

Prosecution of the Crime of Aggression in Domestic Jurisdictions in Africa

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Abstract: This article explores the theoretical and legal conflicts surrounding the prosecution of the crime of aggression in African domestic jurisdictions. While the Kampala Amendments of the Rome Statute attempt to provide clarity and assign jurisdiction to the International Criminal Court (ICC) and national courts, significant legal hurdles remain. These include ambiguity in legal provisions, jurisdictional complexities between the ICC and domestic courts, and conflicting legal norms, particularly regarding the immunity of state officials. Furthermore, this study critically assesses how international instruments like the Rome Statute and the UN Charter interact with regional efforts like the Malabo Protocol and its implications on Africa's fight against impunity. The article utilizes doctrinal legal research by analyzing primary and secondary legal texts to evaluate gaps and propose reforms for effective prosecution at the domestic level.

Keywords: Aggression, Africa, Complementarity Principle, Domestic Jurisdiction, ICC, Immunity, Malabo Protocol, Rome Statute, Sovereignty, UN Security Council.

1. INTRODUCTION

Despite global efforts to criminalize and prosecute acts of aggression, significant challenges persist, particularly in African domestic jurisdictions. The Rome Statute, which forms the backbone of the International Criminal Court (ICC), defines the crime of aggression but places considerable limitations on its domestic prosecution². Jurisdictional issues arising from the interplay between the ICC, the United Nations Security Council

(UNSC), and national legal frameworks continue to hinder effective enforcement. These conflicts often place domestic courts in a dilemma between fulfilling international obligations and respecting national sovereignty, especially where local legal systems are still developing or under strain from political influences.

The Kampala Review Conference of 2010 introduced Article 8 bis, which defines the crime of aggression and expands the ICC's jurisdiction. However, the activation of jurisdiction over aggression remains dependent on conditions such as the Security Council's determination of an act of aggression or, failing that, Pre-Trial Chamber authorization. This procedural complexity has hindered the practical application of the law and discouraged its domestic adoption³. In the African context,

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² Cryer, R., Friman, H., Robinson, D., & Wilmschurst, E. (2014). *An Introduction to International Criminal Law and Procedure* (3rd ed.). Cambridge University Press.

³ Ediger, D. (2012). From Nuremberg to Kampala: The ICC's Jurisdiction over the Crime of Aggression. *International Law Review*, 12(3), 233–248.

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this is compounded by concerns over sovereignty, political retaliation, and weak legal infrastructures. African states have had a contentious relationship with the ICC, perceiving it as biased and selectively prosecuting African leaders, further discouraging domestication and compliance.

Efforts by the African Union (AU) to establish a regional criminal court through the Malabo Protocol demonstrate Africa's interest in creating localized justice mechanisms. However, these efforts are compromised by the Protocol's inclusion of immunity provisions for sitting heads of state, contradicting international standards of accountability under the Rome Statute⁴. Thus, the prosecution of aggression in Africa presents not only a legal issue but also a political and ideological one, reflecting broader debates over the future of international justice and the balance of power between global and regional institutions.

2. HISTORICAL OVERVIEW OF CRIME AGGRESSION

2.1 Legal and Theoretical Background

The criminalization of aggression has evolved significantly since the post-World War II Nuremberg Trials, where for the first time individuals not just states were held accountable for engaging in acts of war. The International Military Tribunal described it as the "supreme international crime," encapsulating all other war crimes within its ambit⁵. The Rome Statute's adoption in 1998 included aggression among the core crimes but deferred its activation until a clear definition was agreed upon this arrived with the Kampala Amendments of 2010. However, the integration of the crime into enforceable international legal practice remains minimal, largely because of its unique legal character.

Theoretically, the crime of aggression raises distinct questions: how can individuals be held criminally liable for an act traditionally committed by states? Legal scholars such as⁶ argue that aggression blurs the boundary between individual and collective responsibility. In most legal systems, states cannot be prosecuted in criminal courts, yet aggression necessitates attributing a fundamentally state-level act to individuals. Moreover, under traditional state-centric international law, matters involving the use of force fall within the realm of sovereign rights, making it contentious to criminalize what may be considered "political" decisions of national defense or survival.

This is further complicated by domestic constitutional structures, particularly in Africa, where heads of state and senior government officials are often legally insulated by constitutional immunities. In theory, the Rome Statute, especially Article 27, nullifies such immunities. However, in practice, many states either do not recognize this or face political backlash if they attempt to implement it. This creates a theoretical and practical divide between international norms and local realities. For instance, in South Africa, the government's failure to arrest Sudanese President Omar al-Bashir in 2015 despite ICC warrants on the grounds of diplomatic immunity demonstrated the complexities surrounding the application of international criminal law domestically⁷.

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

⁴ Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. Springer.

⁵ Cryer, R., Friman, H., Robinson, D., & Wilmschurst, E. (2014). *An Introduction to International Criminal Law and Procedure* (3rd ed.). Cambridge University Press.

⁶ Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. Springer.

⁷ Manson, R. (2015). Jurisdictional Conflicts: The UN Security Council and the ICC. *African Journal of International Law*, 7(1), 111–129.

2.2 Africa's Legal Landscape and Institutional Responses

Africa presents a paradox in the global justice landscape. On the one hand, it is the most ICC-engaged continent, with numerous states having ratified the Rome Statute and collaborated in high-profile prosecutions. On the other hand, it is also the most critical of the ICC, with repeated claims of neocolonial bias and selective justice. This tension plays out clearly in the field of aggression. Despite the Kampala Amendments being adopted over a decade ago, few African countries have moved to ratify or domesticate them. This has resulted in a legal void where the crime of aggression exists in principle but not in practice.

To fill this gap, the African Union introduced the Malabo Protocol in 2014, aiming to establish an African Criminal Court within the African Court of Justice and Human Rights. This court would have jurisdiction over a range of crimes, including aggression. However, its credibility has been undermined by the inclusion of Article 46A bis, which grants immunity to sitting heads of state and senior government officials during their term of office⁸. This directly contradicts Article 27 of the Rome Statute and has been viewed as an institutional retreat from the principle of accountability⁹.

Moreover, the Malabo Court has not yet become operational due to a lack of ratifications, logistical planning, and financial resources. This stalling has raised concerns among scholars and civil society that the court may become a paper tiger an institution created more for political deflection than for justice¹⁰. Furthermore, even if the court were operationalized, the immunity provisions threaten to institutionalize impunity. This raises an urgent question: can African regional institutions truly deliver justice while shielding political leaders from scrutiny?

Some countries, such as Kenya, have experimented with domestic mechanisms to address international crimes. Following the 2007–2008 post-election violence, Kenya initially resisted ICC intervention and proposed establishing a local tribunal. However, political interference derailed the process, and the ICC eventually stepped in¹¹. This episode exemplifies the challenge of balancing domestic ownership of justice with international oversight in politically charged environments.

2.3 The Role of the United Nations Security Council (UNSC)

The Security Council's role in activating ICC jurisdiction over aggression introduces a deeply political dimension to an already complicated legal issue. According to Article 15 bis of the Rome Statute, the ICC Prosecutor may only proceed with investigations into aggression if the Security Council determines that an act of aggression has occurred. If no determination is made within six months, the Prosecutor must seek authorization from the ICC Pre-Trial Chamber (Rome Statute, 1998, Art. 15 bis). This mechanism is problematic for several reasons.

First, it effectively subjects international criminal justice to the geopolitical interests of the five permanent members (P5) of the Security Council China, France, Russia, the United Kingdom, and the United States all of whom have strategic interests in Africa and often use their veto power to protect allies. This politicization undermines the ICC's impartiality and creates perceptions of double standards. As many African leaders have observed, aggression by powerful states such as the United States in Iraq or NATO interventions in Libya have not led to ICC prosecutions, despite mounting evidence and global debate¹².

⁸ Malabo Protocol. (2014). Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. African Union.

⁹ Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. Springer.

¹⁰ Moutloali, M. (2016). The Challenge of Prosecuting the Crime of Aggression in Africa. *African Legal Studies Journal*, 2(1), 1–15.

¹¹ Cryer, R., Friman, H., Robinson, D., & Wilmschurst, E. (2014). *An Introduction to International Criminal Law and Procedure* (3rd ed.). Cambridge University Press.

¹² Kestenbaum, J. (2010). Criminalizing Aggression and the Challenges of Head of State Immunity. *Journal of International Criminal Justice*, 8(2), 345–367.

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Second, African states have limited influence within the UNSC, making it unlikely that their concerns will be prioritized. Even when aggression is directed toward an African state, political calculations by permanent members often result in inaction. This double standard diminishes confidence in the international legal system and provides further rationale for regional legal responses, however flawed they may be.

Moreover, the requirement for a UNSC trigger places African states in a legal limbo: they are expected to uphold international law but have no real power to invoke its protections. This asymmetry contributes to the legitimacy crisis of the ICC in Africa and complicates efforts to promote legal accountability for aggression.

2.4 Operational Challenges in Domestic Jurisdictions

Even in countries that demonstrate political will to prosecute international crimes, significant operational hurdles exist. These include limited resources, overburdened court systems, and lack of familiarity with international criminal law among legal professionals. For example, the judiciary in countries such as the Democratic Republic of Congo and Central African Republic routinely handles war crimes and crimes against humanity but lacks technical expertise to pursue complex crimes such as aggression¹³.

Additionally, most African criminal codes do not contain a definition of aggression aligned with international law. This gap makes it impossible for prosecutors to build cases, even when the political context might allow it. Without legislative harmonization, judicial cooperation, and institutional training, domestic systems remain ill-equipped to address the crime of aggression meaningfully.

The problem is compounded by the sensitive nature of aggression cases. Unlike genocide or crimes against humanity, which are usually committed during internal conflicts, aggression implicates the external relations of states. Prosecuting such crimes may jeopardize diplomatic ties, trade relations, or national security priorities. As a result, states may be reluctant to pursue investigations that challenge their own government officials or powerful foreign actors.

There is also a noticeable lack of public awareness and civil society engagement around the crime of aggression. While transitional justice mechanisms have focused heavily on issues like truth-telling and reconciliation, they have not included significant discourse on unlawful war-making. This societal silence reflects a deeper challenge: creating a culture of accountability for aggression in countries still grappling with internal insecurity, poverty, and authoritarian governance.

2.5 The Path Forward: Legal and Policy Recommendations

To overcome these challenges, a combination of legislative reform, institutional investment, regional cooperation, and international support is needed. First and foremost, African states should prioritize ratifying and domesticating the Kampala Amendments. Incorporating Article 8 bis into national laws will provide a legal basis for holding individuals accountable for aggression and signal a commitment to international legal norms¹⁴.

Secondly, states must build institutional capacity. This includes training judges, prosecutors, investigators, and defense attorneys in the complexities of international law. Legal education curricula should include modules on aggression and international humanitarian law. Partnerships with universities, bar associations, and international institutions can facilitate this knowledge transfer¹⁵.

Thirdly, African regional mechanisms must be reformed to reflect international standards. The immunity provisions of the Malabo Protocol should be removed or amended. Immunity for sitting officials undermines the principle of equality before the law and reinforces impunity. The African Union must also provide the necessary political and financial support to operationalize its court and ensure it functions independently and credibly.

¹³ Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. Springer.

¹⁴ Ediger, D. (2012). From Nuremberg to Kampala: The ICC's Jurisdiction over the Crime of Aggression. *International Law Review*, 12(3), 233–248.

¹⁵ Cryer, R., Friman, H., Robinson, D., & Wilmschurst, E. (2014). *An Introduction to International Criminal Law and Procedure* (3rd ed.). Cambridge University Press.

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Finally, civil society and the media have a role to play in sensitizing the public about the consequences of unlawful wars and the need for accountability. Public demand for justice can push governments to act, even when political incentives are weak. Empowering victims' associations, legal watchdogs, and human rights organizations is therefore a critical part of the enforcement chain.

3. CONCLUSION

The prosecution of the crime of aggression in African domestic jurisdictions is burdened by deeply rooted legal, institutional, and political challenges. While the Rome Statute and the Kampala Amendments represent significant advances in codifying aggression as an international crime, their practical enforcement within African legal systems remains limited. The requirement for UNSC authorization, the persistence of immunity for state officials, and the lack of legislative domestication contribute to the marginalization of aggression prosecutions. Furthermore, many domestic judicial systems in Africa are characterized by structural weaknesses, including inadequate resources, lack of training in international law, and insufficient independence to pursue politically sensitive cases.

The theoretical conflict between individual criminal responsibility and state sovereignty further complicates the prosecution process. Although international criminal law rejects immunity for serious crimes, domestic systems often uphold this immunity, especially for sitting heads of state and senior government officials. This tension is most clearly reflected in the contradictions between the Rome Statute's Article 27 and the Malabo Protocol's Article 46A bis. As a result, African states find themselves caught between two legal orders one international, demanding accountability without exception, and one regional, advocating sovereignty and immunity for leaders.

Nonetheless, there is potential for progress. By incorporating Article 8 bis into domestic law, investing in legal education and capacity building, and reforming regional mechanisms such as the African Court, African states can strengthen their ability to prosecute aggression. Moreover, the ICC should adopt a more cooperative approach to complementarity, supporting states that show willingness but lack capacity. Regional bodies should also revisit immunity provisions that conflict with global standards, as accountability should not be sacrificed for political convenience.

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