Chapter 10

One Step Forward, One Step Back? The Crime of Aggression under the Rome Statute

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Abstract

By activating the Kampala Amendments to the Rome Statute, for the first time since the Nuremberg and Tokyo trials after the Second World War, the International Criminal Court (ICC) has jurisdiction over crime of aggression. This is one giant leap for mankind; nevertheless, the international community will likely have to wait a long time to witness a criminal procedure before the ICC initiated for the crime of aggression. This is because it is not the complete disappearance of the breaching of the rules of jus contra bellum, but the complex and almost inapplicable set of rules on the crime of aggression. To see these obstacles clearly, this article seeks to provide a concise analysis of the definition of the crime of aggression ("substantial aspects") and the exercise of jurisdiction over the crime of aggression ("procedural aspects") in accordance with the respective provisions of the Rome Statute.

Keywords: international criminal law, Rome Statute, International Criminal Court, Kampala Amendments, the crime of aggression

> *'[T]he supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.*[1]

1 Judgment of the International Military Tribunal at Nuremberg, 22 Trial of the Major War Criminals before the International Military Tribunal 421 (1948).

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1. Introduction

Although the maintenance of international peace and security, including the prevention of acts of aggression, is the ultimate purpose of the United Nations,[2] and *jus contra bellum* is a well-established element of the set of imperative norms of international law, scholarly discussions on war and aggression are, unfortunately, still relevant, even in the 21st century. When stocktaking recent events, examples of breaching peace and security easily come to mind: on 24 February 2022, the Russian Federation initiated a complex and enduring war of aggression against Ukraine, and on 13 April 2024, Iran launched several kamikaze drones, cruise missiles, and ballistic missiles against Israel. These instances are only the tip of the iceberg. Despite the comprehensive and unambiguous prohibition of the unlawful use of force, acts of aggression and wars are ongoing at this very moment.

Responsibility for aggression is a "late child" of international law, and the responsibility of States and of individuals should be distinguished. 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 2018. Thus, reflecting on the 25th anniversary of the adoption of the Rome Statute of the ICC (hereinafter, the Rome Statute),[3] this study focuses on individual criminal responsibility, presents a brief historical overview of the development of the concept of aggression, then analyses the definition of the crime of aggression. Within the framework of this analysis, this study examines the substantive aspects of the core crime, then discusses jurisdictional aspects. When exploring the elements and jurisdictional circumstances of the crime of aggression, one should primarily lean on the textual analysis of the respective provisions of the Rome Statute as a research methodology, since, apart from the judgements on the crime against peace by the International Military Tribunal at Nuremberg (hereinafter, Nuremberg IMT) and the International Military Tribunal for the Far East (hereinafter, Tokyo IMT), no case law exists in connection with the crime of aggression. The hypothesis of this study departs from the historical significance of establishing individual criminal responsibility for aggression and making it possible to bring perpetrators to justice, while presupposing that, due to the complex jurisdictional regime set up by the Rome Statute, holding someone responsible for committing such a grave crime remains a highly theoretical scenario.

2 Cryer et al., 2017, p. 307.

3 Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, Treaty Series, vol. 2187, p. 3.

2. Historical Background of the Crime of Aggression

2.1 State Responsibility for Aggression vs. Individual Criminal Responsibility for Aggression

The notions of *jus contra bellum* and the "law of aggression" gradually developed in international law throughout the 20th century. The 1919 Covenant of the League of Nations was the first milestone to embody a real commitment to outlaw war, with Article 10 providing, '[T]o respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'. Although the League of Nations' peace-making initiatives might not have been successful, Article 10 demonstrated a paradigm shift in the way the international community thought about war in general terms. The 1928 Kellogg-Briand Pact, also known as the General Treaty for the Renunciation of War, was another remarkable milestone in restricting the use of force as a legitimate political instrument to settle inter-State disputes. In 1933, the Soviet Union and its neighbouring States also signed a convention[4] to define "aggression", which was remarkable not only for pioneering the definition of aggression[5] but also for being a model for future aggression concepts. Eventually, the 1945 Charter of the United Nations (hereinafter, UN Charter), under Article 2(4),[6] stipulated the prohibition of the use of force with two narrow exceptions: the use of force upon the authorisation of the UN Security Council in accordance with Article 42[7] or the individual or collective self-defence by

4 Convention for the Definition of Aggression, London, 3 July 1933.

5 Convention for the Definition of Aggression Article 2:
Accordingly, the aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be State which is the first to commit any of the following actions:
(1) Declaration of war upon another State;
(2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;
(3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;
(4) Naval blockade of the coasts or ports of another State;
(5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

6 UN Charter Article 2(4):
All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

7 UN Charter Article 42:
Should the UN Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

States in accordance with Article 51.[8] Although these instances are significant antecedents of the drafting process of the rules for addressing the crime of aggression, they did not pave the way for individual criminal responsibility, since all of the abovementioned treaty provisions focused on the responsibility of States.

The crime of aggression *per se* was first recognised under Article 6(a) of the 1945 Charter of the Nuremberg IMT and under Article 5(a) of the 1946 Charter of the Tokyo IMT as follows:

> *Crime against peace: namely, the planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.*

Nonetheless, objections by the accused emerged before the Nuremberg IMT, stating that its charter created new law, and subsequently, the tribunal was applying law *ex post facto* and breaching the principle of *nullum crimen sine lege*. The Nuremberg IMT dismissed this objection and highlighted that, since the 1928 Kellogg-Briand Pact, aggressive war had qualified as a crime under international law.[9] The Nuremberg IMT was also heavily criticised for providing victors' justice and for selectiveness, since it disregarded wars of aggression launched by the Soviet Union. Similarly, the Tokyo IMT followed this reasoning; however, three judges attached dissenting opinions to the judgement,[10] arguing that the 1928 Kellogg-Briand Pact was never meant to open the floor to individual criminal responsibility.[11] May that as it be, it is generally accepted in contemporary scholarly discussions and also in jurisprudence that a definition of a crime of aggression now exists under international customary law in line with the case-law of the Nuremberg and Tokyo IMTs.[12] Moreover, in 1950, the International Law Commission (ILC) issued the collection of

8 UN Charter Article 51:
Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the UN Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the UN Security Council and shall not in any way affect the authority and responsibility of the UN Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

9 *In the opinion of the tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.* (Nuremberg IMT, Judgment and Sentences, reprinted in (1974), 41, *American Journal of International Law* 172, 218).

10 Cryer et al., 2017, p. 308.

11 Weigend, 2012, p. 41.

12 Brownlie, 1963, pp. 185–194; Dinstein, 2011.

the so-called "Nuremberg Principles"[13] affirming that crimes against peace make up a part of international custom, as evidence of a general practice accepted as law.

Some decades later, on 14 December 1974, the UN General Assembly adopted Resolution 3314 (XXIX) (hereinafter, UN General Assembly Resolution 3314) on the definition of aggression focusing (again) on possible acts of States. This resolution starts with a broad definition of aggression committed by States and then enumerates specific and typical examples. However, as the ILC highlighted,[14] UN General Assembly Resolution 3314 *'deals with aggression by States, not with the crimes of individuals, and is designed as a guide for the UN Security Council, not as a definition for judicial use'*. Subsequently, under this resolution, the UN General Assembly made a clear distinction between State acts of aggression and war of aggression entailing individual criminal responsibility.

2.2 The Road Leading from Rome to Kampala

Negotiations to establish the ICC began in 1994, when the ILC proposed a Draft Statute for an International Criminal Court[15] (hereinafter, Draft Statute). Article 23(2) of the Draft Statute established the court's jurisdiction over the crime of aggression, with one major precondition: the need for prior determination by the UN Security Council that the respective State had committed aggression. Considering independence as an essential feature of judicial bodies, this approach proved controversial, and no compromise was reached on whether the definition of the crime of aggression should be included under the Statute, or if so, how it should be defined, and what role the UN Security Council should play in aggression situations.[16]

From the beginning of the drafting process, the dilemma of whether to include the definition of the crime of aggression in the Rome Statute was among the most heated debates at the 1998 Rome Diplomatic Conference (hereinafter, Rome Conference),[17] which finally led to the establishment of the ICC. Although aggression was one of the four core crimes enumerated in the Rome Statute when it was adopted in 1998, the completion of the definition and the details of the exercise of jurisdiction were adjourned for further negotiations. Until then, Article 5(2) provided that:

> *The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime*

13 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission*, 1950, Vol. II, para. 97, Principle VI.

14 Draft Statute for an International Criminal Court with Commentaries 1994, *Yearbook of the International Law Commission*, 1994, Vol. II, Part Two, Article 20, para. 6.

15 Ibid.

16 Cryer et al., 2017, p. 310.

17 Diplomatic Conference on the Establishment of an International Criminal Court, Rome, 15 June to 17 July 1998.

and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[18]

Therefore, when the Rome Statute became effective, in accordance with Article 5(2), it was not possible to initiate procedures of aggression until the States Parties to the ICC Statute reached an agreement on the definition. Consequently, the participating States at the Rome Conference did not accept a compromise regarding the definition of the crime of aggression.

The issue of aggression was undoubtedly the highest 'debt' of the Rome Conference,[19] which had to be settled at the first Review Conference of the ICC Statute (hereinafter, the Review Conference).[20] The obligation to convene the first Review Conference, seven years after the entry into force of the Rome Statute, was laid down in Article 123(1)[21] for the UN Secretary-General, at which the concept of the crime of aggression was adopted in accordance with the provisions cited above.[22] To arrive at a definition that is widely accepted by States Parties, the Assembly of States Parties (ASP) established a Special Working Group on the Crime of Aggression (SWGCA),[23] which was tasked with preparing draft provisions to be presented at the Review Conference. The SWGCA met several times between 2003 and 2009, and the draft standards it prepared, summarised in the SWGCA's latest report,[24] became the starting point for the negotiations held in Kampala. This report contained two additional provisions to the Rome Statute: Article 8 *bis* defined the crime of aggression, whereas Article 15 *bis* defined the conditions for exercising jurisdiction over the crime of aggression.

Article 8 *bis* proposed by the SWGCA did not contain any alternatives, only the version that was finally adopted verbatim at the Review Conference.[25] Regarding the content of the provision, it is noteworthy that it also distinguishes between the crime of aggression and the act of aggression, opening the floor for the criminal responsibility of individuals alongside that of States. Furthermore, Article 8 *bis*(2)

18 Article 21 of the Rome Statute provides amendments, whereas Article 123 enshrines the first review of the Rome Statute.

19 Clark, 2010, p. 689.

20 The Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010 adopted the amendments on the crime of aggression on 11 June 2010 by Resolution RC/Res.6.

21 Rome Statute Article 123(1):

Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

22 The Crime of Aggression, ICC Resolution RC/Res.6, 11 June 2010.

23 The possibility to participate in the SWGCA was open not only to States Parties to the Rome Statute, but to all States. See Continuity of Work on the Crime of Aggression, ICC-ASP/1/Res.1, 9 September 2002.

24 Report of the SWGCA, ICC-ASP/7/SWGCA/2, 20 February 2009.

25 Rome Statute ASP RC/Res.6, 11 June 2010.

of the Rome Statute, in line with Article 1 of UN General Assembly Resolution 3314, reiterates:

> *For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*

Article 8 *bis*(2) also enumerates the acts of aggression listed by way of examples under UN General Assembly Resolution 3314.[26]

Subsequently, the respective provisions of the Rome Statute preserve the concept of UN General Assembly Resolution 3314 regarding the distinction between the crime of aggression and the unlawful use of force, whereby only the most serious forms of the latter fall within the scope of the crime. Therefore, all forms of aggression amount to the use of force, but not all forms of the use of force qualify as aggression.[27] However, the practical transposition of UN General Assembly Resolution 3314 raised some significant concerns during the drafting process, since, under this resolution, the UN Security Council enjoys broad discretionary powers regarding establishing the commitment of aggression. The UN Security Council is not obliged to establish aggression when an act of aggression *pro forma* has been committed, but it can establish the commitment of an act of aggression even if it has not been committed in line with the conducts enumerated under Article 3 of UN General Assembly Resolution 3314. As Hárs points out: *'as a political body [the UN Security Council] does not necessarily decide according to legal criteria, so that political necessity*

26 UN General Assembly Resolution 3314 Article 3:
Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its temtory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

27 Valki, 2018, pp. 768–771.

and compromise may dominate its decisions"[28]; thus, the UN Security Council, as a political decision-maker, is not bound by the principle of legality in the same way as a criminal court. Consequently, the application of an open-ended list is not a viable option in the case of the ICC and establishing criminal responsibility; therefore, the list as transposed into the Rome Statute can only be interpreted *stricto sensu*.[29]

Compared to Article 8 *bis,* the drafting process of Article 15 *bis* proved to be much harder, partly due to the future legal status of States that did not ratify the Kampala Amendments, and partly due to the role of the UN Security Council in determining whether an act of aggression had been committed.[30] According to the ILC's Draft Statute, as has already been mentioned above, the ICC's jurisdiction over the crime of aggression would have relied on the resolutions of the UN Security Council establishing the commitment of an act of aggression. Nevertheless, this textual version, despite the unsurprising lobby of France and the United Kingdom, was considered by States to be highly problematic because of the evident anomalies in the operational effectiveness of the UN Security Council and the limited participation of UN Member States in its decision-making. Thus, the majority of the drafting States considered that the Rome Statute should not give the UN Security Council exclusive powers to determine an act of aggression.[31] Additionally, further doubts emerged that the veto power of the permanent members of the UN Security Council could potentially paralyse the ICC's jurisdiction over aggression for good, both over themselves and their allies.[32]

Unsurprisingly, it was the P5 that sought to argue for the exclusive power of the UN Security Council based on Article 39[33] of the UN Charter to determine whether aggression was committed; however, the view that although the UN Security Council's responsibility for the maintenance of international peace and security is primary, it is not exclusive, eventually prevailed, as it is reflected under Article 24[34] of the

28 Hárs, 2018, para. 7.
29 Clark, 2015, p. 782.
30 Blokker – Kreß, 2010, p. 889; Trahan, 2011, p. 49.
31 Kreß – von Holtzendorff, 2010, p. 1194.
32 Cassese, 1999, pp. 144, 147.
33 Article 39 of the UN Charter:
The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
34 Article 24 of the UN Charter:
1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3) The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

UN Charter.[35] This approach was reaffirmed by, on the one hand, the practice of the UN General Assembly that had also on several occasions established that acts of aggression had taken place, and on the other hand, by the fact that the United States, the United Kingdom, and France had supported the adoption of UN General Assembly Resolution "Uniting for Peace"[36] in 1950, which recognised the UN plenary organ's competence in this regard. As a further argument against exclusive powers of the UN Security Council, the non-permanent members of the Council also pointed out that the International Court of Justice (ICJ) itself has repeatedly dealt with cases where the question of aggression has been raised,[37] although the ICJ has been more cautious than actually weaving the term "aggression" into the text of its decisions.

However, we should bear in mind that the crime of aggression and the act of aggression go hand in hand in the sense that one cannot condemn someone for a crime without expressing condemnation of the State.[38] Thus, the ILC, when codifying the Rome Statute, took the view that it would be inappropriate for the ICC to convict someone of the crime of aggression in the absence of a finding of an act of aggression by the State, and the ILC considered the UN Security Council to be best placed to play the latter role, in accordance with Chapter VII of the UN Charter.[39]

Therefore, the SWGCA's real achievement was to draft a textual version that does not make the determination on an act of aggression exclusively dependent on an external body, the UN Security Council, the UN General Assembly, or even the ICJ, while it does not make it obligatory for the ICC to accept the qualification of an external body so as to respect the presumption of innocence, which is explicitly enshrined in Articles 15 *bis*(9) and 15 *ter*(4) of the Rome Statute, and it gives due effect to the powers of the UN Security Council in this respect. The compromise reached in Kampala was therefore to split the first draft of Article 15 *bis* into two separate articles, 15 *bis* and 15 *ter*, which categorise the procedure for initiating aggression proceedings according to the triggering mechanisms, State Party referrals and *proprio motu* procedures on the one hand and UN Security Council referrals on the other hand. Due to these special rules under the Rome Statute regarding the crime of aggression, the Kampala regime functions as *lex specialis* compared to other core crimes.

35 Clark, 2015, p. 786.

36 UN Doc. GA/RES/377 (7 October 1950).

37 ICJ, Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, 27 June 1986; ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, 19 December 2005.

38 Crawford, 1994, p. 147.

39 Crawford, 1995, p. 411.

3. The Crime of Aggression under the Rome Statute

Article 5 of the Rome Statute emphasises that only the most serious crimes of concern to the entire international community can entail criminal proceedings before the ICC and it provides on a list of atrocity crimes falling under the subject-matter jurisdiction of the court: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. This textual version of Article 5 has been in force for more than six years now, when the Kampala Amendments, adopted at the Review Conference in 2010, became effective as a consequence of an agreement among States Parties on the activation of the ICC's jurisdiction over the crime of aggression on 15 December 2017. Currently, 47 States have ratified the Kampala Amendments.[40] While this is a relatively high number, compared to the number of States Parties to the Rome Statute (125), there is no reason for much optimism. In the next part, we analyse the substantial elements of the crime of aggression, then examine the jurisdictional regime adopted in Kampala.

The crime of aggression has a *sui generis* jurisdictional regime under the Rome Statute, which differs from the manner in which the ICC's jurisdiction can be triggered in the event of other atrocity crimes. Under Article 15 *bis* and Article 15 *ter* three triggering mechanisms may apply: *(i)* when a State Party or a group of States Parties refers a situation to the ICC; *(ii)* when the Prosecutor initiates an investigation *proprio motu;* or *(iii)* when the UN Security Council refers a situation to the Court. As a general rule, States that are not parties to the Rome Statute are excluded from the ICC's jurisdiction over the crime of aggression either from the side of victims or aggressors; however, this rule does not apply to a UN Security Council referral. With regard to a State Party referral or a *proprio motu* investigation (Article 15 *bis*), the ICC will only be able to proceed with the investigation on a reasonable basis if the Kampala Amendments have entered into effect for either the victim or the aggressor. If so, the Prosecutor shall inform the UN Secretary-General about the situation. Additionally, the UN Security Council has the authority to determine whether an act of aggression has been committed by the respective State Party. The deadline to make such a determination is six months. If the UN Security Council fails to determine the commitment of an act of aggression, the Prosecutor may still proceed with an investigation with the authorisation of the Pre-Trial Division of the ICC. The procedure in the case of a UN Security Council referral (Article 15 *ter*) is different from the procedure of the other two triggering mechanisms. If the UN Security Council refers a matter to the ICC, the Prosecutor will have the authority to investigate the crime of aggression committed in any State territory and by any State's national. In other words, for a UN Security Council referral, it is irrelevant whether the victim or the aggressor is a non-State Party, whether the aggression has taken place in the territory of a non-State Party, or whether the aggression has been

40 Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010. United Nations Treaty Collection, Chapter XVIII, 10.b.

committed by a national of a non-State Party. Moreover, for a UN Security Council referral, the individual ratification status or "opt-out" status of a State Party to the Rome Statute is also irrelevant.

3.1 Substantial Aspects: An Analysis of Article 8 bis

International criminal law is a tool (sometimes moderate, but still promising) of the rule of law to combat against unlawful recourse to armed conflicts and bring the authors of war to justice. Nonetheless, thanks to its heavily politicised character, the issue of aggression has always been the most sensitive among core crimes, as the individual's crime of aggression goes hand in hand with the State's act of aggression. In other words, these two concepts do not exist exclusively of each other, and as there is "no smoke without fire"; therefore, there is no crime without the condemnation of a high-ranking policy-maker (political leader, military commander, State official, etc.) as well as of the entire State. This is why aggression is also labelled as a "leadership crime": In essence, the crime of aggression is an international crime committed by a State leader who takes part in an act of aggression carried out as part of a plan or policy. The crime of aggression protects State sovereignty by prohibiting the unlawful use of force; however, it also encroaches on State sovereignty, similar to other core crimes, when installing individual criminal responsibility deriving directly from international law.[41] The crime of aggression substantially differs from other core crimes, as it relates to *jus ad bellum* and necessarily and parallelly raises the issue of State responsibility. This also means that aggression may neither be committed by members of the armed forces, breaching the rules concerning *jus in bello,* nor the leaders of non-State groups.[42] The unique character of this crime also explains why its drafting process took so long. While the crime of genocide, crimes against humanity, and war crimes have more in common with human rights issues, which lay at the heart of the development of international law in the Cold War era, the crime of aggression protects primarily against the unlawful use of force, rather than protecting human rights.[43]

Since 17 July 2018, the ICC has had jurisdiction over the crime of aggression. Although this fact *per se* marks a considerable milestone in the fight against impunity,[44] the business is far from finished. Certainly, establishing individual criminal responsibility for the authors of war has a great moral and symbolic significance; nevertheless, from a legal perspective, the definition of and the conditions of exercising jurisdiction over the crime of aggression are by no means optimal.

41 Cryer et al., 2017, p. 307.

42 Aronsson-Storrier, 2024, p. 437.

43 Ozaki, 2024, 'The Jurisdictional System of the Rome Statute' *Presentation at the 1st International Conference on Contemporary Challenges of International Criminal Justice*, Kraków Center for International Criminal Justice, Poland, 1 June 2024.

44 As the Rome Statute Preamble para. 4 enshrines: *Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished […].*

The great novelty of the Rome Statute is, at least theoretically, to fill in the gap of impunity and hold leaders who are legally capable of committing aggression individually accountable. Article 8 *bis,* based largely on UN General Assembly Resolution 3314, provides as follows:

> *(1) For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*
> *(2) For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:*
> *(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;*
> *(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;*
> *(c) The blockade of the ports or coasts of a State by the armed forces of another State;*
> *(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;*
> *(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;*
> *(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*
> *(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.*

In accordance with Article 8 *bis*, the crime of aggression has three main characteristics: *(i)* it focuses on the most responsible; *(ii)* who participates in (plans, prepares, initiates, or executes) an act of aggression of the State; and *(iii)* this act by its character, gravity, and scale, constitutes a manifest violation of the UN Charter.

As mentioned earlier, aggression is a "leadership crime" by a powerful perpetrator who participates in a State's policy-making on a high-level; but how high should this level be to qualify as a leadership crime? The American Military Tribunal, established under Control Council Law No. 10,[45] stated that *'the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level'*.[46] Therefore, in this case, even though the fourteen defendants were senior military officials (one admiral, thirteen generals), they were not at the required policy level to be criminalised for a crime against peace. In other words, the perpetrator of aggression is *de jure* or *de facto* in the position to make decisions attributable to the State. The phrase 'in a position to effectively exercise' theoretically covers not only State or military officials in formal positions but also basically anyone who has a certain level of influence over the policy-making mechanisms of the State.[47] However, as Aronsson-Storrier,[48] Heller,[49] McDougall,[50] and Politi[51] highlighted, this is highly unlikely to happen, since the phrase 'exercise control over or to direct the political and military action of the State' sets such a high threshold that non-formal leaders cannot meet. It remains to be seen how the ICC judges would apply the "control or direct" test in practice. In line with the jurisprudence of the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY), two different approaches prevail. The ICJ had applied the "effective control" test in the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua*[52] respecting the level of State control over an armed group, and later, it reaffirmed its stance in the *Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide.*[53] By contrast, the ICTY applied the "overall control" test in *The Prosecutor v. Tadić* judgement.[54] As Cassesse highlighted, judicial decisions support the view that whenever the conduct of organised armed groups or military units is at stake, it suffices to show that the State to which they may be linked exercises "overall control" over them, in order for the conduct of those groups or units to be legally attributed to the State, whereas the ICTY applied the "overall control" test as a criterion generally valid for the imputation of the conduct of organised armed groups to a particular State. Nonetheless, the ICTY did not exclude the applicability of the

45 Control Council Law No. 10, XII LRTWC 1.
46 Ibid.
47 Aronsson-Storrier, 2024, p. 445.
48 Ibid.
49 Heller, 2007, p. 470.
50 McDougall, 2013, p. 181.
51 Politi, 2012, p. 285.
52 ICJ, Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, 27 June 1986, para. 115.
53 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007.
54 ICTY, Prosecutor v. Tadić, Appeals Chamber, Judgement, IT-94-1-A, 15 July 1999.

"effective control" standard, stating, however, that it only applied for the attribution to a State of conduct by single private individuals.[55]

In accordance with Article 8 *bis*(1) of the Rome Statute, 'planning, preparation, initiation or execution' constitute the necessary nexus between the State's act of aggression and the individual's act. In line with Element 3, Article 8 *bis* of the Elements of Crimes,[56] taking part in threats to use aggression does not result in criminal responsibility. Planning, preparation, initiation, or execution must occur to constitute a crime. According to one of the commentaries of the Rome Statute, "planning" means that the perpetrator participates in meetings where plans on the aggressive act are made; "preparation" means a wide range of activities such as diplomatic, economic, and military activities; "initiation" means decisions made on a strategic level; and "execution" encompasses acts performed after the commencement of the aggressive act.[57]

The third key element of the crime of aggression is the "manifest violation" of the UN Charter by its character, gravity, and scale. Academic discussions vary on whether it is sufficient that two of the three components are present and meet the standard, or all three components must be present at a time, however, not to the same degree.[58] These elements constitute an objective qualification; therefore, the subjective assessment of the victim State is not sufficient to constitute a crime. The criteria of "manifest violation" suggests that only major violations of *jus ad bellum* constitute a crime of aggression, and it is also a safeguard to exclude "grey areas" of the use of force, for example, humanitarian intervention or anticipatory self-defence from the scope of the crime of aggression.[59] As for the *mens rea* of the crime, there is no need to prove that the perpetrator has made a legal evaluation of the "manifest" nature of his or her act, as being aware of the factual circumstances of the use of force is sufficient.[60]

An act of aggression is defined under Article 8 *bis* (2) of the Rome Statute, and this paragraph is strongly tied with Articles 1 and 3 of UN General Assembly Resolution 3314 and Article 8 *bis* (1) of the Rome Statute, respectively. Albeit the ICC is an independent judicial body, and "outside" determinations of an act of aggression are not binding upon it, resolutions of the UN Security Council and judgements (or advisory opinions) of the ICJ could still have an impact on the court when deliberating the commitment of an act of aggression. However, one should bear in mind that the decisions of the UN Security Council and the ICJ are made in connection with *jus ad bellum* and State responsibility, not in connection with international criminal law and individual criminal responsibility. It should be noted that Article 3 of UN

55 Cassesse, 2007, pp. 649–668.
56 International Criminal Court, Elements of Crimes.
57 Aronsson-Storrier, 2024, pp. 441–444.
58 McDugall, 2013, pp. 128–130; Kreß and von Holtzendorff, 2010, p.1207.
59 Aronsson-Storrier, 2024, pp. 448–449; Hoffmann, 2019, pp. 64–67; Kreß, 2018, p. 16; Mégret, 2018, p. 853.
60 Aronsson-Storrier, 2024, pp. 449–450.

General Assembly Resolution 3314 was heavily criticised for being inconsistent with the definition of aggression under customary international law.[61] As pointed out by the ICJ in the *Case of Armed Activities on the Territory of the Congo,*[62] some acts, such as the allowance of a territory to be used for acts of aggression against a third State, are uncertain. Although the lack of a customary background is not relevant in the case of States Parties where the Rome Statute provides a legal basis for binding obligations, when a situation connected with a non-State Party is referred to the ICC by the UN Security Council, it might lead to ambiguity.

*3.2 Procedural Aspects: An Analysis of Articles 15 **bis** and 15 **ter***

Article 15 *bis* on the exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*) of the Rome Statute provides as follows:

> *(1) The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.*
> *(2) The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.*
> *(3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to 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 Statute.*
> *(4) The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.*
> *(5) In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.*
> *(6) Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the UN Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.*

61 Aronsson-Storrier, 2024, pp. 451.
62 ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, 19 December 2005.

(7) Where the UN Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
(8) Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the UN Security Council has not decided otherwise in accordance with article16.
(9) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
(10) This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *ter* on the exercise of jurisdiction over the crime of aggression (UN Security Council referral) provides as follows:

(1) The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
(2) The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
(3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to 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 Statute.
(4) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
(5) This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *bis*(1) of the Rome Statute covers situations and cases where a State Party (Article 13(a)) or the Prosecutor (Article 13(c)) triggers a procedure before the ICC, and it establishes the legal framework for the court to exercise jurisdiction over the crime of aggression. In parallel, Article 15 *ter*(1) makes a similar provision in relation to Article 13(b) of the Rome Statute, where a situation is referred to the ICC by the UN Security Council, in which case the initiation of proceedings is not conditional on the prior determination by the UN Security Council that an act of aggression has occurred.[63] Paragraphs (2) and (3) of both articles are literally the same; they impose additional conditions for the effective exercise of jurisdiction. Articles 15 *bis*(2) and 15 *ter*(2) provide: *The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance*

63 Kreß – von Holtzendorff, 2010, p. 1211.

of the amendments by thirty States Parties, whereas Articles 15 *bis*(3) and 15 *ter*(3) provide: *The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to 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 Statute*. Although the Kampala Amendments achieved the 30 ratifications required by Articles 15 *bis*(2) and 15 *ter*(2) on 26 June 2016, this did not mean that the ICC would automatically exercise jurisdiction over the crime of aggression from 26 June 2017. The Assembly of States Parties voted on the activation of jurisdiction on 14 December 2017, by consensus of those present,[64] setting the date of the entry into force of the Kampala Amendments for those States that ratify or accept them for 17 July 2018. Participation in the vote on the activation of jurisdiction over aggression was not conditional on the ratification of the Kampala Amendments, which is a direct consequence of the fact that the former required two-thirds of the States Parties, whereas the latter required only 30 ratifications. Furthermore, in relation to Article 15 *ter*(2), Clark highlights that the requirement of 30 ratifications was only a procedural limitation on the UN Security Council and that, since the requirements of Article 15 *ter* were already met, the UN Security Council could have brought aggression proceedings before the ICC not only against States that had accepted the amendments, but even against any State, including, by implication, States not parties to the Rome Statute.[65]

Article 15 *bis*(4) provides an opt-out clause applicable to proceedings under Articles 13(a) and 13(c). The legal status of States Parties to the Rome Statute that accepted or ratified the Kampala Amendments was the long-simmering Achilles heel of the SWGCA's negotiations. As a solution, it was initially suggested that under Article 12(1),[66] States Parties that did not ratify the Kampala Amendments should be bound by these amendments unless they opted out,[67] while others, referring to Article 121(5) of the Rome Statute,[68] argued for an *express verbis* declaration of submission to jurisdiction regardless of their ratification status.[69] Eventually, the second approach prevailed in Kampala, and an opt-out procedure was introduced into the regime of the Rome Statute. Under Article 120, no reservations can be attached to the Rome Statute; therefore, States Parties that did not accept the Kampala Amendments as binding on them could request a waiver from the exercise of jurisdiction over

64 Rome Statute ASP Resolution ICC-ASP/16/Res.5, 14 December 2017.

65 Clark, 2015, p. 788.

66 Article 12(1) of the Rome Statute: *A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5*.

67 Kreß – von Holtzendorff, 2010, p. 1213; McDougall, 2013, pp. 258–259.

68 Article 121(5) of the Rome Statute:

> *Any amendment to articles 5, 6, 7 and 8 of this 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 territory.*

69 Van Schaack, 2010–2011, p. 598.

aggression by submitting a declaration to the ICC Registrar. However, in the absence of case-law, what happens if a State has neither ratified the Kampala Amendments nor made an opt-out declaration is still unclear. The possibility to make an opt-out declaration opens the door for several different interpretation issues around the exercise of jurisdiction in aggression cases, which can be summarised as follows.

(i) In relation to Article 15 *bis*(4), questions of interpretation arise as to whether the phrase *'exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party'* should be applied to acts of aggression by States Parties in general, or only to acts of aggression by States Parties that have accepted or ratified the Kampala Amendments. Sticking to the result of normative interpretation of Article 15 *bis*(4), there is no need to limit the scope of this provision to the States Parties that have accepted or ratified the Kampala Amendments; however, generally, Article 121(5) of the Rome Statute contradicts this approach as, *'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 territory'*.

(ii) In addition to Article 121(5), Article 12 raises some interpretation issues regarding Article 5 *bis*(4). Most scholars argue that the ICC has jurisdiction over the crime of aggression when both the aggressor and the victim are States Parties to the Rome Statute and have ratified the Kampala Amendments but have not submitted an opt-out declaration to the ICC Registrar.

(iii) Meanwhile, there is a consensus that the ICC does not have jurisdiction where the aggressor is a State Party but has exercised its opt-out power.[70]

(iv) There also exists a broad doctrinal consistency that where the aggressor is a State Party that has neither accepted or ratified the Kampala Amendments nor has submitted an opt-out declaration, but the victim has ratified the Kampala Amendments, the ICC has jurisdiction under Article 12(2) a) of the Rome Statute, regardless of whether the victim has previously made an opt-out declaration.[71] Nonetheless, Milanović observes that a restrictive interpretation is also possible here, in the light of which the ICC's jurisdiction does not exist here because the aggressor did not accept the Kampala Amendments *expressis verbis* in accordance with Article 121(5) of the Rome Statute.[72]

(v) In situations where the aggressor is a State Party but it neither ratified the Kampala Amendments nor made an opt-out declaration, and the victim has not ratified the Kampala Amendments, the ICC has no jurisdiction over the aggressor, whether or not the latter has exercised its waiver.[73] In such a hypothetical case, the ICC could have jurisdiction if the State Party that has not ratified the Kampala

70 McDougall, 2013, p. 261; Reisinger Coracini, 2010, p. 782; Milanović, 2012, p. 182.
71 McDougall, ibid.; Reisinger Coracini, ibid.; Milanović, ibid.
72 Milanović, ibid.
73 McDougall, ibid.; Reisinger Coracini, ibid.; Milanović, ibid.

Amendments were to make an *ad hoc* declaration of submission under Article 12(3) of the Rome Statute, although the chances of this scenario are very slim.[74]

(vi) Further uncertainties appear where the aggressor State Party has not ratified the Kampala Amendments and has not made an opt-out declaration, while the victim State Party has ratified the Kampala Amendments. According to the literature, there are two possible approaches to this scenario. The first one is the "expansive" or "permissive" view where the ICC's jurisdiction under Article 12(2) a) is maintained regardless of whether or not the victim has made an opt-out declaration.[75] The second one is the "restrictive" view, which argues, under Article 121(5) of the Rome Statute, that the ICC cannot have jurisdiction because the aggressor State has not ratified the Kampala Amendments.[76]

(vii) A similar question might be raised where the aggressor State Party has ratified the Kampala Amendments and has not made an opt-out declaration, but the victim State Party has not ratified them. Here again, the proponents of the "expansive" interpretation invoke Article 12(2) a) of the Rome Statute to argue that the ICC has jurisdiction, whereas the proponents of the "restrictive" view derive from Article 121(5) that in order to exercise jurisdiction over aggression, both the aggressor and the victim must ratify the Kampala Amendments.[77]

Article 15 *bis*(5) of the Rome Statute establishes a significant limitation applicable only to situations triggered by States Parties or the Prosecutor when reaffirming:

> *in respect of States which are not States Parties to the present Statute, the Court shall not exercise jurisdiction over the crime of aggression if such crime is committed by a national of a State not a Party or is committed in the territory of a State not a Party.*

Although there have been some suggestions that the ICC has jurisdiction over the crime of aggression under Article 12(2) even if the victim is not a State Party, most scholars disagree.[78] What is certain is that jurisdiction does not exist if the aggressor State Party has not ratified the Kampala Amendments and the victim is not a State Party to the Rome Statute. The same applies if the aggressor State Party has made an opt-out declaration, in which case it does not matter whether it has ratified the Kampala Amendments. It is also clear that the court cannot exercise jurisdiction over the crime of aggression if the aggressor State is not a Party to the Rome Statute. Additionally, it remains to be seen whether the ICC's jurisdiction over the crime of aggression can be accepted on an *ad hoc* basis under Article 12(3) of the Rome Statute.[79]

74 McDougall, ibid.; Reisinger Coracini, ibid.; Kreß – von Holtzendorff, 2010, p. 1214.
75 McDougall, ibid.; Reisinger Coracini, ibid.; Milanović, ibid.
76 Akande, 2011, p. 27.
77 Akande, ibid.; Milanović, ibid.
78 McDougall, ibid; Reisinger Coracini, ibid; Milanović, ibid.
79 Akande – Tzanakopoulos, 2018, p. 954; Stahn, 2010, p. 880; McDougall, 2013, p. 264; Reisinger Coracini, 2010, p. 781; Kreß – von Holtzendorff, 2010, p. 1214.

Under Articles 15 *bis*(6), (7), and (8), there are substantial provisions related to the UN Security Council. Article 15 *bis*(6) applies not only to proceedings initiated by the ICC Prosecutor *proprio motu* under Articles 13(c) and 15 of the Rome Statute but also to all proceedings triggered by States Parties, immediately before the opening of an investigation. The qualification that an act of aggression has been committed is evident in cases where the term "act of aggression" is used literally in a UN Security Council resolution; however, the terminology concerning the use of force under the UN Charter is, in the words of Hoffmann, followed by "*conceptual chaos and substantive ambiguity*",[80] and consequently, the terms of "a State being aggressive" or "aggressive behaviour" are more often used in UN Security Council resolutions instead of the term "act of aggression". It is also unclear whether the establishment of an act of aggression should be included in the operative part of a UN Security Council resolution or whether it is sufficient for the UN Security Council to express concern about an "aggressive state" or "aggressive behaviour" in the preamble to that resolution. Notification by the UN Secretary-General is a prerequisite for the opening of an investigation, and in cases where the UN Security Council has not established the commission of an act of aggression, the six-month deadline starts from the date of the notification.

The forthcoming provisions of the Rome Statute outline two alternatives. First, where the UN Security Council has established the commission of an act of aggression, and second, where it has not done so within six months of the notification by the UN Secretary-General. Thus, under Article 15 *bis*(7), the Prosecutor does not need further authorisation to open an investigation if the act of aggression has been established by the UN Security Council, unless, under Article 15 *bis*(10), there are reasonable grounds to believe, in addition to the act of aggression, the commission of genocide, crimes against humanity or war crimes, in which case the Pre-Trial Division may need to give specific authorisation to open an investigation.

Article 15 *bis*(8) provides that in the absence of a UN Security Council resolution on an act of aggression, the opening of an investigation is, in any event, subject to authorisation, even if it is initiated by a State Party where the competent judicial organ is the ICC Pre-Trial Division, which shall be composed of not less than six judges in accordance with Article 39(1). Furthermore, under Article 15 *bis*(8), it is clear that the UN Security Council's power of deferral under Article 16 of the Rome Statute applies to aggression proceedings as well, that is, the UN Security Council may defer investigations or prosecutions for 12 months under Chapter VII of the UN Charter.

Finally, Articles 15 *bis*(9) and 15 *ter*(4) are key points for the ICC's autonomy, its well-functioning as a criminal court, the right to a fair trial, and the presumption of innocence. It is worth recalling that these two articles provide: *A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.* Subsequently, the ICC is free to make a discretionary finding on the commission of aggression: it can find that an act of aggression has

80 Hoffmann, 2019, p. 47.

been committed in the absence of a UN Security Council resolution, or it can even decide that no act of aggression has been committed even if it has been previously established by the UN Security Council or the ICJ.

4. Concluding Remarks

The gradual evolution of the rules concerning *jus contra bellum* is an achievement of post-world-wars' development of international law, which created the preconditions of individual criminal responsibility for the crime of aggression. A real symbolic breakthrough occurred when the Kampala Amendments to the Rome Statute were adopted and the ICC's jurisdiction over aggression was activated. Nevertheless, whether this jurisdiction regime is operational remains to be seen. From my perspective, the statutory regime in effect on the crime of aggression is extremely complex, and undermines the real-life applicability and functionality of the Kampala Amendments. Unsurprisingly, initiatives to modify and simplify the aggression provisions are currently underway. The Global Institute for the Prevention of Aggression recently prepared model amendments to the Rome Statute, aiming to align the ICC's jurisdiction over the crime of aggression with its jurisdiction over genocide, crimes against humanity, and war crimes. The outcome of these efforts will be seen in the future.[81]

The Kampala Amendments to the Rome Statute on the crime of aggression constitute a *sui generis* jurisdictional regime within a *sui generis* jurisdictional regime, particularly in proceedings triggered by States Parties and the Prosecutor *proprio motu*, which is the result of differences in the temporal, personal, and territorial jurisdiction of the court, as well as additional conditions regarding the preconditions for the initiation of proceedings.

First, the difference in temporal jurisdiction, because of which the court has effectively exercised jurisdiction over the crime of aggression only since 17 July 2018. By contrast, for genocide, crimes against humanity, and war crimes, this dates back to 1 July 2002. Second, the narrowing of the personal scope, as the Kampala Amendments have currently been ratified by only 45 States, whereas the Rome Statute has 124 States Parties. Third, jurisdiction based on the territorial principle is also limited in aggression proceedings compared to other core crimes, where Article 15 *bis(*5) states that the ICC has no jurisdiction over offences committed in the territory of a non-State Party (by a national of a State Party). The same provision also narrows the personal scope of the Rome Statute with regard to aggression, as the court cannot exercise jurisdiction over aggression committed by nationals of non-States Parties in the territory of States Parties. In addition to the obvious jurisdictional differences,

81 McDougall, 2024, pp. 1–21.

other specific additional conditions (such as the separate ratification of amendments or the opt-out declarations) must also be considered when initiating aggression proceedings.

However, it is worth noting that this *sui generis* jurisdictional regime is less specific than the other two triggering mechanisms in situations brought before the ICC by the UN Security Council; this is because the only jurisdictional limits that bind the UN Security Council are the 30 ratifications required for activation and the prohibition of retroactivity. The powers of the UN Security Council overthrow the treaty regime of the Rome Statute; in other words, treaty norms bow to the imperative of international peace and security. The ICC's jurisdiction over the crime of aggression appears somewhat simpler (at least at the level of abstraction and legal norms) in relation to proceedings initiated by the UN Security Council than in relation to referrals by States Parties and *proprio motu* prosecutions. Meanwhile, although the normative framework is in place, many practical questions remain obscure, and judicial case-law to guide in these issues is missing. Predicting whether aggression proceedings will be brought before the ICC and, if so, whether this could happen in the foreseeable future, is not a rewarding task for international lawyers; however, the extreme political sensitivity of the crime, the conceptual uncertainties surrounding the use of force and aggression, and the jurisdictional limits built into the Rome Statute imply that the chances of this happening are very slim.

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