

## The Rough jurisdiction of the ICC with regard to Israel's aggression against Iran (13 June, 2025) (Original Research)

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(DOI): 10.22066/cilamag.2026.2069842.2797

Date Received: 28 Oct 2025

Date Accepted: 31 Jan 2026

### Abstract

The extensive aerial operation and armed attack by Israel against Iran on the 23rd Khordad 1404 [corresponding to June 13, 2025] may be characterized as a violation of the fundamental principle prohibiting the use of force, constituting an act and crime of aggression. Beyond other legal dimensions of the act of aggression, the purpose of this article is to examine the complex issue of the possible jurisdiction of the International Criminal Court (ICC) over the alleged committed crime, as well as the jurisdictional challenges facing this institution. While Iran's legal system lacks an appropriate normative and structural mechanism for applying complementarity jurisdiction concerning core international crimes, including the crime of aggression, the non-membership of both Iran and Israel in the ICC, the lack of willingness by Security Council (SC) to refer the situation to the ICC, and normative deficiencies regarding the acceptance of ad hoc declaration ( per article 12(3) of the Rome Statute) by Iran, render the ICC's exercise of jurisdiction difficult and even impossible. A question can be raised in this regard, does the ICC possess jurisdiction, pursuant to the principle of complementarity, to adjudicate upon the act of aggression committed by Israel against Iran? This article, after recounting the events, descriptively and analytically examines the possibility of the ICC exercising jurisdiction in light of trigger mechanism. Ultimately, it demonstrates that the ICC's jurisdiction is confronted with numerous and particular challenges, thus rendering it unable to exercise jurisdiction; an issue that both highlights the necessity of criminalizing core international crimes within domestic law of Iran, and indicates the fundamental reforms to the ICC's Statute, particularly concerning the role of the SC in activating the ICC's jurisdiction.

### Keywords

Israel aggression, Iran, ICC, complementarity jurisdiction, Security Council.

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## 1. Introduction

On June 13, 2025, Israel launched a large-scale aerial operations and armed attack against Iran which targeted energy and military infrastructure, assassinating senior military commanders, as well as residential areas and public services, including hospitals and relief centers. In this aggressive action, which lasted twelve days, civilians and civilian objects, including nuclear scientists and nuclear facilities under the supervision of the International Atomic Energy Agency (IAEA)- including sites in Qom, Arak, Natanz, and Isfahan- were attacked. More than a week later, the United States also entered the war by bombing three Iranian nuclear sites. The Iranian government spokesperson announced that the war casualties included 1062 martyrs and approximately 5800 wounded.<sup>1</sup>

Israel's prime minister, Benjamin Netanyahu, said as much in a televised address announcing the same day of the military operation in which he placed the nuclear issue front and center: "We struck at the heart of Iran's nuclear weaponization program."<sup>2</sup> In fact, Iran's nuclear threat was regarded as a basis for legitimate self-defense. While Israel has justified its attack based on the claim of preemptive self-defense, the legal requirements for self-defense under article 51 of the UN charter are not met. Moreover, no authorization for any defensive measure has been issued by security council. Therefore, Israel's actions constitute a flagrant violation of the fundamental principle prohibiting the use of the force under article 2(4) of the UN charter.

High- ranking officials of the Islamic Republic of Iran have emphasized the necessity of criminal prosecution measures against Israel acts of aggression. Speaking to top judicial officials on Wednesday, Ayatollah Khamenei stressed that "the collar of the criminal must not be released," urging long-term legal follow-up even if it takes decades.<sup>3</sup>

Iran's Deputy Foreign Minister for Legal and International Affairs, stressed that legal recourse is a central pillar of Iran's response to the aggression, describing the strikes as blatant breaches of the UN Charter and the principles of international law. "The perpetrators have already received a firm military response," he said. "Now, the focus is on legal accountability. Two comprehensive reports detailing legal violations—including the killing of children, women, and entire families—have been prepared and are in the final stages of documentation." He noted that the reports have been submitted to both the United Nations Security Council and other international

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1. <https://www.tasnimnews.com/fa/news/1404/04/25/3355981/>, last accessed August 10, 2025.

2. Operation Rising Lion: Israel's PM Announces Targeted Preemptive Airstrikes in Iran, available at: <https://www.americanrhetoric.com/speeches/benjaminnetanyahiranairstrikes.htm>, last accessed August 10, 2025.

3. Iran's Leader urges legal action over recent Israel-US aggression, praises national resolve, available at: <https://ifpnews.com/iran-leader-legal-action-israel-us-aggression-national-resolve/>. Last accessed august 11, 2025.

bodies.<sup>4</sup>

The central question is whether the ICC possesses jurisdiction to investigate and prosecute Israel's alleged act of aggression against Iran? Before addressing this question, the issue of describing the committed act and the jurisdictional limitations of domestic courts in Iran will be examined. Subsequently, it requires an analysis of the ICC's trigger mechanism. This study aims to examine the challenges and obstacles faced by domestic law of Iran and the ICC in investigating and prosecuting the crimes committed by Israel.

## 2. Aggression or Self-Defense?

One of the most important principles of international law is the prohibition against the use of force. Article 2(4) of the UN charter provides that a UN member state cannot threaten or use force against the territorial integrity or political independence of another state, or in any way that diverges from the purposes of the UN charter. Acts of aggression has not been defined in the UN charter. In 1974, the General Assembly adopted Resolution 3314 (XXIX), which contains a definition of aggression. This definition was accepted under international custom and practice,<sup>5</sup> as well as Article 8bis of the Rome Statute.

however, one of the purposes of the United Nations is to suppress acts of aggression in order to maintain international peace and security, Articles 1 and 39 infer that an act of aggression is contrary to the status quo of international peace and security. These articles suggest that states are under general obligations to refrain from committing an act of aggression Yet, the only relevant provision conferring legal obligations on states with respect to recourse to force is Article 2(4) of the UN Charter.<sup>6</sup>

Crime of aggression, as defined in Kampala, requires the commission of an “act of aggression” that “by its character, gravity and scale constitutes a manifest violation of the UN charter.<sup>7</sup> Article 8bis of the Rome Statute,<sup>8</sup> which criminalizes the crime of aggression, explicitly adopts the definition

4. Legal action against US-Israeli aggression underway: Iran deputy FM, July 30, 2025 available at: <https://www.tehrantimes.com/news/516254/Legal-action-against-US-Israeli-aggression-underway-Iran-deputy>, last accessed august 11, 2025.

5. Cherif Bassiouni, M., *Introduction to International Criminal Law: Second Revised Edition*, Martinus Nijhoff publisher: Leiden, Boston, (2014):150.

6. M.S. Wong, “*The crime of aggression and public international law*” Leiden university, the Netherlands: (2016): 19.

7. Antonios Tzanakopoulos and Akande Dapo, “The Crime of Aggression in the ICC and State Responsibility”, *Harvard International Law Journal* 58 (2017): 33.

8. Article 8 bis Crime of aggression: “For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

of aggression as outlined in the relevant UN General Assembly resolution<sup>9</sup> for characterizing acts of aggression. Pursuant to this article determination the crime of aggression necessarily entails the determination of an act of aggression. Thus, it can be argued that, under the trigger mechanism, the UN Security Council's interpretation of an act of aggression is also authoritative.

However, the determination of the crime of aggression falls within the jurisdiction of the ICC. Additionally, the jurisprudence of other international bodies, including ICJ in the case of existence of jurisdiction, in interpretation of the act of aggression may also be invoked.

The evaluation and legal determination of Israel's alleged act of aggression as well as its potential characterization as the crime of aggression depend on whether the objective elements of aggression under Article 8(1) bis of the ICC's statute is satisfied. Furthermore, Israel's claim of self-defense must be assessed in accordance with international legal standards.

### 2-1. Claim of Self-Defense

Israeli Ambassador, Danny Danon, at the Security Council session outlined the justifications for the military operation in the following terms: "Israel's strikes were preventative and carried out with "precision, purpose, and the most advanced intelligence available". The mission, he added, was clear, "dismantle Iran's nuclear progame, eliminate the architects of its terror and aggression and neutralize the regime's ability to follow through on its repeated public promise to destroy the State of Israel." Mr. Danon accused Iran of taking steps toward building a nuclear arsenal. He also criticized the international community for failing to act and rein in Tehran. "Israel did not act recklessly – we waited," he said. "This was an act of national preservation. It was one we undertook alone, not because we wanted to, but because we were left no other option."<sup>10</sup>

The Iranian government has not defined any official or legal policy aimed at the destruction of Israel; rather, it has consistently provided moral support to the Palestinian people. This stance has been continuous source of tension between the two sides. Iran has consistently emphasized regional peace and security, advocating for elections in Palestine as a fundamental solution. According to the Act of Confronting Hostile of Zionist Regime Against Peace and Security, foreign ministry shall follow up diplomatically and politically implementation of Islamic Republic of Iran's political project for Palestine, entitled "holding national referendum in Palestine land" which was registered to the UN with No. S2019/862. Senior Iranian officials have

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9. General Assembly resolution 3314 (XXIX) of 14 December 1974.

10. Security Council meets in emergency session over Iran-Israel conflict, amid strikes and counterstrikes, available at: <https://news.un.org/en/story/2025/06/1164401>, last accessed August 11, 2025.

consistently emphasized the implementation of the provisions of this law.<sup>11</sup>

However, as outlined in the introduction, the primary objective was the elimination of Iran's nuclear capabilities as a form of preemptive self-defense. The central question is whether this claim holds legal validity under international law?

Article 51 of the UN's charter recognizes the inherent right of self-defense under customary international law. It is sometimes suggested that the right of self-defense as recognized in the Charter is too restrictive for the modern age. The US 2002 National Security Strategy, with its references to preventive action, seemed to reflect such a view. Suggestions of this kind tend to overlook, or downplay, the potential role of the Security Council in authorizing States to use force preventively to avert terrorist threats.<sup>12</sup> Article 51 of the charter emphasizes the occurrence of an armed attack. It is evident that any ambiguity in the charter provisions must be interpreted in light of the established rules of interpretation governing international treaties. Under article 31(1) of the Vienna Convention on the Law of Treaties (1969), "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The obvious and ordinary meaning of the phrase "in the occurrence of an armed attack" can only serve to limit the right of self-defense to responding to an actual armed attack.<sup>13</sup> The International Court of Justice, as the principal judicial body of the UN, has likewise in several cases emphasized that self-defense requires the occurrence of an armed attack. For example, in the case of the US military attack against oil platforms of the Islamic Republic of Iran, the court acknowledged that the legal validity of this attack in the exercise of the US's right of defense depends on proving an armed attack has already occurred against the US.<sup>14</sup> The Court has recently stressed in this regard that, for the right of self-defense to be triggered, there must be an armed attack imputable to a foreign state.<sup>15</sup> "Relying on international custom in justifying preemptive self-defense is also not actually valid; claiming the formation of customary rule in preemptive self-defense is not considered as a legal obligation due to its

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**11.** Two-state solution will never lead to sustainable peace in region: Iran FM, available at: <https://nournews.ir/en/news/194783/Two-state-solution-will-never-lead-to-sustainable-peace-in-region-Iran-FM>, published date 10/19/2024. Lasts accessed, August 13, 2025.

**12.** Michael Wood, "International law and the use of force: what happens in practice?" *Indian journal of international law* 53, (2013): 355.

**13.** Hossein Sharifi Tarazkahi, Victor Barin Chaharbakhsh, "Preventive self-defence in 21<sup>st</sup> century", *public Law Studies Quarterly*, 40 (2013): 17.

**14.** Case Concerning Oil Platforms (Iran v United states of America), ICJ Reports, 2003, para.16.

**15.** *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, of 9 July 2004, para. 139.

non-repetition in the international arena."<sup>16</sup>

Moreover, it should be noted that Article 31 (para. 1 lit. c) of Rome Statute refers to the notion of self-defense as a possible ground excluding criminal responsibility under the Statute under specific narrow circumstances. To the extent that military force is being used within the limits of article 51 of the Charter respectively customary international law, such action does not amount to a violation of the Charter of the UN at all, and even less a manifest violation thereof which, therefore, *ipso facto*, excludes such action to even constitute an act of aggression within the meaning of article 8bis para. 2.<sup>17</sup>

Iran is a party to the Nuclear Non-proliferation Treaty (NPT), and its nuclear activities are subject to the supervision of the IAEA. According to the Agency's official reports, there has been no derogation of Iran's nuclear activities from peaceful purposes. Iran has consistently expressed its willingness to engage in dialogue in order to clarify any ambiguities concerning its nuclear activities. Indeed, prior to Israel attack, Iran was actively engaged in talks with the US. Therefore, Iran has neither launched an armed attack against Israel nor posed an imminent threat to it. Therefore, Israel's claim of self-defense is entirely unfounded. It should be noted that the unilateral, subjective and broad interpretation of article 51 of the charter by certain western States serve the pursuit of their particular interests contravenes the well-established rules of treaty interpretation in international law. Such an interpretation has not been approved by state practice nor has it been recognized in international judicial precedent.

## 2-2. Analysis on Israel's crime of aggression

As noted above, the crime of aggression, under article 8bis of the Rome Statute, is legally contingent upon the commission of an act of aggression. In other words, determining whether a defendant perpetrated the crime of aggression depends on a finding of a State's act of aggression, as only states can violate the UN Charter.<sup>18</sup> Article 8bis para. 1 provides that certain 'acts of aggression', namely those which due to their character, gravity and scale, constitute manifest violations of the Charter of the UN, entail individual criminal responsibility under the Court's statute. Therefore, "The *actus reus* of the crime of aggression under Article 8bis of the ICC Statute essentially consists of the individual conduct of "planning, preparation, initiation or

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16. Mohammad Khorshidi Attar and Seyed Hesamadin Lesani, "A Critical View Toward US Claim of Preemptive Self-Defense in the Assassination of General Qasem Soleimani", *Iranian Journal of International and Comparative Law* 1, 1 (2023):93.

17. Andreas Zimmermann and Elisa Freiburg, "Article 8bis, crime of aggression", in: *The Rome Statute of the international criminal court A Commentary*", Third edition, eds. Triffterer/Ambos, (Nomos, C.H.Beck.Hart 2016), 586.

18. Jocelyn Getgen Kestenbaum, "Closing Impunity Gaps for the Crime of Aggression", *Chicago Journal of International Law*, 17, 1 (2016): 62.

execution” and the State “act of aggression”.<sup>19</sup> In practice, the group of people exercising sufficient control over or directing the political or military action of a State, in order to be covered by the leadership requirement as set out in article 8bis para. 1, encompasses heads of States and governments, such as presidents and prime ministers, but also military leaders like ministers of defense or generals commanding the armed forces.<sup>20</sup> The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the UN.

The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.<sup>21</sup>

Israel's attacks represent a flagrant violation of fundamental principles of international law, a blatant act of aggression and a violation of *jus cogens* norms—peremptory rules of international law from which no derogation is permitted.”<sup>22</sup> Therefore, extensive attack against Iran by Israel, which is a manifest violation of the principle of the prohibition of the use of force under article 2(4) UN charter and in accordance with General Assembly resolution (3314) constitutes an act of aggression. The perpetrator's awareness of the manifest violation of the charter is necessary to satisfy the *mens rea*. Prime Minister of Israel explicitly stated that "Regime change in Iran could be a result of Israel's military attacks on the country."<sup>23</sup> Such pronouncement, combined with the targeting of military command, structures and facilities, scientists, and even the attempted targeting of certain political officials (which resulted in failed assassination attempts) collectively pursued with the objective of overthrowing the Iran's government, constitute a manifest violation of the UN Charter. Accordingly, under article 8bis, the crime of aggression has been committed.

### 3. Iran's Complementary jurisdiction

The preamble of the Rome Statute and article 1 refer to the principle of complementarity and emphasizing that the ICC which is established under this Statute shall be complementary to national criminal jurisdictions.<sup>24</sup> The

19. Annegret Hartig, *Making Aggression A Crime Under Domestic Law On The Legislative, Implementation of Article 8bis Of The ICC Statute*, (The Hague, Springer, 2023), 108.

20. Robert Heinsch, “The Crime of Aggression After Kampala: Success or Burden for the Future?” *GoJIL* 2, (2010): 722.

21. Elements of crimes, article 8bis, available at: <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>

22. UN experts condemn Israeli attack on Iran and urge end to hostilities, available at: <https://www.ohchr.org/en/press-releases/2025/06/un-experts-condemn-israeli-attack-iran-and-urge-end-hostilities>, 20 June 2025, last accessed August 12, 2025.

23. Netanyahu says regime change in Iran could be result of Israel's attacks, available at: <https://www.reuters.com/world/middle-east/netanyahu-says-regime-change-iran-could-be-result-israels-attacks-2025-06-15>, last accessed, August, 14, 2025.

24. Rome Statute of the International Criminal Court, Preamble, para 10, available at: [//www.icc-cpi.int/sites/default/files/RS-Eng.pdf](https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf).

principle of complementarity of the ICC operates within a framework aimed at balancing two foundational approaches in international law: the international commitment in ending international crimes, and the necessity of respecting state sovereignty, which grants states primary jurisdiction over such crimes.<sup>25</sup> National courts are not subject to the limitations faced by the ICC, they have access to evidence and suspects, and benefit from adequate funding. Therefore, national courts retain primacy in prosecuting grave international crimes.

Luis Moreno Ocampo, the former prosecutor of the ICC, has made it clear that the absence of trials before the ICC would be a major success,<sup>26</sup> thereby optimistically predicting the ability of national criminal justice systems to pursue their functions sufficiently.

### 3-1. Jurisdictional Immunity Bar

Despite the jurisdictional competence conferred upon domestic courts by the principle of complementarity, significant impediments, most notably the immunities granted to senior foreign officials, impede the exercise of jurisdiction over them in accordance with international law. The crime of aggression constitutes what is known as a ‘leadership crime’ that is committed on behalf of the State. The leadership position of the perpetrator and the nature of the crime thus raise the question of whether personal and functional immunity could be an obstacle to prosecuting the crime of aggression in a court other than a court of the aggressor state.

Under modern international law, the principle of *par in parem non habet imperium* [equals do not have authority over one another] is the starting point for the field of immunities.<sup>27</sup> Although international criminal tribunals—from Nuremberg to the ICC—have moved towards abolishing immunity, it, within national jurisdictions, remains an impediment to exercising jurisdiction.

The International Law Commission (ILC) has argued that the determination by a national court of one State of the question of whether another State has committed aggression would be contrary to the fundamental principle of international law, i.e. *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.<sup>28</sup>

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25. Heybatollah Najandymanesh and Vahid Bazzar, “The Complementary Jurisdiction of The International Criminal Court and the Crime Of Aggression”, *Teaching Of Criminal Law* 14 (2017) 204.

26. David Bosco, rough justice: *The International Criminal Court In A World Of Power Politics*, (Oxford: Oxford university press, 2014), 88.

27. James Crawford, *Brownlie’s Principles of Public International Law*, 9th ed. (Oxford:Oxford University Press, 2019), 433.

28. ILC, Commentary to the Draft Code of Crimes against the Peace and Security of Mankind, in: Yearbook of the International Law Commission, 1996, Vol. II, Part Two, Article 8, commentary 14, p. 30;

In the *Arrest Warrant* case, the ICJ held that, like incumbent heads of state or heads of government, incumbent foreign ministers are inviolable abroad and enjoy absolute personal immunity from the criminal jurisdiction of foreign states, even where the prosecution concerns international crimes.<sup>29</sup>

Personal immunity or *ratione personae* creates a bar to domestic prosecution of a sitting head of State, head of government, or minister of foreign affairs for any crime under international law during their term of office which encompasses both public and private acts. Therefore, this type of immunity is absolute in nature. The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those state officials who represent the state at the international level.<sup>30</sup> Some domestic courts, such as Switzerland, have concluded that the personal immunity of the *troika* extends to the incumbent defense minister.<sup>31</sup>

Functional immunity or immunity *ratione materiae* may also preclude the exercise of jurisdiction by domestic courts. A much larger group of state officials, including the high-ranking officials to whom reference has just been made, enjoy *functional* immunity, namely in so far as they act on behalf of and for the account of the state. This immunity continues to apply even after the official leaves office for acts committed while in office.<sup>32</sup> This conduct-based immunity may be relied on by former officials in respect of official acts performed while in office as well as by serving State officials. It may also be relied on by persons or bodies that are not state officials or entities but have acted on behalf of the State.<sup>33</sup> The scope of this immunity is broader than personal immunity in terms of the persons covered and its duration, while the inclusion of international crimes under its coverage remains subject to ongoing debates. From this perspective, an international crime is not considered a state act eligible for immunity, but rather an act that constitutes a violation of the *jus cogens*, and as such, is subject to an absolute prohibition.

In 2017, during its work on the topic of Immunity of State officials from foreign criminal jurisdiction, the ILC adopted the text of Article 7 with the

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ILC, Report of the Seventy-third session, UN Doc. 10 (2022), p. 238, paragraph 21 (Immunity of State officials from foreign criminal jurisdiction).

29. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judgment of 14 February 2002, para. 54.

30. Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", *The European Journal of International Law* 21, 4 (2011) 818.

31. Switzerland, Swiss Federal Criminal Court, 25 July 2012, Nezzar, paragraph 5.4.2., [https://www.asser.nl/upload/documents/20130221T040104-Nezzar\\_Judgm\\_Eng\\_translation%2025-07-2012.pdf](https://www.asser.nl/upload/documents/20130221T040104-Nezzar_Judgm_Eng_translation%2025-07-2012.pdf), available at: Challenges in prosecuting the crime of aggression: jurisdiction and immunities, Advisory report no. 40, 12 September 2022, p.10.

32. *Ibid.*, p. 6.

33. Akande *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 825.

list of crimes under international law in respect of which functional immunity is not applicable. This list encompasses the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance. The ILC explained the omission of the crime of aggression in the list of crimes to which functional immunity does not apply as follows: The “prosecution of State officials for the crime of aggression by other States would affect the sovereign equality of States”.<sup>34</sup>

If foreign courts do not have jurisdiction over persons suspected of the crime of aggression, functional immunity plays no role in the prosecution of this crime. However, if it is accepted that the crime of aggression can be prosecuted by other States, there seems to be no reason why the crime should be treated differently from other international crimes in respect of immunity.<sup>35</sup> Unlike the International Law Commission, functional immunities are inapplicable under customary international law with respect to the crime of aggression.<sup>36</sup>

Ultimately, beyond disagreements over functional immunity, the issue of immunity-particularly personal jurisdiction over certain senior Israeli officials such as the Prime Minister, the Minister of Foreign Affairs, and the Minister of Defense- may impede the exercise of jurisdiction by Iran’s domestic courts for a specific period. This is an issue that can similarly be invoked by Iranian officials.

### 3-2. Complementarity and the crime of aggression

Prior to Kampala Conference, the international law commission did not recognize domestic court's jurisdiction over the crime of aggression because it considered adjudication of this crime contingent upon a prior determination of an act of aggression, a finding that inherently falls beyond the domestic judicial jurisdiction. According to the commission's view, as it has been pointed out in the previous sections<sup>37</sup> the principle of legality is also an issue.

The negotiations in the Special Working Group on the Crime of Aggression and the Preparatory Committee did not tackle contentious issues related to the complementarity mechanism and aggression. They focused on the definition and the exercise of jurisdiction over aggression with an aim to indirectly frame the ambit of domestic prosecutions.<sup>38</sup> The only direct tackling of the issue of aggression and complementarity was through

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34. The Work of the International Law Commission on immunity of State Officials from Foreign Criminal Jurisdiction, 2017b, p.172. available at: [http://legal.un.org/ilc/guide/4\\_2.shtml](http://legal.un.org/ilc/guide/4_2.shtml). last accessed August 20, 2025.

35. Swiss Federal Criminal Court, *Advisory report no. 40*, 12 September 2022, p. 12.

36. Hartig Anngret, *Ibid.*, p. 404.

37. see footnote 30.

38. Nabil Jurdia Nidal, “The Domestic Prosecution Of The Crime Of Aggression After The International Criminal Court Review Conference: Possibilities And Alternatives”, *Melbourne Journal of International Law*, 14 (2013): 8.

paragraph 5 of annex III which declares that: “It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State”.<sup>39</sup> There is no general consensus among legal scholars regarding the validity of this document. The majority consider the provisions of Rome Statute superior to those of the aforementioned document, and consequently affirm the applicability of the complementarity principle to the crime of aggression.<sup>40</sup> As stated, the ICC's complementary jurisdiction is affirmed in both the preamble and article 1 of statute, this principle constitutes the most fundamental norm governing the court's operations, firmly established in both legal doctrine and the court's jurisprudence. Furthermore, article 121 of the Statute explicitly limits any amendments to article 5 to 8, excluding article 1 which enshrines the complementarity principle. Overall, it can be concluded that domestic courts also possess the jurisdiction to prosecute the crime of aggression.

### 3-3. Mechanism of Iranian Domestic Law

The investigation and prosecution of the crime of aggression in national systems require the identification and definition of the crime in domestic laws. For example, numerous member states of the European Union, which have adopted the Kampala Amendment, have criminalized aggression in their domestic legal systems.<sup>41</sup> Despite The active participation of Iran's representative in the negotiations during both the Rome conference and the Kampala conference, Iran has signed but not ratified the Rome Statute. Therefore, Iran is not a party to the Statute and not a member of the ICC. Iran's domestic law lacks explicit provisions criminalizing core international crimes, including aggression, under the Islamic Penal Code 1392 (2014).

Although these crimes have been recognized by the Act of Confronting Hostile Actions of the Zionist Regime (CHAZR Act) against Peace and Security (May 18, 2020),<sup>42</sup> they remain undefined. Although with certain

**39.** Understandings regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Annex III, Review Conference of the Rome Statute, Kampala 31 May – 11 June 2010, para. 5, Available at: <http://crimeofaggression.info/documents/Review-Conference-official-records-ENG.pdf>, last accessed August 25, 2025.

**40.** Najandymanesh et al., *The Complementary Jurisdiction of the International Criminal Court and the Crime of Aggression* 205.

**41.** See The crime of aggression in the national laws of EU Member States, Genocide Network Observer States and Ukraine, Luxembourg: Publications Office of the European Union, (2023): 14. Availbe at: <https://www.eurojust.europa.eu/genocide-network>, last accessed August 24, 2025.

**42.** Article 11 “The Prosecutor-General, will in cooperation with the Ministry of Foreign Affairs and the Center for International Legal Affairs (Ex. Legal Services Department of Presidential Office) use capacities of domestic, foreign and international authorities and institutions to support Palestinian People and other victims, lodging complaint at the competent domestic and foreign courts and International Court of justice, trying and executing the rulings for punishment of criminal leaders of Zionist occupying regime because of committing inhumane crimes, war crimes, genocide, other crimes, invasion and terrorist measures inside and outside occupied lands.”

ambiguities, and it appears to primarily address Palestinian and non-Iranian victims, it is nevertheless possible to interpret the contents of this Act. It also encompasses the recent Israel aggression against Iran. This interpretation is supported by the fact that article 1 explicitly refers to actions by the Zionist regime against Iran, while other victims are mentioned in more general terms, which in light of article 1, may also include Iran. Furthermore article 11 makes reference to domestic courts.

Nonetheless, fundamental ambiguities persist. Crucially, the crimes themselves are not explicitly defined, and corresponding penalties have not been stipulated. Even assuming that, on the basis of customary international law, the provision of General Assembly Resolution No 3314 concerning aggression could be deemed applicable before Iranian courts, the law remains fundamentally deficient. The lack of definition of crimes and prescribed penalties contravenes the fundamental legal principle of *nullum crimen, nulla poena sine lege* (no crime, no punishment without a law).

Article 5 of the Islamic Penal Code is a jurisdictional provision that determined the scope of applicability of Iran's domestic criminal law and does not constitute the crime of aggression. Consequently, there are no legal mechanisms, such as special branches or specialized courts within domestic judicial institutions, established for their investigation and prosecution.

An important question that arises is whether the lack of criminalization of core international crimes and the absence of specific mechanisms for addressing such crimes preclude the exercise of complementary jurisdiction by domestic courts of Iran? Addressing this question proves crucial for determining both the admissibility of the case before the ICC and the application of *res judicata* principle. To exercise complementarity, The Rome Statute, the jurisprudence of the ICC, and state practice do not necessitate the existence of a specialized judicial mechanism such as special chamber or a domestic special court. Therefore, from this perspective, no criticism can be made regarding the Iranian legal system.

In declaring a case inadmissible before the ICC, two points must be considered: the person who has been investigated or prosecuted, or tried by the competent state; and second, the conduct for which such a person has been investigated, prosecuted, or tried. The terms “conduct which is the subject of the complaint” and “the same conduct” helpfully link the question to the facts as opposed to the law. If a State investigates or prosecutes (or has investigated or prosecuted) a conduct solely under the domestic penal codes, for instance a of murder or mass murders, yet in the ICC prosecutor’s view, that same conduct could constitute or amount to genocide, articles 17 and 20 of Rome Statute, in that case ICC prosecutor may prosecute that person again. The point is whether the actual killing is the same.<sup>43</sup> The Pre-Trial

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43. Jo Stigen, *The Relationship Between The International Criminal Court And National Jurisdiction*, (Boston, Leiden, Nijhoff,., 2008),198.

chamber 1, in the case concerning the admissibility in the situation of Libya, declared that “the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterization. Indeed, the question of whether domestic investigations are carried out with a view to prosecuting 'international crimes' is not determinative of an admissibility challenge and 'a domestic investigation or prosecution for 'ordinary crimes', to the extent that the case covers the same conduct, shall be considered sufficient”.<sup>44</sup>

The ICC jurisprudence has sought to provide a dynamic interpretation of the term “same conduct” in order to avoid discrepancies between national legal systems and ICC with respect to criminalization.<sup>45</sup> Therefore, regarding domestic applicable law, it should be noted that there is no necessity for specific criminalization of core international crimes; however, the conduct in question must objectively reflect the material element of an international crime based on factual circumstances. Moreover, such a teleological interpretation is consistent with the objective of combating impunity. Under articles 498 to 512 of the Islamic Penal Code of Iran, offenses against domestic and foreign security are defined. These provisions make no reference to the act of aggression under article 8bis of Rome Statute. The Law on Countering the Hostile Activities of Zionist Regime against Peace and Security is also silent with regard to the determination of the constituent elements of crimes and their corresponding punishments, and does not appear that the legislator's intention was to criminalize the core international crimes. This act is declaratory and protective rather than executive. Consequently, the declared offenses cannot satisfy the “same conduct” test. Assuming new legislation is enacted regarding core international crimes, this issue would conflict with the well-established principle of prohibition of retroactive application of the law, as stipulated in Article 10 of the Islamic Penal Code. Therefore, it may be concluded that due to the absence of appropriate legislation and the impossibility of applying domestic laws to the committed acts by Israel, the crime of aggression will be admissible before the ICC.

#### 4. Trigger Mechanism of the ICC

The preconditions for the ICC in the exercise of its jurisdiction are spelled out in Article 12 of Rome Statute, under which the jurisdiction of the Court is automatically accepted by States that become party to the Statute. Under Article 13, the procedure is triggered by three possible mechanisms: (a) referral by a State Party; (b) referral by the Security Council acting under Chapter VII of the Charter of United Nations, in which the Court may

44. ICC, *Decision on the admissibility of the case against Abdullah Al-Senussi, pre-trial chamber I, No. ICC/01/11-01/11, 11 October 2013, para. 66 (iv).*

45. Mahdi Reza Sadeghi, *International Criminal Justice System: Structure, Deficiencies And Challenges*, (Tehran: the SD Institute Of Law, 2022) 248.

initiate the investigation even if the national and territorial States have not accepted the Court's jurisdiction; and (c) by an investigation ordered by the Prosecutor on his or her own initiative. As an international treaty, the Rome Statute is subject to the rules of the 1969 Vienna Convention on the Law of Treaties. Article 34 states "A treaty does not create either obligations or rights for a third State without its consent." Regardless of the pertinent reasons, neither Iran nor Israel is a state party to the ICC. Therefore, pursuant to Articles 13(1) and 12(2)(b) of the Statute, Iran cannot refer the crime of aggression to the court.<sup>46</sup> Iran and Israel did not accept the Kampala Amendments regarding the crime of aggression. On 12 November 2018, the judges of the International Criminal Court (ICC) adopted amendments to the Regulations of the Court during their fortieth plenary session. The amendments address a number of procedural issues arising in connection to the activation of the jurisdiction of the Court over the crime of aggression as of 17 July 2018 by the Assembly of States Parties at its sixteenth session on 14 December 2017.<sup>47</sup> Consequently, pursuant to Article 15bis (4 and 5), the ICC cannot exercise jurisdiction over the crime of aggression committed by Israel. To activate the court's jurisdiction, two solutions may be proposed: first, referral by the security council, and second, lodging an ad hoc declaration to the Registrar.

#### 4-1. Security Council Referral

The linkage between the security council and the ICC, generally stems from the relationship between peace and justice, and more specifically, in relation to crime of aggression, derives from the security council's role under the UN charter<sup>48</sup> in determining acts of aggression. An act of aggression constitutes a threat to peace as well as its violation. The main argument of Security Council involvement in the pre-conditions to the exercise of jurisdiction of the ICC over the crime of aggression stems from an interpretation of Article 39 of the UN Charter.<sup>49</sup> Regarding a security council referral, both the temporal jurisdiction requirement and the activation of the ICC's jurisdiction

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**46.** Article 13; Exercise of jurisdiction: The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

**47.** ICC Judges amend the Regulations of the Court in connection with the activation of jurisdiction over the crime of aggression, available at; <https://www.icc-cpi.int/news/icc-judges-amend-regulations-court-connection-activation-jurisdiction-over-crime-aggression>, 15 November 2018, last accessed August 15, 2025.

**48.** Article 39.

**49.** Robert Schaeffer, "The Audacity of Compromise: The UN Security Council and the Pre-Conditions to the Exercise of Jurisdiction by the ICC With Regard to the Crime of Aggression", *International Criminal Law Review* 9 (2009): 412.

must be satisfied; both conditions are met concerning Israel's act of aggression. Pursuant to article 15<sup>ter</sup>, the powers of the security council are extensive, meaning that consent of States in accepting this crime is not prerequisite for a security council referral. Under article 13(b), security council acts irrespective of States membership status. Consequently, the council's referral applies even to States parties which have not ratified the Kampala Amendments. The security council's practice to date has demonstrated its unwillingness to make determinations on acts of aggression. The Security Council has not found the existence of aggression where aggression was most obvious, and it has found aggression in borderline cases. It has used the term "aggression" to describe behavior by very few States, though it has repeatedly cited two states (South Africa and Rhodesia) for aggression, and it has labeled Israel an aggressor twice.<sup>50</sup>

It is evident that the security council's characterization of aggression is primarily political in nature and does not take into account legal effects and consequences. The permanent members of the security council, by virtue of their veto power, can prevent the determination of an act of aggression, even if, aggression has indeed occurred. On 25 February 2022, the day after the triggering of Russia's special military operation, a draft resolution was introduced before the Security Council, the operative part of which deplored the Russian Federation's aggression against Ukraine and decided that Russia shall immediately cease its use of force against Ukraine and unconditionally withdraw all its military forces.<sup>51</sup> This resolution failed to be adopted due to the negative vote (veto) of the Russian Representative. Therefore, it is clear that any potential resolution affirming Israel's aggression against Iran and referring the situation to the ICC, would be vetoed by the United States because the Israel aggression was carried out with U.S. assistance and because the U.S directly participated in this act. Moreover, any potential referral to the ICC, would risk subjecting certain American officials to its prosecution. Furthermore, the United States has consistently opposed the ICC and has employed various measures, including sanctions, to restrict its functioning.

Considering the inaction and ineffectiveness of the Security Council in this regard, is it possible to propose an alternative mechanism? Some scholars have discussed certain limitations concerning the exercise of the veto power; "the veto should not be used in a way that: (1) is inconsistent with, or facilitates violations of, *jus cogens*; (2) is contrary to the UN's Purposes and Principles; or (3) is inconsistent with treaty obligations, such as

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50. Mark S. Stein, "The security council, the international criminal court, and the crime of aggression: How exclusive is the security council's power to determine aggression?" *IND. INT'L & COMP. L. REV.* 16, 1 (2005): 8.

51. UN Doc S/2022/155 (25 February 2022) especially operative paras 2, 3 and 4.

those founded in the Genocide Convention 26 and 1949 Geneva Conventions."<sup>52</sup> Although such interpretations align with the objectives and principles of the UN charter, they nevertheless require a revision of the Charter concerning the veto power. Moreover, there is currently no authority in international law to supervise or review the exercise of the veto.

The Uniting for Peace resolution of the UN General Assembly could present an alternative mechanism. Some Scholars have speculated that the General Assembly could use the Uniting for Peace Resolution to refer cases to the ICC.<sup>53</sup> Some members were of the view that the power to refer cases to the court under article 23, paragraph 1, should also be conferred on the General Assembly, particularly in cases in which the Security Council might be hampered in its actions by the veto.<sup>54</sup> However, this proposal was not accepted at the Rome Conference. As a result, under the trigger mechanism, the General Assembly does not possess the authority to refer situations to the ICC. Undoubtedly, most serious crimes are a matter of concern for the international community. The only body that represents the international community as a whole is the General Assembly, which must be given consideration in future amendments to the Rome Statute. Under the current framework, the right of veto is inconsistent with the rule of law and the international community's concerns regarding serious crimes.

Another significant issue concerns the role of regional organizations, which bear responsibility for international peace and security and whose functions complement those of the Security Council. A number of regional organizations including the European Union have acquired some kind of institutionalized mechanism for conflict management.<sup>55</sup> The UN charter also expressly recognize regional arrangements and emphasizes their vital role in the maintenance of international peace and security. One of the components of regional peace and security is the establishment of regional justice mechanisms, especially when international organizations are unable to fulfill such responsibilities. The establishment of "The Special Tribunal for the Crime of Aggression against Ukraine" by the council of Europe is a specific example in this regard. As Prof. Claus Kreß rightly argues "the Special Tribunal should not be seen as a European solution to what is in fact a

**52.** Jennifer Trahan, "Legal Issues Surrounding Veto Use and Aggression, Case Western Reserve" *Journal of International Law* 55 (2023): 97.

**53.** Darcy Shane, "Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly", JUST SECURITY (Mar. 16, 2022), <https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/>. Last accessed, August 20, 2025.

**54.** Report of the International Law Commission on the work of its forty-sixth session, 2 May -22 July 1994, Forty-ninth session, Supplement, No. 10, commentary on article 23, para. 5. yearbook of the international law commission 1994, vol. II, part two.

**55.** Fredrik Soderbaum and Hettne Bjorn, "The UN and Regional Organizations in Global Security: Competing or Complementary Logics? The UN and Regional Organizations in Global Security: Competing or Complementary Logics?" *Global Governance A Review of Multilateralism and International Organizations* 12 3, (2006):1.

challenge of a global dimension. The proper understanding should be that Europe places the Council of Europe in the service of the international community as a whole.”<sup>56</sup> The African Union, in the Malabo Protocol which amended the Protocol on the Statute of the African Court of Justice and Human Rights, already included the crime of aggression within the statute of a tribunal that may come to exist on a regional basis.<sup>57</sup> Indeed, in such cases, regional mechanisms act as a substitute for the international system, and a complementarity jurisdiction can be attributed to them.

In light of Israel's aggression against Iran, regional mechanisms could be identified and strengthened within the appropriate legal and diplomatic framework to address such acts in accordance with international law and collective security interests of the region. The organization of Islamic cooperation can serve as appropriate example. The OIC strongly condemned the recent US and Israeli attacks on Iran in a draft resolution issued after its 51st Council of Foreign Ministers session held in Istanbul; "Israel attacks on Iran, including repeated military attacks on civilian infrastructure, peaceful nuclear facilities, and the assassination of scientists, senior military commanders, and innocent civilians, including women and children, in grave violation of peremptory norms of international law and principles of the United Nations Charter, including prohibition of threat or use of force against sovereignty and territorial integrity of other States.”<sup>58</sup> Although no specific mechanism has been established for addressing serious international crimes within the OIC, a matter that indeed require an amendment to the Statute, the referral of situations to the ICC by regional organizations, in instances where the security council is unable to act, could be considered as one potential amendment to the Rome Statute.

#### 4-2. Iran's Ad Hoc Declaration

The jurisdiction over the crime of aggression is governed by Article 15bis and Article 15ter of the Rome Statute. Under article 12(3), a state which is not a party to the Statute may by declaration lodged with the Registrar, accept the exercise of jurisdiction by the ICC. Article 15(5)bis stipulates " in respect of state that is not a party to this Statute, the court shall not exercise its jurisdiction over the crime of aggression when committed by that state's nationals or on its territory". Given that the jurisdictional provisions contain

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**56.** The Prof. Claus Kress's remark at the Seminar on the Special Tribunal for the Crime of Aggression against Ukraine – 10 April 2024, available at <https://rm.coe.int/keynote-kress/1680af5a2d>, last accessed August, 21, 2025.

**57.** Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, article 28(A)(14) available at: <https://au.int/sites/default/files/treaties/36398-treaty-0045>, last accessed August 13, 2025.

**58.** OIC condemns US Israeli attacks on Iran calls for UN action, available at: <https://www.aa.com.tr/en/turkiye/oic-condemns-us-israeli-attacks-on-iran-calls-for-un-action/3608858>, 22.6.25, last accessed August 30, 2025.

no express exclusion, an argument could be made that non-States Parties can accept the jurisdiction of the Court over a crime of aggression under Article 12(3).<sup>59</sup> As for the crime of aggression, it is still unclear how article 12 para. 3 could reconcile with article 15bis para. 4 and the possibility of opting out.<sup>60</sup> It is evident that a specific legal regime governs on the crime of aggression. "Since Article 15bis (4) limits the application of Article 12 to a crime of aggression arising from an act of aggression by a State Party that has not lodged a declaration of non-acceptance, it seems that a victim State's declaration in accordance with Article 12 (3) may not successfully activate the exercise of jurisdiction over a crime of aggression arising from an act of aggression by a non-State Party or a State Party that has lodged a declaration of non-acceptance."<sup>61</sup>

Assuming that Iran lodges an ad hoc declaration, given that Israel is not a party to the ICC, the provision of article 15(5)bis would preclude the ICC from exercising jurisdiction over the crime of aggression. A key condition for the ICC to exercise jurisdiction over this crime is that both the aggressor state and victim state must have accepted the amendments, unless the situation is referred by the United Nation Security Council. The jurisdictional regime for the crime of aggression is deliberately narrower than other crimes. The current legal framework creates a high bar intended to protect state sovereignty. Kampala Amendments are opt-in. The aggression amendments bind only States Parties that have ratified them. Israel is bound by neither the Statute nor the amendments. Under article 15ter, the ICC could exercise jurisdiction over aggression involving a non-State Party only if the Security Council refers the situation to the ICC.

Therefore, Iran's Ad Hoc declaration within the legal framework of the Rome Statute has no legal effect and is inadmissible. This issue demonstrates that the ICC, in relation to the crime of aggression, has been unable to modify the high wall of sovereignty in favor of combating impunity; A problem which undoubtedly necessitates amending the Statute.

### Conclusion

An armed attack against Iran by Israel, undoubtedly constitutes a violation of the fundamental principle prohibiting the use of force and is considered an act of aggression. The attack lacked the authorization of the Security Council and did not conform to self-defense as stipulated in article 51 of the UN charter. The committed aggression fulfils both the material and mental

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59. Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2021)335.

60. Carsten Stahn, "The End, the Beginning of the End or the End of the Beginning? Introducing Debates and Voices on the Definition of Aggression" *Leiden journal of international law* 23 (2010): 875,880.

61. Astrid Reisinger Coracini, "The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some", *Goettingen Journal of International Law* 2 (2010): 775.

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elements of the crime of aggression as defined under article 8bis of the Rome Statute. Iran has so far shown no willingness to prosecute the committed crime before its domestic courts in light of the principle of complementarity. Moreover, existing legal framework has not adequately defined the elements of core international crimes, including the crime of aggression therefore, any broad interpretation thereof would not be acceptable in light of the fundamental principles of criminal law. In addition, it must be emphasized that no punishment has been prescribed with respect to these crimes. Therefore, in light of the principles of legality of crimes and punishments, Iranian domestic courts lack the capacity to adjudicate the committed crime. The ICC also faces a number of jurisdictional challenges, as Iran and Israel have neither become parties to the ICC nor accepted the Kampala Amendments. Furthermore, the Security Council lacks the ability to refer the situation to the ICC due to the veto power of the United States. Iran's ad hoc declaration is also ineffective with respect to the crime of aggression due to Israel's non membership. Unless the prosecutor of the ICC initiates investigation into other crimes committed. Since the activation of ICC's jurisdiction over the crime of aggression, this crime has not yet been adjudicated before it. The realization of such proceedings largely depends on a positive and proactive approach by the Security Council, which due to the prevailing political nature of the council, is difficult to attain. Accordingly, core international crimes that are of concern to the international community should not remain unpunished at the discretion of the permanent members of the security council who hold the veto power. The security council must either adhere to specific guiding principles when referring a situation to the ICC, or, in the event of its inability to do so, the matter should be entrusted to the General Assembly or regional organizations. In this regard, an amendment to the Rome Statute is necessary.

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