



**Addis Ababa University**  
**School of Graduate Studies**  
**College of Law and Governance Studies**



**The Activation of the International Criminal Court's Jurisdiction  
on the Crime of Aggression: Opportunities and Challenges to the  
Realization of the International Criminal Justice**

**Thesis Submitted in Partial Fulfilment of Master of Laws Degree  
(LL.M) in Public International Law**

**By: Frehiwot Sinishaw**  
**Advisor: Yonas Birmeta (PhD)**

**Addis Ababa University**  
**Addis Ababa, Ethiopia**  
**January 2019**

**Declaration**

I, the undersigned, declare that this thesis is my own original work and has not been presented for a degree in any other University and that all sources of materials used for the thesis have been appropriately acknowledged.

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Frehiwot Sinishaw (fresinishaw@yahoo.com)

January 2019

**Confirmation**

This thesis is submitted for examination with my approval as an advisor to the candidate.

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Dr. Yonas Birmeta

January 2019

**Board of Examiners**

This thesis is submitted to the faculty of Law and to School of Graduate Studies of Addis Ababa University in fulfillment of all requirements for the degree of Masters in Public International Law.

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By: Frehiwot Sinishaw

Date: January 2019

Approved by Board of Examiners:

Yonas Birmeta (PhD)	.....	.....
Advisor	Signature	Date
.....	.....	.....
Examiner	Signature	Date
.....	.....	.....
Examiner	Signature	Date

## **Dedication**

Dedicated to all my beloved Family (esp. to my niece Dinbit) and Friends

## **Acknowledgments**

I can never give enough thanks to God for giving me everything I need; he has made every aspect of my life fall into their perfect places just like a jigsaw puzzle. I want to thank him for allowing me to have a desire for higher achievement, and most importantly for letting me attain it by making me patient. I want to thank him for his miracles in the courses of joining and finishing my Master's degree subjects, and for making me finish this paper.

I also want to thank him for giving me such a wonderful family who were with me from the beginning till the end of this paper. They have been praying for me literally every single day, motivating me, and providing me with everything I asked for and even more. To be honest, every single one of my family member had put on a great effort in their own ways to make me accomplish my work. They not only have been making time to encourage me by being interested in my work and listening to every little comment I have to give even though it was alien to them, but they have also been constantly available to ask me what I needed and they actually, literally fulfilled every one of them. Thank you all for your love and support.

This research could not have been a success without my amazing friends (classmate and non-classmate) helping me and encouraging me throughout. I want to thank God for blessing me with such a carrying, complain listening, stress easing friends. Special thanks for my classmate friend who provided me with many ideas and gave me his dedicated help in correcting me when I needed it. Thank you all for being by my side.

I am also grateful for being able to have a patient, positive, encouraging and a very smart advisor, giving me constructive criticisms to help me achieve my goal. Thank you.

## **List of Acronyms and Abbreviations**

<b>ASP</b>	Assembly of State Parties
<b>COA</b>	Crime of Aggression
<b>ICC</b>	International Criminal Court
<b>ICRC</b>	International Committee of the Red Cross
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for Yugoslavia
<b>ILC</b>	International Law Commission
<b>IMT</b>	International Military Tribunal
<b>IMTFE</b>	International Military Tribunal for the Far East
<b>NGO</b>	Non-Governmental Organization
<b>SWGCA</b>	Special Working Group for Crime of Aggression
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>UNSC</b>	United Nations Security Council
<b>US</b>	United States
<b>VCLT</b>	Vienna Convention on the Law of Treaties
<b>WWI</b>	World War One
<b>WWII</b>	World War Two

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## **Abstract**

*This paper examines the consequences (opportunities and challenges) of the recent activation of ICC's jurisdiction on the Crime of Aggression (COA), after a long debate and reluctance to criminalize the act. It analyzes this activation's merits in realizing international criminal justice, i.e. promoting reconciliation leading to peace and security, preventing human rights violations and suffering by deterring future crimes, redressing victims of aggression etc. In addition, it analyzes the possible challenges that will inevitably emerge hindering the attainment of these opportunities. The general challenges of the ICC like political influence, lack of State cooperation, a problem of selectivity, financial problems etc., as well as other specific challenges, will directly affect the prosecution of this crime. Hence, this paper gives, among many others, recommendation for developing a tight relationship between different stakeholders for discussing issues regarding this crime, so as to tackle the negatives in order to obtain the positives.*

**Keywords:** *Activation, COA, ICC, Opportunities, Challenges*

# Chapter One

## Introduction

### 1.1 Background of the Study

Modern-day international criminal justice came after WWII as one of the responses to the mass atrocities in our world.<sup>1</sup> It is realized by the international criminal institutions through the act of prosecuting and punishing of the individuals who are responsible for the serious human right violations which fall into the broad categories of war crimes, crimes against humanity, genocide and the COA.<sup>2</sup>

After WWII, the Nuremberg and the Tokyo trials, as well as the two *ad hoc* tribunals, i.e. ICTY and ICTR were established respectively,<sup>3</sup> ultimately leading to the creation of ICC by its establishing instrument ('Rome Statute': adopted in 1998 and entered in to force in 2002), which is the first and only permanent court that was established for the purpose of investigating, prosecuting and punishing individuals accused of the aforementioned serious crimes.<sup>4</sup> Among these crimes, States were not able to reach an agreement on the definition as well as on the jurisdictional application of the court over the COA; hence it remained dormant until 17 July 2018.<sup>5</sup>

COA was a very contentious issue even before the creation of the ICC. The international community could not reach an agreement on the elements of this specific crime.<sup>6</sup>

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<sup>1</sup> ICRC, 'International criminal justice: The institutions' (2013) ICRC, Advisory Service on International Humanitarian Law.

<sup>2</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute) article 5-8.

<sup>3</sup> ICRC (n 1).

<sup>4</sup> International Criminal Court, 'Understanding the International Criminal Court' (2013) The Hague, The Netherlands 1-3.

<sup>5</sup> Erinda Duraj Male, 'Crime of Aggression: Ratification and Implementation' (2016) Volume 2, Issue 1 JMSS 120.

<sup>6</sup> Buhm-Suk Baek, 'The Definition and Jurisdiction of the Crime of Aggression and the International Criminal Court' (2006) Cornell Law Library 4-14.

Nevertheless, after a lot of debates and reluctance, States finally agreed on the definition and on the jurisdictional conditions over this crime in 2010 at the Kampala Review Conference on the Rome Statute.<sup>7</sup> Afterward, they passed a resolution to activate ICC's jurisdiction on 15 December 2017.<sup>8</sup> As a result, for the first time since the Nuremberg and Tokyo trials, ICC can officially prosecute and punish individuals for the COA as of 17 July 2018.<sup>9</sup>

This activation by the ICC will inevitably result in positive and negative consequences in the realization of international criminal justice, i.e. the opportunities and challenges. From this moment onwards, there will be a permanent system for an international individual accountability (ending impunity) on the COA which will promote reconciliation leading to a sustainable peace and security; there will be a judicial protection to States from aggressor States and victims of this crime will be redressed, and it will also deter future crimes and create a good environment for the protection of human rights violations and suffering by making leaders become conscious of their decisions in fear of consequences.<sup>10</sup> These are among the opportunities that will accrue as a result of the activation. However, by taking lessons from experience, challenges are bound to occur on the smooth prosecution of crimes; therefore being aware of all the possible challenges that will arise is mandatory in order to find solutions for them.

ICC is already suffering from challenges like the problem of universality, lack of State cooperation, political influence, a problem with selecting cases, a problem with obtaining evidence, a problem with the victim and witness protection system, for being expensive and prone for a delay.<sup>11</sup> These challenges of the ICC, in general, will be affecting the prosecution of the COA. In addition, it is probable that the long debate over this crime's definition and

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<sup>7</sup> ICC-ASP Resolution on the crime of aggression (adopted at the 13th plenary meeting, on 11 June 2010, by consensus) Resolution RC/Res.6.

<sup>8</sup> ICC-ASP Resolution on the Activation of the jurisdiction of the court over the crime of aggression (adopted at the 13th plenary meeting, on 14 December 2017, by consensus) Resolution ICC-ASP/16/Res.5.

<sup>9</sup> *ibid* paragraph 1.

<sup>10</sup> Handbook, *Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC* (Liechtenstein Institute on Self-Determination, Princeton University 2012) 4.

<sup>11</sup> Hans-Peter Kaul, 'The International Criminal Court – Current Challenges and Perspectives' (2011) ICC-CPI 5-12.

ICC's jurisdictional application on it might somehow continue, though they might not be as strong as in the prior times.<sup>12</sup> A problem of universality of the Kampala Agreement is also expected to limit the jurisdictional scope of the court.

Hence, the purpose of this study is to examine these and other possible opportunities and challenges that will come as a result of the activation.

Analyzing the opportunities and challenges of prosecuting the COA as a result of the recent activation is insufficiently researched and studied. It is an ongoing matter that needs immense attention in order to positively impact the international criminal justice system. Experts on the subject matter, for instance, Dapo Akande, Jennifer Trahan, and David Scheffer have mainly focused on the contentious issues of the crime. This research paper is different from the other works of literature as it focuses on figuring out and examining all the anticipated opportunities and challenges of prosecuting the COA by the ICC as a result of the activation, i.e. it will shed light on the vital possibilities that must be expected from the activation, in turn contributing to the existing international criminal justice system.

## **1.2 Statement of the Problem**

As it has been clarified in the background, aggression was realized as an individual international crime for the first time at the Nuremberg and Tokyo trials.<sup>13</sup> Unfortunately, afterward, it has not been part of the *ad hoc* as well as the special courts' jurisdictions.<sup>14</sup> It has

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<sup>12</sup> Dapo Akande, 'An Analysis of why the ICC does not have Jurisdiction over the Crime of Aggression Committed by Nationals of ICC Parties which have not Ratified the Kampala Aggression Amendments' (2018) ICC Forum on Aggression Debate <<https://iccforum.com/aggression#Akande>> accessed on 2 April 2018; David Scheffer, 'The Missing Pieces in Article 8bis (Aggression) of the Rome Statute' (2017) HILJ 83-86.

<sup>13</sup> Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") (8 August 1945) 82 UNTS 280 (Nuremberg Charter) Article 6 (a); Charter of the International Military Tribunal for Far East (Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; charter dated 19 January 1946; amended charter dated 26 April 1946 Tribunal established 19 January 1946) (Tokyo Charter) Article 5 (a); Jocelyn Getgen Kestenbaum, 'Closing Impunity Gaps for the Crime of Aggression' (2016) Vol.17 No.1 CJIL 57-62.

<sup>14</sup> Robert Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future?' (2010) GoJIL 725.

been a problematic area for States to come together, identify it properly, agree on the elements, and codify it in a clear manner, in order to include it as one of the international crimes, until 2010 by the State Parties of the ICC.<sup>15</sup> Nevertheless, after over 70 years of tiresome struggle, an international criminal court, finally, has the mandate to prosecute and punish individuals responsible for this crime as of 17 July 2018.<sup>16</sup> This incident is hailed for being a leap forward in the realization of international criminal justice. Thus, what is next? What will be the fate of this crime? What are the possible outcomes?

It is relevant to learn and be aware of the possible consequences of this activation as it will help in becoming equipped with appropriate measures to deal with them. The activation is intended to bring several opportunities and make the world a better place to live in.<sup>17</sup> Learning these opportunities and recalling them every step of the way, will help as motivation into achieving them. Unfortunately, without the slightest doubt, challenges will exist making the journey of achieving the opportunities bumpy.<sup>18</sup> The possible merits of the activation cannot be obtained without tackling the possible challenges that will stand in the way. Therefore, in order to tackle them, it is mandatory to prepare, starting from now, by being aware of their existences and their intensities. Hence, the interest to know what to really expect from this activation has motivated this author in to figuring out and examining all the possible opportunities and challenges together, so as to shed light on the possible future of this crime.

### **1.3 Research Questions**

1. What are the opportunities that will be obtained from the activation of ICC's jurisdiction on the COA in terms of realizing international criminal justice?
2. What are the possible challenges that will be encountered as a result of the activation of ICC's jurisdiction on the COA in terms of realizing international criminal justice?

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<sup>15</sup> Kampala Resolution (n 7); Kestenbaum (n 13).

<sup>16</sup> Activating Resolution (n 8) paragraph 1.

<sup>17</sup> Hand Book (n 10).

<sup>18</sup> Kaul (n 11); Akande, (n 12); Scheffer (n 12).

## **1.4 Objectives of the Study**

### **1.4.1 General Objective**

The general objective of this study is to identify and analyze the opportunities and the possible challenges that the activation of ICC's jurisdiction on the COA has in terms of realizing the international criminal justice.

### **1.4.2 Specific Objectives**

1. Identify and analyze the opportunities that will be obtained as a result of the activation of ICC's jurisdiction on the COA in terms of realizing international criminal justice.
2. Identify and analyze the possible challenges that will be encountered as a result of the activation of ICC's jurisdiction on the COA in terms of realizing international criminal justice, and to recommend possible solutions for them.

## **1.5 Significance of the Study**

This study provides background on the process that led to the activation of the COA by the ICC, which will serve as a starter for students and teachers who are interested and/or are learning on this issue. In addition, it will serve as a stepping stone for researchers who are motivated to conduct in-depth research on this area. Further, this study provides the opportunities and challenges that the activation has on the realization of international criminal justice, and also provides recommendations in order to give solutions for the challenges, which can be used by policy makers and legal experts, contributing to the development of the international criminal justice system.

## **1.6 Methodology of the Study**

This research used a doctrinal based research method/ desktop study which involves examining Primary and Secondary sources. Primary sources used include; the Rome Statute of the ICC, the Kampala Agreement on the COA of the ICC, the Activating Resolution and other treaties, resolutions, agreements, communique, reports, and decisions. Moreover, in order to develop the information that was gathered through the primary sources, secondary sources were examined as well. These include books, research reports, articles in scholarly

magazines, journals and other periodicals, newspapers, and magazines. Further, to actually understand about the current issue on the matter, internet sources were used; this helped the study to be up to date and to gather information on the views of many authors on the matter. In addition, this study used descriptive and analytical data analysis method and research design approach. This doctrinal method is chosen by the author of this research because it was found to achieve the intended objectives (suitable to answer the questions of the study). In addition, this paper used the Oxford University Standard for Citation of Legal Authorities (OSCOLA) citation style.

### **1.7 Limitation of the Study**

This specific study has faced financial burden, a problem of free access to materials on the subject matter and a problem of accessing a convenient internet network throughout the study, which turned out to be greatly limiting.

### **1.8 Scope of the Study**

Even though there might be many more matters that exist revolving around the COA, this study focuses on the activation of jurisdiction on it by a specific judicial body i.e. ICC. It further delimits the scope to find out the consequences of this jurisdictional activation in realizing the international criminal justice. It urges to find out the positive and negative ramifications of the activation in order to give solutions for the negatives, so as to obtain the positives smoothly.

### **1.9 Organization of the Study**

This study is composed of four chapters. Chapter one is an introductory chapter which has the background of the study, statement of the problem, research questions, research objectives, significance, methodology, limitation, and scope of the study. Chapter two is a literature review focusing on the historical development of the COA; it introduces the reader with the notion of the COA by providing its historical background before and after the establishment of the ICC (1945-2018). Chapter three is about the consequences that are expected to come out of the activation of ICC's jurisdiction on the COA; it will study the opportunities and the challenges of the activation in realizing international criminal justice. Finally, Chapter four

consists of the conclusion of the study and recommendations given by the author, in order to solve the problem of the study.

## **Chapter Two**

### **Historical Development of the Crime of Aggression**

#### **2.1 Introduction**

This chapter focuses on the evolution of the COA (war aggression); it begins by surfing back in time to study its history before the establishment of the ICC (before 1998). Then, it proceeds to study its development after the establishment of the court (post-1998). In this section, it explores the journey that occurred until the State Parties to the ICC reached an agreement on its definition and on ICC's jurisdictional application on it at the Kampala Review Conference (1998-2010). Afterward, it will analyze the definition and the jurisdictional conditions that they agreed on (2010, Kampala Agreement). Further, it will continue on exploring its journey post-the Kampala Agreement until its activation date (2010-2018). Finally, it culminates with some concluding remarks.

#### **2.2 Historical Development of the COA: Road to the 'ICC and the COA'**

Prior to WWI, war was seen and used as a legitimate political tool by States.<sup>1</sup> Nevertheless, WWI came and shook the entire world's consciousness on how dangerous/demolishing a war can be and as a result, there were attempts done by the international community in order to ban aggressive wars.<sup>2</sup> However, the efforts were not successful and WWII broke out;<sup>3</sup> yet another devastating war that caused mass atrocities. Even though the efforts carried out post-WWI were not successful, the international community made an aggressive war illegal and

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<sup>1</sup> Itumeleng Catherine Moutloali, 'Challenges Facing the Prosecution of the Crime of Aggression' (LLM thesis, University of Pretoria 2012) 19.

<sup>2</sup> Treaty of Peace with Germany (signed 28 June 1919, entered into force in 10 January 1920) (Treaty of Versailles); the Covenant of the LON (part 1 of the Treaty of Versailles), Draft Treaty of Mutual Assistance (1923), Geneva Protocol (1924), Kellogg-Briand Pact (1928) etc.

<sup>3</sup> Beth Van Schaack and Ron Slye, 'A Concise History of International Criminal Law' (2007) Santa Clara Law Digital Commons 24-27.

the world was introduced with the principle of individual criminal accountability for an aggressive war for the first time.<sup>4</sup>

Afterward, as a result of WWII, UN was established in 1945, and its Charter expressly prohibited the use of force by State Parties, and gave the UNSC a mandate to determine the existence of aggression and to give the appropriate measures against it.<sup>5</sup> At about the same time, the first international criminal institution was successfully established; it was known as the IMT/Nuremberg trial.<sup>6</sup> It had jurisdiction on war aggression ('crimes against peace'), and it prosecuted and punished individuals that were responsible for this crime (for WWII).<sup>7</sup> This trial stated that 'crime against peace is 'the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.<sup>8</sup> Consequently, in 1946, the IMTFE/Tokyo trial was created; similar to that of the Nuremberg trial, it had jurisdiction on war aggression and it prosecuted Japanese individuals who were responsible for WWII.<sup>9</sup>

Even though the above two trials were applauded and were seen as a great leap in the realm of the international criminal justice system, they were criticized for lacking a clear definition for the COA,<sup>10</sup> hence the quest of finding a clear definition was taken by the UN.<sup>11</sup> Since the

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<sup>4</sup> Treaty of Versailles (n 2), Article 227; Schaack and Slye (n 3) 8-9.

<sup>5</sup> United Nations Charter (adopted 26 June 1945, entered in to force 24 October 1945) Art 2(4) and Chapter VII.

<sup>6</sup> Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") (8 August 1945) 82 UNTS 280 (Nuremberg Charter) Article 1: The allied powers (victor powers) signed a treaty to establish the IMT for the Prosecution and Punishment of the Major War Criminals of the European Axis; Schaack and Slye (n 3) 29.

<sup>7</sup> IMT Charter (n 6) article 6; Henry T. King Jr., 'Nuremberg and Crimes against Peace' (2009) Vol 41, Issue 2 CWRJIL 276.

<sup>8</sup> Michael Anderson, 'Reconceptualizing Aggression' (2010) Vol. 60: 411 Duke Law Journal 414.

<sup>9</sup> Charter of the International Military Tribunal for Far East (Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; charter dated 19 January 1946; amended charter dated 26 April 1946 Tribunal established 19 January 1946) (Tokyo Charter) Art 5(a); T. King Jr. (n 7) 278.

<sup>10</sup> Buhm-Suk Baek, 'The Definition and Jurisdiction of the Crime of Aggression and the International Criminal Court' (2006) Cornell Law Library 9-10; Jan Schnitzer, 'The Nuremberg Justice Trial 1947 – Vengeance of the Victors?' (LLM thesis, University of Wellington 2010) 60-61.

<sup>11</sup> Suk Baek (n 10) 10-12.

UNSC has a mandate of determining the existence of aggression, it was mandatory to find a clear definition for its determination. Subsequently, States agreed and adopted a definition for the COA in 1974 for the first time in history, i.e. the UNGA resolution 3314 (XXIX) in 1974.<sup>12</sup> Even though this agreement was hailed as a great development, it was also criticized for not being binding (it was a guideline for the UNSC) and for only focusing on States (not on individuals),<sup>13</sup> therefore the quest of finding a definition for war aggression that results individual criminal accountability continued.<sup>14</sup>

In the meantime, while the international community was under the process of finding a definition which entails individual criminal responsibility for a war of aggression, other major international criminal institutions got established by the UNSC, i.e. ICTY and ICTR.<sup>15</sup> These tribunals were established as a response to the mass atrocities that took place in Yugoslavia and Rwanda, respectively.<sup>16</sup> In addition, COA was not under the jurisdictions of these tribunals for lack of definition at this time (because the international community was still working on the definition).<sup>17</sup>

## **2.3 ICC and the COA**

### **2.3.1 Road to the Kampala Agreement (1998-2010)**

The establishment of the above two *ad hoc* international tribunals by the UNSC was among many, the most significant incident that contributed for an immediate necessity for a permanent court and swift creation of the ICC.<sup>18</sup> State Parties met in Rome in 1998 to discuss

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<sup>12</sup> UNGA Resolution 3314 (XXIX) on the Definition of Aggression (14 December 1974) A/RES/29/3314, article 1 and 3; Elizabeth Wilmschurst, 'Definition of Aggression' (2008) Un.org <<http://legal.un.org/avl/ha/da/da.html>> accessed on 15 June 2018.

<sup>13</sup> Anderson (n 8) 415; Suk Baek (n 10) 14.

<sup>14</sup> Suk Baek (n 10) 14.

<sup>15</sup> Schaack and Slye (n 3) 42-45.

<sup>16</sup> International Criminal Court, 'Understanding the International Criminal Court' (2013) The Hague, The Netherlands 3.

<sup>17</sup> Maskun Maskun, 'The Crime Of Aggression: Complexities in Definition and Elements of Crime' (2013) Vol 25 Research Gate 371.

<sup>18</sup> International Criminal Court (n 16).

and adopt the final draft of the Rome Statute in order to establish the ICC.<sup>19</sup> Consequently, COA turned out to be one of the main issues they debated on, and it was impossible for them to agree on its definition and on the court's jurisdictional application on it, hence they agreed to incorporate it under the court's jurisdiction as one of the core international crimes (together with other international crimes: war crimes, crimes against humanity, and genocide), but at the same time they made it dormant until they can reach an agreement on all the issues, and as a result, the ASP of the ICC created a Special Working Group on the COA (SWGCA) to work on this issue.<sup>20</sup> Subsequently, after numerous negotiations, State Parties finally agreed on the definition of the COA which results in individual criminal accountability, for the first time in the history of war aggression, and on ICC's jurisdictional application on it in 2010 at the 'Kampala Review Conference on the Rome Statute'.<sup>21</sup>

### **2.3.2 Kampala Agreement (2010)**

#### **2.3.2.1 Definition of the COA (Article 8bis)**

The definition is divided into two parts; the general and specific definition.

##### **A) General Definition (Article 8bis (1))**

This sub-article defines the crime as: *'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'*.

There are four acts of commission listed, i.e. planning, preparation, initiation or execution, and according to Article 25 (3bis) of the Kampala Agreement, these are not exhaustive and all

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<sup>19</sup> Surendran Koran, 'The International Criminal Court and Crimes of Aggression: Beyond The Kampala Convention'(2012) HJIL 249.

<sup>20</sup> Erinda Duraj Male, 'Crime of Aggression: Ratification and Implementation' (2016) Volume 2, Issue 1 JMSS 120-121.

<sup>21</sup> ICC-ASP Resolution on the crime of aggression (adopted at the 13th plenary meeting, on 11 June 2010, by consensus) Resolution RC/Res.6; 'The Crime of Aggression; a Brief History' (The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression) <<https://crimeofaggression.info/history/>> accessed on 4 July 2018.

other forms of individual participation are included as well.<sup>22</sup> It also provides the kind of person that is responsible for these non-exhaustive lists of commission. It makes the crime a leadership crime referring to those leaders that are on the highest end of the hierarchy ('heads of States and Governments, such as presidents and prime ministers, and military leaders like ministers of defense or generals commanding the armed forces').<sup>23</sup> There is also the manifest violation threshold which requires the use of force by a State to be grave, entailing serious consequences.<sup>24</sup> As for the 'mental element requirement', no special provision applies for this, hence Article 30 of the Rome Statute applies, in which intent and knowledge of one's act are needed.<sup>25</sup>

### **B) Specific Definition (Art 8bis (2))**

This sub-article defines Act of Aggression as: '*the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations...*' It is the exact copy of the UNGA 3314 (XXIX) 1974 Resolution, i.e. the acts of aggression includes, among other things, invasion, military occupation, annexation by the use of force, and blockade of the ports or coasts, if it is considered being, 'by its character, gravity, and scale, a manifest violation of the UN Charter'.<sup>26</sup>

In general, from the above definition, it can be concluded that aggression is divided into two parts; an Act of aggression and the Crime of aggression. An act of aggression is a form of State conduct while the crime of aggression focuses on individual criminal responsibility, thus, in order to prosecute an individual for the COA, it must first be demonstrated that there

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<sup>22</sup> Kampala Resolution (n 21) Annex I No. 5; Robert Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future?' (2010) GoJIL 721.

<sup>23</sup> Koran (n 19) 255; Heinsch (n 22) 722.

<sup>24</sup> Moutloali (n 1) 36

<sup>25</sup> Heinsch (n 22) 732; Suk Baek (n 10) 37-38.

<sup>26</sup> The UNGA Resolution 3314 (XXIX) (n 12).

exists an aggression by a State, i.e. an individual acting alone, without State's action or the involvement of a State cannot commit the COA under ICC's jurisdiction.<sup>27</sup>

### **2.3.2.2 Jurisdiction of the COA (Article 15bis and 15ter)**

It is divided into two parts; Referral System by the Prosecutor of ICC and by a State (Article 15bis) and Referral System by the UNSC (Article 15ter).

#### **A) Initiation by the Prosecutor (*propriomotu*) and State Referral (Article 15bis)**

After State Parties had a hard time agreeing on which article of the Rome Statute (which amendment procedure) should be applying to the amendment of the Statute regarding the COA, they decided that Article 12(5) should apply, i.e. the Kampala Agreement should apply only on those States who have expressly ratified it.<sup>28</sup>

In addition, they set out other two conditions; the need for 30 ratifications and a decision to be taken by State Parties after 1 January 2017 by 2/3 majority vote.<sup>29</sup> The other point they agreed upon was for non-State Parties to be excluded from the jurisdiction completely.<sup>30</sup> This is a deviation from Article 12 (2) of the Statute which provides jurisdiction on the nationals of non-State Parties if they have been alleged to commit the crimes on the territories of the States Parties to the Statute.<sup>31</sup> It also has an 'opt-out' provision, which provides for the application of ICC's jurisdiction on State Parties unless they declare that they do not accept its jurisdiction.<sup>32</sup> This provision has caused a lot of confusion which will be considered in the next section.

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<sup>27</sup> Dapo Akande and Antonios Tzanakopoulos, 'The Crime of Aggression in the ICC and State Responsibility' (2017) Vol. 58 HILJ 34.

<sup>28</sup> Heinsch (n 22) 735-738.

<sup>29</sup> Kampala Resolution (n 21) article 15bis and 15ter paragraph 2 and 3 for each.

<sup>30</sup> *ibid* article 15bis paragraph 5.

<sup>31</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute).

<sup>32</sup> Kampala Resolution (n 21) article 15bis paragraph 4.

Another issue raised under here was the relationship of the ICC with the UNSC on this specific crime. Some suggested that the UNSC should have the sole mandate of determining the acts of aggression and that the ICC shall commence its investigations based on the UNSC's determinations (green light).<sup>33</sup> Nevertheless, others argued for ICC to have its own independent mandate on this crime, and finally, they agreed for the court to independently decide on the existence of the act of aggression (after fulfilling some procedural requirements), hence the court is not solely dependent on the UNSC's decisions on this crime.<sup>34</sup> However, the UNSC's deferral system which is provided under Article 16 of the Rome Statute applies here as well, and the UNSC can defer a case, blocking it for a period of 12 months from being prosecuted by the ICC (in order to fulfill its responsibility of maintaining peace and security).<sup>35</sup> This deferral system has been criticized from the start, as it is commented that it will give the UNSC unnecessary power in the activities of the court.<sup>36</sup>

### **B) Article 15ter: UNSC Referral**

The UNSC can refer any case to the ICC regarding the COA (similar application of ICC's jurisdiction with that of Article 13 (b) of the Statute, i.e. ICC's jurisdiction on the other international crimes).<sup>37</sup>

#### **2.3.3 Post the Kampala Agreement (2010-2017)**

Unfortunately, confusion and debate started shortly after this agreement.<sup>38</sup> Though there were some problems raised on the vagueness of the definition, the main problem continued to be on the jurisdictional application of the court.<sup>39</sup> It was asked why an 'opt out' provision is

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<sup>33</sup> Ayla Prentice-Cuntz, 'On the Crime of Aggression and the ICC in a Quasi-Westphalian System' (2014) International Justice Project <<https://www.internationaljusticeproject.com/on-the-crime-of-aggression-and-the-icc-in-a-quasi-westphalian-system/#f3>> accessed on 12 July 2018.

<sup>34</sup> Kampala Resolution (n 21) article 15bis paragraph 9.

<sup>35</sup> *ibid* article 15bis paragraph 8.

<sup>36</sup> Amir Hussein Rahgoshay, 'The deferral of investigation or prosecution in the ICC by request of the Security Council of UN organization' (2011) *Life Science Journal* 796-797 and 803.

<sup>37</sup> Kampala Resolution (n 21) article 15ter.

<sup>38</sup> Koran (n 19) 276-286.

<sup>39</sup> *ibid*.

provided on Article 15bis paragraph 4, if the court does not have jurisdiction on those States that have not ratified the Agreement,<sup>40</sup> i.e. a question was raised on the jurisdiction of the court over the nationals of a State Party to the Rome Statute that neither ratified the Kampala Agreement nor has opted out from it but which are alleged to have committed the COA on the territory of a State that has ratified the agreement.<sup>41</sup>

As a result, two views emerged; the ‘wide view’ (protection/opt-out camp) and the ‘narrow view’ (consent/opt-in camp).<sup>42</sup> The proponents of the wide view notes that the ‘opt-out’ provision is provided because ICC will be having its jurisdiction without the need of a ratification (an ‘opt-in’ action) on the nationals of State Parties but not on their territories, therefore if a State does not want that, it can ‘opt-out’ from this automatic jurisdiction (e.g. Liechtenstein and Switzerland), i.e. they strongly argued for the normal jurisdiction to apply.<sup>43</sup> They are for protecting the States that have ratified the amendment from aggression.<sup>44</sup> This view emanated from Article 5 (2) and 12 (2) of the Statute.<sup>45</sup> On the other hand, the narrow view proponents noted that since Article 121 (5) is the one that applied, and according to its second sentence, ICC will not have jurisdiction on the territory as well as on the nationals, as consent is necessary for an agreement to apply on a State (e.g. UK, France, and Canada).<sup>46</sup>

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<sup>40</sup> Heinsch (n 22) 738-739.

<sup>41</sup> James Hendry, ‘Analysis: Activating the jurisdiction of the International Criminal Court over the Crime of Aggression’ (2018) Phillippe Kirsch Institute <<http://www.kirschinstitute.ca/activating-the-jurisdiction-of-the-icc-over-the-crime-of-aggression-2/>> accessed on 19 July 2018.

<sup>42</sup> Dapo Akande, ‘An Analysis of why the ICC does not have Jurisdiction over the Crime of Aggression Committed by Nationals of ICC Parties which have not Ratified the Kampala Aggression Amendments’ (2018) ICC Forum <<https://iccforum.com/aggression#Akande>> accessed on 21 July 2018.

<sup>43</sup> *ibid*; Hendry (n 41).

<sup>44</sup> Akande (n 42).

<sup>45</sup> *ibid*; Claus Krieb, ‘On the Activation of ICC Jurisdiction over the Crime of Aggression’ (2018) Volume 16, Issue 1 JICJ 7-8.

<sup>46</sup> Akande (n 42); Noah Weisbord, ‘Activation of the Crime of Aggression’ (2017) UN Headquarters, NY.

This debate continued until it became one of the main contentious issues at the New York Activation Conference in December 2017.<sup>47</sup>

### **2.3.4 Activation of ICC's jurisdiction on the COA (2017-2018)**

After the 30 ratification number requirement and its temporal requirement (1 January 2017) were met, a conference was held in New York to decide on the activation of the crime, which required a 2/3 majority vote.<sup>48</sup> States finally agreed to adopt the narrow view, i.e. for ICC's jurisdiction to only apply on the nationals of those States that have ratified the Kampala Agreement and have not opted out from it.<sup>49</sup> However, they also agreed for ICC's judges to have their independence regarding this issue.<sup>50</sup> They then, agreed for the court to officially activate its jurisdiction on 17 July 2018 (on its 20<sup>th</sup> Anniversary).<sup>51</sup>

Even though there are doubts as to the finality of this jurisdictional issue and about the different possible legal effects of the Activation Resolution,<sup>52</sup> this activation incident has made for an international criminal court to be able to prosecute the COA for the first time after the Nuremberg and the Tokyo tribunals. The court is now officially capable of prosecuting the COA.

## **2.4 Conclusion**

Since the Nuremberg and Tokyo trials, there has never been an international criminal institution that prosecuted individuals for the COA because of lack of a clear definition for the crime. State Parties, tried to solve this problem once and for all at the Rome Conference to establish the ICC so that the court can prosecute and punish COA, but they failed as they

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<sup>47</sup> Kreb (n 45) 9-11.

<sup>48</sup> ICC-ASP Resolution on the Activation of the jurisdiction of the court over the crime of aggression (adopted at the 13th plenary meeting, on 14 December 2017, by consensus) Resolution ICC-ASP/16/Res.5; 'Status of ratification and implementation' (The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, 2018) <<https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/>> accessed on 24 July 2018.

<sup>49</sup> Activation Resolution (n 48) paragraph 2.

<sup>50</sup> *ibid* paragraph 3.

<sup>51</sup> Activation Resolution (n 48) paragraph 1.

<sup>52</sup> Akande (42).

could not agree on its definition and on the court's jurisdictional application on it, hence they made it dormant until they can agree. In 2010, State Parties met at the Kampala Review Conference on the Amendment of the Rome Statute and ended up agreeing on this crime. Unfortunately, debates on it, mainly on the court's jurisdictional application continued to exist, as States interpreted the Kampala Agreement in different ways. In 2017, States decided on the court's jurisdiction to apply only on the nationals and territories of those State Parties that have ratified the amendment and not on others. Consequently, they agreed for the court to prosecute alleged individuals for this crime starting from 17 July 2018. The court now, officially, has jurisdiction on the COA and individuals responsible will be punished for it.

## **Chapter Three**

### **The Opportunities and Challenges of the Activation of ICC's Jurisdiction on the Crime of Aggression in Realizing International Criminal Justice**

#### **3.1 Introduction**

This chapter examines the consequences that will ensue in realizing international criminal justice as a result of the activation of ICC's jurisdiction on the COA, i.e. it examines both the opportunities and challenges of this recent activation. It lists down different categories of opportunities and challenges and deals with each of their merits and demerits. The opportunities are categorized into three groups (broad, specific and conventional) and the possible challenges that might hinder the process of acquiring and appreciating the opportunities are categorized into general and specific challenges, so as to understand and grasp their points easily. Finally, concluding observations of the chapter will be presented.

#### **3.2 Opportunities to the Realization of International Criminal Justice as a result of the Activation of ICC's Jurisdiction on the COA**

Aggression is a violent act that goes against peace and security inevitably resulting in destruction.<sup>1</sup> In the past, individuals who were responsible for acts of aggression have been left unscathed hiding behind the principles of State sovereignty, non-intervention, and official immunities.<sup>2</sup> Nonetheless, ICC has now activated its jurisdiction on this crime; hence individuals suspected for it will be prosecuted and punished. This stride brings various opportunities and a step forward in realizing international criminal justice. These opportunities can be categorized as broad, specific and conventional opportunities. Each of them will be examined hereinbelow.

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<sup>1</sup> Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (T.M.C Asser Press 2014) xv-xix.

<sup>2</sup> Ayla Prentice-Cuntz and Katie Flannery, 'On the Crime of Aggression and the ICC in a Quasi-Westphalian System' (2014) International Justice Project <<https://www.internationaljusticeproject.com/on-the-crime-of-aggression-and-the-icc-in-a-quasi-westphalian-system/>> accessed on 5 August 2018.

### **3.2.1 Broad Opportunities of the Activation**

These advantages are obtained from the prosecutions made by the ICC on the atrocious crimes in general, i.e. on war crimes, crimes against humanity and genocide. Now, after 17 July 2018, because of the activation, COA will also be added into achieving these broad opportunities. It will contribute, along with the other international crimes, in realizing international criminal justice.

#### **3.2.1.1 For the Promotion of Post-Conflict Reconciliation resulting in International Peace and Security, and for the establishment of the Rule of Law**

Aggression ‘threatens the peace, security, and well-being of the world’<sup>3</sup> by causing destruction, hence, making it an international crime and prosecuting individuals that are responsible for it is working towards achieving international peace and security.<sup>4</sup> The activation creates respect and conformity to the international law that is enshrined in the UN Charter<sup>5</sup> on the promotion and maintenance of peace and security by suppressing acts of aggression.<sup>6</sup>

Peace flourishes when there is no use of illegal force between States.<sup>7</sup> When there is a lack of peaceful relations among States, it endangers the peace and security of the entire world.<sup>8</sup> The activation will be establishing an individual accountability ‘aimed at enforcing the most fundamental rule in governing the peaceful coexistence of nations i.e. the prohibition of illegal use of force’.<sup>9</sup>

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<sup>3</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute) preamble, paragraph 3.

<sup>4</sup> Hand Book, *Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC* (Liechtenstein Institute on Self-Determination, Princeton University 2012) 4.

<sup>5</sup> United Nations Charter (adopted June 1945, San Francisco, entered in to force October 1945), chapter VII

<sup>6</sup> *ibid* preamble, article 1, 2 and chapter VII.

<sup>7</sup> Gentian Zyberi, ‘The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest’ in Cecilia M. Bailliet and KjetilMujezinović Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015) 8.

<sup>8</sup> UN Charter (n 5) articles 5.

<sup>9</sup> Handbook (n 4).

At this point, perhaps, it will be helpful to briefly look at the arguments that exist on whether or not prosecution and punishment of international crimes promote reconciliation leading to peace, i.e. the '*Peace vs Justice dilemma*'.<sup>10</sup> In this argument, there are those who argue that reconciliation and peace cannot be attained as a result of punishment, and in fact the justice process will hinder peace negotiation and reconciliation as those who are indicted for prosecution will resort to the use force until death to hide from the consequences (restorative argument), hence, instead; truth-telling, forgiveness, and rehabilitation must be employed.<sup>11</sup> Natsios illustrated this argument by stating that 'the ICC indictment against President Omar al-Bashir endangered the safety of civilians in Darfur and compromised the 2005 Comprehensive Peace Agreement between the North and the South'.<sup>12</sup> On the other hand, others strongly argue that justice is the only way to peace as it redresses the victims which will avoid retaliations/vengeance by them and in addition help in compensating them, and it also deters future crimes (by the criminals as well as by others) in fear of consequences (retributive argument).<sup>13</sup>

However, according to Magnus and Carsten, these arguments exist as a result of a narrow perception of both concepts and not looking at the bigger picture of the two working side by side; they suggested that going beyond this retributive-restorative argument is what is important in achieving reconciliation leading to a lasting peace.<sup>14</sup> Magnus stated that it is only by combining the two that lasting peace can be secured, i.e. by combining the needs of victims, the political realities and acknowledging the role of the international community.<sup>15</sup> Moreover, he suggested to combine the methods used by both views and stated that truth and reconciliation and neo-traditional justice procedures shall be used for the mid-low level

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<sup>10</sup> Noah Weisbord, 'Judging Aggression' (2011) Vol. 50, No. 1, Columbia Journal of Transnational Law 109-132.

<sup>11</sup> Magnus Rynning Nielsen, 'Transcending the 'peace vs. justice' debate: a multidisciplinary approach to transitional justice (sustainable peace) in Northern Uganda after the International Criminal Court's involvement in 2004' (LLM thesis, Stellenbosch University 2010) 37-40.

<sup>12</sup> Weisbord (n 10) 113.

<sup>13</sup> Fatou Bensouda, 'Justice, Reconciliation and the Role of the ICC' (2008) 6, 9-11.

<sup>14</sup> Nielsen (n 11) 44-46, 58-61; Carsten Stahn, 'International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide' (2015) Policy Brief Series No. 36 FICHL 1.

<sup>15</sup> Nielsen (n 11) 59.

officials and prosecution for the higher ones, and also the process of addressing and transforming conflicts in a peaceful manner so as to avoid returning back to them.<sup>16</sup> Carsten, by sharing the same position, also stated that justice (retribution) together with the restoration methods will bring reconciliation.<sup>17</sup>

As a result, prosecuting the suspects and punishing the criminals of the COA will help provide a conducive atmosphere for a post-conflict reconciliation to take place, hence building and sustaining the process of peace and security, together with the restorative methods.

The other opportunity that exists together with peace and security is the establishment of rule of law.<sup>18</sup> Prosecuting an act of aggression is punishing a violation of an international legal norm; hence promoting observance to these norms plays an important part in ‘advancing’ the rule of law.<sup>19</sup> The activation will make individuals/leaders accountable for their actions; their official status will no longer excuse them, they will equally be punished, and it ensures the fact they are not above the law. The rule of law is a system that ‘attempts to protect the rights of citizens from arbitrary and abusive use of government power’;<sup>20</sup> hence, the activation will prosecute those who abuse their powers without an exemption, for the protection of the rights of citizens.

### **3.2.1.2 To Redress the Victims of Aggression**

Victims are expected to be redressed and vindicated when they are part of the prosecution process, i.e. by the act of testifying, by seeing justice rendered and by obtaining reparation.<sup>21</sup>

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<sup>16</sup> *ibid* 60.

<sup>17</sup> Stahn (n 14).

<sup>18</sup> Handbook (n 4) 4.

<sup>19</sup> UN Chronicle, ‘The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law’ (2012) Vol. XLIX No. 4 UN Magazine <<https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>> accessed on 10 August 2018.

<sup>20</sup> ‘Rule of Justice over Rule of Law’ (2 February 2018) <<https://www.lawteacher.net/free-law-essays/constitutional-law/rule-of-justice-over-rule-of-law-constitutional-law-essay.php>> accessed on 15 August 2018.

<sup>21</sup> Robert Cryer and others, “*An Introduction to International Criminal Law and Procedure*” (Cambridge University Press 2007) 24.

Prosecuting the perpetrators who have committed the COA against the victims is a crucial stage in the ‘healing process of the victims’.<sup>22</sup> ICC has a victim and witness participation system which will encompass aggression victims in the prosecuting process and it also has a system where victims are redressed by reparations (compensation, restitution, and rehabilitation) ordered by the court, and support will be provided to these victims by the Trust Fund.<sup>23</sup> Hence, from this moment onwards, physical, psychological rehabilitation and/or material support will be rendered to those who have suffered as a result of the COA. ICTY in the Nikolic case stated that ‘punishment must, therefore, reflect both the calls for justice from the persons who have directly or indirectly been victims of the crimes’.<sup>24</sup>

### **3.2.1.3 For the Protection of Human Rights and Prevention of Suffering as a result of Aggression**

An act of aggression brings with it numerous violations of human rights and international humanitarian law; it affects particularly women and children who are ‘the most vulnerable individuals during conflict’.<sup>25</sup> A preambular provision of the Rome Statute stipulates the importance of being ‘mindful that during this century, millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’.<sup>26</sup>

Aggressive war inevitably results in ‘massive’ and ‘grievous’ crimes of all kinds and this, in turn, will ‘directly violate our fundamental rights’ and ‘indirectly affect our enjoyment of any of the basic human rights or freedoms’.<sup>27</sup> Michael stated that ‘even nowadays, in modern warfare, in the time of so-called surgical strikes, 80 to 90% of war casualties are regularly civilians, mostly children and women’.<sup>28</sup> Hence, the prosecution of COA will make the leaders take the jurisdiction of the court into consideration before they give decisions on even

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<sup>22</sup> Opiyo Marilyn Awuor, ‘The Role of the International Criminal Court in Promoting Peace and Justice’ (Degree of Masters in IDIS, University of Nairobi 2014) 23.

<sup>23</sup> Rome Statute (n 3) article 68, 75 and 79.

<sup>24</sup> Cryer and others (n 21) 24.

<sup>25</sup> Handbook (n 4).

<sup>26</sup> Rome Statute (n 3) preamble, paragraph 2.

<sup>27</sup> Hans-Peter Kaul, ‘Human Rights and the International Criminal Court’ (2011) ICC-CPI 10.

<sup>28</sup> *ibid.*

minute matters.<sup>29</sup> The awareness of the consequence that will be brought on to them personally will make them become conscious of what they are doing. This consciousness will prevent the effects of various human right violations and sufferings.<sup>30</sup>

#### **3.2.1.4 To Record the History of the COA**

Prosecuting acts of aggression will help document history for posterity in respect to the COA which will create a clear record of incidents and help to permanently remember violence.<sup>31</sup> Keeping records of what really took place will be useful for the post-conflict society; it will educate people not to repeat the same mistakes and will also help in reforming the current way by taking notes of history.<sup>32</sup> History recording will help us (each and every individual in the world) understand why and how we are what we are today and it will also be a lesson for us to know on how to behave for a better tomorrow.<sup>33</sup>

### **3.2.2 Specific Opportunities of the Activation**

These opportunities are acquired uniquely from the prosecution of the COA. They are specific to this crime and are additional opportunities that will be attained particularly by the activation.

#### **3.2.2.1 The Existence of a Permanent System for an Individual Criminal Accountability and for Ending Impunity for the COA**

Individuals who were responsible for this crime have been out of ICC's ambit and impunity existed over this specific crime even when impunity ended on the other three international crimes (war crimes, crimes against humanity and genocide), and leaders were insulated from being investigated, prosecuted and punished. At present, by the activation of the jurisdiction, leaders who commit this crime, unlike in the past, will be held responsible and impunity on

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<sup>29</sup> Handbook (n 4).

<sup>30</sup> Sebastian Rădulețu, 'The Role of International Criminal Tribunals in Promoting Human Rights' ILR 6.

<sup>31</sup> Tom Jones, 'The Goals of International Criminal Justice are both Unachievable and Potentially Harmful', Academia 9.

<sup>32</sup> Cryer and others (n 21) 24.

<sup>33</sup> 'The Benefits of Learning History' (RHEG) <<http://rheg.vastserve.com/articles/history-benefits.htm?i=1>> accessed 22 August 2018.

this specific crime will no longer exist.<sup>34</sup> Leaders will no longer escape the justice system and go free after being responsible for causing much destruction: their acts will have an individual consequence. They cannot run off and continue with their lives as if nothing happened after causing insurmountable pain on others. From this point onwards, accountability for acts of aggression has been established and impunity is no longer acceptable. As a result, victims of this crime will no longer remain silent without getting redressed. Hence, this activation established a permanent system of international criminal accountability on the crime for the first time in the history of international criminal justice.<sup>35</sup>

### **3.2.2.2 To Fill the Gap that exists in the Rome Statute**

The Rome Statute has overlooked soldiers' right to life: it neither protects those that are sent unlawfully by the Aggressor State nor those of the Victim State (injured State).<sup>36</sup>

Nevertheless, now because of the activation, according to Tom, aggressor State's soldiers will have the right to refuse to go to aggressive wars ('right to disobey') and the injured State's soldiers will have the right to be treated as victims of an illegal war, hence will be entitled for reparations ('right to reparations').<sup>37</sup> Even though State leaders are held responsible for attacking (aggression) and soldiers are not in any way held liable, they should have the right to say 'no' to going into an illegal war and they should also have the right to be victims as direct harm and violation is put on to them illegally.

Soldiers already have the right to disobey orders that go against the *Jus in Bello* tradition even if obeying does not result in criminal accountability on them.<sup>38</sup> International Refugee Law protects these kinds of soldiers.<sup>39</sup> Nonetheless, this 'right to disobey' is not, in the same manner, used for the *Jus ad Bellum* cases by States, and soldiers had to face a domestic

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<sup>34</sup> Rome Statute (n 3) preamble, paragraph 5.

<sup>35</sup> Hand Book (n 4).

<sup>36</sup> *ibid.*

<sup>37</sup> Tom Dannenbaum, 'The Criminalization of Aggression and Soldiers' Rights' (2016) SSRN 2 and 8-25.

<sup>38</sup> Handbook, *Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, (Reedited, Geneva, January 1992, UNHCR 1979), paragraph 171.

<sup>39</sup> Dannenbaum (n 37) 10.

criminal punishment for refusing ‘to fight in a criminal war of aggression’.<sup>40</sup> Tom contradicts this norm and states that the refugee status should as well be given to the soldiers of an illegal war; he gave EU’s binding directive which grants this status as an example.<sup>41</sup>

Tom goes on to state that understanding and recognizing aggression to be a *crime of unjustified killing*, will necessitate to ‘reconsider areas of Refugee Law, International Human Rights Law, and ICC victim participation and reparation that are contingent on that understanding’,<sup>42</sup> hence interpreting the existing laws in order to give the ‘disobedience right’ and the ‘reparations right’ for soldiers of the aggressor and the attacked States, respectively, is mandatory.<sup>43</sup>

### **3.2.2.3 For Judicial Protection against Aggression by Another State**

States, from this point onwards, are protected against an act of aggression by another State. Even if a State has not ratified the Kampala Agreement and even if a State is not a Party to the Rome Statute, individuals in that State can still be brought in front of the ICC for prosecution if they are accused of committing COA, by the referral system of the UNSC.<sup>44</sup> This is broad protection that is given to States (to all States in the world).<sup>45</sup> In other words, even if a State has not ratified the Kampala Agreement or even if a State is not a Party to the Rome Statute, it will still be accorded protection against aggression by another State because of the existence of a referral of a case by the UNSC.<sup>46</sup>

### **3.2.3 Conventional Opportunities of the Activation**

These advantages can be obtained from any kind of criminal justice system. They are the justifications/the main reasons why prosecutions and punishments exist in the first place,<sup>47</sup>

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<sup>40</sup> *ibid* 9.

<sup>41</sup> *ibid*.

<sup>42</sup> *ibid* 34.

<sup>43</sup> *ibid*.

<sup>44</sup> ICC-ASP Resolution on the crime of aggression (adopted at the 13th plenary meeting, on 11 June 2010, by consensus) Resolution RC/Res.6, article 15ter.

<sup>45</sup> Handbook (n 4).

<sup>46</sup> Kampala Resolution (n 44).

<sup>47</sup> Gerard V. Bradley, ‘Retribution: The Central Aim of Punishment’ (2003) Vol. 27, No.1 HJLPP 19-34.

and now that COA will be prosecuted as one of the main international crimes of the world, it will similarly, achieve these traditional justifications of punishment.

The main opportunity of the activation is to serve a retributive purpose which focuses on punishing criminals who have ‘violated the social norms’, in a proportionate manner, in order to enforce international law.<sup>48</sup> It claims that perpetrators deserve punishment, unlike the restorative view which argues for negotiation and mediation instead of punishment. However, as mentioned above, it is also argued that applying both together is what will give an optimum result towards reconciliation leading to a sustainable peace. In the next paragraphs, the benefits of retribution regarding aggression will be observed (this in no way undermines the other view (i.e. restorative).

Punishing the perpetrators of aggression is not supposed to be understood as a ‘mere desire for revenge’, but as an act that will ‘ensure the guilty is punished, the innocent are protected and the social balance that has been disrupted is restored’.<sup>49</sup> This is important in order to create a sense of satisfaction for the victims on the system, which will avoid unnecessary revenge, in turn preventing future crimes.<sup>50</sup>

This opportunity incorporates in it, the elements of deterrence, incapacitation, fair notice for the accused, rehabilitation and denunciation/education.<sup>51</sup>

Punishing aggressors will aim at preventing the criminal as well as the society from engaging in this prohibited act, i.e. it will prevent illegal uses of force as leaders will be conscious of

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<sup>48</sup> Cryer and others (n 21) 19; Philippe Kirsch, ‘Applying the Principles of Nuremberg in the ICC ‘ (2006) ICC-CPI 3, ‘The Nuremberg judgment stated that ‘crimes are committed by men, not abstract entities, and only by punishing individuals...can international law be enforced’.

<sup>49</sup> Bradley (n 47) 31; Cryer and others (n 21) 19, ‘the ICTY in the Aleksovski case stated that “retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crime...‘that the international community was not ready to tolerate serious violations of international humanitarian law and human rights’.

<sup>50</sup> ‘The Purposes of Punishment’ <<http://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/>> accessed on 27 August 2018.

<sup>51</sup> Bradley (n 47)

their decisions by taking the court's jurisdiction into account.<sup>52</sup> In addition, the convict is incapacitated which will make sure of that he/she will not commit the crime for some time, and he/she will also learn from this and will be less likely to commit another crime because of fear of punishment; it avoids the possibility of the offender committing crimes by way of detaining him (isolating him from society).<sup>53</sup> Therefore, punishing the offender of the COA will help to deter future crimes by way of incapacitation, as well as by way of creating awareness and fear of consequences.

In addition, it will bring the benefit of having a fair trial for the accused of the COA because the court has the duty of guarantying the fundamental rights of the accused; they are protected under the international law through the International Human Rights Instruments, e.g. ICCPR,<sup>54</sup> and through Regional Human Rights treaties, e.g. ACHPR.<sup>55</sup> They are also protected under the Rome Statute and by the jurisprudence of the ICC.<sup>56</sup> Further, retribution will also focus on reforming the criminal of aggression; it aims at changing his/her behavior for the better which will also add in deterring future crimes (rehabilitating the offender).<sup>57</sup>

Finally, it will help to educate the offender, victim and the whole society about the COA, i.e. it will make the offenders understand what was wrong about what they have done and also

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<sup>52</sup> *ibid*; Handbook (n 4); Rome statute (n 3) preamble paragraph 5 states that 'parties are determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.

<sup>53</sup> The Purposes of Punishment (n 50); Cryer and others (n 21) 22, 'Judge Roling, in the Tokyo trial, asserted that the justification for prosecuting aggression, in spite of the fact that it was not previously criminal, was that the defendants were dangerous and their influence on Japan had to be excluded by their imprisonment'.

<sup>54</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) articles 9, 14 and 15.

<sup>55</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Banjul Charter) article 7.

<sup>56</sup> Rome Statute (n 3) articles 64 (2) -67; James K. Stewart (Deputy Prosecutor of ICC), 'Fair Trial Rights under the Rome Statute from a Prosecution Perspective' (ICTR Symposium, 2014) 1; Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2008) Volume 8, Issue 1 NJIHR 1-2.

<sup>57</sup> The Purpose of Punishment (n 50).

teach the society about the unacceptable nature of the committed act.<sup>58</sup> This is the ‘denunciation’ opportunity that will occur as a result of punishing aggressors.<sup>59</sup>

### **3.3 Challenges to the Realization of International Criminal Justice as a result of the Activation of ICC’s Jurisdiction on the COA**

This activation (prosecution of the COA) will inevitably encounter several challenges, which will make it hard to obtain the aforementioned opportunities. Hence, being aware of the negative consequences of the activation, consequently, coming up with solutions and implementing them on the ground will help achieve a better international criminal justice system.

The next section has categorized the possible challenges of the activation into two groups, i.e. general and specific challenges. Each of them will be examined.

#### **3.3.1 General Challenges**

These are challenges that are faced by the ICC in general. They were observed to be faced by the other three international crimes, and now, because of the activation, COA will be of no exception to face them as well. These challenges include but are not restricted to the following ones.

##### **3.3.1.1 The Problem of Universality**

Currently, the Rome Statute is ratified by 123 States.<sup>60</sup> According to the UN, there are 195 States in our world (193 members and 2 observer States of the UN),<sup>61</sup> hence it can be calculated that one third of UN’s members, ‘approximately three fifths of the world’s

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<sup>58</sup> Cryer and others (n 21) 23.

<sup>59</sup> *ibid*, ‘ICTY case: in the Kordic and Cerkez case, referred to “the educational function ... which... aims at conveying the message that rules of international humanitarian law have to be obeyed under all circumstances’; Cavadino, ‘Justifying Punishment’ (2007) Corwin 46-48.

<sup>60</sup> Ferdinand Bada ‘What is the Rome Statute?’ (Word Atlas, 16 May 2018) <<https://www.worldatlas.com/articles/what-is-the-rome-statute.html>> accessed on 4 September 2018.

<sup>61</sup> Partner perspectives, ‘How Many Countries Are There in the World in 2018?’ (World View Stratfor, 15 February 2018) <<https://worldview.stratfor.com/article/how-many-countries-are-there-world-2018>> accessed on 7 September 2018.

population’,<sup>62</sup> including the three permanent members of the UNSC (the U.S, China, and Russia), have not ratified the Rome Statute.<sup>63</sup> This non-participation will have the power to weaken the ability of the court to enforce its instituted laws.<sup>64</sup> For effective implementation of its decisions and for being able to use its full potential, ICC shall be an all-inclusive court (worldwide). Universal ratification is important for the application of the rule of law (equality of every State before the law) and for its deterrence effect.<sup>65</sup> Full implementation of the Rome Statute is crucial; in addition, non-State Parties are not obliged to cooperate with ICC, hence making the court’s activity less effective.<sup>66</sup>

On the face, ICC’s jurisdiction looks extremely vast and that it reaches worldwide by way of the UNSC referrals of non-State Parties (Article 13 (b) of the Rome Statute), and by the application of Article 12 (2) (a) of the Statute which allows the court to have its jurisdiction on nationals of non-State Parties committing crimes on the territories of State Parties. Nonetheless, this view can be contested by those who argue that the UNSC referrals are highly politicized, hence the court is misused for political aims instead of international justice: UNSC has referred only two cases until now (Sudan (Darfur) and Libya) which is extremely low when compared to all the mass atrocities occurring in our world, in many different

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<sup>62</sup> Leila Nadya Sadat, ‘The International Criminal Court: Past, Present and Future’ (2014) Cambridge Compendium of International Criminal Law 13.

<sup>63</sup> Melissa Tessler, ‘Despite recent achievements, many challenges ahead for the International Criminal Court’ (2018) Open Canada.org paragraph 7 <<https://www.opencanada.org/features/despite-recent-achievements-many-challenges-ahead-international-criminal-court/>> accessed on 7 September 2018.

<sup>64</sup> Dan Donovan, ‘International Criminal Court: Successes and Failures’ *International Policy Digest* (South Korea, 23 March 2012) paragraph 36-37 <<https://intpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures/>> accessed on 8 September 2018.

<sup>65</sup> ‘UN chief urges universal ratification of International Criminal Court’s founding treaty’ (UN.org, 4 December 2017) <<https://news.un.org/en/story/2017/12/638232-un-chief-urges-universal-ratification-international-criminal-courts-founding>> accessed on 8 September 2018 ; Parliamentarians for Global Action, ‘Universality of the Rome Statute’, PGaction, paragraph 1 <<http://www.pgaction.org/campaigns/icc/universality.html>> accessed on 9 September 2018.

<sup>66</sup> Human Rights Watch, ‘The ICC Jurisdictional Regime; Addressing U.S. Arguments’ HRW <<https://www.hrw.org/legacy/campaigns/icc/docs/icc-regime.htm>> accessed on 9 September 2018 .

States.<sup>67</sup> As for Article 12, U.S. argued that holding nationals of non-State Parties liable goes against the fundamental principles of Treaty Law, which states that consent is needed for a treaty to apply.<sup>68</sup> As a result, these countries will not be willing to be held responsible, and unless they cooperate, ICC cannot do anything about it, as States' cooperation is the only way through which the court functions.

Thus, universality is mandatory in order to make the court to fully exercise its powers and achieve the main purpose of its creation without encountering any obstacles. Smooth jurisdictional coverage over the entire world by way of ratification is mandatory. This problem will affect the COA, as it is under ICC's jurisdiction from now on as a result of the activation.

### **3.3.1.2 The Problem with Independence and Impartiality of the Court**

For any court, being independent and impartial from any kinds of influences in all of its activities is mandatory, and ICC is no different. Unfortunately, ICC has been criticized for lacking these qualities; it is stated that the court is suffering from political and financial influences. In addition, its sole dependence on States' cooperation has been condemned for being an enormous problem.

#### **A. Political Influence**

ICC is an independent judicial body created by its own multilateral treaty (the Rome Statute), though it has a relationship with the UNSC by the referral system, i.e. Article 13 (b) of the Rome Statute gives the UNSC the authority to refer cases of State Parties as well as non-State Parties to the ICC. This referral system was created in order to save time and cost of setting *ad hoc* tribunals every time they are needed by the UNSC in fulfilling its mandate of maintenance and promotion of peace and security (mandate given by the UN charter): having

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<sup>67</sup> Bethel Aregawi, 'The Politicization of the International Criminal Court by United Nations Security Council Referrals' (2017) ACCORD <<http://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/>> accessed on 14 September 2018.

<sup>68</sup> Michael P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) Vol. 64: No. 1 CWRU School of Law, Faculty Publications 70.

one permanent court to always go to, will avoid the ‘unnecessary proliferation of *ad hoc* tribunals’, which will ensure ‘the development of uniform jurisprudence on international criminal law’.<sup>69</sup> In addition, since UNSC’s referral is not restricted geographically, it was intended to help the court to have universal jurisdiction and to get the political incentive and military support needed to enforce its orders from the UNSC.<sup>70</sup> Hence, the relationship was intended to be symbiotic, one that will help both of these independent organs.

Unfortunately, the relationship is criticized and has been stated that ICC is being politically influenced by the UNSC, i.e. ICC is being used as a political tool by the five permanent members (P5s) of the UNSC.<sup>71</sup> As the famous saying goes ‘all States are equal, but some States are more equal than others’,<sup>72</sup> it is the reality that there are powerful States in our world influencing others politically. The P5s happen to be most of those, and as a result, the UNSC is known for being purely a political body.<sup>73</sup> The ultimate power of the P5s emanates from their veto powers; they will use this veto power to stop a referral that is made to the ICC if it goes against their political interests.<sup>74</sup> For example, they have been criticized of only referring two States (Sudan and Libya) to the ICC until now and ignored other equal or even worse situations in our world like conflicts in Syria and Burma.<sup>75</sup> In other words, they might refer a case of non-State Party when it is politically beneficial for them to do so. Hence, these countries are affecting the smooth functioning of the ICC by manipulating the referrals in

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<sup>69</sup> Victor O. Ayeni and Matthew A. Olong, *Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court* (AJICL, Edinburgh University Press 2017) 248.

<sup>70</sup> *ibid* 248-249.

<sup>71</sup> Aregawi (n 67) paragraph 13.

<sup>72</sup> George Orwell stated that ‘all animals are equal but some animals are more equal than the others in his book “Animal Farm” which was published in 1945, to mean that there are some who are more benefiting than the others, some that are at a higher reach than the others.

<sup>73</sup> Aregawi (n 67) paragraph 13.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid*; Salil Shetty, ‘Ensuring that the ICC Rises to the Challenge’ (2018) HRW paragraph 2 <<https://www.hrw.org/news/2018/07/11/ensuring-icc-rises-challenge>> accessed on 15 September 2018, states that “Russia’s veto at the Security Council continues to block a path to justice for Syria’s victims. Other council members, including the United States, have also used or threatened to use their veto to block action on other atrocity crimes’.

accordance with their personal wills. On top of this, three of the P5s are not members of the ICC but they still can refer cases of non-State Parties whenever it is convenient for their interest, which will weaken the court's 'credibility, integrity, and legitimacy'.<sup>76</sup>

Now that ICC has activated its jurisdiction, it is feared that the UNSC's 'efforts to deter aggression might be undermined' by the P5s 'who preserve for themselves the right to veto any resolutions that may conflict with their interests especially when it comes to the use of force and matters relating to the sovereignty of other States.'<sup>77</sup>

### **B. Financial Influence**

Financing is the other source of influence that weakens ICC's impartiality.<sup>78</sup> Politicians might influence the court by not giving the required amount of money from them: they will use their money to manipulate the activities of a court.<sup>79</sup> Money is needed for investigations and trials, and if a sufficient amount is not given, it will be hard to conduct these activities.

ICC's 60% of funding comes from the EU: most of it being from the Britain, France, Germany, Italy, and Spain.<sup>80</sup> The Netherlands gave ten years of free rent in The Hague, plus 70 million dollars for starting costs,<sup>81</sup> and now, ICC is facing criticisms for never taking a case against one of these States; instead, its focus is solely on taking African cases.<sup>82</sup>

'Human Rights Watch, a strong supporter of the ICC, warned that 'this unevenness increasingly poses a challenge to the credibility of international justice, and, in turn, to that of

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<sup>76</sup> Aregawi (n 67) paragraph 2.

<sup>77</sup> 'United Nations and the Definition of Aggression', Law Teacher- Law Essay Professionals, (2018) paragraph 4 <<https://www.lawteacher.net/free-law-essays/international-law/united-nations-and-the-definition-of-aggression-international-law-essay.php>> accessed on 16 September 2018.

<sup>78</sup> Brian Garst, 'The International Criminal Court: The Case of Politics over Substance' (2015) Center for Freedom and Prosperity 11.

<sup>79</sup> Sang-Hyun Song, 'The Independence of the ICC and Safeguards against Political Influence' (2007) ICCLRCJP 7.

<sup>80</sup> Garst (n 78).

<sup>81</sup> Rita Mutyaba, 'The International Criminal Court - Its Impact and the Challenges It Faces in Fulfilling Its Mandate' (2013) SSRN 23.

<sup>82</sup> Garst (n 78).

the ICC’’.<sup>83</sup> ICC watch stated that ICC is under European and Western control financially.<sup>84</sup> The Guardian stated that ‘Experts point in particular to the case of a Japanese judge who did not have a law degree or any legal qualifications, and was appointed to the ICC after Japan provided financial support’.<sup>85</sup>

There is a direct relationship between money and control; as a result, the independence and impartiality of ICC’s court are as sure as the independence of its financing.

### **C. Sole Dependency on the Cooperation of States**

ICC does not have its own executive force (no army or police force);<sup>86</sup> hence it needs an immense cooperation of States for carrying out its activities: it relies on States and governments wholly for assistance in carrying out investigations to gather evidence and for executing its decisions, and in turn, State Parties have the obligation to cooperate with it.<sup>87</sup> Non-State Parties, on the other hand, do not have the obligation to cooperate unless they are obliged to do so by the UNSC referral resolution.<sup>88</sup>

Unfortunately, State cooperation has proven to be hard from the experiences of the ICC, i.e. more than half of the State Parties have not ‘adopted national legislation to meet their obligations for cooperation with the court’.<sup>89</sup> Moreover, the court has faced the challenge of non-cooperation especially when it comes to arresting suspects: currently, 15 ICC arrest warrants are unenforced because of non-cooperation.<sup>90</sup>

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<sup>83</sup> *ibid.*

<sup>84</sup> ‘Latest ICC Report Reveals that Court is under European and Western Control’, ICC Watch press release (2009).

<sup>85</sup> Afua Hirsch, ‘System for appointing judges ‘undermining international courts’,’ *The Guardian* (London, 8 September 2010) paragraph 5 <<https://www.theguardian.com/law/2010/sep/08/law-international-court-justice-legal>> accessed on 17 September 2018.

<sup>86</sup> Mutyaba (n 81) 22; Garst (78) 4.

<sup>87</sup> Rome statute (n 3) article 86-102.

<sup>88</sup> Ayeni and Olong (n 69) 252.

<sup>89</sup> Tessler (n 63) paragraph 8.

<sup>90</sup> Shetty (n 75) paragraph 8.

From among this 15 current unenforced arrest warrant cases, the Sudanese suspect, President Omar al-Bashir's case is a very good illustration for lack of cooperation by State Parties to the Rome Statute.<sup>91</sup> Al-Bashir has traveled to 'more than 75 countries' since warrants for his arrest were issued in 2009 and 2010, but until this day, no country cooperated with the ICC and no country has even attempted to arrest him.<sup>92</sup> Though the ASP has the authority to impose a sanction on State Parties that are not cooperating, Muller mentioned that States are highly reluctant to sanction each other because they need each other in other fora, and the ASP has proven to be 'fairly toothless' as there are no immediate consequences for non-compliance.<sup>93</sup>

Alex, in his article, wrote that every time there has been a non-cooperation referral made by the judges to the ASP of the ICC or to the UNSC organs; neither of them has taken any measures against the disobedient State.<sup>94</sup> He further stated that the Pre-Trial Chamber voted not to refer South Africa's case (failure to cooperate) to the ASP because of the uselessness of such a referral.<sup>95</sup>

### **3.3.1.3 The Problem of Selectivity**

UN's 2014 annual meeting on the performance review of the ICC hosted different views: the African States were strongly negative towards to the court, claiming that the court is only ruled by the political interests of the Westerns and that it is becoming a tool to colonize Africa.<sup>96</sup> In general, they criticized the performance of ICC on the selection of its cases: that it is selectively fixated on the African countries.

The relationship between ICC and the African States started out smooth: African States saw the ICC as a solution for all of their continent's injustices and supported its realization (Africa

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<sup>91</sup> Tessler (n 63) paragraph 8.

<sup>92</sup> Tessler (n 63) paragraph 8-9.

<sup>93</sup> *ibid* paragraph 10-11.

<sup>94</sup> Alex Whiting, 'The ICC's New Libya Case: Extraterritorial Evidence for an Extraterritorial Court' (2017) Just Security paragraph 5 <<https://www.justsecurity.org/44383/iccs-libya-case-extraterritorial-evidence-extraterritorial-court/>> accessed on 20 September 2018.

<sup>95</sup> *ibid*.

<sup>96</sup> Garst (n 78) 8-10.

has the highest regional representation in the ICC).<sup>97</sup> However, later on, an increasing number of States began to question why ICC was focusing on African cases and why other States' cases were not being brought in front of the court, i.e. they started questioning the independence and impartiality of the court.<sup>98</sup> This slightly hardened relationship got worse when the ICC issued an arrest warrant for the Sudanese President Omar Al-Bashir after the Darfur case in Sudan has been referred to it by the UNSC.<sup>99</sup>

Afterward, AU, on behalf of the African States (State Parties to the ICC), requested the UNSC to defer Al-Bashir's case by stating that ICC's prosecution would threaten the peace process that was happening in Sudan, but the UNSC has consistently failed to act on this request.<sup>100</sup> As a result of this, the AU made a decision to not cooperate with the ICC concerning the Al-Bashir's case.<sup>101</sup> Even worse, these States issued a collective withdrawal strategy from the ICC in January 2017.<sup>102</sup> However, it is not binding and not all African States are included, e.g. Senegal, Nigeria, Tanzania etc. have made reservations on the decision of mass withdrawal.<sup>103</sup>

Ms. Fatou Bensouda (current chief prosecutor of the ICC), has stated that the majority of the cases have been requested by the African States themselves and that the court is not targeting Africa but is targeting impunity in order to protect the vast number of victims, i.e. crimes in

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<sup>97</sup> Gerhard Werle, Lovell Fernandez, Moritz Vormbaum (eds), *Africa and the International Criminal Court* (Springer Asser Press 2014) 195-196.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid* 196.

<sup>100</sup> *ibid* 196-197.

<sup>101</sup> Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (adopted 3 July 2009) Assembly/AU/Dec.245 (XIII) paragraph 9–10.

<sup>102</sup> 'AU Strategy for Collective Withdrawal from the ICC a Non-Starter' (ICTJ, 16 February 2017) <<https://www.ictj.org/news/au-withdrawal-icc-non-starter>> accessed on 21 September 2018.

<sup>103</sup> Mark Kersten, 'Not All it's Cracked Up to Be – The African Union's "ICC Withdrawal Strategy"' (2017) Justice in Conflict <<https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/>> accessed on 21 September 2018.

Africa are worth prosecuting.<sup>104</sup> Nevertheless, ICC is stated to be blind to other States like conflicts in Venezuela and Colombia.<sup>105</sup>

### **3.3.1.4 The Problem with Obtaining Evidence**

Obtaining evidence by the ICC has been stated to be a difficult process and is facing challenges. The first challenge that ICC encounters in obtaining evidence is its need for immense State cooperation to conduct any type of investigation, i.e. without the cooperation/willingness of States, ICC cannot operate properly in collecting its evidence.<sup>106</sup> Permission from States to enter into their territories for conducting interviews and using their mechanisms to collect other evidence make the investigation process hard.<sup>107</sup> In addition, occasionally, even if a State Party is willing to cooperate with the ICC, it might not have a complete control (law enforcing capacity) on some parts of its territory, hence it will still be difficult for obtaining evidence: for instance, ‘in Libya, the central government does not have control over the entire territory of the country, and security concerns prevented ICC investigators from conducting many investigative measures inside the country’.<sup>108</sup>

The second limiting factor that is encountered by the court is the long distance that the investigators had to go from The Hague (the site of ICC) and the security issues of the crime scene areas, i.e. the places/States that the investigation must be conducted on are usually hosting an ongoing conflict, or they are places where a conflict had just recently ended, and as a result, it is difficult to ensure the safety of the ICC investigators as well as the witnesses

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<sup>104</sup> Tabora Bojang, ‘Bensouda denies ICC hunting only African leaders’ (The Standard, 12 July 2017) <<http://standard.gm/site/2017/07/12/bensouda-denies-icc-hunting-african-leaders/>> accessed on 21 September 2018.

<sup>105</sup> Garst (78) 10.

<sup>106</sup> Whiting (n 94) paragraph 4.

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid* paragraph 7.

there.<sup>109</sup> For instance, ‘in Libya, four staff members of the court were arrested and detained after they had undertaken a mission to visit with Saif-Al-Islam Qaddafi’.<sup>110</sup>

The third limiting factor of the ICC is its way of approach to evidence gathering, i.e. investigators are not based in the country (no permanent base in the field of investigation) and their numbers are very small compared with the predecessor international criminal tribunals like ICTY and ICTR, hence, ICC’s investigators per case are relatively lower in number, spending a relatively short amount of time on the crime scene.<sup>111</sup> This approach might make one question the quality of the evidence. Christian, stated in his article, that this approach is the main cause for the higher number of ICC’s case withdrawals, i.e. because of lack of enough solid evidence.<sup>112</sup> In addition, he recommended for investigators to be of the same nationals as to those in the field of investigation (national-situation country relation), and for the prosecutors of the ICC to properly consider intermediary people’s (volunteers who assist the office) concerns and priorities, in order to attain a swift process of investigation and for the presentation of the evidence to have a Socio-Political context (local context: helpful to create a deep understanding of the case for the court), (he wrote that ICC does not use both of these techniques in carrying out its investigation activities, stating that this might impede its impartiality).<sup>113</sup>

### **3.3.1.5 The Problem with the Victim and Witness Protection System**

The Rome Statute of the ICC provides for appropriate measures to ‘protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’.<sup>114</sup> Victim and Witness testimonies are the main sources of evidence in almost all the cases of the

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<sup>109</sup> Christian M. De Vos, ‘Investigating from Afar: The ICC's Evidence Problem’ (2013) LJIL 1009-1010; Mutyaba (n 81) 15.

<sup>110</sup> Mutyaba (n 81) 15.

<sup>111</sup> De Vos (n 109) 1016-1019.

<sup>112</sup> *ibid* 1010-1012.

<sup>113</sup> *ibid* 1019-1024.

<sup>114</sup> Rome Statute (n 3) article 43(6) and 68; ICC-ASP Rules of Procedures and Evidence (First session, New York, 3-10 September 2002) ICC-ASP/1/3 and Corr.1, part II.A, Rule 16-19; Steven William Kayuni, ‘The ICC’s Witness Protection Measures Through The Lens of Policy-Oriented Jurisprudence’ 271-274.

ICC.<sup>115</sup> ICC depends on States' cooperation in victim and witness related activities that it undertakes,<sup>116</sup> and this is a challenge because national forces might be biased and they might go against the victims and/or witnesses.<sup>117</sup> Witnesses are seen as the '*whistleblowers*' by their government, hence they will often be repressed by any means necessary; ergo this will make it harder for the court to build up its cases and serve justice.<sup>118</sup>

Witness interference/tampering is an act that goes against international law, i.e. it will undermine the rule of law, delay due process, produce wrongful convictions or discharges/dismissals, threaten the reliability of the court, weaken the quality/integrity of the evidence/testimony, and it will put lives at stake, causing additional criminal and human rights violations to those who are already suffering.<sup>119</sup>

According to the Open Society Justice Initiative, 'witness interference has been alleged in nearly every case before the ICC, and it is one of the most urgent challenges facing the court and international criminal justice'.<sup>120</sup> Good examples for this can be 'the dismissed case of the Kenyan President Uhuru Kenyatta' and the Lubanga case.<sup>121</sup> 'In Kenya, a dead body of a witness was found in a river between some rocks. In Central Africa, witnesses were allegedly paid and told what to say when they took the stand. In Côte d'Ivoire, witnesses were allegedly threatened to discourage them from going to The Hague.'<sup>122</sup>

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<sup>115</sup> Benjamin Duerr, 'Witnesses are the ICC's Achilles heel' (Justice Hub, 22 September 2016) <<https://justicehub.org/article/witnesses-are-iccs-achilles-heel>> accessed on 26 September 2018.

<sup>116</sup> Rome Statute (n 3) article 93(1) (j).

<sup>117</sup> Donald M. Ferencz, 'Greatest challenges facing the ICC on crimes of aggression are equality before the law, evidence-gathering, and witness protection. Creative solutions which encourage non-ratifiers to ratify may be part of the solution', (2018) ICC Forum on Aggression debate <<https://iccforum.com/aggression>> accessed on 26 September 2018.

<sup>118</sup> *ibid.*

<sup>119</sup> Briefing Paper, 'Witness Interference in Cases before the International Criminal Court' (2016) Open Society Justice Initiative 5.

<sup>120</sup> *ibid* 1-2.

<sup>121</sup> Jennifer Easterday, 'Witness Protection: Successes and Challenges in the Lubanga Trial' (2009) IJM <<https://www.ijmonitor.org/2009/06/witness-protection-successes-and-challenges-in-the-lubanga-trial/>> accessed on 26 September 2018.

<sup>122</sup> Duerr (n 115) paragraph 2.

### 3.3.1.6 Expensive and Prone to Delay

ICC court is criticized for being expensive and ineffective.<sup>123</sup> From the data that was gathered in 2012, the estimated amount of money used by the ICC was \$900 million and it convicted one individual.<sup>124</sup> In 2014, it increased to \$1 billion and added one more individual (two convictions in total).<sup>125</sup> As a result of this, it has been criticized that the amount of money used by it is extremely high and the conviction number is extremely low.<sup>126</sup> In 2017, it has convicted four individuals (within the 15 years it has begun its work).<sup>127</sup> The following table compares the expenditure of ICC with that of its predecessor courts.

Comparing the expenditure of the ICC with predecessor courts <sup>128</sup>			
	The <b>Cumulative total</b> budget spent over the first 10 years	<b>Number of individuals indicted</b> in the first 10 years	<b>Total budget spent per suspect</b>
ICC	\$900 million	15	\$60 million
ICTR	\$1 billion	91	\$11million
ICTY	\$695 million	161	\$4.3 million

<sup>123</sup> Ewelina U. Ochab, ‘A Second Look at the International Criminal Court’ *Forbes* (U.S, 16 July 2017) paragraph 2 <<https://www.forbes.com/sites/ewelinaochab/2017/07/16/a-second-look-at-the-international-criminal-court/#78cba72e2c7e>> accessed on 28 September 2018.

<sup>124</sup> Jon Silverman, ‘Ten years, \$900m, one verdict: Does the ICC cost too much?’ (BBC News, 14 March 2012) <<https://www.bbc.com/news/magazine-17351946>> accessed on 28 September 2018.

<sup>125</sup> David Davenport, ‘International Criminal Court: 12 Years, \$1 Billion, 2 Convictions’ *Forbes* (U.S, 12 March 2014) <<https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#3c12a8682405>> accessed on 28 September 2018.

<sup>126</sup> *ibid.*

<sup>127</sup> Ochab (n 123).

<sup>128</sup> David Akerson, ‘The Comparative Cost of Justice at the ICC’ (DJILP, 26 March 2012) <<http://djilp.org/1877/the-comparative-cost-of-justice-at-the-icc/>> accessed on 29 September 2018.

From the data here, it can be observed that ICC is relatively spending more on its cases. In addition, every year's proposal for a budget is higher than the previous ones and each year this has been one of the major contentious issues.<sup>129</sup>

Further, ICC is criticized for not only being expensive but also for delaying cases.<sup>130</sup> As the famous saying by William Gladstone (British politician who lived from 1809-1898) goes 'justice delayed is justice denied', prolong due process affects the victims as well as the rights of the accused. A very good example is the *Lubanga* case: it took 10 years for Thomas Lubanga to be convicted.<sup>131</sup> Financial constraint, non-cooperation of States, the investigation process and the witness protection system added together will make it difficult for the court to finish up its cases in a timely manner.<sup>132</sup> This delay will create mental and moral disturbances to the victims and will violate the accused's human rights.<sup>133</sup>

Some victims in South Kivu in DRC had this to say on the delay of cases by the ICC; '... The ICC has no impact as the perpetrators of crimes sought by the ICC are running free... The barbarous acts are continuing, in particular, the burning of homes, killings and massacres... and that so far no one has been arrested, and the trial will be a long and slow process.'<sup>134</sup>

In the above note, general challenges that are being faced by the other international crimes (or by the ICC) have been examined. Giving full attention to each of these challenges without underestimating their effects and trying to solve them in order to create a better international criminal system in general, and a successful atmosphere for the prosecution of the COA, in particular, is important. In the next section, possible specific challenges that will be

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<sup>129</sup> Niklas Jakobsson, 'The 2016 ICC budget - more money, more problems?' (Justice Hub, 17 September 2015) <<https://www.justicehub.org/article/2016-icc-budget-more-money-more-problems>> accessed on 29 September 2018.

<sup>130</sup> Vedastus Lukiko, 'Delay of Justice in International Criminal Cases' (LLB thesis, University of Mzumbe, 2013) 8.

<sup>131</sup> Owen Bowcott, 'Thomas Lubanga conviction: why did it take so long?' *The Guardian* (London, 14 March 2012) <<https://www.theguardian.com/law/2012/mar/14/thomas-lubanga-international-criminal-court>> accessed on 29 September 2018.

<sup>132</sup> Lukiko (n 130) 7-14.

<sup>133</sup> *ibid* 12-14.

<sup>134</sup> *ibid* 14.

encountered when prosecuting the COA, in addition to the aforementioned general challenges, will be examined.

### **3.3.2 Specific Challenges**

These categories of challenges are the possible challenges that should be expected to be encountered by the ICC when prosecuting the COA specifically.

#### **3.3.2.1 The Problem with ICC's Jurisdictional Application on the COA**

As mentioned earlier, the debate on the jurisdictional application of ICC on the COA started since the adoption of the Rome Statute, and it continued to exist at the Kampala Conference, then at the negotiating conference in New York where the resolution for its activation was adopted in consensus, i.e. it went from Rome (1998) to Kampala (2010) to New York (2017). Currently, even after the 2017 resolution for the activation,<sup>135</sup> there is still ambiguity as to the jurisdictional boundary of the ICC on the COA.<sup>136</sup>

The question that divided the States after the Kampala Agreement was whether or not the normal jurisdictional regime should apply to the COA, i.e. whether or not ICC has a jurisdiction on the nationals of a State Party to the Rome Statute that has not ratified the Kampala Agreement and has not opted out, but who are alleged to have committed the COA on the territory of a State that has ratified the agreement.<sup>137</sup>

The 2017 Resolution adopted the narrow view of the States which argued for the court not to exercise its jurisdiction on the nationals of the State Parties that have not ratified the Kampala Agreement, instead of the wide view that argued for the court to exercise its jurisdiction on the nationals of all State Parties regardless of their ratification status, unless they have opted

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<sup>135</sup> ICC-ASP Resolution on the Activation of the jurisdiction of the court over the crime of aggression (adopted at the 13th plenary meeting, on 14 December 2017, by consensus) Resolution ICC-ASP/16/Res.5.

<sup>136</sup> Dapo Akande, 'An Analysis of why the ICC does not have Jurisdiction over the Crime of Aggression Committed by Nationals of ICC Parties which have not Ratified the Kampala Aggression Amendments' (2018) ICC Forum on Aggression Debate, (2018) <[https://iccforum.com/aggression#Akande\\_ref30](https://iccforum.com/aggression#Akande_ref30)> accessed on 4 October 2018.

<sup>137</sup> *ibid.*

out.<sup>138</sup> The resolution also added a paragraph that stated about the judicial independence of the judges of the court on this matter.<sup>139</sup> According to Dapo, this last paragraph was added ‘by those States that take the wide position, as a reminder that ultimately the question of who is subject to the court’s jurisdiction is one for the court to decide’.<sup>140</sup>

Even after it seemed that the debate over jurisdiction had finally come to an end because of the consensus adoption of the resolution that rooted for the narrow view, some States that supported the wide view still did not abandon their views, and they immediately, after the adoption, made their statements that they still stand with their wide view and they only voted ‘yes’ so that they would not be seen as that State who was against the development of the international criminal justice system.<sup>141</sup> From this incident, it can be seen that the jurisdictional issue is still alive. Hence, what will happen next? What will be the fate of this issue? This will inevitably bring a challenge to this crime.

Currently, two arguing views exist on the legal effect of this resolution and on what the court must do regarding this issue.<sup>142</sup> The first one argues that the narrow view should strictly be applied by ICC, because the resolution that is adopted by consensus is a subsequent agreement of the Parties to the Rome Statute or it amounts to a subsequent practice which establishes an agreement of the Parties to the treaty regarding its interpretation according to Articles 31 3(a) and (b) of the VCLT, and therefore it is indeed binding.<sup>143</sup>

On the other hand, the second one argues that such an agreement or practice is only one of the several factors that the interpreter is to consider in applying Article 31 of the VCLT and it is not binding.<sup>144</sup> Further, they stated that according to the recent view of the ILC, ‘The interpreter must give appropriate weight to such an interpretative resolution under Article 31

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<sup>138</sup> Activation Resolution (n 135) paragraph 2.

<sup>139</sup> *ibid* paragraph 3.

<sup>140</sup> Akande (n 136).

<sup>141</sup> *ibid*.

<sup>142</sup> *ibid*.

<sup>143</sup> *ibid*.

<sup>144</sup> *ibid*.

paragraph 3 (a), but not necessarily treat it as legally binding'.<sup>145</sup> Dapo Akande stated in his article that 'While the court may not regard the resolution as binding, the resolution adds weight to the view that the narrow position is the correct interpretation to be given to the Rome Statute'.<sup>146</sup> He then argued for the reasons why the ICC has no jurisdiction on the nationals of the State Party to the Rome Statute that has not ratified the Kampala Agreement by stating that according to Article 40 (4) of the VCLT 'unless otherwise provided in a treaty, an amendment to a treaty does not bind a non-accepting State and cannot remove the rights of Parties to the original treaty that have not accepted the amendment' (consent based argument), and he said that Article 121(5) confirms this notion and that we should interpret the case of ICC's jurisdiction in this manner.<sup>147</sup>

An issue that seemed to be resolved on the face still has a bit of controversy that will bring a challenge to the court in implementing its jurisdiction, and as a result, State Parties that are opponent to the view that the court will choose, will most likely might not cooperate with it.

### **3.3.2.2 The Problem with ICC's Definitional Application on the COA**

After State Parties have agreed upon the definition of the COA, there existed criticisms stating that it has gaps and that they should be addressed carefully before they put a challenge on the crime's prosecution.

- ❖ The Leadership element of the crime; COA is a crime of leaders or those who are in a position of effective control over the political or military action.<sup>148</sup> Questions were raised on whether liability is only for those in higher positions, or should smaller officials (whether or not they were masterminds) and private/corporate individuals (business leaders in the private military and security sectors, religious or industrial leaders)<sup>149</sup> who

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<sup>145</sup> *ibid*; International Law Commission, Report on the Work of the Sixty-Eighth Session (2016) Chapter VI Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/71/10, Draft Conclusion 11 at 231 paragraph 38.

<sup>146</sup> Akande (n 136).

<sup>147</sup> *ibid*.

<sup>148</sup> Kampala Resolution (n 44) art 8bis (1).

<sup>149</sup> Robert Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future?' (2010) GJIL 722-723.

are part of the crime be included as well.<sup>150</sup> In other words, it has been commented that the sole focus on leaders may ignore other main participants that contributed equally to the leaders, or even higher than them.

- ❖ The Statehood element of the crime; COA occurs when a State uses an armed force against the sovereignty, territorial integrity or political independence of another State.<sup>151</sup> Comments were given that the definition solely focuses on State actors, excluding non-State actors.<sup>152</sup> It was stated that aggressive warfare these days is not only being fought by State actors but non-State actors like Al Qaeda, Boko Haram, the Lord's Resistance Army (LRA), Al-Shabab etc. are being part of them.<sup>153</sup>
- ❖ Non-inclusiveness of the 'Cyber Warfare' notion to the definition; cyber warfare is defined as 'an action taken to undermine the functions of a computer network for a political or national security purpose in which its effect is equivalent to an armed attack'.<sup>154</sup> Example for this might be the usage of a computer network by a State or non-State actor to undermine the democratic process and influence an election outcome of another State.<sup>155</sup> It is commented that these kinds of acts should be included within the ambit of the court as they are an updated/computerized versions of aggression (Cyber Aggression).
- ❖ The vague stance of the definition on the notions of Self-defense and Humanitarian Intervention (Responsibility to Protect) as an exception to the acts of aggression.<sup>156</sup> Mathew has stated that these issues are going to inevitably re-emerge when the first

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<sup>150</sup> Rebecca F. Green, Federica D'Alessandra and Juan P. Calderon-Meza, 'Accountability for the Illegal Use of Force – Will the Nuremberg Legacy Be Complete?' (2017) HILJ 4-5; MacKennanGraziano and Lan Mei, 'The Crime of Aggression under the Rome Statute and Implications for Corporate Accountability' (2017) HILJ 56-61.

<sup>151</sup> Kampala Resolution (n 44) Article 8bis (2).

<sup>152</sup> David Scheffer, 'The Missing Pieces in Article 8bis (Aggression) of the Rome Statute' (2017) HILJ 83-84.

<sup>153</sup> *ibid.*

<sup>154</sup> Oona A. Hathaway and others, 'The Law of Cyber-Attack' (2012) Vol. 100:817 Yale.Edu 833.

<sup>155</sup> Scheffer (n 152) 84-85; Green, D'Alessandra and Calderon-Meza (n 150) 5.

<sup>156</sup> Jennifer Trahan, 'In Defense of Humanitarian Intervention' (2017) *Opinio Juris* <<http://opiniojuris.org/2017/04/19/in-defense-of-humanitarian-intervention/>> accessed on 14 October 2018; Kevin Jon Heller, 'Why Unilateral Humanitarian Intervention is illegal and potentially criminal' (2017) *Opinio Juris* <<http://opiniojuris.org/2017/04/20/against-unilateral-humanitarian-intervention-and-why-it-can-be-criminal/>> accessed on 14 October 2018.

aggression case comes in front of the ICC, and he suggested that acts that are consistent with the UN Charter must not qualify as an aggression, and in addition, the ‘Manifest Violation’ threshold might be used as a standard for the inclusion of these exceptions even though it is an uncertain standard on its own.<sup>157</sup> In addition to being an unclear standard, the threshold is also seen as a problematic area by making the court to focus only on grave circumstances, leaving the lesser ones untouched.<sup>158</sup>

### **3.3.2.3 Restricted Jurisdictional Application of the Kampala Agreement**

UN has 193 member States (only two States being non-members) almost achieving global participation.<sup>159</sup> ICC has 123 member States achieving a bit of a lower global reach. Among these State Parties to the Rome Statute, 36 member States are the only ones who have ratified the Kampala Agreement agreeing for the court to have its jurisdiction on them regarding the COA.<sup>160</sup> This number is less than 30% of the total number of State Parties.

State Parties decided for the court to exercise its COA jurisdiction only on those States that have ratified the Kampala Agreement and not on those State Parties that have not ratified.<sup>161</sup> Hence ICC has jurisdiction on 36 States.

The only way it can have its jurisdiction on the States who have not ratified the agreement and on the non-State Parties to the Rome Statute is by the UNSC referral system.<sup>162</sup> Although this system, at first, seems to give the court a wide reach on the COA, because of the political challenge of the UNSC that we have mentioned earlier on the general challenges section, it is very much difficult for the court to reach a large number of States. Thus, chances of COA

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<sup>157</sup> Matthew Gillett, ‘The Anatomy of an International Crime: Aggression at the International Criminal Court’ (2013) SSRN 15.

<sup>158</sup> Keder Akman, ‘Challenges for the International Criminal Court and the Crime of Aggression - Jurisdiction, Immunity and Politics’ (LLM thesis, University of Stockholm 2013) 26.

<sup>159</sup> Partner perspectives (n 61).

<sup>160</sup> ‘Status of ratification and implementation’ (The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, 2018) [crime of aggression.info <https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/>](https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/) accessed on 15 October 2018.

<sup>161</sup> Activation Resolution (n 135).

<sup>162</sup> Kampala Resolution (n 44) article 15ter.

cases reaching the ICC smoothly without the obstacle of veto powers for personal political interests is hard to imagine.

### **3.3.2.4 The Complementarity Principle of ICC vis a vis the COA**

The Rome Statute provides for ICC to complement national courts unlike the *ad hoc* tribunals (ICTY and ICTR), in which they provided for the primacy principle (for them to have the priority in entertaining cases),<sup>163</sup> i.e. ‘...the Court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution...’.<sup>164</sup>

COA presupposes at least two sovereign states, i.e. the aggressor State and the victim State: as a result, we will have three scenarios where this crime can be prosecuted by national courts: 1) The aggressor State prosecuting its own nationals (before or after the change in government) 2) the victim State prosecuting the nationals of the aggressor State 3) a third-State Prosecuting the nationals of the aggressor State (by the principle of universal jurisdiction).<sup>165</sup> The second and the third scenarios, ‘one State’s national courts determining whether another State had committed an act of aggression’<sup>166</sup> was considered by the ILC (in its 1996 Draft Code of Crimes against Peace and Security of Mankind) to be against the international principle that provides for sovereigns (equals) not to have authority over one another (*‘Par in Parem Non Habet Imperium’*), and it was stated that it will have a negative effect on international relations and international peace and security.<sup>167</sup> Nonetheless, this justification by the ILC was not accepted by some, suggesting that ‘international legal norms have shifted away from absolute notions of State sovereignty’ and that national courts play a

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<sup>163</sup> Statute of the International Criminal Tribunal for Yugoslavia (adopted 25 May 1993) article 9 (2); Statute of the International Criminal Tribunal for Rwanda (1994) article 8 (2)

<sup>164</sup> Rome statute (n 3) article 17.

<sup>165</sup> Jocelyn Getgen Kestenbaum, ‘Closing Impunity Gaps for the Crime of Aggression’ (2016) CJIL 75-76; Jennifer Trahan, ‘Is Complementarity the Right Approach for the International Criminal Court’s Crime of Aggression? Considering the Problem of “Overzealous” National Court Prosecutions’ (2012) CILJ 587-588.

<sup>166</sup> Kestenbaum (n 165) 73.

<sup>167</sup> *ibid* 72-74; Beth Van Schaack, ‘Par In Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (2012) JICJ 1-5.

huge role in combating impunity.<sup>168</sup> The Kampala Agreement took the approach that is opposite to ILC's and accepted for the court to complement national courts for the COA.<sup>169</sup>

Some, besides agreeing with ILC's report, they also stated other challenges of the complementarity principle. They stated that since aggression is a leadership crime, the issue of immunity will emerge.<sup>170</sup> Immunity is accorded to leaders and this will hinder the prosecution of one's State official in another State's court.<sup>171</sup> If it passes this challenge, obtaining evidence by one State from the aggressor's State is challenging because access to political information would be hard as it involves national secrets (classified information).<sup>172</sup> Even after they have passed procedural obstacles, judges of the other State may have to face the highly political nature of aggression.<sup>173</sup>

Nonetheless, according to Jennifer, all of the above scenarios can be put under the ambit of ICC's jurisdiction being covered by the words 'unwilling' and 'unable', and the scenarios that are out of its ambit are the scenarios where the victim State or third State that has personal interest in the prosecution prosecute the national of an aggressor State.<sup>174</sup> In these scenarios, the courts will be 'overzealous' or 'all too willing' to prosecute the case; in other words, it will be victor's State justice which will go against the fair trial rights of the accused making ICC a better venue for this particular case.<sup>175</sup> She stated that this situation might also occur with the other core international crimes but it is not as significant when compared to aggression cases.<sup>176</sup>

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<sup>168</sup> Kestenbaum (n 165) 73-74.

<sup>169</sup> *ibid* 74.

<sup>170</sup> Itumeleng Catherine Moutloali, 'Challenges Facing the Prosecution of The Crime of Aggression' (LLM thesis, University of Pretoria 2012) 38 and 49-60.

<sup>171</sup> Julie Veroff, 'Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward' (2016) YLJ 757.

<sup>172</sup> *ibid* 756.

<sup>173</sup> *ibid* 758; Kestenbaum (n 165) 75.

<sup>174</sup> Trahan, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions' (n 165) 586-594.

<sup>175</sup> *ibid* 590-592.

<sup>176</sup> *ibid* 592-594.

### **3.3.2.5 Challenge of Equality of States before the Law**

As we have seen earlier, the three permanent members of the UNSC (U.S, Russia, and China) are not members of the Rome Statute and the other two permanent members (the UK and France) are members of the Rome Statute but were now found to be against criminalizing aggression by not ratifying the Kampala Agreement and by consistently arguing for ICC's jurisdiction not to apply on the States that have not ratified it (they wanted themselves to be out of its jurisdiction).<sup>177</sup> Their view was adopted by the Activating Resolution (2017). They made this 2017 meeting intense and they influenced others into adopting the narrow view for the sake of only activating the crime.<sup>178</sup>

There was already lack of equality before the law for the three permanent members and for other non-members as to the other international crimes, but now, all of the permanent members, other non-members and even 70% of State Parties are not under ICC's jurisdiction for the COA, as a result, there exists a 'serious lack of equality before the law' as to this crime.<sup>179</sup> The law is not only applying unequally on all States in our world, but it is also applying unequally on citizens of the same State (e.g. UK's soldiers are accountable for War Crimes, but their leaders who sent them to an illegal war are not accountable because of UK's ratification status (has not ratified)).<sup>180</sup> This will jeopardize and weaken the international criminal justice system. This sends out a message that the Rule of Law works only for the weak/poor States and not for the powerful and politically manipulative ones.

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<sup>177</sup> Owen Bowcott, 'ICC crime of aggression comes into effect without key signatories' *The Guardian* (London, 17 July 2018) <<https://www.theguardian.com/law/2018/jul/17/icc-crimeof-aggression-comes-into-effect-without-key-signatories-uk-law-war>> accessed on 20 October 2018; Catherine Gegout, 'The crime of aggression, the UK and France: time to show leadership on the principles of international law at the International Criminal Court' (Open Democracy, 2 May 2018 ) <<https://www.opendemocracy.net/can-europe-make-it/catherine-gegout/crime-of-aggression-uk-and-france-time-to-show-leadership-on-pri>> accessed on 20 October 2018.

<sup>178</sup> Ferencz (n 117).

<sup>179</sup> *ibid*; Owen Bowcott, 'UK calls for 'greater clarity' on ICC's new crime of aggression' *The Guardian* (London, 15 November 2017) <<https://www.theguardian.com/law/2017/nov/15/uk-calls-for-greater-clarity-on-iccs-new-of-aggression>> accessed on 21 October 2018.

<sup>180</sup> Ferencz (n 117).

### **3.4 Conclusion**

Activating ICC's jurisdiction on the COA will be promoting reconciliation that leads to a lasting peace, redressing victims of aggression which were ignored in the past, preventing human right violations that will occur as a result of this crime, and preventing future crimes committed by the criminal him/her self by way of incapacitation, as well as by the society (especially leaders) by way of educating the unacceptable nature of the crime and by creating fear of individual consequence.

Nonetheless, the prosecution process will not be easy as general challenges, like political and financial influences on the court, the sole dependency of the court on the cooperation of States to implement its activates, problems of obtaining evidence etc., as well as specific challenges like, the existing debates on the definition and on the jurisdictional application of ICC on the crime, jurisdictional restriction of the Kampala Agreement, lack of equality of States before the law etc., will inevitably occur. Hence we must find different solutions for the different possible challenges in order to smoothly acquire the opportunities of the prosecution.

## **Chapter Four**

### **Conclusions and Recommendations**

#### **4.1 Conclusions**

Individuals who were responsible for the COA have been prosecuted internationally for the first time after WWII by the Nuremberg and Tokyo tribunals, respectively. Afterward, no other international tribunal made an effort to prosecute individuals accused of this crime due to the fact that the international community could not reach an agreement regarding the exact definition of the COA. ICC came into existence in 1998 in the midst of this confusion revolving around the COA. State Parties attempted to solve the problem once and for all in order to incorporate it in the Rome Statute of the ICC. Nevertheless, the disagreements prevailed and they decided to leave this crime dormant or suspend its activation until they can agree on its definition and on ICC's jurisdictional application on it. Consequently, State Parties agreed for the first time on the definition of the crime and on the jurisdictional conditions in 2010 at the Kampala Conference twelve years after the adoption of the Rome Statute of the ICC. However, they further delayed its activation date to be sometime after 1 January 2017. Afterward, State Parties met at New York in December 2017 and agreed to activate it starting from 17 July 2018 (on the 20<sup>th</sup> anniversary of the court). Hence for the first time since the prosecutions made by the Nuremberg and Tokyo trials, an international criminal court has the mandate to prosecute the COA.

This activation creates a permanent system of individual accountability by ending impunity on the COA. From this moment onwards, States are protected from aggressor States, which will promote peace and security by providing an atmosphere for post-conflict reconciliations and it will also establish the rule of law over this crime. Moreover, it will prevent human rights violations and suffering by deterring future crimes as a result of fear of consequences and by way of teaching the offender as well as the society. It will redress victims of this crime in addition to providing a fair trial for the accused, and it will rehabilitate the offender to become a good member of the society. These are the opportunities of the activation in realizing international criminal justice. Unfortunately, challenges will be encountered when prosecuting this crime hindering the obtainment of these opportunities.

ICC already suffers from different challenges which will directly affect the prosecution of the COA, i.e. the problem of universality; restricting it not to reach every State obstructing the rule of law across the world. Even worse, it suffers from political and financial influences exerted on it. It has been criticized for being dependent on the wills of the most powerful States and becoming a tool to achieve their political interests. Further, since it does not have its own enforcement body, it solely depends on States' cooperation, and States have been seen to be reluctant to cooperate with ICC over the course of years. This lack of independence and impartiality will jeopardize its entire objective. In addition, it is facing a challenge from the African continent. States in Africa made an agreement not to cooperate with ICC and they established a strategy to withdraw from it collectively because they believe that it is targeting only Africa by having a racist agenda. They stated that it is exercising a selective prosecution towards the African States. Moreover, it faces challenges when obtaining evidence from the crime scene and protecting victims and witnesses from threats, in addition to being expensive and prone to delay.

Besides these general challenges that will be encountered by the COA, other specific challenges exist, adding up to the tension. First and for most, the confusion on the jurisdictional application of the ICC on the COA still exists because some States, even after they adopted the resolution of the activation, have been giving statements saying that they still oppose the agreed upon paragraph in the Activating Resolution. The question of 'what is going to be the legal effect of this incident' is one of the main challenges. Moreover, confusion as to the interpretation of this crime's definition and ICC's further restricted global reach will pose an enormous amount of challenge on the crime.

Learning and being aware of all the possible challenges of the activation, will aid in creating a careful solution finding process, which will tackle the examined problems so that the opportunities can be harnessed smoothly.

#### **4.2 Recommendations**

Immediate solutions have to be given for the challenges that will possibly occur when prosecuting the COA. Unless these issues are resolved by taking appropriate measures from the beginning, they are bound to ruin the smooth obtainment of the promised advantages,

going against the very purpose of the activation. Then what is the whole use of activating it in the first place? It will be as if it is still dormant. Therefore, the researcher recommends the following points that are helpful to tackle these challenges.

- ❖ Attaining universal ratification by the ICC: ICC together with other intergovernmental organizations, NGOs, civil societies and the legal community, should put an even greater amount of effort than the past, in persuading non-signatory State including and especially focusing on the three permanent members of the UNSC to ratify the Rome Statute. Simultaneously, they must also work on the States that have not ratified the Kampala Amendment. Universality helps the court to have States under an obligation to cooperate with it and tackle the challenge of inequality of States before the law. In addition, it should also take strict enforcement measures (sanctions) to make sure of States' cooperation unlike in the past.
- ❖ Setting up criteria for the UNSC's referral mandate: UNSC's scope of authority on its referral mandate needs to be set up clearly in detail, in order to avoid the political influence exerted by the P5s. Specific standards and procedures have to be provided for this organ so as to offer consistency and predictability in its work, i.e. grounds for its actions have to be established to avoid ambiguities towards its decisions.
- ❖ Empowerment of the Court:
  - 1) In order to resolve the financial problems of the court and to relieve it from the dire manipulations of the member States who have a greater share in terms of financing it, the court should find other alternative and permanent financial sources besides the usual contributions made by the State Parties to the Rome Statute.
  - 2) Giving attention and following strict procedures when selecting cases; impartial selection so as to fight impunity across the world.
  - 3) Facilitating its obtainment of evidence by creating a bond with NGOs, civil societies, and better yet, with every single person in the world. Being constantly active in reaching out to the public by any means appropriate in order to create awareness by teaching everyone about the need to cooperate with ICC and how. States/Governments are usually reluctant to cooperate with ICC when they have something to hide, and it will be impossible to go through them to implement its

activities, hence going around them may come in handy. Educating people to record videos of atrocities and send it directly and immediately to the court, can be an example. In other words, being close to the public and creating a sense of security and belongingness (making everybody believe that they are part of the justice process) will create a positive outcome. This way, everyone becomes the police force for the ICC.

- 4) To apply an effective victim and witness protection system by reviewing the current approach is mandatory so as to avoid the fear of engaging ones' self with the court.

All of the above-mentioned recommendations together with the application of cost minimizing schemes for investigation would add value in combating the court's expensiveness and delays.

- ❖ Creating an all-inclusive, consistent platform for an in-depth discussion on the specific issues of the crime: The first step that should be taken is to have a face to face discussion between all stakeholders; the court, State Parties, civil society and the international legal community (academic scholars, practitioners etc.) should be given the opportunity to have continuous conversations about all of their possible concerns, in an organized and systematic manner. Every solution starts with an open and free discussion, i.e. the process of re-directing all the energy towards facing all the possible issues. Establishing regional and global departments that solely work on this issue is extremely important: e.g. AU and UN ('Research and Development department on the COA'), and these departments can provide the platforms.
- ❖ Publishing continuous reports on the agreed upon issues by the court: Creating a flow of communication between the court and the public about the court's view on the different issues avoids unnecessary confusion. E.g. interpretations made by the court on the definition.
- ❖ Amending the Statute so as to redress the complementarity Principle dilemma: Filling the gap that is created as a result of the activation by way of amendment helps address this problem. The issue of States being 'all too willing' to try aggressor State's suspects goes against the fair trial rights of the accused. The international criminal

justice system should not only focus on redressing the victims, but it should as well give an equal amount of effort in guarantying all the rights of the accused.



New York: Activation of ICC's Jurisdiction on the Crime of Aggression on December 2017.<sup>181</sup>

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<sup>181</sup> Photo is taken from ICC-CPI, 'Assembly activates Court's jurisdiction over crime of aggression' (15 December 2017) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>> accessed on September 2018

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