

Vilnius University Faculty of Law

Department of Private Law

Ritah Nafula

2nd study year, International and European Law Study Programme Student

Master's Thesis

**Proposals for the Amendments of the Rome Statute of the ICC and Their
Implications for Enforcing Accountability for the Crime of Aggression:
The African Perspective**

**Pasiūlymai dėl TBT Romos statuto pakeitimų ir jų įtaka atsakomybės už
agresyvius nusikaltimus užtikrinimui: Atėnų Afrikos perspektyva**

Supervisor: Dr. Gabija Grigaite – Daugirdė

Reviewer: Prof. Dr. Skirgailė Žalimienė

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ABSTRACT

The crime of aggression remains the most contentious and rarely enforced crime in the Rome Statute. Despite the adoption of the Rome Statute in 2002, crime of aggression attained its definition and procedures for enforcement through the Kampala Amendments 2010. However, the crime still faces jurisdictional, political and legal limitations.

This research seeks to propose amendments to the Rome Statute for enforcement and accountability of the crime of aggression with emphasis on the perspective and interest of African states, due to the historical relationship of Africa and the International Criminal Court, and the role played by African states in the international criminal justice sphere.

Keywords: International Criminal Court, African Union, crime of aggression, Kampala Amendments, United Nations Security Council, Rome Statute.

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INTRODUCTION

The controversial history of the crime of aggression begins with the early, largely unsuccessful attempts to regulate, and then prohibit the use of interstate armed force. After the First World War, in 1920 the League of Nations was established with a mandate for maintaining international peace which was later followed by the signing of the Kellogg-Briand Pact in 1928 to legally prohibit aggressive war. This pact was used after the Second World War during the Nuremberg trials for the crime against peace. It also further led to Article 2 (4) of the United Nations (UN) Charter which provides for the prohibition of threat or use of force against territorial integrity or political independence of any state.

In 1998 during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) that was held in Rome, the Rome Statute of the International Criminal Court was adopted which establishes the International Criminal Court (ICC)¹. This Statute entered into force in 2002.

The creation of the Court was primarily embraced in Africa because most states had and continued to experience atrocious crimes for example, the Rwandan genocide of 1994 which resulted in almost one million deaths². African states were also the first to engage the Court with Uganda, Democratic Republic of Congo (DRC) and Central African Republic all referring international crimes committed within their own borders³.

The crimes under jurisdiction of the ICC include the genocide, war crimes, crimes against humanity and the crime of aggression. Unlike the other crimes under the ICC's jurisdiction, which are based on the *jus in bello* and international human rights law, the crime of aggression is a child of the *jus ad bello*, and it is something of an understatement to say that the prohibition of the threat or use of force is one of the most fraught area of international law⁴.

It should be noted that even after the 2010 Kampala Amendments of the Rome Statute of the International Criminal Court which provided for the definition of the crime of aggression and the Court's jurisdiction, no case has been handled by the ICC which leads to the urgency

¹ ARSANJANI, H. Mahnouch (1999). The Rome statute of the international criminal court. *The American Journal of International Law*, 93(1), 22.

² OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 2.

³ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 545.

⁴ MCDUGALL, Carrie (2013). *The Crime of Aggression under the Rome Statute of the International Criminal Court*. 98. Cambridge University Press, 2.

to discuss and determine the issues that are affecting the prosecution of this crime, individual criminal responsibility and most especially holding the perpetrators accountable.

Problem statement

Despite having the crime of aggression provided for under the Rome Statute of the International Criminal Court, stating its definition, the acts that amount to the act of aggression and the special rules for court's jurisdiction over the crime, it has become impracticable for the Court to prosecute the crime of aggression. This is based on issues like jurisdiction, selective justice and accusations, political and procedural gaps. Furthermore, the ICC having been created out of an international system in which there is unequal power, with some states exerting far more influence than others to shape international norms and behavior to their favor⁵. This has turned out as a problem for the African states that despite being among the large member states of the ICC, they are underrepresented in shaping international criminal culture and norms on aggression. It is worth noting that Africa is one of those continents that face challenges of military intervention both from fellow African states and from foreign countries thus having a good and enforceable legal framework on the crime of aggression would give hope to the affected African states. Furthermore, the ICC's requirement of United Nations Security Council referrals and state consent diverts from the principles of universality and equal application of the law.

This research seeks to bridge these gaps by proposing legal amendments as well as proposed amendments at the New York Review conference 2025, which would enhance enforcement and accountability of perpetrators of the crime of aggression under the Rome Statute especially in the African standpoint.

Objective

To propose amendments of the Rome Statute of the ICC and their implications for enforcing accountability for the crime of aggression.

Research tasks

- a) To analyze the legal framework on the ICC and crime of aggression under the Rome Statute.

⁵ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 545.

- b) To identify the jurisdictional and procedural gaps affecting the enforcement of individual criminal responsibility for the crime of aggression.
- c) To recommend amendments on the crime of aggression under the Rome Statute to improve enforcement of accountability in a case of a crime of aggression.
- d) To assess the implications of the proposed reforms for the African states.

Methodology

The research will entail a qualitative and doctrinal legal research approach to analyze the legal framework on the ICC and crime of aggression under the Rome Statute as well as to identify the jurisdictional and procedural gaps affecting the enforcement and accountability for the crime of aggression. Given that, the primary sources will include the Rome Statute, 2010 Kampala Amendments, amendments proposed for New York ICC review session 2025, relevant United Nations resolutions, African legal instruments and relevant case law.

The secondary research will be carried out by analyzing the literature review based on the research. These secondary sources will entail academic articles, legal commentaries, and institutional reports.

Significance of the study and novelty

This research proposes amendments to the Rome Statute of ICC and their implication on enforcing accountability for the crime of aggression basing on how African states and African Union respond to the crime of aggression and the Kampala amendments of 2010.

This research seeks to propose amendments that will contribute to ongoing efforts to strengthen the ICC's ability when prosecuting the crime of aggression. By incorporating the African perspective, the study also supports international law to be more inclusive and equitable system of international justice. The findings will be relevant to international lawyers, policymakers, human rights advocates, and scholars of international relations.

Existing literature focusses more on the limitations of the Rome Statute's provisions of aggression, especially the jurisdictional issues introduced by Articles 15 bis and 15 ter. Many scholars have critiqued the narrow scope and political constraints in the Statute. However, the available research has not adequately examined how these provisions affect African states and how reforms could be developed from an African standpoint. This research seeks to fill this gap by incorporating the African regional experiences and legal tradition to attain better international reforms that address the crime of aggression at the ICC.

Furthermore, existing research focusses more on the relationship between African member states and the ICC delving into the ICC being selective when prosecuting cases. Prosecuting more of the African leaders and not leaders of the western countries like Russia and China. Thus leading to the ICC being viewed as international platform for political interests instead of being an international judicial body. Due to such challenges, the appointment of Fatou Bensouda the former Attorney General and Minister of Justice of Gambia as the Prosecutor of the Court was seen as a way of trying to appease the African member states whose relationship had started to fall out with the ICC⁶.

Given the above introduction, in order to propose amendments to the Rome Statute to enhance enforceability of the crime of aggression, it is necessary to first examine the evolution and existing legal framework regarding the crime. Therefore, the first chapter discusses the development of the crime into the crime of aggression and analyses the provisions of the Rome statute and Kampala amendments providing for the crime while identifying ambiguities, procedural and jurisdictional challenges.

⁶ MURITHI, Tim (2013). The African Union and the International Criminal Court: an Embattled Relationship? *The Institute for Justice and Reconciliation*, Policy Brief 8, 1-9.

I: THE EVOLUTION OF THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW

1.1. The birth of the crime against peace

Aggression was never a crime before 1945. This was based on the fact that use of force was a way of political power and influence⁷. Aggressive war was an act of the state and not a crime where individuals were held responsible⁸. However, for war to take place there had to be authority from the superior officials⁹, and this meant that such individuals who started the war were often let free after the war¹⁰. Given this history, people advocated for the establishment of the Tribunal to handle such cases and hold individuals accountable as well as the desire to put German war criminals to trial after the World War II. A charter was developed in London during the summer of 1945 to govern the future International Military Tribunal at Nuremberg¹¹.

The three major crimes under the Charter of the International Military Tribunal were war crimes, the crime of initiating and waging aggressive war and crimes against humanity¹². The crime against peace was defined under the Charter as, “planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in any common plan or conspiracy for the accomplishment of any foregoing”¹³. However, it can also be noted that this particular definition lacked specific wording or language to deal with aggression¹⁴. The International Military Tribunal described it as the “supreme international crime,” encapsulating all other war crimes within its ambit¹⁵. The Tribunal also emphasized that since crimes against international law are committed by men, not by abstract entities, punishing individuals who commit such crimes is the only way of enforcing international law¹⁶. Thus upholding individual criminal responsibility.

⁷ SAYAPIN, Sergey (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present cases*. The Hague, The Netherlands: Asser Press, pp. 3

⁸ KING, T. Henry, Jr. (2009). Nuremberg and Crimes against Peace. *Case Western Reserve Journal of International Law*, 41 (2), 273.

⁹ SAYAPIN, *ibid*, 7, pp. 5

¹⁰ KING, *ibid*, 8, pp. 274

¹¹ *ibid*.

¹² HARRIS, Whitney (2016). A World of Peace and Justice under the Rule of Law: from Nuremberg to the International Criminal Court. *Washington University Global Studies Law Review*, 15(4), 690

¹³ KING, *ibid*, 8, pp. 275

¹⁴ *ibid*.

¹⁵ KUWE, Eliasa (2025). Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa. *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), 2

¹⁶ CLARK, Roger (2007). Nuremberg and the Crime against Peace. *Washington University Global Studies Law Review*, 6(3), pp. 542

After Nuremberg, prosecution of war criminals became prominent in different jurisdictions for example Tokyo Military Tribunal, United States Military Courts, all these were following the Nuremberg pattern¹⁷. The Tokyo War Crime Tribunal in the Far East tried Japanese leaders for the same crimes as in Nuremberg with similar provisions pertaining to the crime of aggression¹⁸. This was followed by the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal 1950 (Nuremberg principles) which recognized individual responsibility under Principle I and also provided for the fact that heads of state or government officials had no immunity for crimes under international law (Principle III). The Nuremberg Principles also provided that individuals could not rely on orders from the superior as a defense for committing a crime under international law provided a moral choice was possible to that person (Principle IV).

Later in the 1990s, there was the establishment of the International Criminal Tribunal for the former Yugoslavia (1993) and the Rwanda Tribunal in 1994 where criminals were brought to trial¹⁹ for only genocide, war crimes and crimes against humanity thereby upholding the international customary law of individual criminal responsibility. However, it should be noted that both the Statute of International Criminal Tribunal for former Yugoslavia (ICTY) and the Statute of International Criminal Tribunal for Rwanda (ICTR) did not provide for the crime of aggression which was the crime against peace by then. This was viewed as an intended exclusion of the crime by the UN Security Council because it would have opened up some of their leaders to being prosecuted, thus it was more of a political reason to protect their interests. Additionally, during the 1990s, there was no clear definition of the crime of aggression and including it in the statutes would have led to controversies among states.

It should be noted that the prosecuting of the crime of aggression was the most important outcome of the Nuremberg trials which led to the codification of prohibition of wars of aggression under the UN Charter and a definition of the crime in 1974 under the General Assembly resolution 3314 (XXIX)²⁰.

¹⁷ HARRIS, Whitney (2016). A World of Peace and Justice under the Rule of Law: from Nuremberg to the International Criminal Court. *Washington University Global Studies Law Review*, 15(4), 696

¹⁸ PEIRCE, Rachel. (2001). Which of the Preparatory Commission's Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction Should be Adopted into the Rome Statute of the International Criminal Court?. *BYU Journal of Public Law*, 15(2), 286 - 287

¹⁹ HARRIS, *ibid*, 17, pp. 699-700

²⁰ SCHARF, Michael (2012). Universal Jurisdiction and the Crime of Aggression. *Harvard International Law Journal*, 53(2), 360

In conclusion, it is evident that the development of the crime against peace together with the aspect of individual criminal responsibility, is envisaged from the Nuremburg trials, to the Tokyo military tribunal trials and then the Nuremburg principles. However, it should be noted that before these trials and after the Second World War, the United Nations (UN) was formed in 1945 to promote peace, security and cooperation among nations so as to prevent reoccurrence of the war. Therefore, the UN Charter entered into force on October 1945 to guide the UN in the promotion of peace in the world. This Charter provided for the prohibition of the use of force and was a great step towards the formation of the crime of aggression.

1.1.1. Legal significance of the UN Charter framework on the prohibition of the use of force

The UN Charter was signed in June 1945 before the Charter of International Military Tribunal and the Nuremberg trials of 1945 to 1946. The UN Charter provided for the prohibition of the aggressive war and this formed a milestone in the realization of the crime against aggression.

Article 2 (4) of the UN Charter laid down a stringent restriction on the use of force in international relations, an obligation which was from its inception designed to be of a superior legal nature and is now recognized to have acquired the character of customary international law and even that of *jus cogens*²¹. This norm is now binding even for states that are not members of the United Nations.

The UN Charter preamble common interest clause and Article 1(1) list effective collective measures for prevention and removal of threats to peace and suspension of acts of aggression or breaches of peace as part of the purpose of the UN²². The UN major bodies; the Security Council and the General Assembly have powers to react to threats of peace, breach of peace and acts of aggression as provided for under Article 12, 24 (1) and 39 of the UN Charter²³.

The prohibition of threat or use of force plays a primary role in international law as it is provided under Article 2(4) of the UN Charter²⁴. However exceptions to this rule are provided

²¹ SAYAPIN, Sergey (2009). International Law, the Use of Force and the Crime of Aggression: From the Charter of the United Nations to the Rome statute of the International Criminal Court. *Asian Yearbook of International Law*, 15, 3.

²² *ibid.*, pp. 4

²³ *ibid.*

²⁴ LHOTSKY, Jan (2015). Manifest Violation of the UN Charter [in Relation to the Crime of Aggression]. *Czech Yearbook of Public & Private International Law*, 6(1), 77

for example self-defense as per Article 51 of the Charter, and UN Security Council can also authorize military intervention in accordance with Article 42 of the Charter²⁵.

The 1945 UN Charter had transformed the prohibition of war into a prohibition of the use of force²⁶ as well as providing the Security Council the power to determine acts of aggression. However, it should be noted that the UN Charter lacked the definition of aggression and what amounted to an act of aggression.

Later on the General Assembly Resolution 3314 (XXIX) was adopted on 14 December 1974, as an interpretation of Article 2(4) of the United Nations Charter, with a definition of Aggression²⁷ as:

“Aggression is 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, as set out in this Definition²⁸”.

This definition was for the exclusive use of the Security Council and was conceived to provide guidance to the Council when it had to deal with situations amounting to a breach of international peace and security or acts of aggression²⁹. In order to preserve the Council's room to maneuver, Article 2 of Resolution 3314 provided that "the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." In other words, despite whatever the definition said, the Council could decide not to make a determination according to its own interpretation of the facts³⁰.

The resolution further provides what amounts to acts of aggression under Article 3. However, this was not exhaustive as specified under Article 4 due to the fact that the Security Council still maintained the power to determine other acts of aggression. This Article makes an act of aggression a still open ended discussion which leads to uncertainties because under

²⁵ LHOTSKY, Jan (2015). Manifest Violation of the UN Charter [in Relation to the Crime of Aggression]. *Czech Yearbook of Public & Private International Law*, 6(1), pp. 78

²⁶ KRESS, Claus (2018). On the Activation of ICC Jurisdiction over the Crime of Aggression. *Journal Of International Criminal Justice*, 16 (1), 4 [online]. <http://academic.oup.com/jicj/article/16/1/1/4924915>

²⁷ SAYAPIN, Sergey (2009). International Law, the Use of Force and the Crime of Aggression: From the Charter of the United Nations to the Rome statute of the International Criminal Court. *Asian Yearbook of International Law*, 15, pp. 6

²⁸ *ibid.*, pp. 7

²⁹ SOLERA, Oscar (2010). The Definition of the Crime of Aggression: Lessons not Learned. *Case Western Reserve Journal of International Law*, 42(3), pp. 804

³⁰ *ibid.*

criminal law, the crime must be well defined, clarified and clear. Meron criticizes Article 4 for being antithetical to criminal law statutes and treaties³¹.

Given the above, it should be noted that the two documents paved way for the development of the crime of aggression in the international criminal law. However, both the UN Charter and the Resolution 3314 (XXIX) only provided for state responsibility for the crime of aggression and not including individual responsibility as provided by the Nuremburg trials and principles which were adopted by the UN General Assembly (UNGA) Resolution 95 (1) in 1946. Meron criticizes the Resolution 3314 (XXIX) for not restating already existing customary law³². This research finds that the UN Charter and the Resolution 3314 (XXIX) was one step in front and one step back for the crime of aggression since individual perpetrators were left free and not prosecuted. This left a gap in the prosecution of the crime and thus paved way for the Rome Statute that provided for individual criminal responsibility regarding the crime of aggression.

1.1.2. The Rome Statute and the crime of aggression

After the successful prosecution of international crimes under the Nuremburg trials, Tokyo military tribunal, the ICTY and the ICTR, there was a great desire and requests to have a permanent Court to prosecute such crimes. Negotiations for the establishment of the International Criminal Court were started and took place at the Rome Conference with 120 states in favor, 7 against and 21 abstentions³³. This led to the adoption of the Rome Statute of the International Criminal Court (ICC). Its adoption saw the realization of a permanent universal accountability mechanism for those responsible for the most serious crimes³⁴. The crime of aggression was included as one of the crimes under the Rome Statute. However, this faced definitional problems³⁵ whereby some states and 5 permanent members agreed for the Court to exercise jurisdiction to this crime only after the Security Council determining that there has been an act of aggression, and any issues had to be consistent with the charter of the UN³⁶.

³¹ MERON, Theodor (2001). Defining Aggression for the International Criminal Court. *Suffolk Transnational Law Review*, 25(1), pp. 8.

³² *ibid.*, pp. 9.

³³ ARSANJANI, H. Mahnoush (1999). The Rome statute of the international criminal court. *The American Journal of International Law*, 93(1), 22.

³⁴ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 525

³⁵ ARSANJANI, *ibid*, 33, pp. 29

³⁶ *ibid*, pp.30

The original text of the Rome Statute, which was adopted in 1998 and entered into force in 2002, ostensibly endowed the ICC with jurisdiction over the crime of aggression³⁷. Those against the inclusion of this crime feared the over politicization of the Court. The contention was that states could abuse this crime by constantly referring cases to the Court, even if there was no crime³⁸. Another argument was that there was no agreement on what the crime of aggression was and there was no precedent of what constituted aggression³⁹. It was also maintained that there was no agreement on what constituted individual criminal responsibility⁴⁰. Others claimed however that there was precedent at the Nuremberg trials⁴¹. However, because it was the subject of much controversy, the crime was left undefined, which prevented the ICC from exercising practical jurisdiction over it⁴².

It should be noted that if the crime of aggression had not been recognized under the Rome Statute probably we would have been faced with a number of consequences like⁴³: a serious setback in international law, a rejection of lawfulness of crimes against peace, it would seem impossible to regulate power politics and the use of military force through law, there would be no mandate for further work on the crime of aggression and no basis for having a special working group on the crime of aggression which prepared for over 7 years regarding the crime⁴⁴.

Kaufman⁴⁵ argues that by ratifying the Rome Statute, a country exposes its political and military commanders to prosecutions under the Rome Statute⁴⁶. He further argues that where a country does not want to be prosecuted by the ICC, it can refrain from ratifying the Rome statute. However, he additionally notes that this does not completely make the country prosecution free because the Rome Statute allows prosecution where the defendant state has ratified the treaty⁴⁷.

³⁷ KAUFMAN, D. Zachary (2013). The United States, Syria, and the International Criminal Court: Implications of the Rome Statute's Aggression Amendment. *Harvard International Law Journal*, 55, 38

³⁸ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 526

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² KAUFMAN, *ibid.*, 37, pp. 38

⁴³ KAUL, Hans-Peter (2010). From Nuremberg to Kampala – Reflections on the Crime of Aggression. 4th International Humanitarian Law Dialogs Crime against Peace – Aggression in the 21st Century. Robert H. Jackson Centre, 5.

⁴⁴ *ibid.*

⁴⁵ KAUFMAN, *ibid.*, 37, pp. 35-44

⁴⁶ *ibid.*, pp. 37

⁴⁷ *ibid.*, pp. 41-42

Further complicating matters is the Rome Statute's complementarity principle⁴⁸. While it empowers domestic jurisdictions to handle international crimes, including aggression, it simultaneously demands a high threshold of institutional capability and political independence⁴⁹. In many African states, these conditions are not met. As such, the ICC remains the primary enforcer of the law on aggression ironically, in a context where states themselves have shown resistance to ICC jurisdiction⁵⁰.

After the ICC was established, a Special Working Group on the crime of aggression was put in place that worked on the definition and the Court's exercise of jurisdiction over the crime, leading to Kampala Review Conference in June 2010⁵¹.

1.1.3. The Kampala Amendments 2010

During the conference in Kampala, Uganda 2010, delegates agreed on the definition of the crime of aggression which is the current Article 8 bis of the Rome Statute. Furthermore the delegates also set conditions for exercise of Court's jurisdiction with regards to the crime and this is provided under Article 8 bis, 15 bis and 15 ter of the Rome Statute⁵². For a crime of aggression to be determined there should be assessment of an act of aggression and whether it has taken place⁵³. This act of aggression must manifest a violation of the UN Charter.

The Review Conference had the task of deciding the following issues on the crime of aggression: 1) the definition and what elements had to be present for it to be a crime; 2) how jurisdiction would be exercised by the ICC, as well as the role of the Security Council; 3) the jurisdictional regime of non-State Parties and non-ratifying States Parties⁵⁴.

Court can exercise jurisdiction over the crime where it has been referred by the Security Council, state or prosecutor's own initiative. The ICC pre-trial division can as well authorize

⁴⁸ KUWE, Eliasa (2025). Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa. *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), 2.

The complementarity principle is provided for under Article 1 and 17 of the Rome Statute, whereby the ICC is the Court of last resort and can only prosecute and investigate cases where the national courts are unwilling or unable to.

⁴⁹ *ibid.*

⁵⁰ KUWE, *ibid.*, 48, pp. 2.

⁵¹ SCHARF, Michael (2012). Universal Jurisdiction and the Crime of Aggression. *Harvard International Law Journal*, 53(2), 361 -362

⁵² LHOTSKY, Jan (2015). Manifest Violation of the UN Charter [in Relation to the Crime of Aggression]. *Czech Yearbook of Public & Private International Law*, 6(1), 78

⁵³ *ibid.*, pp. 79

⁵⁴ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 529

the prosecutor to proceed with the investigation⁵⁵ where the Security Council has not made the determination that an act of aggression has been committed by the concerned state.

The crime is only committed by persons in position to exercise control over or direct the political or military action of a state. This limits the perpetrators to presidents, prime ministers and top military leaders such as ministers of defense and commanding generals⁵⁶. Complementarily, the criminalization of aggression would act as a deterrent for persons in positions of power, or in control of a State⁵⁷. They would be subject to the jurisdiction of the Court over the crime of aggression, therefore playing a role in preventing aggressive war making⁵⁸.

But the Kampala consensus does include conditions for the Court's exercise of jurisdiction over the crime of aggression, which are significantly more restrictive than the conditions governing the Court's exercise of jurisdiction over genocide, crimes against humanity and war crimes. The essential point is that in a situation, which has not been referred to the ICC by the Security Council, the exercise of the Court's jurisdiction over the crime of aggression, pursuant to Article 15bis of the ICC Statute, will remain dependent on the consent of the states of the relevant territories and of the nationality of the individuals concerned⁵⁹.

Given that the consensus reached at Kampala did not constitute a complete breakthrough. Instead, it was decided to stipulate two additional conditions for the activation of the Court's jurisdiction over the crime⁶⁰. Pursuant to Articles 15bis (2) and (3) and 15ter (2) and (3) of the ICC Statute, the activation would require (i) the ratification or acceptance of the amendments by 30 States Parties, and (ii) a decision to be taken, after 1 January 2017, by the same majority of States Parties as is required for the adoption of an amendment to the Statute⁶¹. The first condition already having been fulfilled, the activation decision was placed on the agenda of the sixteenth session of Assembly State Parties held between 4 and 14 December 2017 in New York⁶².

⁵⁵ SCHARF, Michael (2012). Universal Jurisdiction and the Crime of Aggression. *Harvard International Law Journal*, 53(2), pp. 362

⁵⁶ *ibid*, pp. 363

⁵⁷ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 520

⁵⁸ *ibid*.

⁵⁹ KRESS, Claus (2018). On the Activation of ICC Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 16 (1), 7 [online]. <http://academic.oup.com/jicj/article/16/1/1/4924915>

⁶⁰ *ibid*.

⁶¹ *ibid*.

⁶² *ibid*.

While the States Parties reached agreement at the 2010 Kampala Review Conference, it was only in December 2017 that the Assembly of States Parties to the Rome Statute accepted the resolution to trigger the Court's jurisdiction over the crime from July 2018⁶³. Consequently, the activation of the jurisdiction of the International Criminal Court over the crime of aggression represented a major step in the development of international criminal justice since the adoption of the Rome Statute in 1998⁶⁴.

Despite the Kampala Amendments being adopted over a decade ago, few African countries have moved to ratify or domesticate them⁶⁵. This has resulted in a legal void where the crime of aggression exists in principle but not in practice⁶⁶.

Kress⁶⁷ highlights the legal controversy regarding the ICC jurisdiction over alleged crime of aggression committed by a state which has not ratified the Kampala Amendments where the crime has not been referred to the ICC by the Security Council⁶⁸. He points out the first legal view being that the Court has no jurisdiction over an alleged crime of aggression committed either on the territory or by a state party to the ICC statute that has not ratified the Kampala Amendments. He further adds that this gives states a treaty right that cannot be taken away unless the state consents. However, he further argues the second opinion being that where a state party has ratified the Kampala Amendments, it gives the ICC jurisdiction over crimes of aggression committed on its territory by a state that has not ratified the amendments. This jurisdiction is based on Article 12 (2) of the Rome Statute⁶⁹. Kress notes that state parties agreed through the New York resolution that the ICC has no jurisdiction to handle crime of aggression committed on territories of state parties that have not ratified the Kampala Amendments. However, this resolution further provided for the independence for the ICC judges to determine jurisdiction and make a few adjustments necessary⁷⁰.

⁶³ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 520

⁶⁴ *ibid.*

⁶⁵ KUWE, Eliasa (2025). Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa. *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), 3

⁶⁶ *ibid.*

⁶⁷ KRESS, Claus (2018). On the Activation of ICC Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 16 (1), 1-17 [online]. <http://academic.oup.com/jicj/article/16/1/1/4924915>

⁶⁸ *ibid.*, pp. 8

⁶⁹ *ibid.*

⁷⁰ *ibid.*, pp. 15

1.2. Legal and jurisdictional challenges in prosecuting the crime of aggression

Despite the fact that the Kampala Amendments provided for the definition of the crime of aggression and the Court to exercise jurisdiction over the crime, there are still a number of uncertainties and ambiguities with the amendments affecting Court's jurisdiction and prosecution of the crime for example the definition, jurisdictional and procedural limitations as discussed below.

1.2.1. Definitional ambiguities under article 8 bis and their limitations

The Rome Statute of the International Criminal Court defines the Crime of Aggression as 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 Nations⁷¹. This definition raises a question of what amounts to an act of aggression.

The Rome Statute of the International Criminal Court further provides for the definition of the act of aggression as 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 Nations⁷². The following acts shall be considered as an act of aggression regardless of declaration of a war⁷³;

- 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 thereof⁷⁴;
- 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 State⁷⁵;
- c) The blockade of the ports or coasts of a State by the armed forces of another State⁷⁶;
- 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

⁷¹ Article 8 bis (1) of the Rome Statute of the International Criminal Court (1998). *United Nations*, 2002.

⁷² Article 8 bis (2) of the Rome Statute of the International Criminal Court (1998). *United Nations*, 2002.

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid.*

for in the agreement or any extension of their presence in such territory beyond the termination of the agreement⁷⁷;

- 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 State⁷⁸;
- 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 therein⁷⁹.

This definition from the Kampala conference has been derived from pre-existing sources⁸⁰ that is the 1974 UNGA definition and Article 2(4) UN Charter. Unlike the other crimes under the ICC jurisdiction, the crime of aggression cannot be committed by an individual acting alone. This is because as per the definition this is a crime committed by only state leaders and state officials with authority to direct state forces into aggressive action⁸¹.

The nature of the crime of aggression is accordingly dual. The criminal offense in question comprises the conduct of an individual and the act of an aggressor state⁸². It is clear from the intrinsic peculiarities of aggression that single individuals acting without coordination cannot commit such a crime instead, it always results from the collective action of a plurality of persons⁸³. Secondly, the crime in question is attributable to “political and military leaders and other senior state officials” who “mastermind, plan, or organize” this crime⁸⁴. Due to this, Knoops refers to the crime of aggression as a “leadership crime”⁸⁵.

There are divided opinions regarding the criminal responsibility of individuals who participate in the crime in question in non-official roles⁸⁶. On the one hand, most scholars opine that private actors, for instance, business leaders and other prominent industrialists, cannot be criminally responsible for participating in the crime of aggression since they cannot fulfill

⁷⁷ Article 8 bis (2) of the Rome Statute of the International Criminal Court (1998). *United Nations*, 2002.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ BOAS, T. Anouk (2013). The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict, 6 [online]. International Crimes Database Brief 1

⁸¹ *Ibid.*

⁸² AVDIC, Faruk (2021). The Leadership Requirement of the Crime of Aggression under the Rome Statute of the International Criminal Court. *Journal of Liberty and International Affairs*, 7(3), 159

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ KNOOPS, G. G. J. (2014). International Criminal Court (ICC), Crime of Aggression, Accessory Liability, Universal Jurisdiction, Complementarity, Leadership Crime. *International Studies Journal*, 11(1), 10.

⁸⁶ AVDIC, *ibid.*, 82, pp. 167

control or direct requirement⁸⁷. These views draw support from the fact that those acting in private capacities could hardly ever find themselves in a position to control or direct the political or military machinery of a state⁸⁸. Hence, according to these views, individuals acting in the non-official capacity cannot be criminally responsible for the commission of the crime in question since they, by their external statuses that position them outside public offices, cannot have the decision-making power which would enable them to control or direct the behavior of a state⁸⁹. According to Coracini, a “state” act of aggression is a very material element of the crime that needs to be proven to establish individual criminal responsibility⁹⁰, therefore the definition leaves out private actors.

After the Nuremburg trials of 1945 and 1946, the United States established 12 subsequent trials from 1946 to 1949 that were referred to as the United States Military Tribunals at Nuremburg. These Tribunals dealt with the criminal prosecution of leading German Nazi industrialists in the I. G. Farben and Krupp cases for their participation in crimes against peace⁹¹. The concerned industrialists accused of crimes against peace were not formally members of the government but were nevertheless very closely associated with it⁹². Even though the United States Military Tribunals acquitted the accused civilians in particular cases, they clarified that private actors are subject to criminal prosecution and conviction for crimes against peace, that is, the crime of aggression, on the condition that they meet all the objective and subjective elements of the crime⁹³. Given this insight by the United States Military Tribunal, it is worth noting that individuals can only be prosecuted if the elements of the crime are in place and in this regard the crime provides for the requirement of the state involvement as an element of the crime. Therefore, such individuals should be state officials as discussed earlier and not private individuals.

Given the above, the clear reference to an act of aggression of a state in the definition would arguably give way to use of force by non-state actors without any judicial

⁸⁷ AVDIC, Faruk (2021). The Leadership Requirement of the Crime of Aggression under the Rome Statute of the International Criminal Court. *Journal of Liberty and International Affairs*, 7(3), pp. 167

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ CORACINI, Astrid (2010). The International Criminal Court’s Exercise of Jurisdiction over the Crime of Aggression – at Last ... in Reach ... Over Some. *Goettingen Journal of International Law*, 2(2), 772

⁹¹ AVDIC, *ibid.*, 87, pp. 168

⁹² *ibid.*

⁹³ *ibid.*

consequences⁹⁴. This definition implies that non state actors cannot be prosecuted for the crime of aggression, hence this is the general rule. However, there are situations where non-state actors can be controlled by states to commit the crime of aggression against another state. In the Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)⁹⁵, Nicaragua alleged that the United States of America (USA) had violated its sovereignty when it supported Contras rebels that undermined the Nicaragua government. It was alleged that the USA had trained, recruited, armed, and supported the rebels. The International Court of Justice (ICJ) held that for a state to be attributed to acts of non-state actors, that state should have had “effective control” over the actions of the non-state actors. Thus mere recruiting, training and supporting does not amount to effective control by the state if the state did not direct the non-state actors’ specific actions or if those actions were not done on behalf of the state. This case set up the “effective control” test which still aligns with the definition under Article 8 bis that indeed the state must be involved in the actions of the non-state actors.

However, in the case of Prosecutor v Dusko Tadic⁹⁶ the International Criminal Tribunal for the former Yugoslavia (ICTY) found the effective control test in the cases of Nicaragua v USA too strict and provided the “overall control” test. The overall control test implies that for as long as the state finances, organizes and equips a non-state group, the state is responsible for the actions of the non-state group whether or not each of its actions was specifically imposed, requested, or directed by the state. The Tribunal further added that states might easily shelter behind the pretext that it did not give instructions to the non-state group for their actions and thus disclaim state responsibility. These two different approaches raise the question of which test the ICC would apply. It is understood that the ICC does not have a system of binding precedence thus both the ICJ and the ICTY would be persuasive to the ICC. However, it can be argued that the effective control test of the ICJ would be more persuasive to the ICC than the overall control test of the ICTY, because Article 8 bis provides for the definition of aggression to include the “use of armed force by the state” indicating state responsibility which is upheld by the UN charter. The ICJ is the principal judicial body of the UN handling cases

⁹⁴ BOAS, T. Anouk (2013). The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict, 9 [online]. International Crimes Database Brief 1

⁹⁵ The International Criminal Court of Justice. Ruling of 27 June 1986 Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)

⁹⁶ International Criminal Tribunal for the former Yugoslavia (ICTY). Ruling of 15 July 1999 Prosecutor v Dusko Tadic No. IT-94-1-A

related to state responsibility. Furthermore, according to Article 8 bis the act of aggression must manifest a violation of the Charter of the UN. Thus a decision of the UN judicial body would be more persuasive to the ICC in this aspect.

The crime of aggression is also only applicable to manifest UN Charter violations for which one must assess the character, gravity and scale of the violation⁹⁷. In order to identify a crime of aggression, there should be an assessment as to whether the act of aggression has taken place. Secondly, it requires that such act must meet the criteria of paragraph 1⁹⁸ which is its character, gravity and scale constitutes a manifest violation of the UN Charter caused by use of armed force will fit the definition.

The threshold requirement that the act of aggression must be in ‘manifest’ violation of the Charter of the UN constituted the key to reach agreement about the most demanding aspect of the negotiations: the formulation of the State Conduct Element⁹⁹. The double function of this requirement is to set a quantitative (‘by its gravity and scale’) and a qualitative (‘by its character’) threshold¹⁰⁰.

There can be cases that are clearly illegal but their character, gravity and scale do not amount to manifest violation of the UN Charter for example cross border operations like the India - Pakistan border tensions from 2020. There was use of armed force by four militants at the Nagrot border of India. India alleged that these militants were from Pakistan. However Pakistan denied responsibility of what happened. Such incidents do not meet up the character, gravity and scale of the act of aggression since there was no state responsibility as it could not be proved that indeed Pakistan was responsible. They were just four armed militants who were armed thus the incident was not grave and could not be considered as an act of aggression. The Turkey cross border incursions at the Syrian border of Kurdish 2014, while fighting Islamic state fighters. Syria alleged that this amounted to an act of aggression. However, this did not meet the character, gravity and scale to amount to manifest violation of the UN Charter. It did not affect Syria’s political independence, there was displacement of a few people and the incursions were on a small scale that did not amount to full invasion of Syria. Or, one can imagine a missile that is launched into another state, but crashes in a desert of that other state,

⁹⁷ BOAS, T. Anouk (2013). The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict, 6 [online]. International Crimes Database Brief 1

⁹⁸ LHOTSKY, Jan (2015). Manifest Violation of the UN Charter [in Relation to the Crime of Aggression]. *Czech Yearbook of Public & Private International Law*, 6(1), 78 - 79

⁹⁹ KRESS, Claus (2018). On the Activation of ICC Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 16 (1), 6 [online]. <http://academic.oup.com/jicj/article/16/1/1/4924915>

¹⁰⁰ *ibid.*

well short of its target¹⁰¹. Another example might be an incursion that results from a map error (or other accident or mistake), or ‘harmless error’, where mens rea might also be lacking¹⁰². Thus no crime of aggression can be identified in such cases¹⁰³. This is because not every act of aggression is a basis for criminal responsibility¹⁰⁴.

As per the Vienna Convention on the Law of Treaties Article 46(2), a violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith¹⁰⁵. Still this definition is too general to determine “manifest violation”. Thus it will be a big challenge for the Court to develop criteria for specifying the term “manifest violation”.

It may seem advisable for the Office of the Prosecutor to signal at an early moment in time that it will take seriously the core message underlying the threshold requirement contained in Article 8bis (1) of the ICC Statute: that the substantive definition of the crime of aggression covers only a use of force by a state which reaches a high level of intensity and which is unambiguously unlawful¹⁰⁶. Such a signal will help dispel persisting and understandable doubts that the Court could get involved in burning legal controversies about anticipatory self-defense, self-defense against a non-state armed attack, and humanitarian intervention¹⁰⁷. In the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)¹⁰⁸, Democratic Republic of Congo (DRC) made a complaint to the International Court of Justice against Uganda for acts of armed aggression committed on the territory of Congo affecting its sovereignty and violating human rights. Uganda made a counter memorial of 3 claims, 2 of which were accepted. Uganda claimed that the use of force was an exercise of self-defense from acts of aggression allegedly committed by the DRC against Uganda; and attacks on Ugandan diplomatic premises and personnel in Kinshasa and on Ugandan nationals for which the DRC was alleged to be responsible. The Court rejected Uganda’s claim stating that the pre-condition of self-defense did not exist. Court further held

¹⁰¹ TRAHAN, Jennifer (2015). Defining the ‘Grey Area’ where Humanitarian Intervention may not be Fully Legal, but is not the Crime of Aggression. *Journal on the Use of Force and International Law*, 2(1), 58.

¹⁰² *ibid.*

¹⁰³ LHOTSKY, Jan (2015). Manifest Violation of the UN Charter [in Relation to the Crime of Aggression]. *Czech Yearbook of Public & Private International Law*, 6(1), pp. 81

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ KRESS, Claus (2018). On the Activation of ICC Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 16 (1), 16 [online]. <http://academic.oup.com/jicj/article/16/1/1/4924915>

¹⁰⁷ *ibid.*

¹⁰⁸ International Court of Justice. Ruling of 19 December 2005 [online]. <https://icj-cij.org/case/116>

that the unlawful military intervention by Uganda was of such magnitude and duration that the Court considered it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the United Nations Charter¹⁰⁹.

Another criticism was how to ensure conformity of the criminalization of aggression with cases of humanitarian intervention¹¹⁰. The concern was that when humanitarian interventions occurred without the consent of the Security Council they could amount to the crime of aggression¹¹¹. Trahan discusses that humanitarian intervention should not be held fully legal for it not to constitute a crime of aggression even if it is not unambiguously illegal to constitute a manifest Charter violation¹¹². As discussed above for an act to amount to a crime of aggression, it should by its character, gravity and scale manifest a violation of the UN Charter and against the sovereignty, territorial integrity or political independence of the affected state. However, humanitarian interventions are usually on a small scale with an intention to stop human rights abuses, to protect the people and not intended for territorial expansion, sovereignty or political independence of the state. It can be argued that humanitarian interventions especially not authorized by the Security Council may not be legal, however, they do not amount to crime of aggression prosecutions because of their intentions.

Furthermore, this definition of the crime of aggression does not cover “system disruption” as a form of warfare for example the disruption or sabotage of critical systems such as electricity, water, gas, telecommunications or transport¹¹³. There can be no doubt that the substantive definition of the crime of aggression is narrow as a definition of a crime under international law should be¹¹⁴.

In conclusion, although Article 8 bis provides for the definition of the crime and act of aggression, there are so many uncertainties and ambiguities regarding the definition as discussed above, which might make it impracticable to prosecute the crime and hold perpetrators accountable. Such ambiguities also pave way for the ICC to be used as a platform for political issues as there would be a lot of controversies from the ambiguities posed in the

¹⁰⁹ International Court of Justice. Ruling of 19 December 2005 [online]. <https://icj-cij.org/case/116>

¹¹⁰ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 527

¹¹¹ *ibid.*

¹¹² TRAHAN, Jennifer (2015). Defining the ‘Grey Area’ where Humanitarian Intervention may not be Fully Legal, but is not the Crime of Aggression. *Journal on the Use of Force and International Law*, 2(1), 62.

¹¹³ BOAS, T. Anouk (2013). The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict, 8 [online]. International Crimes Database Brief 1

¹¹⁴ KRESS, Claus (2018). On the Activation of ICC Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 16 (1), 17 [online]. <http://academic.oup.com/jicj/article/16/1/1/4924915>

definition. In addition, the following subchapter analyzes the jurisdictional and procedural limitations that constraint the prosecution of the crime by the Court.

1.2.2. Jurisdictional and procedural limitations

Article 5 of the Rome Statute provides the ICC with jurisdiction over the crime of aggression and this should be exercised in accordance with the Rome Statute.

Article 121 (5) of the Rome Statute provides that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory¹¹⁵. This represents a significant departure from the ordinary jurisdictional regime found in Article 12, whereby the Court's jurisdiction is enlivened by the acceptance of jurisdiction by either the state on the territory of which a crime is committed, or the state of nationality of the alleged perpetrator¹¹⁶.

Article 123 ICC Statute comprehensively governs both the adoption and the entry into force of any such amendment¹¹⁷. It should further be noted that these crimes of aggression should have been committed one year after the ratification or acceptance of the amendment by 30 state parties¹¹⁸.

It might be argued, despite the natural flow of its English wording, that the aim of this phrase (Article 121 (5) Rome Statute) was solely to prevent the exercise of the Court's jurisdiction on the basis of the ratification of the state concerned of the respective amendment while leaving the option open for the Court to otherwise exercise jurisdiction on the basis of having been committed on the territory of another ratifying state (positive understanding of Article 121)¹¹⁹. This so-called 'negative' interpretation of Article 121(5) ICC Statute, excluding the Court from exercising its amended jurisdiction whenever the crime is committed by the nationals of a non-accepting state party or on its soil, is further confirmed by a

¹¹⁵ Article 121 (5) of the Rome Statute of the International Criminal Court

¹¹⁶ MCDUGALL, Carrie (2024). Expanding the ICC's Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 22 (3-4), 546

¹¹⁷ ZIMMERMANN, Andreas (2012). Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties. *Journal of International Criminal Justice*, 10(1), pp. 213

¹¹⁸ Article 15 (2) of the Rome Statute of the International Criminal Court

¹¹⁹ ZIMMERMANN, *ibid*, 117, pp. 217

comparison with Article 124 ICC Statute¹²⁰. Thus notwithstanding Article 12, paragraphs 1 and 2, a state, on becoming a party to the Statute, may declare that, for a period of seven years after the entry into force of the Statute for the state concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time¹²¹.

Furthermore, and perhaps most crucially, but again limited to the Court's treaty-based jurisdiction for the crime of aggression, pursuant to Article 15 bis (4), a state party must formally opt out of the Court's jurisdiction over a crime of aggression arising from an act of aggression committed by that state in order for its nationals to be generally excluded from the Court's jurisdiction¹²². It is clear that States Parties have the ability to exempt themselves from the ICC's jurisdiction over the crime of aggression by lodging an opt out declaration with the Registrar prior to the commission of a relevant state act of aggression¹²³, a fact that has been confirmed by the lodging of opt-out declarations by Kenya¹²⁴. It is worth mentioning that Kenya was the first case where a State Party has made a declaration of non-acceptance on 30 November 2015¹²⁵. It was concerned with the distinction between an act of aggression and a war of aggression¹²⁶.

Thus, the article establishes an opt-out clause of the jurisdiction of the Court for the crime of aggression¹²⁷. It does this as an incentive for states to join the ICC as they can always declare that they wish to be exempted from the jurisdiction of the Court over the crime of aggression¹²⁸.

The distinction between an opting-out state and a non-opting-out state, where the first receive protection if attacked, while the second remains in a precarious situation, is discriminatory¹²⁹. It is contended that the same position does not occur with accepting or ratifying States parties and non-accepting or non-ratifying States parties, because where a

¹²⁰ ZIMMERMANN, Andreas (2012). Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties. *Journal of International Criminal Justice*, 10(1), pp. 217

¹²¹ Article 124 of the Rome Statute of the International Criminal Court

¹²² ZIMMERMANN, *ibid*, 120, pp. 221

¹²³ MCDUGALL, Carrie (2024). Expanding the ICC's Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 22 (3-4), 546

¹²⁴ *ibid*, pp. 550

¹²⁵ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 536

¹²⁶ *ibid*.

¹²⁷ *ibid*, pp. 534

¹²⁸ *ibid*.

¹²⁹ *ibid.*, pp. 535

national of a State Party that has accepted the amendments commits a crime of aggression in the territory of a non-accepting State Party the ICC cannot exercise its jurisdiction¹³⁰. Article 15bis (5) clearly states that, “*In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory*”¹³¹.

This represents a complete reversal of the general principle of how jurisdiction by the ICC is exercised¹³². According to article 12 of the Rome Statute, alleged crimes (in the case of genocide, crimes against humanity, war crimes) committed by a national of a non-State Party in the territory of a State Party are subject to the ICC jurisdiction, irrespective of the trigger mechanism, if there has been State referral, proprio motu by the Prosecutor or Security Council referral¹³³.

Contrary to this, in the case of the crime of aggression, there is a total exemption of non-States Parties from the scope of jurisdiction of the Court. This represents a substantial restriction in the ability of the Court to act¹³⁴. This new regime applies to cases of state referral and proprio motu investigation by the Prosecutor¹³⁵. However, for Security Council referrals there is no limitation irrespective of who has accepted the jurisdiction of the Court or has made a declaration of non-acceptance¹³⁶. Accordingly, in the case of state referrals or proprio motu investigation, this regime means that the express consent of an aggressor non-State Party is needed for the Court to exercise jurisdiction¹³⁷. This is unlikely to occur¹³⁸. This seemingly leads to a situation where there will generally be a lack of jurisdiction by the Court if a national of a State Party commits an act of aggression on the territory of a non-State Party¹³⁹.

This is not what happens when applying article 15 bis, paragraph 4, which allows the Court to exercise jurisdiction when a State party that has not opted-out commits an act of aggression in a State Party that has opted-out¹⁴⁰. In fact, by excluding non-States Parties from its

¹³⁰ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 535

¹³¹ AKANDE, Dapo and TZANAKOPOULOS, Antonios (2018). Treaty Law and ICC Jurisdiction over the Crime of Aggression. *The European Journal of International Law*, 29(3), pp. 949

¹³² SARKIN, Jeremy and ALMEIDA, Juliana, *ibid.*, 130, pp. 536

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ *ibid.*, pp. 536 - 537

¹³⁶ *ibid.*, pp. 537

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

jurisdiction where a crime of aggression is concerned, it creates a situation where the advantages of joining the Rome Statute by the big powers, such as by the USA, China, the Russian Federation, or India, are limited¹⁴¹. This means that the leaders (heads of state and government officials) of these countries cannot be prosecuted for the crime of aggression by the ICC.

The procedural requirements to start an investigation with respect to the crime of aggression are demanding¹⁴². The procedure provides for two avenues: if the UN Security Council refers a situation involving the crime of aggression to the Court pursuant to Article 15ter, the Prosecutor may commence the investigation if the Prosecutor concludes that there is a reasonable basis to proceed under the Statute, pursuant to Article 53(1)¹⁴³. If a State Party refers the situation to the Court or the Prosecutor intends to initiate an investigation proprio motu, then the procedure under Article 15bis (6) to 15 bis (8) applies¹⁴⁴. Article 15 bis (6) of the Rome Statute provides that where the prosecutor concludes that there's a reasonable basis to proceed with an investigation in respect of a crime of aggression, he/she has to first ascertain determination from the Security Council that an act of aggression was committed. Article 15 bis (7) further provides that after the determination has been made by the Security Council, then the Prosecutor may proceed with investigations.

Under Article 13 of the Rome Statute, a state party or the Security Council, pursuant to Chapter VII of the United Nations Charter, may refer to an independent prosecutor of the ICC cases in which it appears that admissible crimes have occurred¹⁴⁵. One problem inherent in allowing either a prosecutor of the ICC to investigate crimes or a state party to refer crimes is that such accusations may be politically motivated against certain states¹⁴⁶. Thus, although the

¹⁴¹ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 537

¹⁴² CHAITIDOU, Eleni (2019). The Amendments to the Regulations of the Court: Laying the Groundwork for Investigating the Crime of Aggression. *Journal of International Criminal Justice*, 17 (3), 496

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ PEIRCE, Rachel. (2001). Which of the Preparatory Commission's Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction Should be Adopted into the Rome Statute of the International Criminal Court?. *BYU Journal of Public Law*, 15(2), 283.

Chapter VII of the UN Charter provides for action with respect to threats to the peace, breaches of the peace and acts of aggression.

¹⁴⁶ *ibid.*

Rome Statute has set forth provisions to eliminate this concern, these procedural safeguards are ambiguous and do not provide adequate protection¹⁴⁷.

Excluding citizens of non-state parties (other than the referred state) hinders the ability of the Court to investigate all crimes committed within its jurisdiction in the geographic and temporal situation referred, and also acts to shield UNSC member states' interests¹⁴⁸. It should be noted that there are quite a number of countries that have not ratified the Statute.

The above articles state the fact that the Security Council has to first determine that there was an act of aggression for the Prosecutor to proceed with investigations of the crime of aggression. The Prosecutor must notify the Security Council through the UN Secretary-General of the situation before the Court, including any relevant information and documents¹⁴⁹. It should also be noted that where the Security Council has not provided this determination within 6 months, the Prosecutor may proceed to investigate the crime of aggression provided the Pre-Trial Division has authorized the commencement of the investigations¹⁵⁰. However, this is subject to the fact that the Security Council has not deferred the investigation as per Article 16 of the Rome Statute.

Given the above Articles, it can be seen that the Security Council has the overall authority to determine that investigation and prosecution of the crime of aggression. Kaufman provides arguments by the ICC proponents that the requirement of pre-trial chamber to authorize investigations initiated by the prosecutor is meant to deter treacherous prosecutions and refers to it as an institutional check¹⁵¹.

Article 16 at first glance appears to be a rather blunt instrument for the Security Council to influence what charges may be brought before the court in a particular situation, since by its terms it seems to result in the deferral of the investigation and prosecution of an entire situation altogether rather than operating as a line item veto¹⁵². Nonetheless, the intense controversy

¹⁴⁷ PEIRCE, Rachel. (2001). Which of the Preparatory Commission's Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction Should be Adopted into the Rome Statute of the International Criminal Court?. *BYU Journal of Public Law*, 15(2), 283

¹⁴⁸ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 554

¹⁴⁹ CHAITIDOU, Eleni (2019). The Amendments to the Regulations of the Court: Laying the Groundwork for Investigating the Crime of Aggression. *Journal of International Criminal Justice*, 17 (3), 496

¹⁵⁰ Article 15 bis (8) of the Rome Statute of the International Criminal Court

¹⁵¹ KAUFMAN, D. Zachary (2013). The United States, Syria, and the International Criminal Court: Implications of the Rome Statute's Aggression Amendment. *Harvard International Law Journal*, 55, 40-41

¹⁵² SCHAACK, Beth Van (2011). Negotiating at the Interface of Power & Law: The Crime of Aggression. *Columbia Journal of Transnational Law*, 49 (3), 21

surrounding Security Council Resolutions 1422¹⁵³ and 1487¹⁵⁴ suggests that the Council might at some point attempt to use its Article 16 power (and perhaps its Article 13(b) referral power for that matter) more surgically to dictate which charges may be brought in particular situations or cases¹⁵⁵. It remains to be seen to what extent the terms of the ICC Statute constrain the Council's exercise of its Chapter VII powers and whether the court would override the Council's preference that no aggression charges be considered within a particular situation¹⁵⁶.

The Security Council was created as a political organ having essential task and unprecedented powers¹⁵⁷. It has a primary responsibility for maintenance of international peace and security, the power to determine the existence of any threat to the peace, breach of peace, or act of aggression and adopt enforcement measures and the power to adopt binding decisions that may even contain obligations that prevail over treaty obligations of states¹⁵⁸. It cannot be questioned that the Security Council is the domain of high politics, power politics and super-power-politics¹⁵⁹. The Security Council's role in activating ICC jurisdiction over aggression introduces a deeply political dimension to an already complicated legal issue¹⁶⁰.

The main legal argument used by the five permanent members to decide why the Security Council should determine the act of aggression was that it's the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression¹⁶¹. If the United Nations Security Council (UNSC) refers a situation to the ICC for investigation, the membership status of the state is extraneous and such a case is theoretically open to the same criticisms levelled at the international tribunals¹⁶². Furthermore, the UNSC is then in the

¹⁵³ Security Council Resolution 1422 (2002) was adopted on 12 July 2002 and therein the Security Council using its powers under Article 16 of the Rome Statute requested the ICC not to commence, proceed, investigate or prosecute any cases involving officials or former officials or personnel of non-state parties, over acts or omissions under the UN authorized operations for a period of twelve months starting from 1 July 2002. The UN Security Council further expressed interest of renewing its request for the next following twelve months.

¹⁵⁴ Security Council Resolution 1487(2003) was adopted on 12 June 2003. As provided in the Resolution, the Security Council renewed its request under Resolution 1422 (2002) for another twelve months and further expressed the intention for renewal.

¹⁵⁵ SCHAACK, Beth Van (2011). Negotiating at the Interface of Power & Law: The Crime of Aggression. *Columbia Journal of Transnational Law*, 49 (3), 21

¹⁵⁶ *ibid.*

¹⁵⁷ BLOKKER, Niels (2022). Prosecuting the Crime of Aggression: The Role of the UN Security Council. In: BOCK, Stefanie and CONZE, Eckart (eds.) (2022). *Rethinking the Crime of Aggression*. T.M.C. Asser Press, The Hague, pp. 256

¹⁵⁸ *ibid.*, pp. 256

¹⁵⁹ *ibid.*

¹⁶⁰ KUWE, Eliasa (2025). Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa. *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), 3

¹⁶¹ BLOKKER, *ibid*, 157, pp. 258

¹⁶² FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 551

position of affecting the work and reputation of the Court in that its caseload is shaped by the concerns and self-interests of permanent members of the UNSC some of whom are not parties to the Rome Statute¹⁶³. Kaufman criticizes that states that hold veto power in the UNSC can easily block referrals for prosecution through the UNSC¹⁶⁴.

The ICC is already subject to significant Security Council control, both in terms of the Council's power to refer situations involving Non-Party States under Article 13(b) and in deferring prosecutions in a situation altogether under Article 16¹⁶⁵.

Kuwe¹⁶⁶ argues that the procedural complexities of Security Council's determination of acts of aggression and Pre-Trial Chamber authorization have affected the prosecution of the crime of aggression¹⁶⁷. Kuwe further criticizes that the UNSC role in activating ICC's jurisdiction over crime of aggression brings a political difficulty to already challenging legal issue subjecting justice to geopolitical issues of the five permanent members; USA, France, Russia, UK and China who have their own interests in Africa and also protecting their allies undermining ICC's impartiality and creates perceptions of double standards¹⁶⁸. As many African leaders have observed, aggression by powerful states such as the United States in Iraq or NATO interventions in Libya have not led to ICC prosecutions, despite mounting evidence and global debate¹⁶⁹.

On February 24, 2022, Russia launched a full-scale invasion of the neighboring state of Ukraine. Russia claimed to be demilitarizing and de-Nazifying Ukraine, protecting the people against genocide, and acting in self-defense¹⁷⁰. The International Court of Justice has since provisionally ruled "that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine" and issued a provisional measures order for Russia to "immediately suspend the military operations¹⁷¹. However, the Russian Federation, using its veto power

¹⁶³ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 551

¹⁶⁴ KAUFMAN, D. Zachary (2013). The United States, Syria, and the International Criminal Court: Implications of the Rome Statute's Aggression Amendment. *Harvard International Law Journal*, 55, 42

¹⁶⁵ SCHAACK, Beth Van (2011). Negotiating at the Interface of Power & Law: The Crime of Aggression. *Columbia Journal of Transnational Law*, 49 (3), 20

¹⁶⁶ KUWE, Eliasa (2025). Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa. *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), 1 - 5

¹⁶⁷ *ibid.*, pp. 1

¹⁶⁸ *ibid.*, pp. 3

¹⁶⁹ *ibid.*

¹⁷⁰ TRAHAN, Jennifer (2023). Legal Issues Surrounding Veto Use and Aggression. *Case Western Reserve Journal of International Law*, 55, 94

¹⁷¹ *ibid.*

under Article 27(3) of the UN Charter, was able, on February 25, 2022, to block condemnation of its own aggression before the UN Security Council which is the body charged under the UN Charter with "primary responsibility for the maintenance of international peace and security"¹⁷². Moreover, because of Russia's veto power, it is unlikely that the Security Council will play any significant role related to the situation in Ukraine in implementing a sanctions regime, taking measures to try to stop or end the commission of atrocity crimes, referring the situation to the International Criminal Court (which referral could include the crime of aggression)," or taking other measures to try to resolve the situation¹⁷³. Thus, the Security Council will be largely paralyzed from carrying out its core mandate because of the veto power of a permanent member¹⁷⁴. This is similar to the paralysis that resulted when the Security Council was repeatedly unable to act due to vetoes or veto threats with respect to the crimes occurring in Syria, in Darfur, Sudan, and numerous other situations¹⁷⁵. While the Security Council was deadlocked due to the Russian exercise of its veto power and was therefore unable to secure a condemnation of the Russian invasion of Ukraine, a resolution similar to the 1950 uniting for peace resolution of the General Assembly¹⁷⁶ was passed with overwhelming majority representing global condemnation of Russian intervention in Ukraine¹⁷⁷. While global pressure does serve its purpose, and its use should not be underestimated, the General Assembly nonetheless lacks the ability to impose binding sanctions, thereby lacking punitive enforcement power¹⁷⁸. Thus this leaves the ICC the only one capable to handle such cases.

Chaitidou also criticizes the regulation 13¹⁷⁹ which provides for the electing of a presiding judge, there is no criteria provided for the such a judge as per the law and it would be good practice to have a judge with competence in international law and matter of use of force as one of the criteria¹⁸⁰.

¹⁷² TRAHAN, Jennifer (2023). Legal Issues Surrounding Veto Use and Aggression. *Case Western Reserve Journal of International Law*, 55, pp. 95

¹⁷³ *ibid.*, pp. 95 -96

¹⁷⁴ *ibid.*, pp. 96

¹⁷⁵ *ibid.*

¹⁷⁶ The 1950 Uniting for Peace Resolution of the General Assembly provides that where the Security Council due to lack of unanimity of the permanent members fails to maintain international peace and security, the General Assembly shall consider the matter immediately and also provide recommendations.

¹⁷⁷ ALBADER, Fatemah. (2022). War without Consequence for the Permanent Members of the Security Council: the Need for Urgent Reform: in wake of the Russian Invasion of Ukraine. *U.C. Davis Journal of International Law & Policy*, 29(1), 97

¹⁷⁸ *ibid.*, pp. 98

¹⁷⁹ Regulation 13 of the International Criminal Court, Regulations of the Court (2004, as amended 2024). ICC-BD/01-05-16

¹⁸⁰ CHAITIDOU, Eleni (2019). The Amendments to the Regulations of the Court: Laying the Groundwork for Investigating the Crime of Aggression. *Journal of International Criminal Justice*, 17 (3), pp. 498

Although the Rome Statute provides the ICC with the jurisdiction over the crime of aggression, the fact that the Court cannot prosecute non state parties, states that have not ratified the Kampala Amendments 2010, and states that have opted out, makes it impracticable for the Court to prosecute perpetrators of the crime.

In light of the above discussed structural and jurisdictional limitations, it is thus important to assess in the next chapter the relationship of the African states and the ICC since the Court deals more with cases from the African continent. Furthermore, it is worth analyzing how these limitations affect African states, the legal issues raised and how African states have assisted in the shaping of the crime of aggression.

II. THE AFRICAN PERSPECTIVE ON ICC AND THE CRIME OF AGGRESSION

2.1. The relationship between Africa and ICC

When the ICC was established, there was anticipation that it would be an avenue for ensuring accountability and justice for the most serious crimes¹⁸¹. The ICC became the world's first permanent international criminal tribunal¹⁸². Senegal was the first state to ratify the Rome statute and 17 African states were among the first 60 to ratify it thus contributing to the achievement of threshold necessary for the Statute to become effective¹⁸³. To date, 43 African states are signatories and 33 of them have ratified the Statute making Africa the most represented continent making thirty percent of the ICC's total membership¹⁸⁴.

When the ICC began functioning in 2002, Africa was facing historical patterns of authoritarianism, lack of democracy, militarized governments that were responsible for mass atrocities, and where, in spite of the shift to multiparty democracy in the early 1990s, egregious crimes still occurred¹⁸⁵. The Rwandan genocide in 1994, the genocide in Darfur, Sudan (2003), ethnic massacres in South Sudan, cyclic tribal atrocities in Kenya, Nigeria, Uganda, the DRC and the Central African Republic (CAR) are among prominent cases of wanton destruction of human life under multiparty politics in an era in which the rule of law and respect for human rights were expected to prevail¹⁸⁶. ICC has become fundamental in preventing and ending impunity for human rights violations on the African continent¹⁸⁷. However, African states have continued to defy the ICC for example the prominent case of the arrest warrant against former President Omar Al-Bashir¹⁸⁸ where fellow African leaders refused to arrest him to be forwarded to ICC for prosecution. This can also be seen from Rwanda's refusal to arrest and extradite Al-Bashir when he travelled to Rwanda¹⁸⁹.

¹⁸¹ OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 2.

¹⁸² *ibid.*, pp.1

¹⁸³ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 545.

¹⁸⁴ OKURUT, *ibid.*, 181, pp. 1.

¹⁸⁵ SHILAHO, K. Westen (2018). The International Court (ICC) and the African Union (AU): a Bulwark Against Impunity or an Imperial Trojan Horse?, *African Journal on conflict resolution*, 18(1), 121

¹⁸⁶ *ibid.*, pp. 122

¹⁸⁷ OKURUT, *ibid.*, 181, pp. 1.

¹⁸⁸ *ibid.*, pp. 3

¹⁸⁹ *ibid.*

The relationship of the African leaders and ICC indicates a fall in the relation and lack of confidence in the Court¹⁹⁰ leading to defiance by the African States. This paralyzes the Court in a way that it becomes unable to proceed on the matter in question¹⁹¹.

African leaders seem to support the ICC when they refer their adversaries like rebel leaders and political opponents to the Court. However, they are unwilling to cooperate when investigation or prosecution is against one of their peers¹⁹². This can be seen when Uganda referred the case of Lord Resistance Army rebels to the ICC and cooperated to have it prosecuted by the Court. However, Uganda was one of the countries that were defiant with the arrest of former President Al- Bashir of Sudan¹⁹³.

To date, a total of eight African leaders have been charged in the ICC for various crimes. These include: former Ivory Coast president Laurent Gbagbo; former Ivory Coast Youth Minister Charles Ble Goude; former Liberian President Charles Taylor; former Kenyan President Uhuru Kenyatta; Kenya's then Deputy-President William Samoei Ruto; former Vice President of the Democratic Republic of Congo Jean-Pierre Bemba Gombo; former Minister of Defense of Sudan Abdel Raheem Muhammad Hussein; and former Sudanese President Omar Al Bashir's indictment (International Criminal Court, Defendants)¹⁹⁴.

The significant statistics of African leaders who have been indicted in the ICC ultimately inspires a perception that Africans are being targeted by the court regardless of the fact that some of the individuals charged were actually found to be responsible for the most serious crimes against humanity¹⁹⁵. The ICC has on several occasions denied allegations that they are discriminating against and systematically targeting Africans¹⁹⁶.

ICC's selective justice has been also attributed to the special relationship with the UNSC which is becoming increasingly scrutinized as the latter initiates, or fails to initiate, investigations into situations in which crimes defined in the Rome Statute appear to have been committed that could not otherwise be opened by the Court¹⁹⁷.

¹⁹⁰ OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), pp. 3

¹⁹¹ *ibid.*, pp.8

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*, pp. 11

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

¹⁹⁷ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 550

Lubbe¹⁹⁸ discusses the two cases of African Union decisions on the indictment of former President of Sudan Al- Bashir and former President of Libya Gaddafi (now deceased) which led to tension of the relation of the African Union (AU) and the ICC. He states the reasons for AU's not cooperating with the ICC's request to arrest former President Omar Al-Bashir relying on relevance of immunity of heads of state and further stating that AU argued that its role of peace making among its member states was undermined¹⁹⁹. Lubbe concludes by stating that regional efforts for peace making should not be undermined since the state parties put in a lot of effort to achieve it. However, where need be required international justice could be used²⁰⁰.

In February 2017, African leaders agreed on a 'strategy of collective withdrawal' from the ICC. This decision was premised on the widespread disapproval of the ICC by African Union leaders²⁰¹.

Efforts by the African Union (AU) to establish a regional criminal court through the Malabo Protocol demonstrate Africa's interest in creating localized justice mechanisms²⁰². This court would have jurisdiction over a range of crimes, including crime of aggression²⁰³. However, these efforts are compromised by the Protocol's inclusion of immunity provisions for sitting heads of state, contradicting international standards of accountability under the Rome Statute²⁰⁴. Thus, the prosecution of aggression in Africa presents not only a legal issue but also a political and ideological one, reflecting broader debates over the future of international justice and the balance of power between global and regional institutions²⁰⁵. Sirleaf also criticizes the Malabo Protocol stating that it undermines the developing norm of prohibiting official immunities under the customary international law²⁰⁶. He further notes that this provision undermines claims that states are acting out of a sense of legal obligation in prohibiting official immunity and this may lead to persistent objection in customary

¹⁹⁸ LUBBE, H. Johannes. The African Union's Decisions on the indictments of Al-Bashir and Gaddafi and their Implications for the Implementation of the Rome Statute by African States. In: AMBOS, Kai and MAUNGANIDZE, Otilia (eds.) (2012). *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa*. 24th edn. Gottingen: University of Gottingen, pp. 179-199

¹⁹⁹ *ibid.*, pp. 184

²⁰⁰ *ibid.*, pp. 197

²⁰¹ OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 11

²⁰² KUWE, Eliasa (2025) 'Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa', *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), pp. 2

²⁰³ *ibid.*, pp. 3

²⁰⁴ *ibid.*, pp. 2

²⁰⁵ *ibid.*

²⁰⁶ SIRLEAF, Matiangai (2017). The African Justice Cascade and the Malabo Protocol. *International Journal of Transitional Justice*, 11, 77

international law by states that support official immunity²⁰⁷. Kuwe criticizes that the Malabo protocol of the African Union also undermines the principle of equality before the law and promotes impunity²⁰⁸. It is noteworthy that the Malabo Court has not yet become operational due to a lack of ratifications, logistical planning, and financial resources²⁰⁹. Before the Malabo Declaration, the AU had passed a resolution in Addis Ababa in 2013 that purportedly accorded heads of state and government immunity against the ICC²¹⁰. However, African states parties of the Rome Statute are bound by the provisions of the Rome Statute in particular Article 27 which prohibits official immunity. This particular AU resolution does not exempt the African states from ICC prosecution unless when they withdraw from the Rome Statute.

Some countries, such as Kenya, have experimented with domestic mechanisms to address international crimes²¹¹. Following the 2007 – 2008 post-election violence, Kenya initially resisted ICC intervention and proposed establishing a local tribunal. However, political interference derailed the process, and the ICC eventually stepped in²¹². This episode exemplifies the challenge of balancing domestic ownership of justice with international oversight in politically charged environments²¹³. Domestic ownership of justice is very vital in international criminal justice. As earlier discussed, the complementarity principle requires that the case can only be brought before the ICC where the national courts are unwilling or unable to handle the matter. In that regard, when domestic courts handle the cases, states take ownership of justice and it does not seem like justice is being imposed from the international sphere. This strengthens the national system of justice, its legitimacy and compliance to the law.

In conclusion, African states contributed to the establishment of the ICC when they took part in the ratification of the Rome Statute that put the Court into place. Further engaged the Court by referring cases which helped with the human rights violations and impunity that were taking place on the continent at the time. However, the continued complaints from African states regarding the Court such as selective justice have affected the relation of the African

²⁰⁷ SIRLEAF, Matiangai (2017). The African Justice Cascade and the Malabo Protocol. *International Journal of Transitional Justice*, 11, pp. 78

²⁰⁸ KUWE, Eliasa (2025) 'Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa', *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), pp. 4

²⁰⁹ *ibid.*, pp. 3

²¹⁰ SHILAHO, K. Westen (2018). The International Court (ICC) and the African Union (AU): a Bulwark Against Impunity or an Imperial Trojan Horse?', *African Journal on conflict resolution*, 18(1), 141

²¹¹ KUWE, *ibid.*, 208, pp. 3

²¹² *ibid.*

²¹³ *ibid.*

States and the Court, thus leading to the next subchapter that discusses the legal concerns raised by the African States against the ICC.

2.2. Legal issues raised by African Union: state sovereignty, immunity of heads of states and jurisdictional bias

African states have over the years raised legal and political concerns regarding the ICC's prosecutions claiming that it is selective, targets African leaders and exempting those from the western world. African states have often raised issues of state sovereignty, immunity of their heads of states and jurisdictional bias of the ICC. These concerns have shaped the current relationship between African states and the ICC as discussed above including threatening to withdraw from the Rome statute. It has also led to the putting in place of the AU Malabo Protocol that protects immunity of heads of state and the establishment of the Regional Court to handle crimes like the crime of aggression so as to do away with the ICC. This sub chapter discusses these legal concerns and how they shape the current and evolving relationship of African states and international criminal law.

The principle of sovereignty is not absolute²¹⁴. Interference in the internal affairs of states by others has been in existence for centuries. In the nineteenth century, for instance, the international community intervened to bring an end to piracy, slave trade, and violation of the human rights of minority groups²¹⁵. As such, the character of the principle of sovereignty must reflect a state's international obligations, treaties, and its participation in international organizations²¹⁶. All these international treaties, conventions, agreements and membership within international bodies limit the sovereignty of a state²¹⁷. African states have accepted ICC jurisdiction, thereby surrendering some of their own sovereignty to the international institution, and are the most affected by its operations²¹⁸.

The crime of aggression protects state sovereignty, territorial integrity and political independence by prohibiting the unlawful use of force; however, it also encroaches on State

²¹⁴ SHILAHO, K. Westen (2018). The International Court (ICC) and the African Union (AU): a Bulwark Against Impunity or an Imperial Trojan Horse?, *African Journal on conflict resolution*, 18(1), pp. 123

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 560

sovereignty, similar to other core crimes, when installing individual criminal responsibility deriving directly from international law²¹⁹.

Independency and sovereignty is vital to African states due to the colonial history and this could be the reason why African states do not want to surrender their independence to international bodies²²⁰. There has been strong advocacy around African states withdrawing from ICC to protect their sovereignty²²¹. Many African rulers are therefore suspicious of the intentions of Western led intervention missions in Africa's conflicts for fear of encroachment on their sovereignty, or what remains of it, under the pretext of responsibility to protect²²².

The concern of state sovereignty and external interference from foreign states has shaped the continental political responses to ICC for example when the Assembly of Heads of State, the AU's highest decision-making organ, directed all AU member states not to cooperate with the ICC in executing the request for the arrest and surrender of Al-Bashir²²³. This decision was justified by relying among other things on the principles of sovereignty guaranteed under the UN Charter and the Constitutive Act of the African Union (AU Charter)²²⁴. This decision was also intended to provide immunity of heads of states.

The international law doctrine of immunity from prosecution effectively exempts certain individuals from prosecution for crimes committed while they are serving as heads of state or foreign state representatives²²⁵. There is debate about whether immunity can be conferred for international crimes such as genocide, crimes against humanity, crime of aggression and war

²¹⁹ BERES, Nora. One step forward, one step back? The crime of aggression under the Rome Statute. In: KRESS, Claus, BARRIGA, Stefan and GROVER, Leena (eds.) (2025) *The Crime of Aggression: A Commentary*. Cambridge: Cambridge University Press, PP. 223

²²⁰ LUBBE, H. Johannes. The African Union's Decisions on the indictments of Al-Bashir and Gaddafi and their Implications for the Implementation of the Rome Statute by African States. In: AMBOS, Kai and MAUNGANIDZE, Ottilia (eds.) (2012). *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa*. 24th edn. Gottingen: University of Gottingen, pp. 193

²²¹ OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 11

²²² SHILAHO, K. Westen (2018). The International Court (ICC) and the African Union (AU): a Bulwark Against Impunity or an Imperial Trojan Horse? , *African Journal on conflict resolution*, 18(1), 124

Responsibility to protect (R2P) is a principle that was adopted at the UN 2005 world summit. This provides that a state has the primary responsibility to protect its population from crimes like genocide, crimes against humanity, war crimes and ethnic cleansing. However, where the state fails to do so, then the international community can help protect the population of that particular state through diplomatic and peaceful means. Failure of the peaceful means, then the international community will intervene through collective action that should be authorized by the Security Council.

²²³ LUBBE, *ibid*, 220, pp. 184

²²⁴ *ibid*.

²²⁵ OKURUT, *ibid*, 221, pp. 16

crimes, especially before the ICC²²⁶. Generally, the position taken by the ICC, although not definitive, is that ‘customary international law creates an exception’ and no immunity can be conferred for these types of crimes because genocide, war crimes and crimes against humanity cannot be acts of state and because they are jus cogen norms that is, they are norms from which no derogation is permitted, not even by state leaders²²⁷.

The idea that heads of state should be immune from criminal prosecutions is not new, nor does it originate with African states²²⁸. Such immunity has a long history of conferring protection on individuals performing acts of state and shields individuals from prosecution for domestic crimes or civil liability²²⁹. The idea is that heads of state must have some latitude to perform acts and participate in international politics on foreign soil without fear of foreign domestic law²³⁰.

This is further complicated by domestic constitutional structures, particularly in Africa, where heads of state and senior government officials are often legally insulated by constitutional immunities. In theory, the Rome Statute, especially Article 27, nullifies such immunities²³¹.

The principle of non-intervention or non-interference in the domestic matters of another state presents a rationale for absolute immunity of presidents from criminal prosecution²³². The principle of non-intervention places an obligation upon states not to interfere with domestic affairs and the territorial or political integrity of another state through the use of force (Article 2(4), UN Charter)²³³. This principle operates within the framework of equality of states at international law which prevents a sovereign state being subjected to the jurisdiction of another²³⁴. Thus if a state is to arrest another sitting head of state, such action would amount to an illegitimate / unconstitutional regime change²³⁵ in that state. While this is the case with

²²⁶ FISHER, J. Kirsten (2018). Africa’s role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 555

²²⁷ *ibid.*

²²⁸ *ibid.*

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ KUWE, Eliasa (2025) ‘Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa’, *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), pp. 2.

²³² OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 17

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ *ibid.*

criminal matters, there is an exception to immunity of heads of state that has been developed in relation to accountability for international crimes under international tribunals²³⁶.

Arrest warrants issued for heads of state, arguably, force African leaders to choose between obligations to the Court to arrest (if their states are member states of the ICC) and obligations under customary international law to respect official immunities, a choice that makes international politics challenging²³⁷. This can be seen from the most recent events when Poland announced that Israel Prime minister Benjamin Netanyahu would not be arrested when he travels to Poland for the International Holocaust Memorial day that took place on 27 January 2025, thus defying ICC arrest warrant. The fact that the ICC lacks a police force with which to enforce its rulings and arrest suspects and is therefore dependent on diplomatic pressure and the cooperation of members to carry out such tasks puts states that would most regularly interact with the newly indicted head of state in an awkward position²³⁸. Prosecuting a person in power or in control of a state who has committed an act of aggression against another state will jeopardize the relations between those states²³⁹.

Former President of South Africa Jacob Zuma justified his government's actions for not arresting former President Al-Bashir of Sudan by stating that the arrest of al-Bashir would tantamount to illegitimate regime change in Sudan²⁴⁰. This argument is premised on the principle of sovereign equality of states, which is the foundation for immunity of states from being subjected to the jurisdiction of another (*par in parem non habet imperium*)²⁴¹. That a move to arrest a sitting head of state invariably leads to a change in the governance of the country concerned²⁴². Arresting a sitting president may constitute extreme meddling in the sovereignty and independence of another state. Notwithstanding of this consideration, the ICC ruled that South Africa had failed in its duty to arrest Al-Bashir and extradite him to The Hague for prosecution²⁴³. As a result, South Africa attempted to withdraw from the ICC.

²³⁶ OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 17

²³⁷ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 554 - 555

²³⁸ *ibid.*, pp. 555-556

²³⁹ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 548

²⁴⁰ OKURUT, *ibid.*, 236, pp. 12

²⁴¹ *ibid.*

²⁴² *ibid.*

²⁴³ *ibid.*

In 2016, the ICC referred Chad, Djibouti and Uganda to the UN for failing to meet their obligations to cooperate with the Court and arrest Al-Bashir (former President of Sudan) when he visited their countries²⁴⁴. Other African states, including Kenya and Nigeria, had also allowed the former Sudanese President to visit and leave, as had South Africa²⁴⁵.

The issues of most pressing concern to some vocal African leaders, are the Court's narrow focus on Africa and its refusal to listen to concerns regarding head-of-state immunity, which arguably ties to the region's ability to conduct international politics²⁴⁶.

Kuwe criticizes that the issue of lack of immunity of heads of state at the international level has brought about division between international norms and national realities that embody immunity of its heads of state in their constitutions thus making it hard to implement international law domestically²⁴⁷. This indicates a wave of states desiring to protect immunity of heads of states as per the customary international law. It is evident that with ICC's lack of a police force to enforce these arrests, defiance may become the new normal where states are not arresting leaders of other states.

Another legal concern raised by the African states is jurisdictional bias. There is thus a general perception in Africa that the Office of The Prosecution practices selective prosecution using geopolitical considerations, targeting Africa and casting a blind eye on atrocities committed by the United States and its allies in Syria, Iraq and Afghanistan²⁴⁸. Gambia accused the ICC of bias against people of color and in particular, Africans and this inspired the state's decision to quit the ICC in October 2016²⁴⁹. Gambia raised some concerns with the Court's scrutiny on Africans while ignoring the atrocities committed by Western states²⁵⁰. This was sparked off by the case of Britain's former Prime Minister, Tony Blair, whom the ICC declined to prosecute over his role in atrocities committed during the Iraqi War²⁵¹. The Prosecutor's decision not to try Blair for war crimes was met with widespread outcry as many felt that he

²⁴⁴ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 556

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*, pp. 549

²⁴⁷ KUWE, Eliasa (2025) 'Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa', *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), pp. 2.

²⁴⁸ SCHNEIDER, Lea (2020). The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa? *Journal of International Criminal Law*, 1(1), 93

²⁴⁹ OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 13

²⁵⁰ *ibid.*, pp.13 - 14

²⁵¹ *ibid.*, pp. 14

was responsible for engineering the Iraqi war²⁵². This can also be noted from the ICC case statistics, as of September 2025 there are twelve cases under active investigations at the ICC with six of which are for African states.

This point of jurisdictional bias appears to carry weight in light with the concept of sovereign equality of states in international law²⁵³. This principle requires states to be treated as equals under international relations. The ICC's practice of focusing on African states while ignoring the crimes committed by Western states may very well constitute an undermining of this principle²⁵⁴. Gambia's former president Jammeh was himself implicated in several serious crimes including torture committed during his tenure as president. Thus it can be argued that his opposing the authority of the ICC as seen above, would therefore be a logical option for a man who thought he was close to being indicted by the Court²⁵⁵. However, it is not only those with self-interested conflicts with the Court who are supporting the call for immunity²⁵⁶ and referring to the Court as being selective, for example the former President of South Africa Jacob Zuma never had a case against him before the Court.

In September 2017, a UN Commission of Inquiry released a report on Burundi implicating the then President Pierre Nkurunziza in crimes against humanity including torture, enforced disappearances, sexual violence, extrajudicial killings and arbitrary arrests which occurred during his bid for a third term of presidency in April 2015²⁵⁷. President Nkurunziza immediately jumped on the bandwagon of the African leaders calling for an end to what they described as an assault on African state sovereignty²⁵⁸. Burundi preempted the ICC's investigations by withdrawing from the Rome Statute in October 2016. This effectively paralyzed the Court's investigations into the crimes committed by Nkurunziza's administration since its jurisdiction is limited to state parties to the Rome Statute. All efforts to establish accountability for the election related violence have since stalled²⁵⁹. Given the above, Burundi has refused to reconsider its decision to withdraw from the Rome Statute as this would lead to the re-opening of claims against the former President Nkurunziza. However, in the case of the

²⁵² OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 14

²⁵³ *ibid.*

²⁵⁴ *ibid.*

²⁵⁵ *ibid.*

²⁵⁶ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 558

²⁵⁷ OKURUT, *ibid.*, 252, pp. 15

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*

situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar²⁶⁰ the ICC pronounced itself as having jurisdiction over deportation of the Rohingya people from Myanmar (Non-State Party) to Bangladesh (State Party). In that regard the Court can exercise jurisdiction over a crime that has been partially committed in non-state party and partially in the state party. In reference to Burundi, it is evident that once Burundi becomes a state party again, then the Court will have jurisdiction over atrocities that were committed there. .

Concerns of jurisdictional bias by the Court are also seen from the referrals by the UNSC to the Court. The differential treatment by the Court of Libya and Syria demonstrates one repercussion of this arrangement²⁶¹. Because neither country is a member-state, the only way for the ICC investigation into these situations to be initiated would be by means of UNSC referral. In February 2011, the UNSC unanimously voted to refer the actions of the Muammar el-Gaddafi former President of Libya to the ICC²⁶². No such referral was forthcoming for Syria, despite arguably similar conditions and 57 states including the UK, Germany, Botswana, Tunisia, Japan and Costa Rica calling for one²⁶³. This lack of UNSC attention to Syria may be partly because of the country's ties to permanent members of the UNSC that possess veto power and who are also not members of the ICC, specifically China and Russia. To some critics, this state of affairs reeks of politics in the absence of objective justice, where legal principles become 'subservient to political agendas'²⁶⁴. There continues to be reasonable concern about the unequal treatment of these two similar cases and, more generally, about the UNSC's relationship with the Court²⁶⁵.

Furthermore, there are examples of bias within the referrals themselves that undermine the credibility of the Court, demonstrating again how powerful states are able to shield themselves from Court censure²⁶⁶. Mainly, it is the referral and deferral powers of the UNSC which evoke criticism²⁶⁷. In the cases of both Darfur and Libya, the influence of the UNSC and other powerful global actors is evident in the manner in which non-Sudanese and non-Libyan actors

²⁶⁰ International Criminal Court. Pre-Trial Chamber III. Ruling on 14 November 2019 No. ICC-01/19.

²⁶¹ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 552

²⁶² *ibid.*

²⁶³ *ibid.*

²⁶⁴ *ibid.*, pp. 552 -553

²⁶⁵ *ibid.*, pp. 553

²⁶⁶ *ibid.*

²⁶⁷ SCHNEIDER, Lea (2020). The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa? *Journal of International Criminal Law*, 1(1), 94

were treated²⁶⁸. UNSC Resolution 1593, adopted in 2005, referring the situation in Darfur, Sudan, to the ICC includes an operative paragraph 6, which excludes investigations of non-state parties, with the exception of Sudan²⁶⁹. This paragraph has been dubbed ‘the most controversial aspect of the referral. It is troubling since ‘the exclusion of some states’ nationals makes it difficult to reconcile the resolution with the principle of equality before the law. Some states’ nationals are more equal than others²⁷⁰.

In regard to the criticism levelled against the ICC by African state leaders claiming that the Court is an instrument of Western imperialism bringing ‘justice’ to Africa, the process by which situations are brought forth creates concern for the justness of case selection²⁷¹. It is not that the crimes on the African continent should not be addressed, nor that any of the African-based situations currently before the Court do not merit ICC attention; rather, there are other situations globally that also warrant Court attention and have been neglected or purposefully ignored²⁷².

It should be noted that most African cases at the ICC were self-referrals thus cannot be blamed on the ICC and terming it as jurisdictional bias. Furthermore, the African criticism of the Court are both valid concerns and at the same time political interests of African leaders that were already for prosecution before the Court, hence the desire to protect their interests. UNSC’s veto powers and the desire to protect their allies cannot as well be ignored since the UNSC has powers to refer cases to the ICC thus its political interests can very well affect the cases that are before the Court. Furthermore concerns raised by African states have also paved way for Africa’s participation in the shaping of the crime of aggression as will be discussed in the next sub chapter.

2.3. Africa’s contribution in shaping the crime of aggression

Africa has played a great role in the development of the crime of aggression more than what has been acknowledged at the scholarship level. This can be seen through UN debates, leadership at the Kampala Review Conference, regional instruments like the Malabo Protocol thus adding to the international criminal law at large. Africa has contributed a unique

²⁶⁸ FISHER, J. Kirsten (2018). Africa’s role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 553

²⁶⁹ *ibid.*

²⁷⁰ *ibid.*

²⁷¹ *ibid.*, pp. 554

²⁷² *ibid.*

perspective on the interpretation, limitation and understanding of the crime of aggression basing on its own historical atrocities and post-colonial conflicts and foreign countries intervention.

UNGA Resolution 177(II) entrusted the International Law Commission (ILC) with the task of drawing up a draft code of offences against peace and security of mankind²⁷³. The composition of the ILC at the submission of its first and second reports in 1951 and 1954 respectively were representatives from contemporary UN regional groups with the exclusion of African group²⁷⁴. In essence, no African state was represented on the Commission at the initial preparation of the draft code of offences²⁷⁵. Later, newly independent African states lobbied to be included in the work of the ILC and this push led to UNGA Res 36/39 which enlarged the ILC to include 8 nationals from African states²⁷⁶. However, as far as the project is concerned, the negotiation of the Rome Statute appears to suggest that African states exhibited much faith in the project than its originators²⁷⁷. On the eve of the ICC's birth, Third World States thus fought for including the crime of aggression within the Court's jurisdiction. Their goal was to revive the individual crime of aggression, which had not been prosecuted since the International Military Tribunals of Nuremberg and Tokyo²⁷⁸. It is therefore only when the Third World States formed a majority of the General Assembly in the wake of decolonization that they managed to use their new power in numbers to adopt a definition of aggression²⁷⁹.

What is clear is that African states with exception of Morocco played a key role in codifying the crime of aggression in the Rome Statute²⁸⁰. African states participated actively in the conference debates and were represented in all the Commission²⁸¹. This is further seen when Uganda hosted the Review conference that led to the Kampala Amendments in 2010. During this conference African states were quick to point out that the ICC should not be dependent on the UN Security Council to carry out its work²⁸². Speaking for the African group,

²⁷³ OZUO, Izunna Isdore. (2018). Criminalization of Aggression in international Law: The Role and Position of African States. *African Journal of Criminal Law and Jurisprudence*, 3, 17.

²⁷⁴ *ibid.*

²⁷⁵ *ibid.*

²⁷⁶ *ibid.*, pp. 17 - 18

²⁷⁷ *ibid.*, pp. 18

²⁷⁸ DE BOCK, Charles. (2014). The Crime of Aggression: Prospects and Perils for the Third World. *Chinese Journal of International Law*, 13(1), 106

²⁷⁹ *ibid.*, pp. 99

²⁸⁰ OZUO, *ibid.*, 273, pp. 21

²⁸¹ *ibid.*

²⁸² *ibid.*, pp. 22

the then Attorney General of Kenya, Amos Wako, argued that African States Parties were particularly not convinced that the Court's jurisdiction over the crime of aggression should be subject to the Security Council's approval²⁸³. The general idea was that the independence of the Court should not be 'unduly prejudiced by political consideration'²⁸⁴. African states parties rejected the structuring of aggression in a manner that grants the UN Security Council exclusive authority to trigger prosecutions. The continuity between this position on the crime of aggression and the controversial article 16 amendment which aims to trim to exclusive power of the UN Security Council to defer ICC cases was self-evident²⁸⁵ from African states.

On the second issue, African states expressed the view that the 'crime of aggression ought to be treated in the same way as all the other crimes'²⁸⁶. The implication of this position is that a state's lack of ratification of the aggression amendment does not entirely preclude a successful prosecution of aggression attributable to that state. That is, all the trigger mechanisms enumerated in the Rome Statute can apply provided the crime was committed in the territory of a State Party to the Statute that has accepted the amendment²⁸⁷. The net effect is that African States Parties were content with the status quo as far as jurisdiction over the crime of aggression is concerned. To most African States, there is no need to create a separate regime for the crime²⁸⁸.

The Kampala compromise while recognizing that the politics of the Security Council should not constrain the prosecution of the crimes before the ICC, partly deferred to the Council²⁸⁹. However, the question that is yet unanswered is this: what will happen if the Security Council makes a negative determination of aggression in respect of the situation in question? Will the Prosecutor still proceed with the investigation?²⁹⁰ It can be argued that this is a matter that can still be forwarded to the Pre-Trial Chamber to determine whether the Prosecutor can proceed with the investigations as discussed in Part I of this paper.

We also notice African states contribution towards the new proposal for the amendment of the Court's jurisdiction regarding non state parties and states parties that have not ratified

²⁸³ OZUO, Izunna Isdore. (2018). Criminalization of Aggression in international Law: The Role and Position of African States. *African Journal of Criminal Law and Jurisprudence*, 3, 22

²⁸⁴ *ibid.*

²⁸⁵ Institute for Security Studies (08– 03-2010). *Africa must lead on the development of the crime of aggression* [online]. <https://issafrica.org/iss-today/africa-must-lead-on-the-development-of-the-crime-of-aggression>

²⁸⁶ OZUO, *ibid.*, 283, pp. 23

²⁸⁷ *ibid.*

²⁸⁸ *ibid.*

²⁸⁹ *ibid.*

²⁹⁰ *ibid.*

the Kampala amendments, which was held in New York July 2025. Sierra Leone is among the countries that are calling for the review of the amendment. Furthermore African states also participate through advocacy. In the lead-up to the review of the Kampala Amendments on the Crime of Aggression by the Assembly of States Parties to the International Criminal Court (ICC) in July 2025, Africa Legal Aid (AFLA) organization mobilised the responsible ministers of African States Parties to the ICC with the objective to raise awareness and foster a sense of ownership among the states to advocate for a crime of aggression regime that is both fair and legitimate²⁹¹.

In sum, African states equally expressed great delight at the historic adoption of the resolution activating the jurisdiction of the ICC over the crime of aggression²⁹².

Given the above participation of African states in the shaping of the crime of aggression, it would be important to examine the reaction and response of the African states towards the crime, to determine whether African states are contented with the current situation, prosecution and laws regarding the crime of aggression.

- African states feel like it does not necessarily apply to African member states of the Rome Statute as was requested during the Kampala Review (discussed above). This is due to the fact that for the Kampala Amendment to apply to a member state, that state must have ratified the amendment and also accepted the Court's jurisdiction over the crime
- African states still find that the international criminal law is politicized due to the fact that a political body, Security Council has to determine that there was an act of aggression before the crime is prosecuted. Although the Prosecutor can still request the Pre Trial Chamber so as to proceed with the investigations where the UNSC has not determined the act of aggression, the mere fact that the UNSC is the first privilege role to determine the act of aggression with its permanent members and veto powers, it sets a picture of the Court being politicized. It is important not to minimize the possibility, in fact the likelihood, that the Court has been viewed as a political tool by some of the

²⁹¹ Africa Legal Aid. *Africa Legal Aid champions the review of the Kampala amendments on the crime of aggression* [online]. https://www.africalegalaid.com/africa-legal-aid-champions-the-review-of-the-kampala-amendments-on-the-crime-of-aggression?utm_source=chatgpt.com

²⁹² OZUO, Izunna Isdore. (2018). Criminalization of Aggression in international Law: The Role and Position of African States. *African Journal of Criminal Law and Jurisprudence*, 3, 25

leaders of the states²⁹³. Just like Murithi²⁹⁴, Shilaho argues that ICC cannot entirely be a judicial body as this is evidenced by influence from the five veto permanent members of the United Nations Security Council that refer cases to the ICC, making the Court not purely legal institution. He points out that three of these five permanent countries of UNSC have not ratified the ICC and thus have no trust in the Court²⁹⁵.

- African Union still requires to first be given a chance to handle cases of its member states before the matter can be forwarded to the ICC. This is due to the fact that the African Union is more inclined to creating peace and good relationship among its members which is done through peace talks and dialogues instead of going for prosecution. However, as discussed earlier, the crime of aggression is more inclined to holding heads of states and government officials accountable for the crime, as per Article 8 bis of the Rome Statute. Thus the principle of complementarity may not apply in reference to the crime of aggression as national judicial systems may not be able to hold the heads of states accountable due to their immunity. Furthermore the AU is already having the Malabo Protocol which also protects immunity of heads of states and government officials, thus it leaves the ICC as the only platform available to handle the crime and hold government officials accountable.
- Kuwe argues that Africa's lack of influence in the UNSC makes it unable to have their concerns prioritized leading to inaction where the aggression is made to African states²⁹⁶. Having influence in the UNSC, Africa's concerns would be heard, decisions would be made from the African stand point and crimes of aggression committed in Africa would also be recognized and condemned.

The ICC will be challenged and might have difficulty recovering if widespread distrust were to take root, especially if it were geographically concentrated in Africa²⁹⁷. Such distrust is blossoming but not yet overwhelmingly widespread in Africa; attention must be paid to

²⁹³ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 546

²⁹⁴ MURITHI, Tim (2013). The African Union and the International Criminal Court: an Embattled Relationship? *The Institute for Justice and Reconciliation*, Policy Brief 8, 1-9.

²⁹⁵ SHILAHO, K. Westen (2018). The International Court (ICC) and the African Union (AU): a Bulwark Against Impunity or an Imperial Trojan Horse?, *African Journal on conflict resolution*, 18(1), 130.

²⁹⁶ KUWE, Eliasa (2025) 'Prosecution of the Crime of Aggression in Domestic Jurisdiction in Africa', *International Journal of Novel Research in Humanity and Social Sciences*, 12(4), pp. 4

²⁹⁷ FISHER, *ibid*, 293, pp. 550

resolving concerns, for both moral and practical reasons²⁹⁸. This attention is important both because some concerns are appropriate such as the international imbalance of power over the Court and because even warranted dismissal of growing dissatisfaction of the Court in Africa, if it is done in a disrespectful manner, leads to political and moral challenges to the Court's foundation²⁹⁹. For the Court to maintain trust from the African states, the issues leading to mistrust like the UNSC power imbalance needs to be addressed, in this way African states will be assured that their concerns will be represented very well and decisions made to that effect. Furthermore, ignoring the concerns will only legitimate the crisis of the jurisdictional bias, hence there is need for reforms to ensure that international criminal law is applied equally and where it is required, not based on political interests.

With reference to the legal concerns discussed above and the current relationship of the African states and the ICC, it demonstrates that the issues raised are not merely political but also grounded in procedural fairness, unequal application of justice by the Court hence leading to the requirement for reforms to enable the enforceability of the crime and ensuring accountability of perpetrators. Therefore, the following chapter proposes amendments aimed at enforcing accountability of the crime of aggression while responding directly to the challenges identified in the African context.

²⁹⁸ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), pp. 550

²⁹⁹ *ibid.*

III. PROPOSAL FOR AMENDMENTS OF THE ROME STATUTE ON THE CRIME OF AGGRESSION

Having analyzed the definitional, jurisdictional and procedural limitations of the crime of aggression along with the legal issues raised by African states, this research proposes reforms for the amendment of the legal framework relating to the crime. This seeks to bridge the gaps, ensure enforceability and holding the perpetrators accountable for the crime by redefining the crime of aggression, reforming the UNSC role and expanding the Court's jurisdiction to include non-states parties and states parties that have not ratified the Kampala amendments.

3.1. Redefining and clarifying the crime of aggression to enhance legal certainty

The definition of the crime of aggression makes the perpetrators to the crime being majorly, a person in a position effectively to exercise control over or to direct the political or military action of a State³⁰⁰ for example heads of states and heads of the military. This leaves out perpetrators who are not in positions of authority. The leadership requirement is thus an integral part of the definition of the crime in question contained in the Statute, and it is one of its special features³⁰¹. In this regard, the definition is too narrow only covering people in the leadership capacity. It is recommended that this definition be amended to broaden the category of people that can be prosecuted for the crime. There are senior officials that determine military and security policies, political strategies and advisors, such officials have influence on the actions of the army of the state but may not be political or military leaders.

According to the Rome Statute, the crime of aggression cannot occur without the involvement of a state³⁰². Hence, here lies the difference between the crime of aggression and other core crimes which can be committed by individuals (normal people not involved with the state) and non-state actors. While it is hard to imagine the commission of genocide, crimes against humanity, and war crimes, without significant state involvement, these crimes can be committed by non-state actors³⁰³. In a state governed like a dictatorship, private persons, such as family members, close friends, and confidants, may exert an enormous influence on a dictator holding ultimate power³⁰⁴. These persons may be more influential in the eyes of a

³⁰⁰ Article 8 bis (1) of the Rome Statute of the International Criminal Court (1998). *United Nations*, 2002.

³⁰¹ AVDIC, Faruk (2021). The Leadership Requirement of the Crime of Aggression under the Rome Statute of the International Criminal Court. *Journal of Liberty and International Affairs*, 7(3), 159

³⁰² *ibid.*, pp. 159

³⁰³ *ibid.*

³⁰⁴ *ibid.*

tyrant even than prominent party members or the highest government or military officials³⁰⁵. For instance, when it comes to Adolf Hitler, it has been widely acknowledged that his female companion Eva Braun was the most significant figure in his life³⁰⁶. However, no matter the extent to which these private figures exert influence on a potentate, they cannot bear criminal responsibility since they do not have the power to control or direct the behavior of a state in question, which is another argument in favor of adopting the stricter control or direct test instead of broader shape or influence standard³⁰⁷.

Overall, the analysis leads to a conclusion that private actors should be held criminally responsible for the participation in the crime of aggression on the condition of meeting specified requirements laid down in the text of the Statute, however proving the existence of effective control of private actors over political or military actions may pose a demanding challenge for the acting prosecutor³⁰⁸.

Instituting heads-of-state immunity as the solution requested by African states would result in reinstating the very type of injustice that the ICC was created to combat, as well as entrenching rather than alleviating selectivity by introducing selectivity built into the structure of the Court to shield certain (domestically powerful) perpetrators, and therefore contravene the Court's moral foundation of human rights protection and promotion and the denial of impunity for atrocity crimes³⁰⁹. Some of the most fervent advocates of head-of-state immunity are those pursuing their own personal self-interests rather than those of their citizens³¹⁰. In that regard, heads of state immunity should not be upheld for international criminal crimes. However, since everyone is equal before the law, the same should apply to all heads of state worldwide and not only to selective regions.

3.2. Reforming the UN Security Council role to limit political influence

The UN Security Council determines that there was an act of aggression under the Article 15 bis (6) of the Rome statute. This was viewed as only providing guidance for the Security

³⁰⁵ AVDIC, Faruk (2021). The Leadership Requirement of the Crime of Aggression under the Rome Statute of the International Criminal Court. *Journal of Liberty and International Affairs*, 7(3), 169

³⁰⁶ *ibid.*

³⁰⁷ *ibid.*

³⁰⁸ *ibid.*

³⁰⁹ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 557

³¹⁰ *ibid.*

Council in its free decision to qualify an act as an act of aggression³¹¹. It is recommended that the UN Security Council maintains its political role and this should not affect the Court's independence to handle crimes of aggression. In this way, the Court should be given the authority to determine whether there was an act of aggression and not to give this role to the Security Council as per the Rome Statute. Article 15ter concerns the referral of a situation by the Security Council. It corresponds, as pointed out also in the Discussion Paper of March 2024, to the ICC's standard regime over genocide, crimes against humanity and war crimes, of Article 13(b)³¹². Currently, this provision is fully operational but difficult to be set in motion in practice due to the veto powers of the permanent five Security Council members³¹³. 'Security Council member-states must resist the pressure to politicize the work of the ICC'³¹⁴.

There is need to give the Court some maneuvering ability and to ensure that it would decide about its own jurisdiction, irrespective of what position achieved consensus³¹⁵. It was simply an assertion that the decision on the jurisdiction of the Court, taking into account the legal interpretations of the Kampala Amendments connected with the Rome Statute framework, falls within the competences of the judges³¹⁶. Thus calling for the independence of the judges and of the Court³¹⁷. The principle of separation of powers is already imperfectly incorporated in the ICC Statute³¹⁸. Adding the crime of aggression to the court's subject matter jurisdiction promised to revive and indeed sharpen debates about the optimum balance between Security Council hegemony in situations involving threats to and breaches of the peace and the principle of judicial independence³¹⁹. Given that the UNSC has the power to determine a threat or breach of peace as well as determining acts of aggression, in this way the UNSC was given

³¹¹ DE BOCK, Charles. (2014). The Crime of Aggression: Prospects and Perils for the Third World. *Chinese Journal of International Law*, 13(1), 95

³¹²EINARSEN, Terje (18 – 04 - 2025). *ICC's Jurisdiction over the Crime of Aggression: Amending Article 5 Instead of Article 15bis (Part I)* [online]. <https://opiniojuris.org/2025/04/18/iccs-jurisdiction-over-the-crime-of-aggression-amending-article-5-instead-of-article-15bis-part-i/>

Article 13 (b) of the Rome Statute provides that the Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

³¹³ *ibid.*

³¹⁴ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 561

³¹⁵ SARKIN, Jeremy and ALMEIDA, Juliana (2019). Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 36(3), 545

³¹⁶ *ibid.*

³¹⁷ *ibid.*

³¹⁸ SCHAACK, Beth Van (2011). Negotiating at the Interface of Power & Law: The Crime of Aggression. *Columbia Journal of Transnational Law*, 49 (3), 20

³¹⁹ *ibid.*

primary role in matters that are political hence the UNSC might end up using its political role and influence to make decisions based on political interest and their allies. Thus by having the ICC as a judicial body in regards to the crime of aggression should be more of checks and balance put in place to control the powers of the UNSC. Unlike the USA, which wanted to see ultimate control over the Court lie with the UNSC (of which the USA is a permanent member), many African states were early and continuous supporters of an independent Court, recognizing the need for such an institution to address grave abuses domestically and with hopes that the international institution would propel support for human rights globally and combat impunity³²⁰.

Indeed, if there was any collective red line amongst the Permanent five's diverse set of interlocutors it was that the ICC must remain liberated from Security Council control beyond Article 16, even in the context of the crime that touches most closely on the Council's prerogatives³²¹. The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law³²².

The six months timeframe provided for the prosecution to await the Security Council's determination of an act of aggression delays and limits the prosecution and holding perpetrators accountable for the crime of aggression. During the six months the UN Security Council is given to make a determination, the Prosecutor may conduct the preliminary examination but is prevented from undertaking investigative activities with regard to the crime of aggression³²³. If one adds to the six-month period the time needed to conclude the authorization process involving the Pre-Trial Division, it is not unlikely that a significant amount of time will have passed before the Prosecutor can actually start the investigation³²⁴. Vulnerable or aged witnesses may die or sensitive evidence could be lost during this period. Mindful of the time-sensitive aspect of any investigation, it is vital to allow the Prosecutor to preserve aggression-related evidence during this time. Similar to the possibility for the Prosecutor to preserve

³²⁰ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 545

³²¹ SCHAACK, Beth Van (2011). Negotiating at the Interface of Power & Law: The Crime of Aggression. *Columbia Journal of Transnational Law*, 49 (3), 20

³²² TRAHAN, Jennifer (2023). Legal Issues Surrounding Veto Use and Aggression. *Case Western Reserve Journal of International Law*, 55, 108

³²³ CHAITIDOU, Eleni (2019). The Amendments to the Regulations of the Court: Laying the Groundwork for Investigating the Crime of Aggression. *Journal of International Criminal Justice*, 17 (3), 503

³²⁴ *ibid.*

testimonies in the context of Article 15(2) involving the other Article 5 crimes with the assistance of the Pre-Trial Chamber, the possibility could be given to the Prosecutor to do the same in the context of preliminary examinations involving the crime of aggression³²⁵.

The requirement of the permanent member states to be member parties of the Rome Statute, this will also reduce on the situations or circumstances faced where the states that hold power of the council are actually not members of the Rome Statute. This will also encourage other African states to become members of the Rome statute. It is unlikely that the Security Council will refer a situation involving acts of aggression to the court if it does not also support the leveling of aggression charges (or at least accept their possibility)³²⁶. This lack of a filter power threatens to reduce Security Council referrals, diminish the role of the Council in the work of the ICC and thus potentially reduce the number of cases coming before the Court involving other core crimes in addition to aggression³²⁷. Given the fact that UNSC would not want to open their leaders to prosecution under the ICC, strengthening the complementarity principle will encourage the UNSC on becoming member states of the Statute since they have already strong well established judicial systems in their countries. Furthermore, incentives of more influence under the Assembly of State Parties will also encourage UNSC to become member states to the Statute. Additionally, regional institutions could be used to encourage their members including members of the UNSC to be state parties to the Rome Statute.

In conclusion, having the Security Council states as state parties to the Rome Statute will encourage other states to be state parties. Furthermore reforming the Security Council role under the crime of aggression to enable the Court exercise its judicial mandate without any implied political influence from the Security Council will strengthen the trust in the Court by the states as well as improve on its independence.

3.3. Expanding the court's jurisdiction to non- states parties and states parties that have not ratified the amendments

According to the Kampala amendments, the ICC lacks jurisdiction to determine crime of aggression cases related to non-state parties and state parties that have not ratified the amendments, except with referral from UNSC, thus narrowing the Court's jurisdiction. Due to

³²⁵ CHAITIDOU, Eleni (2019). The Amendments to the Regulations of the Court: Laying the Groundwork for Investigating the Crime of Aggression. *Journal of International Criminal Justice*, 17 (3), 503

³²⁶ SCHAACK, Beth Van (2011). Negotiating at the Interface of Power & Law: The Crime of Aggression. *Columbia Journal of Transnational Law*, 49 (3), 20

³²⁷ *ibid.*

this, the governments of Costa Rica, Vanuatu, Sierra Leone, Germany and Slovenia proposed amendments to enhance the enforceability of the crime by the ICC. This led to the New York Review Conference of July 2025 where the proposed amendments were discussed and a resolution was passed³²⁸.

One of the proposals provided in the Resolution is the need to align the Court's jurisdiction over the crime of aggression with its jurisdiction over other core crimes, by means of amending Article 15bis³²⁹. In any case the jurisdiction over the crime of aggression is substantially narrower than for the other crimes, and the current proposals seek to amend Article 15bis (4) and (5) in ways that will bring the general conditions for jurisdiction into play also for the crime of aggression³³⁰.

Paragraph (4) of Article 15bis should be replaced with text that mirrors the language of Article 12(2). This would make it clear that ratification or acceptance of the aggression amendments by either the territorial state or the state of nationality (or, in aggression terms, the victim or aggressor state) is sufficient to enliven the ICC's jurisdiction over the crime of aggression. Jurisdiction would be enlivened regardless of whether the second state is a State Party that has not ratified or accepted the aggression amendments, or a non-State Party to the ICC Statute³³¹.

Paragraph (5) of Article 15bis would be replaced with language mirroring Article 12(3) to make it clear that the mechanism whereby non-States Parties can make an ad hoc declaration accepting the Court's jurisdiction also applies to aggression (the prevailing view is that it is currently inapplicable)³³². The mechanism would be available to both non-States Parties to the ICC Statute and to States Parties that have not accepted the aggression amendments³³³. However, it should be noted that for this amendment to apply to such states, the states must accept both the Kampala amendments and the new proposed Article 15 bis amendments, because the Kampala amendments define the crime of aggression and failure to accept it along with the new proposals then the state will not have secured protection in case of a crime of

³²⁸ ICC-ASP/S-1/Res.1

³²⁹ EINARSEN, Terje (18 – 04 - 2025). *ICC's Jurisdiction over the Crime of Aggression: Amending Article 5 Instead of Article 15bis (Part I)* [online]. <https://opiniojuris.org/2025/04/18/iccs-jurisdiction-over-the-crime-of-aggression-amending-article-5-instead-of-article-15bis-part-i/>

³³⁰ *ibid.*

³³¹ MCDUGALL, Carrie (2024). Expanding the ICC's Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 22 (3-4), 553

³³² *ibid.*, pp. 554

³³³ *ibid.*

aggression. This is because the draft Resolution suggests that the harmonization (new) amendments and the Kampala amendments form an inseparable package³³⁴, they work hand in hand.

Since already Court lacks jurisdiction over any crime of aggression committed by a non-State Party's nationals or on a non-State Party's territory. To plug this jurisdictional gap, it has been proposed that an ad hoc international tribunal be established. In order to reduce concerns about selectivity and, more importantly, to ensure that the limitations on the ICC's jurisdiction will not bar ICC action in relation to future crimes of aggression³³⁵. Today, only one international court is competent to handle individual criminal responsibility for aggression: the International Criminal Court (ICC), which has had jurisdiction over the crime of aggression since 17 July 2018³³⁶.

There is need to remove the requirement of non-state parties to only be prosecuted when the matter is referred by the Council as provided for under Article 15 ter of the Rome Statute. There may especially be a reduction in cases involving Non-Party States, which can only be triggered by the Council³³⁷ where the Security Council involves its veto political powers when determining the cases to be referred to the Court. Case referral to the Court should be maintained with the independent channels of state referral and proprio motu investigations by the Prosecutor.

3.4. Impact of African states' participation in international criminal justice

African leaders are in a significant moral and practical position to help steer ICC and global governance policy as major stakeholders in this institution and they have the opportunity to stay the withering of an institution that was intended to deny impunity for horrific crimes, an institution that they once enthusiastically supported³³⁸. To date, those African leaders who have

³³⁴ CORACINI, Astrid Reisinger and KRESS, Claus (04 – 07 – 2025). *For an Effective and Legitimate Jurisdictional Regime on the Crime of Aggression at Last: States Parties to the Statute of the International Court to Convene on Monday for a Special Session in New York* [online]. https://www.ejiltalk.org/for-an-effective-and-legitimate-jurisdictional-regime-on-the-crime-of-aggression-at-last-states-parties-to-the-statute-of-the-international-court-to-convene-on-monday-for-a-special-session-in-new-york/?utm_source=chatgpt.com

³³⁵ MCDUGALL, Carrie (2024). Expanding the ICC's Jurisdiction over the Crime of Aggression. *Journal of International Criminal Justice*, 22 (3-4), 544

³³⁶ BERES, Nora. One step forward, one step back? The crime of aggression under the Rome Statute. In: KRESS, Claus, BARRIGA, Stefan and GROVER, Leena (eds.) (2025) *The Crime of Aggression: A Commentary*. Cambridge: Cambridge University Press, PP. 214

³³⁷ SCHAACK, Beth Van (2011). Negotiating at the Interface of Power & Law: The Crime of Aggression. *Columbia Journal of Transnational Law*, 49 (3), 20

³³⁸ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 544

chosen to publicly criticize the Court have, at best, expressed dissatisfaction and at worst, compounded genuine problems by introducing solutions that would contribute to injustice and impunity³³⁹. The current climate of international criminal law (ICL) marked by the regionalization of international justice, declining confidence in the ICC and UN debates, offers African states an opening to play a more significant and normative role³⁴⁰.

If African leaders harbor grievances with the court's methods of operation or are unsatisfied by the ICC's inadequacies, it is incumbent upon them to champion reform on the legal concerns of sovereignty, immunity of heads of states and jurisdictional bias through the appropriate channels³⁴¹. Quitting the Court altogether does nothing for victims but promotes impunity of perpetrators for international crimes which is highly undesirable. It amounts to errant political leaders protecting each other from being accountable for atrocities which they have committed³⁴².

The African Union has also not helped Africa's pursuit of justice and accountability for international crimes committed by heads of state. The African Union to this end has abdicated from intervening against errant presidents since this supposedly violates the principle of non-interference in domestic matters, and would tantamount to an unconstitutional regime change³⁴³. This has left such leaders in power leading to the continued human rights violations and continued international crimes in the African region. The findings demonstrate that the regional institution is failing the states by going further to put in place the Malabo Protocol to shield such tyrant leaders in power.

African states having experience and knowledge of what affects them or their concerns, makes their participation in the global platform especially international criminal law very vital. African participation is both needed and valued in developing global norms and perceptions in areas of issues seen to be prevalent in African states, because local knowledge and allies are crucial to the credibility of international mobilisation efforts³⁴⁴.

In conclusion, it is worth noting that the reforms provided in this chapter respond directly to the limitations highlighted in chapter I and the legal issues raised by African states in chapter

³³⁹ FISHER, J. Kirsten (2018). Africa's role in the Progression of International Criminal Justice: a Moral and Political Argument. *The Journal of Modern African Studies*, 56(4), 544

³⁴⁰ *ibid.*

³⁴¹ OKURUT, Emmanuel and AMONG, Hope (2018). The Contentious Relationship between Africa and the ICC. *Journal of Law and Conflict Resolution*, 10(3), 23

³⁴² *ibid.*

³⁴³ *ibid.*, pp. 19

³⁴⁴ FISHER, *ibid.*, 339, pp. 561

II. Therefore strengthening the Court's exercise of justice in reference to the crime of aggression is not only required for the legal framework revision but also a rebalancing of the relationship of Africa states and the ICC since African states contribute to the functioning of the Court and its credibility as well contributing to international criminal law as a whole.

CONCLUSIONS

After researching, studying and analyzing this master's thesis topic "Proposal for the Amendments of the Rome Statute of the ICC and Their Implications for Enforcing Accountability for the Crime of Aggression: The African Perspective" a detailed analysis was made of the legal framework of the Rome Statute regarding the ICC and crime of aggression, identification of jurisdictional and procedural gaps affecting the enforcement of individual criminal responsibility for the crime, recommendations were proposed to improve accountability and implications of the proposed reforms for the African states. Given that, below are a number of conclusions regarding this thesis:

1. The Rome Statute and the Kampala Amendments provide the legal framework for the prosecution of the crime of aggression. The provision of the crime of aggression under Article 8 bis of the Rome Statute was one of the greatest achievement in international criminal law. It defines the crime of aggression as well as what amounts to an act of aggression. The once crime against peace and a political crime was later made prosecutable by the ICC. Furthermore the Statute provides for the individual criminal responsibility for persons in the leadership capacity that is, the person capable of exercising control of the political and military action of the state.
2. However, the research finds that prosecution of the crime of aggression is faced with a number of procedural and jurisdictional challenges making it hard for the Court to enforce accountability. Prosecution of cases only from state parties that have ratified the Kampala amendments, the UNSC role of determining the act of aggression and opting out option for states narrows the Court's jurisdiction over the crime and also creates mistrust as a Court used for political interests.
3. A number of proposed reforms to enhance the enforceability and holding perpetrators accountable include expanding the definition of the crime of aggression to include other categories of persons and not only people in the leadership position, redefining the crime to also include non-state actors and relying more on the complementarity principle to strengthen trust in domestic judicial systems.
4. The proposed reforms especially for the Court's exercise of jurisdiction over the crime for non-state parties and state parties that have not ratified the Kampala Amendments will enable such African states that fall in that category to accept Court's jurisdiction over the crime. In this way such African states will not need to be state parties to the

- Statute. There is a development regarding expanding this jurisdiction of the Court, that is the resolution from the July 2025 New York Review conference. A working group was put in place to work on the reform and improve on it to enable enforceability.
5. Furthermore, limiting the UNSC would also give African states hope that the ICC is not politically influenced and thus not having selective justice. The UNSC can be limited by making the veto powers inapplicable in reference to cases to the ICC. The General Assembly can step in where veto powers have affected handling of cases however, this takes time and affects carrying out investigations by the Prosecution. In addition, restricting UNSC deferral powers under Article 16 of the Rome Statute. UNSC deferrals are political in nature and when the ICC acts upon such deferral powers, it will be considered as being influenced by the UNSC and acting basing on its political interests. This also affects the independence of the Court. Given that, removing UNSC influence from the preliminary stages of the crime of aggression cases will imply independence of the Court, timely investigation and timely case hearing.
 6. The findings indicate that the reforms have significant implications to African states that form the largest part of the ICC member states. Addressing issues like the UNSC dominance, heads of state immunity and selective justice would restore African states' confidence in the Court and strengthen their participation in international criminal justice.
 7. In order for the ICC to be effective when prosecuting the crime of aggression depends on the clarity of its legal framework, the coherence of its jurisdiction, and the confidence of its member states. Putting more emphasis in strengthening these elements is very important to ensure that accountability for the crime of aggression is enforced and free from political influence. By aligning the Rome Statute's crime of aggression provisions with principles of fairness, independence, and equal application, will put the law at the center of safeguarding global peace.

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SUMMARY

Proposal for the Amendments of the Rome Statute of the ICC and Their Implications for Enforcing Accountability for the Crime of Aggression: The African Perspective

Ritah Nafula

The International Criminal Court (ICC) was established by the Rome Statute in 2002 as the first permanently established international court to handle international crimes of genocide, war crimes, crimes against humanity and the crime of aggression. Among cases handled by the ICC, crime of aggression has never been enforced even after the Kampala Amendments of 2010 which provided for the definition and Court's jurisdiction over the crime.

This research analyzes the legal framework of the Rome Statute relating to the crime of aggression while putting more emphasis on the jurisdictional and procedural gaps that are affecting the ICC's enforceability and holding perpetrators accountable for the crime. It also the role of the UN Security Council in the prosecution of the crime of aggression which include determining an act of aggression and referring cases to the ICC. It further examines the relationship of the African States and the ICC as well as issues raised by African states which include; immunity of heads of states, sovereignty of states and jurisdictional bias. It is worth noting that failure to address the legal concerns raised by the African states might lead to the withdrawal of the states from the Rome Statute.

With the use of doctrinal methodology, this research proposes recommendations to the Rome Statute that could strengthen the enforcement of the crime of aggression, with specific attention to the implications for Africa. It also further analyzes the recommendations from the New York Conference Review and how they will affect the Court's jurisdiction regarding non-states parties and states parties that have not ratified the Kampala Amendments.