based on their having used only such force as was reasonable in the circumstance to prevent a crime; to wit, the commission of the crime of aggression under international law, but this time as they honestly believed it was about to be committed on the State of Iraq, by the United States of America, through the vehicle of its B-52 bombers.

Lord Bingham of Cornhill, in dismissing their appeal, held (see @ para.30) as follows :-

" .... A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty's Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law. ....

In *Buttes*, at p 933, Lord Wilberforce cited with approval the words of Fuller CJ in the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897), 252:

*"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."*

<sup>28</sup> Lord Nicholls reference here to "the confiscatory decree of the Nazi government of Germany in 1941" was in reference to the facts in the matter of *Oppenheimer v Cattermole* [1976] A.C. 249

<sup>29</sup> *R v. Jones and Milling et al.* (2006) [2007] 1 A.C. 136

<sup>30</sup> S.3(1) Criminal Law Act, 1967 "a person may use such force as is reasonable in the circumstances in the prevention of crime ..."

I do not suggest that these rules admit of no exceptions: cases such as *Oppenheimer v Cattermole* [1976] AC 249 and *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 may fairly be seen as exceptions.<sup>31</sup>

With the passage of a further four years the time had come for the matter to be raised again, albeit this time only in the Court of Appeal, and in a much more firmly commercially based matrix of facts, although expressly alleging that the foreign state concerning had been complicit in committing a criminal act. In *Korea National Insurance v Allianz Global & Speciality AG (2008)*<sup>32</sup> a North Korean Airline (Air Koryo) had obtained insurance cover from a local North Korean Insurer, the Plaintiffs, who in their turn had then re-insured with the defendants. There was a helicopter accident involving a warehouse, and in a subsequent formal judgment Air Koryo were ordered to make payment to the injured party. Then following a further formal arbitration, which again occurred in a North Korean tribunal, the Plaintiffs were ordered to reimburse the airline. They in turn naturally then claimed that sum against the defendant's as re-insurers, but they refused to pay. The plaintiff then brought proceedings again, and this time pursuant to the express terms of their insurance contract, in North Korea and perhaps not overly surprisingly obtained judgment against the defendant. They then sought to enforce that judgment here in England.

In their defence *Allianz* claimed the judgment in North Korea was procured by a criminal fraud instigated or approved by the North Korean state itself; alternatively, the judgment was unenforceable on grounds of public policy in that the North Korean judiciary were part of, and not independent from, the entity of the North Korea state, which had itself instigated or approved of the fraudulent procurement of the judgment. The trial judge in the Commercial Court, applying *Buttes Gas & Oil*, ruled out the defence on the grounds that the issues involved were manifestly non-justiciable. Waller L.J. in the Court of Appeal when reversing that decision and upholding the appeal said (see @ para.30) as follows :-

“30. There is no general rule that if an allegation might embarrass a foreign sovereign it follows that that will also embarrass diplomatic relations with the United Kingdom and that thus such embarrassing issues are non-justiciable. Lord Wilberforce in *Buttes* was considering whether there exists in English Law a general principle that ‘the courts will not adjudicate upon the transactions of foreign sovereign states’ (p 931G). He came to the conclusion there is such a principle but it is noteworthy that his examples relate to sovereign acts done within the sovereign territory or situations in which the issue would impinge on international relations at state level. His ultimate conclusion on the facts of that case which he pointed out ‘would have included establishing that the actions at least of Sharjah, and it also appears Iran and of Her Majesty's government, were at some point unlawful’ and ‘an inquiry into the motives of the then ruler of Sharjah in making a decree’ was that ‘Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are ... no judicial or manageable standards by which to judge these issues ...’

31 Brooke LJ in *Kuwait* accepted that it was not easy to generalise about the application of the principle of non-justiciability but said:

‘Guidance, however, is to be found in such considerations as whether there are “judicial or manageable standards” by which to resolve the dispute, whether the court would be in “a judicial no-man's land”, or perhaps whether there would be embarrassment in our foreign relations, at any rate if that possibility was drawn to the court's attention by the executive. Sensitive issues involving diplomacy between states, or uncertain or controversial issues of international law, may be other examples of situations calling for judicial restraint.’

32 These statements give no support to the view that, where in a commercial context allegations are made against the state, not in relation to some sovereign act carried out in its own jurisdiction but

<sup>31</sup> The specific case law authorities which Lord Bingham cited as establishing that the judiciary would be “slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services” were *Chandler v Director of Public Prosecutions* [1964] AC 763, 791, 796; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398; *Lord Advocate's Reference No 1 of 2000* 2001 JC 143, para 60; *R (Marchiori) v The Environment Agency* [2002] EWCA Civ 03, [2002] EuLR 225, paras 38-40. And the further authorities which he cited as establishing that it would equally be “very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law” were *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 932; *J H Rayner (Mincing Lane) Limited v Department for Trade and Industry* [1990] 2 AC 418, 499; *Westland Helicopters Limited v Arab Organisation for Industrialisation* [1995] QB 282, 292; and *R (on the application of Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335, paras 38, 40.

<sup>32</sup> *Korea National Insurance v Allianz Global & Speciality AG* [2008] 2 C.L.C. 837

in relation to acts which affect the rights of a party under a commercial contract, that the court should exercise restraint to the extent of not being prepared to decide the same, at least without some indication from the executive that a decision will embarrass the diplomatic relations between the United Kingdom and that State. If a foreign state were an insured under an insurance contract the insurers cannot be precluded from alleging a fraudulent claim simply because that might embarrass the foreign state. It cannot be any different if a state entity makes the claim and it is asserted that both the entity and the state owner were involved in the fraud.”

Occasion for the pendulum to swing back again this time came even quicker. In *Al-Haq v the Foreign Secretary*<sup>33</sup> the following year (2009), an application for judicial review was brought before the Administrative Court by the Claimant, a Palestinian non-governmental human rights organisation. It sought a declaration to the effect that the UK Government, in failing to condemn the actions of the Israeli Forces of Occupation, particularly in the course of the Cast Lead Operation, during which the IDF had first bombed and then occupied substantial parts of the Gaza Strip and more especially in continuing to trade in arms with the State of Israeli, was in breach of its international obligations. The Applicant’s case was founded largely in the asserted breaches, by the Israeli forces concerned, of international humanitarian law which had occurred during the course of the Cast Lead Operation and also in reference to the judgment of the ICJ in the ‘West Bank Wall’ Opinion. This was clearly a case of a ‘big ask’ and not too surprisingly a Divisional Court, on a renewed application hearing, was able to dismiss the application *in limine*, Pill L.J. holding (see @ para.41 *et seq.*) as follows :-

“41 Applying the principles stated in the cases, it is not in my view arguable that the claimant would, on the assumed facts, obtain the relief sought. As established in *CSSU v Minister for the Civil Service* [1985] AC 374, the controlling factor in considering whether a particular exercise of prerogative power is susceptible to judicial review is not its source but its subject matter. The subject matter in the present case is, at bottom, the conduct of Israel and whether that state is in breach of its international obligations. The need, for the purpose of the present application as referred by Collins J, to assume facts, does not permit the court to ignore the claim in substance being made; for condemnation of Israel. For the courts of England and Wales to decide whether Israel is in breach of its international obligations and, if so, the extent and nature of the breach or breaches, is beyond their competence (Lord Wilberforce in *Buttes*, citing Fuller CJ). That is so whether or not Israel were to decide to contest the allegations before the court. Indeed, the dilemma in which Israel, a sovereign state, would be placed demonstrates the unacceptability of the claimant’s proposition.

42 Unlike *Kuwait*, this is not a case in which the breach of international law is plain and acknowledged or where it is, as in *Abbasi*, clear to the court. The Wall Opinion considers different issues and there has been no authoritative judgment upon Operation Cast Lead as a starting point for the court’s consideration of whether to act. “

Finally, in the very next year (2010) the Court of Appeal was once again seized with the issue of non-justiciability, this time with respect to an adjudication on the true effect of a foreign constitutional law, requiring judicial oversight of all imprisonment, in respect of an action brought by a British national on a claim for false imprisonment in that country. It should come as no surprise to the reader that this allegedly unlawful imprisonment occurred in Iraq. This time, however, it was a case of imprisonment by British military forces of occupation, who claimed that they were empowered to resort to the internment of a suspected terrorist without charge, under the terms of the UN Security Council Resolution<sup>34</sup> ‘authorising’ their conduct as an occupying power.

In *Al-Jedda v Secretary of State for Defence*<sup>35</sup>, the case had previously gone before the House twice before, and there it had been held that the UNSC Resolution was the supreme or supervening international instrument, applying in particular the supremacy provisions of Article 103 of the UN Charter, thereby displacing the rights which the Plaintiff might otherwise have reasonably expected to enjoy under the European Convention on Human Rights (“ECHR”). However, in the subsequent judgment of the Grand Chamber in Strasbourg<sup>36</sup>, reversing that decision, the European Court of Human Rights (“ECtHR”) held that Mr Al-Jedda’s three and a half year military detention without charge amounted to a breach of his rights under Art.5 of the Convention

<sup>33</sup> *Al-Haq v the Foreign Secretary* [2009] EWHC 1910 (Admin)

<sup>34</sup> UN Security Council Resolution 1546

<sup>35</sup> *Al-Jedda v Secretary of State for Defence* [2011] Q.B. 773

<sup>36</sup> *Al-Jedda v the United Kingdom* (Application no. 27021/08) decided in the Grand Chamber handed down on 7 July 2011

(Right to Liberty) which was not displaced or over-ridden by the further need to comply with the terms of UNSC Resolution 1546.

However, in the meanwhile the Claimant, whilst appealing the judgment of the House to Strasbourg, also amended his grounds to include a claim that his detention had been unlawful under the 'local law' (i.e. Iraqi law) as well, at least since, the adoption of the new Iraqi Constitution, in May of 2006 and which had guaranteed no imprisonment without judicial oversight. This amended claim, however, was also dismissed in the Administrative Court, Underhill J. deciding, *inter alia*, that whilst reliance on and application of the terms of the new Iraqi Constitution, by a British Court, would be (a) justiciable, nevertheless (b) it would be contrary to British public policy to do so, which by statute must take precedence in a British court<sup>37</sup>.

Arden L.J. in giving the leading judgment of the Court of Appeal held as to the first issue (see @ para.74 *et seq.*) as follows :-

“74. In my judgment, the judge was right. As can be seen from the discussion under Issue 1, the provisions of the Constitution with which this appeal is concerned clearly provide judicial and manageable standards. English courts are familiar with constitutional interpretation. The issues in this action do not involve a challenge to the validity of the Constitution of Iraq. This court would only be reaching conclusions as to the meaning of the Iraqi Constitution for the purposes of this private law claim in damages. The fact that Iraq is another sovereign state does not preclude this court from adjudicating upon Mr Al-Jedda's claim. In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, the House of Lords did not shrink from the conclusion that a resolution of the Revolutionary Command Council of Iraq was contrary to public policy notwithstanding that it was an act of a foreign state within its own jurisdiction. The passage from Buttes Gas relied upon by Mr Swift was considered by the House of Lords in that case. The House concluded that, while it may occasionally be the case that the resolution of a dispute may involve the application of standards of this kind, it was open to the court in other cases to consider whether the acts of a foreign state violated international law, or were contrary to public policy: see in particular per Lord Nicholls, at paras 25–26, and per Lord Steyn, at para 113.

75. In the circumstances I agree with the judge's conclusion on this point.”

However, as to the second issue on “public policy” she found against the judge below (see @ para.86 *et seq.*) as follows:-

“86. However, the effect of applying Iraqi law to Mr Al-Jedda's claim to determine the lawfulness of his detention is that the British Government is at risk of liability for doing no more than carrying out its international obligations, in circumstances where its obligations under the UN Charter have been sufficient to qualify protection for Mr Al-Jedda under the Convention. None the less, in my judgment, that does not mean that it is appropriate to invoke the public policy exception. That exception falls to be applied if the relevant law of Iraq is in some way in itself offensive or objectionable. It does not apply simply because a remedy exists in Iraqi law which would not be available under domestic law. There is nothing inherently offensive or objectionable about the Iraqi law on which Mr Al-Jedda relies. A failure by the MNF (subject to CPA 17) to obtain immunity from Iraqi law would not of itself make it contrary to public policy to apply Iraqi law. I would thus allow the appeal on this issue.”

In the conclusion, whilst Arden L.J. also then went on to find that Mr.Al-Jeddah's detention was in the event unlawful under the Iraqi constitution, her brethren (Dyson JSC and Elias LJ) forming the majority on this issue were of the contrary view, finding his detention to have been lawful, even under the terms of the new Iraqi Constitution.

Offering then a review of this, albeit brief, recent history of the application of the doctrine of ‘non-justiciability’ in our courts, to the case of whether a domestic court has jurisdiction to adjudicate on the legality of the actions of, and even also, on occasion, on the very laws and legislation of, foreign sovereign states (including executive decrees of), I think it may helpful to adopt a simple spreadsheet format which I have set out below.

<sup>37</sup> Private International Law (Miscellaneous Provisions) Act 1995, s.14(3)(a)

### Case Law Review

So three instances where investigation and adjudication by our courts was barred, as raising issues that were deemed non-justiciable, namely

- (i) competing claims to Gulf oil rights by rival Californian exploration corporations, and where HMG had already intervened by force of arms in support of at least one of the claims, and opposing that of Iran, amongst others
- (ii) the allegation that the US bombing of Baghdad at the start of the Second Gulf War, by B-52 bombers based in the UK, amounted to the commission of a crime of aggression against Iraq, and finally
- (iii) the assertion that the conduct of Israeli military forces in the prosecution of Operation Cast Lead, in Occupied Palestinian Gaza territory, amounted to the commission of conduct war crimes under international law.

And three instances where investigation and adjudication by our courts was permitted, as raising issues that were deemed justiciable, namely

- (i) the forcible appropriation of Kuwaiti jet airlines, by the State of Iraq, following the aggressive and criminal occupation of Kuwait by the previous administration of Saddam Hussein, contrary to fundamental principles of international law
- (ii) a claim that a judgment by a North Korean Court, compelling payment of an insured sum under the terms of a valid contract, had been obtained by state sponsored and/or instituted criminal fraud committed by the state organs of North Korea
- (iii) the application of the provisions of the 'new' post-war Iraqi constitution, to the legality of the detention without charge of a British national, by British military occupying forces in Iraq.

Candidly the cynic in me wants to suggest that President Bush Jr.'s infamous reference, in his 2002 State of the Union Address, to there then being a terrorist "Axis of Evil"<sup>38</sup> comprising in the then Iraq, Iran and North Korea; could well be thought of as merely a political manifestation of what amounts to the complementary "Axis of Non-justiciability", as applied by the British judiciary over recent years. But doubtless that would be wholly unworthy of me.

Instead, let me merely suggest that the pendulum of decisions as revealed by this analysis, clearly indicates to me that, if not a movable feast, nonetheless the line of non-justiciability can be a very finely drawn one and that, contrary to the suggestion of some, there is certainly no hard and fast clear principle, invariably and blindly applied by our courts as some 'bright-line', as to when they will, and when they will not, investigate and if thought necessary adjudicate in this area, and in the interests of British justice.

Case	Court	Issue	Decision
<b><i>Buttes Gas and Oil Co. v Hammer (Nos. 2 &amp; 3)</i></b> [1982] A.C. 888	House of Lords	Competing claims, including by Head of State decree, to territorial (littoral) sovereignty over waters and thus oil rights in the Persian Gulf	<b>Non-justiciable</b> "No manageable standards"
<b><i>Kuwait Airways Corporation v. Iraqi Airways Company</i></b> (Nos 4 and 5) [2001] 3 W.L.R. 1117	House of Lords	Legal effect of Iraqi state act of appropriation, following aggressive occupation of Kuwaiti territory, supported by formal Resolution of State Authority (ie Iraqi RCC)	<b>Justiciable</b> Breach of fundamental principle of international law

<sup>38</sup> [http://en.wikipedia.org/wiki/Axis\\_of\\_evil](http://en.wikipedia.org/wiki/Axis_of_evil)

<b><i>R v. Jones and Milling et al.</i></b> (2006) [2007] 1 A.C. 136	House of Lords	Grounds for holding that the crime of aggression under customary international law, per US/UK attack on Iraq in 2003, had not been adopted/assimilated into our domestic criminal common law	<b>Non-justiciable</b> “Would draw courts into area which in the past they had done only with reluctance and the utmost circumspection”
<b><i>Korea National Insurance v Allianz Global &amp; Speciality AG</i></b> [2008] 2 C.L.C. 837	Court of Appeal	Claim that a North Korean Court judgment, upholding an insurance claim against foreign re-insurers, had been obtained by state sponsored/instituted fraud.	<b>Justiciable</b> acts which affect the rights of a party under a commercial contract, not in relation to some sovereign act carried out in its own jurisdiction
<b><i>Al-Haq v the Foreign Secretary</i></b> [2009] EWHC 1910 (Admin)	Administrative Court High Court QBD	Declaration sought against HMG for failure to condemn, and for continuing to trade in arms with, the State of Israel, even following IDF war crimes committed in Occupied Territory during Operation Cast Lead	<b>Non-justiciable</b> “not a case in which the breach of international law is plain and acknowledged or where it is, as in <i>Abassi</i> clear to the court”
<b><i>Al-Jedda v Secretary of State for Defence</i></b> [2011] Q.B. 773	Court of Appeal	Justiciability of Iraqi Constitutional law providing for judicial oversight of imprisonment, re the internment of a British Citizen in Iraq by British Occupying military forces.	<b>Justiciable</b> “the provisions of the Constitution with which this appeal is concerned clearly provide judicial and manageable standards”

Howsoever that may be, let me now posit, in support of the general proposition as outlined at the outset that, whilst the prosecution of a former ‘leader’ of a foreign sovereign power, before a British criminal court, on a charge of committing a crime of aggression, necessarily requires that court to also inquire into and make a determination as to the commission of an ‘act of aggression’ as committed by that foreign power, the following factors would, in keeping with the thrust of the case law authorities just reviewed, nonetheless tend to weigh heavily in favour of the justiciability of just such an inquiry and determination, even if considered only under established common law principles.

Firstly, a charge of aggression necessarily involves examination of conduct, albeit state conduct, committed outside the exclusive territorial confines of the accused state itself (per observations of Brooke L.J. in *Kuwait Airways* when in the Court of Appeal and Waller L.J. in *Korea National Insurance*), and instead necessarily involves conduct on the territory of at least one other state, namely the victim of the alleged aggression, if not more. Secondly, it involves determination of an alleged breach of the most fundamental, indeed peremptory normative principles of, CIL - namely the commission of an act of international aggression, (per observations of Lord Nicholls in the House in *Kuwait Airways*), which crime, let us recall, was characterised by the Judgment of the IMWCT at Nuremberg as nothing less than the “*supreme international crime*”<sup>39</sup>. Thirdly, the parameters of the definition of the state act, as set forth in UNGA Resolution 3314 (1974) and as are now re-iterated in art.8bis §(2) of the Rome Statute, therein set forth the very paradigm of “manageable judicial standards” by which to judge such an allegation (per Lord Wilberforce in the House in *Buttes Gas and Oil* as later applied by Arden L.J. in *Al-Jeddah*).

Accordingly, and in my respectful submission, I would contend that, even if judged against only established common law authority, it is very far from clear that a British court, including especially a criminal court, would presently decline to adjudicate on the issue of the commission, under international criminal law, of an ‘act of aggression’ as committed by a foreign sovereign power, where to do so was a necessary and unavoidable requirement of its discharging its wider jurisdiction to determine the case before it, even when acting under established common law principles alone.

<sup>39</sup> Ibid as quoted above see @ fn 7

## 5. Options for Statutory Incorporation

As indicated at the outset I now turn to consider the application of the learning to be gleaned from all these authorities and precedents, to the practical case of the statutory incorporation of the crime of aggression into domestic Scots law by way of the amendment of the ICC (Scotland) Act 2001. In doing so I should point out, however, that in all material respects the Scottish legislation is in identical terms to its counterpart statute passed but a few weeks earlier in Westminster, the ICC Act 2001, which is applicable to the remainder of the UK or EW&NI<sup>40</sup> as the acronymicists would have it, and thus that in principle the exact same considerations would apply equally in relation to the equivalent amendment of that legislation also.

The present jurisdictional ambit or scheme of the statute is essentially to be found at s.1, as follows<sup>41</sup>:

- “(1) It shall be an offence for a person to commit genocide, a crime against humanity or a war crime.
- (2) Subsection (1) above applies to acts committed—
  - (a) in Scotland; or
  - (b) outwith the United Kingdom by a United Kingdom national or a United Kingdom resident.”

Accordingly this jurisdictional scheme is threefold and I shall consider each aspect in turn:

### 5.1 Jurisdiction *Ratione Territorii* (by Reason of Territory)

This is naturally enough pretty straightforward as applying to Scotland, so that were aggression to be simply added as a further crime to this list, as at subs.(1), then any such crime, were it to be committed in Scotland (hopefully a remote but nonetheless clearly conceivable possibility) would be captured by the territorial aspect of the scheme, as it were entirely irrespective as to the nationality, place of residence etc. of whomsoever was accused. Only two points of possible further interest I think arise.

Firstly, it is perhaps important to note, especially from the point of view of practical applicability, that the definition of the crime of aggression (as in art.8bis §(1) Rome Statute – see above) encapsulates also such ‘inchoate’ acts as ‘the planning and preparation’ of a crime of aggression, in addition to but separately from, the more substantive acts of ‘initiating and executing’ an actual act of aggression. It follows from this that a person who, whilst in Scotland, had so participated in such ‘acts’ of planning and/or preparation, would then fall to be captured under the existing territorial jurisdictional scheme, even though the actual subsequent substantive act of aggression, which they had allegedly thereby helped to either plan or prepare, or both, actually took place elsewhere in the world.

Equally, and for similar reasons, it is important to note that, under the provisions of s.7 of the Scottish Act<sup>42</sup>, meaning of ‘ancillary offence’, criminal liability would also apply on this territorial basis, in relation to the full range of inchoate and ancillary classes of criminal participation, both under Scottish statute and at common law<sup>43</sup>.

Secondly, it is particularly noteworthy that the territorial scope of both this Act, and indeed for that matter perhaps more especially of the earlier EW&NI Act as well, do not also reach so as to include ‘British overseas territories, dependencies and possessions’. Accordingly, and leaving aside for a moment the territorial scope of the crime of aggression alone, were it to be added to this existing regime, it follows that, just for an example, even considering only current ICC crimes, as defined by the two ICC Acts, were say an Argentinian national to be accused of committing a war crime while on the Falkland Islands (presumably in the course of any future re-enactment of the 1982 conflict) they could not then be tried in England or Scotland for the same under either of the 2001 Acts, since the Falklands are obviously outside the UK !

### 5.2 Jurisdiction *Ratione Gentis* (by Reason of Nationality)

Again this is hopefully a fairly straightforward consideration, the term “United Kingdom national” being specifically further interpreted in s.8A(1)<sup>44</sup> as follows :

<sup>40</sup> Referring to England, Wales & Northern Ireland and pronounced “*uni*” as in the common diminutive for “University”.

<sup>41</sup> The equivalent provisions in the EW&NI Act are to be found at s.51 per E&W and s.58 per N.I.

<sup>42</sup> Equivalent EW&NI Act provisions is to be found @ s.55 per E&W and s.62 per N.I.

<sup>43</sup> These include being ‘art and part in’ the commission of an offence; ‘inciting’ a person to commit an offence; ‘attempting’ or ‘conspiring with others’, to commit an offence; perverting, or attempting to pervert, the course of justice in connection with an offence; or defeating, or attempting to defeat, the ends of justice in connection with an offence.

<sup>44</sup> See s.67(1) of the EW&NI Act for the equivalent provisions

“United Kingdom national” means—

- (a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,
- (b) a person who under the British Nationality Act 1981 (c.61) is a British subject, or
- (c) a British protected person within the meaning of that Act,”

It follows that under this head the scope of jurisdiction of the Scottish ICC Act and that of the EW&NI Act are effectively currently co-extensive, which is to say that an accused person who, having acted for the relevant purposes of the definition of the ICC crime concerned outside of UK territory, nonetheless comes within the jurisdiction of either Act by reason of their being a United Kingdom national instead, that person is then capable of being indicted and prosecuted in either Scotland, or elsewhere in the UK and under either statute respectively. For the specific purposes of basing a jurisdiction in respect of a crime of aggression, the defining issue for the purposes of fixing the *crimen loci*, or place of the crime, is most obviously to ask where the associated state ‘act of aggression’ took place, and this will almost inevitably have occurred on territory ‘outside the United Kingdom’.

This then is a jurisdictional matter which presumably would, certainly potentially at least, have to become subject to some examination and possible amendment in the event of any future re-emergence of the separate constitution of the Crown in right of Scotland, as distinct from the UK as a whole. Yes, a rather over legalistic formulation and reference to a future independent Scotland, whose responsible national leadership would presumably then also have exclusive responsibility in relation to placing them, rather than as present the political leadership in London, in “*a position effectively to exercise control over or to direct the political or military action of a State*”, meaning thereby then any future state of Scotland, as per the definitional leadership element of the crime.

Finally in a matter allied to this jurisdictional aspect, but separate to it, and again leaving aside for the moment the issue of jurisdictional scope over the crime of aggression *per se* were it to be added to this existing regime, a further jurisdictional provision, whilst included under the EW&NI Act<sup>45</sup> is not though equally present in the Scotland Act. This is as respects “*a person subject to UK service jurisdiction*”, presumptively who is, however, not otherwise separately captured as also a United Kingdom national. That expression is defined in s.67(3) of the EW&NI Act alone, as follows:-

“(3) In this Part a “person subject to UK service jurisdiction” means[a person subject to service law, or a civilian subject to service discipline, within the meaning of the Armed Forces Act 2006.]<sup>46</sup>”

Of the two groups of persons the expression “*a civilian subject to service discipline*” is clearly much the broader, as set out in detail in Schedule 15 to the 2006 Act<sup>47</sup> and covers a very wide range of persons, or rather captures a very large potential number of persons<sup>48</sup>.

<sup>45</sup> See s.51(2)(b) of the EW&NI Act and as it differs from the equivalent s.1(2)(b) of the Scotland Act.

<sup>46</sup> Words substituted for s.67(3)(a)-(c) by Armed Forces Act 2006 c. 52 Sch.16 para.189 (October 31, 2009). As to the meaning of the expression “*a person subject to service law*” see the definition at s.367 of the that Act, as follows :-

“Persons subject to service law: regular and reserve forces

(1) Every member of the regular forces is subject to service law at all times.

(2) Every member of the reserve forces is subject to service law while—

(a) in permanent service on call-out under any provision of the Reserve Forces Act 1980 (c. 9) or the Reserve Forces Act 1996 (c. 14) or under any other call-out obligation of an officer;

(b) in home defence service on call-out under section 22 of the Reserve Forces Act 1980;

(c) in full-time service under a commitment entered into under section 24 of the Reserve Forces Act 1996;

(d) undertaking any training or duty (whether or not in pursuance of an obligation); or

(e) serving on the permanent staff of a reserve force.

<sup>47</sup> As that is given effect by s.370 of that Act.

<sup>48</sup> A sufficient flavour of the scope of that definition is hopefully capable of being derived from merely a look at the contents of that Schedule without further examining each aspect in detail. That content is as follows :

**“Part 1 CIVILIANS SUBJECT TO SERVICE DISCIPLINE**

para. 1 Persons in one of Her Majesty's aircraft in flight

para. 2 Persons in one of Her Majesty's ships afloat

para. 3 Persons in service custody etc



It can therefore hopefully be better appreciated just how broad the scope of this definition is, and therefore, just how many potential people could come within it. All the more relevant then, I would suggest that, a non-UK national who nevertheless falls under the present regime because they are a “*a person subject to UK service jurisdiction*”, whether that is because they are “*a person subject to service law*” or much more likely because they are “*a civilian subject to service discipline*”, can only be prosecuted under the EW&NI Act and cannot be subject to any equivalent prosecution in Scotland, under the Scottish Act. This is so notwithstanding that the military unit or base or vehicle, to which such a non-UK civilian is attached or otherwise affiliated, is pre-eminently what in any ordinary sense would be considered a Scottish military unit, base or vehicle operating overseas i.e. outside the United Kingdom.

### 5.3 Jurisdiction *Ratione Incolae* (by Reason of Residency)

The statutory definition of a ‘UK resident’ under the Scotland Act is now to be found set out in the extensive provisions at s.8A(2) through (6) and which reflects a very considerable expansion and re-casting of the definition of that term, as compared to its formulation in the 2001 Act as originally passed<sup>49</sup>, and as introduced by amendment set out in s.32(2) of the Criminal Justice and Licensing (Scotland) Act 2010 [ASP 13] Pt 2, which came into force on March 28, 2011. The purpose of the expanded and re-cast definition, as now also appears in identical terms at the amended s.67A of the EW&NI Act<sup>50</sup>, is in response to a successful lobbying campaign, led by the Aegis Trust, with a view to ensuring that persons hiding out in the UK, not as official ‘residents’ (i.e. that is with formal Home Office permission to remain) but rather typically here under false identities, are captured. Typically they may be suspected or accused of committing ICC crimes, such as genocide and crimes against humanity, in the course of recent past conflicts of a non-international character in places such as Rwanda (1994) and Bosnia-Herzegovina (1992-1995), and would not now escape liability under the Act by reason of any doubt as to their ‘residential’ status under the Act.

Thus there is not, as presently cast, any suggestion whatsoever of either of the current ICC Acts offering any jurisdictional scope capable of being regarded as in any way ‘universal’; such as, by comparison one might reasonably argue say exists in relation to the offence of committing a grave breach of a Geneva Convention, under the provisions of the Geneva Conventions Act, 1957<sup>51</sup>. The fact is that the existing jurisdictional scheme is drawn, even taking into account the amended broader definition of ‘UK resident’ introduced to accommodate the concerns of the Aegis Trust campaign, specifically in order to eliminate there being any risk of the British courts, including then also Scottish courts, becoming any species of open season, come one come all, forum for international war crimes litigation.

However, that said, it is inevitably in relation to the application of this last aspect of the established jurisdictional ambit of the ICC Acts, by reason of residency, whereby, were the crime of aggression to be incorporated, the likelihood of the issue of the legality or lawfulness of an alleged state act of aggression, as committed by one foreign sovereign state upon the territory of another such state, might then theoretically at least come before a British criminal court for examination and potential adjudication.

Naturally, it is not really realistic to suppose that a person occupying a ‘leadership’ position in relation to the political and/or military action of a foreign state, is likely to have been a resident (of any character) in the UK at the time when they allegedly participated criminally in the planning, preparation, initiation or execution of an act of aggression by that State. However, the fact is that the current jurisdictional regime, as applied in both of the ICC Acts, permits of not just of a jurisdiction *rationae incolae*<sup>52</sup> (by reason of residency) and a separate

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para. 4 Crown servants in designated area working in support of Her Majesty’s Forces

para. 5 Persons working for specified military organisations

para. 6 Persons in designated area who are members or employees of other specified organisations

para. 7 Persons designated by or on behalf of Defence Council

para. 8 Persons residing or staying with person subject to service law in a designated area

para. 9 Persons residing or staying with person falling within para4 or para6 in a designated area

para. 10 Persons residing or staying with person falling within para5.”

<sup>49</sup> That original formulation had comprised in the following rather blinding glimpse of the obvious as set out in the general interpretation section of that Act, s.28, per :” “United Kingdom resident” means a person who is resident in the United Kingdom” !

<sup>50</sup> Added by Coroners and Justice Act 2009 c. 25 Pt 2 c.3 s.70(4) (April 6, 2010)

<sup>51</sup> See in particular the jurisdictional language set out in s.1(1) thereof, per

“Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, [a grave breach of any of the scheduled conventions or the first protocol] shall be guilty of an offence ..”

<sup>52</sup> Per s.8A of the Scottish Act and s.67A of the EW&NI Act.

retrospective jurisdiction *rationae temporalis retrospectare*<sup>53</sup> (by reason of past time), but also provides a specific jurisdiction in relation to the past crimes of those who only subsequently then later come to be UK residents, as to which see now s.6 of the Scottish Act (“Proceedings against persons becoming resident in the United Kingdom”)<sup>54</sup>, subsections (1)&(2) of which provide, as follows :-

- “(1) This section applies in relation to a person who—
- (a) commits acts outwith the United Kingdom at a time when that person is neither a United Kingdom national nor a United Kingdom resident; and
  - (b) subsequently becomes a United Kingdom resident.
- (2) Proceedings may be brought against such a person in Scotland for a substantive offence if—
- (a) that person is a United Kingdom resident at the time the proceedings are brought; and
  - (b) the acts in respect of which the proceedings are brought would have constituted that offence if they had been committed in Scotland.”

Accordingly it is only in relation to the application of this further and combined residential and transformational jurisdictional aspect of the statutory regime, where it becomes a practical proposition to image or analyse the potential future possibility of a Scottish criminal court being required to examine and potentially adjudicate upon the legality of a foreign act of aggression, not then involving the territory of the UK at all. However, one cannot then perform that analysis divorced from the specific language of the statutory jurisdictional regime provided ; and, as can now be seen, that regime actually expressly requires that a hypothetical transfer of the *crimen loci* is performed, as a necessary part and parcel of the application of the jurisdictional regime.

Let me try to make this plainer. Were the crime of aggression to be incorporated into this statute and then subsequently applied in the case of a UK resident, but in relation to a crime which they were alleged to have committed before so becoming resident here, then one can only consider or perform the requisite legal analysis of the issues raised by such a prosecution, in relation to the legal requirements as set out in the clear language of the statute, including then as to any hypothesizes or legal fiction required to be performed by that language for the purpose of permitting proceedings to be begun here in the first place.

Still not yet fully clear? More simply still then, the court has to examine and adjudicate upon, not whether the alleged act of aggression as committed by a foreign sovereign state was unlawful under international law applicable to it at the time ; but rather, the statute requires it only to examine and adjudicate upon the issue as to whether that act would have comprised in a crime of aggression, committed by the defendant before it under this Statute “if ..[it].. had been committed in Scotland” instead. Given then the application of that statutory hypothesis, I submit that all considerations as to the issue of the non-justiciability of foreign sovereign acts and the application of the principle of sovereign equality etc., simply fall away. The court is simply not being asked, by the statute, to sit in judgment over the state act conduct of a foreign power, as if it were some special species of international war crimes tribunal; but rather it is only being required to determine whether those acts would have comprised an offence under this Act “if they had been committed in Scotland” instead.

If that seems unfair or unjust to the defendant who might not have ever thought at the appropriate time of later becoming a UK resident, then the answer is that that was something perhaps they should have thought about when instead later deciding to become such a resident here. The clear jurisdictional regime, as set out in the language of this Act, now provides that, in effect by choosing to so become a UK resident, that person also thereby confers upon our courts the power to prosecute them for their past ICC crimes, as if they had been committed here instead. That as they say is the law.

Equally, one might say that if a UK national manages somehow to act as a ‘leader’ in a foreign power, at a time when that State then commits an act of international aggression against another, putatively neighbouring state, not frankly something unheard of certainly in our Victorian imperial past, they would now become liable to prosecution under the current statutory regime if applied to aggression, even though the UK as a state itself may not have been involved in any manner whatever in the international dispute which led to that act. If that should be so with respect to our own nationals, who choose to go abroad to commit such heinous and egregious breaches of fundamental international law ; then why should it not be just to similarly treat foreign nationals who start foreign wars abroad, but then later chose to come here to hide out.

<sup>53</sup> Per s.9A of the Scottish Act and s.65A of the EW&NI Act.

<sup>54</sup> See s.68 of the EW&NI Act for the equivalent provision.

#### 5.4 *Compromise Option*

A further option, which might appeal to those still to be persuaded that statutory incorporation of the crime of aggression into the current jurisdictional regime of the Act, does not raise the real prospect of investigation and adjudication by a domestic court, of such a nature as is inevitably objectionable or offensive to common law principles ; then there exists a further or compromise position. Which is to say, to require the trial court to treat the issue, as to whether or not there has been an act of aggression committed by a foreign power, as a diplomatic fact or state of affairs, upon which it will receive and take judicial notice of any diplomatic stipulation provided by Her Majesty's Government.

The practice of seeking such a diplomatic stipulation from the appropriate Secretary of State, and then applying that as conclusive of the fact or facts in issue therein provided, has a long and well established precedent in the common law. After some initial hesitation in the field, by the mid 19th. Century, it became the well established practice, as a rule of evidence, that such matters as the status of a defendant entitling him to claim a diplomatic immunity or privilege, or in relation to the status of a foreign state, for example whether in amity or enmity with the Crown, were matters of fact in respects of which the evidence of the appropriate or duly authorised officer of the executive would be admitted and taken as being conclusive of the fact<sup>55</sup>.

The effect of the Foreign Office Certificate, as it is usually termed, is to substitute the view of the British government for an independent judicial determination on the facts of a claim to be entitled to the particular status involved. See for example, *Duff Development Co., Ltd. v. Kelantan* [1924] AC 797 *per* Viscount Cave (see @ p.805 *et seq.*), as follows:-

“First, it was argued that the Government of Kelantan was not an independent sovereign State, so as to be entitled by international law to the immunity against legal process which was defined in *The Parlement Belge*.<sup>33</sup> It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the Court does not permit it to \*806 be questioned by the parties. Information of this character was obtained from a Secretary of State and accepted without question in *Taylor v. Barclay* and *Mighell v. Sultan of Johore* ; and those cases were followed in *Foster v. Globe Venture Syndicate* and in *The Gagara*.”

In order, to avoid the inevitable further objection that this would merely serve to shift the locus of the breach of international sovereign equality by the organs of this state, from its judiciary to its executive, then there would be a further possible element or refinement, which could be set out in the statute. This would be to the effect that rather than the Secretary of State simply coming to his own view and informing the Court ; rather he would be required to ask for the position taken on the matter by the then current government or sovereign power in the state concerned, that is whose equal sovereignty might arguably otherwise be affronted by any wholly independent determination by a British court. This position would then form the determination which the Court would receive and take judicial notice of, and thereby I think, it would follow that much of the potential affront to the sovereign equality of the foreign power, would be thereby assuaged if not eradicated. As a simple matter of practicality, it of course does not follow that the foreign state power concerned is predictably never going to admit or stipulate to, in effect concede, that its own past previous conduct amounted to such an egregious breach of its obligations under international law ; because, of course, there may very well have been such a change of administration or leadership in the state concerned, that it subsequently feels only too willing to dissociate itself from or indeed denounce the conduct of its own former errant leadership or sovereign power.

However, equally inevitably, the contemporary problem with such an approach, most especially in the case of the exercise of a criminal jurisdiction, concerns whether this would be fully compatible with the defendant's due process rights, himself by necessity having been a participant in, that former leadership. More precisely as to whether in the modern context it would comprise in a breach of his rights to a fair trial under Art.6 of the ECHR.

Notably the ECtHR (*European Court of Human Rights*) has specifically held that, the issue of a certificate by the Secretary of State for Northern Ireland, to the effect that certain construction firms should be barred from consideration for government contracts, on grounds of national security, and where subsequently the factual grounds or basis for which decisions were withheld and thus not-challengeable in proceedings before either the Employment Appeals Tribunal for Northern Ireland, nor indeed thereafter on a subsequent judicial review, did indeed so amount to a breach of the art.6(1) right to a fair trial.

<sup>55</sup> See for example : *Taylor v. Barclay* (1828) 7. II Sim.213 @220 *per* Lord Shadwell L.-C.

In *Tinnelly & Sons Ltd & Others and McElduff & Others v United Kingdom*<sup>56</sup> the ECtHR concluded in its judgment (see @ para.77) as follows:-

“ As noted above, the conclusive nature of the section 42 certificates had the effect of preventing a judicial determination on the merits of the applicants' complaints that they were victims of unlawful discrimination. The Court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under Article 6(1) of the Convention to submit a dispute to a court or tribunal in order to have a determination on questions of both fact and law cannot be displaced by the ipse dixit of the executive.”<sup>57</sup>

Accordingly, if a Secretary of State's certificate, subject of mere civil proceedings, and as to a matter as weighty as the needs of domestic national security concerns, is still sufficient so as to deny a person their right to a fair trial, under art.6 ECHR ; then I would have thought that, *a fortiori*, in the course of criminal trial, a Foreign Secretary's declaration, as to the results of diplomatic enquiries of a foreign sovereign state, as to its view in turn about whether it had previously committed an act of aggression, certainly could not now be taken as providing conclusive evidence on the point, without thereby inevitably denying the criminal defendant his due process or fair trial rights.

This view is further additionally fortified by the earlier decision of the ECtHR in *Beaumont v France*<sup>58</sup> in which, again in a civil matter of compensatory claim only, although according to a long established practice, the Court of Cassation had referred the question as to the proper construction to place on a bi-lateral Franco-Moroccan Protocol to the Conseil d'Etat, which in its turn sought out, and considered itself bound by, the ruling of the French Foreign Minister on that matter. The Court in its judgment (see @ para.38) held:-

“The Court does not subscribe to the Government's view. It points out that the practice under consideration meant that, when the administrative court encountered serious difficulties in interpreting an international treaty, it was obliged to request the Minister for Foreign Affairs to clarify the meaning of the impugned provision and it then had to abide by his interpretation in all circumstances. ....

It observes, however, that in the instant case the Conseil d'Etat referred to a representative of the executive for a solution to the legal problem before it. It dismissed the application filed by Mr Beaumont and his sisters because the minister had confirmed the interpretation adopted by the compensation committee. The Court points out, in addition, that the minister's involvement, which was decisive for the outcome of the legal proceedings, was not open to challenge by the applicants, who had moreover not been afforded any possibility of giving their opinion on the use of the referral procedure and the wording of the question. Only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation “tribunal” within the meaning of Article 6(1).<sup>36</sup> The Conseil d'Etat did not meet these requirements in the instant case.

39. In sum, the applicants' case was not heard by an independent \*504 tribunal with full jurisdiction. There has accordingly been a violation of Article 6(1) in this respect also.”

Accordingly, I am left in little doubt but that, were such a Foreign Office Certificate to be sought and obtained today, in such a matter as a criminal prosecution for a crime of aggression, then the effect or conclusion of such a Certificate, assuming naturally that it purported to establish that the state act in issue is now accepted by the State in question, as having amounted to or involved an act of aggression, could not be conclusive on the Court as to the truth of that factual assertion. Rather it must be limited at most to establishing the ‘accession’, of the current administration in the foreign sovereign power concerned, to the underlying premise for the proceedings, if not then a fully permissive attitude to their conduct. Leaving it always open to the defendant to challenge the truth of the assertion, as to the commission of an act of aggression *per se*, and ultimately leaving it open to the tribunal itself to reach its own independent final judicial determination on the point. Consequently, I should

<sup>56</sup> Application No. 20390/92, European Court of Human Rights (10 July 1998) (1999) 27 E.H.R.R. 249

<sup>57</sup> Applied in *Devlin v United Kingdom* (29545/95) European Court of Human Rights (30 October 2001) [2002] I.R.L.R. 155; (2002) 34 E.H.R.R. 43

<sup>58</sup> (1995) 19 E.H.R.R. 485

observe that whilst it follows that adopting such a procedure as this would surely considerably lessen the impact of the potential insult to sovereign equality, given the approach and accession to the underlying premise by the sovereign in question; it cannot, however, be permitted to prove conclusive on the factual point in question, without thereby denying the defendant their due process rights and thus their right to a fair trial.

Finally, on this aspect I would only observe that, in the event of a failure to obtain the stipulation as sought from the foreign sovereign state, and especially where the foreign power actually denies the fact of the aggression or at least refuses to so stipulate to it, then it would follow that the criminal allegation could not then be prosecuted in this country, amounting to the very class of 'inability to prosecute' as is referred to in art.17(1) of the Rome Statute and thereby creating or triggering the requisite grounds for its admissibility to be proceeded with before the ICC instead.

#### 5.5 National Act Jurisdiction Only Option

Finally, it is worth at least mentioning the implications of limiting the future statutory procedural jurisdiction of Scottish courts, to prosecute the crime only in the case where the state act of aggression involved is such as was committed by the United Kingdom itself; namely the case of the very exception for national jurisdiction which the ILC itself was prepared to concede was permissible, within the terms of Art.8 (Establishment of Jurisdiction) in its Draft "Code of Crimes against the Peace & Security of Mankind" (1996) as cited at the outset of this article.

A practical and simple formulation of language, whereby such a limited jurisdiction with respect to the crime of aggression, could be effectively achieved, might be to amend the existing s.1(4) language of the Scottish Act, by adding as follows :-

*"... "crime of aggression" means a crime of aggression as defined in article 8bis, subject to the proviso that, as respects acts covered by subsection (2)(b) above, the term "a State" where it occurs in paragraph 1, and in the first sentence of paragraph 2, of that article shall be read as meaning "the United Kingdom" and not otherwise."*

Subsection 1(2)(b), as we have seen, establishes the extra-territorial jurisdiction of the court with respect to ICC crimes committed "*outwith the United Kingdom by a United Kingdom national or a United Kingdom resident*", so that were this option to be adopted then both crimes and acts of aggression committed on Scots soil instead, hopefully a rare likelihood certainly as respects the latter, would nonetheless continue to remain prosecutable even though then obviously involving an act of aggression undertaken by a state other than the United Kingdom. Whereas, those involving an act committed by a person and, *a fortiori*, any act of aggression committed by a state acting "outwith the UK", could only be prosecuted where that was a state act of the United Kingdom itself.

#### 6. Conclusions

In the first place, whilst I might highly desire that it be otherwise, I currently remain unconvinced that the crime of aggression, at present and unequivocally attracts the character of a crime of 'universal jurisdiction', under customary international law. Secondly, whilst I recognise that the Rome Statute regime creates no strict legal 'right' or 'obligation' to incorporate this crime into our domestic criminal law, that is no different to the position that also currently attains with respect to each of the other ICC crimes, already so incorporated under the 2001 Act. They have been so incorporated not because we are obliged to do so, but rather because, given the application of the underlying principle of the complementarity of the jurisdiction of the ICC with that of our own national courts, it is in our own national interests to do so, in order to provide a preferred national jurisdiction for the prosecution of ICC crimes, at least where those crimes are committed on our own territory or by our own nationals or residents.

Further, that in so far as (the US sought) Understanding #5, annexed to the Kampala resolution on the aggression amendments, seeks to emphasise this absence of obligation, in fact it does so only whilst expressly excluding the case of a domestic jurisdiction over a national crime of aggression, i.e. as committed by one's own State, thereby re-iterating the very exception to exclusive international jurisdiction, as also recognised in art.8 of the ILC's (1996) revised Draft Code on Crimes Against the Peace and Security of Mankind.

Thirdly, that applying the current English common law authorities on the application of the principle of sovereign equality, as that is reflected in the doctrine of so-called 'non-justiciability', it is in fact very far from clear that a British court, including especially a criminal court, even basing itself only on the common law, would presently decline to adjudicate on the issue of the commission, under international criminal law, of an 'act of aggression' committed by a foreign sovereign power, where to do so was a necessary requirement of its discharging its wider jurisdiction to determine the case before it. Given especially that such a state act would be (a) committed outside the exclusive territorial confines of the 'accused state' itself, (b) involves a breach of the

most fundamental, indeed peremptory normative principles of customary international law, and, finally (c) the definition of that criminal state act, as now set forth in art 8bis§2, provides the very paradigm of “manageable judicial standards” by which to judge such an allegation.

Recalling then finally the principal object, as set out at the start, which was to discern possible legislative options for, or approaches to, the task of prosecuting an individual, domestically in a Scottish court, for a crime of aggression, per the newly agreed international art.8bis definition, in particular in a case where the associated ‘act of aggression’ was not such as had been committed by the United Kingdom itself, but rather by a foreign sovereign power, whilst remaining consistent with those established common law principles. I would conclude that there are actually three possible such approaches, the last of which is admittedly to simply limit the scope for the prosecution of this crime to the case of only an aggression as committed by the British state itself.

(a) Relying on the jurisdictional provisions of the existing s.6(2)(b) of the Scottish Act, I suggest that it ought to be possible to treat a prosecution for a crime of aggression to the same basic regime, as currently applies to the other ICC crimes already under the present Act. In practice, the only realistic circumstances under that regime, in which the legality or lawfulness of the ‘state act’ conduct of a foreign sovereign state, is likely to fall for determination by a Scottish court, is where a former foreign state ‘leader’, accused of complicity in the commission of a crime of aggression as committed by that State, subsequently then chooses to come to reside in Scotland instead, presumably in order to hide out. I would argue that the transformational legal hypothesis, per s.6 (2)(b), and as provides the very statutory jurisdictional premise, for permitting the proceedings to be brought here in the first place, is such as requires the court to consider only whether “*the acts*”, as in ‘all of the acts’, “*in respect of which the proceedings are brought would have constituted that offence if they had been committed in Scotland*” has the effect whereby the court is then not required to sit in judgment over the state act conduct of a foreign power, as if it were some special species of international war crimes tribunal.

Rather, it is being required to determine only whether those acts, including then the very state act gravamen of the offence, would have comprised an offence under this Act “if they had been committed in Scotland” instead. Which is to say, that it creates a hypothetical Scottish territorial jurisdiction, as the very premise for the proceedings, the effect of which is to remove entirely the basis for the application of the doctrine of non-justiciability, per foreign sovereign equality, instead.

(b) To create a bespoke statutory mechanism whereby the Secretary of State is required to seek out, by diplomatic means, a stipulation from the sovereign power(s) concerned, as to their acceptance of, or accession to, the underlying premise for the prosecution, namely as to the allegation of the former criminal state act by that State, as a necessary pre-requisite to the conduct of proceedings. As a matter of legislative amendment clearly the most complicated and involved option, but nonetheless very much in keeping with previous authority on the established approach to such matters.

Note, however, that (i) any such stipulation, if forthcoming, could no longer be regarded as conclusive on the trial court as to the illegality of the state act, as would probably have been the case in previous centuries, having regard to the defendant’s contemporary due process fair trial rights, especially as arise under art.6 of the ECHR, and (ii) provision would have to be made, whereby, in the absence of such a diplomatic stipulation, the matter of the allegation would then have to be referred to the Prosecutor of the ICC, as, if and when that Court is empowered to exercise its jurisdiction with respect to the crime of aggression, for consideration as to its admissibility to that Court instead, under the art.17(1) provision on the ‘inability’ of the state party to prosecute.

(c) To limit the current jurisdictional scope of the Act, especially as it applies to the past conduct of UK residents, so that in relation to a case of aggression, it applies to a state act committed “*outwith the UK*” (per s.1(2)(b) of the Act) only in the instance where that act of aggression concerned is committed by the UK itself. That is to say no extra-territorial jurisdiction, except in the singular case of an allegation of UK aggression itself, an exception specifically recognised in and permitted by art.8 of the ILC’s (1996) Draft Code on Crimes against the Peace and Security of Mankind.

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