

The Crime of Aggression in the African Court of Justice and Human and Peoples' Rights

SERGEY SAYAPIN

In accordance with Article 28A(1)(14) of the Malabo Protocol, the International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights shall have power to try persons for the crime of aggression. Article 28M of the Protocol sets out a definition of the crime for the Court. The definition is largely in line with current international law on the subject but also reflects important regional features. This article analyses the substantive provisions of Article 28M, in a comparative fashion, and suggests that it could potentially become, once the Malabo Protocol enters into force, even more efficient than the Rome Statute's provisions on the crime of aggression, as far as African States are concerned.

1. INTRODUCTION

The crime of aggression is a core crime under international law.¹ It was first introduced in the Charters of the Nuremberg² and Tokyo³ Tribunals, and was subsequently invoked in the course of the Nuremberg follow-up trials.⁴ Cold

This contribution draws, to an extent, upon chapter 5 of the book and reflects the views of the author alone. The author thanks Professor Noah Weisbord (Florida International University College of Law) for his helpful comments on this chapter's draft.

¹ See G. Werle and F. Jessberger, *Principles of International Criminal Law*, 3rd edition (Oxford University Press, 2014), pp. 529–56. See also A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, *Cassese's International Criminal Law*, 3rd edition (Oxford University Press, 2013), pp. 136–45.

² See the Charter of the Nuremberg Tribunal, Art. 6(a). See also: S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (T. M. C. Asser Press / Springer, 2014), pp. 40–3, 149–61.

³ See the Charter of the Tokyo Tribunal, Art. 5(a). See also S. Sayapin, *supra* note 2, pp. 43–4, 161–80.

⁴ See S. Sayapin, *supra* note 2, pp. 45, 180–190. See also Y. Dinstein, *War, Aggression and Self-Defence*, 5th edition (Cambridge University Press, 2011), pp. 142–143.

War antagonisms made its prosecution impossible for decades to come: not a single trial involved charges of aggression since the late 1940s. The crime of aggression was included in Article 5 of the Rome Statute of the International Criminal Court (ICC) in 1998, but neither the crime itself nor the conditions for the exercise of the ICC jurisdiction with respect to it were defined until the 2010 Kampala Conference.⁵ Even then, the activation of the ICC jurisdiction with respect to the crime of aggression was postponed until 2017, at the earliest, and ICC jurisdiction was made subject to a number of further limitations.⁶

Article 28M of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter referred to as the Malabo Protocol) of 27 June 2014 establishes the jurisdiction of the African Court of Justice and Human and Peoples' Rights (hereinafter referred to as the African Court) with respect to the crime of aggression. The definition of the crime is largely in line with current international law – in particular, with Article 8 bis of the Rome Statute – but it also contains a number of important regional features and innovations. This contribution offers a comparative analysis of the Malabo Protocol's Article 28M against the background of Article 8 bis of the Rome Statute, upon which Article 28M is based, and highlights the latter's specific features and practical implications of its future invocation by the African Court.

2. 'CHAPEAU' OF THE DEFINITION (ARTICLE 28M(A) OF THE MALABO PROTOCOL)

Article 28M(A) of the Malabo Protocol contains a 'chapeau' of the definition, which largely mirrors an analogous provision of the Rome Statute⁷ but goes even further, as far as three important elements are concerned:

⁵ Ibid., pp. 56–62. See also A. Cassese, 'On Some Problematical Aspects of the Crime of Aggression', 20 *Leiden Journal of International Law* (2007), pp. 841–9; R. S. Clark, 'Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Conditions for ICC Exercise of Jurisdiction Over It', 20 *EJIL* (2009), No. 4, pp. 1103–1115; C. Kress, 'The Crime of Aggression before the First Review of the ICC Statute', 20 *Leiden JIL* (2007), pp. 851–65; C. Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: a Reply to Andreas Paulus', 20 *European Journal of International Law* (2009), No. 4, pp. 1129–1146; S. D. Murphy, 'Aggression, Legitimacy and the International Criminal Court', 20 *EJIL* (2009), No. 4, pp. 1147–1156; A. Paulus, 'Second Thoughts on the Crime of Aggression', 20 *EJIL* (2009), No. 4, pp. 1117–1128; N. Weisbord, 'Conceptualising Aggression', 20 *Duke Journal of Comparative and International Law* (2009), No. 1, pp. 1–68; N. Weisbord, 'Prosecuting Aggression', 49 *Harvard International Law Journal* (2008), No. 1, pp. 161–220.

⁶ S. Sayapin, *supra* note 2, pp. 298–312.

⁷ Cf. Art. 8 bis (1) of the Rome Statute: '1. For the purpose of this Statute, 'crime of aggression' means 'the planning, preparation, initiation or execution, by a person in a position effectively

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 or organization, whether connected to the state or not, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party (emphasis added).

It may seem that this introductory provision is a mere restatement of the pre-existing customary law on the subject, including of Article 8 bis (1) of the Rome Statute: it alludes to the modes of criminal conduct listed in the Nuremberg and Tokyo Charters (‘planning, preparation, initiation or execution’), reaffirms the Nuremberg and Tokyo Tribunals’ conclusions regarding potential defendants’ superior standing in their respective State or organisational structures (‘person in a position effectively to exercise control over or to direct the political or military action of a state or organization’), and includes only the most significant violations of the Charter of the United Nations or the Constitutive Act of the African Union (‘which, by [their] character, gravity and scale, constitut[e . . .] manifest violation[s]’ of the UN Charter or the Act) among the acts of aggression for the purpose of the Malabo Protocol.⁸ However, Article 28M(A) does deviate from the letter and substance of Article 8 bis (1) of the Rome Statute, because (1) establishes jurisdiction not only with respect to representatives of States but also to those of non-State actors, (2) refers to the Constitutive Act of the African Union, in addition to the Charter of the United Nations, and (3) lists human security of the population of a State Party among protected values. These aspects require some analysis and clarification.

A. Jurisdiction with Respect to Persons in a Position Effectively to Exercise Control Over or to Direct the Political or Military Action of a State or Organisation

Since the relevant international trials held in the 1940s, aggression was considered as a ‘leadership crime’ requiring special subjects – that is,

to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’

2. For the purpose of paragraph 1, ‘act of aggression’ means ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations [. . .]’

⁸ Cf. S. Sayapin, *supra* note 2, pp. 257–8.

high-ranking civilian and military State officials – and lower-ranking State officials were to be excluded from the range of potential subjects of the crime. Hence, Article 8 bis (1) of the Rome Statute made reference to ‘person[s] in a position effectively to exercise control over or to direct the political or military action of a State’ – thus limiting its jurisdiction to top-echelon State agents only. Formally, Article 28(M)(A) of the Malabo reproduces this provision, since it establishes the African Court’s jurisdiction with respect to the crime of aggression committed by ‘person[s] in a position effectively to exercise control over or to direct the political or military action of a state’. However, it should be noted that the efficiency of this provision is seriously impaired by Article 46A bis of the Malabo Protocol (‘Immunities’): ‘No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office’. This broadly worded provision was designed to shield against prosecution, including on charges of aggression, not only serving AU Heads of State or Government, but also all other senior civilian and military State officials who would typically be involved in such a crime – that is, Ministers of Defence, Heads and members of General Staff, Ministers of Foreign Affairs and of the Interior, directors of special services, members of Parliaments approving an internationally unlawful use of armed force, and even prominent public figures (for example, religious or social leaders) inciting the commission of the crime. Hence, as a matter of practice, Article 28M would unfortunately remain a dead letter, as far as serving senior officials of AU Member States are concerned, until their tenure of office is over, and prosecutions of such individuals under Article 28M would only be possible, if ever, once their official capacities would cease. Obviously, the feasibility and efficiency of such belated prosecutions would depend upon the concerned States’ political will and other attendant circumstances.

Formally, Article 28M(1) of the Malabo Protocol also establishes the African Court’s jurisdiction with respect to the crime of aggression committed by representatives of non-State actors (organisations) who would use force in violation of international law. Although the military danger of non-State organisations such as Al Qaeda, Daesh, etc. is evident, and Article 28M(A) of the Malabo Protocol certainly constitutes a progressive development of regional international law, and as such is deserving of attention, this author maintains his previously expressed opinion regarding the non-applicability of the elements of the crime of aggression to non-State actors:

It is understood that Article 8 bis (1) [of the Rome Statute] does not cover (even large-scale instances of) autarkic use of armed force by non-State actors. Unlike some authors [...] this writer does not believe that such cases must be covered by the Rome Statute's definition of the crime of aggression. Since its inception in the theory of international law, the concept of aggression was understood in its relationship with the State [...], and there is no obvious reason for changing this conceptual understanding. Firstly, armed attacks by non-State actors would almost certainly be covered by other relevant rules of international law, including those of the Rome Statute (cf. Articles 6, 7 and 8). Secondly, such uses of force would be almost implausible without, at least, an implicit support or acquiescence from States harbouring the non-State actors perpetrating the attacks – a situation covered by Article 8 bis (2) (g) of the Rome Statute [...]. Subparagraph (g) refers to a State's 'substantial involvement' in the 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [acts of aggression]'. It is submitted that allowing a non-State group to prepare for a large-scale armed attack against persons or property situated in another State should indeed be considered as the host State's 'substantial involvement', because not taking determined measures for repressing such criminal activities would denote the host State's sharing those activities' aims or, at least, acquiescing to them. Displaying a similar tolerance towards a non-State actor's preparation for the commission of a crime under international law – genocide, crimes against humanity or war crimes – may be indicative of the existence of an aggressive *mens rea* on the part of leaders of the host State [...]⁹

Hence, in the light of current customary international law, the extension of the African Court's jurisdiction with respect to the crime of aggression to representatives of non-State actors (organisations) appears to be redundant, given that various forms of the use of force by non-State actors are already covered by Articles 28B ('Genocide'), 28C ('Crimes against humanity'), 28D

⁹ Ibid., p. 260, footnotes omitted. However, see A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, *supra* note 1, p. 140: 'Arguably, international criminal liability for aggression might also arise where then armed attack against a state is planned, organized, initiated or executed by individuals belonging to a non-state organization or other organized entity. Nothing precludes non-state organizations from being able to use massively armed force against a foreign state [...] While there are sound arguments for extending criminal responsibility for aggression to instances of massive use of armed force by non-state actors, the ICC Kampala Review Conference took a different approach: the definition of the crime of aggression finally adopted restricts criminal liability [to] persons 'in a position effectively to exercise control over or to direct the political or military action of a state' because of questions over whether current customary international law supported an extension of the crime to non-state or minor official actors'.

(‘War crimes’), 28G (‘Terrorism’), and 28H (‘Mercenarism’), and Article 28M (B)(h) of the Malabo Protocol, in and of itself, establishes criminal responsibility for ‘[t]he sending *or materially supporting* by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State [...]’ (emphasis added, see *infra* 3(A)(8)).

B. *The Role of the Constitutive Act of the African Union*

The Constitutive Act of the African Union,¹⁰ adopted at Lomé, Togo, on 11 July 2000, reaffirms the Purposes and Principles of the United Nations¹¹ and adapts them, respectively, in Articles 3 (‘Objectives’) and 4 (‘Principles’), to African realities. With due regard to those realities, the following rules on the use of force add to relevant provisions of the Charter of the United Nations:¹²

- the African Union is empowered to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity (Article 4(h));
- Member States are empowered to request intervention from the Union in order to restore peace and security (Article 4(j));
- unconstitutional changes of governments should be condemned and rejected (Article 4(p)).

The disjunctive sentence in Article 28M(A) of the Malabo Protocol (‘the Charter of the United Nations *or* the Constitutive Act of the African Union’, emphasis added) should not be read as juxtaposing the Constitutive Act vis-à-vis the Charter of the United Nations, despite the preposition ‘or’ used. The Charter of the United Nations is a treaty of prevalent legal force,¹³ and placing it before the Constitutive Act is quite appropriate, since the provisions of the Act should not contradict those of the Charter (cf. *infra* 3(A)(1), though). Although the Constitutive Act’s more specific rules do not have direct equivalents in the Charter, they should not be interpreted as contravening the Charter but rather should be read in conjunction with it: since Article 52 of the Charter explicitly endorses the operation of regional arrangements, the provisions of the Constitutive Act’s Article 4 referred to above should be regarded as additional grounds for internationally lawful uses of force.

¹⁰ For the official English text of the Constitutive Act, see: www.au.int/en/about/constitutive_act (last accessed 29 May 2016)

¹¹ Cf. Arts. 1 and 2 of the Charter of the United Nations.

¹² Cf. Arts. 2(4) and 51 of the Charter of the United Nations.

¹³ Cf. Art. 103 of the Charter of the United Nations.

Consequently, the instances of the use of force in accordance with subparagraphs (h), (j) and (p) of the Constitutive Act's Article 4 are not to be regarded as acts of aggression under Article 28M(A) of the Malabo Protocol, and should not entail individual criminal responsibility.

C. *Human Security of the Population of a State Party as a Protected Value*

Article 28M(A) of the Malabo Protocol concludes with a reference to two specific values protected by the provision against acts of aggression – namely, to ‘the territorial integrity and human security of the population of a State Party’. Whereas States’ territorial integrity is a well-established value protected by international law against aggression,¹⁴ the notion of ‘human security of the population of a State Party’ seems to overlap with the definition of crimes against humanity for the purpose of the Malabo Protocol (cf. Article 28C). Since crimes against humanity ‘target fundamental, recognized human rights, in particular, life, health, freedom, and dignity’ (primary object of the crime) and thereby call into question ‘the security and well-being of the world’ (secondary object of the crime),¹⁵ treating similar acts, additionally, under the heading of the crime of aggression would, in this author’s opinion, somewhat distort both concepts. It is therefore advisable to limit the notion of aggression to what it traditionally has been – that is, the use of force against the territorial integrity, political independence or other essential features of statehood – and to deal with crimes against the ‘human security of the population’ under the heading of crimes against humanity.

D. *Other Essential Elements of the ‘Chapeau’*

As will be seen below, Article 28M of the Malabo Protocol was almost literally borrowed from Article 8 bis of the Rome Statute – with the latter’s substantive advantages and, probably more importantly for practical purposes, limitations. Where the corresponding elements of both provisions overlap exactly, this author’s earlier reflections on relevant provisions of the Rome Statute are reproduced, with an understanding that they should also be fully applicable to the Malabo Protocol’s respective rules. In turn, linguistic and, especially, substantive differences between Article 28M of the Malabo Protocol and Article 8 bis of the Rome Statute are emphasised, and their legal consequences are shown.

¹⁴ S. Sayapin, *supra* note 2, pp. 238–9.

¹⁵ G. Werle and F. Jessberger, *supra* note 1, pp. 333–4.

1. 'For the Purpose of this Statute'

Like Article 8 bis (1) of the Rome Statute, Article 28M(A) of the Malabo Protocol begins with an important reservation to the effect that the definition of the crime of aggression shall apply '[f]or the purpose of [the] Statute [of the African Court]' only. The purpose of including this reservation in both provisions is very practical:

This restrictive clause was a part of the compromise reached at the First Review Conference, in order to make the new definition workable and not to upset the interests of States, which are not Parties to the Statute. Professor Kai Ambos reports that the United States were preoccupied with making sure that the proposed amendment only affect the ICC Statute, without creating any legal effect beyond the material, personal and temporal fields of its application [...]. It must hence be concluded that the definition may not, at this stage, be regarded as claiming universal recognition, neither can it prevent the development, at the national or international levels, of alternative legal theories or rules pertaining to the crime of aggression, even after the entry into force of Article 8 bis [...].¹⁶

Since the Malabo Protocol's definition of the crime of aggression is intended for the purpose of the African Court only, its future application by the Court may, over time, evolve into a regional custom. Moreover, this author believes that the Malabo Protocol's provision on the crime of aggression could, potentially, become even more efficient than its 'parent provision' in the Rome Statute (see *infra* 4).

2. 'Planning, Preparation, Initiation or Execution' of an Act of Aggression

Under Article 28M(A) of the Malabo Protocol, four modes of conduct are criminalised in connection with an act of aggression – planning, preparation, initiation and execution. As these terms have been 'borrowed' from the Nuremberg and Tokyo Charters almost verbatim – with the exception of 'execution,' which replaced the original term, 'waging a war of aggression' – they may now be considered as having a customary value.¹⁷ Notably, the same modes of conduct are criminalised under Article 8 bis (1) of the Rome Statute.

¹⁶ S. Sayapin, *supra* note 2, pp. 258–9, footnotes omitted.

¹⁷ *Ibid.*, pp. 226–33. See also Y. Dinstein, *supra* note 4, pp. 141–142.

3. 'Act of Aggression'

Since Article 28M(A) of the Malabo Protocol largely builds upon pre-existing international law – in particular, upon Article 8 bis (1) of the Rome Statute – this author's earlier reflection on the relationship between a State's *act* of aggression and an individual *crime* of aggression appears to retain its relevance:

It suffices to restate here [...] that an act of aggression should be regarded, in the context of Article 8 bis (1), as a *direct* result of perpetrators' criminal conduct, and not merely as its 'by-product' delivered through the intermediary of a State. The potential perpetrators of the crime are described in Article 8 bis (1) as being *as such* capable of planning, preparing for, initiating or executing an act of aggression. In this logical structure, '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' referred to in Article 8 bis (2) results immediately from (an aggregate of) individual criminal acts, and 'the State', which uses force against protected values listed in the provision becomes a 'tool' in the perpetrators' hands – an indispensable one, given the nature of the crime at issue, but it still is a 'mechanical' tool, not a subject capable of taking autonomous decisions to the contrary to the perpetrators' will, for they themselves embody the State's will. In other words, for the purpose of the ICC Statute, a 'crime of aggression' consists in that 'a person in a position effectively to exercise control over or to direct the political or military action of a State' participates in 'planning, preparation, initiation or execution' of an internationally wrongful act involving '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', the 'character, gravity and scale' of which would warrant the concern of the international community as a whole [...]¹⁸

For the author's reservation on the (in)ability of non-State actors to engage in the commission of an act of aggression, see *supra* 2(A).

4. '[W]hich, by Its Character, Gravity and Scale, Constitutes a Manifest Violation of the Charter of the United Nations or the Constitutive Act of the African Union'

The qualification of a requisite intensity of an act of aggression included in Article 28M(A) of the Malabo Protocol and pertaining to the 'character, gravity

¹⁸ S. Sayapin, *supra* note 2, pp. 260–1, footnotes omitted. See also Y. Dinstein, *supra* note 4, pp. 153–154.

and scale' of an act of aggression also restates pre-existing international law – that is, a corresponding sentence of Article 8 bis (1) of the Rome Statute:

Article 8 bis (1) concludes with an essential provision to the effect that a use of force between States may be deemed to amount to an act of aggression for the purpose of the ICC Statute only if, 'by its character, gravity and scale, [it] constitutes a manifest violation of the Charter of the United Nations' [...]. In other words, in order to qualify as an act of aggression for the purpose of Article 8 bis (1), a State's use of force must be so unlawful, devastating and massive as to meet, respectively, the cumulative benchmarks of 'character, gravity and scale' laid down in the 'manifest standard' [...]. This provision resulted from discussions within the Special Working Group on the Crime of Aggression [...] on the requisite intensity of armed force to be involved in an alleged State act of aggression [...] in order for such act's authors to be held responsible by the ICC. As Stephan Barriga points out, an explicit aim of this clause is to exclude from the ICC jurisdiction 'not only [...] minor border skirmishes and other small-scale incidents but also acts whose illegal character [would be] debatable rather than manifest' [...] and hence to limit the Court's jurisdiction to individual acts bringing about 'the most serious' internationally wrongful uses of force [...] of 'concern to the international community as a whole' [...]. It is accordingly understood that inter-State confrontations involving the use of armed force [...] but not reaching the cumulative normative threshold articulated in Article 8 bis (1) should not be regarded as acts of aggression for the purpose of the ICC Statute, since, to borrow from S. Barriga's terminology, 'border skirmishes and other small-scale incidents' would conspicuously not meet the 'gravity' and 'scale' requirements [...] and, in turn, State acts whose illegality under applicable public international law were 'debatable' (such as the forcible protection of nationals abroad or the *bona fide* 'humanitarian intervention' [...]) would not correspond to the 'character' criterion – even if their gravity and / or scale were sufficient. It appears that the threshold was placed at such a high level – and appropriately so – on the one hand, with the purpose of limiting the ICC's future workload, and, on the other hand, with a view to reinforcing the link between a State act of aggression and a corresponding individual crime [...].¹⁹

Notably, Article 28M(A) of the Malabo Protocol, like Article 8 bis (1) of the Rome Statute (in contrast to some of its *travaux préparatoires*), contains no examples of 'manifest violation[s] of the Charter of the United Nations or the Constitutive Act of the African Union'. Its purpose is to set an overall high

¹⁹ S. Sayapin, *supra* note 2, pp. 261–3, footnotes omitted.

threshold of gravity of an act of aggression, whereas the latter's more specific definitional elements are included in Article 28M(B).

3. ACT OF AGGRESSION (ARTICLE 28M(B) OF THE MALABO PROTOCOL)

The second paragraph of Article 28M contains a list of acts, which qualify as acts of aggression for the purpose of individual criminal responsibility under the Malabo Protocol. The list is exhaustive and hence corresponds to the principle of legality, as understood in international criminal law.²⁰ Before proceeding to consider specific examples of acts of aggression,²¹ some general remarks are worthwhile.

Like in Article 8 bis (2) of the Rome Statute, the reference to a declaration of war in Article 28M(B) of the Malabo Protocol is superfluous, as the legal significance of relevant rules largely diminished since the middle of the 20th century:

Since the Second World War, such declarations have in practice been very rare and, besides, they lost their legal significance with the adoption of the 1949 Geneva Conventions [...]. The declaration of war must have been recalled in this context with a view to emphasising, once again, the important 'threshold of gravity' of consequences an alleged act of aggression should entail [...] – that is to say, the level of violence of an international armed conflict. Even so, it would have been more accurate to refer to the non-recognition of a subsequent *state* of war by the States involved, and not to a prior or parallel *declaration* thereof, for such a declaration would not, in accordance with international humanitarian law, affect the legal qualification of the difference resulting from an alleged act of aggression as an international armed conflict, irrespective of the duration of that conflict.²²

Next, unlike Article 8 bis (2) of the Rome Statute, Article 28M(B) of the Malabo Protocol does not make any direct reference to the UN General Assembly resolution 3314 (XXIX). With due regard to this author's critical point with respect to the Rome Statute's provision on the crime of aggression, the absence of the reference to the 1974 UN Definition of Aggression in the

²⁰ See G. Werle and F. Jessberger, *supra* note 1, pp. 39–41; A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, *supra* note 1, pp. 22–36.

²¹ On the notion of the act of aggression under international law, see S. Sayapin, *supra* note 2, pp. 104–9. See also Y. Dinstein, *supra* note 4, pp. 85–123.

²² S. Sayapin, pp. 263–4, footnotes omitted, emphasis in the original.

Malabo Protocol should be regarded as an progressive development of international law:

[A]ll other crimes within the jurisdiction of the ICC (Articles 6–8) have been listed in the Statute as a matter of its own content, which reinforces the Court's *ratione materiae* competence. The definitions of those other crimes were either specifically formulated for the purpose of the Statute (crimes against humanity, Article 7), or classified for its purpose (war crimes, Article 8), or reproduced verbatim from a relevant international treaty (genocide, Article 6). It is uncertain why it was deemed necessary to quote a non-binding document – such as the General Assembly resolution 3314 (XXIX) – in Article 8 bis (2) while the other crimes within the jurisdiction of the Court had been formulated without references to other, even binding, sources of international law (with the exception of the 1949 Geneva Conventions in Article 8(2)(a) of the Statute and their Common Article 3 in Article 8(2)(c) of the Statute).²³

Finally, it should be noted that most of the acts listed in Article 28M(B) of the Malabo Protocol were borrowed from Article 8 bis (2) of the Rome Statute – and, through its intermediary, from Article 3 of the 1974 UN Definition of Aggression. At the time of negotiating the Rome Statute's provisions on the crime of aggression, there seemed to be no universal recognition of those provisions' legal value:

It was reported that there had been no unanimity within the Special Working Group on the Crime of Aggression with respect to whether subparagraphs (a) to (g) of the 1974 Definition's Article 3 all represented current customary international law: some members of the Special Working Group 'took the view that that was only true for subparagraph (g)', for its content had already been confirmed by the International Court of Justice [...]. Other experts noted that most of the acts listed in Article 3 had been 'reflected in the practice of the Security Council', while for some acts there existed none [...]. This is unsurprising: the Security Council is a political body in whose action national interests of its members, especially of permanent members, prevail [...] and the Council may not be expected to apply rules of international law in the same impartial way as a judicial body – such as, in the future, the International Criminal Court – should have to do.²⁴

²³ Ibid., p. 264, footnotes omitted, emphasis in the original. See also: S. Sayapin, 'The Definition of the Crime of Aggression for the Purpose of the International Criminal Court: Problems and Perspectives', in 13 *Journal of Conflict and Security Law* (2008), issue 2, pp. 333–52, at 346–7.

²⁴ Ibid., pp. 264–5, footnotes omitted. See also: S. Sayapin, 'The Definition of the Crime of Aggression for the Purpose of the International Criminal Court: Problems and Perspectives', *supra* note 23, at 347.

Obviously, the drafters of the Malabo Protocol took the view that the UN Definition of Aggression did represent customary international law, since they integrated its key provisions in Article 28M(B) as a matter of its own law, in line with this author's previous recommendation, for the purpose of the African Court:

Be that as it may, Article 8 bis (2) could well have done without a direct reference to the General Assembly resolution 3314 (XXIX) but might have simply reproduced the relevant provisions of Article 3 of the 1974 Definition of Aggression as a matter of the Statute's own content. Such a verbatim integration of those provisions in the Rome Statute would have elevated them from the rank of 'soft law' to the level of treaty law binding on the Statute's States Parties – certainly, pending the future entry into force of Article 8 bis [...] – and would have helped avoid scholarly critique similar to this author's.²⁵

A. *Examples of Acts of Aggression*

The generic definition of an act of aggression in Article 28M(A) is followed by eight specific examples (in subparagraphs (a)–(h)), seven of which almost literally reproduce the relevant provisions of pre-existing international law. The subparagraphs (a)–(h) of Article 28M(B) are crucial, for they represent, for the purpose of the Malabo Protocol, *prima facie* acts of aggression, about which its States Parties to the Statute agreed that such acts 'shall constitute acts of aggression' (emphasis added) – certainly, provided that they, by their character, gravity and scale, constitute manifest violations of the Charter of the United Nations or the Constitutive Act of the African Union (cf. *supra* 2(B), 2(D)(4)). A brief analysis of subparagraphs (a)–(g) is offered below.

1. The Use of Armed Forces

Judging by its comprehensive wording, subparagraph (a) of Article 28M(B) seeks to protect the security of States Parties against the broadest possible range of internationally unlawful uses of force:

- (a) The use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations.

²⁵ S. Sayapin, *supra* note 2, p. 265, footnotes omitted.

With due regard to this contribution's limited volume, two brief comments should be made here. First, it is likely that the African Court, when dealing with individual cases on charges of aggression in the future, would invoke subparagraph (a) *in almost every single case*, in conjunction with another, more specific subparagraph of Article 28M(B), due to the former's more general character. Hence subparagraph (a) should explicitly protect not only the elements of *statehood* of the State affected by aggression but also other fundamental values, whereas subparagraphs (b)–(h) would criminalise specific objective methods of using force unlawfully against a victim State. Conceptually, since an act of aggression is one gravely inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations (see *supra* 2(D)(4)), every act of aggression should be regarded as a disruption of *peace* in the world and, specifically, on the African continent – and this aspect appears to be overlooked in subparagraph (a) of Article 28M(B). Second, it is worth noting, that, unlike in Article 28M(A) where the UN Charter is accorded priority, in subparagraph (a), the Constitutive Act of the African Union is listed first and hence seems to have priority over the Charter – if not as a matter of law, then, at least, as a matter of practice. Given the overall good quality of the Protocol's text, it is quite unlikely that the drafters of the Protocol made a technical mistake here. Rather, this could be a subtle way to emphasise the significance of the Constitutive Act as a treaty, which reflects regional realities and accordingly endows the African Court with broad powers in the area of maintaining peace and security in the region.

2. Invasion or Attack, Military Occupation, Annexation

Subparagraph (b) of the Malabo Protocol's Article 28M(B) restates verbatim Article 8 bis (2)(a) of the Rome Statute and reads as follows:

- (b) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.

A closer look at the key notions contained in this provision, which mirrors its 'parent provision' – Article 8 bis (2)(a) of the Rome Statute – exactly, should help elucidate the implications of the entire subparagraph in terms of international law:

This provision's keyword being 'territory', it protects the territory of States against four modes of internationally wrongful military impact: invasion, attack, military occupation, annexation [...] From the point of view of

international law, invasion and annexation are grave assaults against the territorial integrity of a State, whose manifest illegality derives from Article 2(4) of the Charter of the United Nations [...] It must be recalled that, since 1945, territorial acquisitions effected by military force in contravention of the Charter have usually been regarded as violations of international law [...] Likewise, 'military occupation' means that restrictions are imposed upon the political independence of a State [...] and 'invasion' implies that the armed forces of a State concerned trespass another State's frontiers illegally, which constitutes a breach of the principle of the inviolability of frontiers [...]²⁶

It is understood that the term 'the armed forces of a State' should be interpreted in the sense of other applicable international law – more specifically, Article 43 of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

3. Bombardment, Use of Weapons

Like subparagraph (b) of the Rome Statute's Article 8 bis (2), subparagraph (c) of the Malabo Protocol's Article 28M(B) seeks to protect States' territorial integrity, for it mentions 'the territory of another State' twice:

- (c) The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.

The only difference between, respectively, Article 28M(B)(c) of the Malabo Protocol and its 'parent provision' – Article 8 bis (2)(b) of the Rome Statute – consists in the insertion of a definite article at the beginning of the sentence. Otherwise, the provision inherited all substantive limitations of its original source:

Again, 'bombardment' and 'the use of any weapons' are actions permissible under international humanitarian law – certainly, with limitations deriving from the well-established principles of proportionality and distinction between combatants and civilians [...] Likewise, any scholarly analysis of this provision should of necessity take into account the rules of international law applicable to the use of specific types of weapons – such as chemical, biological, nuclear and certain conventional weapons [...] Yet, this provision is not about criminalising 'bombardment' or 'the use of [any] weapons' in the

²⁶ *Ibid.*, p. 266, footnotes omitted. On the notion of belligerent occupation, see: Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), pp. 1–8

sense of international humanitarian law, for it does not cover unlawful attacks against enemy nationals or property – these are criminalised by Article 8 (war crimes) of the Rome Statute. Its *protected object* is different – a State’s territory. The criminality of acts covered by subparagraph (b) of Article 8 bis (2) consists in that they are directed against a State’s territory, which – along with population and public authorities – constitutes a State’s very self [...]”²⁷

4. Blockade

Subparagraph (d) of the Malabo Protocol’s Article 28M(B) adds ‘airspace’ to the ports or coasts of a State whose blockade is criminalised under subparagraph (c) of Article 8 bis (2) of the Rome Statute:

(d) The blockade of the ports, coasts or airspace of a State by the armed forces of another State.

This addition is important, since airspace constitutes a part of a State’s territory and extends over its entire land, internal and territorial waters,²⁸ and thus considerably extends the territorial scope of protection against aggression, in comparison to Article 8 bis (2)(c):

The rationale for the criminalisation of blockade lies in the status of ports and coasts as parts of a coastal State’s territory [...] As in the context of the preceding paragraphs, the qualification of a violent (‘by the armed forces of another State’) restriction of the coastal State’s sovereignty over its territory – including over its territorial sea [...] – as aggression is certainly warranted. Moreover, blockade can be used as a basis for attacks [...], bombardment or the use of weapons [...] against the coastal State, or for an attack on a State’s armed forces [...], which in themselves qualify as acts of aggression.²⁹

5. Attack on a State’s Armed Forces

Like subparagraph (d) of Article 8 bis (2) of the Rome Statute, subparagraph (e) of the Malabo Protocol’s Article 28M(B) supposedly criminalises the ‘first strike’ by the armed forces of a State against those of another State:

(e) The attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State.

²⁷ Ibid., p. 267, footnotes omitted, emphasis in the original.

²⁸ See J. Crawford, *Brownlie’s Principles of Public International Law*, 8th edition (Oxford University Press, 2012), p. 203

²⁹ See S. Sayapin, *supra* note 2, pp. 267–8, footnotes omitted.

The substitution of an indefinite article at the beginning of the Rome Statute's Article 8 bis (2)(d) by a definite article in Article 28M(B)(e) of the Malabo Protocol is of a technical nature and should bear no legal implications. The substance of Article 28M(B)(e) appropriately reflects pre-existing international law:

It seems that this provision applies to the initial armed attack, because any response to such an attack – provided that it complies with applicable international law, in particular, in terms of proportionality – would be regarded as an individual or collective self-defence in the sense of Article 51 of the Charter of the United Nations [...]. Although there is no mention of territory in this subparagraph, the reference to the 'land, sea or air forces, or marine and air fleets' may be taken to imply that a State's territory, which includes its land and subsoil, territorial sea, internal waters, [...] and air space, [...] is the ultimate object of an armed attack hereby criminalised. As each of the constituents of territory is defended by a relevant combat branch, an aggressive attack against one of these should be regarded as (at least, an indirect) attack against the territorial object they defend. Hence, the qualification of such an armed attack as aggression does comply with the overall logic of Article 8 bis (2).³⁰

6. Internationally Wrongful Use of a State's Armed Forces Present within the Territory of Another State

Subparagraph (f) of the Malabo Protocol's Article 28M(B) builds upon subparagraph (e) of the Rome Statute's Article 8 bis (2) and qualifies as an act of aggression the conduct of a State's armed forces, which had previously arrived in another State with the latter's consent but afterwards acted in a hostile manner either against the receiving State or against a third State:

(f) The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the African Union Non-Aggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement.

The African Union Non-Aggression and Common Defence Pact was adopted on 1 January 2005 and entered into force on 18 December 2009.³¹ This

³⁰ *Ibid.*, p. 268, footnotes omitted.

³¹ For the text, see: www.au.int/en/sites/default/files/treaties/7788-file-african_union_non_aggression_and_common_defence_pact.pdf (last accessed 3 June 2016)

document is key for our purpose, because, in addition to examples of acts of aggression listed in the Malabo Protocol, it provides, in Articles 1(c)(ix–xi) three further modes of action, which qualify as acts of aggression:

- ix. the acts of espionage which could be used for military aggression against a Member State;
- x. technological assistance of any kind, intelligence and training to another State for use in committing acts of aggression against another Member State; and
- xi. the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent transnational organised crimes against a Member State.

Although these modes of action are not listed explicitly in Article 28M(B) of the Malabo Protocol, it appears that they should also qualify as individual criminal acts for the purpose of the Malabo Protocol's definition of the crime of aggression, because the Malabo Protocol's Article 28M(B)(f) refers explicitly to the African Union Non-Aggression and Common Defence Pact.

The public danger of the acts covered, respectively, under Article 28M(B)(f) of the Malabo Protocol and Article 8 bis (2)(e) of the Rome Statute lies in the following:

In addition to dangers of a military character, which are implicit in this subparagraph and which might, in accordance with the other subparagraphs of the definition, themselves qualify as acts of aggression [...], the act in question would also violate the principle of fulfilment of obligations under international law in good faith[...]. As the material (*ratione materiae*) regulations for the presence of foreign armed forces in a State's territory are clearly determined in applicable treaties, and their temporal (*ratione temporis*) field of application is always determined (in the treaties themselves), the qualification of a grave [...] breach thereof as an act of aggression would duly conform to international law.³²

7. Allowing the Use of a State's Own Territory for the Commission of an Act of Aggression Against Another State

Like the preceding subparagraph, subparagraph (g) of the Malabo Protocol's Article 28M(B) also deals with the conduct of States, which accommodate foreign troops or armaments in their territories:

³² See S. Sayapin, *supra* note 2, p. 269, footnotes omitted, emphasis in the original.

- (g) The action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State.

The rationale for regarding such conduct, under both the Malabo Protocol and the Rome Statute, as an act of aggression is as follows:

In accordance with applicable international treaties, a State's territory may be placed at the disposal of another State for the stationing of armed forces, or the placement of armaments, or for both [...] The responsibility of the host State would thereby consist in guaranteeing that the foreign armed forces or armaments would not be used for breaching international law [] In order to qualify as aggression, the allegedly unlawful acts actually perpetrated by the State whose armed forces are stationed, or whose armaments are placed, in the receiving State must be covered by any other substantive subparagraph of Article 8 bis (2). If the host State's relevant officials become aware of such unlawful acts, they must, without delay, resort to lawful – unilateral or multilateral – measures [...] available to their State to stop their occurrence, otherwise they may themselves become liable for facilitating or tolerating an act of aggression.³³

8. Sending Armed Bands, Groups, Irregulars or Mercenaries

Importantly, the conduct referred to, respectively, in subparagraph (h) of the Malabo Protocol's Article 28M(B) and in subparagraph (g) of the Rome Statute's Article 8 bis (2) is the only example of an act of aggression, among those listed, whose customary nature under international law has, so far, been confirmed by the International Court of Justice:

- (h) The sending or materially supporting by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Since the conduct in question has been dealt with at length in the ICJ's *Nicaragua* Judgment, the readers should be referred to relevant paragraphs in that Judgment, for details.³⁴ Additionally, the following considerations on the matter could be useful:

³³ *Ibid.*, pp. 269–270, footnotes omitted.

³⁴ See *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, judgment of 27 June 1986, ICJ Reports (1986) 14, paras. 75–125, 187–209, 227–45.

While the phrase about carrying out ‘acts of armed force against another State of such gravity as to amount to the acts listed above’ seems relatively clear in the light of the foregoing analysis, two supplementary observations ought to be made here. Firstly, it is submitted that the phrase ‘armed bands, groups, irregulars or mercenaries’ should especially cover, in the modern world, private military companies insofar as their staff engage in hostilities on behalf of the employer States or under their control, whereby private military companies may be dealt with under the heading of ‘armed groups’ [...] The nature of such companies is perceptibly different from that of ‘armed bands’ and ‘irregulars’, nor would they normally meet either of the two ‘standard’ international legal definitions of mercenaries [...] so treating them, for the purpose of Article 8 bis (2), under the generic heading of ‘armed groups’ is appropriate. Since international law for the regulation of private military companies’ status is *in statu nascendi*, States may feel tempted to so frame the legal frameworks applicable to such private companies as to ‘outsource’ to them some of their own tasks, and thus effectively to exempt themselves from a part of responsibility under international law. The outcomes of the so-called ‘Montreux process’ remain to be seen [...]

The second substantive comment pertains to the attribution of acts carried out by ‘armed bands, groups, irregulars or mercenaries’ to the State on whose behalf they act. The rules of attributing such entities’ conduct to a State are found, especially, in Articles 5, [...] 7 [...] and 8 [...] of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts [...] The International Law Commission’s official Commentary on Article 5 introduces the notion of ‘parastatal entities’, which ‘exercise elements of governmental authority in place of State organs’, [...] ‘provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned’, [...] and directly mentions ‘private security firms’ as an example of such parastatal entities [...]³⁵

Obviously, States employ private military and security companies in the exercise of their conventional function – the use of force – with a view to limiting their own responsibility for violations of international law, which are likely to occur in the course of respective armed conflicts. Hence, with a view to ensuring their own security, and to preventing impunity, States Parties to the Malabo Protocol could consider dealing with the employment of private military and security companies in the commission of acts of aggression, in the sense of subparagraph (h) of the Malabo Protocol’s Article 28M(B), with due

³⁵ See S. Sayapin, *supra* note 2, pp. 270–72, footnotes omitted, emphasis in the original.

regard to Article 5 of the 2001 Articles on State Responsibility. Since the invocation of individual criminal responsibility for the crime of aggression connected with the employment of ‘parastatal entities’ already has a foundation in international law, such an approach should not be incorrect as a matter of practice. Besides, it is recommended to explicitly mention private military and security companies in subparagraph (h) of the Malabo Protocol’s Article 28M(B), when a suitable occasion to amend the provision arises.

4. CONCLUSION

As was shown above, Article 28M of the Malabo Protocol inherited most limitations of its ‘parent provision’ – Article 8 bis of the Rome Statute, although it does contain some innovative elements reflective of progressive development of international law. The Malabo Protocol was adopted on 27 June 2014 and should enter into force thirty days after the deposit of instruments of ratification by fifteen Member States of the African Union, in accordance with Article 11(1). In accordance with Article 11(2), for each Member State which shall accede to it subsequently, the Protocol and Annexed Statute shall enter into force on the date on which the instruments of ratification or accession are deposited. As of 1 June 2016, the Protocol has been signed by nine Member States of the African Union but has not yet been ratified by a single Member State.³⁶

Potentially, though, Article 28M may turn into a powerful provision binding upon 54 States on a large and populous continent, which has been suffering from murderous conflicts for far too long, and surpass the success of Article 8 bis of the Rome Statute as a matter of practice.³⁷ The latter should, hopefully, enter into force in a foreseeable future, since it has already earned thirty requisite ratifications,³⁸ and the ICC Assembly of States Parties should be prepared to activate the ICC jurisdiction with respect to the crime of aggression in accordance with its own agenda. Yet, given some African States’ current concerns with respect to the ICC, and with due regard to the ICC’s

³⁶ For the status of ratifications of the Malabo Protocol, see: www.au.int/en/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf (last accessed 4 June 2016)

³⁷ See *passim* T. Muriithi, ‘Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court’, in G. Werle, L. Fernandez and M. Vormbaum (eds.), *Africa and the International Criminal Court* (T. M. C. Asser Press, Springer, 2014), pp. 179–93.

³⁸ For the status of ratifications of the Kampala amendments, see: <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> (last accessed 4 June 2016)

principle of complementarity, endowing an efficient regional mechanism of criminal justice – such as the reformed African Court could be – with jurisdiction with respect to the crime of aggression should be regarded as a welcome development, since it would usefully and legitimately release the ICC of at least some of its potential workload (of course, provided that the African Court would exercise its jurisdiction fairly and impartially).

It is this author's hope that the Malabo mechanism would help turn Africa into a more peaceful continent, and that the authors of unlawful uses of force on that continent would be held accountable. True, the provision on immunities of serving AU Heads of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office, which was included in Article 46A bis of the Malabo Protocol, would be a serious impediment to the timely exercise of justice. However, this provision should not prevent prosecutions of former senior State officials, once their tenure is over, and, knowing this, many of such officials should hopefully refrain from exercising their authority in violation of international law, while in office. Besides, quite a number of African States have already enacted domestic provisions criminalising aggression and other crimes against peace,³⁹ and prospects of domestic 'Habr -style' prosecutions should be another restraining factor.

³⁹ See S. Sayapin, *supra* note 2, pp. 207–22. See also S. Barriga, 'The crime of aggression', in M. Natarajan (ed.), *International Crime and Justice* (Cambridge University Press, 2011), pp. 329–34; G. Kemp, *Individual Criminal Responsibility for the Crime of Aggression* (Intersentia, 2010), p. 129; A. Reisinger Coracini, 'Evaluating domestic legislation on the customary crime of aggression under the Rome Statute's complementarity regime', in C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden, Boston, 2009), pp. 725–54