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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ) is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide as platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

VALENTINE T. MBELI (Ph.D.)

Editor- in- Chief.

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TABLE OF CONTENTS

INVASION OF UKRAINE: INTERROGATING THE CRIMINAL LAIBILITY OF RUSSIA UNDER INTERNATIONAL LAW

IFEOLU JOHN KONI, Ph.D.....1

CLIMATE CHANGE, HUMAN RIGHTS AND THE RESPONSE OF THE AFRICAN HUMAN RIGHTS SYSTEM: FOCUS ON THE AFRICAN COMMISSION AND THE COURT ON HUMAN AND PEOPLES' RIGHTS

KELESE GEORGE NSHOM & GIDEON FOSOH NGWOME.....23

LEGAL MECHANISMS TO COUNTER TAX AVOIDANCE IN NIGERIA

ISAU OLATUNJI AHMED, Ph.D.....46

STATE AND INDIVIDUAL RESPONSIBILITIES FOR CRIME OF AGGRESSION UNDER THE ROME STATUTE: WHAT PROSPECT FOR INTERNATIONAL CRIMINAL JUSTICE

FON FIELDING FORSUH, Ph.D.....63

GENDER DISCRIMINATION AND THE INTERNATIONAL DIVISION OF LABOUR: A LEGAL APPRAISAL

O. F. OLUDURO& Y. F. OLUWAJOBI.....86

EROSION OF THE PHILOSOPHY OF POSITIVISM THROUGH JUDICIAL ACTIVISM: EMERGING TREND IN THE PRINCIPLE OF JUDICIAL PRECEDENT IN NIGERIA

IGBONOH A JOSHUA, Ph.D.....113

THE IMPACT OF INTERNATIONAL LAW ON DOMESTIC CORPUS: A REVIEW OF ATTORNEY-GENERAL, CROSS RIVER STATE V ATTORNEY-GENERAL OF THE FEDERATION

YAHYA DURO U. HAMBALI, Ph.D & JOSEPHINE N EGEMONU, LLM.....130

RESISTANCE AGAINST RAPE AND KIDNAPPING IN NIGERIA: JUSTIFYING LETHAL SELF DEFENCE AGAINST VIOLENT CRIMES

ATERO AKUJOBI, Ph.D.....141

JUDICIAL IMPARTIALITY AND INDEPENDENCE IN NIGERIA: A REALITY OR A FAÇADE?

DORCAS A AKINPELU, LLM & ADEOLA O. AGBOOLA, LLM....156

THE STATUTE OF EXTRAORDINARY AFRICAN CHAMBERS: AN END TO IMPUNITY IN AFRICA?

JOEL A ADEYEYE, Ph.D.....170

EXPLORING THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN NIGERIA

DR.AMADE ROBERTS AMANA &DR.SOLOMON A.IENLANYE.194

REFLECTIONS ON THE CLEAVAGES OF IDENTITY AND INDIVIDUALITY OF WOMEN IN CAMEROON

NCHOTU VERALINE N. MINANG, Ph.D.....207

STATE AND INDIVIDUAL RESPONSIBILITIES FOR CRIME OF AGGRESSION UNDER THE ROME STATUTE: WHAT PROSPECT FOR INTERNATIONAL CRIMINAL JUSTICE

FON FIELDING FORSUH (Ph.D.)*

Abstract

The use of force against the territorial integrity of another State is proscribed by the United Nations Charter in article 2(4) and is considered by the international community as a fundamental breach amounting to aggression which constitutes a serious threat to international peace and security. It is also an international crime under both articles 5 and 8 of the Rome Statute making the ICC competent to prosecute it. Article 8(1) grants a controversial jurisdiction to the ICC over aggression because it has to make a determination on state responsibility which is not its competence. This article examines the jurisdiction and competence of the ICC in establishing state and individual responsibilities for the crime of aggression. Through the consultation of primary data from statutes and case law, not leaving out secondary sources from text books, articles and the internet, this paper concludes that the ICC would not be able to effectively prosecute aggression due to some limits and barriers to its jurisdiction. It recommends inter alia that the Court's jurisdiction should be extended to making determination on state responsibility and more state parties and non-state parties should ratify the Kampala amendment to grant the ICC an extensive jurisdiction in this regard. This would provide a brighter future for international criminal justice in the fight against impunity for the crime of aggression.

Keywords: State, Individual, Responsibility, Crime of Aggression

Introduction

From time immemorial, the intercourse between states has been characterized by armed conflicts which have jeopardized the very existence of man. This was exacerbated with the outbreak of the First and Second World Wars, culminating into the massive destruction of human lives and properties, creating the need to hold perpetrators accountable.[1] To give effect to this, the 1919 Treaty of Versailles

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[1] Part VII of the Treaty of Versailles21 (Articles 227-230). For more insight, see H Olasolo, *The criminal responsibility of senior political and military leaders as principals to international crime*s, Oxford and Portland Oregon, (2009), pp. 1-13.

authorized the creation of a special tribunal to try Kaiser Wilhelm II of Germany.[2] Even though the trial never took place,[3] it represented a move towards accountability and the fight against impunity for those whose acts breach international peace and security.

The abortive prosecution of the German emperor after World War I (WWI), the outbreak of World War II (WWII) and its subsequent effects led to the intensification on the regulation of the prohibition on the use of force by states in their international relations. Acts of waging wars against the territorial integrity of states is regarded by the international community as aggressive war, 'aggression' and it represents one of the most if not the most serious breach against the fundamental rules of the international community. That is why the United Nations Charter in its article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any state. Any violation of this provision amounts to aggression which has been recognized as an internationally wrongful act resulting from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community, that its breach is recognized as a crime by that community as a whole and constitutes an international crime.[4] The Nuremberg Tribunal came down heavily on the war of aggression ruling to the effect that initiating a war of aggression is 'not only an international crime; it is the supreme international crime' as its consequences are not merely limited to belligerent states, but rather affect the whole world.[5]

The recognition and prosecution of aggression as an international crime by the Nuremberg and the Tokyo tribunals served as bed rock for the prohibition and granting of jurisdiction over same to the International Criminal Court. In line with the United Nations Charter, the preamble of the Rome Statute is to the effect that all State Parties should refrain from using force or threat thereof against the territorial integrity and political independence of whichever state, or act in any other way that is in contradiction of the regulations of the UN's Charter.[6] This therefore means that, the proscription of crime of aggression under the Rome Statute reinforces the core norm against aggressive use of force found in article 2(4) of the UN Charter and supports international peace and security.

The 1998 Rome statute granted the ICC jurisdiction over aggression in article 5 but did not define the crime and circumstances under which responsibility could be established. The definition to the crime was established at the 2010 review

[2] Article 227 reads in part: 'The Allied and Associated Powers publicly arraigned William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal would be constituted to try the accused, thereby assuring him the guarantees to the right to defence'.
[3] The refusal by the government of Holland to extradite the German emperor was officially advance as the reasons for the failure of the trials when in reality it was the absence of the will on the part of allied powers.
[4] Article 19(2) Draft Code of the ILC.
[5] International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. 1. (Nuremberg, 1947), 186.
[6] Paragraph 7 of the Preamble of the Rome Statute of 1998.

conference in Kampala[7] and the Assembly of State Parties in its 16th session, by consensus, adopted a resolution to activate the crime of aggression under the Rome Statute which effectively started on July 17, 2018.[8] Indeed, the inclusion of the crime of aggression within the scheme of the Rome Statute stems from the desire of the international community to see that the supreme international crime attracts individual criminal liability, as it once did under the Nuremberg and Tokyo Charters.[9]

In fighting against impunity for international crimes through the instrumentality of international criminal justice, there is the need to establish the responsibility of perpetrators. Unlike other international crimes[10] under the jurisdiction of the ICC, the criminalization of aggression as defined in article 8 *bis* of the Rome Statute requires the establishment of the criminal responsibility of both states and individuals. Establishing state responsibility for crime of aggression will be a difficult task for the ICC because it focuses on individual criminal responsibility[11] while state responsibility is dealt with by competent political bodies, internationals courts, or is simply left to the more traditional means of peaceful settlement of international disputes. The jurisdiction of the ICC is therefore limited to natural persons.[12] The most worrisome aspect is that for individual responsibility to be established for crime of aggression that of states needs to be established. This makes the whole issue complicated since the jurisdiction of the ICC is limited in that dimension and aggression is committed by those who hold leadership positions, whose acts can be attributed to the state, thereby engaging state responsibility. In identifying the jurisdiction challenges that would be faced by the ICC in prosecuting the crime of aggression, this article explores the possibility of establishing the criminal responsibility of states along-side individual responsibility for aggression. It examines self-defence as a ground for excluding criminal responsibility for the crime of aggression. It further identifies the barriers to state responsibility which is a pre-condition for individual criminal responsibility for the crime of aggression.

Establishing responsibility for crime of aggression

It has been mentioned earlier that the proscription of aggression as an international crime under the Rome Statute in article 8 *bis* requires that the prosecution establishes the criminal responsibility of states and individuals. It is worth

[7] Kampala Amendments on the Crime of Aggression (Kampala Amendments), Resolution RC/Res. 6, 11th June 2010. See D Akande, 'What Exactly Was Agreed in Kampala on the Crime of Aggression?', (2010) *European Journal of International Law*.

[8] International Criminal Court, *Assembly activates court's jurisdiction over crime of aggression.* Press release (Dec. 15, 2017). Available from: https://www.icc-cpi.int/Pages/item.aspx?name=pr1350 accessed 13/7/2020.

[9] K Kittichaisaree, *International Criminal Law,* 1st ed. Oxford: Oxford University Press, (2001), p. 207.

[10] Article 5 of the Rome statute of 1998, The Crime of Genocide, Crimes against Humanity and war crimes.

[11] Article 25 of the Rome Statute, ibid.

[12] See paragraphs 1 and 2 of the preamble of the Rome Statute. See also G Gaja, 'The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression', in M Politi and G Nesi., (eds.), *The International Criminal Court and the Crime of Aggression*, Aldershot, Ashgate, (2004), p. 123., VGowlland-Debbas, 'The Relationship between the Security Council and the Projected International Criminal Court', (1998),3 *Journal of Armed Conflict Law*, pp. 97–119.

emphasizing the since the ICC has jurisdiction over natural persons, it is required to first of all establish the responsibility of states to permit her do same for individuals.

State responsibility for crime of aggression

In proscribing aggression, the Rome Statute reinforces the core norm against aggressive use of force found in article 2(4) of the UN Charter and supports international peace and security. Article 8 *bis* 1 provides that;

> 'For the purpose of the 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'.

The usage of the term 'aggression' in the above provision needs to be scrutinized from two angles, i.e. from the perspective of the individual and that of the state. Whereas the term 'crime of aggression' is used in an individual-centric sense, 'act of aggression' is state-centric in its nature. Based on these two conceptualizations adopted under Article 8 *bis*, it can be logically concluded that to attract individual criminal responsibility for the crime of aggression, it must first be established that a state committed an act of aggression. Without establishing an act of aggression on the part of the state, all efforts to prosecute individuals for the connected crime of aggression would be in vain.

State Acts for aggression to be established (*actus reus*)

The crime of aggression according to article 25(3)*bis* of the Rome Statute is considered as a leadership crime. This is because the persons that order the perpetration of acts amounting to aggression as provided in article 8*bis* are those who are in effective control of state policies and have direct control over the political or military action of a state. They act in the interest of the state by committing acts which threatens the international community and as such a state should be responsible. This is nothing new for the crime of aggression because since the 1940s, aggression has been perceived as a leadership crime- a 'supreme crime' that may be committed only by the highest state officials. It is inferable from the Nuremberg and the Tokyo judgments that only high-ranking political, military or industrial leaders involved at the policy-making level were prosecuted for crimes against peace. In fact, it had been explicitly stated in article II (2) (f) of the Control Council Law No. 10[13] that for an individual to have committed a crime against peace, it must be established that he held a high political, civil or military (including General Staff) position or a high position in the financial, industrial or economic life. Thus, prosecuting a leader like a president of a country would be viewed as an action against the state responsible for violating international obligations by committing acts of aggression. The rationale behind adopting the leadership clause has been succinctly explained in the *The United States of America vs. Wilhelm von*

[13] Law No. 10 was enacted in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.

Leeb et al[14] in this way: 'Somewhere between the Dictator and Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it'.

It may be that some wars are launched primarily by individuals, but many have significant even massive popular support and/or are launched by democratically elected leaders. Because of the emphasis on aggression as a 'leadership crime', the degree to which the population and the military may willingly have embraced aggression risks being hidden from sight, possibly allowing both simply to blame their leaders.[15]

State criminal responsibility overlaps with the criminal responsibility of its organs.[16]When acts of aggression are committed by state officials or agents of the state, questions may also be raised about the responsibility of the state that the acts of the individual are attributable. Indeed when an international crime like aggression within the jurisdiction of the ICC is committed by a state organ or a person whose acts are otherwise attributable to the state, there would usually be the case of responsibility for breach of international law. Under the general regime of state responsibility, 'the conduct of state *any* organ shall be considered an act of that state under international law'[17]. This position was stated by the House of Lords in *R v. Jones and others*[18], to the effect that waging aggressive war is a crime under existing international law. It has been indicated by U. Leanza, that aggression being an international crime, is strictly related to a state[19], whose official, acting on behalf of this state as a military or political leader, is committing this crime[20].

Acts of aggression committed by the fore mentioned officials on behalf of states may arise from orders that amount to a particular grave and manifest illegal use of force by such states. Thus according to the Rome Statute, the act of aggression is defined 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 Nations'.[21] This implies that, not all instances of the use of armed force amount to an act of aggression.[22] Therefore illegal acts by the mentioned officials culminating into use of armed force by a State against another State in violation of the UN Charter would be state act of aggression. The use of armed force here presupposes violence, as the core of the

[14](Nuremberg: US Military Tribunal, 1948).
[15] B Larry Cata, 'The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment', (2002), *21 Penn State International Law Review.* 509.
[16]P N Drost, *Humanicide. International Governmental Crime Against Individual Human Rights*, Leiden, Sythoff, 1959, pp 295 and 297.
[17]Article 4 of the ILC Articles on State Responsibility.
[18][2006] UKHL 16, [2006] All ER 741, at paras 19 (Lord Bingham), 59 (Lord Hoffmann), 99 (Lord Mance).
[19] U Leanza, 'The Historical Background'(in) M Politi and G Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate , (2004), p. 8.
[20] M A Shukri, 'Will Aggressors Ever be Tried Before the ICC?', (in) M Politi and G Nesi (eds.), ibid, p. 36.
[21] Article 8 *bis*(2) Rome Statute.
[22] For example, Art. 51 of the UN Charter stipulate the right of self-defence as an exception to the prohibition of the use of force discussed below.

prohibition of the use of force enshrined in Article 2(4) of the UN Charter and grounded in customary international law[23] and stems from the idea of prohibition of illegal warfare. The manifestation of an act of aggression is the material act of use of violence by a state against another state through its armed forces[24]. Such use of armed force may take the form of military occupation (temporary or annexation)[25], Bombardment (which can be perpetrated while within or out of the victim territory)[26], blockade of ports or coast of a state by armed forces[27], attack on land, sea or air forces or marine and air fleets of another stat[28], use of armed forces of one state which are within the territory of another state with agreement from such state[29], making use of armed bands, groups, irregular or mercenaries which carry out attacks of armed forces against another state[30].

The Criminal Mind of the State with respect to crime of aggression (*Mens Rea*)

Criminal responsibility cannot be established without the criminal intent. Thus, for a state to be fully responsible for an act of aggression, it must be established that it was committed intentionally. Intention on the part of the state is difficult if not impossible to establish because the state is an inanimate element which acts through humans. As such, the criminal mind of the state in itself cannot be established except by taking into consideration the acts of the officials or organs charged with responsibility of handling state interest or whose acts are attributable to the state.

From the analysis of the *actus reus* above, attribution of wrongful acts to state means both attribution of prohibited conduct under international law carried out by a state organ, and attribution of prohibited intent of state organ. If no intent of the organ can be proved, attribution of the prohibited conduct alone would not be sufficient to entail state responsibility. This thus implies fault on the part of the state which corresponds to the *mens rea* of the state organ (which ordered the aggression).[31] These are organs which represent the state and with which the state can be identified.

In the crime of aggression, the planning, preparation, initiation or waging of aggression must be intentional brining in the psychological element. However, the problem with the psychological element of aggression (*animus aggressionis*) is that this requirement can be interpreted in two different ways, that is, as requiring on the

[23] See ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), judgment of 27 June 1986, paras. 172-186.

[24] The threat of force will not suffice because the use of force always presupposes violence. See J. Green and F. Grimal, 'The Threat of Force as an Action in Self-Defense Under International Law', (2011) 44 *Vanderbilt Journal of Transnational Law* 285, p. 311. See also Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, 3rd Edition, (2001), p. 9.

[25] Article 8*bis*(2)(a) of the Rome Statute of 1998.

[26] Ibid, article 8*bis* (2)(b).

[27] Ibid, article 8*bis* (2)(c).

[28] Ibid, article 8*bis* (2)(d).

[29] Ibid, article 8*bis* (2)(e-f).

[30] Ibid, article 8*bis*(2)(g).

[31] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral pleadings, 15 March 2006, Statements by Serbia and Montenegro, CR/2006/20, paras. 345–347.

part of the accused either a specific intent to commit aggression or simple knowledge that his conduct is contributing to the perpetration of aggression. According to precedents of the Nuremberg and Tokyo judgments, no specific intent is necessary to hold the perpetrator criminally accountable for aggression.[32] To convict the accused persons for aggression, the International Military Tribunal relied on the fact that they had 'knowledge' of Hitler's aggressive plans.[33]Moreover, the relevant case law of the International Court of Justice (ICJ) shows that no specific intent is required on the part of a state to show that it has committed aggression.[34] This therefore implies that the requirement is the existence of knowledge as to the fact that aggression is being committed against the territorial integrity of another state as prohibited by the United Nations Charter and the Rome Statute. Article 30 of the Rome Statute requires intent and knowledge for criminal responsibility. G. Werle, et al has unanimously claimed that a deed consisting in preparation, instigation or leading an aggressive attack (i.e. when the perpetrator is committing a crime against peace) should be committed purposefully and with full awareness.[35] In other words, the perpetrator should be aware of the use of military force on the part of the state in a form being in contradiction with the UN's Charter.

Individual Responsibility

State responsibility and individual criminal liability for crime of aggression have a common origin. They both stem from the serious breach of obligations owed to the international community as a whole.[36]But article 25 of the Rome Statute labeled 'individual criminal responsibility'- stipulates that a person who commits a crime under the ICC purview is individually responsible and liable for punishment. This poses a problem as to the relevance of establishing state responsibility for individual liability for crimes of aggression to be established since the purview of the ICC is individual and not a state. The leadership clause mentioned in article 8 *bis* (1) narrows responsibility for crimes of aggression to those in position of 'control or direct' state policy which is one of the main conceptual differences between crime of aggression and other crimes under the ICC's jurisdiction.[37] The other crimes are usually perpetrated by common foot soldiers and masterminded by leaders, whilst

[32] Y Dinstein, *War, Aggression and Self-Defence*, 2nd edn., Cambridge, Cambridge University Press, (1994), pp. 139-140. See also G. Werle et al, *Principles of International Criminal Law*, The Hague, TMC Asser Press, (2005), p. 399.

[33] International Military Tribunal, *Nuremberg* Judgment, 1 October 1946, 41 *AJIL* (1947), pp. 172–333 ('IMT Judgment')

[34] The following cases are illustrative of this fact; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), *Merits*, Judgment, 27 June 1986, ICJ *Reports* 1986, p. 14 et seq.; *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ *Reports* 1996, p. 226 et seq.; *Case Concerning Oil Platforms* (Iran v. USA), Judgment, 6 November 2003, *ICJ Reports* 2003, p. 161 et seq.; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, p. 136 et seq.; *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v.
Uganda), Judgment, 19 December 2005, available at www.icj-cij.org, accessed 22/08/2021.

[35] G. Werle et al, *Principles of International Criminal Law*, The Hague, TMC Asser Press, (2005), p. 399.

[36]A De Hoogh, *Obligations* ErgaOmnes *and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, The Hague, Kluwer, (1996). See also M Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, Oxford University Press, 1997. C J Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge, Cambridge University Press, (2005).

[37]Article 5 of the Rome Statute of 1998 as to Crime of Genocide, Crimes against Humanity and war crimes.

commission of the crime of aggression is exclusively reserved to state leadership. This gives the impression that engaging the responsibility of a leader would be enough to prosecute for the crime of aggression whereas state policies are mostly executed in the interest of the state.

It can thus be concluded that unlike other crimes under the jurisdiction of the ICC, only leaders (political and military) can be held accountable for crime of aggression on an individual basis. They can properly bear the responsibility on behalf of the state even if they have not committed any atrocity with their own hand. But it is relevant to note that since they direct state policies, their acts and intent are attributed to the state. Thus, for crimes of aggression, individual criminal responsibility overlaps with state responsibility because they seem to be no separation between their responsibilities.[38]

Controversy on ICC's Jurisdiction over State Responsibility

The finding of a state's responsibility for the breach of peace for a conviction on the crime of aggression raises questions about the involvement of the ICC in making a determination on state responsibility. This is because the Court's jurisdiction is limited to natural persons (individuals)[39] just like the purview of international criminal law. International law unlike international criminal law regulates the relationship between states by addressing their rights and obligations. Therefore, states are considered as primary subjects of international law and it is on that premise that the concept of aggressive use of force amongst states was conceived and prohibited by the United Nations Charter in article 2(4). This is not to say that individuals are not equally subjects of international law, but worthy of note is the fact that the determination of state responsibility is more within the competence of political bodies, more traditional means of peaceful settlement of international disputes, or is simply left to the competence of international courts like the ICJ than within the jurisdictional remits of the ICC.

Unlike the ICC, the jurisdiction of the ICJ refers only to states as provided for in article 34.1 of the Statute of the ICJ. Article 36.1 of the same statute circumscribes the ICJ's competence to cases which the parties refer to it. Moreover, according to article 36.2, the Court's jurisdiction entails questions of public international law and those related to international responsibility and reparations. This can be justified with the case law of the ICTY which like the ICC has jurisdiction over natural persons and can only establish individual criminal responsibility. In *The Prosecutor v. Krstić*,[40]the Trial Chambers of the ICTY made it clear that while dealing with notorious crimes committed during the conflict in the former Yugoslavia, it would not address the question of collective responsibility including state responsibility, because its task was to establish individual criminal liability only. The ICJ on the other hand has been asked to settle the dispute between Bosnia and Herzegovina

[38]P N Drost, *Humanicide. International Governmental Crime Against Individual Human Rights,* Leiden, Sythoff, (1959), pp 295 and 297.
[39]Article 25 of the Rome Statute.
[40] TC, Judgment, 2 August 2001, para. 2.

and Serbia and to ascertain whether the latter was responsible for the genocide that occurred in the former Yugoslavia.[41]

The determination of international obligations amounting to international crimes has not been limited to the competence of international criminal tribunals and the ICC. Other international courts have also been involved in making such determinations. But the difference between the former and the latter courts lies on the that fact that while the criminal tribunals and courts base on individual responsibility, international courts have been more concerned with serious breach of international obligations by states which amount to international crimes. An example can be seen in *Legal Consequences of the construction of a wall in the occupied Palestinian Territory*[42] where the ICJ examined 'legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States'.[43] Indirectly referring to articles 40 and 41 of the ILC codification work the Court decided that since Israel had seriously breached obligations owed to the international community as a whole, 'all other States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.'[44] That the Conduct of Israel also represented a serious breach in terms of its magnitude in that it was a serious breach of the self-determination principle, of international humanitarian law and human rights law. In 2004, the ICJ viewed aggression essentially in terms of a relationship between states. It commended to the effect that self-defence which is an exception to the prohibition on the use of force entails an interstate relation and can only be validly invoked in a case of an armed aggression 'by one state against another state'[45].

Just like the ICJ, the ruling by the Inter-American Court of Human Rights in *Velásquez-Rodríguez v. Honduras*[46]shows how a practice of wrongful acts can concretely be taken into account to establish serious breach of an international obligation entailing state responsibility. This case originated from a petition against Honduras, which was supposedly responsible for the violation of the American Convention on Human Rights and, in particular, for the disappearance of ManfredoVelásquez. While focusing on the disappearance, the court accepted a particular approach of the commission in proving the facts underlying the petition. The court adopted an approach which relied on the existence of a practice of

[41]Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide(*Bosnia and Herzegovina v. Yugoslavia*), *Preliminary Objections*, Judgment, 11 July 1996, *ICJ Reports* 1996, p. 595 et seq.; Application for the Revision of the Judgment of 11 July 1996 in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide(*Yugoslavia v. Bosnia and Herzegovina*), *Preliminary Objections*, Judgment, 3 February 2003, *ICJ Reports* 2003, p. 7 et seq.;
[42]Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, p. 136 et seq.
[43]Ibid, para. 154.
[44]Ibid, para. 159.
[45]ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.Para. 139.
[46] Judgment, 29 July 1988, *Annual Report of the Inter-American Court of Human Rights*, Series C No. 4, 1988. P. 60.

disappearances supported or tolerated by the Government of Honduras and accepted that;

> 'If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction'.

The decision of the court concentrated on the existence of such a practice as it relied on precise elements to establish that the practice of disappearance had been proven. These were a number of disappearances during a limited period of time; the fact that those disappearances followed a similar pattern; the fact that it was public and notorious knowledge in Honduras that kidnappings were carried out by military personnel or the police, or persons acting under their orders; and the fact that disappearances were carried out in a systematic manner. The court finally found out that the kidnapping and disappearance of Manfredo Velásquez falls within the systematic practice of disappearances referred to by the facts[47].

The above analysis if taken strictly would be limiting on the jurisdiction of the ICC to make a determination on the criminal responsibility of states for the crime of aggression since it is based on individual criminal responsibility. It is worth noting that obligation on the prohibition of aggressive use of force amongst states is recognized under both international law[48] and international criminal law[49]. That is why in dealing with individual criminal responsibility, article 25 (4) of the Rome Statute still obliges states to respect their obligations under international law. Such obligations equally entail not to use aggressive force against other states (aggression) as proscribed by both the United Nations Charter and the Rome Statute. This would equally require an extension of the competence of the ICC to state responsibility for crime of aggression under article 8 *bis*.

Jurisdictional Challenges on the ICC Over the Crime of Aggression

The Rome Statute in articles 5 and 8 *bis* grants jurisdiction and competence to the ICC over the crime of aggression. But this jurisdiction is limited by ratification of the Rome Statute and Security Council's approval including its power of referral and deferral.

Limitations on state referrals and prosecutor's *propiomotu* powers

Where the jurisdiction of the Court is triggered by a state referral or by the prosecutor's *propiomotu*, (on his own initiative), the Court shall not exercise its jurisdiction over the crime of aggression when committed by the national of or on the territory of a state that is not party to the Rome Statute of the ICC[50]. Article 15 *bis* (5) clearly states that 'in respect of a State that is not a party to this Statute, the

[47]Inter-American Court of Human Rights, Judgment of July 29, 1988 (Merits).
[48] Article 2(4) UNC
[49]Paragraph 7 of the preamble of the Rome Statute.
[50] Article 15 *bis* of the Rome Statute.

Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory'. This shows that there is far less jurisdiction that the ICC has over aggression than it has over other crimes under its competence. This is because with other international crimes, the court's jurisdiction covers crimes committed in territories of state parties and crimes committed in non-state parties by nationals of state party to the Rome Statute.[51] This also includes crimes committed on board vessels or aircrafts that are registered in one of the state parties or flying the flags of such state parties. Also, included are aircrafts or vessels of states even though not state parties, but they have consented to the jurisdiction of the ICC even on an *ad hoc* basis. It would equally cover crimes committed by nationals of state parties to the ICC in the aforementioned vessels or aircrafts.

The ICC's jurisdiction over crime of aggression will apply by virtue of article 12 of the Rome Statute unless state parties opts out of the jurisdiction as provided in article 15 *bis* (4). On this view, nationals of ICC states parties that have not ratified the Kampala Amendments are subject to ICC jurisdiction if they commit aggression on the territory of a state that has ratified the aggression amendments. This is on the basis of territoriality, in accordance with article 12(2)(a) of the Rome Statute. The same Rome Statute in article 121(5) provides a treaty right to state parties which under the law of treaties, cannot be taken away without their consent.[52] This article provides in its last sentence that 'in respect of a state party which has not accepted the amendment (to articles 5. 6, 7 or 8), 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'. This has a limiting effect on the exercise of jurisdiction over the crime of aggression by the ICC in cases of state referrals and *propiomotu* power of the prosecutor.

The United Nations Security Council approval and deferral

The Rome Statute in article 16 grants powers to the United Nations Security Council to defer cases from the ICC. It also makes provision for the requirement of an approval from the Security Council for the ICC to exercise its jurisdiction over aggression. Such situations may have a limited effect on the powers of the ICC over aggression.

Security Council approval

Article 15*bis* (6) of the Rome Statute requires the prosecutor of the ICC to ascertain whether the Security Council has made determination to the effect that a state has committed an act of aggression in order to proceed with an investigation. This the prosecutor does by notifying the UN Secretary General of the situation before the court, including any relevant information and documents. This somehow subordinates the ICC's exercise of jurisdiction over aggression to prior determination by the Security Council that state aggression has actually occurred. The Security Council's determination of an act of aggression may be very unlikely

[51] See articles 12 and 25 of the Rome Statute.
[52] See articles 33(3)(a)(b) and 40(4) of the Vienna Convention on the Law of Treaty 1969.

to be forthcoming since the Security Council has hardly used its powers under Chapter VII to do so yet even without criminal repercussions.[53] This would cause the crime of aggression to remain a dead letter as it will weaken the prohibition of the use of force and a challenge to the fight against aggression.

Making the prosecution of the gravest international crime dependent on a determination by a political body which great powers have veto power to shield themselves and their allies is not very appropriate. The practice of the Security Council has shown that it will not refrain from using its prerogatives under Chapter VII and article 103 of the UN Charter to claim precedence over the ICC as it already happened when it shielded UN forces who were United States forces from the Jurisdiction of the ICC.[54]

Looking further at the provisions of article 15 *bis* (7) and (8) which make use of the phrase ".…….the prosecutor may proceed with investigation with respect to crime of aggression….." is somehow problematic. The use of the word 'may' is discretionary and not a mandatory 'shall' implying that actions by the prosecutor can still be blocked from proceeding by the Security Council under any guise it deems fit within the ambits of chapter VII of the UN charter, especially when it requires meeting its mission in article 39 and use of the power of deferral in article 16 of the Rome Statute.

Security Council deferral

The jurisdiction of the ICC over the crime of aggression can also be limited by the power of deferral granted to the Security Council in article 16 of the Rome Statute. According to this article, the Council may, in a resolution adopted under Chapter VII of the United Nations Charter, request the court to defer (namely not commence or proceed with) an investigation or prosecution for a renewable period of twelve month.[55] It therefore recognises the ability of the Security Council to suspend the activities of the ICC with regard to a specific situation or case, when it is considered that such suspension is necessary for the maintenance of international peace and security. It has been argued for example that the exercise of this power might be appropriate in situations where a precarious, but realistic peace has been achieved and proceeding with an immediate investigation or prosecution by the ICC would threaten such condition.[56] But it would appear inconsistent with the purpose of article 16 of the Rome Statute to request a suspension of ICC proceedings in a case

[53] The only cases in which the Security Council has condemned 'acts of aggression' were not adopted under Chapter VII: see Res. 455 (1979), at para. 1, Res. 573 (1985), at para.1, and Res. 577 (1985), at para. 2. See to this effect N Strapatsas, 'The Practice of the Security Council Regarding the Concept of Aggression'. In C. Kreß& S. Barriga (Eds.), *The Crime of Aggression: A Commentary*, Cambridge: Cambridge University Press, (2016), pp. 178-213.

[54] C Stahn, 'The Ambiguities of Security Council Resolution 1422(2002)', (2003), *European Journal of International Law*, vol. 14 No. 1, pp 85-104.

[55] This power is exercised over proceedings commenced either by state voluntary referrals, the prosecutor *propiomotu* powers and the United Nations Security Council referrals.

[56] M L, Keller, 'Achieving Peace and Justice: The International Criminal Court and Ugandan Alternative Mechanisms', (2008), 23 *Connely Journal of International Law*, pp. 209-243.

where a government is attempting to coerce a deferral (or complete amnesty from prosecution) in exchange for disarming or even engaging in peace negotiations.[57]

It can be understood from the foregoing that an inappropriate use of the power of deferral by the Security Council which not in line with the aforementioned purpose would limit the ICC in prosecuting aggression. The use of deferral by the Security Council has shown that it is one of the most controversial powers that the Rome Statute grants to the Council. This is because the Council would rather shield than encourage the future prosecution of aggression especially when it has to do with the interest of its permanent member. This can be established with the abuse of the power of deferral done at the behest of the USA which in 2002, threatened to veto a routine extension of the United Nations peacekeeping mission in Bosnia unless UN peacekeepers were granted permanent blanket immunity from the ICC's jurisdiction.[58] This move to prevent the ICC from prosecuting crimes committed by peacekeeping forces who were US nationals led to the adoption of Resolution 1422 purportedly done under Security Council's power of deferral in article 16 of the Rome Statute. The resolution provided immunity to all UN peacekeepers from non-state parties to the ICC for a renewable period of one year and was renewed by Resolution 1487 in 2003.[59]

Unlike the situation under Resolutions 1422 and 1487 where deferrals were granted, it was refused with respect to restoring peace in Darfur which was a clear case for deferral. An ICC arrest warrant which was issued against the then president Omar al-Bashir of Sudan[60]created serious security issues in the country and was criticised by the African Union as an impediment to its regional efforts to foster peace and reconciliation in Sudan- that the ICC failed to appreciate the effects its actions were having on these efforts.[61] The AU's peace and Security Council issued a communiqué in March 2009 requesting the Security Council to exercise its power under article 16 of the Rome Statute to defer indictment of Bashir[62]which was given deaf ears. It is important to note that the Security Council's decision not to defer Bashir's indictment was not appropriate because a precarious but realistic peace was about to be achieved by the AU and a continuation of ICC proceeding constituted a threat to such conditions. This was ex-rayed with the manner in which the Sudanese government responded to ICC arrest warrant by expelling aid agencies, threatening NGO's and peacekeeping troops.[63] The government equally became very

[57] R Kenneth, 'Workshop: The International Criminal Court Five Years on: Progress or Stagnation?', (2008), *6 Journal of International Criminal Justice*, pp. 763-767.

[58] L Moss, 'The UN Security Council and the International Criminal Court: Towards a more principled relationship'. International Policy Analysis, Friedrich Ebert-Stitfung, March 2012, p. 4.

[59] For more on the US interest as regards Resolution 1422(2002), see CStahn, (2003), 'The Ambiguities of Security Council Resolution 1422(2002)', (2003), *European Journal of International Law,* vol. 14 No. 1, pp 85-104.

[60]*Prosecutor v. Omar Hassan Ahmad al-Bashir*, case No.ICC-02/05-01/09.

[61]M Plessis, et al, 'Africa and the International Criminal Court', Chatham House International Law Meeting Summary, 2013/01, July 2013.P. 4. See also New Africa, 'The AU Case', August/September, 2009, p. 73.

[62]African Unions Peace and Security Council. 2009, statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al Bashir, PSC/PR/Comm.(CLXXV). 5 March, Addis Ababa, Ethiopia.

[63] Congressional Research Service (CRS) Report, 'International Criminal Court cases in Africa: Status and Policy Issues', July 22, 2011, p. 29.

uncooperative in spite the obligation of cooperation imposed on it by Resolution 1593 which referred Sudan to the ICC.

Limitation related to Security Council referral

The ICC may assert jurisdiction in cases where the Security Council refers it to the prosecutor acting pursuant to chapter VII of the United Nations Charter.[64] This is mostly in situations which the Council determines under article 39 of Chapter VII of the United Nations Charter as constituting a threat to world peace and security which includes aggression.[65] In this case, the court will have jurisdiction over nationals of ICC state parties that have ratified the Kampala amendment on aggression, nationals of ICC state parties that not have ratified the amendment and nationals of non-ICC state parties. Unlike with state referral and *propiomotu* over aggression discussed above, the jurisdictional regime provided for with respect to UN Security Council referrals on aggression is thus the same as that which already exists in the Rome Statute for the other crimes.

In spite of the extensive jurisdiction that may be granted to the court over crimes of aggression with Security Council referrals, it is worthy of note that such referrals may be marred with inconsistencies. The first relates to that fact that the Council might be selective or partial when referring situations or cases to the ICC. Such selectivity might be as a result of influence by permanent members to protect their interest and those of their allies. Examples can be seen with Security Council's referral of two countries notably Sudan[66] and Libya[67] on important basis that international crimes were committed in their territories. But there are countries where same were committed and have not been referred to the court by the council. An example includes the Syrian government under Bashar Assad which allegedly used the military to attack insurgents, activists, protestors and any parties in opposition to the government. In this violent crackdown, thousands have reportedly been killed.[68]This situation caused thirteen cross regional states to issue a joint statement on the Situation in Syria at the 19th Regular Session of the Human Rights Council in March 2012 stating that the situation in Syria should be referred to the ICC[69]which was not done. Moreover, the Security Council did no moves to refer Syria in spite of its refusal to uphold several UN resolutions calling for cessation of

[64] Article 13(b) of the Rome Statute.
[65] Article 15 *ter*, ibid.
[66] The situation in Darfur Susan was referred to the ICC by Resolution 1593 of 31 March 2005.
[67] The situation in Libya was referred to the ICC by Resolution 1970 of February 2011.
[68] AMICC, Syria and the International Criminal Court, October 17, 2012. See also Reuters, Both Sides in Syria Commit War Crimes Including Murder, Torture, UN Says, Monday February 13, 2013.
[69] UN Human Rights Council, Debate on the follow up to the 17th Special Session – Report of the International Commission of Inquiry on the Syrian Arab Republic, 12 March 2012, Joint statement by Austria on behalf of 13 states (Belgium, Botswana, Costa Rica, Croatia, France, Ireland, Liechtenstein, Maldives, New Zealand, Norway, Slovenia, Switzerland, Austria). Available at: http://www.unmultimedia.org/tv/webcast/2012/03/austria-follow-up-to-17th-special-session-31st-meeting.html. Accessed 13-11-2020. Several reasons were advance to support the referral of the situation in Syria to the ICC and the Commission on inquiry concluded that widespread, systematic, gross human rights violations amounting to war crimes and crimes against humanity may have been committed in Syria and the Syrian Government had done nothing to address these violations. See UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 22 February 2012, UN Doc A/HRC/19/69.

hostilities. It has been alleged that the reluctance to refer Syria to the ICC was caused by Russian and China's (P5s) vehement threat to veto any Security Council Resolution to that effect. They have manifested this by going against most UN decisions concerning Syria.[70]

Self-Defence as an Exception to Inter-State Use of Force and a Ground for Excluding Responsibility for Crime of Aggression

Responsibility for crime of aggression requires both the act and the criminal intention of states and individuals as established above. The Rome Statute lists a number of grounds which might be invoked to exclude criminal intention by the accused. But it seems almost impossible for states to invoke grounds excluding criminal liabilities which are typical of isolated wrongful acts like duress[71], insanity,[72] intoxication[73], mistake of fact[74] and mistake of law[75], and necessity. Most defences to criminal responsibility for other crimes under the Rome Statute cannot be applied to crime of aggression which entails state responsibility. The defence that can conveniently be applied to state and individual responsibilities for crime of aggression is self-defence.

Under the regimes for state and individual responsibilities, the rational for self-defence is the same. The law exceptionally admits derogation to the norm protecting collective interest (international peace) allowing an individual interest perceived as fundamental (the survival of the state) to prevail over the former. Even though the rational for self-defence under state and individual responsibilities is the same, their meaning under both regimes is different.

Self defence is recognized as a ground for excluding individual criminal responsibility under article 31(1)(c) of the Rome Statute which may relieve an individual of responsibility for international crimes he/she has committed.[76]Unlike the Rome Statute, the UN Charter in its article 51 provides for the inherent right of states to act in (individual and collective) self-defence in case of aggression. Such would be lawful use of force by a State in the exercise of the inherent right of individual or collective self-defence, and which would therefore not constitute aggression by that State. This distinction was recognized in *The Prosecutor v.*

[70]UN News, Global perspective Human Stories, "Russia, China block Security Council referral of Syria to International Criminal Court", 22nd May 2014. See also UN Meeting Coverage and Press Release, "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution", SC/11407, 22 MAY 2014. See also the Security Council's refusal to refer Sri Lanka to the ICC. LMoss, "The UN Security Council and the International Criminal Court: Towards a More Principled Relationship", International Policy Analysis, Friedrich-Ebert-Stiftung, March 2012, p. 11. Another good example are the crimes committed by Israeli forces against Palestinians in the Gaza Strip leading to the death of many civilians which the UNSC has taken no step to refer to the ICC since Israel is not a state party and an important US ally.

[71] Article 31(1)(d) of the Rome Statute of 1998.

[72] Ibid, article 31(1)(a).

[73] Ibid, 31(1)(b).

[74] Ibid, article 32(1).

[75] Ibid, article 32(2).

[76] From the reading of article 31(1)(c), there are three requirements for self-defence to exclude criminal responsibility to wit: first; the accused must have acted reasonably, second; the action must be in response to an imminent and unlawful use of force and third; the act must have been proportionate to the degree of danger.

Kordić and Čerkez,[77] where the Trial Chamber relied on the notion of 'individual self-defence' and excluded the possibility that military operations in self-defence could provide justification for serious violations of international humanitarian law. This is thus to the effect that two different and separate notions of self-defence apply under international criminal law and state responsibility.

As far as the crime of aggression is concern, self-defence can play a very peculiar role in excluding criminal responsibility. Both state and individual responsibility arise from the same grave breach of an international obligation which is a state act of aggression from which individual derive their responsibility. Individuals are not held responsible for personal acts of aggression, but for acts of aggression committed by state.[78]Individual criminal responsibility of political and military leaders derives from the fact that they represent the state and they are the ultimate decision makers to whom the responsibility can be ascribed. There are thus responsible for state aggressive policy. The fact that aggression is defined in terms of state action, and when state self-defence applies, no wrong can be said to exist under international law. Therefore, no individual can be held criminally responsible for a legitimate use of force under international law.

Condition for the exercise of the inherent right to self-defence

Article 51 of the United Nations Charter brings out an exception to the prohibition on interstate use of force in article 2(4) of the same Charter. Article 51 provides that;

> '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 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 Security Council and shall not in any way affect the authority and responsibility of the 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'.

The right to self-defence, which is embodied in the above provision is the temporary right until the Security Council takes measures necessary to maintain international peace and security. That is why any right exercised in that direction must be reported to the Security Council. Of relevance is the fact that the right acknowledged under this article is clearly not without limits. According to customary international law self-defence must generally conform to certain conditions found in the classic *Caroline* formula as set down by the US in 1837.[79] This formula requires a response based on self-defence grounds to be necessary, proportionate and immediate.

[77] ICTY, TC, Judgment, 26 February 2001, para. 452.
[78] See the provision of article 8*bis*(1).
[79]*The Caroline Case* 29 BFSP 1137-1138; 30 BFSP 195-196. [AQ – Year].

Necessity requires and contains an obligation to verify[80] that the conflict cannot be solved by peaceful measures and no other measures could prevent enemy attack. For example, in the situations of the direct threat to the state survival when the other options, except the use of force, cannot change the situation in a positive way.[81] The use of force for self-defence should therefore be a response to the real threat to the survival of a state.

Proportionality means that the use of force must be limited to the neutralization or abolition of the attack against which a state is defending itself[82]. It also requires that not only the insurance of the balance between the injury caused by the wrongdoing state and the countermeasures, or at least the insurance that the countermeasures do not seriously exceed the injury created by the wrongful act, but also follows the aim to force the offender to discontinue its wrongful conduct.[83]

Immediacy requires that the action in self-defence must immediately follow the start of an attack. This supposes that the interval between the attack and self-defence should not be long. This requirement is controversial because an isolated armed attack may not be the reason for starting a war for self-defence. The bureaucratic procedure requiring state officials to make a decision to act in response to an attacked by giving instructions to the armed forces may be long. Therefore if the interval between an armed attack and a war of self-defence is long, a war may still be lawful if the delay is objectively justified.[84] This therefore means that an interpretation of closeness will depend on the context of each situation.

The ICJ has in several rulings given credence to the aforementioned requirements as customary norms of international law. In *Nicaragua v. United States*[85], the ICJ recognized that the Charter of the United Nations 'does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'. The Court equally evaluated the principle of immediacy and stated that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated[86]. The ICJ also followed the same strand of reasoning in the *Islamic Republic of Iran v. United States of America*[87], by referring to the principles of necessity and proportionality and pointed out that 'the United States must also show that its actions were necessary and proportional to the armed attack made on it and that the platforms were a legitimate military target open to attack in the exercise of self-defence'. In

[80] Y Dinstein, *War, aggression and self-defence*, Fourth edition, Cambridge University Press, (2005), p. 237.
[81] J A Green, 'The ratione temporis elements of self-defence', (2015), *Journal on the Use of Force and International law*, 2, No.1, p. 101.
[82] R Gutman, et al, *Crimes of War: What the public should Know*, W.W. Norton & Company, (2007), 341p.
[83] ACassese, *International Law*, Oxford University Press, 2005, p. 306.
[84] Y Dinstein, *War, aggression and self-defence*, Fourth edition, Cambridge University Press, (2005), pp. 242-243.
[85]Judgment of International Court of Justice, 1986, para. 176.
[86]Ibid, para. 237.
[87]Judgment of International Court of Justice, 2003, para. 51.

Democratic Republic of the Congo v. Uganda[88], the ICJ indicated that since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The principles of necessity, proportionality and immediacy are of outstanding legal and practical importance for the right of self-defence.

Barriers to Prosecution for the Crime of Aggression by the ICC

Added to the controversies over ICC determination of state responsibility and jurisdictional challenges for crime of aggression discussed above, there are certain barriers to the prosecution of aggression by the court. Such barriers can limit the powers of the court as regards crimes of aggression and would constitute setback to the international criminal justice in this regard.

Complementarity limitations

The ICC is by the principle of complementarity provided in paragraph 10 of the preamble of the Rome Statute intended to supplement domestic prosecution of international crimes, rather than supplant domestic enforcement of international norms[89]. The Court only complements national jurisdictions by providing a permanent international institution capable of investigating and prosecuting the most serious crimes of international concern[90]. According to this principle, national courts are given priority in prosecuting international crimes in article 5 of the Rome Statute; and only when it is determined that national courts are 'unable' or 'unwilling' to conduct genuine or bon fide prosecutions of those crimes will the ICC be allowed to commence prosecution[91]. Complementarity in this situation is viewed in two directions that both the aggressor state and the aggressed state have the powers to prosecute by virtue of the fact that the crime is initiated in the aggressor state (article 8*bis* (1)) and executed in the aggressed state (article 8 *bis* (2)).

The prosecution of international crimes in national courts is based, among other things, on the practical considerations of efficiency and effectiveness since states (national courts) will usually have the best access to evidence, witnesses, and resources to conduct the trials[92]. The political nature of aggression which deals with state officials acting in the interest of the state could lead to more problematic and lengthy prosecutions compared to the prosecutions of the other core crimes in national courts. There may be no incentive on national courts to prosecute state officials and their superiors. Their incentives may be to shield alleged aggressors from punishment and to protect evidence necessary to prove the elements of the crime, citing national security considerations. This may only be achievable in an aggressor state where there is regime change where the previous government's

[88]Judgment of International Court of Justice, 2005, para. 147.
[89] The intent of this preamble is replicated in article 1 of the Rome Statute.
[90] Ibid.
[91] See article 17 of the Rome Statute of 1998.
[92]B Olugbuo, 'Positive complementarity and the fight against impunity in Africa' in C Murungu.& JBiegon, (eds), *Prosecuting international crimes in Africa,* Pretoria: Pretoria University Law Press,(2011).

policies were unpopular and there is political and popular will to account for past crimes[93].

National courts will face practical difficulties in gaining access to classified state information and secrets that could have been the driving force behind the decision to take military actions against another state[94]. States would hardly allow national courts and even those of other states to have access to such information, especially if this can be used in other situations not directly linked to a case of aggression. The handling of evidence that could prejudice the national security of another state if disclosed during proceedings is regulated in the Rome Statute.[95] This will be difficult, if not impossible, to achieve in a national court where its state could see an opportunity to use that information to advance its interest or the interest of other states it has relations with. In most cases if not all, this would have a serious negative bearing on the impartiality of judges who would rather safeguard state interest at the expense of international justice for aggression. Yoram Dinstein has to this effect commented that *"…….the nature of crimes against peace is such that no domestic proceedings can conceivably dispel doubts regarding the impartiality of the judges … Any panel of judges comprised exclusively of enemy (or former enemy) nationals will be suspected of irrepressible bias …."*[96].

Since aggression requires the determination of state responsibility, for a national court of a state to do such determination on another state would be considered contrary to the international principle of *par in parem non habet imperium* (equals, or sovereigns, do not have authority over one another).[97] This may have a negative bearing on international relations and by extension international peace and security.

Crime of aggression which involves an attack on the sovereignty of another state implies that its effect is on another state and not the perpetrating state. This therefore would not only require the national courts of the perpetrating state to prosecute under complementarity. Just like in other international crimes under the jurisdiction of the ICC, it would equally require the victim state to prosecute since the effects of the crime of aggression are felt therein than in the state where aggression was prepared. This situation would pose a serious challenge for the national court of another state to determine the responsibility of top ranking officials of another state, talk less of state responsibility.

Immunities of state officials

The fight against impunity for international crimes requires that there should be no barrier like immunity from prosecution. The Rome Statute in its article 27 consecrates this to the effect that immunity attached to a person in a leadership position shall not prevent the ICC from exercising jurisdiction over them. But the

[93]P Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Oxford: Routledge, (2013) p. 218.
[94] BVan Schaack, (2012), 'Par in parem imperium non habet: Complementarity and the crime of aggression', (2012), *10 Journal of International Criminal Justice* 133, p. 153.
[95] Article 72 of the Rome Statute provides for the protection of national security information.
[96] Y Dinstein, *War, aggression and self-defence*, Fourth edition, Cambridge University Press, (2005), p. 145.
[97] Y Dinstein, 'Par In Parem Non Habet Imperium', (1966), *1Israel Law Review*, pp. 408-12.

same Statute contradicts itself and makes immunity a barrier to prosecution in article 98 requiring the ICC to respect diplomatic immunity and international immunity agreements, during the arrest and surrender of a person for prosecutions before it. This may give opportunity for states laws on immunities to be applicable to shield their leaders from being prosecuted for aggression since it is a leadership crime as indicated in article 8 *bis*(1) of the Statute. This is because immunity granted to state representatives does not only prohibit the actual trial, it also prohibits the extradition and surrender of that individual to a court of law[98].

There are two categories of immunity to wit 'functional immunity' which protects the individual carrying out official business of a state; and 'personal immunity' which protects the person of certain individuals who are important in carrying out state administration.[99] These individuals enjoy immunity from prosecution by virtue of their official or diplomatic positions, whether as heads of states or government or as public officials and diplomats[100]. Customary international law rule is that the activities of heads of states and governments are absolutely immune from prosecution. This immunity, however, ceases whenever the officials concerned have left the positions which granted them such immunities except for those acts undertaken whilst in office[101]. The reasons for this immunity cover is that state functions would be impaired if an official enjoying this cover is prosecuted. Such immunities consecrated by the law can be relied upon by states to bar prosecution especially as they would be reticent to prosecute leaders in their national courts.

Bilateral immunity agreements

These are agreements that require states not to surrender their subjects to the ICC in case of prosecution. Most of these agreements are purportedly entered into under article 98(2) of the Rome Statute. It is under this guise that the United States of America succeeded in persuading states to sign treaties in which parties pledged not to refer each other's nationals to the ICC without the consent of the state of nationality.[102]

In pursuing such agreements, the US made use of economic threats and suspension of military aids.[103] For instance, in July 2nd, 2003, the US announced the suspension of its military aid to 35 states following their refusal to grant immunity to American nationals that can be indicted by the ICC[104]. The US government concluded these agreements under its American Service Members' Protection Act of 2 August 2002.

[98] International Criminal Law Manual (2010), p. 295.
[99] Ibid.
[100] The Vienna Convention of Diplomatic Relations and Consular Relations of 18 April 1961, article 98.
[101] See Arrest Warrant Case of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), 2002 ICJ, 3, 88 para 54-55 (Feb. 14) where the ICJ held that people in official positions are entitled while in office to immunities from prosecution in a foreign state even for acts that constitute international crimes.
[102] It has also been considered as the foundation for the several non-extradition treaties signed by the US and other states. See Amougou, A. J-L. (2012), "Le Refus de coopérer avec la Cour Pénale Internationale ", Revue de la Faculté des Sciences Juridiques et Politiques, Université de Ngoundere, p. 17.
[103] See the Nethercutt Amendment to an appropriations act which was a bill adopted on December 7th, 2004, for fiscal year 2005. See also Consolidated Appropriation Act, 2005.
[104] Ibid.

This Act authorises the US President to use all means necessary, including force, to free any American service member that might be held by the Court. It also authorises the President to terminate American military and other assistance from any state that is not a member of NATO that refuses to enter into the agreements with the USA.[105]Such persuasive move can be considered as vice of consent which nullifies consent in international agreements because parties to a treaty are supposed to freely consent without fear and undue influence[106].

Acts of State Doctrine

Acts of state is a doctrine which can be upheld by any domestic court as a jurisdictional bar and defence against prosecution for international crimes, including the crime of aggression. According to this doctrine, national courts of any state do not have jurisdiction to adjudicate claims relating to acts done by another state in the exercise of its sovereign power, including engaging in war, negotiating peace, and annexing territory[107]. In *National Navigation Company of Egypt v. Talvoularidis*[108], it was noted that the legality of an act done by a foreign State cannot be tried by the courts of another State. That although this rule is subject to exceptions in a case where the State has acted as an individual or as a civil person, no exception can be raised when the basis of the action against the State is the exercise of the State's sovereign powers. In this case, any act of aggression would be considered an act *jure imperii*, or a public act of state, triggering the act of state doctrine. Therefore, a victim state cannot exercise jurisdiction over high level officials allegedly committing aggression without the aggressor state's waiver unless a competent body had declared the act an act of aggression, thereby pronouncing on the crime's main element.[109] Without such a declaration, the only other options for domestic prosecution would be in the aggressor state's courts or the ICC which is limited by certain challenges identified in this write-up.

[105] The USA has through this moved pressured many countries to enter into bilateral immunity agreements. Some of them include; Afghanistan, Albania, Azerbaijan, Bahrain, Bhutan, Bolivia, Bosnia-Herzegovina, Botswana, Cambodia, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Dominican Republic, East Timor, Egypt, El Salvador, Gabon, The Gambia, Georgia, Ghana, India, Honduras, Israel, Macedonia, Madagascar, Maldives, Marshal Islands, Mauritania, Mauritius, Micronesia, Mongolia, Mozambique, Nauru, Nepal, Nicaragua, Palau, Panama, Philippines, Romania, Rwanda, Cameroon, Senegal, Seychelles, Sierra Leone, Sri Lanka, Tajikistan, Thailand, Togo, Tonga, Tunisia, Tuvalu, Uganda, Uzbekistan and Zambia, see International Criminal Court - Article 98 Agreements Research Guide. Geroge Town Law Library available at https://guides.ll.georgetown.edu/article_98#:~:text=Georgetown%20University%20Law%20Library, accessed 26-08-2021. The Nethercutt Amendment of 15 July 2004 further withheld funds from the Economic Support Fund from 50 states that refused to enter into impunity agreements with the United States. Some of these states include Benin, Republic of Congo, Lesotho, Mali, Namibia, Niger, South Africa and Tanzania.

[106] See to this effect articles 51 and 52 of the Vienna Convention on the Law of Treaties, 1969.

[107] See to this effect the following cases. *Attorney-General v. Nissan*, [1969] UKHL 3, [1970] A.C. 179 (H.L.), para. 263 (appeal and cross appeal judgment); *Johnstone v. Pedlar*, [1921] UKHL 1, [1921] 2 A.C. 262 (H.L.) 271; *Controller and Auditor-General v. Davison* [1996] 2 N.Z.L.R. 278 (CA); *New South Wales v. Commonwealth* (1975) 135 C.L.R. 377, 388 (Austl.); 8 A.L.R. 1, 28; *The Queen v. Seven Named Accused*, Supreme Court, Pitcairn Island, April 19, 2004, in 127 I.L.R. 266–67, 287–88.

[108]Nov. 9, 1927, Gazette Vol. XIX, p. 251 (1927-1929) 4 I.L.R 173.P. 251.

[109]Which in this case is the United Nations Security Council.

Possibility to opt in or out of ICC's Jurisdiction over the crime of aggression by state parties

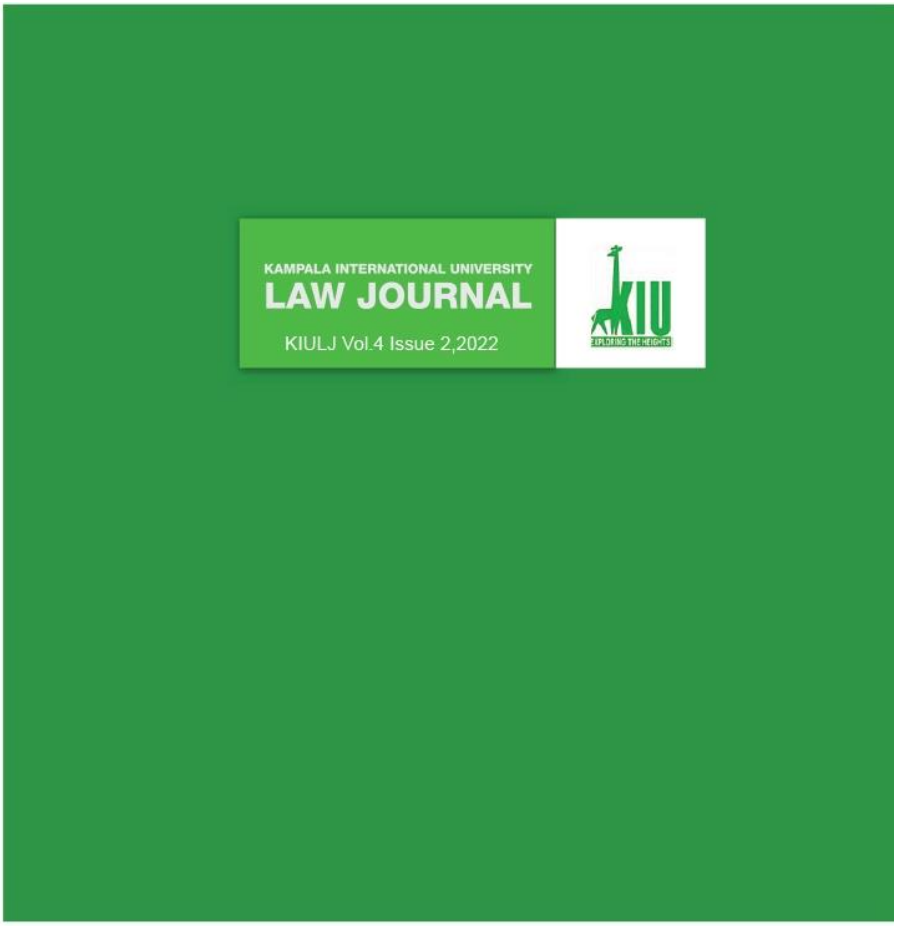
Article 15*bis*(4) of the Rome Statute provides for the opting out choice of state parties who do not wish to fall under the ICC's jurisdiction for crimes of aggression committed by its nationals or on its territory. If a state party ratifies the Kampala amendments then it will fall under the ICC's jurisdiction for aggression thereby opting in. The opting out clause is a safe back exit, or rather front exit, for states who do not wish to accept liability for their acts of aggression. This contradicts article 120 of the Rome Statute that prohibits reservations to the Statue. The ICC will only have jurisdiction over the offence when there's aggression between two state parties which have both opted in and where a state party who has opted in aggresses against a state party who opted in and later opted out[110]. The last case results in states being covered as victims but not aggressors; this weakens the ICC's ability to equally apply the law to all state parties and defeats its purpose of ending impunity[111] thereby downplaying on international criminal justice to this effect.

Conclusion

Aggression amongst all other crimes under the jurisdiction of the ICC constitutes a manifest violation of the United Nations Charter, challenging state sovereignty and threatening world peace and security. Prosecuting it by the ICC requires that state responsibility should be established as required by article 8 *bis* (1) of the Rome Statute. Given that the court's jurisdiction is limited to individuals, establishing state reasonability poses a serious challenged for the ICC thus creating uncertainty for international criminal justice as far as aggression is concerned. This is further complicated by the jurisdictional limits to the powers of the ICC and the barriers to prosecuting the crime of aggression as examined in this paper.

All setbacks identified in the write-up limits the jurisdiction of the ICC on crimes of aggression which constitutes a serious world evil. It is therefore recommended that one way to minimize the impacts of jurisdictional carve-outs is for more states, State Parties and non-state parties to ratify the crime of aggression amendment and to implement crime of aggression legislation into their domestic criminal codes. The jurisdiction of the ICC should equally be extended to permit it make a determination on state responsibility since it is required to do so for individual responsibility to be established. The United Nations Security Council should be ready to limits its use of power of deferral and make an appropriate use of its power of referral to enable the ICC effectively prosecute aggression because like the Court, its mandate is to maintain international peace and security even through the instrumentality of international criminal justice.

[110] C Davis, et al, "The Crime of Aggression and the International Criminal Court", (2011), *17 The National Legal Eagle* 10, p. 12.
[111] Ibid.



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