BETWEEN SOVEREIGNTY AND ACCOUNTABILITY: THE CRIME OF AGGRESSION AND INDIA'S DILEMMA WITH THE ROME STATUTE

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1. Introduction

The establishment of the International Criminal Court (ICC) under the Rome Statute in 1998 marked a watershed in international criminal law. The Court's jurisdiction over genocide, war crimes and crimes against humanity reflected a global consensus on individual criminal responsibility for the gravest international wrongs; the later operationalisation of the crime of aggression sought to extend this principle to the illegal resort to force.[1] The incorporation of aggression into the ICC's remit, however, required careful negotiation: unlike the other core crimes, aggression directly implicates state conduct and political decision-making, raising difficult questions about sovereignty, lawful use of force, and institutional competence.

The historical pedigree of aggression as an international crime extends to Nuremberg and Tokyo where the principle that state leaders could be held criminally responsible for waging aggressive war was first articulated. Nuremberg labelled such conduct a "crime against peace" and described it as the "supreme international crime" because of its capacity to engender other violations and vast human suffering.[2] The legal and moral force of that statement remains a lodestar in contemporary debates, but translating it into durable institutional arrangements for the twenty-first century has proved politically fraught.

India's engagement with these developments has been cautious and calibrated. From the Rome Conference in 1998 through the Kampala Amendments in 2010, Indian representatives consistently raised concerns about the relationship between the ICC and the United Nations Security Council (UNSC), the clarity of the aggression definition, and procedural safeguards necessary to prevent politicised prosecutions.[3] These concerns are not merely formal: for a large

[1] Rome Statute of the International Criminal Court, A/CONF.183/9 (17 July 1998).
[2] Trial of the Major War Criminals, Vol. 1, Judgment, International Military Tribunal (IMT), 1946, pp. 74–105.
[3] K.A. Naqvi & P. Bais, India and the International Criminal Court (Peace Palace Library, 2010).

regional power with unresolved border disputes and active external security challenges, the prospect of external criminal scrutiny of decisions taken in hard cases poses both legal and political dilemmas.

This article probes India's dilemma in depth. It situates India's reservations within the legal history of aggression, examines doctrinal tensions, in particular the interplay of complementarity and UNSC referrals, assesses the geopolitics that animate Indian policy, and offers a pragmatic set of reforms that could reconcile India's sovereignty concerns with evolving international expectations. The argument is that India's stance is principled and defensible, and that constructive engagement combined with targeted reform of ICC processes would serve both India's national interests and the cause of fair global justice.

2. Scope and Objective

The article examines:

- The doctrinal evolution of the crime of aggression from Nuremberg to Kampala and its implications for state responsibility and individual criminal liability.
- India's legal and policy objections to the Rome Statute's aggression regime, with emphasis on sovereignty, UNSC dynamics, and domestic constitutional concerns.
- The geopolitical context, principally India's relations with China and Pakistan and regional crises, that shapes Indian risk assessments.
- Comparative experiences and practical proposals for reconciling accountability with sovereign prerogatives, including institutional reform options for the ICC.

3. Research Questions

This study addresses:

- How did the historical and doctrinal evolution of the crime of aggression influence India's negotiating posture at Rome and Kampala?
- Which legal and constitutional tensions render the aggression regime particularly sensitive for India?

- What institutional reforms could reduce perceived politicisation risks and make ICC participation more acceptable for states like India?

4. Methodology

The article uses a doctrinal and policy-oriented approach combining textual analysis of primary instruments (Rome Statute and Kampala Amendments), historical materials (Nuremberg jurisprudence), official Indian statements and parliamentary records, relevant case studies (for example, Kosovo, Ukraine, Galwan, and Pulwama/Balakot episodes), and scholarly commentary. The synthesis aims to ground normative recommendations in institutional feasibility and state practice.

5. Hypothesis

India's hesitation to accede to the Rome Statute, particularly insofar as the crime of aggression is concerned, stems from a rational balancing of competing imperatives: a commitment to international justice and the rule of law on the one hand, and the preservation of core sovereign functions (defence, foreign policy, and the conduct of hostilities) on the other. The hypothesis predicts that India will be more disposed to engage with the ICC when (i) definitions are clarified to limit ambiguity, (ii) procedural safeguards reduce the scope for politicised referrals, and (iii) complementarity is strengthened through credible domestic implementation.

6. Chapterization

6.1. Historical and Legal Origins of the Crime of Aggression.

Nuremberg's principal innovation was to move from state-centered notions of accountability to individual criminal responsibility for acts that threatened international peace. The Tribunal's articulation of "crimes against peace" provided both legal rationale and moral impetus for later codification efforts. Yet early Cold War divisions and sensitivities about state sovereignty meant that aggression remained contested and underdeveloped in multilateral law for decades.

Efforts in the UN to define aggression (notably the 1974 General Assembly definition) provided an elemental legal compass, but the Rome Statute's drafters elected to postpone the operationalisation of aggression pending further state consensus. When the Kampala Review Conference adopted amendments in 2010, Article 8bis codified a definition broadly consistent

with earlier UN materials, focusing on the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State; crucially, the amendments linked jurisdictional activation to a procedure that involved the UNSC for referrals in many cases.[4]The compromise was therefore legal and political: aggression was defined, but its prosecution remained interwoven with Security Council politics.

The embedding of the Security Council in the activation mechanism was the focus of much debate. Proponents argued that the Council's Charter role in maintaining international peace made its involvement logical; critics countered that the Council's composition and veto rights of permanent members risked politicising what ought to be a neutral legal determination. For many non-aligned and emerging powers, this structural arrangement was unacceptable as it appeared to confer a gatekeeping power on a fractious political body.

6.2. India's Concerns Regarding Sovereignty and Security.

India's objections to the aggression mechanism have several interlocking dimensions.

First, there is a constitutional and political dimension. The conduct of foreign affairs and the command of the armed forces are core sovereign functions in India's constitutional scheme. Any external institution that could second-guess the decision-making around resort to force is seen to touch upon the democratic prerogatives of the executive and, by extension, the political accountability mechanisms that undergird them. Indian policymakers have therefore sought assurances that statutory or treaty obligations will not unduly constrain legitimate, constitutionally sanctioned security decisions.[5]

Second, there is the UNSC asymmetry. Because the Kampala regime contemplates Security Council referrals and determinations, and because the Council includes permanent members with veto power, India has feared that the aggression mechanism could become a tool of geopolitical advantage: some states could be shielded from scrutiny while others become targets for politically motivated referrals. This concern is compounded by India's own long-standing view that the Security Council requires reform to better reflect contemporary international

[4] A. Bellamy & K. Kubalkov´ a (eds.),´ *The Crime of Aggression: A Commentary on the Rome Statute* (Oxford Univ. Press, 2012).
[5] Official Statement, Ministry of External Affairs, Government of India, 2011.

realities.[6]

Third, there is the operational reality of India's neighbourhood. India's northern border with China remains disputed in several sectors; the eastern and western borders with Pakistan have been the site of recurring crises and cross-border terrorism. These realpolitik dynamics mean that military and police actions, ranging from road-building in border areas to cross-border strikes against terrorist safe havens, could be susceptible to political interpretation abroad. Policymakers worry that ambiguous legal standards could expose commanders and political leaders to later accusation for decisions taken in the fog of crisis.[7]

Fourth, there is a structural concern about complementarity in practice. Although the Rome Statute enshrines the principle of complementarity, meaning that the ICC acts only when national jurisdictions are unwilling or unable to prosecute, India needs assurance that its domestic system will be treated as genuinely primary. Absent credible procedural safeguards and respect for national sovereignty, the complementarity promise remains abstract.

6.3. Implications of Ratification and Reasons for Hesitance.

Ratification would bring India into the ICC's institutional orbit with benefits, including participation in the Assembly of States Parties, influence over institutional development, and a normative commitment to accountability. Scholars have argued that India's accession would strengthen the Court's legitimacy and bring an important Global South perspective to its jurisprudence.[8]

Yet several disincentives persist. Practical anxieties revolve around the scenario of selective referrals, whereby some states might use political power to prevent investigation of their own nationals while supporting referrals against rivals, and the difficulty of reliably distinguishing acts of legitimate self-defence from criminal aggression after the fact. In crisis situations, state leaders must often choose between imperfect options; the possibility of subsequent criminalisation of these choices influences risk calculus and strategic behaviour.

Another category of concern is institutional capacity. Ratification implies not only accepting external scrutiny but also undertaking implementing legislation and strengthening domestic

[6] K.A. Naqvi & P. Bais, *India and the International Criminal Court* (Peace Palace Library, 2010).
[7] A. Singh, "India and the ICC: Revisiting Concerns of Sovereignty," *Asian Journal of International Law*, 2019, Vol. 9(1), pp. 77–98.
[8] R. Basu, "India's Emerging Role in International Criminal Justice," *International Journal of Constitutional Law*, 2020, Vol. 18(3), pp. 657–676.

investigatory and prosecutorial capacity. For India this would mean legislative reform, military legal training, and the establishment of domestic mechanisms to fulfil complementarity obligations, which is a substantial endeavour.

Lastly, there is reputational calculus. India must weigh how accession would affect its relations with key partners, some of whom are non-Parties, and how the ICC's enforcement patterns would be perceived domestically. Given the politicised history of international criminal justice in some regions, Indian public opinion and political actors treat such moves with caution.

6.4. Perspectives from International Experience.

International precedents illustrate the complexity of aggression politics. The debate over NATO's 1999 intervention in Kosovo, for instance, raised acute questions about humanitarian intervention, the legality of the use of force absent Security Council authorisation, and the scope for subsequent legal scrutiny. Although the ICTY examined certain conduct arising from the conflict, it did not pursue aggression charges against NATO states, demonstrating the limitations and selectivity that can arise inpractice.[9]

The Russia–Ukraine crisis (2022 onwards) has exposed additional constraints. Russia's nonmembership of the ICC and Security Council dynamics prevent a straightforward ICC aggression referral; that reality has catalysed discussion of alternative mechanisms, such as ad hoc tribunals or hybrid arrangements, to ensure accountability for aggression where the ICC cannot act.[10] For India, these developments illustrate that great power politics can impede legal remedies and that alternative accountability architectures may emerge outside the ICC framework.

These examples validate many of India's concerns: enforcement of international criminal law is frequently a function of geopolitics as much as of legal doctrine, and institutional arrangements that do not squarely address political asymmetries risk being seen as unfair.

6.5. Bridging Sovereignty and Accountability: Reform Options.

If India's principled objection is to the institutional design rather than to the normative value of holding aggressors accountable, the policy challenge becomes designing reforms that reduce

[9] P. Williams, *U.S. Policy Regarding the ICC*, CRS Report RL31495 (Oct. 2007).
[10] House of Commons Library (UK), *Conflict in Ukraine: A Special Tribunal on the Crime of Aggression* (Aug. 2024).

the risk of politicisation while preserving legal efficacy. Several reform avenues are plausible.

1. Clarify the definition of aggression. The text of Article 8bis could be further refined to delineate clearly what constitutes leadership conduct triggering responsibility, such as specifying thresholds for manifest intent or unlawful purpose, thus narrowing the interpretive space for politicised allegations. A refined definition could also explicitly carve out certain defensive measures and clearly delineate counter-terrorism and internal security operations from state aggression.

2. Reduce UNSC gatekeeping. Structural reforms might limit the Security Council's unilateral ability to block aggression prosecutions. For example, the Assembly of States Parties could be empowered to make determinations by qualified majority when the Security Council is deadlocked. Such a measure would require political negotiation but could materially lower the veto problem that worries India.

3. Strengthen complementarity and domestic implementation. India could lead efforts to develop model implementing legislation and practical capacity-building packages that demonstrate credible domestic competence to investigate and prosecute aggression-related conduct where appropriate. A demonstrated national capacity would make ICC involvement less likely and build trust.

4. Procedural safeguards for political context. The ICC could adopt more robust pre-

investigative procedures that screen referrals for political motive and require higher evidentiary thresholds before proceeding to full investigations of leadership conduct in interstate contexts.

Collectively, these options show that institutional reform is not only a distant ideal but also a practicable policy route by which India can preserve sovereign prerogatives while supporting accountability norms.

7. Practical Recommendations

Based on the foregoing analysis, this article proposes a pragmatic agenda for India:

1. Active negotiation for ICC reform: India should seek to build a coalition with other Global South states to press for amendments that reduce UNSC dominance over aggression activation,

clarify definitions, and strengthen the Assembly of States Parties' role.

2. Domestic preparedness: Invest in legislative and institutional measures that make complementarity meaningful: draft implementing legislation, train military legal officers, and create independent oversight mechanisms for the use of force.

3. Selective cooperation: Continue to cooperate with the ICC on areas of convergence, for example war crimes and crimes against humanity, which bolsters India's credentials as a pro-justice actor while preserving leverage on aggression issues.

4. Strategic diplomacy: Use multilateral fora to promote transparency and procedural fairness, advocating for measures that minimise great-power selectivity.

5. Public legal education: Build domestic consensus through academic, judicial and parliamentary engagement to explain the legal stakes and empower informed public debate.

8. Conclusion

India's posture towards the Rome Statute and the crime of aggression reflects a considered equilibrium between global justice aspirations and national sovereignty concerns. The anxieties about UNSC asymmetries, definitional ambiguity, and the political risks of leader prosecution are warranted in light of historical experience. Yet these anxieties do not imply a rejection of accountability. Rather, they point to the need for institutional design that protects fair process and equality among states.

Reform is both necessary and feasible. If India chooses to lead or join a reform coalition, it can help shape a system that is resilient to politicisation while capable of holding leaders to account in genuinely egregious cases. In the interim, India's emphasis on complementarity and domestic legal preparedness is a prudent policy route. By strengthening national systems and engaging selectively with the ICC, India preserves its sovereign space while contributing constructively to the global rule-of-law project.