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**The Crime of Aggression: The Negotiations to Bring the Crime into Force and the
Extent to which they have Advanced International Criminal Justice**

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Declaration

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Sean Summerfield

Abstract

This thesis focuses on the Rome Statute Amendments on the Crime of Aggression and the extent to which they represent a step forward in the advancement of international criminal justice.

This thesis charts the development of the criminalisation of aggression and takes a critical look at the positions of delegations during the negotiations, the jurisdiction and entry-into-force provisions adopted in December 2017, and what these mean for international justice and the International Criminal Court.

Although there remains considerable room for judicial refinement of the definition, particularly with regard to the scope of the ‘manifest’ threshold requirement, it nevertheless represents a significant step forward in the development of international criminal law, and provides a reasonable basis by which future acts of aggression can be judged.

As to the jurisdictional remit, this thesis laments the restrictive nature of the framework adopted. The consent-based regime will seriously limit the prospect of future prosecutions. That being said, it was a willingness to find a delicate balance between a Security Council monopoly and an expansive regime that ensured an agreeable outcome, and there is virtue in that.

The success of the aggression amendments has always been in the hands of states. With each ratification, the Court is strengthened. If the international community is serious about punishing the aggressive waging of war, it must rally behind the Court rather than undermine the promises made in Kampala.

The real power of the amendments perhaps lies not in the frequency with which they will be used to punish crimes of aggression, but in the extent to which they confirm the aggressive waging of war as illegal under international law. The amendments represent an important step forward.

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Chapter 1 – Introduction

In much the same way that history has been blighted by the waging of aggressive wars, it is also littered with attempts to criminalise them. We've seen the emergence of 'just war' theory in the early middle ages, the early development of international law and a rights-based approach during the renaissance period, and reliance on collective security through multinational organisations in the latter half of the twentieth century. It remains to be seen whether the twenty-first century will come to be characterised by a commitment to the rule of law and individual criminal responsibility, though the establishment of the world's first permanent international criminal court and the criminalisation of state-led aggression are surely steps in the right direction. In December 2017, States Parties agreed by consensus at the Assembly of States Parties (ASP) that the crime of aggression would come into force on 17 July 2018, marking a monumental shift in the way in which the international community responds to the waging of aggressive war.

In spite of this, serious doubts remain, not just about the definition of the crime and the limited power the Court has been granted to exercise it, but also about the extent to which these developments represent a positive step forward in the advancement of international justice and the international criminal court. This thesis will seek to examine this overarching question in detail, taking into account the big definitional and jurisdictional questions that states have now definitively answered, and offering thoughts on the way in which the answers to them will change the way we think about individual criminal responsibility.

In order to do so we will need to look critically at the definitional and jurisdictional provisions adopted to assess whether they provide a sound basis for prosecuting atrocity crimes; the negotiations that took place and what they reveal about how states measure progress, specifically the extent to which the ICC should be empowered to act; the role of civil society and the extent to which civil society organisations agree that the amendments represent a step forward; the likelihood that the provisions adopted will result in successful prosecutions; and arguments that the provisions will fundamentally weaken the Court.

1.1. Statement of Aims & Original Contribution

The primary question that this thesis will therefore seek to answer is whether the provisions that have now been adopted represent a step forward in the advancement of international criminal justice or whether they weaken an already beleaguered Court. This is not a novel question. It is one that has been asked numerous times over the years, both prior to the establishment of the International Criminal Court and during negotiations to establish a workable legal framework for the crime.

Until now, however, there have been unanswered questions regarding the Court's jurisdiction, specifically who will be bound by the provisions. The December 2017 ASP decision has definitively answered those questions, clarifying that only states that have ratified the aggression amendments – and not subsequently opted-out – will be bound. This thesis is, therefore, able to tackle the overarching question with clarity over the Court's reach in light of the latest – and final – round of negotiations. It is also able – through empirical research in the form of interviews with those present and most involved – to provide a first-hand account of the negotiations and enable a critical analysis of not just where we ended up, but how we got there.

The original contribution this thesis is able to make to the discourse, is thus two-fold. Firstly, it is entirely contemporary in that it is able to take into account the December 2017 ASP decision to activate the crime and the 17 July 2018 activation date. With this thesis submitted only a matter of weeks after the crime finally came into force, it is the most up-to-date account of the long journey of the crime of aggression, from conception to activation. This thesis is not restricted – as others that preceded it were – by having to speculate on the shape the jurisdictional remit might take. We now have clarity on the extent of the Court's reach, and the doctrinal approach adopted throughout this thesis allows the provisions to be analysed both in terms of the two-tiered approach they create vis-à-vis the other crimes that fall within the mandate of the ICC and the extent to which they provide a workable basis for future prosecutions.

Secondly, the empirical research conducted sheds light on the intricacies of state positions that led to the outcome we now have; demonstrates the extent to which states – and civil society – disagree about

what exactly constitutes a step forward for the ICC; and provides support for the thematic conclusions drawn throughout.

1.2. Methodology

The information gathered and used in this thesis originated from two major sources: pre-existing literature – which is plentiful and includes primary sources, academic commentary, media and civil society reports – and primary legal materials, including case law from the international tribunals and domestic courts, UN statutes, the ICC Statute itself, and the negotiated outcomes from Rome, Kampala and the December 2017 ASP.

These sources were supplemented by interviews unique to this research, which helped to clarify and develop the major research questions. Independent research was used primarily to provide insight into the way in which discussions and negotiations to criminalise the crime of aggression had progressed over the years, and to provide a better understanding of the motivations behind influential state positions.

Although original interviews were conducted, this thesis very much adopts a qualitative approach to research methods. In doing so, both doctrinal and socio-legal approaches are used.

Ultimately, this thesis is concerned with the legal outcome of negotiations and much of the analysis relates to how the language adopted is to be interpreted. The extent to which states have adopted an understanding of the jurisdictional remit that is contiguous with the language drafted is a core part of this work and so doctrinal analysis was indispensable.

That being said, the provisions adopted do not exist in a vacuum. There are wider socio-legal considerations that weighed heavily on states during the course of negotiations and which have demonstrably impacted the legislative framework we now have. Given the nature of international criminal law, and the profound interplay between politics, international relations and the law, a socio-legal approach was needed to properly understand these wider connotations that needed to be taken into account.

This research was originally intended to rely heavily on elite interviews conducted with well-known and influential individuals that had been involved throughout the process. Many of these interviews were carried out and they provided valuable insight into the process, though it would be a stretch to assert that they form the basis of this thesis. The interviews are instead used to provide valuable insight into the process and to support thematic conclusions throughout the research.

As with any elite interviews, there are a number of dangers and pitfalls, not least the risk of an unclear or distorted recollection of events that took place some years previously, as well conscious or unconscious bias that comes with being affiliated with one particular side of an argument.¹ While these concerns cannot be discounted entirely, the negotiations and themes discussed throughout benefit from having been the subject of numerous articles and research pieces, allowing spoken accounts to be cross-referenced with written ones. In many instances, the interviewees are also speaking about events that have either very recently taken place, or on issues which the participants have continued to work since. In any case, the interviews often provided valuable insight into the way in which delegations currently view the process, and were particularly helpful in understanding the way in which negotiations continued to unfold.

The interviews were conducted with the ethical approval of the University of Sussex, in the most part in early 2016. Additional interviews were then conducted towards the end of 2017 in the run-up to the December 2017 ASP decision on the activation of the crime of aggression amendments, and afterwards to understand how activation discussions had played out.

Six interview subjects were finally identified due to their familiarity with the negotiation process at various stages along the way. These included:

- 1) William Pace, the longstanding Coordinator of the Coalition for the ICC, who has been an active participant first in the establishment of the International Criminal Court and latterly in the criminalisation of aggression. A participant in Rome at the conference to establish the ICC, as well

¹ Richards, D. (1996), 'Elite Interviewing: Approaches and Pitfalls', *Politics*, Vol.16, pp.199-204

as a leading member of the NGO community, his perspective was especially important in explaining the reasons behind the decision taken in Rome to include the crime of aggression within the ICC Statute yet defer discussions to establish a workable legal framework for it. He was also able to offer valuable insight into the role NGOs played in both Rome and Kampala.

- 2) Chris Whomersley, former Deputy Legal Adviser to the UK Foreign and Commonwealth Office. As the lead negotiator on behalf of the United Kingdom in Kampala, he was better positioned than most to explain the outcome and the intricacies of state positions. His insight into the understandings that the UK and likeminded states had taken away from Kampala on the correct interpretation of the Article 121 provisions was particularly instructive.
- 3) A member of the UK Delegation to Kampala in June 2010, who provided valuable insight into the Review Conference negotiations, was able to set discussions in context and commented helpfully on dynamics, particularly outside of the negotiating room.
- 4) A senior member of the UK delegation to the ASP 16 in December 2017. This interviewee was engaged immediately prior to the December 2017 decision and actively participated in the negotiations to activate the crime. These interviews were particularly valuable in documenting ongoing state efforts to influence the accepted interpretation of the Kampala amendments and ultimately to shape the jurisdictional remit of the Court going forward.
- 5) A member of the UK FCO's Legal Directorate, who engaged in helpful discussion on the legal issues still to be worked through in the years leading up to the December 2017 activation vote, and the role – or lack thereof – that NGOs sought to play in influencing ongoing discussions.
- 6) A representative of Parliamentarians for Global Action, a key NGO working towards the domestic implementation of legislation through an established global network of parliamentarians. These discussions were helpful in shedding light on national support for the provisions, and the role that civil society played in their advancement.

It had been the intention to interview other individuals central to crime of aggression discourse, namely Claus Kreß, a prolific academic and member of Germany's negotiating team in Kampala; Christian Wenaweser, President of the Assembly of States Parties and former Chair of the Working Group on the Crime of Aggression, along with his principle legal advisor Stefan Barriga; Harold Koh, US Department of State Legal Advisor and US lead in Kampala; and Benjamin Ferencz, a driving force behind the development of international criminal law since his time as a Prosecutor at the Nuremburg tribunals. In the end, all proved indispensable despite none being interviewed specifically for this thesis. They are all quoted throughout, largely because their contributions and thoughts are so widely documented as to make primary sources abundantly available, and each helped enormously to clarify and develop the major research questions. Instead, interviews were conducted with those who were intimately involved at various stages of the crime's development but whose voices are less prominent in academic literature.

Similarly, it had been the intention to explore in more depth the role NGOs played in driving forward the criminalisation of aggression. As later chapters will demonstrate, for numerous reasons, civil society was far less influential during the Kampala negotiations than it had been in Rome. As such, while the role they played is analysed, it does not instruct the central narrative of this thesis.

The interviews conducted for this thesis were intended to allow the interview subjects to express their views without being influenced by the pre-conceived notions of the author. The interviews were semi-structured and interview subjects were not held to a strict list of questions. Questions asked were designed to allow the interviewees to expand on themes that they believed to be essential and relevant to the development of the crime. In most instances, the interviewees were selected because of their proximity to historical events – be that the Kampala Review Conference or an Assembly of States Parties – and interviewees were invited to talk broadly about their experiences of those events. They would then be invited expand on issues relevant to the thesis as they arose or asked clarifying questions when necessary. The transcripts (on file with the author) reflect the conversational nature of the interviews.

William Pace was asked to talk about the role of the Coalition for the ICC – and civil society more generally – during the negotiations to establish the ICC, and if that influence was also exerted during the Kampala Review Conference.

Chris Whomersley was asked to explain how the Kampala negotiations played out and to expand on the main areas of contention. Crucially, he was asked to describe his interpretation of the provisions agreed and offer thoughts on why disagreement persisted.

A similar process was followed with regard to the other interviewees. They were asked broad questions designed to give them the freedom to discuss their experiences of the process and were encouraged to expand on issues that they thought were important.

William Pace and Chris Whomersley were happy for quotes to be directly attributable. The other interviewees preferred to be anonymised as representatives of their respective organisations. The majority of interviews were recorded and later transcribed. For those who declined to have their views captured on tape, a written record was kept. While the majority of the content gleaned from the interviews provided background research, there are numerous quotes throughout the thesis which are used to support its substantive arguments.

It will be clear to anyone reading that a particularly Anglo-American approach has been adopted, including when selecting the interviewees. This is due to a number of factors. First, it is a question of access. Much of the research for this thesis was conducted while I was employed by the UK Foreign and Commonwealth Office. Although my employment was wholly unconnected to this thesis, it did give me access to those in the diplomatic sphere that had been involved in both Kampala and the December 2017 ASP, and to UK members in particular.

The prominence afforded to certain actors also reflects the reality of the negotiations. The empirical research conducted was intended to shine a light on these negotiations and, in particular, disagreement over who was to be bound by the provisions: interpretation of Article 121. The UK was at the forefront of those disagreements, and so input from UK representatives was deemed essential.

The role played by the United States is documented much more prominently than that of other powerful non-State Parties - namely Russia, China and India - largely because the US sought to exert far more influence over proceedings than did the others. Russia, China and India as non-States Parties – much like the US – were all afforded observer status allowing them to participate in discussions but not to vote. While Russia, China and India participated in discussions, aligning themselves with particular movements or blocs or expressing opinions throughout, they were largely content to play a secondary role; one that reflected their observer status. The US, on the other hand, was actively engaged in securing an outcome deemed favourable to the US. Though they had not participated in much of the processes leading up to Kampala, during the Review Conference they sought to shape the debate, build alliances during negotiations, and secure additional understandings on some of the key issues.

As to the overall approach, much of the discourse surrounding international criminal law is Anglo-American. English speaking journals dominate the literature, with many of the most prominent commentators writing in English and American journals. That dominance can be felt throughout this thesis.

1.3. Structure of the thesis

The adoption of a workable legal framework to criminalise individual acts of aggression has been a long time in the making. The historical development of the crime (chapter 2) is instructive in understanding how we arrived at the substantive elements of the crime, including the definition and jurisdictional regime. A doctrinal analysis of both the definition and the jurisdictional regime will be carried out in chapters 3 and 6. Only through understanding exactly what was agreed can we seek to analyse whether this means the Court's hand is strengthened by the provisions. This means deciding whether they provide a sound legal basis for the Court to successfully prosecute those responsible for atrocity crimes or whether they are so restrictive as to make it unlikely anyone will ever face justice for waging an aggressive war.

As to the definition adopted (chapter 3), most of the work was done not at the Kampala Review Conference in 2010, but in preparatory meetings in the decade beforehand and by the ILC in preparing

a General Assembly-adopted definition in 1974. Indeed, the 1974 definition was presented to the Review Conference largely unchanged, and was adopted without further discussion in Kampala. That does not mean, however, that it is uncontroversial. The definition marks the crime of aggression as exceptional in a number of ways, which also serve to ensure that the crime is more politically charged than the other core international crimes. It is limited to persons who are ‘in a position effectively to exercise control over or to direct the political or military action of a state’, and is vague on the extent to which ‘grey-areas’ of international law are caught up in the definition. This has ensured a lukewarm reception from a number of states, unsurprisingly those most likely to resort to force. This thesis will examine in detail these provisions, including the enumerated acts that constitute the crime, the mental state of any perpetrator, the extent to which the definition adequately accounts for the changing nature of war – including the rise of cyber-warfare – and the rise of non-state actors, and, perhaps most controversially, the extent to which the threshold for what constitutes a crime of aggression is high enough to prevent pre-emptory self-defence and humanitarian intervention from falling within the remit of the Prosecutor.

Before moving on to chapter 6 and the substantive elements of the jurisdictional regime, we will first examine the negotiations that took place in Kampala (chapter 4) to agree that regime and the entry-into-force mechanism adopted. The negotiations were conducted largely in good faith, and were notable for the active role played by the United States and the decision by the Chair to attempt to accommodate US concerns, despite the US not being a State Party to the ICC Statute. The way in which the negotiations progressed and the various positions adopted by delegates gives crucial insight into how the international community views the role of the Court and the power it should have. This chapter therefore gives valuable insight into how different states want international criminal justice to progress and the extent to which they are prepared to cede control to the Court in deciding when individual acts should be punished.

Despite agreement having been reached in Kampala, one issue of interpretation persisted over the Court’s jurisdiction, specifically who was to be bound when the provisions came into force. Disagreement lingered over whether states must ratify the amendments in order to be bound by them,

or whether all states would be bound once the amendments were activated, unless they formally opted out. We will evaluate the positions of the two camps that occupied these positions, looking critically at this outstanding issue and the negotiations that took place at the 2017 ASP to arrive at an agreeable solution (chapter 5). Once agreement had been reached on who would be bound by the provisions, the final hurdle to adoption of the amendments was a decision to be taken by the ASP. This hurdle was cleared in December 2017 when the ASP adopted by consensus the provisions and set the date of 17 July 2018 for their coming into force. This date has now passed and the crime of aggression is a crime punishable at the International Criminal Court.

As to the jurisdictional regime (chapter 6), a novel approach was adopted that separates the crime of aggression from the other core crimes insofar as it substantially limits the ICC's exercise of jurisdiction over the crime in cases absent Security Council referral. In adopting a consent-based approach to the crime, delegations have given states the choice as to whether or not they will be bound by the provisions, introducing an explicit opt-out provision into the amendments. This chapter will take a critical look at the final package adopted and the strengths and weaknesses of the Review Conference compromise.

Crucial to the establishment of the International Criminal Court – and the development of international criminal law more generally – has been civil society and non-governmental organisations (chapter 7). Civil society played a central role both before and during the Rome Conference to establish the ICC. With participating organisations accredited by the umbrella organisation, the Coalition for the ICC, they were organised and effective. Exerting substantial influence throughout the process, they facilitated contact with States Parties, arranged meetings on various ICC issues, coordinated demonstrations and press conferences, lobbied governments, ministers, and parliamentarians, compiled regular reports which were then disseminated through the media, and embedded members in state delegations. This was not the case in Kampala. While civil society continued to play a role, it was much diminished. We will look at the factors influencing this decline, including geopolitical factors that served to dampen enthusiasm for the aggression amendments, and differences in policy positions that explain why civil society groups were unable to unite behind a common position. The varying interpretations held by states as to what constitutes a step forward in the advancement of international criminal justice are

rightly central to this thesis. This chapter seeks to balance those interpretations with views from civil society organisations. Ultimately, it will be shown that civil society was as divided as states when it came to the intricacies of the aggression amendments.

One of the major criticisms of the aggression amendments is the extent to which, in order to secure compromise, states watered down the jurisdiction of the Court to such an extent that few cases of aggression will fall within its scope (chapter 8). There have been persistent claims that few investigations or prosecutions will result from the amendments. Here, recent examples of state-led aggression can be instructive, and the provisions are applied to these conflicts to offer the reader an insight into the type of crimes the international community had in mind when the crime was added to the Rome Statute. These inform thoughts on the extent to which the amendments may come to alter the international order by imposing additional considerations on those that might seek recourse to war.

In answering the overarching question of this thesis, it is necessary to examine the various arguments put forward by those who believe that – far from representing a step forward in the advancement of international criminal justice – the aggression amendments actually weaken an already beleaguered court (chapter 9). Those that claim the Court is fundamentally weakened by the provisions point to inconsistencies between the amendments and established international law practice on the need for state consent. Others contend that the aggression provisions – governed as they are by the principle of complementarity – are ill-suited to domestic courts insofar as states will be required to sit in judgement over another State's decision to resort to force. These are legitimate concerns, all of which are addressed, along with further claims that the amendments will impede international efforts to promote peace and stability around the globe by undermining state willingness to participate in humanitarian intervention; weaken the hand of negotiators in peace deals; and impede the Court's ability to punish other atrocity crimes.

It will become clear throughout this thesis that events in Kampala and the December 2017 decision to activate the amendments represent steps taken towards the end goal of eradicating impunity for atrocity crimes and the waging of aggressive wars. They do not mark an end point in that endeavour. This thesis

is intended to review these events and the decisions taken. It will show that the amendments are imperfect. That is the necessary consequence of multilateral negotiations. The reader is urged to recall an aphorism familiar to anyone that has engaged in multilateral negotiations: that we should not let the perfect become the enemy of the good.

Chapter 2 – Historical Development of the Criminalisation of Aggression

This chapter will seek to provide a chronological account of the criminalisation of the crime of aggression. The first half of this chapter will chart the chronological development of the jus ad bellum and evolution of the concept of aggressive war as a scourge in need of a remedy. This will take us to Nuremburg and the establishment of aggressive war as a punishable act. The second half of this chapter will chart the major milestone attempts in the twentieth century to then define aggressive acts and simultaneously hold individuals accountable for them through the establishment of an international criminal court. The emergence of NGOs as a progressive force will also be touched on. This will take us through proceedings in Rome and the preparatory meetings in preparation for the agreement reached at Kampala on the codification of the crime of aggression. This chapter will seek to provide historical context that will allow an assessment of the likelihood that the provisions adopted thus far will lead to the prosecution and punishment of those most responsible for crimes of aggression.

2.1. Evolution of the concept of aggressive acts of war as a punishable act

2.1.1. Jus ad bellum pre-Nuremberg

The tribunals of the twentieth century and the establishment of the International Criminal Court represent seminal moments in the development of international criminal law, seeking as they do to establish a precedent that individual responsibility for aggression will not go unpunished as a criminal act. Yet it was not until the Nuremburg and Tokyo trials at the end of the Second World War that aggression was finally recognised as a crime under international law,² and only within the last few years have we arrived at a definition of the crime of aggression that is coupled with a jurisdictional remit that can be exercised by a permanent international criminal court. This chapter will provide a brief overview of that progress.

For as long as humans have occupied this earth there has been evidence of the prominent role war has played in almost every known civilisation. Wars were commonly seen as ‘acceptable political practices,

² Sayapin, S. (2014) ‘The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State’, T. M. C. Asser Press / Springer, p.3

and sometimes even as noble endeavours uniting peoples in their human destiny and exclusively capable of displaying all human virtues and vices.’³ With war glorified as an accepted, even integral function of the international relations of states, there was no appetite for criminalising aggressive state behaviour. Treaties that did exist took a very different diplomatic form to those that now govern international law. Used not as tools in the service of international law and the furtherance of peace, they were instead enacted in preparation for war through the forging of alliances, or at the close of war to declare the terms of surrender and impose the new post-war order.⁴

It was not until the middle ages that attempts were made to regulate the waging of war. The Islamic faith and Sharia law prohibited wars between Muslims more than thirteen centuries ago,⁵ yet these restrictions were intrinsically linked to, indeed firmly rooted in, religious doctrine. Similarly, European ‘Just War’ theory – initially developed in the context of Catholic theology but later to transition into a universal, secular and moral theory grounded in law – also sought to limit the conditions for war. Traced back as far as the fourth century to St. Augustine, ‘just wars’ were said to comprise both the principles of ‘just cause’ and of ‘legitimate authority’. With regard to the former, St. Augustine wrote that ‘a war is usually considered just if it makes retribution for injustice, when a people or a state must be punished for their unwillingness to make good for the damage caused by their subjects, or to return what they had acquired illegally.’⁶ The principle of just cause was considered to be a matter of moral theology, ensuring that the question of whether a war was ‘just’ fell within the jurisdiction of the Church.⁷

This classic version of just war theory as bound to the church began to be challenged around the sixteenth century by Francisco de Vitoria and Francisco Suarez. Vitoria added to it the idea that war could be just in circumstances where the people were seeking to overcome a violation of their rights. Suarez added further that the just cause principle would allow the victim to punish those guilty of

3 Coppieters B, Fotion N, Apresyan R (eds) (2002) *Moral Restraints on War: Issues and Examples*. Gardariki, Moscow, p.4

4 For a much more detailed account see Sayapin’s ‘Historical Background of the Criminalization of Aggression’, *Op. Cit.*

5 A practice that still ensures that modern Muslim states are unlikely to wage large-scale wars against other Muslim states, though the Iran-Iraq conflict represents a notable exception.

6 Coppieters, Fotion, Apresyan, *Op Cit.* p.33

7 Jokic, A. (2012) ‘What’s a Just War Theorist?’ *Journal of Theoretical and Philosophical Criminology*, Vol.4(2), p.92

injustice.⁸ Both were attempts to integrate the classic conception of just war into a secular, rights-based and legalistic doctrine.⁹ The principle of legitimate authority reaffirmed the state as the primary entity empowered to wage war.¹⁰

These attempts to limit the scourge of war, and, crucially, to do so through a rights-based paradigm, marked a key breakthrough in the early development of customs of war, and their later influence should not be underestimated. As will be demonstrated further in this chapter, just war theory would continue to develop into the modern era to form the core ethical foundation of the modern *jus ad bellum*.¹¹

It was not long before these foundations of a rights-based approach were built upon with another key contribution to the modern conception of the *jus ad bellum*, this time from the ‘father’ of international law, Hugo Grotius. A Dutch lawyer perhaps best known for his 1625 treatise *De jure belli ac pacis libri tres* (‘Three Books of the Law of War and Peace’), Grotius believed that war must be limited by compliance with inalienable rights emanating from human nature, and he divided the laws governing these rights into those of a *natural* character and those of a *positive* character. Positive law included a subsection entitled *human* law, which in turn encompassed *international* law to regulate interactions between entire peoples.

This concept of inalienable individual rights to be governed within the auspices of a new category of international law established, in the words of Hedley Bull, ‘one of the classic paradigms that has since determined both our understanding of the facts of inter-state relations and our ideas as to what constitutes right conduct therein. This is the idea of international society: the notion that states and rulers of states are bound by rules and form a society or community with one another, of however rudimentary

8 Sayapin, Op Cit. pp.19-20

9 Jokic, Op Cit. p.93

10 In modern times, this competence has been extended to international bodies comprised of individual states, namely the UN Security Council and regional security and military organisations such as NATO.

11 Sayapin, Op Cit. p.21

a kind.’¹² Grotius’s concept partially set the intellectual framework for the peace agreement that would come to be reached following the Thirty Years War.

The Thirty Years War raged between Catholics and Protestants in Europe until 1648, the devastating effects prompting the need for a new European political order. The major powers convened to devise a peace based upon the concept of equal, autonomous states and the presumption against external interference, guaranteeing states the absolute authority to regulate their domestic affairs.¹³ Underpinning this new peace were a series of treaties that mandated that states must first attempt to resolve disputes peacefully before resorting to war.¹⁴ This agreement, the Peace of Westphalia, gave concrete expression to the idea of an international society which Grotius had propounded, and the theory upon which it was based came to dominate the field of international relations for several centuries until modern institutions such as the UN Security Council and concepts such as individual criminal responsibility and universal jurisdiction led to a loosening of the paradigm’s influence.¹⁵

In this post-Westphalian phase, the concept of aggressive war-making as the supreme international crime was also beginning to gain traction. As the Swiss jurist, Emmerich de Vattel wrote in his 1758 work *Law of Nations*, the sovereign who takes up arms without a lawful cause is ‘chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes. He is guilty of a crime against the enemy, he is guilty of a crime against his people, finally, he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example.’¹⁶

Despite this, the horrors of war continued to cast a dark shadow over mankind. When the 1789 French Revolution and the Napoleonic wars destroyed peace in Europe, the majority of European powers were

12 Bull, H; Roberts, A; Kingsbury, B (eds.). (1992), ‘The Importance of Grotius in the Study of International Relations’ in *Hugo Grotius and International Relations*. OUP, p.71

13 Prentice-Cuntz, A & Flannery, K. (2014), *On the Crime of Aggression and the ICC in a quasi-Westphalian system*, at <http://www.internationaljusticeproject.com/on-the-crime-of-aggression-and-the-icc-in-a-quasi-westphalian-system> (accessed 10 July 2018)

14 O’Connell, M.E & Niyazmatov, M. (2012) ‘What is Aggression: comparing the *Jus ad Bellum* and the ICC Statute,’ *Journal of International Criminal Justice*, 10(1), p.189

15 Prentice-Cuntz & Flannery. Op Cit.

16 Emmerich de Vattel, (1758) *Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Translation of the Edition of 1758, Carnegie Institute of Washington, 1916

once again forced to meet – much like in Westphalia almost 150 years before – to redefine the political foundations of Europe. The ensuing Vienna Congress of 1814 did ensure peace between the great powers of the Austrian, Russian, Prussian and Ottoman empires¹⁷ for the following 40 years, but was unable to prevent the Crimea War between 1853-1856. When the Franco-Prussian War of 1870 followed, Gustav Moynier – a Swiss founding member of the International Committee of the Red Cross – in 1872 made the first proposal for a permanent international criminal court in modern times. This would prove to be the start of a rich history of civil society involvement in the development of international criminal law.

Further attempts to regulate warfare were made in The Hague Conventions of 1899 and 1907 – convened by Russia with the intention of agreeing a revision of the declaration concerning the laws and customs of war¹⁸ – but which were severely constrained by notions of state sovereignty.¹⁹ The conferences took important steps to establish legal and institutional mechanisms to regulate the law of armed conflict – mechanisms which would come to be recognised as constituting customary international law by the Nuremburg and Tokyo tribunals. The Hague Conventions prohibited the employment of certain means of waging war,²⁰ but the obligatory force of those conventions was confined to limited sections - for instance, armed conflicts originating in the context of pecuniary disputes. General recourse to war remained uninhibited by these conventions, and the regulations in no way designated such practices as criminal.²¹

The conventions failed to prevent the onset of the First World War, and it took the destruction wrought during this four year period for renewed momentum to gather in the form of various resolutions and protocols aimed at curbing the scourge of aggressive war.

A key driver behind these various resolutions and protocols was the push for a post-war settlement whereby peace was based not on the competing interests of states but on collective security and the rule

17 Although the Ottomans were not represented at the Vienna Congress.

18 Schindler, D. & Toman, J. (1988) 'The Laws of Armed Conflicts,' Martinus Nijhoff Publisher, pp.69-93.

19 Ibid.

20 Scott, J.B. (ed) The Hague Conventions and Declarations of 1899 and 1907 (OUP New York 1915)

21 Lumb, R.D. (1959) 'Individual Responsibility for Aggressive War: The Crime against Peace' University of Queensland Law Journal, Vol. 3 (4)

of law. Speaking in 1917, then President of the United States, Woodrow Wilson, claimed that this new order ‘must be based upon the common strength, not upon the individual strength, of the nations upon whose concert peace will depend.’²²

The end of WWI marked the real starting point in the history of prosecutions for international crimes.²³ The Peace Treaty of Versailles of 1919 was largely concerned with civil reparations to be paid by Germany following WWI, though it did also look to establish the personal criminal responsibility of Kaiser William II. It did not make specific reference to the crime of *aggression*, which had at that stage not come into being as a concept, but did envisage ‘a special tribunal for the trial against the former German Head of State charged for a *supreme offence* against international morality and sanctity of treaties.’²⁴ While the trial of Kaiser Wilhelm as the former German Head of State ultimately failed after the Netherlands refused to extradite him on the basis that such a *supreme offence* did not appear in Dutch penal law or any of the treaties the Netherlands had concluded, Versailles did mark an important step forward in changing attitudes towards war, moving us towards a place where war ceased to be a legitimate instrument under international law in the nineteenth-century sense.²⁵

The League of Nations was to follow, founded in 1920 as a result of the Paris Peace Conference. A precursor to the UN, the League of Nations sought to prevent wars from occurring by rigorously requiring League member states to settle all of their disputes peacefully.²⁶ While the Covenant of the League did not include a general prohibition against war, it did bring about a seismic shift in international relations, seeking to establish effective mechanisms for regional cooperation and security. The substantive chapters of the Covenant of the League of Nations embodied the central idea of the league: collective security, together with the various procedures for peaceful settlement of disputes. Signatories to the Covenant bound themselves to submit all serious disputes to peaceful settlement and promised to join in common action against any other which made war in violation of the Covenant. Such

22 Wilson, W. ‘An Address to the Senate, 22 January 1917’, in Link (ed.) (1966–), Papers of Woodrow Wilson. Volume 40, p.539

23 Schabas, W.A. (2004) ‘Origins of the criminalisation of aggression: how crimes against peace became the ‘Supreme International Crime’,’ in: Politi M, Nesi G (eds) The International Criminal Court and the crime of aggression. Ashgate Publishing Limited, Aldershot, pp.17–32

24 The Treaty of Versailles, signed 28 June 1919 (entered into force 21 October 1919), Part VII Penalties, Art. 227.

25 See Neff, S.C. (2005) ‘War and the law of nations: a general history.’ CUP, p.289

26 Ibid.

common action was to take the form of economic sanctions as its primary coercive mechanism and, if this were not enough, of military intervention.²⁷

The League of Nations was also responsible for forming international legal instruments that would contribute to establishing the prohibition of aggressive war under customary international law.²⁸ These included the Draft Treaty of Mutual Assistance in 1923, which declared ‘aggressive war an international crime,’ and that signatories would ‘undertake that no one of them will be guilty of its commission.’²⁹ The draft text was unable to find consensus, but this was due largely to an inability to define the acts that would constitute aggression rather than any principled objection to aggression as an illegal act, a problem that – as we shall see in later chapters – would come to blight the international community for many years to come. Similarly, a draft Protocol for the Pacific Settlement of International Disputes of 1924 was also proposed, asserting ‘that a war of aggression constitutes a violation of this solidarity and an international crime.’³⁰ Signed but not ultimately ratified, it nevertheless led the Nuremberg Tribunal to note in its Judgment that it was ‘signed by the leading statesmen of the world, representing the vast majority of the civilized states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.’³¹

The Kellogg-Briand Pact of 1928, also known as the General Treaty for the Renunciation of War as an Instrument of National Policy, went even further, ‘condemning recourse to war for the solution of international controversies, and renouncing it, as an instrument of national policy in their relations with one another.’³² The Pact was not without its flaws, chief amongst them its failure to define the crime of aggression. In practical terms, the Pact also famously failed to prevent the Italian invasion of Abyssinia in 1936,³³ or the outbreak of the Second World War a little over 10 years later, despite the major protagonists being signatories to it. The idea that a treaty could – at that time – prevent all future wars

27 League of Nations. (1919). *The Covenant of the League of Nations*. Montreal: A.T. Chapman.

28 Ibid., p.290

29 League of Nations, *Reduction of Armaments*, Report of the Third Committee to the Fourth Assembly, 27 September 1923

30 League of Nations, *Protocol for the Pacific Settlement of International Disputes*, 2 October 1924

31 International Military Tribunal (Nuremberg), *Judgment of 1 October 1946*, p.446

32 Kellogg-Briand Pact, signed 27 August 1928 (entered into force 24 July 1929), Art. 1.

33 See Emperor of Ethiopia, Haile Selassie I's Appeal To The League Of Nations in June 1936, available here: <https://www.mtholyoke.edu/acad/intrel/selassie.htm> (accessed 5 July 2018)

was always going to be naive, and opinion divides over whether the Pact was largely a historical irrelevance³⁴ or the start of a new world order.³⁵ Nevertheless, the treaty does mark an important step in the development of international law in that it would come to be relied upon by the founders of the Nuremburg tribunal, keen to judge Nazi crimes against previously agreed international standards.

With the Sixth Pan-American Conference of 1928 declaring that ‘war of aggression constitutes an international crime against the human species, [and that] all aggression is illicit and as such is declared prohibited,’³⁶ a body of law was forming that would inform the provisions adopted at the Nuremberg and Tokyo tribunals to try those most responsible for the horrors of the Second World War.³⁷

The UN War Crimes Commission, established in October 1943 to undertake preparatory investigative work for the future prosecution of the Axis’ major war criminals, also contributed to that body of law.³⁸ The Commission was ultimately unable to reach consensus on whether aggressive war amounts to a criminal act, but the process gave rise to intensive debate³⁹ that challenged pre-existing international law, which concerned itself with placing limitations on states’ previously unqualified right to resort to the use of force⁴⁰ rather than the criminalization of aggression.

Following the end of the Second World War, the Charter of the UN was signed on 26 June 1945, laying out new rules governing the use of force by states. The opening paragraph of Chapter I of the UN Charter establishes that the organization's first purpose is:

34 See Walt, S.M. (2017) ‘There’s Still No Reason to Think the Kellogg-Briand Pact Accomplished Anything’ in Foreign Policy (29 September 2017). Article available at: <https://foreignpolicy.com/2017/09/29/theres-still-no-reason-to-think-the-kellogg-briand-pact-accomplished-anything/> (accessed 13 July 2018)

35 See Hathaway, O.A. & Shapiro, S.J. (2017) *The Internationalists: How a Radical Plan to Outlaw War Remade the World*. New York, New York: Simon and Schuster

36 Lukashuk, I. ‘International Illegality and Criminality of Aggression,’ in (ed. Ginsburgs and Kudriavtsev) *The Nuremberg Trial and International Law* (1990) p.27

37 Ferencz, D. (2010) ‘The Crime of Aggression: Some Personal Reflections on Kampala’, *Leiden Journal of International Law*, 23(4), p.906.

38 The UNWCC was established by Allied powers in 1943 and was responsible for identifying, classifying, and assisted national governments in trying war criminals in Europe and Asia, with a particular focus on atrocity crimes. While the Commission had no power to prosecute criminals by itself, it did report back to governments and the evidence it collected was used at Nuremberg and other courts. The United Nations War Crimes Commission Archive is available at: <http://www.unwcc.org/unwcc-archives/> (accessed 11 August 2018)

39 See Schabas (2004) *Op Cit*.

40 Sayapin, *Op Cit*.p.39

“to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace...”

Article 2(4) further sets out that:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Chapter VII then provides that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken [...] to maintain or restore international peace and security.

These provisions transformed the prohibition of war into a prohibition of the use of force, while article 2(4) would come to be relied upon as the basis for the definition of the crime of aggression. But while these precedents had given birth to the idea of possible penal sanction for the unlawful use of force, the enforcement of this sanction – either through an International Criminal Court (ICC) or at the national level – was still some way off.⁴¹

2.1.2. Nuremberg

Nuremberg provided a breakthrough. Three months after the end of the Second World War, the allied powers signed the ‘London Agreement’ creating the International Military Tribunal known as ‘the Nuremberg Tribunal’ to prosecute those most responsible for Nazi atrocities. The Tribunal’s procedure combined elements from the common, civil and criminal law procedures of the British, American, French and Soviet systems.⁴² As the first tribunal set up to criminalise aggressive acts of war,

41 Kreß, C. (2018) ‘On the Activation of ICC Jurisdiction over the Crime of Aggression’, *Journal of International Criminal Justice*, Vol.16 (1), p.4

42 Ibid, p.41

Nuremberg struggled to affirm a sound legal basis for the prosecutions. While states had been working towards its criminalisation, they had thus far failed to define crimes against peace or to punish those who committed them. As such, there was no firm legal precedent for such an international court. Much effort was made by the allied powers to link ‘crimes against peace’ as it appeared at Nuremberg to the Kellogg-Briand Pact of 1928.⁴³

The London Agreement enumerated three crimes to be tried at Nuremberg: War Crimes, Crimes against Humanity, and Crimes against Peace. Crimes against Peace would form the bedrock of the future prohibition of crimes of aggression. Article 6 of the Tribunal’s Charter affirmed that Crimes against Peace were primarily constituted by ‘the planning, preparation, initiation or waging of a war of aggression.’⁴⁴ In punishing Crimes against Peace, Nuremberg recognised the waging of a war of aggression as the ‘supreme international crime’, adopting the view that that ‘the crime which comprehends all lesser crimes, is the crime of making unjustifiable war.’⁴⁵

Nuremberg established a legal precedent for the proposition that waging a war of aggression is an international offence, leading the American Chief Prosecutor Robert Jackson to report back to President Truman that henceforth nobody could deny or fail to know that the principles on which the Nazis had been convicted constitute law, and that this prohibition of aggressive war had become a law *with a sanction*.⁴⁶

It is certainly true that Nuremberg cemented the notion that international laws protecting humans could supersede traditional ideas of state sovereignty, leading to a proliferation of international NGOs working to document, publicise and denounce abuses,⁴⁷ but it remained unclear what exactly was meant by *aggression*, with no definition of the constitutive acts offered. Nuremberg ensured twelve

43 Bassiouni, M.C. (2017). ‘The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization’, Harvard International Law Journal. Vol.58, p.87

44 Charter of the International Military Tribunal, Article 6(a)

45 Report to the President by Mr. Justice Jackson, 6 June 1945, available at: www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf (accessed 10 July 2018)

46 Ibid.

47 Heller, P. (2013) ‘Challenges and Opportunities: Civil Society in a Globalizing World’, United Nations Development Programme, Occasional Paper 2013/06, p.11

convictions for crimes against peace⁴⁸ but despite Jackson's famous promise that, from that moment on the waging of aggressive war would not go unpunished, the acts that constitute aggression could only be inferred from the Tribunals Charter and judgments. Renewed attempts to define the crime – as well as to establish an independent international court to prosecute individuals for breaches of it – would continue until the end of the twentieth century, progression charted in the latter half of this chapter.

2.2. Defining Aggression and establishing the International Criminal Court

2.2.1. Post-Nuremburg

The immediate aftermath of the Second World War showed initial promise for those committed to preventing future atrocities, with the Universal Declaration of Human Rights and the Genocide Convention adopted in 1948. When drafting the Genocide Convention, the United Nations Secretariat had initially included a model statute for a court, but the proposal was considered too ambitious for the time and the conservative drafters stopped short of establishing such an institution.⁴⁹ The General Assembly instead issued a resolution calling upon the International Law Commission (ILC), a UN commission of legal experts charged with the codification and progressive development of international law, to prepare both a code of crimes against the peace and security of mankind,⁵⁰ and a draft statute for an international criminal court. The ILC submitted its draft statute in 1952, followed by a draft code of crimes in 1954.^{51 52}

Despite these important attempts to enshrine the protection of human rights within internationally recognised norms and prohibit atrocity crimes, war and violations of these norms continued unabated.

48 Karl Dönitz, Wilhelm Frick, Walther Funk, Hermann Göring, Rudolf Hess, Alfred Jodl, Wilhelm Keitel, Konstantin von Neurath, Erich Raeder, Joachim von Ribbentrop, Alfred Rosenberg, Arthur Seyss-Inquart. The International Military Tribunal for Germany (1946-09-30), Judgment of the International Military Tribunal for the Trial of German Major War Criminals: The Nazi Regime in Germany, The Avalon Project, Yale University

49 Schabas, W.A. (2007) 'An Introduction to the International Criminal Court,' Cambridge University Press, 3rd Edition, p.8.

50 UN General Assembly resolution 177(II) Foundation of the Principles Recognised in the Charter of the Nuremburg Tribunal and the Judgment of the Tribunal, 21 November 1947

51 Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 260 B (III).

52 Yearbook, 1954, Vol.1. 267th meeting, para.39, pg.131. On the 1954 draft code in general, see Johnson, D. H. N.(1955) 'Draft Code of Offences Against the Peace and Security of Mankind', 4 International and Comparative Law Quarterly 445.

The Israel-Arab war,⁵³ massacres in India and Pakistan,⁵⁴ and the enactment of apartheid in South Africa⁵⁵ are just a few examples of internationally recognised conflicts, in which countless atrocities took place.

With no shortage of acts of state aggression on the world stage, and codification of law designed to prohibit such acts in its infancy, the forty years immediately after Nuremberg have been described as a period of slow progress in the development of international criminal law.⁵⁶ As Benjamin Ferencz subsequently stressed, ‘with fighting going on all over the globe – including in India, Pakistan, Cyprus, the Congo, Cambodia, Vietnam and the Middle East – it was clear that it was easier to commit aggression than to define it.’⁵⁷

Progress was further hampered by the onset of the Cold War, which ushered in a period of increased political tension, making advancement on the war crimes agenda virtually impossible,⁵⁸ and agreement to the definition of aggression and other crimes remained elusive.⁵⁹

During this time, the UN Security Council – often hampered by the veto power of the Soviet Union and the US – proved itself reluctant to find that there had been an act of aggression,⁶⁰ though it did adopt

53 For an overview of the Israel-Arab Wars, see Bregman, A. (2016) ‘Israel’s wars: a history since 1947’, Routledge, 4th Ed; Morris, B. (1998) ‘1948: A History of the First Arab-Israeli War’, Yale University Press; Bloom, M. (2001) ‘Atrocities and armed conflict: state consolidation in Israel, 1948–56’, Conflict, Security & Development; Pappée, I. (2009) ‘The Vicissitudes of the 1948 Historiography of Israel’, Journal of Palestine Studies, Vol. 39 (1); Oren, M.B. (2002) ‘Six Days of War: June 1967 and the Making of the Modern Middle East’, Random House Publishing; Nassar, J.R. (1997) ‘The Culture Of Resistance: The 1967 War In The Context Of The Palestinian Struggle’, Arab Studies Quarterly, Vol. 19 (3).

54 See Ganguly, S. (2002) ‘Conflict unending: India-Pakistan tensions since 1947’, Columbia University Press; McMahon, R.J. (1996) ‘The Cold War on the Periphery: The United States, India, and Pakistan’, Columbia University Press; Schofield, V. (2010) ‘Kashmir in Conflict: India, Pakistan and the Unending War’, I.B.Taurus.

55 See Cobban, H. (2015) ‘Amnesty after Atrocity?: Healing Nations after Genocide and War Crimes’, Routledge; Gibson, J.L and Gouws, A. (1999) ‘Truth and Reconciliation in South Africa: Attributions of blame and the struggle over apartheid’, American Political Science Review; Hayner, P.B. (2002) ‘Unspeakable truths: Confronting State Terror and Atrocity’, Routledge.

56 Robert H Jackson Centre, ‘The Influence of the Nuremberg Trial on International Criminal Law’, <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (accessed 10 July 2018)

57 Ferencz, B. (1975) ‘The United Nations Consensus Definition of Aggression: Sieve or Substance?’ George Washington Journal of International Law and Economics, 708.

58 Schabas (2007), Op Cit., p.9.

59 Robert H Jackson Centre, Op Cit.

60 Weisbord, N. (2008) ‘Prosecuting Aggression’, 49(1) Harv Int’l LJ 161, p.169. Nineteen condemning South Africa for aggression against several African States (between 1976 and 1987); six condemning the minority regime of Southern Rhodesia for aggression against various African States (between 1973 and 1979); two condemning acts of aggression perpetrated against Seychelles (in 1981 and 1982); two condemning Israel for aggression against Tunisia (in 1985 and 1988); one condemning aggression against Benin (in 1977); and one condemning Iraq for aggression against diplomatic premises in Kuwait (in 1990).

resolutions condemning acts of aggression in Southern Rhodesia,⁶¹ South Africa,⁶² Benin,⁶³ Tunisia,⁶⁴ and Iraq.⁶⁵

Failure to act on other occasions often forced the UN General Assembly to break the deadlock through its 'Uniting for Peace' resolution,⁶⁶ which empowers the General Assembly to act 'if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression.'⁶⁷ On 11 occasions, the General Assembly has made a recommendation for members to take collective action in response to a threat to the peace, breach of the peace, or act of aggression.⁶⁸ While valuable in terms of ensuring that acts of aggression were denounced, the General Assembly is no less an inherently political body than the Security Council,⁶⁹ and was further hampered by there being no accepted definition of the crime. Work to agree a definition and ultimately a mechanism for identifying and prosecuting it continued.

Several Special Committees on the Question of Defining Aggression were set up by the General Assembly from 1952 to 1965, and in 1974 the big breakthrough came. The fourth Special Committee was successful in drafting the definition annexed to the UN General Assembly's 'Definition of Aggression' resolution.⁷⁰ This was adopted unanimously.

61 United Nations Security Council resolution 326 (1973) of 2 February 1973.

62 From 1976 to 1987, the Security Council adopted a number of resolutions condemning acts of aggression committed by South Africa against Angola, Botswana, Lesotho, Seychelles and other States in southern Africa; see Security Council resolution 418 (1977) adopted unanimously on 4 November 1977; and Resolution 581 (1986) adopted by 13 votes to none, with 2 abstentions (United Kingdom and United States) on 13 February 1986.

63 Security Council resolution 405 (1977) adopted on 14 April 1977

64 Resolution 573 (1985) of 4 October 1985; and Security Council resolution 611 (1988).

65 Resolution 660 (1990)

66 UN General Assembly 5th session, Resolution 377 A (V) of 3 November 1950

67 Ibid., para.1. For further discussion of the use of Res.377, see Carswell, A.J. (2013) 'Unlocking the UN Security Council: The Uniting for Peace Resolution', 18 JCSL 453; and Henderson, C. (2014) 'Authority without Accountability? The UN Security Council's Authorization Method and Institutional Mechanisms of Accountability', *Journal of Conflict and Security Law*, Vol.19 (3), pp.506-508

68 The UN General Assembly is empowered to act pursuant to Resolution 377 in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, and can respond with the use of armed force, when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly can call an emergency special session if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations. Since 1950, ten emergency special sessions have been convened in accordance with Resolution 377, while the crisis in Bangladesh was addressed during a regular session of the General Assembly: Middle East (1956), Hungary (1956), Middle East (1958), Congo (1960), Middle East (1967), Bangladesh (1971), Afghanistan (1980), Palestine (1980), Namibia (1981), Middle East (1982), Palestine (1997).

69 Ruys, T. (2010) 'Defining the Crime of Aggression: The Kampala Consensus', *Military Law and the Law of War Review*, p.24

70 United Nations General Assembly resolution 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974)

Relying heavily on the Soviet Union's 1933 draft definition,⁷¹ the General Assembly's 1974 resolution was intended as a guide for the Security Council to determine when acts of aggression had been committed rather than as a definitive legal basis for determining individual criminal responsibility.⁷² Nevertheless, it still constitutes a significant step forward, serving as the basis for the agreement to be reached in Kampala. Later chapters will analyse in detail the provisions agreed in Kampala, and so we will not duplicate much of that analysis by dedicating too much time to the 1974 definition, but it is certainly worth highlighting the provisions agreed and briefly discussing the reactions to them.

Article 1 of the resolution condemns '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.'⁷³ Article 2 then confirms that the first use of force in contravention of the UN Charter will be *prima facie* evidence of aggression, but that the Security Council retains the authority to decide whether an act of aggression has taken place. Article 3 then provides a non-exhaustive list of actions that constitute aggression against another state, summarised as: (a) An invasion or attack, or any military occupation or annexation; (b) Bombardment or the use of any weapons against another state; (c) The blockade of ports or coasts; (d) An attack on the land, sea or air forces, or marine and air fleets; (e) The use of armed forces within the territory of another state without the agreement of the receiving state; (f) Allowing territory to be used by another state in the perpetration an act of aggression against a third state; (g) Sending armed hands, groups, irregulars or mercenaries to carry out acts listed above.⁷⁴

These articles confirm that aggressive acts are those which involve armed measures, rather than some other form of coercion, be it economic, ideological or otherwise.⁷⁵ The list of actions that constitute acts of aggression are also indicative, and not meant to exclude other forms of aggression.

71 The Soviet Union posed a draft definition of aggression to the Committee on Security Questions to the General Commission of the Disarmament Conference for the Reduction and Limitation of Armaments on 6 Feb 1933. The definition was slightly revised on 24 May 1933 but was never adopted.

72 See Bartman C.S. (2010). 'Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us', 43 Case W. Res. JIL

73 Ibid., p.180.

74 UN General Assembly 'Definition of Aggression' resolution 3314, Op. Cit.

75 That other conceptions of force, such as economic or ideological coercion, ultimately fell outside the definition is considered in more detail in: Grzebyk, P. (2013) 'Criminal Responsibility for the Crime of Aggression', Routledge at p.53. That other forms of coercion could be considered aggression was discussed throughout the twentieth century. See, for example, McDougal, M.S. and Feliciano, F.P. (1959) 'Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective', Yale Law Journal, Vol. 68 (6); Editors, (1974) 'The Use of Nonviolent Coercion: A Study in Legality under Article 2(4)

One part of the definition has led to further debate concerning whether there should be any reference to the consequences of committing aggression or not.⁷⁶ This debate centred on reference to ‘war of aggression’ as something apparently distinct from ‘aggression’ in Article 5(2), where it states: a ‘war of aggression is a crime against international peace. Aggression gives rise to international responsibility.’ Some have argued that a ‘crime of aggression’ for which an individual may be held accountable must be a ‘war’ of aggression, therefore asserting that individual criminal responsibility only attaches to the most flagrant violations of international law.⁷⁷ Indeed in the Nuremberg Charter’s provision on aggression referred to a ‘war of aggression’ within the category of ‘crimes against the peace’, and the 1970 General Assembly Declaration on Friendly Relations included the sentence: ‘A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.’⁷⁸ In opposition to those arguing that this created a two-tier system of responsibility, some states called for this to be updated. They argued for there to be no reference to ‘war of aggression’ or to ‘crime’. Instead, these states simply wanted a reference to state responsibility, and clarification that a state’s responsibility flows from aggression.

What is clear is that states were focused on the consequences for states in Article 5(2), and not on individual accountability. While arriving at a definition was hailed as a watershed moment by Benjamin Ferencz,⁷⁹ states were quick to point out that the 1974 General Assembly resolution was a guide for the UN Security Council, rather than an instrument of criminal prosecution.⁸⁰ Indeed, when charged with

of the Charter Of The United Nations’, *University Of Pennsylvania Law Review*, Vol. 122; Dom, M. (1978) ‘Defining Economic Aggression in International Law: The Possibility of Regional Action by the Organization of American States’, *Cornell International Law Journal*, Vol. 11 (1); Farer, T.J. (1985) ‘Political and Economic Coercion in Contemporary International Law’, *American Journal of International Law*, Vol. 79 (2).

76 O’Connell & Niyazmatov. *Op Cit.* p.196.

77 *Ibid.*

78 United Nations General Assembly resolution 2625 XXV of 24 October 1970; ‘Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the charter of the United Nations’.

79 Ferencz, B. (1975) ‘The United Nations Consensus Definition of Aggression: Sieve or Substance?’ *George Washington Journal of International Law and Economics*, p.168

80 Sunga, L.S. (1998) ‘The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5–10)’, 6 *European Journal of Crime, Criminal Law and Criminal Justice* 61. p.65.

reviving the work on a definition of the crime in 1996, the ILC concluded that the 1974 definition was ‘overly political and lacked legal precision.’⁸¹

Ferencz has subsequently described his frustration that ‘no one seemed to recall that the General Assembly had mandated a code and court to serve as the basis for enforcing the Nuremberg principles.’⁸² In the end, the General Assembly definition was never utilised as the basis for prosecution in a criminal trial. Despite it being dismissed by the ILC, the definition to be adopted in Kampala came to rely heavily on the 1974 formulation.⁸³ It also contributed to the growing body of customary international law on the crime of aggression. Indeed in writing on potential consequences of invading Iraq, Attorney General Goldsmith was later to warn Tony Blair of possible prosecution for the crime of aggression which he recognised ‘was customary international law and which therefore automatically formed part of the country’s domestic law.’⁸⁴ The British House of Lords in *R. v. Jones (2006)* also later confirmed that the crime of aggression formed part of customary international law.⁸⁵

While the push for an agreed definition of the crime of aggression had progressed, the prospect of an established court to prosecute those that violated its provisions stalled. Despite the impasse, civil society organisations continued to work towards the formulation of codified international law and the establishment of an international criminal court, while NGOs like the International Law Association continued to propagate the court idea as a matter of principle.⁸⁶ From the 1970s through to the end of the cold war period, the International Law Commission ‘continued to work on a code of international crimes, and individuals like Benjamin Ferencz, a former prosecutor of the Nuremberg tribunal, and M.

81 . See Int’l. L. Comm’n, Report of the International Law Commission on the Work of its 48th Session, May 6–July 26, 1996, at 83–85, U.N. Doc. A/51/10 (SUPP) (Jan. 1, 1996).

82 E-mail from Benjamin Ferencz to Weisbord (Apr. 4, 2007) (on file with Weisbord), in Weisbord (2008), Op. Cit., p.168.

83 Paulus, A. (2009) ‘Second thoughts on the crime of aggression,’ *European Journal of International Law*, 20(4), p.1118.

84 Note from Lord Goldsmith, UK Attorney-General to UK Prime Minister Tony Blair, 7 March 2003, available at: <http://www.comw.org/warreport/fulltext/0303goldsmith1441.pdf>. (accessed 12 July 2018)

85 *R. v. Jones et al.* [2006] UKHL 16.

86 Glasius, M. (2002) ‘Expertise in the cause of justice: global civil society influence on the statute for an international criminal court’, in: Glasius, Marlies, Kaldor, Mary & Anheier, Helmut K., (eds.) *Global Civil Society Yearbook 2002*. Oxford University Press, p.139.

Cherif Bassiouni, an Egyptian professor of criminal law, continued to devote academic treatises to the idea of a permanent court.’⁸⁷

In 1981, the International Law Commission was again asked by the General Assembly to revive the work on its draft code of crimes. Doudou Thiam, the newly appointed special rapporteur for the file, carried out substantial work in addressing a range of questions, including definitions of crimes.⁸⁸ A substantially revised version of the 1954 draft code of crimes was prepared, and in 1991 was sent to Member States for their reaction.

While the code would come to be essential for defining the crimes to be prosecuted by an international criminal court, work still needed to progress on the statute for the institution itself. In 1989, a formal proposal was presented to the General Assembly, calling for the establishment of an international criminal court to prosecute those complicit in the illicit trafficking in drugs across national borders ‘and other transnational criminal activities’, and the International Law Commission was given the task of drafting a statute for such a court. Seizing the opportunity, the International Law Commission proposed that the mandate for the court should also incorporate crimes against peace and security of mankind - including aggression, genocide and crimes against humanity - and by 1994, the Commission had a final version of its draft statute for an international criminal court.⁸⁹

2.2.2. The road to Rome via the ad hoc tribunals

When, in 1994, the Commission submitted the final version of its draft statute for an ICC to the General Assembly, it recommended that states convene a conference to turn the draft into a binding treaty. When the UN General Assembly opted instead to subject the draft to further discussion, a coalition of NGOs, frustrated by delay, decided to take action. In February 1995, the Coalition for an International Criminal

⁸⁷ Ibid.

⁸⁸ Schabas (2004), *Op.Cit.*, p.8.

⁸⁹ The text of the Draft Statute and the ILC’s commentary are found in the Report of the International Law Commission on the Work of its Forty-Sixth Session, 49 UN GAOR Supp. (No. 10), UN Doc. A/49/10, paras 23–91.

Court (CICC) was founded as ‘a broad-based network of NGOs and international law experts,’⁹⁰ with the aim of facilitating progress on the text.

Two years later in 1996, the Commission adopted the final draft of its ‘Code of Crimes against the Peace and Security of Mankind.’ The International Law Commission’s draft statute focused on procedural and organisational matters, and the code of crimes defined the crimes and the associated legal principles. Both would play a seminal role in the preparation of the Statute of the International Criminal Court.⁹¹

Later that year, a Preparatory Committee was established to begin work redrafting the draft text, and a date was set for a conference to establish the Court. The conference would take place in Rome over the summer of 1998. In the intervening years, the CICC and related NGOs supported ‘the emergence of a like-minded group of countries who were in favour of swift establishment of a strong court, [acting] as a counterweight to the permanent members of the Security Council on the one hand and members of the Non-Aligned Movement on the other, both of which were reluctant to establish an independent court with supra-national powers.’⁹²

While the Commission had been grappling with its draft statute, the ethnic cleansing taking place in Yugoslavia and the genocide in Rwanda were shocking the conscience of the world, providing renewed impetus to those calling for comprehensive international rules and a permanent court to deter and punish those involved in atrocity crimes. In February 1993, the Security Council decided upon the establishment of a tribunal mandated to prosecute ‘persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’⁹³ and in November 1994, following a request from Rwanda, the Security Council created a second ad hoc

90 Glasius, *Op.Cit.*, p.146.

91 Schabas (2004), *Op.Cit.*, p.8.

92 Interview with William Pace, Coordinator of the NGO Coalition for an International Criminal Court, on 3 and 17 December 2001., cited in Glasius, *Op.Cit.*, p.140.

93 United Nations Security Council resolution 808 (1993).

tribunal, to prosecute genocide and other serious violations of international humanitarian law committed in Rwanda and neighbouring countries during 1994.⁹⁴

Due to the internal nature of the conflicts in Yugoslavia and Rwanda, focus instead turned to genocide, crimes against humanity and war crimes, with the crime of aggression not included within the mandate of either ad hoc tribunals. The tribunals were intrinsically linked, sharing the same prosecutor and Appeals Chamber. The body of case law that flowed from these ad hoc tribunals was hugely significant in clarifying legal principles as they relate to the prosecution of atrocity crimes, and many of the findings were to be incorporated directly into the Statute for the ICC. The crimes included in the Rome Statute, along with the definitions used, owe a lot to both the Statutes of the ad hoc tribunals and to their growing jurisprudence.⁹⁵

The events in Yugoslavia and Rwanda represented a turning point. This manifested itself not just in the development of international criminal law and renewed interest in a permanent institution to punish atrocity crimes, but also in the role civil society groups were to play. As Bassiouni notes, the activities of human rights organisations in publicising the atrocities taking place were integral in propagating the idea that perpetrators could and should be punished.⁹⁶

Even instances in which the ad hoc tribunals erred provided lessons for subsequent drafters. The Rome Statute developed alternative modes of liability, placed greater emphasis on crimes of sexual violence, and sought to re-establish the centrality of states and state sovereignty at the ICC through the principle of complementarity.⁹⁷

Women's groups were particularly inspired by the example of the Yugoslavia tribunal in their work for an ICC.⁹⁸ The widespread use of rape as a weapon of war and component of ethnic cleansing brought

94 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993)', UN Doc. S/25704.

95 For further discussion on the impact of the ad hoc tribunals on the Rome Statute, see Ford, S. (2018) 'The Impact of the Ad Hoc Tribunals on the International Criminal Court', John Marshall Law School

96 Bassiouni, M.C. (1996). 'An Idea Whose Times Has Come'. Chicago Tribune. (18 June 1996) accessed 10 July 2018, available at http://articles.chicagotribune.com/1996-06-18/news/9606180219_1_war-crimes-human-rights-yugoslavia-and-rwanda

97 Ford, Op. Cit.

98 Glasius, Op.Cit., p.142.

women's experiences to the fore. Taking into consideration the concerns of women's groups, 'an officer for gender issues was appointed within the prosecutor's office of the ICTY; and it was decided to allow rape victims to give testimony anonymously, and to seriously prosecute rape as a war crime.'⁹⁹

2.2.3. Rome

Following agreement at the Preparatory Committee on the establishment of an international criminal court, the Rome Conference was convened, taking place from 15 June to 17 July 1998. More than 160 governments participated in the conference. By the end, 120 nations voted in favour of the adoption of the Rome Statute of the International Criminal Court. Seven nations voted against the treaty (including the United States, Israel, and China), while 21 countries abstained. This marked an 'historic achievement',¹⁰⁰ establishing for the first time a permanent international criminal court to prosecute the crimes that most shocked the conscience of humanity.

During the Rome Conference, the international community focused again in earnest on the prospect of prosecuting the crime of aggression. While it was widely accepted that the crime of aggression should form part of the ICC's jurisdictional remit, as evidenced by the fact that the crime was included within the Rome Statute as one of the four core crimes, opinion was divided on both the definition of the crime and the role that the Security Council would play in proceedings. Rather than stall the adoption of the ICC Statute and the birth of the fledgling institution, a compromise was reached. The ICC Statute recognised in Article 5 that the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole, and that should include the crime of aggression.¹⁰¹ The ICC Statute also, however, ensured that the Court shall only exercise jurisdiction over the crime of aggression 'once a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime'.¹⁰²

⁹⁹ Ibid.

¹⁰⁰ Blokker, N & Kreß, C. (2010). 'A consensus agreement on the crime of aggression: impressions from Kampala,' *Leiden Journal of International Law*, 23(4), p.889

¹⁰¹ Art.5(1)(d), ICC Statute.

¹⁰² Art.5(2), ICC Statute.

The ICC Statute explicitly recognised the crime of aggression as a crime under customary international law, and committed the international community to agreeing a definition and jurisdictional remit for the crime. The Court's Preparatory Commission was tasked with preparing 'proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction.'¹⁰³ These proposals were to be submitted 'to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute.'¹⁰⁴

The role of civil society organisations in the process which led to the adoption of this Statute was 'almost unprecedented in international treaty negotiations, rivalled only by its contribution to the Landmines Ban Treaty, concluded six months earlier.'¹⁰⁵ Indeed the CICC credits civil society with some of the most important aspects of the statute, such as its strong provisions for gender crimes and the independence of the prosecutor.¹⁰⁶ More than 200 NGOs attended the Conference, including women's organisations, peace and conflict resolution organisations, groups focused on global governance and strengthening the United Nations. The major international human rights organisations, including Amnesty International and Human Rights Watch, and Bar Associations including the International Commission of Jurists, were heavily involved in the ICC negotiations.¹⁰⁷ As William Pace, Convenor of the CICC, admits, such was the level of influence wielded by civil society that the CICC was asked by the United Nations to organise the accreditation of NGOs to the Conference, 'a unique form of self-regulation not attempted before at international conferences.'¹⁰⁸

The CICC has been described as being extremely effective in pushing its agenda, enabling NGOs to lobby state representatives from their region; targeting delegations thematically on issues such as gender justice, victims, children, and peace; and reporting on proceedings from the working groups of state

103 Resolution F, para.7. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. I, Final Documents, Annexe I, at 72.

104 Ibid.

105 Glasius, *Op.Cit.*, p.137.

106 Coalition for the ICC, 'History of the ICC > Rome Conference,' available at: <http://iccnw.org/?mod=icchistory&idudctp=21&order=authordesc> (accessed 10 July 2018)

107 Glasius, *Op Cit.* p.142.

108 Ibid. p.147.

representatives.¹⁰⁹ Delegations were pushed toward more progressive positions, partly through debates in their domestic newspapers¹¹⁰ as a result of CICC reporting.

2.2.4. Road to Kampala

With a permanent court, finally in place – and provisions adopted to punish war crimes, crimes against humanity and genocide – attention now turned to the crime of aggression. The search was for a workable definition and agreeable jurisdictional remit to govern the crime of aggression at the ICC. In accordance with the mandate agreed in Rome, the Preparatory Commission met on a number of occasions, seeking to form a proposal on the crime of aggression worthy of consideration by a Review Conference. The Working Group on Aggression was formed, making significant progress in preparing the first Coordinator's Discussion Paper, presented in July 2002.

The 2002 Discussion paper helped to shape the ensuing discussion on the crime of aggression. It sought to provide a working definition of the crime, as well as discussion on the role of the Security Council.¹¹¹ In recognition of the work of the Working Group on Aggression and the entry into force of the ICC Statute on 1 July 2002, the Assembly of States Parties established the Special Working Group on the Crime of Aggression (SWGCA).¹¹² This group was composed of ICC States Parties, interested non-party states, and a number of independent experts and representatives of NGOs.¹¹³

2.2.4.1. Defining the crime of aggression

Building on the 2002 Discussion paper, the SWGCA's work culminated in a 2009 Discussion Paper. Informed by the General Assembly's 1974 definition of aggression, this Discussion Paper provided the basis for negotiations at the Review Conference to follow. Indeed, it was decided that the 2009 Discussion Paper's definition was to be adopted verbatim during the Review Conference, allowing

¹⁰⁹ Ibid.

¹¹⁰ On the Record (1998e). 'Strong Lobbying Efforts of Latin American NGOs Impacted the Rome Conference'. Vol.1, No. 23, Part 2 (27 July)

¹¹¹ UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2, 11 July 2002.

¹¹² ICC-ASP/I/Res. 1 adopted by consensus at the 3rd Plenary Meeting on 9 September 2002, ICC-ASP/I/3, 328.

¹¹³ Weisbord, N. (2014) 'Bargaining Practices: Negotiating the Kampala Compromise for the International Criminal Court,' 76 Law and Contemporary Problems, p.87.

negotiations to focus on the more controversial elements of the Court's jurisdictional remit and the role of the Security Council.

A definition of aggression for the purposes of prosecution by a criminal court had finally been agreed.

Those provisions read:

Article 8 bis

1. 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.

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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) 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;*
- (b) 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;*
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;*
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;*
- (e) The use of 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*

agreement or any extension of their presence in such territory beyond the termination of the agreement;

- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*
- (g) 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 the acts listed above, or its substantial involvement therein.*

The work of the SWGCA in arriving at this definition was sub-divided into two areas: individual conduct and the conduct of the state.¹¹⁴

Addressing the area of individual conduct, the SWGCA adopted the phrase ‘by a person in a position effectively to exercise control over or to direct the political or military action of a state.’¹¹⁵ In line with the approach taken at Nuremberg, the crime of aggression was distinguished from the other crimes within the ICC’s remit in that aggression is seen as an absolute leadership crime.¹¹⁶ Unlike war crimes, the act of waging war will not lead directly to ordinary soldiers being punished.

In dealing with the second sub-heading, it was decided that provisions should remain within the confines of customary international law, in that the crime of aggression should only extend to states. This was despite strong arguments that transnational private organisations can be a serious threat to international peace.¹¹⁷ While it was decided that the illegal use of armed force should constitute the punishable state

114 See the 2007 Report of the SWGCA, quoted in Kreß, C & von Holtzendorff, L. (2010) The Kampala Compromise on the Crime of Aggression, *Journal of International Criminal Justice*, 8(5), p.1188.

115 Ibid.

116 Clark, R.S. (2009) ‘Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction over it,’ *European Journal of International Law*, 20(4), p.1104. See also, Heller, K.J. (2007) ‘Retreat from Nuremberg: the leadership requirement in the crime of aggression,’ *European Journal of International Law*, 18(3), pg.477-497.

117 “[T]he world has become much more complex, with what James Rosenau termed the state-centric international system continuing to function according to the dictates of traditional geopolitics, while operating within the context of a multi-centric world in which geopolitics has been transcended, and in which territory, spatial relationships, and the constraints and privileges of sovereignty, are far less compelling. New transnational actors have emerged to pose novel and insidious security threats, while traditional categorisations of states based upon power and wealth have been rendered inadequate and incomplete.” Williams, P. (1997). ‘Transnational organised crime and national and international security: A global assessment.’ *Society Under Siege: Crime Conflict and Illegal Weapons*, Virginia Gamba (ed.) Johannesburg, Halfway House: Institute for Security Studies, pp.70-81. “Organized crime is now a threat to international peace and security in almost every theatre where the United Nations has peacekeeping, peacebuilding, or special political missions.” Kemp, W., Shaw, M. and Boutellis, A. (2013) ‘The Elephant in the Room: How Can Peace Operations Deal with Organized Crime?’ International Peace Institute. “Transnational Criminal Organisations pose serious threats to both national and international security, and are extremely resistant to efforts to contain, disrupt or destroy

act, the question of how exactly to define this illegal use of armed force was more controversial. Opinion was broadly split between those states that favoured an inclusive definition such as that adopted in 1974, and those that wanted a higher threshold.¹¹⁸ The result was a compromise in which the 1974 definition of the UN General Assembly resolution 3314 was referenced in Art.8(2), along with the threshold requirement contained in Art.8(1) that an act of aggression must constitute a manifest violation of the Charter of the United Nations in its ‘character, gravity and scale.’

2.2.4.2. Conditions for the exercise of jurisdiction

A third element of the work of the SWGCA related to the conditions for the exercise of jurisdiction. Much of the work needed to reach agreement on this crucial element would fall to the delegations at the Review Conference in Kampala.

Agreeing on the conditions for the exercise of jurisdiction rested to a large extent on the role of the Security Council. The five permanent members of the Security Council favoured an approach set out in a 1994 International Law Commission (ILC) Draft Statute. This approach required a prior determination of an act of aggression by the Security Council as a precondition of ICC proceedings. This was strongly opposed by the overwhelming majority of states participating in negotiations, and since agreement could not be reached it was left to the Review Conference to find a way forward.

Intimately linked to this issue, was the question of whether the Court should have the power to exercise its jurisdiction over the crime of aggression even in cases where the alleged aggressor state had not consented to the new provisions on the crime of aggression.¹¹⁹ If consent of the new provisions by the aggressor state was needed before ICC proceedings could be initiated, the permanent members of the Security Council may well be more inclined to forgo their insistence on the need for a prior Security Council determination. While a number of states favoured adoption of the Article 12 provisions that regulate the exercise of jurisdiction for the other international crimes, it soon became clear that in order

them.”, Williams, P. (1994) ‘Transnational Criminal Organisations and International Security’, *Survival*, 36:1, pp.96-113. See also Avant, D. and Haufler, V. (2012). ‘Transnational Organisations and Security’. *Global Crime*, 13(4), pp.254-275.

118 Kreß & von Holtendorff, *Op Cit.* p.1190.

119 *Ibid.*, p.1195.

to gain the consent needed, a special entry-into-force mechanism was going to have to be negotiated. This too was left to the Review Conference.

Despite a number of jurisdictional issues remaining unanswered,¹²⁰ the SWGCA did make important progress in addition to providing a workable definition of the crime. It was agreed that any determination of the Security Council would not be prejudicial to a future finding of the Court. It was also confirmed that the three trigger mechanisms that apply to the other international crimes would also apply to the crime of aggression, namely referral of a crime to the ICC by a State party or the Security Council, or the initiation of an investigation *proprio motu* by the Prosecutor of the Court.

With these provisions and a definition of the crime accepted, along with a clear idea of the parameters of discussion to follow, the stage was set for Review Conference negotiations.

The following chapter will provide an in-depth account of the provisions adopted in Kampala that, contained within Article 8 bis, define the crime of aggression and the associated acts that result in individual criminal responsibility.

¹²⁰ See Murphy, S. (2010) 'Aggression, legitimacy and the International Criminal Court,' *European Journal of International Law*, 20(4), p.1148.

Chapter 3 – Examination of the Definition of the Crime of Aggression

This chapter will seek to provide an in-depth account of the provisions adopted in Kampala that, contained within Article 8 bis, define the crime of aggression and the associated acts that result in individual criminal responsibility. The first part of this chapter will briefly look at the format of the definition, examining the rationale behind sub-dividing the broader definition into two parts: the first that defines a crime of aggression and establishes the threshold of illegality, and the second that elaborates in concrete terms which actions amount to acts of aggression. The second and third parts of this chapter take each of those elements of the definition in turn, critically assessing what they provide and analysing how the provisions might be interpreted by the Court. The final section of this chapter looks at the mental elements of the crime and the implications for defendants seeking to argue they did not possess the requisite mens rea. This chapter is closely linked to its sister Chapter on Jurisdiction which similarly examines the jurisdictional provisions adopted in Kampala.

3.1. The Structure of Article 8 bis

Discussions that took place in preparation for the Kampala conference, namely those of the Special Working Group for the Crime of Aggression (SWGCA), provided a working definition of the crime, albeit one that still needed to be formally adopted. While states were keen to address a number of concerns they had about the definition – leading to the Understandings to be adopted in Kampala, they understood that reopening the definition would inevitably lead to its total unravelling.¹²¹ As such, support for the definition stood firm and was adopted in Kampala as Article 8 bis.

Article 8 bis is thus divided into two paragraphs, the first (Art.8 bis (1)) defines the ‘crime of aggression’ and the second (Art.8 bis (2)) elaborates the constituent parts of an ‘act of aggression’. Both elements must be satisfied before individual criminal responsibility can be assigned and so it is necessary to fully understand both here. In order to take a critical look at the definitional provisions agreed in Kampala,

¹²¹ Wenaweser, C. (2010) Reaching the Kampala Compromise on Aggression: The Chair’s Perspective, *Leiden Journal of International Law*, 23(4), p.883.

it is important to first go back and understand the rationale of the drafters – and the position of states – in arriving at this two-part definition.

As a starting point for defining the crime of aggression, there had been little progress made since Nuremberg, and customary international law largely rested there.¹²² As such, only aggressive *war* led to criminal responsibility. The drafters were faced with the modern reality that instances of state aggression are rarely declared, and not every unlawful use of force by a state falls within the modern conception of aggression. A new concept needed enumeration. Largely – and sensibly – avoiding attempts to capture the meaning of *war*, it was instead decided that the definition provided by the General Assembly in resolution 3314, which incorporated both a general definition of the crime of aggression to be read along with a list of acts of aggression, would be relied upon in some form.

As touched upon in the previous chapter addressing the historical development of the criminalisation of aggression, states were broadly divided over whether an inclusive or narrow definition should be adopted: an inclusive approach whereby the acts of aggression listed in Article 3 of the annex to Resolution 3314 would be included without any additional threshold, or a narrower definition incorporating both the general definition of the crime of aggression along with an even higher threshold requirement. In the end, the SWGCA presented a compromise in the Chair's 2009 *Non-paper on the Elements of Crimes*, whereby the list of acts of aggression from the Resolution 3314 definition were included along with the resolution's accompanying chapeau comprising a more general definition of the crime of aggression. This was to be supplemented by a threshold requirement stipulating that the acts must be of such a degree that they constitute a *manifest* violation of the UN Charter.

The decision to include a general definition of the crime of aggression along with the enumerated acts was a necessary one as the acts of aggression adopted almost verbatim from Article 3 of the annex to Resolution 3314 in Article 8 *bis* (2) do not contain any requirement of illegality. If read in isolation, these fail to rule out uses of force that are not sufficiently serious as to amount to a crime of

¹²² Wilmschurst, E, 'Aggression', in R.Cryer, H. Friman, D. Robinson & E. Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2nd edn: CUP, 2010), p.320

aggression.¹²³ Furthermore, it is only through the introduction of a higher threshold that the ‘manifest illegality’ applies to the definition as a whole. These and other issues related to the threshold requirement are dealt with in more detail below.

At the time of drafting, the Resolution 3314 definition was intended as an aid to the Security Council in determining acts of aggression rather than as a definitive legal definition of the crime. This goes some way to explaining why it fails to address these grey areas of international law, but to have adopted it for the purposes of the ICC without further elaboration would not, in the words of Claus Kreß, have adequately responded to the fundamental challenge posed to any attempt to define the crime of aggression.¹²⁴ As Elizabeth Wilshurst recognises, the formulation adopted will require the ICC to rule on whether the collective act of the state is in breach of international law, and the Court will need to consider any defences under international law which are available to the state.¹²⁵ These will be considered further below.

3.2. The Crime of Aggression

This opening paragraph of Article 8 *bis* defines the crime of aggression in general terms and establishes the basis for the individual criminal responsibility of possible perpetrators. Article 8 *bis* (1) reads:

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.

This section contains three elements that, along with an act of aggression contained within Art.8 *bis* (2), must be present for a crime of aggression to have occurred. These are (1) individual conduct: that an individual must have been involved in the ‘planning, preparation, initiation or execution’ of the crime;

¹²³ See Glennon, M.J. (2009) ‘The Blank-Prose Crime of Aggression’ 35 The Yale Journal of International Law, p.97

¹²⁴ Kreß & von Holtzendorff, Op Cit. p.1191

¹²⁵ These international law defences are not expressly included in the ICC Statute, but will have to be ruled on within the Court’s decision as to whether the use of force in question was contrary to international law. Wilshurst, Op Cit. pp.321-322

(2) leadership requirement: that those acts must have been carried out ‘by a person in a position effectively to exercise control over or to direct the political or military action of a State’; and (3) threshold requirement: that the act ‘by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’

3.2.1. Individual conduct: ‘planning, preparation, initiation or execution’

As to what would constitute the acts of commission, the SWGCA chose to remain faithful to the language used at Nuremburg, only substituting ‘waging’ for ‘execution’.¹²⁶ This substitution was considered a necessary result of the definition of the state act element of the crime being broadened to ‘act of aggression’ in place of ‘war of aggression’.¹²⁷ No views expressed in the SWGCA reveal that any substantive difference of meaning, however, was intended.¹²⁸

As Barriga has noted:

*‘execution’ could be seen as the odd sibling among these words, as all the others describe the typical activity of the leader, whereas it is usually the soldier who executes an act of aggression by actively engaging in combat. Then again, modern warfare would allow a leader to execute a devastating act of armed force by a simple push of a button.*¹²⁹

Unlike Article 6(a) of the NIMT Charter and Article 5(a) of the IMTFE Charter, Article 8 *bis* (1) does not criminalize the ‘participation in a common plan or conspiracy’. As interpreted by Nuremberg, conspiracy differed little from planning and preparation;¹³⁰ the charge of conspiracy was in effect superfluous, and led to criticism of the Tribunal.¹³¹

¹²⁶ ICC-ASP/6/20, Annex II, p. 88, para. 8..

¹²⁷ McDougall, C. (2013) ‘The Crime of Aggression under the Rome Statute of the International Criminal Court’, CUP, p.188

¹²⁸ Ambos, K. (2010) ‘The Crime of Aggression after Kampala’, German Yearbook of International Law, Vol. 53, p.468

¹²⁹ Barriga, S. (2009) ‘Against the Odds: The Results of the Special Working Group on the Crime of Aggression’, in The Princeton Process on the Crime of Aggression 1 (Stefan Barriga, Wolfgang Danspeckgruber & Christian Wenawesar eds., 2009)

¹³⁰ Judgment (1947) 41 AJIL 172 at 222.

¹³¹ Quincy Wright, (1947) 41 AJIL 38 at 68. Also see Wilmshurst, Op Cit. p.321-322

It is not necessary that an individual be involved in all four of the acts of commission, with participation in any one of those stages sufficient to establish individual responsibility. This was first confirmed in a discussion paper submitted to the SWGCA at the 2005 Princeton inter-sessional meeting:

*While individual criminal responsibility for a crime of aggression presupposes that a complete collective act, i.e. an actual use of force, actually occurs, it is possible for an individual to incur criminal responsibility for an act of participation which is confined to the planning or preparation stage of the collective act. It would seem that the criminalization of such acts of participation has a sound basis under customary international law and has so far been largely uncontroversial.*¹³²

It is perhaps just as well that participation in only one of these constitutive acts is required, as it may prove difficult to distinguish the ‘planning’ from the ‘preparation’ of an act of aggression,¹³³ and indeed the ‘initiation’ from the ‘execution’. As regards aggressive war, *planning* has been described as ‘the formulation of a design or scheme for a specific war of aggression’, while *preparation* has been interpreted as comprising ‘the various steps taken to implement the plan’ before the outbreak of the war.¹³⁴ Similarly, *initiation* has been taken to mean acts confined to the commencement of the use of armed force, while the *execution* would comprise any subsequent military operation.¹³⁵

3.2.2. Leadership and State requirements: ‘a person in a position effectively to exercise control or direct the political or military action of a State’

The second element of Art.8 *bis* (1), that the acts must be carried out by ‘a person in a position effectively to exercise control or to direct the political or military action of a state’, reaffirms Council Control Law No. 10 of 1945¹³⁶ in recognising the crime of aggression as a ‘leadership crime’ in that only those most responsible will be held accountable for it.

¹³² ICC-ASP4132, Annex II.B, p. 380.

¹³³ See further Greenspan, M. (1959) ‘The Modern Law of Land Warfare’, University of California Press, Berkeley and Los Angeles. p. 455

¹³⁴ Ibid.

¹³⁵ Mancini, M. (2012) ‘A Brand New Definition for the Crime of Aggression: The Kampala Outcome’, *Nordic Journal of International Law* 81, p.241

¹³⁶ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, done at Berlin on 20 December 1945

In practice, targeting those most responsible is a feature of all international crimes. What is a notable distinction is the idea that only those in certain positions, with certain amounts of power, are capable of committing the crime of aggression. This reality, that ordinary soldiers would never be prosecuted for it, differentiates the crime of aggression from the other three crimes covered by the Rome Statute.

One other notable difference is that, while the other three crimes are focused on the protection of the individual or a group of individuals, the crime of aggression is focused on protecting the sovereignty, territorial integrity or political independence of another state, rendering it logical to reduce the possible actors of this crime to the leaders of the state or military apparatus.¹³⁷

This does not in the strictest sense exclude religious or industrial leaders from its scope of application, but given the crime's focus on 'armed force' it would require them to be in a position to influence the political or military actions of the respective state.¹³⁸ This supports the findings of Nuremburg, that business men too participated in the Nazi conspiracy to wage aggressive war and were to be deemed criminally responsible,¹³⁹ and the assertions of Control Council Law No. 10 of 1945 which expressly included among persons to be deemed responsible for crimes against peace those who 'held high position in the financial, industrial or economic life' of Germany, one of its allies, co-belligerents or satellites.¹⁴⁰ While not impossible that those in positions of power might seek to instrumentalise that power in influencing political and military figures, the high threshold imposed does make it unlikely that - for the purposes of an ICC investigation - such financiers, industrialists or economists would ever wield sufficient control or direction over state or military apparatus as to be held accountable for an act of aggression.¹⁴¹

Further, through this explicit link between the crime and the state, Art.8 *bis* (1) precludes the prosecution of non-state actors. For some this is a glaring omission. Harold Koh who led the US Delegation to Kampala, criticised this delineation on the basis that it risks preventing the prosecution of crimes that

137 Heinsch, R. (2010) 'The Crime of Aggression After Kampala: Success or Burden for the Future?' Goettingen Journal of International Law 2, p.722

138 Ibid. p.723

139 Order of the Tribunal Granting Postponement of Proceedings against Gustav Krupp von Bohlen, 15 November 1945, Judgment, p.226

140 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, done at Berlin on 20 December 1945

141 See Heller (2007) Op Cit. p.496.

have recently emerged as the ‘greatest potential security threats facing the international community,’¹⁴² namely cybercrimes which are often committed by non-state actors and in ways unconnected to traditional state apparatus. Others have already highlighted the ‘inconsistency of a system that allows the prosecution of acts of aggression committed by the leaders of a state while providing for an implicit ‘exemption’ for non-state leaders (such as those at the top of the hierarchy of Al-Qaeda or Hezbollah) from the jurisdictional reach of the Court relating to the same acts.’¹⁴³ For Mauro Politi, a former Judge at the international Court, this appears to be a serious shortcoming, and one which the Court will not be in a position to remedy by way of interpretation.¹⁴⁴

For others however, the concept of aggression has – since its inception in the theory of international law – been understood in its relationship with the state, with no obvious reason for now changing this conceptual understanding. The very notion of international criminal law was borne of a need to restrict the resort to force by states through the curtailing of state sovereignty. As discussed previously, states have a habit of waging war on other states and non-state actors alike. That the crime as drafted excludes non-state actors reflects this reality, and to suggest that the system is flawed because it does not incorporate non-state actors would be to wilfully ignore that historical trend.

It is also worth noting that armed attacks by non-state actors would almost certainly be covered by other relevant rules of international law including those of the Rome Statute. Furthermore, such uses of force would be almost implausible without, at least, the implicit support or acquiescence from states harbouring the non-state actors perpetrating the attacks.’¹⁴⁵

142 For Harold Koh this was cyber warfare, but one might also include the actions of non-state actors such as ISIS in any critique of the scope afforded to the ICC in prosecuting the crime of aggression. See Koh, H. (2015) ‘The Crime of Aggression: The United States Perspective’, Faculty Scholarship Series. Paper 5006 available at http://digitalcommons.law.yale.edu/fss_papers/5006 (accessed 10 July 2018)

143 Politi, M. (2012), ‘The ICC and the Crime of Aggression – A Dream that Came Through and the Reality Ahead’, *Journal of International Criminal Justice*, p.287

144 Ibid.

145 Sayapin, Op Cit. p.260

3.2.2.1 ‘Aided, abetted or otherwise assisted’

As just highlighted, Article 8 *bis* requires that the perpetrator be ‘in a position effectively to exercise control over or to direct the political or military action of a State.’ This sets a high threshold: the person planning, preparing, initiating, or executing the acts must presumably hold a high-ranking position in the aggressor state. ‘Control’ or the ability to ‘direct’ the state’s action is required. This differs from Article 25(3) of the Rome Statute, which establishes modes of liability for the other crimes. Article 25(3) distinguishes between principal perpetrators and accomplices, those who are involved in instigating, ordering, aiding and abetting, or otherwise contributing to the commission of a crime.

During the negotiations on the crime of aggression, there was a debate as to whether the Article 25 regime should also apply to the crime of aggression or whether the modes of liability should be set out solely in Article 8 *bis*.¹⁴⁶ The former was eventually adopted, clarifying that Article 8 *bis* is to be read together with Article 25(3) of the ICC Statute. As such, Article 25(3) applies to the crime of aggression as well, making it possible for an individual to be prosecuted for having *aided, abetted or otherwise assisted* in planning, preparing, initiating or executing an act of aggression, as long as the leadership requirement to be discussed next is also met: that it applies ‘only to persons in a position effectively to exercise control over or to direct the political or military action of a State.’

It has been argued that applying Article 8 effectively renders Article 25(3) redundant for the purposes of aggression, in that the crime would only apply to principal perpetrators,¹⁴⁷ however a closer look at what is meant by ‘effective control’ indicates this might not be the case. As Nuremburg demonstrated, it seems unlikely that ‘control’ need be absolute, with many of those convicted at Nuremburg not in a sufficiently high-ranking position as to be able to exercise control over the entire war effort. Such a reading would render fewer more than Hitler responsible for the crime. Control over the ‘political or military action’ of the state is also relevant. This arguably widens the scope of aggression beyond those

146 Barriga, S. (2012) ‘Negotiating the Amendments on the Crime of Aggression’, in S. Barriga and C. Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press); and Clark, R.S. (2017) Individual Conduct, in *The Crime of Aggression: A Commentary* (Claus Kreß & Stefan Barriga eds.) pp.565-566

147 Ambos, K. (2014) ‘Treatise on International Criminal Law: Volume II: The Crimes and Sentencing’, OUP, p.206-208

that took the actual decision to go to war, to those that were sufficiently high up in the hierarchy to be able to shape the political policy of the aggressor state or influence military decision making.

As such, in any given situation, a government minister may be involved only indirectly in planning, preparing, initiating, or executing the act of aggression but could thus be found to have been an accomplice rather than a principal perpetrator of the crime of aggression. The same may apply to high-ranking officials within the military.¹⁴⁸

Indeed, the discussion paper above envisages two examples in which an individual could be prosecuted for having aided, abetted or otherwise assisted in the commission of a crime of aggression: ‘(1) a high-level state official commences to participate in a meeting aimed at preparing an act of aggression, but is prevented from taking part in the decision-making; and (2) a high-ranking military officer is close to giving an important order during the execution of an act of aggression, but is prevented from completing the act of ordering.’¹⁴⁹

3.2.3. Threshold requirement: ‘its character, gravity and scale, constitutes a manifest violation’

The final part of Article 8 *bis* (1) establishes that in order for the instances of state aggression listed under Article 8 *bis* (2) to entail individual criminal responsibility, the act must ‘by its character, gravity and scale, constitute a manifest violation of the Charter of the United Nations.’ This ensures that only the most serious examples of state aggression would be punishable.

The intention to establish a high threshold for the crime was further confirmed in an Annex adopted along with the Kampala provisions, containing seven ‘Understandings regarding the amendments to the Rome Statute of the ICC on the crime of aggression.’¹⁵⁰ These Understandings were negotiated by the states at Kampala and are to be read in conjunction with both the Article 8 definition and the Article 15 jurisdictional provisions. While the extent to which these understandings have any legal effect is

148 Nerlich, V. (2017) ‘The Crime of Aggression and Modes of Liability – Is There Room Only for Principals?’ Harvard ILJ, Vol.58, pp.44-47

149 ICC-ASP/4/32, Annex II.B, p. 383, quoted in Mancini, p.242

150 Annex III of Resolution RC/Res.6, adopted by consensus at Kampala on 12 June 2010

unclear,¹⁵¹ they still represent an important part of the negotiations and provide valuable insight into the views of the negotiating states.¹⁵² Understanding 6 confirms aggression as ‘the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences.’

With regard to any assessment as to what constitutes a manifest violation, both the Understandings at 7 and the Amendments to the Elements of Crimes for Article 8 *bis* in paragraph 3 clarify that ‘the three components of character, gravity *and* scale must be sufficient to justify a ‘manifest’ determination.’¹⁵³ While use of the word ‘and’ would indicate that all three criteria need to be satisfied for an act of aggression to be considered manifest, the Understandings also state that ‘no one component can be significant enough to satisfy the manifest standard by itself,’ leaving open the possibility that the presence of two of the criteria would be sufficient.¹⁵⁴

The term ‘manifest violation’ is new and cannot be found in the Resolution 3314 Definition of Aggression, though the attempt to restrict international law to the most serious violations is not without precedent and brings to mind the ‘grave breaches’ regime of the Geneva Convention’s humanitarian provisions. The requirement that there be a ‘manifest’ breach introduces an objective qualifier that captures the qualitative difference between an ‘act’ and a ‘crime’ of aggression.

That being said, the perceived lack of precision regarding the term ‘manifest’ has led to criticism that the definition is too narrow – failing to encapsulate a myriad of incidents that are not considered

151 See Heller, J.H. (2010) ‘The Uncertain Legal Status of the Aggression Understandings’, *Journal of International Criminal Justice*, 10(1)

152 Understandings 1-3 address Security Council referrals and the Court’s temporal jurisdiction. Understandings 4 and 5 concern the impact of the provisions on customary international law and domestic jurisdiction. These five understandings will be dealt with in the following chapter dealing with the Article 15 provisions.

153 See ICC-ASP/4/32, Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 28 November-3 December 2005, Official Records, Annex II.D, p.389; Kreß, C. (2009) ‘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*, pp.1138; Kreß & von Holtzendorff, *Op Cit*, pp.1193, 1207.

154 This question was raised during the Chatham House International Law Meeting: The International Criminal Court: Reviewing the Review Conference, 24 June 2010, at 6, available at: http://www.ejiltalk.org/wp-content/uploads/2017/06/Chatham-House-Aggression-Paper_20100624TheICCRReviewingTheReviewConference.pdf (accessed 10 July 2018)

‘manifest’, and too broad – failing as it does to clarify whether acts of humanitarian intervention or pre-emptory self-defence would be considered manifest violations.

In response, Kai Ambos has argued that ‘given the highly normative content of any qualifier attempting to capture the criminal essence of a certain act and the general problem of describing concrete human conduct in a sufficiently precise form using abstract legal terms, it is difficult to conceive any objective definition which would express the substance of the threshold clause more precisely.’¹⁵⁵ The inclusion of the term ‘manifest’ introduces a high threshold that, combined with the existence of character, gravity and scale, should be sufficient clarification that only the most serious examples of aggression should be prosecuted.¹⁵⁶

Indeed, at the time of drafting, the SWGCA emphasized that this clause ‘would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and those falling within a grey area.’¹⁵⁷ While this confirms the intention to prevent the ICC from being burdened with instances of border incursions and other minor incidents,¹⁵⁸ it also raises the prospect that the manifest threshold was intended as a catch-all phrase, through which uses of force that fall within this ‘grey area’ of international law – namely pre-emptive self-defence and humanitarian intervention – are also excluded.

3.2.3.1. ‘Grey areas’ of international law: humanitarian intervention and pre-emptive self-defence

This raises a particularly important question: can the manifest threshold preclude the use of pre-emptive self-defence or humanitarian intervention from being considered a crime of aggression? It is a question to which there is currently no definitive consensus.

¹⁵⁵ Ambos (2010), Op Cit. p.484

¹⁵⁶ Ibid. p.485

¹⁵⁷ ICC-ASP/6/20/Add.1, p. 12, para. 24.^[1]^[2]^[3]

¹⁵⁸ Informal inter-sessional meeting 2006 of the Special Working Group on the Crime of Aggression, 8-11 June 2006, in Assembly of State Parties, 5th session 2006, Doc ICC- ASP/5/SWGCA/INF.1 (2006), para. 19.

As will be seen further below in this chapter, the mental elements adopted for the crime stop short of requiring that the perpetrator made a legal assessment as to whether the state's actions constituted a manifest violation of the UN Charter. As such, these provisions specifically exclude the defence of mistake of law, ensuring that the extent to which state actions of pre-emptive self-defence or humanitarian intervention comprise a crime of aggression rest solely on the Court's interpretation of the manifest threshold provision.

Humanitarian intervention is a term used to describe action taken for 'claimed' humanitarian purposes but without Security Council authorisation and without the agreement of the state concerned.¹⁵⁹ While international law provisions would on the face of it appear to prohibit the use of force absent prior Security Council authorisation or in genuine self-defence, opinion is divided over whether relatively recent cases of international intervention highlight an emerging norm of customary law allowing the implementation of the responsibility to protect (R2P) doctrine, or that such intervention is indeed already lawful based on the continued existence of a customary law right which has not been displaced by the UN Charter.¹⁶⁰

A thorough analysis of the extent to which humanitarian intervention and responsibility to protect have become established parts of customary international law will not be replicated here. There is plenty of analysis on this already out there.¹⁶¹ It is important to note though, that the US were keen to carve out such an exemption for the crime of aggression. Indeed, when negotiating the Kampala provisions, the US unsuccessfully attempted to establish in the Understandings that the use of force to prevent genocide, crimes against humanity and war crimes should not fall within the definition, arguing that the provisions as drafted presented 'a concomitant risk that a broad or vague definition will discourage

¹⁵⁹ Wilmshurst, *Op Cit.* p.324

¹⁶⁰ *Ibid.* p.325

¹⁶¹ See Arbour, L. (2008) The responsibility to protect as a duty of care in international law and practice, 34 *Review of International Studies*; Eaton, J. (2011) An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect, 32 *Mich.J. Int'lL.* 765; Janzekovic, J. (2008) The Use of Force in Humanitarian Intervention: Morality and Practicalities (Ashgate) 103; Kunadt, N. (2011) The Responsibility to Protect as a General Principle of International Law, *Anuario Mexicano de Derecho Internacional*, vol. XI, p. 187-226; Saxon, Z & Pratt, L. (2015) From Cause to Responsibility: R2P as a Modern Just War, *The University of Notre Dame Australia Law Review*. Vol. 17(7). Schabas, W. (2006) *Preventing Genocide and Mass Killing: The Challenge for the United Nations*, Minority Rights Group International Report; Thakur, R., 'The responsibility to protect', in Thakur, R., (ed.), (2006) *The United Nations, Peace and Security. From Collective Security to the Responsibility to Protect*, Cambridge, Cambridge University Press.

states from using force in cases where they should.’¹⁶² This comes after the US and its allies invoked humanitarian narratives - in addition to security concerns - as part of their rhetorical justifications for the US-led invasion of Iraq,¹⁶³ and has led to questions over whether that invasion constituted a manifest violation. One might similarly question the NATO intervention in Yugoslavia, given that NATO members acted without the explicit authorization of the Security Council.¹⁶⁴ Both will be considered in much more detail in chapter 8.

The law related to self-defence is much clearer, with Article 51 of the UN Charter establishing the ‘inherent right of individual or collective self-defence’, and the ICJ confirming in its *Nicaragua* case on the use of force.¹⁶⁵ Pre-emptive self-defence however, that is, against an attack that is threatened and neither ongoing nor imminent, is more controversial.¹⁶⁶ While it might seem logical that self-defence must come after an attack has begun or is imminent, it has been argued that it is unrealistic in all cases to expect states to await until this point is reached. As Arendt outlines, when the UN Charter was drafted, the main purpose of the law was to address conventional threats posed by conventional actors: states. WMD and terrorism pose threats unanticipated by traditional international law, and could render a state incapable of mounting an effective defence if it were required to wait for an armed attack to be imminent. It can be very difficult to determine whether a state possesses WMD, and by the time its use is imminent, it could be extremely difficult for a state to mount an effective defence. Similarly, terrorists use tactics that may make it all but impossible to detect an action until it is well underway or even finished.¹⁶⁷ As Wilmschurst notes, the ICJ has left open the issue of the lawfulness of a response to

¹⁶² Koh (2015), Op Cit. p.272

¹⁶³ The humanitarian narrative revolved around claims about human suffering in Iraq and the need to liberate its people. While it is widely assumed that security is the dominant *casus belli* in the post-9/11 world, there is much evidence to suggest that the humanitarian justifications that played a critical role in the military interventions of the 1990s were still important after 9/11. The use of humanitarian justifications for the Iraq war clearly has implications for the ‘responsibility to protect (R2P)’ movement, which has gained prominence since the December 2001 publication of the International Commission on Intervention and State Sovereignty (ICISS) report, available here: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed 25 January 2019). For further discussion on the impact of the US-led invasion of Iraq on R2P, see Moses, J., Bahador, B. & Tessa Wright (2011) ‘The Iraq War and the Responsibility to Protect: Uses, Abuses and Consequences for the Future of Humanitarian Intervention’, *Journal of Intervention and Statebuilding*, Vol. 5 (4), pp.347-367

¹⁶⁴ Heinsch (2010), Op Cit. pp.726-727

¹⁶⁵ *Nicaragua v. USA* (1986) ICJ Rep

¹⁶⁶ See Reisman, W.M & Armstrong, A. (2006) ‘The Past and Future Claim of Preemptive Self-Defense.’ *The American Journal of International Law* Vol.100 (3) pp.525-550; Van de hole, L. (2003) ‘Anticipatory Self-Defence Under International Law.’ *American University International Law Review* Vol.19 (1). pp.69-106; Arend, A.C. (2003) ‘International Law and the Preemptive Use of Military Force’ *The Washington Quarterly*, Vol.26 (2). pp. 89–103

¹⁶⁷ For more detailed discussion of this point see Arend, Op Cit. p.97

the threat of an imminent armed attack,¹⁶⁸ while the claim to ‘pre-emptive self-defence’ to prevent the *emergence* of a security threat is widely rejected as impermissible under international law.¹⁶⁹

In concrete terms, the objective threshold forces us to consider the differences between classic crimes of aggression and recent acts with the potential to meet the threshold. Iraq’s invasion of Kuwait in 1990 for instance, is similar in nature – even if not in scale – to Nazi attacks on neighbouring countries in 1939, comprising as it did both acts contained within Article 8 *bis* (2) and meeting the ‘manifest violation’ threshold contained within Article 8 *bis* (1) that is necessary for it to be deemed a crime of aggression. The US-led invasion of Iraq in contrast might not amount to a crime of aggression due to the absence of a ‘manifest violation’ of the UN Charter if it is accepted that the invasion was justified on the basis of Security Council resolution 678 of 29 November 1990.¹⁷⁰ More pertinently, in the build-up to the US-led invasion of Iraq, much was made of the use of chemical weapons by Saddam Hussein on his own people. As were claims contained within the UK government’s ‘September Dossier’ – later repeated by then Prime Minister Tony Blair in the run-up to the war – that Iraq possessed Weapons of Mass Destruction and was capable of deploying them within 45 minutes of an order. These issues - and the case of Iraq specifically - will be discussed in more detail in chapter 8, which applies the provisions to historical cases to give a sense of the likelihood that successful prosecutions may arise in the future.

Such claims bring into sharp focus the relevance of claims to humanitarian intervention and pre-emptive self-defence to the crime of aggression and the role the Courts will have in interpreting the Kampala provisions. What is clear is that the Court will have to make a judgement as to the extent to which acts of aggression meet the threshold requirement established in Article 8. It remains to be seen how expansive a view the Court will take.

168 Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) (1986) ICJ Rep 14, para. 194). See also Case concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*) (2005) ICJ Rep, para. 143, in Wilmshurst, Op Cit. p.323

169 Wilmshurst, Op Cit. p.323

170 Ambos (2010), Op Cit. p.485

3.3. The Act of Aggression

With Article 8 *bis* (1) providing a general definition of the *crime* of aggression, Article 8 *bis* (2) then clarifies the state actions that would constitute an *act* of aggression. When such acts are committed, and concurrently the criteria set out in Article 8 *bis* (1) are satisfied, individual criminal responsibility for the crime of aggression is established.

The first subparagraph of Article 8 *bis* (2) adopts the chapeau from the Resolution 3314 Definition of Aggression, setting out in general terms that:

[An] ‘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.

The wording of this general definition is well established in international law. The Resolution 3314 definition of aggression from which it is derived was in turn based on Article 2(4) of the UN Charter that has been variously referred to as ‘the cornerstone of peace in the Charter,’ ‘the heart of the United Nations Charter’ and the ‘basic rule of contemporary public international law.’¹⁷¹

The definition adopted in Kampala makes some alterations from the UN Charter’s 1945 prohibition of force, excluding from the definition of aggression the mere threat of force; ensuring that only ‘armed’ force is encapsulated; and including ‘sovereignty’ together with territorial integrity and the political independence of the victim State.¹⁷² These changes raise the threshold for what constitutes an act of aggression, making it consistent with the intention to limit the Court's jurisdiction to the most serious acts of aggression and exclude cases of insufficient gravity.

The second subparagraph of Article 8 *bis* (2) then elaborates which individual acts *prima facie* qualify as acts of aggression. It is established that the acts enumerated (a) to (e), ‘regardless of a declaration of

¹⁷¹ See Simma, B (ed) (1994) *The Charter of the United Nations: a commentary*. OUP

¹⁷² Dinstein, Y. (2001) *War, Aggression and Self-Defence*, 3rd edn. CUP

war, shall, in accordance with UN General Assembly resolution 3314 of 14 December 1974, qualify as an act of aggression.’ These acts comprise:

- (a) 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;*
- (b) 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;*
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;*
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;*
- (e) The use of 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 agreement or any extension of their presence in such territory beyond the termination of the agreement;*
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*
- (g) 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 the acts listed above, or its substantial involvement therein.*

This list of acts is also taken verbatim from the Resolution 3314 definition of aggression. As discussed, these acts will need to be of such gravity, character and scale as to constitute a manifest violation of the UN Charter, ensuring that only the most egregious instances of blockades, bombardments, attacks etc. will be deemed a *crime* of aggression.

As well as illuminating which acts qualify as an act of aggression, the definition also gives an indication as to which scenarios it does not cover. These include the lawful use of force through individual or

collective self-defence or actions authorised by the Security Council. A number of other prominent exclusions have already been discussed, namely and the use of force by non-state actors; and actions that do not meet the ‘manifest violation’ threshold, under which humanitarian intervention and even pro-democratic intervention may fall. Cyber-attacks has also be raised as a notable exclusion. While not explicitly excluded, cyber-attacks will only be considered an act of aggression if they fall within the enumerated acts of Article 8 above and meet the ‘manifest’ threshold.¹⁷³

It is clear from paragraph (a) that the intention is to protect the ‘territorial integrity’ of the state from invasion, attack, military occupation or annexation arising from the use of force. Both invasion and annexation have long been regarded as international crimes, the manifest illegality of which derives from their inclusion in Article 2(4) of the UN Charter.¹⁷⁴ The terms *attack* and *military occupation* however are less well established as grave breaches of international law, leading some to question the legitimacy of their inclusion.¹⁷⁵ Indeed Harold Koh has used the inclusion of *military occupation* to suggest that it would, on the face of it ‘appear to characterize as aggression such things as the Allied occupations following World War II.’¹⁷⁶ In the face of such criticism it must be remembered that all other conditions, including but not limited to the threshold requirement and the absence of Security Council authorisation, must be met for such an attack or occupation to be considered a crime of aggression. What is more, Article 8 is clear that only occupations resulting from the unlawful use of force would be considered an act of aggression.

Similarly, in paragraph (b), bombardment and the use of weapons are not per se breaches of international law. This does not, as Harold Koh has suggested with reference to the use of weapons, open the door to the possibility that ‘brief skirmishes of relatively little real consequence’ would be covered by the act. Their inclusion does not preclude the need for all other criteria contained within

¹⁷³ For discussion on cyber crimes and the crime of aggression see: Ambos, K. (2016) ‘Individual Criminal Responsibility for Cyber Aggression’, *Journal of Conflict and Security Law*, Vol.21 (3), pp.495–504; Ophardt, J.A. (2010) ‘Cyber Warfare and the Crime of Aggression: The Need for Individual Accountability’ *Duke Law & Technology Review*, Vol.3. pp.1- 27; Scheffer, D. (2017) ‘The Missing Pieces in Article 8 *bis* (Aggression) of the Rome Statute’, *Harvard International Law Journal*, Vol.58. pp.83-86

¹⁷⁴ See Sayapin, *Op Cit.* p.265

¹⁷⁵ *Ibid.*

¹⁷⁶ Koh (2015), *Op Cit.* p.267

Article 8 *bis* to be met, and nor, incidentally, does it preclude due regard being paid to the rules of international law applicable to the use of specific types of banned weapons.

Paragraph (c) deals with blockades of ports and coasts, while paragraph (d) is concerned with attacks on the ‘land, sea or air forces, or marine and air fleets’. In both instances, the intended targets are implicitly a part of the state’s territory, and thus have been included within the crime’s remit.

Paragraphs (e) and (f) are concerned with situations whereby one state allows its territory to be used by another, and seeks to regulate the conduct of both states as party to the agreement. Again, Harold Koh expresses concern that this could lead to accusations of aggression arising out of minor violations of bilateral agreements. The arrangements and the conduct of states entering into them are governed by the detail of the relevant bilateral treaty, and only grave breaches would fall within the remit of the ICC. The inclusion of such host state provisions raises the possibility that a host state could be held complicit in facilitating or tolerating an act of aggression due to the actions of the resident state. It is proposed that once aware of unlawful acts being perpetrated within the host state’s territory, the host state must adopt ‘lawful – unilateral or multilateral – measures available to their state to stop their occurrence.’¹⁷⁷

The final paragraph (g) deals with the sending of ‘armed groups, irregulars or mercenaries’, which carry out acts of such gravity as to amount to the acts listed above, a practice that the ICJ has confirmed as in violation of customary international law in its famous *Nicaragua* judgment.¹⁷⁸ That the sending state is responsible for the actions of armed groups is also enshrined within the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), namely Article 8.¹⁷⁹ Article 8 sets out that ‘the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.’¹⁸⁰

¹⁷⁷ Sayapin, *Op Cit.* p.270

¹⁷⁸ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua case), ICJ Reports (1986), para 116.

¹⁷⁹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, (2001) Yearbook of International Law Commission, Vol. II, Articles 5, 6, 7, 8

¹⁸⁰ Ibid. Art.8

The need for those committing the crime of aggression to be in a position to effectively to exercise control was discussed earlier in this chapter. Here the concept of effective control is raised once more, this time in relation to the state's control over armed groups that it sends. The concept of 'effective control' has been discussed at great length at the ICJ, namely the *Nicaragua*, *Armed Activities* and *Bosnia Genocide* cases, and the ICTY in its *Tadić* case. The established case law confirms the continuing validity of the effective control standard as set out by the ICJ in its *Bosnia Genocide* case.¹⁸¹ Affirmed in its *Nicaragua* judgment, the test requires that the 'state's instructions be given, in respect of *each* operation in which the alleged violations occurred, *not generally* in respect of the overall operations taken by the persons or group having committed the violations'.

There has been criticism that this standard imposes too high a threshold for what constitutes effective control, particularly in cases where there is common purpose between the state and a non-state actor could give states 'the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore'.¹⁸²

That debate will not be replicated here,¹⁸³ suffice to say that the case law has evolved to a point where there is at least a degree of certainty surrounding what constitutes effective control. The decision to include paragraph (g) within the definition of the crime of aggression makes it abundantly clear that states will not be exempt from prosecution for the crime of aggression when committed by armed groups that they have sent and over whom they exercise control, in line with customary international law and established case law on how that is constituted.

3.3.1. Exhaustive nature of the list

The SWGCA discussed whether this was to be considered an exhaustive list of possible state actions, and indeed debate has continued subsequently. Stefan Barriga, Lichtenstein's Deputy Permanent

¹⁸¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (*Bosnia Genocide*), Merits, 26 February 2007, ICJ Reports (2007) 43, at 207–208, para. 398.

¹⁸² *Bosnia Genocide*, Op Cit. at 256–257, para. 39, Dissenting Opinion of Vice-President Al-Khasawneh. See also at 448–449, paras 115–117, Dissenting Opinion of Judge Ad Hoc Mahiou.

¹⁸³ For fuller discussion see, in particular, Lanovoy, V. (2017) 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct', *European Journal of International Law*, Vol. 28 (2), pp.563–585

Representative to the UN and a principal legal adviser to the Chairs of the negotiations on the crime of aggression, recalled that it was decided it should be considered ‘semi-open’ or indeed ‘semi-closed’,¹⁸⁴ whereby the possibility of other incidents constituting aggressive acts was left open, but on the proviso that they too meet the conditions contained within the broader Article 8 bis.

The exhaustive nature of this list potentially carries legal consequences, with some suggesting there is scope for a defendant to challenge an ‘open’ definition as violating the principle of legality or *nullum crimen sine lege*. Those concerned argue that an open definition would lack the requisite specificity, not being sufficiently specific as to respect the basic criminal law premise that the law penalises ‘only acts which are outlawed according to a broad consensus in society, both as to their illegal nature and to individual criminal accountability.’¹⁸⁵ The essence of the principle of legality is that an individual may not be prosecuted for conduct she could not know was punishable, and requires the law to be so clear as to make its consequences foreseeable.¹⁸⁶ The requirement of legal clarity is also considered a general principle of international criminal law.¹⁸⁷

In the context of the crime of aggression, these arguments essentially beg the question: could the employment of vague terms result in the Court ruling that cases are inadmissible or that accused persons are not guilty because their conduct cannot unarguably be said to fall within the definition of the crime? In essence, where is the dividing line between acts captured by the definition, and those excluded, to be drawn?¹⁸⁸

184 The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009, edited by Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser, p.11.

185 Paulus, Op Cit..p.1122

186 Ferdinandusse, W. N. (2006) ‘Direct Application of International Criminal Law’, National Courts, 238

187 The requirement of clarity is seen as including the requirement of specificity. On the principle of specificity in international law, see Cassese, A. (2008, 2nd ed.) ‘International Criminal Law’, 41 - 43 (discussing the ‘principle of specificity’); and Fluckiger, A. ‘The Ambiguous Principle of the Clarity of Law’, Obscurity and Clarity in the Law: Prospects and Challenges, 12 (Anne Wagner & Sophie Cacciaguidi-Fahy eds., 2008).

188 These arguments are considered in more detail in chapter 9. See also Glennon (2009), Op Cit. p.85

This concern was raised at the time of adoption, with US Ambassador for War Crimes Stephen Rapp warning at Kampala that ‘individuals must know whether conduct crosses the line into that which is forbidden before they act and not learn the answer in the crucible of trial.’¹⁸⁹

The answer to these concerns is two-fold. Firstly, as Jennifer Trahon has argued, a semi-closed list with a chapeau that closes it, as envisaged above, should not violate the principle of legality.¹⁹⁰ Indeed international criminal law is abound with phrases in need of substantial judicial interpretation, and that does not detract from the fact that the definition provides a detailed list of acts that would – when coupled with the manifest threshold – constitute a crime of aggression. This provides a core of prohibited conduct that will satisfy the definition of the state act element of the crime of aggression on any reading. In other more difficult instances, the Prosecutor and the Court will have to decide whether the definition is satisfied, and rule in favour of accused persons where the test has not been met.

Secondly, there are a multitude of international instruments ready to attest to the recognition of aggression as a crime under customary international law. The influential House of Lords judgment in *R v Jones (2006)* is just one of them, attesting as it did that ‘the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial of those accused of this most serious crime.’¹⁹¹

Arguments that the definition lacks the requisite precision to be considered legally binding therefore appear unpersuasive, but what is clear is that the ICC will be forced to take positions on politically controversial aspects of the *jus ad bellum*. Whether or not the ICC is best placed to make those decisions goes to the heart of the debate over the merits of the criminalisation of aggression before the ICC, a question that will be explored in chapter 9, looking at whether the amendments represent a positive step forward for the Court.

189 Crook, J. (2010) ‘U.S. Delegation Active in ICC Negotiations to Define Crime of Aggression’, *American Journal of International Law*, Vol. 104, pp. 511-514

190 Trahon, J. (2011) *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, *International Criminal Law Review*, p.60

191 UK House of Lords, *R.v. Jones*, Judgment of 29 March 2006, (2006) UKHL 16

3.4. Mens Rea

Anyone familiar with even basic concepts of domestic criminal law will recognise the need to establish the perpetrator's mental state in relation to the alleged crime. This standard also applies in international law, and for the purposes of the ICC the general clause of Article 30 of the Rome Statute is instructive. Article 30 (1) stipulates that, 'unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court, only if the material elements are committed with intent and knowledge.'¹⁹² It is 'intent and knowledge' that are key here. Article 30 goes on to clarify that a person has the requisite intent when in relation to the conduct he 'means to engage in [it]' and in relation to the consequences he 'means to cause [it] or is aware that it will occur in the ordinary course of events.' Knowledge consists of an 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events.'¹⁹³

The material elements of ICC crimes can therefore be broken down into conduct, consequences, and circumstances, and the mental elements into intent and knowledge.

As Weisbord helpfully summarises, for the conduct element of a crime, the defendant has the culpable mental state if he or she 'intends to engage in the conduct.' For the consequence element, the defendant has the culpable mental state if he or she 'means to cause that consequence or knows that it will occur in the ordinary course of events.' The culpable mental state for the circumstance element is also knowledge. A defendant who knows that a required circumstance exists has the culpable mental state for this material element of the crime.¹⁹⁴

In assessing the mental elements of the crime against the material elements contained within Article 8, the perpetrator must first have 'planned, prepared, initiated or executed an act of aggression.' This represents the conduct of the crime of aggression and therefore the mental element required is intent. Paragraph 2 of the Introduction of the Elements of Crimes for Article 8 confirms that the defendant

¹⁹² Article 30 ICC Statute

¹⁹³ Ibid.

¹⁹⁴ Weisbord, N. (2012) 'The Mens Rea of the Crime of Aggression', Washington University Global Studies Law Review, Vol.12, p.491

does not need to have the specific intent to commit an act contrary to the UN Charter.¹⁹⁵ The defendant is merely required to have meant to plan, prepare, initiate or execute an act.

Second, the perpetrator must be a person in a position to effectively exercise control over or direct that action of the state. This leadership requirement represents the circumstance that must be present for an act to constitute a crime of aggression. Consequently, the defendant must *know* that he or she is in a position to exercise control over or direct the actions of the state. It follows that someone who has effective control but is not aware of the influence they are exerting would not possess the requisite mens rea.

The third requirement is the material state act of aggression that is contained within Article 8 *bis* (2) and which flows from the planning, preparation, initiation or execution.

The fourth element of the crime establishes that the required mental element is knowledge. That is that ‘the perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.’ Mere knowledge of facts indicating that a state had used armed force would not suffice,¹⁹⁶ but conversely it is also not necessary that the perpetrator made a legal assessment as to whether the use of armed force is inconsistent with the Charter of the United Nations.¹⁹⁷ Element 5 adds to this understanding that the state act of aggression, by its character, gravity, and scale, constitutes a ‘manifest’ violation of the UN Charter, and element 6 clarifies that in order to satisfy the mental element the perpetrator must know of the factual circumstances amounting to a manifest violation of the UN Charter.¹⁹⁸

The effect of elements 3, 4, 5 and 6 is to establish that although a legal assessment that the state acts constitute a manifest violation of the UN Charter is not necessary, knowledge of the factual circumstances amounting to a manifest violation are. The Chairman of the SWGCA in his *Non-paper*

¹⁹⁵ Introduction of the Elements of Crimes for Article 8

¹⁹⁶ SWCA Chairman, in his 2009 Non-paper on the Elements of Crimes

¹⁹⁷ Paragraph 2 of the Introduction of the Elements of Crimes for Article 8

¹⁹⁸ ‘The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.’ Amendments to the Elements of the Crime of Aggression, Resolution RS/Res.6, Annex II., para.6

on the Elements of Crimes offered examples of such facts that would establish the inconsistency of the use of force with the Charter of the United Nations, and which the defendant must know: ‘(1) the fact that the force was used against another state; (2) the fact that there was no prior or imminent attack by the targeted state; and (3) the fact that there was no Security Council resolution expressly authorizing the use of force.’¹⁹⁹

It becomes clear that although the provisions require no formal legal evaluation to have been made, in practice it is difficult to separate knowledge of the facts establishing a manifest violation from a legal evaluation. As Weisbord points out, to establish that the defendant knew that a manifest violation had taken place seems to require proving that the defendant had some knowledge of the law of the Charter.²⁰⁰ As will be seen later, the possibility of raising a defence of mistake of law is intentionally restricted by the requirement that a legal evaluation is not needed for the mental elements of the crime to have been met. If requiring a defendant to have such a knowledge of the facts that it, in practice, amounts to a legal evaluation, the validity of this restriction is called into question. In any case, the SWGCA seems to have been satisfied that the high threshold established by the ‘manifest’ requirement would make it unlikely that a defendant could successfully raise such a defence. This is examined further below.

The requirement that the perpetrator had knowledge of the factual circumstances amounting to a manifest violation leaves open the possibility that despite committing an act of aggression, the leader responsible reasonably believed that the state’s actions did not amount to a manifest violation of the UN Charter. Considered first by a small group of legal experts and diplomats convened to draft the elements of the crime of aggression, the group envisaged a leader who planned, and therefore had knowledge of, a small-scale border skirmish that got out of control and, unbeknownst to him, resulted in a large-scale invasion of a neighbouring state (a manifest violation of the UN Charter).²⁰¹ In such a case, it could be argued that the leader should be exempt from criminal liability for the crime of

199 ICC-ASP/8/INE2, Annex II, Appendix II, p. 18, para. 20.

200 Weisbord (2012). p.497

201 The 2009 Montreux Draft Elements of Crimes were later used as a foundation document by the SWGCA Chair in drafting his Non-paper on the Elements of Crimes. These can be found in *Crime of Aggression Library: The Travaux Préparatoires Of The Crime Of Aggression* 669, (Stefan Barriga & Claus Kreß eds., 2012)

aggression on the basis that a reasonable leader would not have known that the act of aggression would be a manifest violation of the UN Charter.

In spite of this, these mens rea provisions depart somewhat from traditional criminal law concepts in so far as a perpetrator may be convicted on the basis of *knowledge of* – rather than the stricter requirement of *intent to commit* – the state act of aggression. Similarly, a perpetrator who has knowledge of a military operation but does not intend to violate the UN Charter can still be punished under some circumstances,²⁰² specifically when it is adjudged that a reasonable leader should have foreseen such an outcome.

The mental elements of the crime bear heavily on the way in which the provisions relate to the ‘grey areas’ of international law and the way in which pre-emptory self-defence and humanitarian intervention will be dealt with by the court.²⁰³ Anyone relying on either of these principles would in effect be arguing that they lacked the requisite mens rea in that the state’s actions were not considered to constitute a manifest violation of the UN Charter. As discussed above, it is presumed that the inclusion of the manifest threshold was indeed intended specifically to exclude such actions that fall within this grey area.²⁰⁴ Nevertheless, as Elizabeth Wilmshurst points out, ‘the law lacks the necessary certainty if state leaders cannot predict in advance whether they will be vulnerable to prosecution or not depending upon whether the ICC eventually concludes that the law is sufficiently controversial for the violation not to be ‘manifest’.’²⁰⁵ That these acts *should* fall short of the ‘manifest’ standard will reassure some, but the fact that ‘manifest’ is an objective term to be decided by the Court goes to the heart of the US’s unease at the mens rea provisions adopted in Kampala. Their unsuccessful attempts to secure assurances along these lines in the Understandings only serves to further underline that not all state leaders *are* confident they can predict what the ICC will conclude.

202 Weisbord (2012), p.506

203 Ibid. p.496

204 Wilmshurst, Op Cit. p.326-327

205 Ibid.

3.4.1. Mistake of Fact and Mistake of Law

The mens rea of the crime of aggression raises the possibility that the defence of mistake of fact or the defence of mistake of law could be raised. Article 32 (1) and (2) of the ICC Statute establish that either can be grounds for excluding criminal responsibility ‘only if it negates the mental element required by the crime.’

As to a mistake of fact, given that the mental element of the crime is a knowledge of the facts, a mistake of fact exists when ‘a person presumes the existence of a factual circumstance, which prompts him to bring about the material elements of a crime, not knowing that the objective nature of the factual circumstance is different (for example, less dangerous or grave), and the individual would probably refrain from performing the conduct if he or she knew the true nature of the presumed factual circumstance.’²⁰⁶

The defence of mistake of fact is related to mistaken self-defence (or putative self-defence)²⁰⁷ and a brief discussion of the mens rea test to be applied to both is necessary to demonstrate the limits of each. The example of the shooting down of a foreign civilian aircraft, which is misperceived for a military one, as it enters a state’s airspace and does not identify itself to ground services because of equipment breakdown,²⁰⁸ is a useful one for conceptualising the similarities between the two.

We will first deal with the test to be applied to self-defence, and then address whether the defence of mistake of fact is open to any accused that fails to meet the self-defence test.

Putative self-defence concerns mistakes made as to the factual conditions of self-defence and not with the mental element of the alleged crime. The relevant self-defence test enshrined in the ICC Statute is set out in Article 31(1)(c), which reads in abbreviated form:

²⁰⁶ Sayapin, *Op Cit.* p.296

²⁰⁷ For a fuller discussion of these principles, see Tonkin, H. (2005) ‘Defensive Force Under the Rome Statute Defensive Force under the Rome Statute’, *Melbourne Journal of International Law*, Vol 6 (1)

²⁰⁸ *Ibid.*

‘The person *acts reasonably* to defend himself or herself or another person ... against an imminent and unlawful use of force’.

Here, Article 31(1)(c) supports a purely objective standard. The words ‘[t]he person acts reasonably to defend himself or herself or another person... against an imminent and unlawful use of force’, pertain only to the defendant’s reaction, not to his or her perception of the threat. No reference is made to the accused’s mental state and as such, Article 31(1)(c) does not appear to apply where the defendant is mistaken, even reasonably mistaken, as to the existence of a threat.

This is a different approach to the one taken in domestic jurisprudence, whereby some form of consideration of the defendant’s mental state is considered. The United States, for instance, employs a hybrid test that combines a subjective and an objective element by considering the accused’s perception as well as reaction. The defendant’s belief in an impending attack must be reasonably held in the sense that he genuinely held it, and that belief must have been objectively reasonable under the circumstances.

Forming somewhat of a common law exception, English criminal law establishes an entirely subjective test. Self-defence can be claimed where the defender honestly believed in the existence of a threat: it is immaterial if that belief is unreasonable.²⁰⁹ An acquittal is therefore permitted even where the defendant makes a wholly unreasonable mistake as to the existence of a threat.²¹⁰

The ICC Statute has, however, departed from this standard. One might read ‘acts reasonably’ as meaning ‘reacts to a perceived threat reasonably’, thereby requiring only a reasonable belief in the existence of a threat, which is the approach taken by UK common law outlined above. Had the drafters included wording that hinged on the accused’s ‘reasonable belief’, a subjective standard might have been applied. On the ordinary wording of the provisions adopted, however, an objective test appears to

209 Hessbruegge, J. (2016) ‘ECtHR Armani Da Silva v UK: Unreasonable Police Killings in Putative Self-defence?’, Blog of the European Journal of International Law, available at: <https://www.ejiltalk.org/ecthr-armani-da-silva-v-uk-unreasonable-police-killings-in-putative-self-defence/> (accessed 6 February 2019)

210 See, DPP v Morgan [1975] UKHL 3. Also see Beckford v The Queen [1988] AC 130; R v Oatridge (1992) 94 Cr App R 367. This approach is also taken in South Australia: see Criminal Law Consolidation Act 1935 (SA) s 15, as discussed in Michael Grant, ‘Self-Defence in South Australia: A Subjective Dilemma’ (1994) 16 Adelaide Law Review 309. New Zealand law is to the same effect: see R v Ranger (1988) 4 CRNZ 6.

have prevailed. The ‘reasonable belief’ test did appear in earlier drafts of Article 31(1)(c) but was ultimately rejected in favour of the current provision, which was intended to operate objectively.²¹¹

As such, it seems that the drafters intended that Article 31(1)(c) exclude defendants who commit crimes within the jurisdiction of the ICC on the basis of mistaken beliefs in the existence of threats, irrespective of the reasonableness of those beliefs.²¹² With putative self-defence ruled out under Article 31(1)(c), the question becomes: could a defendant who was mistaken as to the existence of a threat instead rely on the defence of mistake of fact?

It might be thought that cases of mistaken or ‘putative’ defensive force, where the defendant is mistaken as to the existence of a threat, would fall under Article 32 (1) on mistake of fact. As we have already seen, however, mistake of fact:

“shall be a ground for excluding criminal responsibility only if it negates the *mental element* required by the crime.”

Accordingly, the subject-matter of the mistake envisaged by Article 32 is strictly concerned with an offence element (specifically, the mens rea of the offence) and has nothing to do with a defence element such as a defendant's belief that circumstances exist which warrant his or her acting in self-defence.²¹³

A defendant who makes a mistake as to the material existence of a threat may therefore still possess the requisite mental element of the offence.

This may prove to be problematic for the ICC in that a strictly objective test rules out putative self-defence, while also leaving the defendant with no recourse to the defence of mistake of fact in cases that do not negate the mental element of the crime. A thorough analysis of this issue can be found

211 See, e.g. Report of the Preparatory Committee on the ICC, above n 19, 99 (art N: Proposal 1); 1998 Draft Statute, above n 21, 58 (art 31(1)(d)). See also M Cherif Bassiouni (ed), *The Statute of the International Criminal Court: A Documentary History* (1998) 319–20, 377.

212 An exception to this exists in extreme cases of mental illness: Rome Statute, above n 1, art 1(1)(a).

213 Yeo, S. (2008) ‘Commonwealth and International Perspectives on Self Defence, Duress and Necessity’, *Current Issues In Criminal Justice*, Vol.19 (3), pp.349-352

elsewhere in the literature,²¹⁴ though it is worth noting that the stance taken by the ICC Statute has been criticised as too draconian in insisting on the factual reality of the threat and ignoring altogether the belief of the defendant.

As to a mistake of law, as a general rule, ignorance of the law is not grounds for excluding criminal responsibility. This is confirmed by Article 30 which expressly states that ‘a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility.’ As touched upon above, for the avoidance of doubt, paragraph 2 of the Introduction of the Elements of Crimes for Article 8 further sets out that ‘there is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations’ and similarly ‘there is no requirement to prove that the perpetrator has made a legal evaluation as to the ‘manifest’ nature of the violation of the Charter of the United Nations.’²¹⁵ These provisions clarify that as it is not necessary that the perpetrator carried out an evaluation into – and had legal knowledge of – the extent to which his actions contravened the law, a defence of mistake of law is bound to fail.

Explaining the rationale for not requiring legal knowledge on the part of the perpetrator, the Chairman of the SWGCA explicitly stated in his *Non-paper on the Elements of Crimes* that ‘specifying a mental element of ‘knowledge of factual circumstances’, as opposed to a mental element of ‘knowledge of law’ may, in principle, have the effect of limiting the availability of certain mistake of law arguments.’²¹⁶

The extent to which limiting the scope of such defences is in line with the Rome Statute remains to be seen, although the exclusion of the possibility to rely on a mistake of law may seem severe, excluding as it does grey areas of international law such as pre-emptory self-defence and humanitarian

214 See, e.g. Ambos, K. (2002) ‘Other Grounds for Excluding Criminal Responsibility’ in Cassese A Gaeta P & Jones JWD ed *The Rome Statute of the International Criminal Court: A Commentary* Vol II Oxford University Press Oxford; Eser A 1999 ‘Article 3 I: Grounds for excluding criminal responsibility’ in Triffterer, O. (Ed.) *Commentary on the Rome Statute* Nomos Verlagsgesellschaft Baden Baden; Tonkin, Op Cit.; and Triffterer, O. (1999) ‘Article 32 Mistake of fact and mistake of law’ in Triffterer O (ed.) *Commentary on the Rome Statute* Nomos Verlagsgesellschaft Baden Bade; and Yeo, Op. Cit.

215 Paragraph 2 of the Introduction of the Elements of Crimes for Article 8

216 ICC-ASP/8/INE2, Annex II, Appendix II, p. 18, para. 21. The Chairman of the SWGCA added: ‘However, such mistake of law arguments would be very difficult to advance anyways, given that only ‘manifest’ Charter violations, and no borderline cases, would fall under the Court’s jurisdiction due to the threshold requirement in Article 8 bis, paragraph 1’

intervention. As Claus Kreß points out, such grey areas of international law are already accounted for. ‘The objective requirement of manifest illegality already has the effect of excluding from the state conduct element any use of armed force that falls into the ‘grey area’ of the prohibition on the use of force. The objective requirement of manifest illegality thus (partly) serves as a functional equivalent of a mistake of law defence in legally controversial cases.’²¹⁷

With the ‘manifest violation’ clause establishing an objective requirement, it will be for the Court to decide, on a case-by-case basis, which actions can be justified and which amount to manifest violations of the UN Charter.

3.5. Concluding remarks

The definition marks the crime of aggression as exceptional in a number of ways, setting it apart from the other international crimes. The crime of aggression is embedded in peace maintenance even more deeply than the other core crimes, given its direct link to *jus ad bellum* (‘manifest violation of the Charter of the United Nations’).²¹⁸ Aggression is also a leadership crime, with prosecution for acts of aggression limited to those most responsible. As the newly adopted definition states, perpetration is limited to persons who are ‘in a position effectively to exercise control over or to direct the political or military action of a state.’²¹⁹ At the same time, the concept remains tied to state-led aggression, resisting attempts to widen its scope. These differences were critical in shaping negotiations leading up to the Kampala agreement, and also cast light on why aggression is more politicised, and thus more controversial, than the other international crimes.

There is broad acceptance that there remains considerable room for judicial refinement of the definition,²²⁰ particularly with regard to the exhaustive nature of the enumerated acts of aggression and the extent to which the threshold requirement excludes acts of pre-emptory self-defence and

²¹⁷ Kreß & von Holtzendorff, Op Cit. p.1201

²¹⁸ Stahn, C. (2010) ‘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(4), p.882.

²¹⁹ Art.8(1) bis.

²²⁰ Kreß & von Holtzendorff, Op Cit. p.1211.

humanitarian intervention. Indeed, the impact of the manifest threshold provision is seen throughout this chapter, and states and commentators alike will be keen to establish some clarity over its reach.

Nevertheless, Article 8 *bis* represents a significant step forward in the development of international criminal law and customary international law more broadly. Representing the most important normative advance with regard to the crime since Nuremberg, it moves us beyond traditional conceptions of aggressive *war*, and provides both a basis by which future acts of aggression can be judged and the definitional tools the Court needs in its pursuit of those guilty of committing crimes of aggression.

With the definition largely agreed, the vast majority of time at the Kampala Review Conference was devoted to setting out the conditions for the exercise of the Court's jurisdiction over it. The following chapter will provide an account of these negotiations, providing critical insight into the positions adopted by delegations and the rationale behind the decisions taken.

Chapter 4 – The Kampala Negotiations

This chapter will seek to provide an account of the negotiations that took place at the 2010 Review Conference in Kampala to agree an amendment to the Rome Statute that would define the crime of aggression and set out the conditions for the exercise of the Court's jurisdiction over it. Through insight provided by those present and intimately involved it will offer an insider account of the manner in which the negotiations were conducted, the alliances that were formed, and the compromises that were made. Central to this will be the intention of delegations – at the time – with regard to the way in which the amendments would enter into force, and specifically to whom they would apply. This will provide context to the provisions adopted and will shed light on the intentions of the drafters and the manner in which the provisions should be interpreted going forward.

4.1. The Negotiations

The Review Conference on the Rome Statute of the International Criminal Court took place in Kampala, Uganda over 10 working days from 31 May to 11 June 2010. A picturesque resort overlooking the shores of Lake Victoria played host. The resort was initially built in 2001 to accommodate the visiting Presidents and Prime Ministers at the 2007 Commonwealth Conference (CHOGM), and delegations largely stayed in the resort, with formal discussions taking place in the adjacent Conference Centre rooms. Delegations describe an ebullient atmosphere that permeated the opening days of the Conference. With preparation years in the making through various preparatory conferences in The Hague and New York, there was a sense that tangible gains were finally within reach.²²¹

The Review Conference accommodated a huge number of participants. ICC States Parties in attendance numbered 84, with 32 non-States Parties (including the United States) also present. 500 civil society

²²¹ Interview with UK Delegate in Kampala. Transcript on file with Author

organisations registered to attend, comprising international organizations, NGOs, and numerous other international experts and observers.²²²

Leading up to the Review Conference the Special Working Group met eight times between 2003 and 2009 in both New York and The Hague. These meetings were then supplemented by further informal talks – the ‘Princeton process’ – hosted largely by the Liechtenstein Institute on Self-Determination at Princeton University. In keeping with the tradition adhered to during these sessions, it was seen as integral to the credibility and future workability of any agreement reached in Kampala, that every effort was made to accommodate States Parties and non-States Parties alike. While only States Parties would ultimately have a vote on the adoption of any negotiated outcome, those leading the conference were keen to achieve a consensus decision between all parties, and this requirement was written into the conference Rules of Procedure.²²³ All delegations were also acutely aware that a divisive vote on such a sensitive issue would all but certainly have spelled trouble for the Court.²²⁴ The need for near unanimity was as much a practical requirement as an ideological one. Article 121(3) that governs the adoption of amendments to the Statute requires a two-thirds majority of States Parties (111 at the time) for the adoption of an amendment – that is, at least 74 votes. With only 84 States Parties present in Kampala, and with some delegations leaving before the final meeting of the conference, a very small dissenting minority would be able to block any agreement.

While delegations met principally to discuss the proposed amendment to the Rome Statute that would incorporate a definition of aggression and the conditions for the exercise of the jurisdiction of the Court over the crime, aggression was not the only issue up for discussion at the Review Conference. A ‘stocktaking’ of international justice took the form of four panels that were held during the first week of the conference. Also on the agenda were two further proposed amendments to the Rome Statute, the first a Belgian war crimes amendment and the second a proposal to delete Article 124, which permits

222 See ‘Delegations to the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010,’ RC/INF.1, dated 26 August 2010, at (listing the names of delegates from 84 States Parties, and 32 Non-States Parties as attending the Review Conference).

223 Rule 51 of the Conference Rules of Procedure, previously issued as ICC-ASP/6/Res.2, annex IV, established that “Every effort shall be made to reach decisions in the Conference and in the Bureau by consensus. If consensus cannot be reached, decisions shall be taken by vote.” Available at https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-3-ENG.pdf (accessed 7 March 2017)

224 Barriga (2009), Op Cit. p.520

states to opt out of certain war crimes provisions of the Statute for seven years. This meant that delegations had considerably less time to focus on reaching an agreement on the crime of aggression than the 10 working days' duration of the Review Conference.

The primary formal arena for working through outstanding issues at working level in Kampala was the Working Group on the Crime of Aggression (WGCA), which met on numerous occasions during the Review Conference and was chaired by Prince Zeid of Jordan, a former President of the Assembly of State Parties to the Rome Statute. These formal discussions were supplemented, as is common in multilateral negotiations, by countless meetings between smaller configurations of delegations and the Chair in the margins. These informal meetings were integral to the process being driven forward and a number of likeminded groups emerged. Among them the permanent members of the Security Council, the African Group (which was keenly interested in reaching a consensus on this issue on African soil), the Group of Latin American and Caribbean Countries (with strong leadership from Argentina and Brazil), the Group of Eastern European States, and a largely Western group.²²⁵

In terms of process, in the lead up to the conference on 25 May 2010 the Chair of the WGCA issued a draft Conference Room paper which would form the basis of discussions going forward.²²⁶ Ideas put forward in the negotiations in working group format, in private discussion and through circulated non-papers by delegations or groups of delegations were then used by the Chair to shape this draft paper. This resulted in two further revisions issued by the Chair. Once the WGCA had made sufficient progress, the remaining issues were transferred back – via progress reports – into the hands of the President of the Review Conference.²²⁷ It is in these plenary sessions of the ASP that formal agreement could be reached.

As President of the Assembly of States Parties, and himself a former Chair of the Working Group on the Crime of Aggression, the Review Conference and plenary sessions of the ASP were overseen by

²²⁵ Ibid.

²²⁶ Conference Room Paper on the Crime of Aggression, Review Conference of the Rome Statute (25 May 2010), RC/WGCA/1

²²⁷ All Review Conference documentation, including summaries and reports can be found at: https://asp.icc-cpi.int/en_menus/asp/reviewconference/pages/review%20conference.aspx (accessed 13 August 2018)

Christian Wenaweser, Permanent Representative of Liechtenstein to the United Nations, aided by his deputy Stefan Barriga. Prince Zeid, Christian Wenaweser and Stefan Barriga proved central figures during the Review Conference and played crucial roles throughout.

The Conference was formally opened by Christian Wenaweser, and at the first meeting on 31 May 2010 statements were delivered by Ban Ki-moon, United Nations Secretary-General; Judge Sang-Hyun Song, President of the Court; Luis Moreno-Ocampo, Prosecutor of the Court; former United Nations Secretary-General, Kofi Annan; and H.E. Yoweri Museveni, President of Uganda.²²⁸

With the scene set, delegations began work on the three outstanding issues: the definition, the need for state consent, and the role of the Security Council.

4.2. The Definition

As discussed in the chapter 2 charting the historical development of the criminalisation of aggression, from the eight sessions of the Special Working Group between 2003 and 2009, supplemented by the Princeton Process, a draft definition of the crime was agreed without brackets. Heading into the conference there had been little indication from the negotiating partners that this definition could not be agreed. However, renewed interest in the ICC and the crime of aggression by the United States in late 2009 cast doubt on this assumption.

The Bush administration's hostility to the ICC is well documented²²⁹ and its policy of non-engagement with the Court ensured that – despite many of the meetings taking place on its territory – the US was not present during the Special Working Group's preparatory meetings, nor was the US present for the Princeton process. The election of Barack Obama represented a watershed moment, with the US suddenly eager to engage with the process. In March 2010, the US presented its position at the ASP

228 All statements available at : https://asp.icc-cpi.int/en_menus/asp/reviewconference/pages/review%20conference.aspx (accessed 13 August 2018)

229 See Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States (2002) Pub. L. No. 107-206. The American Service-members' Protection Act (ASPA) was passed as Title II of this legislation and authorised 'all means necessary and appropriate to bring about the release of any US or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court', also known as 'the Hague Invasion Act'. See also Faulhaber, L.V. (2003) 'American Servicemembers' Protection Act of 2002', 40 Harv. J. on Legis. 537

through Department of State Legal Advisor Harold Koh, provoking a degree of trepidation from those States Parties that had been working towards agreement for years. The US articulated serious concerns over the draft amendments. From an ideological point of view, the US questioned the wisdom of overburdening the Court with what it envisaged would come to be seen as a political crime. Procedurally, it considered the draft definition to be overly broad and a departure from customary international law, and rejected the notion that domestic courts should be empowered to sit in judgment over the use of force by other states. In negotiating terms, they aligned themselves with the other permanent members of the Security Council in expressing a strong preference for both a consent-based regime and an exclusive role for the Security Council in determining when acts of aggression have been committed.²³⁰

Despite these strong reservations, the US found itself isolated in its push for the definition to be reopened, unable even to convince the other permanent Security Council members of the merits of attempting to narrow it down. As the Chair of the negotiations recognised, delegations understood that ‘reopening the definition would inevitably lead to its total unravelling.’²³¹ As such, support for the definition stood firm forcing the US to pursue a different approach during the Review Conference: seeking to establish a set of ‘understandings’ that would be annexed to the amendments and would serve to elaborate how the provisions were to be interpreted. Such a list of understandings regarding some of the jurisdictional issues had already been prepared and had been included in Annex III to the Chair’s 25 May 2010 Conference Room paper. These understandings – once agreed – would remain in annex to any adopted amendment and were intended to be interpretive, offering further clarity on what had been adopted, though the legal weight they carry is still disputed.²³² The US now sought to add to this list additional understandings in relation to the Article 8 *bis* definition.

230 See United States Mission to the United Nations, Statement by Harold Koh, Legal Advisor, United States Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court (23 March 2010)

231 Wenaweser, Op Cit. p.883.

232 For full discussion on the legal weight of the Understandings see Heller (2012), Op Cit. p.229 (arguing that the Court would have the right to ignore the Understandings unless they are adopted by all of the States Parties to the Rome Statute).

Work on the understandings eventually included in the 25 May Conference Room paper had begun in the lead up to Kampala through the Special Working Group and the Princeton Process, although the term ‘Understandings’ was not used at the time. In the final meeting of the SWGCA in February 2009 the Chair submitted a non-paper highlighting that ‘a number of issues [had] surfaced which the Review Conference might usefully address when adopting the amendments on aggression.’²³³ His non-paper went on to suggest draft language for discussion.

This proposal formed the basis of the consolidated list of Understandings annexed to the 25 May Conference Room Paper. Paragraphs 1 and 2 of the Understandings asserted that the Security Council would be able to refer any state to the Court irrespective of its acceptance of jurisdiction. It left open however, the issue of whether referrals would be possible from the time of adoption, or from entry into force. Paragraphs 3 and 4 dealt with jurisdiction *ratione temporis*, while paragraphs 5 and 6 set out possible approaches with regard to acceptance of the amendment on the crime of aggression in the event the amendment comes into force in accordance with Article 121(5). Discussion of these Understandings are contained further below.

With the Chair of the Review Conference keen to ensure US buy-in, the German delegation led by Claus Kreß was tasked to lead a separate negotiating track to reach agreement on the Understandings, forcing the other delegations to consider the inclusion of provisions dealing with definitional aspects of the amendment.

Harold Koh reiterated US concerns with the draft Article 8 *bis* definition and set out the US desire to address these concerns through the Understandings in his opening statement on 4 June 2010.²³⁴ A formal list of six draft understandings contained within a non-paper by the US then followed on 7 June 2010. This non-paper translated the US concerns into concrete solutions for addressing them. The opening paragraph of the US non-paper sought to address concerns that the amendments as drafted departed from customary international law, and suggested the inclusion of an understanding that the amendments

²³³ 2009 Chairman’s Non-Paper on Other Substantive Issues.

²³⁴ Koh, H. (2010) US State Department, Statement at the Review Conference of the ICC, Kampala, 4 June 2010, available at: <https://2009-2017.state.gov/s/l/releases/remarks/142665.htm> (accessed 10 July 2010)

should ‘not be interpreted as constituting a statement of the definition of ‘crime of aggression’ or ‘act of aggression’ under customary international law.’ The second understanding sought to ensure that the amendments would ‘not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another state.’ The third understanding would establish that only the most serious and dangerous forms of illegal use of force would be considered to constitute aggression, and that in arriving at such a decision, all the circumstances of each particular case, including the purpose for which force was used and the gravity of the acts concerned or their consequences, must be considered. It also sought to distinguish between acts of aggression and crimes of aggression, whereby it is ‘only a war of aggression that is a crime against international peace.’ The fourth understanding addressed US concerns that humanitarian intervention might be considered an aggressive act in light of the amendment and included language that would ensure that ‘an act undertaken in connection with an effort to prevent the commission of any of the core crimes contained in Articles 6 [Genocide], 7 [Crimes against Humanity], or 8 [War Crimes] of the Statute would not constitute an act of aggression.’ The fifth understanding reiterated that an aggressive act could only be considered a manifest violation if it was committed without the consent of the relevant state, was not taken in self-defence, and was not authorised by the Security Council. And the sixth understanding explained that ‘all three components of character, gravity, and scale must be sufficient to justify a “manifest” determination.’

These six understandings can broadly be summarised as attempts to address US concerns that the Article 8 *bis* definition exceeds the limits of customary international law to the extent that the right to exercise domestic jurisdiction is granted to states and humanitarian intervention is not explicitly excluded, resulting in too few reassurances that only the most serious crimes will be considered acts of aggression.

The extent to which a right to exercise domestic jurisdiction is granted to states goes to the heart of the issue of complementarity, something discussed in the lead up to Kampala. As will be seen further below in this chapter, including an understanding that establishes that the amendment does not give way to domestic jurisdiction ultimately proved uncontentious and was eventually adopted. As it does not,

however, directly concern the definition of the crime, it was not considered as part of the German-led process. The other paragraphs of the US non-paper were.

As Claus Kreß recalls, ‘in light of the by then solid consensus on draft Article 8 *bis* and the late hour in the negotiations, the great majority of delegations were understandably reluctant to enter into a discussion of these proposals. Yet, there was also the feeling that it would be unwise not to engage with a delegation of the United States that had come to Kampala in a conspicuously open and constructive spirit.’²³⁵ As such, extensive bilateral and regional consultations were conducted on 8 and 9 June 2010.

From these consultations, Claus Kreß reports that delegations indicated flexibility to consider elements that sought in an abstract way to ensure that only the most serious uses of illegal force would constitute aggression. Conversely, it became clear that any attempts at divorcing draft Article 8 *bis* from customary international criminal law would not fly. Similarly, delegations were reluctant to address the issue of excluding from the scope of the definition genuine forcible humanitarian interventions, despite a minority of delegations looking favourably on the US suggestion. This reluctance to discuss the idea that genuine humanitarian intervention should be excluded from any conception of aggression was not *per se* an out-and-out rejection of principle. Rather there was widespread concern that it would be ‘inappropriate to deal with key issues of current international security law in the form of understandings drafted not with all due care, but in the haste of the final hours of diplomatic negotiations.’²³⁶ The German delegation instead decided to pursue a ‘minimalist approach’, presenting to delegations two generally worded proposals aimed at satisfying US concerns about the seriousness and gravity of the crime.

The first, ‘Understanding X’, set out that ‘a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the purposes for which force was used and the gravity of the acts concerned and their consequences; and that only the most serious and dangerous forms of illegal use of force constitute aggression.’ While

²³⁵ Kreß & von Holtendorff, Op Cit. p.1205

²³⁶ Ibid.

generally well received, the Iranian delegation suggested a formulation more closely aligned to the language of Article 2 in the annex of General Assembly resolution 3314.²³⁷ The US delegation agreed, and the following text was eventually adopted as Understanding 6:

'It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.'

The second proposal, 'Understanding Y', set out that 'in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, each of the three components of character, gravity and scale must independently be sufficient to justify a 'manifest' determination.' The Canadian delegation expressed concerns that this formulation might be overly restrictive in requiring that all three components *independently* be sufficient to justify a 'manifest' determination. In their view, there might be examples of State force whereby two of the components were *definitively* manifest violations, while the third was only *almost* a manifest violation. In such a scenario, the threshold may be met in accordance with the requirements of draft Article 8 *bis* (1) but would fall short of the threshold established by draft Understanding Y. Article 8 *bis* (1) requires that an act of aggression, by its character, gravity and scale, constitutes a manifest violation. It was a reading of the three components together that was important. The US agreed to a redraft on the basis that it was also specified that one component alone would not be enough to satisfy the manifest requirement. As such, the following was adopted as Understanding 7:

'It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.'

²³⁷ Non-Paper on possible further understandings (Annex III of the Conference Room Paper). See also Kreß & von Holtzendorff, Op Cit.

From these understandings, the US gained clarity over a number of points: (1) only ‘the most serious and dangerous’ forms of illegal use of force constitute aggression; (2) the determination whether an illegal use of force constitutes aggression ‘requires consideration of all the circumstances of each particular case,’ including ‘the gravity of the acts concerned and their consequences;’ and (3) an underscoring that the three factors in determining whether an act of aggression is a manifest violation of the UN Charter – character, gravity, and scale – must be read conjunctively. For Harold Koh, the use of the word ‘and’ in Article 8 *bis* (1) was based on an understanding that any one element would not be sufficient for this purpose and that all must be present,²³⁸ though as the Canadian intervention made clear, they must all be present to the extent that read together they constitute a manifest violation, not that they must each constitute a ‘manifest’ determination in their own right.

While these were important clarifications for the US, they did not address all areas of concern. In relation to the Understanding 7 assertion that character, gravity, and scale must be read conjunctively, it failed – in Harold Koh’s view – to address the way in which the Court might interpret the word ‘manifest’. The US would have preferred to establish that it was only a *war of aggression* that could constitute such a violation, a formulation they felt would have brought Article 8 *bis* more in line with Resolution 3314.

Perhaps the biggest regret for the US delegation was their inability to agree in the Understandings a clear exemption for humanitarian intervention. For the US, ‘a true humanitarian intervention should not be considered ‘aggression’ and should not entail the risk of international criminal prosecution’, and the language they put forward would have excluded the use of force to prevent the very atrocity crimes that the Rome Statute itself aims to prevent: genocide, crimes against humanity, and war crimes.²³⁹

For the other delegations, the manifest violation threshold established both in Article 8 *bis* and in the new Understanding 6 was enough to satisfy concerns that the definition would be applied too liberally. As explained above, there was also a strong sense that the final days of negotiations did not allow

²³⁸ Koh (2015), Op Cit. pp.272-273

²³⁹ Ibid.

sufficient time for deliberation of, nor were the Understandings the appropriate mode of expression for, key issues of current international security law. We return to humanitarian intervention in later chapters, looking at the extent to which – in the absence of absolute clarity – the aggression amendments might have a dissuasive effect on states’ willingness to participate in genuine acts of humanitarian intervention.

4.3. Jurisdictional issues

With Article 8 *bis* all but agreed, along with two understandings (6 and 7) addressing at least some of the US concerns over the definition, two big issues remained to be resolved at the Review Conference. Both were intimately linked and were issues on which the delegations initially appeared to have adopted irreconcilable positions.²⁴⁰ The first issue was whether the Security Council should play a primary or exclusive role in the exercise of jurisdiction, specifically whether the ICC should only be allowed to proceed on the basis of a Security Council pre-determination that a crime of aggression had been committed, or whether the ICC should be able to act in the face of Security Council inaction.²⁴¹ This was described as the ‘question of questions’ facing delegations.²⁴² The second question was whether some form of expressed consent by the alleged aggressor state should be required, which would demand a more restrictive jurisdictional regime than applies for the other international crimes. This was effectively a balancing act, seeking to accommodate States Parties and non-State Parties alike. Delegations had precious little time to reach agreement on these two issues.

4.3.1. Jurisdictional Filters

With regard to the ‘jurisdictional filters’ question – who could trigger an investigation – a great deal of important work had already been carried out as part of the Princeton Process. Adopted by the SWGCA in February 2009 were proposals outlining the conditions for the Court’s exercise of jurisdiction over the crime of aggression. Importantly, these proposals indicated consensus that all three existing

²⁴⁰ Wenaweser, *Op Cit.* p.884

²⁴¹ Milanovic, M. (2012) ‘Aggression and illegality: custom in Kampala,’ *Journal of International Criminal Justice*, 10(1), p.166.

²⁴² Kreß & Holtendorff, *Op Cit.* p.1201

jurisdictional triggers in the Rome Statute would apply to the crime of aggression – Security Council referrals, State Party referrals, and proprio motu investigations of the Prosecutor. This – at least superficially – brought the crime of aggression into line with the other ICC crimes.

For the permanent members of the Security Council, this was a significant concession in that it ceded the exclusive competence of the Security Council to initiate investigations. In return for this concession, the proposals outlined a more restrictive procedure that was to be followed in the event that states or the Prosecutor sought the initiation of an investigation. It was established that once the Prosecutor has established a reasonable basis to proceed with an investigation, she must notify the UN Secretary-General who would in turn notify the Security Council. If the Security Council then determined that an act of aggression had been committed, the Prosecutor could proceed with an investigation. This established that the Security Council would always be given the first opportunity to determine conclusively whether an act of aggression had occurred, though it was made clear as a procedural matter that a determination of an act of aggression by an organ outside of the Court shall be without prejudice to the Court's own findings.

Two questions regarding the jurisdictional filters issue remained to be answered by delegations in Kampala, both concerning the extent to which the Security Council would have final say over a decision to proceed with an investigation. The first was whether, following a referral by the Security Council, the Prosecutor would have to return to the Security Council for a determination of aggression in the event that one had not already been given. The second was whether, in the event of a state referral or investigation proprio motu, a Security Council green light in the form of a determination was also required before an investigation could proceed. In other words, could the Prosecutor proceed with an investigation on the basis of either a referral alone, or in instances where the Security Council declined to make a determination of aggression, either because a permanent member had vetoed such a proposal or through outright inaction? And if so, under what circumstances?

The starting point in negotiations at Kampala was the Chair's 25 May Conference Room Paper, which presented six options contained under two broad alternatives.²⁴³

'Alternative 1' would retain the Security Council as the exclusive filter, and contained two options: prevent investigations entirely in the event that no Security Council determination had been made, even in the event of a Security Council referral (option 1); or allow investigations to proceed in instances where the Security Council has referred the situation to the Court but declined to make its own determination of aggression (option 2). To opt for option 1 would be to impose an additional filter on Security Council referrals and the other two trigger mechanisms alike: that the Court must always seek a determination of aggression from the Security Council, even if the Security Council had referred the situation themselves. Delegations decided to leave these two options open in the WGCA sessions, leaving them instead to the Plenary sessions towards the end of the Review Conference, discussed below. The focus of the WGCA instead turned to narrowing down the options contained in 'Alternative 2', and to providing a workable alternative to an exclusive Security Council filter.

'Alternative 2' provided a further four options under which the Prosecutor may proceed with an investigation in the event that no determination had been made by the Security Council. All four options would be subject to a six-month wait from the date of notification. After this six-month period had expired and the Security Council had not made a determination of aggression, investigations could commence on the basis of: 1) no further filter mechanism, and thus the Prosecutor could immediately proceed with an investigation; 2) a ruling by the Pre-Trial Chamber of the Court; 3) a General Assembly decision; or 4) a ruling by the ICJ.

Work to narrow down these four options took place behind the scenes in the form of bilateral meetings between interested parties and Prince Zaid as Chair of the WGCA. These were then followed up with the first formal debate which took place on Friday 4 June 2010.²⁴⁴ Following fruitful discussions, the Chair issued a Rev.1 of his Conference Room Paper on 6 June 2010. The options of having no further

²⁴³ Conference Room Paper on the Crime of Aggression, Review Conference of the Rome Statute (25 May 2010), RC/WGCA/1

²⁴⁴ Kreß & Holtzendorff, *Op Cit.* p.1202

filter mechanism or a deciding role for either the General Assembly or the ICJ had been rejected, a decision which met with no opposition.²⁴⁵ This narrowed the question to one simple proposition: should the ICC's pre-trial judges be able to authorise proceedings after six months of Security Council inaction?

The challenge now confronting delegations was how to balance the competing positions of those in favour of retaining the Security Council as the exclusive filter (Alternative 1) and those of the opinion that an internal mechanism should be in place to prevent gridlock in the event of Security Council inaction (Alternative 2).

A turning point came in the form of a non-paper submitted by Argentina, Brazil and Switzerland on 7 June 2010, the 'ABS Proposal'. Whereas the provisions as outlined in the Chair's 25 May Conference Room Paper and subsequent 6 June Rev.1 had dealt with the three trigger mechanisms of Security Council referrals, State referrals and proprio motu investigations uniformly, the ABS Proposal sought to divide them. It was suggested that a new Article 15 *ter* deal with Security Council referrals, while Article 15 *bis* would govern state-referred and proprio motu investigations.

The ABS Proposal divided the trigger mechanisms in order to allow delegations to apply different regimes in relation to both state consent and entry into force (both of which will be dealt with below) depending on whether the investigation was initiated by the Security Council or one of the other two trigger mechanisms. This distinction also paved the way for safeguarding the primary right of the Security Council to initiate investigations, while allowing delegations space to negotiate a more restrictive regime for the other trigger mechanisms. It also paved the way for delegations to apply different provisions in relation to how the trigger mechanisms would be filtered.

The ABS Proposal received praise for its ingenuity and it significantly influenced the course of further negotiations.²⁴⁶ The proposed distinction between Security Council referrals in Article 15 *ter* and the other two trigger mechanisms in Article 15 *bis* was included in the WGA Chair's Rev.2 of his

²⁴⁵ Ibid.

²⁴⁶ Ibid.

Conference Room Paper on 7 June 2010. This established the assumption that, in case of Security Council referrals, the ICC would exercise its jurisdiction without further conditions under Article 15 *ter*, though it was still undecided whether in the event of a Security Council referral the Prosecutor would be compelled to seek a further determination from the Security Council before any investigation could progress. In the case of the other two trigger mechanisms, delegations also needed to decide whether the Pre-Trial Chamber could authorise an investigation after 6 months of Security Council inaction. This would become the very last question for delegations to reach agreement on. At the time of Rev.2, and in order to strengthen the appeal of this option in the eyes of those delegations concerned about the possibility of ‘politically motivated and meritless cases,’²⁴⁷ it had been suggested to enhance this filter by involving all judges of the Pre-Trial Division or by subjecting the decision of the Pre-Trial Chamber to an automatic appeals process. The former would prove to be a useful suggestion.

The WGCA had made substantial progress on the question of jurisdictional filters, separating the trigger mechanisms to allow proprio motu and state referrals to be subject to a more stringent regime than Security Council referrals, and narrowing down the possible mechanisms available in the event of Security Council inaction. The remaining issues were left to the Plenary sessions of the final days of the Review Conference, with Christian Wenaweser now seeking to build on the work of Prince Zaid and delegations in the WGCA.

After submitting his ‘Non-paper by the President of the Assembly of States Parties’ at 11pm on 10 June 2010 which dealt with issues of consent and entry into force discussed below, Ambassador Wenaweser then issued a second non-paper at 4.30pm the following day, 11 June 2010. On the issue of trigger mechanisms, it sought to answer both remaining questions.

As to the question of whether a Security Council referral must also contain a prior determination of aggression, Ambassador Wenaweser contended that given that it was cumbersome for the Prosecutor to go back to the Security Council for a determination of aggression when the referral initially came

247 Barriga, S & Grover, L. (2011) A Historic Breakthrough on the Crime of Aggression, *The American Journal of International Law*, Vol.105, p.530

from the Security Council itself, this additional filter should be deleted from Article 15 *ter* altogether.²⁴⁸

In practical terms this made sense. If the Security Council made the referral in the first place, it hardly seemed necessary that the Prosecutor should be forced to return for a determination ruling. Those initially in favour of an exclusive role for the Security Council accepted this line of argument, reassured that the initial decision to refer a situation remained under the control of the Security Council.²⁴⁹ As such, the final compromise was brought in line with Article 13 (b) and the other crimes under the ICC Statute. A referral by the Security Council would empower the Prosecutor to act without further conditions.

As to the question of how the Court might proceed with state referrals and proprio motu investigations in the event of Security Council inaction, the non-paper proposed to allow pre-trial judges to authorise proceedings, bringing the crime of aggression into line with the other international crimes. As such, in instances in which a Security Council referral or determination was not forthcoming, after six months of Security Council inaction the ICC's pre-trial judges would be able to authorise an investigation that was initiated either by the Prosecutor proprio motu or by a state referral. This approach was, however, balanced by making direct reference to Article 16 of the ICC Statute, which allows the Security Council to suspend ICC proceedings. It also provided that the competence to authorise the Prosecutor to proceed would fall not upon the three-judge Pre-Trial *Chamber* as originally envisaged, but upon the six judges of the Pre-Trial *Division* as a whole.²⁵⁰ As previously suggested, this was intended to impose a higher threshold on the decision to authorise an investigation to proceed, reassuring those states concerned that political motivations could be behind any decision to investigate.

Throughout the negotiations, states had been moving towards a position whereby the Security Council would be the primary but not exclusive trigger mechanism. Due in part to these additional restrictions placed on the two trigger mechanisms, states were prepared to accept the Chair's proposals. These were not the only conditions placed on proprio motu and state-referred investigations, however. Further

²⁴⁸ Ibid. p.529

²⁴⁹ Ibid.

²⁵⁰ Ibid. p.530

restrictions regarding state consent and the entry-into-force of the provisions were needed in order to gain consensus. These conditions are explored below.

4.3.2. A Consent-based regime and Entry into Force

The second major issue to be decided by delegations in Kampala was whether some form of prior expressed consent to the provisions by the alleged aggressor-state should be required, which would demand a more restrictive jurisdictional regime than applies for the other international crimes. This question of aggressor-state consent was closely linked to the adoption of provisions for the entry into force of the crime which would detail which states were to be bound and at which point the provisions would come into effect.

Entry-into-force had been discussed at length in the preliminary meetings running up to Kampala and debate continued to rage during the negotiations. Delegations' views on which legal procedure should be followed to bring the provisions into force were determined by their preference for how expansive the jurisdictional remit of the Court should be.

The rules for amending the ICC Statute and incorporating the aggression provisions were already in place, set out in Article 5(2) of the ICC Statute, which defers the exercise of jurisdiction until:

*'a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.'*²⁵¹

Article 123 establishes that the provisions of Article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference. The problem was that Article 121 contained two possible entry-into-force procedures – in paragraphs (4) and (5), and Article 5(2) failed to specify which of these procedures should apply.

²⁵¹ ICC Statute, Art.5(2)

While it was initially suggested by some that the provisions could be adopted without the need to explicitly amend the ICC Statute (a mechanism that would require only a two-thirds majority of the Review Conference for the provisions to apply to all states), as Stefan Barriga recalls, such an expansive approach was rejected by a number of delegations who would not accept the notion that the aggression amendments could be added to the Statute without having to submit this substantive and sensitive matter to the parliamentary process of ratification.²⁵² As a result, states were left to choose between Article 121(4) and Article 121(5).

As a general rule, in order to amend provisions within the ICC Statute, Article 121(4) applies. This establishes that seven-eighths of the States Parties must have ratified the provisions and that they will then apply to all states one year after this threshold is reached. This establishes a very high threshold (7/8ths), but also stipulates that once that threshold is reached all States Parties will be bound.

An exception is contained in Article 121(5). Article 121(5) applies when the relevant provisions amend the core crimes (genocide, crimes against humanity, war crimes and aggression) listed in Articles 5, 6, 7 and 8 of the ICC Statute. Article 121(5) states that for such amendments, the provisions ‘shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.’ This establishes no threshold, but ensures that the provisions shall only apply in respect of a state that has ratified or accepted the provisions. This seemed to be in line with the Review Conference’s intention to advance a consent-based approach to the crime that differentiated it from the others within the ICC Statute.

The issue therefore centred on whether the aggression provisions could be incorporated within the ICC Statute simply by adding them to Articles 5, 6, 7 and 8, thereby amending the ICC Statute but not the core crimes (an Article 121(4) understanding) or whether incorporating the provisions signalled an amendment to the core crimes (an Article 121(5) understanding).

²⁵² Barriga & Grover (2011), Op Cit. p.523

As Stefan Barriga recalls, during discussions in the run-up to Kampala, the majority of States Parties, including many European states, had leaned towards an Article 121(4) application, bringing the aggression provisions into line with the other core crimes. As Kampala loomed however, and preliminary agreement on the definition of aggression was made by the SWGCA in February 2009, states began to wake up to the realisation that the provisions could in fact be adopted in Kampala. This prompted a change of position from several delegations who instead expressed a preference for the consent-based regime of Article 121(5).

Those delegations favouring a consent-based regime counted Australia, Canada, New Zealand, most European states, and the permanent members of the Security Council as part of their ranks. Despite the fact that an Article 121(5) reading would allow the exercise of jurisdiction to apply immediately following ratification by the state concerned, it would leave the decision to ratify – and thus be bound – firmly in each state’s hands. Those in favour of an Article 121(4) understanding comprised all of the African states, members of the Non-Aligned Movement, and most Latin American and Caribbean countries. These states were willing to accept the high number of ratifications required for entry into force of the amendments under Article 121(4) (seven-eighths of states parties) – and the delay this could mean for entry into force – as a trade-off for ensuring that the provisions did not lead to impunity.

With delegations split to such a degree that a majority for either side seemed hopelessly out of reach, a compromise proposal was needed.

As discussed above in relation to the trigger mechanisms, the first major proposal came from Argentina, Brazil and Switzerland (the ‘ABS proposal’),²⁵³ which divided the trigger mechanisms and allowed different provisions to be applied to each. Under the ABS proposal, Article 121(5) was to govern the provisions related to Security Council referrals, which would enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. The provisions related to proprio motu investigations and state referrals would enter into

253 Non-Paper by Argentina, Brazil and Switzerland (ABS), Review Conference of the Rome Statute (6 June 2010)

See also Kostic, D. (2011) ‘Whose crime is it anyway? The international criminal court and the crime of aggression,’ *Duke Journal of Comparative & International Law*, 22:109, p.115.

force in accordance with Article 121(4), for all states after ratification by seven-eighths of States Parties. This initiative would ensure that the crime came into force immediately on the basis of Security Council referrals for those that accepted the amendments. No further conditions were foreseen for the exercise of jurisdiction. The ABS Proposal would also have enshrined a protective regime for the other trigger mechanisms which would not rely on aggressor-state consent. It would instead apply uniformly to crimes committed by nationals of States Parties or on their territory in accordance with Article 12(2) regardless of whether they had accepted the provisions or not, but would only come into effect once seven-eighths of States Parties had agreed it should.

This proposal demonstrated the willingness of states to make compromising choices in pursuit of consensus. It also managed to focus discussion on the question of aggressor-state consent under state referrals and proprio motu proceedings. The ABS Proposal was included in the WGCA Chair's Rev.2 of his Conference Room Paper on 7 June 2010,²⁵⁴ but much more work lay ahead. As drafted, it opened up the possibility of state referrals and proprio motu investigations proceeding regardless of whether the state concerned had consented to the provisions. It would have taken a huge shift in position for those delegations that favoured a purely consent-based regime, and an even bigger shift for the permanent members of the Security Council pushing for exclusivity with regard to the trigger mechanisms.

Seeking to build on the ABS Proposal now contained within the Chair's Rev.2 Conference Room Paper, the Canadian delegation submitted a further proposal on Tuesday 8 June 2010.²⁵⁵ The Canadian non-paper took as its starting point that a determination by the Security Council would authorise the Prosecutor to proceed with an investigation. As for the other two trigger mechanisms, the non-paper proposed that the Pre-Trial Chamber, after six months of inaction, could only authorise an investigation to proceed provided that 'all states concerned with the alleged crime of aggression – the state on whose territory the alleged offence occurred and the state of nationality of the persons accused of the crime – have declared their acceptance' of the provisions. This proposal established a purely consent-based

²⁵⁴ Conference Room Paper on the Crime of Aggression, Review Conference of the Rome Statute (10 June 2010)

²⁵⁵ Non-Paper by Canada, Review Conference of the Rome Statute (8 June 2010)

regime for state referrals and proprio motu investigations, requiring that they opt-in to the provisions before they could be held responsible for crimes committed by their nationals or on their territory. What's more, this proposal was in direct contradiction with the previous ABS Proposal which had removed the need for prior state consent for these trigger mechanisms.

It was now imperative that the concerned states come up with a compromise acceptable to all, and the ABS and Canadian delegations entered direct negotiations to compile such a compromise text. Commonly referred to as the 'ABCS Non-paper', this compromise text was presented to the WGCA on the afternoon of Wednesday 9 June 2010.²⁵⁶ Leaving aside Security Council referrals, where it was assumed that no further jurisdictional conditions would be imposed, the ABCS Proposal focused entirely on the other two trigger mechanisms. The ABCS Proposal started from the basis that jurisdiction would apply to crimes of aggression committed by a State Party's nationals or on its territory, but then introduced three key restrictions.

The first was that the exercise of jurisdiction would begin 'five years after the entry into force of this article for any State Party'. This insertion extended the delay of entry into force following ratification from one year to five years for each state individually. This was seen as an insertion designed to placate those delegations that were concerned the Court was not yet equipped to deal with aggression cases. The second key feature was to introduce an opt-out clause. The text proposed that 'the Court may exercise its jurisdiction over the crime of aggression committed by a State Party's nationals or on its territory, *unless that State Party has filed a declaration of its non-acceptance* of the jurisdiction of the Court'. This would enable states to explicitly establish that they did not wish to be bound by the provisions.

The third key feature was that non-State Parties were excluded completely, with the Court not able to exercise its jurisdiction over the crime of aggression when committed by a non-State Party's nationals or on its territory.

²⁵⁶ Barriga & Grover (2011), Op Cit. p.526

It is not explicitly stated whether the ABCS Non-paper intended to apply an Article 121(4) understanding whereby all states would be bound following ratification by seven-eighths of States Parties; an Article 121(5) understanding whereby the amendments would enter into force only for the ratifying state; or indeed – as Claus Kreß contends – that the proposal represented an ingenious compromise whereby the ABCS non-paper took as a starting point that jurisdiction could be extended to crimes committed on the territory and nationality of states in accordance with Article 12 of the ICC Statute regardless of whether they had ratified or not, but softened this by recognising the absence of state consent through excluding those states that had opted out or were not States Parties. This would appear to be in conflict with the idea of Article 121(5) applying only to ratifying states on an individual basis, and would require an interpretation whereby Article 121(5) applied only to the extent that a threshold of ratifying states was reached. The ambiguity created by applying an Article 121(5) understanding, alongside a threshold of required ratifications to trigger jurisdiction and an opt-out clause, is discussed in more detail in subsequent chapters.

What is clear is that the ABCS Non-paper significantly influenced the shape of the final text. As discussion moved from the WGCA to the plenary session, Christian Wenaweser issued his Non-Paper by the President of the Assembly at 11pm on Thursday 10 June 2010.²⁵⁷ This non-paper closely mirrored the provisions contained within the ABCS Non-paper.

Additionally, it included two interesting developments. The first, seen as a concession to the permanent members of the Security Council was the suggestion of an additional threshold requirement, either on the basis of ratifications or a number of years passed before the Court's jurisdiction would be activated. In his Second Non-Paper by the President of the Assembly, submitted at 4:30 pm on 11 June 2010, it was confirmed that the amendments would not come into force until 'one year after the ratification or acceptance of the amendments by thirty States Parties.' The second inclusion was clarification that the provisions shall enter into force in accordance with Article 121(5).

²⁵⁷ Non-Paper by the President of the Review Conference (June 10, 2010)

Explicit reference to Article 121(5), on the face of it appeared to confirm that the aggression amendments would enter into force individually for each ratifying State, but the inclusion of both an opt-out clause and the additional requirement that thirty states must ratify the amendments before they take effect raised the possibility that Article 121(5) only applies insofar as it is necessary to reach that threshold. At which point the amendments apply to all States Parties, conditional on the provisions contained within the amendments, not least the option to opt-out. These provisions led to a great deal of confusion in subsequent years, specifically in relation to whether states were also required to first ratify the aggression amendments before they could be considered bound by them, or whether under Article 12 all delegations would be considered to have accepted the provisions in relation to the core crimes (including aggression) and would thus be bound unless they opted out. Indeed, the confusion surrounding this goes to the heart of objections at the time of adoption that the provisions were on a dubious legal foundation.²⁵⁸ All of these issues are considered in detail in the following chapter examining the outstanding question to be resolved and the subsequent chapter looking at the final jurisdictional regime adopted.

4.4. The Final Act

As detailed in the earlier sections of this chapter, the final hours of discussions had been left to the ‘question of questions’ and the Security Council’s exclusive role in authorising the Court to proceed with an investigation. As we have seen, the Second Non-Paper of the President of the Assembly had answered this at 4:30pm on the final day of the Conference, deciding that a referral from the Security Council would suffice and that in the absence of a Security Council referral the Pre-Trial Division of the Court could, after six-months inaction by the Security Council, authorise an investigation to proceed. In spite of the progress made in all other areas, this proposal still divided delegations. In his last act, the Final Non-Paper by the President of the Assembly, Ambassador Wenaweser proposed a compromise: an ‘activation formula’ that would make the exercise of jurisdiction over the crime of aggression for state referrals, proprio motu investigations and Security Council referrals conditional on

²⁵⁸ See Statement by Japan, Kampala Review Conference, June 2010

an activation decision ‘to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute’, requiring a two-thirds majority of States Parties. States would also be required to resolve ‘to activate the Court’s jurisdiction over the crime of aggression as early as possible’, demonstrating a political will for this decision to be taken as soon as possible in 2017.

With the final day of the Kampala Review Conference drawing to a close, countless WGA discussions, plenary sessions and meetings in the margins had resulted in an array of proposals, counter-proposals, non-papers and working documents. The proposal on the table was a final chance to reach agreement. Failure would likely have resulted in agreement on the definition only, with the question of jurisdiction to be decided at some undetermined date in the future.

The final amendment on the table comprised the previously agreed definition, a draft-enabling resolution, and the draft provisions on the conditions for the exercise of jurisdiction which now read:

Article 15 bis. Exercise of jurisdiction over the crime of aggression (state referral, proprio motu)

(1) The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraphs (a) and (c), subject to the provisions of this article.

(2) The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

(3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

(4) The Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with

the Registrar. The withdrawal of such declaration may be effected at any time and shall be considered by the State Party within three years.

(5) In respect of a 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.

(6) Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

(7) Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

(8) Where no such determination is made within six months after the date of notification, the prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the Security Council has not decided otherwise in accordance with Article 16.

(9) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

(10) This Article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5.

Article 15 ter. Exercise of jurisdiction over the crime of aggression (Security Council referral)

(1) The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

(2) The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

(3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

(4) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's findings under this Statute.

(5) This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5.

Following a short interval for final consultations, delegations were asked if they could agree to the amendments as proposed. They were adopted by consensus.

Delegations had finally arrived at an agreed framework outlining the Court's jurisdiction. A following chapter on the jurisdictional regime adopted will provide an in-depth account of these provisions, taking a critical look at the final package adopted.

In agreeing that there must be 30 state ratifications or acceptances of the provisions,²⁵⁹ and that once this threshold had been reached, States Parties must take the decision to activate that jurisdiction not before 1 January 2017,²⁶⁰ delegations had created two additional hurdles on the path to activation: a ratification threshold and an activation decision to be taken by the ASP.

As highlighted earlier – and which the next chapter will demonstrate – there was still one outstanding issue that required attention. The decision to adopt an imaginative compromise that applied an Article 121(5) understanding, alongside a threshold of required ratifications to trigger jurisdiction and an opt-out clause, caused confusion amongst states. As such, although a legal framework had been agreed, the

²⁵⁹ ICC Statute, Art.15 *bis* (2) & Art.15ter (2)

²⁶⁰ ICC Statute, Art.15 *bis* (3) & Art.15 *ter* (3)

jurisdictional question of who the provisions would apply to once they came into force had, for many, not been answered with sufficient clarity. An outstanding question of who exactly would be bound by the provisions persisted. Specifically, whether states must ratify the amendments in order to be bound by them, or whether all states are bound once the amendments came into force, unless they formally opt out.

In the intervening years between agreement in Kampala and the decision to activate the crime, states would need to ratify the provisions in sufficient numbers, reach agreement over who was to be bound by them, and take the final decision to activate. The next chapter will document this process and critically assess the final round of negotiations to take place to solve this outstanding issue.

Chapter 5 – The Outstanding Question: To Whom the Provisions Will Apply

The Kampala negotiations required 30 States Parties to ratify the amendments before states could activate the crime of aggression, a threshold that was reached when Palestine ratified the amendments in June 2016. As a decision on the activation of the crime drew nearer, disagreement persisted surrounding the Court’s jurisdiction and who was to be bound when the provisions came into force. The opening section of this chapter will bring the reader up-to-date with the ratification process that formally enabled a decision to be taken by the Assembly of States Parties. Section 2 will look critically at the major outstanding question still to be answered: whether a positive or negative understandings of Article 121(5) would prevail, and each interpretation’s conformity with existing law on treaties. Section 3 will assess the way in which negotiations to find an agreed interpretation progressed, and section 4 will document the historic decision taken by the ASP to activate the crime of aggression.

5.1. Introduction

As we saw in the previous chapter (4) documenting the negotiations in Kampala, states emerged with agreement on a definition and – for the most part – a jurisdictional remit for the crime. There were, however, additional hurdles put in place before the crime could be activated: States Parties in Kampala decided that the Court’s exercise of jurisdiction over aggression would require 30 ratifications or acceptances,²⁶¹ and that once this threshold had been reached, States Parties must take the decision to activate that jurisdiction not before 1 January 2017.²⁶² Furthermore, States Parties resolved to activate the Court’s jurisdiction over the crime of aggression ‘as early as possible’.²⁶³

Heavily involved throughout the process, it came as no surprise when Liechtenstein became the first state to formally ratify the aggression amendments on 8th May 2012. A steady stream of ratifications from States Parties around the globe followed: 2 more in 2012, a further 10 in 2013 and 7 more still in

²⁶¹ ICC Statute, Art.15 *bis* (2) & Art.15 *ter* (2)

²⁶² ICC Statute, Art.15 *bis* (3) & Art.15 *ter* (3)

²⁶³ Resolution RC/Res. 6, adopted at the 13th plenary meeting, on 11 June 2010, see Depositary Notification C.N.651.2010 Treaties-8, dated 29 November 2010

2014. 6 ratifications in 2015 took the figure to 26. Ratifications continued to trickle in throughout 2016 and on 26th June 2016, Palestine became the thirtieth ICC member to ratify the text. The number has risen steadily since (to 35 at the time of writing), and Parliamentarians for Global Action report that government or parliamentary officials in at least 28 additional States Parties are actively working on ratification of the aggression amendments. Many more have made concrete commitments to ratify.²⁶⁴ With the 30-state threshold reached, the final hurdle to overcome was a decision to be taken by States Parties at an ASP after January 2017.

One question, however, remained unanswered. How were the Article 121 provisions to be interpreted? In plainer terms: were states required to ratify the amendments in order to be bound by them or did they come into force for all States Parties that had not explicitly opted out? With states claiming different interpretations of what had actually been agreed in Kampala, clarification was demanded before any decision could be taken to activate the amendments.

As the 2017 milestone grew closer, states began to take concrete steps to influence the adoption process. Activation of the aggression amendments was discussed at the 15th ASP session in November 2016; a ‘working group facilitation process’ was established under the auspices of the New York Working Group to provide a space for States Parties to meet and work through remaining issues and report back to the ASP; a focal point - Ms. Nadia Kalb of Austria - was appointed to propose an activation text; and ‘activation of the Court's jurisdiction over the crime of aggression’ was formally placed on the provisional agenda of the 16th ASP session in New York, setting the 4-14 December 2017 as the timeframe for States Parties to make a decision on activation.²⁶⁵

5.2. The Outstanding Question

It appears on the face of it that delegations in Kampala adopted – through expressions of reliance on Article 121(5) and an opt-out clause – two provisions that were not in complete harmony. With the 30-

²⁶⁴ Parliamentarians for Global Action, ‘Status of ratification and implementation’, available at: <https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> (accessed 11 September 2017)

²⁶⁵ Provisional agenda available here: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-1-ENG.pdf

state threshold already met and a meeting of the ASP to adopt the provisions looming, the effect was confusion over whether the ICC - in the absence of a Security Council referral - would have jurisdiction over *all* States Parties. That is over aggression committed by the nationals of all States Parties unless they opt out. Or whether the ICC would only have jurisdiction over nationals of States Parties who have ratified the amendment, again unless that State Party opts out.²⁶⁶ The answer to this question would have far-reaching ramifications for states and the Court, and was the difference between the ICC having jurisdiction over all 123 States Parties once the amendments come into force (except for those that formally opt out), or only over the 35 states that have thus far ratified the amendments, assuming that they do not subsequently opt out.

Two competing understandings stem from different interpretations of the Article 121(5) provisions: a ‘negative’ interpretation of the provisions, whereby the second sentence of Article 121(5) (‘in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory’) is taken on face value to mean that States Parties must have accepted the amendment in order to be bound; and a ‘positive’ understanding, whereby Article 12(1) sets aside the second sentence of Article 121(5) in establishing that – as signatories to the ICC Statute – states have already accepted the jurisdiction of the Court over the crime of aggression, and this is logically confirmed by the opt-out clause under Article 15 *bis* (4).

States and academics alike were divided by this question and broadly came to fall within one of the two camps. Which interpretation would prevail remained the primary open question to be resolved, with the Understandings adopted in Annex to the Kampala amendments failing to definitively clarify the correct approach. It is necessary to look critically at these two positions before we examine the final outcome that was agreed at the ASP in December 2017. The next section will therefore look at the arguments advanced in favour of both the ‘positive’ and ‘negative’ understandings of Article 121(5), critically

²⁶⁶ Ibid.

assess to what extent they are in conformity with the existing law on treaties, and look at how these arguments came to shape the discussion in the run-up to – and during – the December 2017 ASP.

5.2.1. A Positive Understanding of Article 121(5)

Stefan Barriga, acting as assistant to Ambassador Wenaweser – the President of the Review Conference – during the Kampala negotiations, was clearly aligned with the camp pushing the positive understanding that only an opt-out will exclude States Parties from falling within the remit of the Court's jurisdiction. As he summarises, the approach that Ambassador Wenaweser presented in Kampala was strongly based on Article 12(1) of the Statute, under which States Parties have already accepted jurisdiction over the crime of aggression. Consequently, non-ratifying and allegedly aggressing States Parties that do not accept the Court's jurisdiction under Article 15 *bis* would have to submit an opt-out declaration provided for by Article 15 *bis* (4) in order to prevent the Court from exercising jurisdiction.²⁶⁷ Indeed, statements made by some delegations at the time confirm such an understanding,²⁶⁸ and Ambassador Wenaweser hinted at such himself when clarifying that he had presented the compromise proposal to the plenary as a 'sui generis solution on the basis of the acceptance already given by States Parties under Article 12 of the Rome Statute.'²⁶⁹

Such an understanding relies on a creative and nuanced interpretation of the Article 121(5) provisions whereby reference to Article 12 of the ICC Statute is key.

Article 12 establishes that 'a state which becomes a Party to [the ICC] Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5', including aggression, and that the nationality and territoriality principles thus apply. This is then taken as the starting point for the crime of aggression. Despite contradicting Article 121(5), Article 12(1) should be seen 'as a more

²⁶⁷ Barriga and Grover (2011), Op Cit. p.532

²⁶⁸ See the statements made in the 2010 debate of the UN General Assembly on the Report of the International Criminal Court, UN Doc. A/65/PV.41, at 8-9 (Switzerland), 17-18 (Brazil) (2010)

²⁶⁹ Wenaweser (2010), Op Cit. p.885-886

concrete provision (as regards its relationship to the crime of aggression), and therefore as the *lex specialis* that prevails over the more general rule of Article 121(5), second sentence.’²⁷⁰

It is further argued that the positive understanding is confirmed by the new opt-out provision of Article 15 *bis* (4), which provides that the Court ‘may, in accordance with Article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar’. This is supplemented by operative paragraph 1 of the Resolution RC/Res.6 adopted in Kampala, which establishes that the State Party may declare their opt-out ‘prior to ratification or acceptance’ of the aggression amendments. It is argued that it would be illogical to include a provision allowing States Parties to opt-out of the provisions before they had accepted them if a negative understanding of Article 121(5) applied and states were not in fact bound until they had ratified in any case. The other provisions contained within Article 15 *bis*, namely the opt-out, is therefore included to ‘soften’ the taken assumption that states are bound once the crime of aggression comes into force because they have already accepted the jurisdiction of the Court as States Parties.

Under this understanding, Article 121(5) was referenced to ensure that states were bound individually once they had ratified, but only up until the point that the threshold of 30 ratifications was reached. At this point, subject to the decision to be taken by the ASP, Article 121(5) would cease to apply and the crime would take effect for all States Parties. It is argued that relying on the second sentence of Article 121(5) would completely undermine the effect of the opt-out clause. As Stefan Barriga asserts, ‘if the negative understanding of the second sentence of Article 121(5) held up, it would pull the rug from underneath the concept of an opt-out system; instead, it would be an ‘opt-in-then-opt-out’ system, which defies the logic of the negotiations at the Review Conference’.²⁷¹

270 Caban, P. (2015) ‘The Definition of the Crime of Aggression - Entry Into Force and the Exercise^[1] of the Court’s Jurisdiction Over this Crime’, Czech Yearbook of Public & Private International Law, 6, p.70

271 Barriga, S. (2012) ‘Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression’; in: Gerard Dive, Benjamin Goes, Damien Vandermeersch (eds.): From Rome to Kampala: The first 2 amendments to the Rome Statute, Bruylant, p.31-54

It is certainly true that this interpretation would have the benefit of giving full effect to the opt-out provision, placing the emphasis on states to opt out of the provisions if they do not wish to be bound by them. It also makes sense when viewed in negotiating terms: that, as Claus Kreß recognises, ‘the idea of an opt-out declaration was born precisely in order to bridge the gap between those in favour of applying the jurisdictional scheme under Article 12(2) of the ICC Statute without modification (the ABS Proposal) and those who preferred a strictly consent-based regime (the Canadian Proposal).’²⁷² Binding states once the established threshold had been reached and states had voted at the ASP to activate the crime, but then allowing States Parties to opt-out if they desired would be a compromise between these two positions, and would make logical sense as a negotiated outcome. It would also make better sense of the 30-state threshold provision, giving it a clear purpose in providing an additional procedural hurdle before the triggering of jurisdiction of the Court for *all* States Parties.

These benefits – however appealing at this stage – do not settle all remaining questions. Nor do they make it the case that such an understanding was the intention of all delegations at the time of adoption in Kampala.

Accepting for a moment the proposition that a positive understanding should apply, it would logically follow that once the Court had been granted jurisdiction over the crime of aggression, all States Parties would be bound even if neither party had ratified the amendments, assuming neither had opted out. Curiously though, Stefan Barriga as a key proponent of the positive understanding, does not go this far. As the positive understanding is bound so closely to Article 12, which establishes that the Court may exercise its jurisdiction if one or more of the states are parties to the Statute, Stefan Barriga argues that it ‘follows from the logic of Article 12 of the Rome Statute to which Article 15 *bis* (4) refers [that] the amendment must have entered into force either for the state of nationality or the territorial state’.²⁷³ For Barriga, ‘the aggression amendments establish a true opt-out regime that would allow the Court to exercise jurisdiction over an aggressor State Party even if it had not ratified the amendments’.²⁷⁴

²⁷² Kreß & Holtzendorff, Op Cit. pg.1213

²⁷³ Barriga, in Bruylant, (2012), Op Cit. p.42-43

²⁷⁴ Ibid.

To have suggested that all states should be bound on the basis that they had already accepted the jurisdiction of the Court under Article 12 would have brought the jurisdictional remit of the crime of aggression in line with that which applies to the other core crimes, save the option for those states to opt-out. To have suggested that there must be a nationality or territoriality link from both states would have brought the positive understanding much closer to a negative understanding explored below. In opting for a middle way, Stefan Barriga has sought to establish that there must be some national or territorial link to a state that has explicitly accepted the amendments through ratification. Similarly, Lichtenstein have confirmed that they ‘strongly believe that the Kampala agreement provides legal protection to ratifying states vis-a-vis all States Parties, in accordance with the principle of territoriality - just as we all enjoy legal protection vis-a-vis non-State Parties with respect to other Rome Statute crimes.’²⁷⁵ As such, the interpretation espoused by Lichtenstein, Barriga and others would allow acts of aggression committed by non-ratifying States Parties to be prosecuted when committed on the territory of ratifying States Parties.

As Ben Ferencz has opined, Article 121(5) is a mixed provision which does little to advance the cause of clarity, and that when read in isolation, ‘would appear to entirely exempt nationals of non-ratifying States Parties from the Court's exercise of aggression jurisdiction. Yet, there is simply no way that such a construction can be squared with the broader language of the Statute, nor with the delicate balance of compromises that were arduously negotiated and ultimately agreed to in Kampala.’²⁷⁶ As the following section demonstrates, not all agree.

5.2.2. A Negative Understanding of Article 121(5)

Others have maintained – both at the time and subsequently – that the second sentence of Article 121(5) already precludes the Court from exercising jurisdiction with respect to nationals or the territory of non-ratifying States Parties.²⁷⁷ This interpretation relies on a literal reading of the second sentence of Article

²⁷⁵ Statement made by Lichtenstein at ASP 16, NYC December 2017.

²⁷⁶ Ferencz, B. (2016) ‘Current US Policy on the Crime of Aggression: History in the Unmaking?’, *Case Western Reserve Journal of International Law*, 48, p.211

²⁷⁷ See the statements made by France and the United Kingdom during the general debate of the ninth session of the ICC Assembly of States Parties in December 2010. See also the U.S. statement made in the 2010 General Assembly debate, UN Doc. A/65/PV.41, at 26-27, in Barriga, p.532

121(5), which states: ‘in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.’ This would mean that if any state involved in the aggression had not ratified the aggression amendments, the Court would be unable to exercise jurisdiction over any of the victim or aggressor participants to the crime. The negative understanding establishes Article 121(5) as an exception to the general jurisdictional regime under Article 12.

Proponents of the negative understanding – including the US, France and the UK – pushed for greater clarity that the inclusion of opt-out provisions in the Kampala agreement do not in any way override their interpretation of Article 121(5), namely that only those states that ratify the provisions are bound.

As Sarah Sewell, United States Under-Secretary of State for Civilian Security, Democracy and Human Rights, stated in a speech discussing the outcome of the Kampala Review Conference, ‘US] concerns about uncertainty [over aspects of the amendments] have been exacerbated by the efforts of some supporters of the amendments to promote an interpretation which [the US] believes flies clearly in the face of the plain language of the Rome Statute, contending that the Court’s aggression jurisdiction would extend even to the nationals of States Parties that do not ratify the amendments.’²⁷⁸

Speaking in 2015 with the Head of the UK Delegation in Kampala, Chris Whomersley, it was also his view that the ambiguity the opt-in provision introduces was being exploited by those states that would prefer a more expansive jurisdictional regime. Any understanding that would allow a State to be bound regardless of whether or not they had ratified the provisions ‘was not in the spirit of what had been agreed... [you’re bound] if you ratify, otherwise you’re not.’²⁷⁹ It was his view that the opt-out clause was either wilfully accepted by some states at the time as a hook for later pushing an understanding that all states are bound unless they opt out, or it represents a situation that has since been seized upon as an opportunity to push the same understanding.

278 Panel discussion on ‘The ICC Crime of Aggression and the Changing International Security Landscape’ at the American Society of International Law’s 109th Annual Meeting, April 8-11, 2015, available at: <https://www.asil.org/resources/2015-annual-meeting> (accessed 12 July 2018)

279 Whomersley interview. Transcript on file with Author

5.2.3. Conformity with the Law of Treaties

As Dapo Akande recognises, it is not clear that it was within the remit of the Review Conference to decide on how the aggression provisions were to come into force and as such whether the interpretation of Article 121(5) is in any way binding.²⁸⁰ It has been argued that the question of which interpretation should apply is a matter of fact, and treaty law.²⁸¹ As such, the validity of the Kampala – and subsequent ASP 16 – agreement could be open to challenge by those that oppose this decision or have an interest in it being overturned.

Furthermore, despite paragraph 1 of the adopting resolution making it clear that the amendments ‘shall enter into force in accordance with Article 121, paragraph 5’, it is clear that the additional conditions imposed in Article 15 *bis* ensure that, as Japan recognised at the time, the jurisdictional regime adopted fails to reflect either Article 121(4) or Article 121(5) faithfully. Indeed, right up until the provisions were agreed, Japan questioned whether delegations were placing the provisions on a sound legal footing.²⁸² This further opens up the creative solution negotiated to legal scrutiny.

The possibility of this becoming an issue the Court may have to rule on is dealt with by the fact that a positive understanding of Article 121(5) raises its own legal issues. As the positive understanding is premised on states having already accepted jurisdiction over the crime of aggression when they signed up to the ICC Statute, it must be asked whether this is in conformity with the applicable rules of treaty law. Specifically, whether states can be bound by amendments to existing treaties that they have not explicitly consented to.

Here the Vienna Convention on the Law of Treaties (VCLT) is informative, stating that ‘[t]he amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement’.²⁸³ In such instances Article 30, paragraph 4(b) applies, and provides that ‘[w]hen

280 Akande, D. (2010) ‘What Exactly was Agreed in Kampala on the Crime of Aggression?’ Blog of the European Journal of International Law, available at: <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (accessed 10 July 2018)

281 Ibid.

282 Statement by Japan, Kampala Review Conference, June 2010

283 Vienna Convention on the Law of Treaties, Article 40(4)

the parties to the later treaty do not include all the parties to the earlier one... as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations.’ Here, the abiding international law principle is that states cannot be bound without their consent.²⁸⁴

It is certainly true that the ICC Statute provided in Article 5(2) that ‘the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted [...] setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.’ States thus accepted that delegations would at some stage come to define the jurisdictional regime for the crime of aggression and that this may vary from the regime governing the other core crimes. Similarly, Article 12(1) confirms that a state which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5, including the crime of aggression. It is contended though, that this does not exempt states from the requirement that if they are to be bound, they must first consent to the newly agreed provisions. As the VCLT sets out, states are only bound by the original treaty to which they are signatories until the point that they accept the amendments. While Article 5(2) and Article 12(1) demonstrate an acceptance amongst states that new jurisdictional provisions will be agreed and the Court will have jurisdiction over them once they have, their acceptance relates to the process of agreeing a new jurisdictional remit rather than tacit acceptance of whatever it is that might be agreed. Here, international treaty law is clear: consent to the amendment provisions is a legal necessity.

As such, it seems an unacceptable argument that states would have agreed with the exercise of the Court’s jurisdiction over the crime of aggression as defined by the Review Conference – in whatever form the Review Conference might decide – as far back as 1998. Such an interpretation appears to be at odds not just with the provisions adopted in Kampala but also with the general law of treaties.²⁸⁵

284 Corten, O. & Klein, P. (eds.): *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. II, pp.983-984

285 Fuller discussion of this available in Caban, *Op Cit.* pp.61-76

5.3. Working Towards Agreement

The ambiguity that surrounded the interpretation of Article 121(5) weighed heavily on states deciding which steps to take next regarding ratification. Members of the UK Foreign & Commonwealth Office attest to having been in meetings in which UK representatives discussed how a state could best ensure that they were not to be bound by the provisions.²⁸⁶ With no confidence in the way in which the provisions would be interpreted, various options – including not ratifying and simultaneously lodging an opt-out declaration – were considered.

From speaking with delegations present in Kampala, and given the last-minute introduction of the opt-out provision, it seems likely that the provision was ‘hastily inserted in Article 15 *bis* without bringing it completely in coherence with the articles dealing with the amendment procedure’, or at least without full consideration first being given to what the provision entailed.²⁸⁷ This uncertainty left open the possibility that the amendments could pass at an ASP without it first being clarified how Article 15 *bis* (4) should be applied.

If the amendment were to pass without further clarification, states that wished not to be bound would be forced to lodge a public opt-out, explicitly stating that they did not wish to be bound by the crime of aggression amendments. Another option would have been to rely on judicial interpretation in the first instance, a risky strategy that would have left the decision out of state hands. It is also not inconceivable that – had the amendments passed without further clarification – the Security Council might seek to block any investigation initiated on the premise that all states are bound regardless of whether or not they ratify. States that did not wish to be bound by the provisions in particular, were understandably keen to avoid these scenarios, and so work began behind the scenes to influence any decision taken before activation of the amendments came to pass at the ASP.

With a decision possible after the mandated date of 1 January 2017, the 16th ASP session in December 2017 was earmarked for an activation decision. When the 30-state ratification threshold was reached in

²⁸⁶ Confirmed by UK interviewees. I was also personally present at one of these meetings.

²⁸⁷ Heinsch (2010), Op Cit. p.739

June 2016, the 15th ASP session in November 2016 became the first opportunity for States Parties to lay down markers regarding any activation decision.

Even though the crime of aggression was not formally on the agenda of the 15th ASP session, a handful of states took the opportunity to reiterate the importance of maintaining momentum in the drive towards activation and to encourage other states to ratify the amendments. For Germany, the new provisions would have an important preventative effect by influencing the mind-sets of state leaders that might otherwise be inclined to war, and as such, the German delegation urged all states to work together with a view to taking the concrete activation steps required under the Rome Statute.²⁸⁸ Similarly, in a joint statement the EU and its Member States stressed their collective commitment to continuing to work together towards the common goal of achieving universality following the recent ratifications of the amendments on the crime of aggression.²⁸⁹

Others, however, took the opportunity to voice concerns, particularly about varying interpretations as to the application of the jurisdictional provisions adopted.²⁹⁰ As Ben Ferencz noted, it was no secret that the UK, Canada, France, Japan, and Norway each had misgivings about the application of the jurisdictional provisions adopted in Kampala as part of a compromise package.²⁹¹

5.3.1. The New York Working Group

Indeed, the 15th ASP session was used by the UK and France to call for greater clarity over the jurisdictional reach of the Court before any decision was taken. Specifically, they requested a new working group to ‘develop a common understanding of how the jurisdiction will be exercised.’ France

288 German statement at the 15th ASP, Nov.2016. Written statement available at: https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_15th_session.aspx (accessed 6 September 2017)

289 EU statement (delivered by Slovakia) at the 15th ASP, Nov.2016. Written statement available at: https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_15th_session.aspx (accessed 6 September 2017)

290 EU Statement to the Review Conference, Kampala June 2010

291 Benjamin Ferencz commenting on Akande, D. (2017) ‘The ICC Assembly of States Parties Prepares to Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?’, Blog of the European Journal of International Law, available at: <https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/> (accessed 12 July 2018)

opened the discussion, arguing in its statement to the ASP that a dedicated working group would allow further discussion of the issue of activation of the crime of aggression in 2017, enabling all states to have a clear and common understanding of the consequences of the implementation of the amendments of Kampala.²⁹² The UK supported the proposal for a working group ‘so that states take the responsibility for ensuring clarity rather than leaving such hugely difficult and political issues to the Court to resolve in future individual cases.’²⁹³ For the UK, ‘further discussion and greater clarity regarding activation of the Court’s jurisdiction over the crime of aggression’ was needed, ‘not to undo or re-open the amendments agreed in Kampala, but instead to develop a common understanding of how the jurisdiction will be exercised.’²⁹⁴ Unsurprisingly, after the conclusion of the ASP the US delegate argued in support of the Franco-British proposal on the basis that ‘it is in the interests of justice’ to continue debating the issue.²⁹⁵

Following these calls for greater clarity, the ASP agreed to create a ‘facilitation’ that would be:

*Based in New York, open only to States Parties, to discuss activation of the Court's jurisdiction over the crime of aggression [...] which will make every effort to reach consensus and will submit a written report directly to the Assembly ahead of its sixteenth session.*²⁹⁶

As such, the New York Working Group (NYWG) – a formation already in being which, along with The Hague working group, conducts substantial preparations for each ASP – was mandated to discuss, in State-Party-only format, activation of the Court’s jurisdiction with regard to the crime of aggression, and to submit a written report to the ASP ahead of the 16th session in December 2017. Specifically, the NYWG would discuss the following question: are nationals of States Parties that do not ratify or accept the Kampala amendments, and which also do not opt out of ICC jurisdiction as provided for in those

292 French Ambassador to the Netherlands, Philippe Lalliot, speaking at the 15th ASP, Nov.2016. Written statement available at: https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_15th_session.aspx (accessed 11 July 2018)

293 UK FCO Minister, Baroness Anelay’s speech at the 15th ASP, Nov.2016. Written statement available at: https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_15th_session.aspx (accessed 12 July 2018)

294 Ibid.

295 Maupas, S. (2017) ‘After 15 years, ICC States still debating crime of aggression’ (15th February 2017), available at: <http://www.justiceinfo.net/en/justice-reconciliation/32132-after-15-years,-icc-states-still-debating-crime-of-aggression.html> (accessed 11 July 2018)

296 ICC-ASP/15/Res.5, annex I, para. 18(b)

amendments, subject to ICC jurisdiction over aggression in cases where the situation is referred to the Court by a state, or the prosecutor takes up the matter *proprio motu*?

The answer to this question was intended to inform the text put forward for approval at the 16th ASP session. Ms. Nadia Kalb was appointed focal point for the activation of the Court's jurisdiction over the crime of aggression, and was responsible for proposing this text.

Since being mandated to discuss activation of the crime of aggression, the NYWG did so on five occasions.²⁹⁷ A number of questions remained unanswered, including the position with respect to states which ratify or accept the Rome Statute after the Kampala amendments were adopted and whether they are to be regarded as having ratified the Kampala amendments of 2010 or only the original Rome Statute of 1998.²⁹⁸ It was also still to be decided whether non-parties to the ICC Statute can make declarations under Art. 12(3) accepting the jurisdiction of the Court over aggression, as they can and have done with respect to the other crimes within the Court's jurisdiction.²⁹⁹ Important as these issues might be, states appeared relatively untroubled by the prospect of the Court reaching a conclusion on these at a later stage. The same cannot be said for the core issue still that was still to be resolved and as the interventions of states at the 15th ASP indicate, the outstanding jurisdictional question remained the most contentious issue.

The first meeting of the group on 22 March 2017 was convened to seek the views of delegations regarding which issues should be discussed in the framework of the facilitation; to take general views of the delegations, including on planning; and to map out the way forward for discussions. In subsequent meetings, the NYWG invited esteemed academics to present and participate in discussion on the core issue dividing states. These series of presentations were 'designed to prepare delegations to participate

²⁹⁷ The first meeting of the group was held on 22 March 2017. Subsequent meetings have taken place on; 25 April; 2 June; 27 June; and 08 September 2017.

²⁹⁸ Akand, D (2017) 'The ICC Assembly of States Parties Prepares to Activate the ICC's Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?' Blog of the European Journal of International Law, available at: <https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/> (accessed 11 July 2018). On this, see this post by Andreas Zimmermann.

²⁹⁹ Ibid.

in the December meeting of the ASP', and as such, a variety of views were sought from academics in the field.

At a meeting on the 25th April 2017, Jon Heller³⁰⁰ and Roger Clark³⁰¹ gave presentations on the repercussions of each interpretation of the Art.121(5) provisions and participated in the discussion that followed. It is worth noting that Jon Heller and Roger Clark fall into different camps when it comes to this interpretation, a diversity of opinion – from two respected academics heavily involved throughout the aggression process – which the ASP sought to replicate in subsequent meetings. Dapo Akande and Noah Weisbord followed on the 2nd June 2017, again advocating different sides of the divide. The process was designed to encourage dialogue between States Parties, bringing in trusted academics to help facilitate that process. As Jon Heller has subsequently reported, however, it was clear that in spite of the NYWG's efforts states remained deeply divided over the issue of who is to be bound once the provisions come into force.³⁰² As such, although proving useful as a focal point for discussions, the NYWG resulted in a report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression³⁰³ that provided little more than a summary of State Parties' positions.

5.4. ASP 16 decision to activate the Crime of Aggression

The ASP took place over nine working days, from 4-14th December. With a number of agenda items to get through, not least the election of numerous officials including six judges, a President and two Vice-Presidents, there was limited time to discuss the crime of aggression amendments. This was complicated by the fact that states arrived in New York ahead of the 16th session of the ASP firmly divided. Four States Parties became the focal point of discussions, and were the four states most entrenched in their positions. The UK and France in one camp, arguing for a negative understanding of Article 121(5) that

300 Professor of Criminal Law, SOAS, London

301 Board of Governors Professor of Law, Rutgers University New Jersey

302 Jon Heller, (2017) 'UN Presentation on the Aggression Amendments', *Opinio Juri Blog*, available at: <http://opiniojuris.org/2017/05/05/my-un-presentation-on-the-aggression-amendments/> (accessed 11 July 2018)

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would exclude non-ratifying States Parties from the Court's jurisdiction, and Lichtenstein and Switzerland in the other, arguing for a positive understanding of Article 121(5) that would ensure States Parties had to formally opt out in order not to be bound.

The US, as an observer state, was active in lobbying behind the scenes in line with the UK and French position. As the decision was, however, to be taken by the ASP - and so limited to States Parties - the US was not directly involved in the December 2017 negotiations. For the US, the big concession they had been seeking - that non-States Parties should be exempted from the aggression amendments completely - had already been secured in Kampala. While they strongly favoured a restrictive interpretation of Article 121, they had to be content with allowing the US and France to lead the charge.

For Ben Ferencz, the bottom line was that the whole question of which states are to be bound 'is rather moot', insofar as a mechanism for opting out has been specifically put in place for those that do not wish to be bound. Given that states have been given this power, to opt out of the Court's proprio motu or state party referral jurisdiction for the crime of aggression should they so wish, the suspicion was that 'the motivation in raising the Article 121(5) issue may well be that certain countries would prefer not to have to overtly opt out in order to avoid the Court's jurisdiction, as it may tend to draw unwanted attention to their interest in remaining beyond the reach of the ICC as far as the crime of aggression is concerned. Mere non-ratification would seemingly be a much less conspicuous route to impunity.'³⁰⁴

Lichtenstein certainly sought to frame discussions in a similar way, expressing concern that states are not allowed to re-open the negotiated outcome in Kampala. At ASP 16, Lichtenstein adopted an identical position to that submitted in an earlier April 2017 paper. In that paper, and with a view to assisting the discussions in the facilitation process leading up to the activation decision at the ASP in December 2017, Lichtenstein concluded that in any event, 'the scope of the issue should be kept in perspective. There is no difference of view about entry into force, only about exercise of jurisdiction. States Parties that wish to ensure that they will not be subject to the Court's jurisdiction do not have to

³⁰⁴ Benjamin Ferencz commenting online, on Akande's blog 'The ICC Assembly of States Parties Prepares to Activate the ICC's Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?', Op Cit.

convince others [of their interpretation]. Instead, they can at any time simply inform the Registrar of their legal position: that they do not accept the Court's jurisdiction over the crime of aggression in the absence of ratification of the amendments. As a result, they will be exempt from jurisdiction with the exact same effect as if the second sentence of Art. 121(5) applied.³⁰⁵

It is undeniably true that states have open to them the possibility to opt out and avoid any doubt as to the inapplicability of the aggression amendments to their nationals as a result. Stated plainly, however, this somewhat misses the point: that avoiding such a public declaration was likely a consideration for concerned states during Kampala, and would have likely been a motivating factor at the December 2017 ASP.

That being said, the UK and others were steadfast in both public and private discussions that it was their clear understanding – both now and at the time of Kampala – that only through ratification would states be bound. They were subsequently disinclined to give up this point, particularly when to do so would necessitate a potentially damaging public proclamation that they want to be exempt from the reaches of international justice over the crime of aggression. That the reader may well think this a morally questionable position to adopt does not alter the fact that these states maintain the belief that they have been put in this position by states pushing for a more expansive jurisdictional regime than was agreed in Kampala.

While it remains true that the opt-out is at hand for those willing to use it, the implementation of an interpretation that grants the Court jurisdiction over all States Parties that have not opted out, in the view of the UK and others, would have subverted the agreed text and placed the emphasis on states to opt-out rather than on states to opt-in. This was not a compromise these states were likely to concede willingly, and as such, the UK and France held firm that they were not prepared to support the amendments without clarity that only ratifying States Parties would be bound.

305 Lichtenstein Paper, (2017) 'Clarifications regarding the effect of the Kampala amendments on non-ratifying States Parties', available at: http://www.regierung.li/media/medienarchiv/icc/Crime_of_Aggression_clarification_paper_Liechtentein.pdf?t=636293244988311691 (accessed 11 July 2018)

With their opening positions well established, it fell to Austria to facilitate discussions between the two camps. Other states who were not wedded to one particular interpretation or tied to a particular camp sought to break the deadlock. One such compromise text was tabled by Brazil, Portugal and New Zealand, who suggested affirming a positive understanding of Article 121(5), with an annex to be included detailing the States Parties that wished to opt-out. This proposal was to form the basis for future texts and by the penultimate day – Wednesday 13 December – States Parties had before them a revised text that provided three options: activate the Court’s jurisdiction without offering any further clarity as to how the Court’s jurisdiction should be interpreted; activate the Court’s jurisdiction with clarification that non-ratifying states were not bound by the amendments (the UK, France position); or a middle ground whereby the Court’s jurisdiction would be activated but states that had made their desire not to be bound – as reflected in the Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression³⁰⁶ – would be exempt in respect of the crime of aggression when committed by nationals or on the territory of these States Parties.³⁰⁷

This third option was intended to offer a less conspicuous way for states to opt out. It is also worth noting, that the effect of the third option would have been to place States Parties in the same position as if they had not ratified the amendments at all, meaning that those States Parties that had expressed a willingness to not be bound by the amendments would be exempt from acts committed by their nationals and for acts committed on their territory. This is different from states that utilise the Kampala opt-out, which ensures that the nationals of States Parties that opt out cannot be prosecuted, but does not prevent acts of aggression committed on the territory of the State Party that has opted out from being prosecuted. That there is a difference between the two is an imbalance addressed in chapter 6 on jurisdiction.

As Nikolas Stürchler - Head of the International Humanitarian Law and International Criminal Justice Section at the Swiss Federal Department of Foreign Affairs – recalls, this compromise option garnered

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307 Discussion Paper, Rev.2. 13 December 2017, available here: <http://www.ejiltalk.org/wp-content/uploads/2018/01/CoA-Discussion-Paper-Rev.2-for-distribution-clean.pdf> (accessed 24 February 2018)

support from a number of delegations in the room, with only the UK and France openly objecting.³⁰⁸ On that basis, draft resolution ICC-ASP/16/L.9 was presented³⁰⁹ which was then followed by a second slightly amended version.³¹⁰ Both sought to build on the third option compromise and formed the basis of discussion on the final day.

By the final day of negotiations, the UK and France continued to hold firm in their belief that it had already been decided in Kampala that non-ratifying states were not bound and it became clear that consensus was not going to be achieved on the basis of the previously circulated draft resolution. At 17:00 on the final day – Thursday 14 December – the UK and France circulated their own draft resolution that would adopt the amendments on the basis that non-ratifying states were not bound. By this point the Austrian facilitators had stepped down and – with the President of the ASP now absent – it was left to the two Vice-Presidents, Sergio Ugalde (Costa Rica) and Sebastiano Cardi (Italy), to find a way forward.

Going into the final hours of the final day, there were a number of considerations – of which states were acutely aware – weighing on the way in which negotiations were to proceed. The first was that, were a draft resolution to be put to a vote rather than be adopted by consensus, it would require a two-thirds majority of States Parties in order to pass. As Stefan Barriga has stated, this carries a certain logic: ‘given that at least a two-thirds majority of States Parties is required to adopt amendments, it seems appropriate to require the same level of political support for a decision that gives them full effect.’³¹¹ As the governing Article 121 of the Rome Statute makes no reference to the vote being restricted only to those ‘present and voting’, it is taken that two-thirds of *all* States Parties must vote for the amendment. The number of States Parties currently stands at 123. This means that, as a minimum, 82

308 Stürchler, N. (2018) ‘The Activation of the Crime of Aggression in Perspective’, Blog of the European Journal of International Law, available at: <https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/> (accessed 11 July 2018)

309 ICC-ASP/16/L.9 available here: <http://www.ejiltalk.org/wp-content/uploads/2018/01/ICC-ASP-16-L9-ENG-CoA-resolution-13Dec17-2200.pdf> (accessed 24 February 2018)

310 ICC-ASP/16/L.9 Rev.1 available here: <http://opiniojuris.org/wp-content/uploads/ICC-ASP-16-L9-Rev1-ENG-CoA-resolution-14Dec17-1440-TRACK-1.docx> (accessed 24 February 2018)

311 Barriga, S. & Blokker, N. (2017) ‘Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues’ in *The Crime of Aggression: A Commentary*, Kreß & Barriga (Eds.), p.637

States Parties would have been required to vote for any resolution on the table. A number of delegations had already left at this stage in proceedings, with Nikolas Stürchler of the Swiss delegation placing the number of delegations present in the room at barely 100.³¹² It was therefore far from clear whether a vote on the resolution would pass.

Secondly, and as a member of the UK delegation confirmed in interview, had the calling of a vote been raised as a realistic prospect, the feeling was that states would have decided instead to delay activation of the crime.³¹³ For those that had worked so hard over the years towards activation of the crime, further delay – over seven years after the Kampala Review Conference and almost 20 years after the crime was included in principle in the ICC Statute in Rome – would have felt like failure. Indeed, as Lichtenstein pleaded in their paper released in the run-up to ASP 16, ‘in light of the extremely difficult compromise achieved in Kampala, the many obstacles overcome over years of negotiations, and the fact that the amendments provide for a greatly reduced, consent-based jurisdictional regime, the concerns voiced should not be considered of such a nature as to endanger the completion of this historic project.’³¹⁴

Finally, to have the amendments accepted by consensus had been the desired outcome from the start. It was the way in which the Kampala amendments had been accepted and it was considered that anything else would be an unwelcome sign of division.

These three factors combined to strengthen the hand of any delegation prepared to take the amendments to a vote and ultimately see them fall, and meant that the UK and France felt emboldened to hold out for their interpretation of the crime of aggression jurisdiction.

After holding two separate meetings, one with the UK and France, and the other with Lichtenstein and Switzerland, the two Vice-Presidents presented – at 23:00 on the final day – a ‘take it or leave it’

312 Stürchler blog, Op Cit.

313 Confirmed in interview with UK delegate to the ASP 16, December 2017. Transcript on file with Author

314 Lichtenstein Paper, (2017) ‘Clarifications regarding the effect of the Kampala amendments on non-ratifying States Parties’, available at: http://www.regierung.li/media/medienarchiv/icc/Crime_of_Aggression_clarification_paper_Liechtenstein.pdf?t=636293244988311691 (accessed 11 July 2018)

proposal. After some initial errors had been ironed out, it provided what was to become ICC-ASP/16/Res.5, the final resolution on the activation of the crime of aggression amendments.

The ‘take it or leave it’ draft contained four substantive paragraphs. In addition to calling on States Parties to ratify the amendments (paragraph 4), the resolution set the activation date as 17 July 2018 (paragraph 1), exactly 20 years after the ICC Statute was adopted by consensus in Rome.

As to resolving the outstanding question that had dominated discussion of the crime of aggression amendments since Kampala in 2010, Paragraph 2 confirms in no uncertain terms that:

“the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments.”

As such, States Parties that do not ratify or accept the amendments will be in the same position as non-State Parties, confirming the negative understanding of Article 121(5) as the prevailing interpretation.

This was a major win for the UK, France and others that had refused to accept that only by opting out would states be excluded from the jurisdiction of the Court. It also came as a relief to the US, who despite being present at ASP 16 remained uninvolved in the negotiation process.³¹⁵ It was also a significant concession on the part of Lichtenstein, Switzerland and others who had fought until the very last moments to have their positive interpretation of Article 121(5) adopted.

The compromise element of the text came in paragraph 3, which reaffirms the independence of the judges of the Court:

3. Reaffirms paragraph 1 of Article 40 and paragraph 1 of Article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court;

³¹⁵ Confirmed in interview with UK delegate to the ASP 16, December 2017. Transcript on file with Author.

This is an odd inclusion – added at the request of Lichtenstein and Switzerland – which, although not altering the unequivocal declaration of States Party intent in paragraph 2, does hint that the issue may not be entirely over. As Dapo Akande has since speculated, it seems that the intention of those who pushed for the addition of paragraph 3 to the ASP resolution ‘was to try to leave some scope for the Court to decide on the key contentious questions in a way that might be contrary to the ASP decision.’³¹⁶ But is the Court likely to make a determination that runs contrary to the express wording of the resolution?

While the Court ultimately has authority to decide matters of jurisdiction, it is also bound to make any decision on the basis of relevant treaties. The Court is also ‘bound to decide on the basis of interpretation of the relevant treaty texts and in so doing must follow the applicable principles of treaty interpretation under the VCLT and under customary international law,’³¹⁷ as outlined earlier in this chapter. The resolution is perfectly clear on what State Parties agreed to. That the process was drawn-out and fought until the end does not alter that fact, and it would be wholly unusual for the Court to disregard it.

The UK and France asked that paragraph 3 be removed from the resolution, fully aware that it was inserted with the intention of undermining the preceding paragraph. Ultimately – and despite a further two-hour delay – perhaps reassured that State Parties had been clear in their intention and in order to secure consensus, paragraph 3 remained.

At around 00:40 on Friday 15 December, delegations adopted ASP/16/Res.5 by consensus, confirming activation of the crime of aggression from 17 July 2018.

The operative paragraphs of the resolution read:

1. Decides to activate the Court’s jurisdiction over the crime of aggression as of 17 July 2018;

316 Akande, D. (2018) ‘The International Criminal Court Gets Jurisdiction Over the Crime of Aggression’, Blog of the European Journal of International Law, available online at: <https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/> (accessed 24 February 2018)

317 Ibid.

2. Confirms that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or proprio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;

3. Reaffirms paragraph 1 of Article 40 and paragraph 1 of Article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court;

4. Renews its call upon all States Parties which have not yet done so to ratify or accept the amendments to the Rome Statute on the crime of aggression.³¹⁸

The following chapter (6) will take a critical look at the final package adopted by the Kampala Review Conference and ASP 16, examining the strengths and weaknesses of the crime of aggression compromise and the decision to exclude non-ratifying States Parties from the Court's jurisdiction.

318 ICC-ASP/16/ Res.5

Chapter 6 – Examination of the Jurisdictional Remit

This chapter will seek to provide an in-depth account of the provisions adopted in Kampala that, contained within Article 15 bis & ter, set out the mechanisms for and limits to the ICC's exercise of jurisdiction over the crime of aggression. The first part of this chapter will briefly look at the format of the jurisdiction provision, before the second section examines efforts to balance the role of the Security Council and the Court, and the third section analyses the rules that govern when the provisions can enter into force. The third and fourth sections will then critically assess the Article 15 bis provisions dealing with proprio motu investigations and state referrals – including the various mechanisms establishing a consensual-pillar for the crime; and the Article 15 ter provisions dealing with Security Council referrals. A critical part of this chapter will involve examining the implications of the decision to exclude non-ratifying States Parties from the Court's jurisdiction, a question that was settled by the ASP 16 in December 2017. The final sections of this chapter take a critical look at the final package adopted, examining the strengths and weaknesses of the crime of aggression compromise. The provisions adopted are included in Annex in their entirety.

6.1. The Structure of Article 15

As we have seen in the previous chapter covering the negotiations in Kampala, the primary open question to be resolved was which trigger mechanism for the exercise of jurisdiction would be adopted. States were divided over whether it should be necessary for the Security Council to make a prior determination as to the existence of an 'act of aggression' or explicitly request the Prosecutor to proceed with the investigation, or whether the Prosecutor should be empowered to act in the absence of such a determination. Wrangling over the primacy of the Security Council came to define discussions in Kampala. In the end, the Review Conference opted for a two-tier system, splitting the provisions dealing with jurisdiction in two: Article 15 bis sets out the conditions for the exercise of jurisdiction in the case of state referrals or the Prosecutor initiating proprio motu investigations, and Article 15 ter deals with Security Council referrals.

From this we have agreement that a prosecution can in principle be initiated by any of the three trigger mechanisms: Security Council referral (Art.15 ter); state referral and proprio motu investigation (Art.15

bis). The first of these was largely uncontroversial and forms the primary pillar on which the Court's jurisdictional regime rests. Negotiating the 'consent-based' pillars of proprio motu powers and State Party referrals was trickier and a number of limitations on the exercise of jurisdiction were put in place.

6.2. A Balancing Act: Security Council vs. The Court

As will be seen throughout this chapter, in adopting provisions aimed at establishing a consensual approach, the Review Conference was forced to find a balance between the role of the Security Council – as the primary body in respect of the maintenance of international peace and security – for initiating investigations, and the role of the Court, including both the Prosecutor and the judges – empowered to prosecute those who perpetrate the four core crimes that most threaten this peace and security. This is an issue that has been present since the foundation of the ICC, but was given renewed impetus during discussions on the crime of aggression.

This is for two main reasons, both of which will be explored below. The first is that decisions to wage war are inherently political and are furthermore capable of being both legal and illegal depending on the circumstances. Provisions on the crime of aggression would give the Court jurisdiction to investigate future situations not dissimilar from those arising from decisions taken by a number of Heads of State, including western Heads of State, in recent times. The possibility that decisions to go to war could, in future, be scrutinised by an independent court made a number of states uneasy.

These concerns were further compounded by the fact that the crime of aggression is unique in that it is only capable of being committed by an elite band of very senior officials, usually Heads of State. This focused the minds of Heads of State concerned about the possibility of their decisions being scrutinised and punished in a way never before possible.

It was thus seen as essential for some states that political control be exerted by the Security Council, and so balancing the role of the Security Council with the Court became the primary issue driving negotiations in Kampala.

Going back to the fundamental role of both institutions, that the Security Council is the UN's primary and most powerful organ is well established. Indeed, Article 1 of the UN Charter establishes that the organisation's first purpose is:

“to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

It is with this primary purpose in mind that the great powers of 1945 were given permanent seats on the Council as those countries best able to perform this central role.³¹⁹ The Security Council's unique place within the UN structure is confirmed by Article 24 of the UN Charter, which confers on the Security Council “primary responsibility for the maintenance of international peace and security”. Article 25 also sets out that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

As such, the UN Charter grants the Security Council extraordinary powers, with it answerable to no other authority. This primacy is reflected in the fact that the UN Charter has primacy over the Rome Statute establishing the ICC.³²⁰

The ICC, on the other hand, was established to be a credible, independent judicial body, able to adjudicate the most serious of international crimes fairly and impartially. While the Security Council played no direct role in establishing the ICC, the aims of both institutions – justice on the one hand and the maintenance of peace and security on the other – are intertwined. This interplay is recognised in the preamble to the Rome Statute, which affirms that grave crimes must not go unpunished, not only

319 Moss, L. (2012) ‘The UN Security Council and the International Crime Court - Towards a More Principled Relationship.’ Friedrich Ebert Stiftung. Available at: <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 11 July 2018)

320 Indeed, the UN Charter is granted primacy over all other treaties, under Article 103 of the Charter.

because they ‘shock the conscience of humanity’ but also because they ‘threaten the peace, security and well-being of the world’.³²¹

The interplay between these two institutions is critical to efforts to ensure that threats to international peace and security do not go unpunished. With that in mind, and motivated partly by concerns that the inherently political nature of the Security Council may infect what needs to be an independent judicial body devoid of political motive, the Relationship Agreement between the UN and the ICC was negotiated and entered into force in 2004. This agreement recognises the Court ‘as an independent permanent judicial institution’³²² and declares the principle that ‘the United Nations and the Court respect each other’s status and mandate.’³²³ Furthermore, much of the formal interplay between the Security Council and the Court is governed by the Rome Statute, including the power of the former to refer a situation to the Court and to halt investigations under Article 16.

Much has been written about the ways in which these institutions interact in reality, not all of it positive. Louise Arbour, a former Prosecutor of the ICTY, has commented that ‘international criminal justice cannot be sheltered from political considerations when they are administered by the quintessential political body: the Security Council.’ She goes on to assert that she has ‘long advocated a separation of the justice and political agendas, and would prefer to see an ICC that had no connection to the Security Council. But this is neither the case nor the trend.’³²⁴ Despite these concerns, that the Security Council not only plays a role but a decisive one, is a political reality. And in the absence of political will to establish alternative mechanisms, the Security Council will continue to be intrinsically linked to the way in which the Court exercises its jurisdiction.

321 Moss, *Op Cit.* p.3

322 Article 2(1), Relationship Agreement between the UN and the ICC

323 Article 2(2), Relationship Agreement between the UN and the ICC

324 Arbour, L. (2011) ‘The Rise and Fall of International Human Rights’, British Museum Lecture, 27 April 2011, available at: <https://www.crisisgroup.org/global/rise-and-fall-international-human-rights> (accessed 11 July 2018)

With this ongoing debate firmly in their minds, delegations in Kampala were faced with the question of how this interaction should continue to play out with regard to the crime of aggression. Specifically, how to balance the role of both.

Delegations in Kampala answered the question of how to balance the role of the Security Council with that of the Court in a number of ways. In making the decision to divide the trigger mechanisms for the crime of aggression and (as we will see below) applying stricter conditions on the non-Security Council triggers, delegations affirmed that the Security Council was the primary body responsible for determining whether an act of aggression had occurred, while also recognising the competence of the Prosecutor to investigate *proprio motu* or following a state referral.

Delegations were also, however, mindful of the need to ensure that the Court's role as an independent judicial body was not compromised. In order to ensure this, both Article 15 *bis* & *ter* contain provisions aimed at safeguarding the autonomy of the Court to make its own determinations vis-à-vis external bodies, including the Security Council. Paragraph 9 of Article 15 *bis* and paragraph 4 of Article 15 *ter* clarify that a 'determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.' This goes some way to balancing the role of the Security Council with the need for independence and judicial autonomy on the part of the ICC, affirming that once an investigation has begun in accordance with the above provisions, the Court is free to come to an independent conclusion regardless of whether a contrary determination has been made by another body. This insertion is relevant to both the judges of the Court that will have to make a determination once a case is brought by the Prosecutor, and the Prosecutor who, subject to the conditions imposed below, must be free to initiate investigations where she sees fit based on the available evidence.

Finally, delegations were also mindful of the need to ensure that the newly adopted provisions on the crime of aggression did not impact on the other crimes within the Court's remit. To this end, Paragraph 10 of Article 15 *bis* and paragraph 5 of Article 15 *ter* clarify that Article 15 *bis* & *ter* are 'without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred

to in Article 5,' recognising that a number of novel provisions have been adopted with regard to the crime of aggression and that these should not impact on a reading of the ICC Statute regarding its other crimes. We will now look in detail at these novel provisions, starting with the rules that govern their entry into force.

6.3. Delayed Activation

To the question of *when* the provisions shall come into force, paragraphs 2 and 3 of Article 15 *bis & ter* established an entry into force mechanism that applied to the crime of aggression in its entirety, regardless of the trigger mechanism used. It was agreed that the Court would only exercise jurisdiction over the crime of aggression subject to a decision to be taken after 1 January 2017 by States Parties and subject to the ratification of the amendment concerning the crime by at least 30 States Parties.

This imposed two conditions on entry into force: first, that 30 States Parties ratify the provisions as per Article 15 *bis & ter* (2), and second, that once that threshold has been reached, the ASP shall take a decision after 1 January 2017, as per Article 15 *bis & ter* (3). These provisions imposed at least a seven-year delay on entry into force.

While such a delay was not the outcome that all had hoped for, the Conference Chair later commented that the consensus reached in Kampala reflected 'very significant compromises that all interested parties were prepared to make both in the best interest of the International Criminal Court, but also to make, collectively, a big step to advance international criminal law.'³²⁵ The extent to which this view is shared by the academic community, NGOs, States Parties, and practitioners of international criminal law will be explored in following chapters. From a pragmatic standpoint, the seven years allowed time for States Parties to bring their national legislation into line with the provisions, allowed time for some of the more opaque provisions to be discussed at length, and gave the Court more time to establish itself as the primary judicial institution dealing with international crimes.

³²⁵ Wenaweser, Op. Cit., pg.887.

As the previous chapter (5) documented, these two requirements have now been met. At the time of writing, 35 states have ratified the aggression amendments and – following a decision by the ASP in December 2017 – the crime of aggression formally entered into force on 17 July 2018.

6.4. Security Council Referrals

As will be seen below, the consensual pillar of the Court’s jurisdiction over the crime of aggression carries considerable complexity and scope for divergent interpretations. Not so the primary pillar of Security Council referrals, and so we will deal with that briefly here.

Set out in Article 15 *ter*, the rules governing Security Council referrals comprise five paragraphs. The opening paragraph confirms that the Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b) [referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations].

Of the remaining paragraphs, Article 15 *ter* (2) and (3) simply mirror the entry into force provisions contained in Article 15 *bis* (2) and (3), while the final two paragraphs of Article 15 *ter* then mirror the clarifications on the independence of the Court and inviolability of the other crimes offered in Article 15 *bis* (9) and (10) above.

Article 15 *ter* contains no opt-out clause. Nor does it restrict the national or territorial jurisdiction of the Court in any way. This affirms that once the provisions have entered into force, a Security Council referral will authorise the Court to proceed with an investigation regardless of whether the state being investigated has signed up to the provisions or is even a State Party. For Security Council referrals, the same procedure applies to the crime of aggression as it does the other crimes under the ICC Statute. As such, no further screening by Pre-Trial judges is needed for the Prosecutor to commence investigations.³²⁶

³²⁶ Ruys, *Op Cit.* p.125

This firmly establishes the Security Council pillar as the most expansive of the two jurisdictional regimes, but of course requires political agreement at Security Council level. The virtue of this is assessed along with other significant features of the provisions below.

6.5. State Referrals and Proprio Motu Investigations

That the Court may exercise jurisdiction over the crime of aggression through state referrals and proprio motu investigations is affirmed in paragraph 1 of Article 15 *bis*, in which it confirms that ‘the Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) [proprio motu] and (c) [state referrals].’ While this explicit reference to Article 13 of the ICC Statute appears to bring the jurisdictional remit of the crime of aggression in line with that which governs the jurisdiction of the other ICC crimes, the following paragraphs of Article 15 *bis* go on to limit this remit in novel ways.

6.5.1. Procedural Hurdles

The first way in which this jurisdiction is eroded is through the imposition of procedural hurdles that will apply before an investigation can proceed. Paragraphs 6 to 8 of Article 15 *bis* set out the procedure the Prosecutor has to follow in cases of state referral or proprio motu investigations. Once the decision has been made that there is a reasonable basis to proceed with an investigation, the Prosecutor ‘shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the state concerned... [and] notify the UN Secretary General accordingly’ (paragraph 6). If the Security Council has already made such a determination, the Prosecutor can proceed with the investigation (paragraph 7). In case no such determination has been made by the Security Council after six months, and provided the Pre-Trial Division has authorized the investigation in accordance with Article 15, and the Security Council has not decided otherwise in accordance with Article 16, the Prosecutor can also proceed with the investigation (paragraph 8).³²⁷

³²⁷ Heinsch, Op Cit. p.740

These provisions establish that the prosecutor can investigate crimes of aggression without an explicit determination by the Security Council. Nevertheless, a number of checks have been put in place:

First, the Prosecutor is precluded from proceeding with investigations in the event that the Security Council has already made a determination that the Court should not proceed. That the Security Council can halt an investigation is not a new concept, applying as it does to the other crimes under Article 16 of the ICC Statute. The Review Conference, perhaps to reassure the P-2 (France and the UK), still felt the need to restate it.

Second, in instances where the Prosecutor – on the basis of an internal preliminary investigation – believes there to be reasonable grounds to proceed with an investigation and the Security Council has not made a determination, there is a requirement for the Prosecutor to wait six months before initiating a formal investigation. This six-month period gives the Security Council time to consider the situation, making a determination if it so wishes or indeed halting an investigation under its Article 16 powers. It is only once six months have passed and no such determination has been made that the investigation can proceed. This six-month waiting period is novel, and further sets the crime apart from the others within the ICC Statute. While this will inevitably delay future investigations, it is the first of many compromises that signal deference to the Security Council, but is – importantly – one that does not fundamentally alter the competence of the Court to investigate and prosecute acts of aggression.³²⁸

Preliminary investigations by the Prosecutor have a tendency, since the establishment of the Court, to run for a number of years. At the time of writing there are eleven ongoing preliminary investigations, in the DRC; Uganda; Sudan; CAR; CAR II; Kenya; Libya; Côte d'Ivoire; Mali; Georgia; and Burundi.³²⁹ While a number of these preliminary investigations were initiated within the last year or two, some have been ongoing for many years. The DRC for instance has been under preliminary investigation since April 2004. Viewed in this context, it is eminently possible that any preliminary investigation into a crime of aggression would also have been running for a lengthy period, and begs the question: is a further six-month delay before a formal investigation can commence a significant

³²⁸ Ruys, *Op Cit.* p.126

³²⁹ ICC Preliminary Investigations, available at: <https://www.icc-cpi.int/pages/situation.aspx> (accessed 20 September 2018)

concession to make? With history demonstrating that preliminary investigations have a tendency to run into many years, it is suggested that an additional six-month period to give the Security Council time to consider any situation is not a concession likely to have a significant impact on the Court's use of the aggression provisions.

A third pre-condition is that the Pre-trial Division must have authorised the investigation. While requiring pre-trial judges to authorise proceedings is standard for *proprio motu* investigations into the other crimes within the ICC Statute, the pre-condition attached to the crime of aggression varies in two important ways from that which applies to the other core crimes. Firstly, pre-trial judges are also required to authorise investigations into crimes of aggression arising from state referrals, adding a further internal check to *all* investigations not referred by the Security Council. Secondly, investigations into crimes of aggression require that all pre-trial judges of the Pre-trial *Division* – rather than the less stringent requirement that the Pre-trial *Chamber* – authorise investigations. This was added to ensure a more thorough examination of the merits of proceeding with an investigation, reassuring those concerned about the possibility of 'politically motivated and meritless cases'.³³⁰

All three of these provisions represent small but significant limits on the Court's ability to exercise jurisdiction over the crime of aggression. They also represent concessions made to secure a compromise, reasserting as they do the primacy of the Security Council as the primary body in respect of the maintenance of international peace and security.

These additional hurdles subordinate the ICC to an inherently political organisation in the Security Council, leading some to question whether the crime aggression is merely 'policy in disguise of the law'.³³¹ The extent to which these provisions may come to limit the ability of the Court to prosecute crimes of aggression will also be considered in a later chapter, though it is contended here that none of these additional hurdles fundamentally changes the ability of the Court to initiate investigations following a request by the Prosecutor or States Parties. Much bigger obstacles to the Court's jurisdiction

330 Barriga & Grover (2011), Op Cit. p.530

331 KreB (2010) 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', EJIL 20(4), p.1143

were put in place by the provisions governing over whom the Court will be able to exercise jurisdiction, provisions examined below.

6.6. A Consensual Approach

While paragraphs 2 and 3 establish *when* the provisions will come into force and paragraphs 6 and 8 establish *how* the provisions will be applied, they do not definitively conclude *over whom* the provisions should apply: that is, whether the provisions should bind all states or only States Parties; and in the case of the latter, whether the provisions should apply to those that have explicitly or implicitly accepted the provisions.

To these questions, the Review Conference and the subsequent ASP in December 2017 have answered that a strictly consensual approach will prevail in the absence of a Security Council referral, placing three key limits on the Court's jurisdiction: the provisions will only apply to States Parties (Article 15 *bis* (5)) that have accepted the provisions (Article 121(5)), and have not subsequently opted-out (Article 15(4)). As we have seen, interpretation of the provisions was heavily disputed and questions of interpretation regarding who will be bound by the provisions persisted right up until the decision was taken to activate the amendments. These three decisions: of excluding non-States Parties under Article 15 *bis* (5); of only including within the Court's jurisdiction ratifying States Parties by applying Article 121(5) and then interpreting it narrowly; and of including the opt-out provision provided for in Article 15(4), will be considered in turn before we take stock of the overall state of the jurisdictional regime adopted.

6.6.1. Exclusion of non-States Parties - Article 15 *bis* (5)

Paragraph 5 of Article 15 *bis* limits the jurisdiction of the Court in instances of State-referred and Prosecutor-initiated investigations by setting out that:

'In respect of a 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.'

This confirms that for the purposes of state referrals and proprio motu investigations, the ICC shall not exercise jurisdiction over the crime of aggression when committed by nationals of a non-State Party or on its territory. This departs from the Article 12(2) provisions that govern the other crimes in that States Parties have effectively deprived the ICC of jurisdiction over an act of aggression committed against themselves by a non-State Party.³³² Had this line not been included, it would have been possible for the ICC to prosecute nationals of non-State Parties for the crime of aggression when those acts were committed against State Parties. Similarly, in agreeing that the Court shall not exercise its jurisdiction over the crime of aggression when committed on a non-State Party's territory, delegations also ensured that the Court would not have jurisdiction over nationals of States Parties when committing acts against a non-State Party.

While this insertion underlines the Review Conference's intention to implement a consent-based approach to the crime, it led some states to argue that this was too restrictive and that Article 12(2) rules should apply equally to the crime of aggression, granting the Court jurisdiction in situations where one of the states involved was party to the Statute. Others pointed to the 'extreme political sensitivity of prosecuting crimes of aggression - as compared to other crimes covered by the ICC Statute - and stressed the danger of the ICC's legitimacy being jeopardized'³³³ should jurisdiction be granted over a state that had not previously signed up to the ICC Statute.

It is questionable whether the Court's legitimacy would in fact have been damaged had a more expansive regime, in line with article 12(2), been applied to the crime of aggression. There are already, of course, ongoing examinations into situations involving states that are not States Parties. The preliminary examination, which could on the basis of the available evidence become an investigation, into the situation in Palestine is one obvious example, opening up the possibility of Israel (a non-State Party) falling within the remit of the Court. If aggressor states can be pursued for the other core crimes, then why not for aggression?

³³² Ruys, *Op Cit.* p.121

³³³ Ruys, *Op Cit.* p.127

The answer appears to be that the crime of aggression differs from the other core crimes in that its focus in practice will primarily be on Heads of State. While this will often be the case for the other core crimes, the crime of aggression is set apart in that only a very small, elite band of extremely senior figures will ever be capable of ‘planning, preparing, initiating or executing’ an act of aggression.

It is certainly true that, for the other core crimes, there are ongoing formal investigations in which arrest warrants have been issued for sitting Heads of States that have not accepted the jurisdiction of the Court, namely Libya and Sudan. However, it is also the case that these investigations have only arisen following Security Council referrals. When it comes to the crime of aggression, the reality facing states was that whenever an investigation into the crime of aggression was to be initiated, it would almost certainly target a sitting Head of State, regardless of the trigger mechanism used. This goes to the heart of state unease over the political nature of the crime.

This therefore raises legitimate concerns about the way in which the crime will come to be viewed by the international community and the impact it will have on the functioning of – and support for – the Court. 2016 saw Burundi, South Africa and Gambia announce their intention to withdraw from the ICC claiming that the Court is ‘an instrument of powerful countries used to punish leaders who do not comply with the West.’³³⁴ African opposition to the ICC reached a new peak at the beginning of 2017 when – despite opposition from many African states – the African Union (AU) passed a non-binding resolution that adopted an ICC withdrawal strategy. While not committing to the idea of collective withdrawal, the resolution did call for further research into the idea and documented AU concerns with the Court, proposing to amend the Court’s Statute to exempt sitting leaders implicated in widespread atrocities.³³⁵

Given AU concerns in particular surrounding the prosecution of sitting Heads of State, the extent to which the decision to adopt amendments into a crime that will specifically target Heads of State will impact on the future of the Court will be examined in more detail in subsequent chapters. What is clear

334 Human Rights Watch, Burundi: ICC Withdrawal Major Loss to Victims (27 October 2016), available at <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> (accessed 11 July 2018)

335 Ibid.

is that these concerns were felt by delegations in Kampala when they agreed to exclude – in the absence of a Security Council referral – situations involving non-States Parties from the reach of the Court.

In the absence of a Security Council referral, the decision to completely exclude non-State Parties from the Court's reach casts further doubt on the progress made at the Review Conference. It is clear that a number of prominent non-State Parties were keen to ensure that they would not be the subject of an ICC investigation into aggressive acts, even – and unlike the other crimes within the ICC Statute – when committed on the territory of a State Party.³³⁶ But the provisions go further still, exempting from the jurisdiction of the Court aggressive acts committed by State Parties that have not opted out if those acts are committed on the territory of non-State Parties. This asymmetry with the other core crimes does not escape Jon Heller, for whom there is no 'legal rationale for the limitation'.³³⁷

No legal rationale perhaps, but Jennifer Trahan does envisage a political one. Here, Trahan presumes that such an exemption was pushed by certain states with a view to facilitating coalition building.³³⁸ Loosely using the US-led invasion of Iraq as a hypothetical, the United States (completely exempt as a non-State Party) could then encourage State Parties (such as the UK and France) to join a coalition in launching an intervention in the territory of a non-State Party (say, Iraq), safe in the knowledge that – even if both the UK and France had ratified the amendments and not opted out – neither State would be susceptible to an ICC investigation.³³⁹ This would certainly seem plausible, with the US having expressed concerns that the adoption of the amendments would 'have a chilling effect on potential coalition partners in US-led military actions'.³⁴⁰

336 See Scheffer, D. (2010) 'States Parties Approve New Crimes for International Criminal Court', ASIL Insight, vol. 14, issue 16; Scheffer, D. (2010) 'The complex crime of aggression under the Rome Statute,' Leiden Journal of International Law, Vol.23 (4)

337 Heller, K.J. (2010) 'The Sadly Neutered Crime of Aggression', *Opinio Juris*, 13 June 2010, available at <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/> (accessed 11 July 2018)

338 Trahan, J. (2015) 'Defining the "Grey Area" where Humanitarian Intervention may not be Fully Legal, but is not the Crime of Aggression', *Journal on the Use of Force and International Law*, 2, p.92

339 Absent a Security Council referral, but of course the US, UK and France would all be in a position to veto such a referral.

340 See Schaack, B.V. (2015) 'U.S. Policy on the ICC Crime of Aggression Announced', *JUST SECURITY*, available at <http://justsecurity.org/22248/u-s-policy-icc-crime-aggression/> (accessed 13 July 2018)

It is difficult at this stage to predict whether the worst fears of some will come to pass, that in subordinating the ICC to the Security Council through additional procedural hurdles and a complete exemption for crimes involving non-State Parties except when authorised by the Security Council, delegations have ensured that political considerations will outweigh legal ones. The possibility of this will be considered in a later chapter looking at the extent to which prosecutions are likely to arise from the provisions.

6.6.2. Exclusion of Non-Ratifying States Parties, Part I – Article 121(4) vs. Article 121(5)

This consensual approach – at least on the face of it – was further confirmed by the legal mechanism adopted for bringing the provisions into force. While the decision as to who would be bound by the aggression provisions (consent-based versus a more expansive approach) was inherently a political question partly answered by Article 15 *bis* (5), it also needed to be justified by adherence to a legal entry-into-force mechanism.

As chapter 4 on the negotiations in Kampala explained, states were faced with a decision as to whether adopting the provisions entailed amending the core crimes of the ICC Statute (in which case Article 121(5) would be the operative mechanism), or whether the Statute could be amended without amending the core crimes (in which case Article 121(4) could apply). This choice of legal mechanism for entry-into-force would have different repercussions for who would be bound.

Delegations in Kampala decided that they were in fact amending the core crime of aggression (in Article 5) by effectively replacing Article 5(2) – a placeholder for a future agreement – with the new Article 8 *bis* definition and Article 15 *bis* and *ter* jurisdictional conditions. As such, they made a clear choice that Article 121(5) would apply. As stated in paragraph 1 of the adopting resolution:

the Review Conference ‘decides to adopt, in accordance with Article 5, paragraph 2, of the Rome Statute of the International Criminal Court [...] the amendments to the Statute contained in annex 1 of the present resolution, which are subject to ratification or acceptance *and shall*

enter into force in accordance with Article 121, paragraph 5; and notes that any Party may lodge a declaration referred to in Article 15 bis prior to ratification or acceptance.'

When read alongside Art.15 *bis* (5) which sets out that the Court shall not exercise its jurisdiction over the crime of aggression in respect of a state that is not a party to this Statute when committed by that state's nationals or on its territory, the decision to apply Article 121(5) severely limits the reach of the Court, ensuring it can only initiate proceedings against states that have explicitly ratified or accepted the aggression provisions, and only then when the acts of aggression are committed on the territory of another state that has also accepted the provisions and not also opted out (a further condition explored below). As we saw in the previous chapter, not all states favoured such a restrictive set of conditions, with many arguing that Article 121(4) should apply, even if this meant a lengthy delay while agreement between seven-eighths of States Parties was sought. In spite of this, practical considerations seem to have held sway, with delegations largely convinced that reliance on Article 121(4) and a seven-eighths threshold would mean that it would take a very long time for jurisdiction of the crime of aggression to be fully activated.

6.6.3. Exclusion of Non-Ratifying States Parties, Part II - Interpreting Article 121(5)

While it may have been settled in Kampala that Article 121(5) would be the appropriate mechanism for bringing the crime into force, as the previous chapter (5) demonstrated in detail, this did not stop states from arguing that the provisions should still – once adopted – apply to all States Parties regardless of whether they had formally ratified the amendments.

As the numerous statements made by states such as Lichtenstein and Switzerland – along with influential and engaged individuals such as Ben Ferencz and Stefan Barriga – attest, many of the participants at Rome did not intend to create a regime based on a negative understanding of Article 121(5). Yet as was agreed at the ASP in December 2017 – that was what came to pass. Indeed, the idea that the Chair of the Review Conference himself did not intend to create such a system, yet that is what was agreed, is staggering.

Any initial shock should, however, be tempered by the fact that it is clear that the jurisdictional arrangements adopted through the aggression amendments were extremely ‘complex, unclear and complicated and that to come to their satisfactory interpretation in the context of other relevant provisions of the Rome Statute is a very difficult mission.’³⁴¹ Indeed, it has been stated that ‘to say that the jurisdictional picture that emerges from all this is complex would be an understatement’.³⁴²

With a negative understanding of Article 121(5) prevailing, states completed a triumvirate of limitations on the reach of the Court. First, states are free to simply not ratify the agreement or indeed to opt out of it once they have. Second, the provisions explicitly shield non-State Parties from the Court’s reach. While the provisions enable the Court to proceed without the explicit authorisation of the Security Council, the price for breaking the Security Council monopoly on the initiation of investigations, was limitations so severe as to bring into question whether the Court is ever likely to initiate any.

There is now substantial concern that it will be far too easy for states to insulate themselves from prosecution by simply not ratifying the provisions. This goes to the heart of the problem with a consent-based approach: why would States Parties submit themselves to the jurisdiction of the Court if others are deciding not to. This question is not unique to the crime of aggression. Indeed, the ICC – much like most international institutions – is founded on the consent of states. The extent to which this was indeed a compromise too far is explored in later chapters, but it does raise here the question as to whether a meaningful number of states will ratify the amendments and not opt out. After all, it is hard to imagine that any of the states that have ratified are likely to wage aggressive war against another ratifying state, threat of prosecution or not.

6.6.4. Exclusion of States Parties that Opt Out - Article 15(4)

With delegations in Kampala clearly expressing the intention for the provisions to enter into force in line with Article 121(5), it would seem clear that the Court will only be able to exercise jurisdiction over states that have ratified the provisions. This rejection of an Article 121(4) approach, whereby states

³⁴¹ Caban, *Op Cit.* p.75

³⁴² Milanović, *Op Cit.* p.181

would have been bound regardless of whether or not they had ratified, would appear to render an opt-out provision unnecessary.

Nevertheless, as we saw from the chapter on negotiations at Kampala, delegations agreed to the late addition of such an opt-out clause. Enshrined in Article 15(4), the Court may exercise jurisdiction over a crime of aggression unless the State Party in question ‘has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.’

This brings into question the intention to only grant the Court jurisdiction over states that have accepted the provisions, and has forced commentators to ask: why would a State Party which has accepted the amendment want to then opt-out of the regime? Would it not be more sensible *not* to ratify the amendment in the first place? Furthermore, why would a State Party which has not accepted the amendment lodge a declaration of opting out, since Article 121(5) makes it crystal clear that the Court would not be able to exercise its jurisdiction regarding that crime?³⁴³ A number of answers to these questions have been proposed.

A first, though far from compelling reason for including the opt-out provision could be for states to make explicit their intention not to be bound. Indeed, given the ambiguity regarding the interpretation of the provisions related to entry into force, this has the added benefit of granting states extra assurances that they will not be bound.

Second, given the inclusion of the requirement for 30 states to ratify the amendments before they take effect, the inclusion of an opt-out provision makes sense for those that want to see the crime of aggression included within the remit of the Court, but do not themselves want to be bound by it. Given the duality between the trigger mechanisms established, this would have the effect of granting the Security Council the ability to refer situations while giving states the option of ensuring they are not the object of Prosecutor-initiated or state-referred prosecutions.

³⁴³ Heinsch, *Op Cit.* p.739

Third, and here Jon Heller goes further, arguing that states that ratify the provisions but also opt out are in fact in a better position than those that choose not to opt in at all. This brings us on to an asymmetry that results from the Kampala agreement. As Heller points out, ‘there is a fundamental difference between a State Party who opts in and then opts out and a State Party who never opts in.’³⁴⁴ While neither can be prosecuted for acts that they commit, the State Party that ratifies and then opts out is still protected from acts of aggression committed *against* it, while the State Party that does not ratify is not. The effect of this asymmetry – and the opt-out provisions more generally – on the ability of the Court to successfully prosecute illegal war will be assessed in a later chapter. Given this approach, it would seem likely that states that ratify the provisions may also decide to opt out. Indeed, other than risk perpetuating the perception that they do not fully support the work of the ICC and international justice, they have nothing to lose in doing so.

A fourth reason for including an opt-out could in fact be because those that introduced the option during negotiations (Canada and others) intended *all* states to be bound unless they wielded an opt-out, an approach that would be in apparent contradiction with the decision to adopt an Article 121(5) understanding with regard to entry into force. This brings us to the key source of confusion as to what was agreed in Kampala.

Jennifer Trahan raises the example of another prominent opt-out in international criminal law, the Article 124 war crimes opt-out, which – although subsequently deleted – was included in the Rome Statute to allow States Parties to opt out of jurisdiction over three specific types of war crimes concerning the use of prohibited weapons during internal armed conflict for seven years.³⁴⁵ Up until its deletion in November 2015, only two states, France and Colombia, exercised their right to this opt-out, something Trahan suggests might indicate an ‘embarrassment factor’ over any decision to exclude

344 Heller, K.J. (2010) ‘Opt-ins and Opt-outs’, *Opinio Juris*, (21 June 2010), available at: <http://opiniojuris.org/2010/06/21/opt-ins-and-opt-outs/> (accessed 11 July 2018)

345 States Parties at the Review Conference were also expected to agree to delete the Article 124 opt-out provision of the Rome Statute, which allows States Parties to opt out of jurisdiction over specific war crimes for seven years (see Rome Statute, Art. 124.) Ultimately, the decision whether to remove that provision was deferred until the 14th session of the Assembly of States Parties. On 26 November 2015 during the 14th session of the ASP, the decision was taken to delete the opt out contained within Article 124. For additional discussion of the Belgian war crimes amendment and decision to retain Article 124, see Trahan, *Op Cit.* p.67

liability. It remains to be seen whether states will deem it too politically risky to employ an opt-out, but early indications are that a more pressing concern is whether enough of the major international players will ratify at all. With ASP confirming that states simply need not ratify in order to be exempt, it seems the opt-out will be rarely used and largely irrelevant.

6.7. The Package Adopted

When finally adopted in Kampala, the aggression provisions comprise an enabling resolution (Resolution RC/Res. 6), seven amendments to the ICC Statute, an amendment to the Elements of Crimes, and a set of interpretive Understandings.³⁴⁶

The resolution emphasises that in conformity with Article 12(1) States Parties have accepted the Court's jurisdiction over all four crimes; clarifies that the amendments enter into force for each state that chooses to accept them one year after they deposit their ratification instrument in accordance with Article 121(5); and provides that the amendments will be reviewed seven years after the beginning of the Court's exercise of jurisdiction, meaning that they will be reviewed again in 2025.

The six amendments to the ICC Statute then implement the substantive provisions discussed above. Amendment 1 deletes the Article 5(2) mandate, now satisfied, to adopt the amendments on the crime of aggression.³⁴⁷ Amendment 2 adds a new Article 8 *bis* to the Statute, which defines the crime of aggression. Amendment 3 adds a new Article 15 *bis* to Statute, which provides for a consent-based jurisdictional pillar in describing the conditions for the exercise of jurisdiction in the case of State referrals and proprio motu investigations. Amendment 4 adds a new Article 15 *ter* to the Statute, which describes the conditions for exercising jurisdiction in the case of Security Council referrals. Amendment 5 adds a new subparagraph to Article 25(3) of the Statute which confirms that secondary perpetrators are criminally responsible for a crime of aggression only if they also fulfil the leadership requirement

³⁴⁶ Barriga & Grover, Op Cit. p.531

³⁴⁷ Ibid.

in Article 8 *bis* (1). Amendments 6 and 7 simply add – where relevant – reference in other parts of the Statute to the new Article 8 *bis* definition.

The amendment to Elements of Crimes makes a number of clarifications concerning both the elements of the crime of aggression that the Prosecutor would have to prove to the Court and some aspects of the definition, as discussed in the previous chapter providing an examination of the definition of the crime of aggression.

Finally, a set of seven interpretive Understandings were included, clarifying a number of points arising from the negotiations. Understandings 1-3 address Security Council referrals and the Court's temporal jurisdiction; understandings 4 and 5 concern domestic jurisdiction, and understandings 6 and 7 concern the meaning of a 'manifest' violation of the UN Charter. All are included in Annex here.

As we have seen in the chapter on the Kampala negotiations, these Understandings were particularly important to the US delegation, with Harold Koh, the State Department's Legal Adviser, commenting after the negotiations that '[t]he United States considered the definition of aggression flawed, but a number of important safeguards were adopted. Understandings were adopted to make the definition more precise, to ensure that the crime will be applied only to the most egregious circumstances.'³⁴⁸ The extent to which the Understandings carry legal weight is disputed, though the prevalent view is that they are included as a supplementary means of interpretation that the Court would have the right to follow – or indeed ignore – once the aggression amendments have entered into force.³⁴⁹ Regardless, and as we have seen in previous chapters, they are an important tool in understanding the intention of the drafters, and proved useful as a mechanism for avoiding opening up the definition of the crime of aggression.

348 Heller, K.J., (2010) 'Are the Aggression "Understandings" Valid?', *Opinio Juris*, available at <http://opiniojuris.org/2010/06/16/are-the-aggression-understandings-valid/> (accessed 11 July 2018)

349 For full discussion on the legal status of the Understandings, see Heller (2012) 'Uncertain Legal Status', *Op Cit*.

To summarise the provisions that came into effect on 17 July 2018, the Court can proceed with an investigation into the crime of aggression in one of three ways: through a Security Council referral, a State referral or by the Prosecutor initiating an investigation on her own.

A Security Council referral is the most expansive in that it grants the Court the power to investigate any state regardless of whether they have adopted the aggression provisions or indeed regardless of whether they are even a State Party. State referrals and proprio motu investigations are less expansive. In these instances, the Court will only have jurisdiction to proceed with an investigation once the Prosecutor has notified the UN Secretary General of this intention and waited six months to give the Security Council the opportunity to respond, the judges of the Pre-trial Division of the Court have authorised the Prosecutor to proceed, and the Security Council has not formally objected through use of Article 16. Once these conditions have been met, the Court may seek to prosecute only states that are party to the ICC, have ratified the aggression amendments, and have not subsequently opted-out of the aggression provisions, and even then, only when the acts of aggression have been committed against a State Party.

Jon Heller has produced a useful visualisation of when the Court will have jurisdiction. A summarised version of that table below is included below. The two actors refer to the state committing aggression (state of nationality) and the state against whom aggression is committed (territorial state). “OO” refers to a State Party that has opted out of jurisdiction.³⁵⁰

State Party & State Party —> Jurisdiction

State Party & State Party OO —> Jurisdiction

State Party & Non-State Party —> No Jurisdiction

Non-State Party & State Party —> No Jurisdiction

There are many other possible formulations that do not lead to the Court having jurisdiction over aggressive acts, but the two examples above are the only instances in which the Court will be

350 Full table available here: Heller, K.J. (2010) ‘The Sadly Neutered Crime of Aggression’, *Opinio Juris*, 13 June 2010, available at <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/> (accessed 11 July 2018)

empowered to act in the absence of a Security Council referral. Following chapters will be devoted to the likelihood of investigations and successful prosecutions arising from the amendments.

The decision confirmed by the ASP in December 2017 to only include within the jurisdiction of the Court those that have ratified and not opted out, means that the Court's reach – unless authorised by the Security Council – is limited only to those states that have ratified and not opted-out, which at present stands at marginally more than 30. Yet there is hope that political pressure will dissuade states from shielding themselves completely and that in the words of one UK delegate to the Kampala Review Conference, a 'circle of virtuous states'³⁵¹ will emerge. It has to be said though, given the extremely limiting provisions put in place, and the slow trickle of states that have ratified since Kampala, this seems optimistic.

The answer to why these compromises were accepted by delegations is relatively obvious. A decision was taken that in order to bring the members of the Security Council on board, a restatement of the primacy of the Security Council and a commitment to a purely consent-based approach beyond that was needed. For a Court devoid of an enforcement mechanism beyond that granted by state cooperation, it is questionable whether it would have been possible to reach agreement without these concessions.

While not everyone agrees, it is generally accepted that as 'international law does not always evolve in perfect steps, and given the decades these steps can take to be achieved, the agreement reached is far better than no agreement.'³⁵² The extent to which the provisions might lead to successful prosecutions and indeed the extent to which they strengthen or weaken the ICC will be explored in later chapters.

³⁵¹ The idea of a 'circle of virtuous states' was first raised by Robbie Manson, who attended the Kampala Review Conference as a representative of the UK Coalition for the ICC and on behalf of the Institute for Law, Accountability and Peace, see Trahan (2015), Op Cit. p.91

³⁵² Trahan (2015), Op Cit. p.93

Chapter 7 – Role of Civil Society

This chapter will seek to assess the role civil society has played in the criminalisation of aggression. Sections 1 and 2 will look at role civil society played and the impact NGOs were able to have at the Rome Conference to establish the ICC in 1998 and the Kampala Review Conference on the aggression amendments in 2010. Section 3 will highlight some of the geopolitical factors that served to dampen enthusiasm for the amendments in Kampala. Section 4 will then examine the differences in policy positions amongst civil society groups, explaining why civil society was unable to unite behind a common position and exert influence over the Kampala negotiations. Concluding thoughts will then be offered on ways in which civil society can play a positive and progressive role going forward.

7.1. Introduction

As previous chapters have documented, state delegations played a pivotal role in shaping the Review Conference outcome and the text adopted. But what of civil society? The influence of civil society groups at the Rome Conference some 12 years earlier has been well documented, and they have been credited with driving forward negotiations to establish the International Criminal Court.³⁵³ In contrast, they were notably absent for much of the negotiations in Kampala and played a much-diminished role as actors of change. As Noah Weisbord, who has provided perhaps the most comprehensive account of civil society engagement at Kampala, writes: ‘the majority of civil society groups focusing on international justice issues were supportive of the aggression project in principle, but the devil was in the detail and they were unable to exorcise him.’³⁵⁴

This chapter will seek to examine this decline, charting the reasons why civil society found itself less able to influence discussions in Kampala and what this reveals about ‘the crime of aggression as an idea, the people engaging with it and the context in which those engaging with it are operating.’³⁵⁵ Many of the divisions inherent in civil society’s approach to the crime of aggression are mirrored in the

353 Weisbord, N. (2017) ‘Civil Society and the Crime of Aggression,’ in A Commentary on the Crime of Aggression Vol.2, Claus Kreß and Stefan Barriga, eds. (Cambridge University Press), p.1310

354 Ibid. p.1313

355 Ibid. p.1310

approaches of state delegations and the international community as a whole, and so as well as documenting the role of civil society in Kampala, this chapter also provides context for those to follow.

7.2. The Rome Conference

At the Rome Conference, civil society played a crucial role in driving forward and shaping the negotiations. The ability of civil society organisations to exert such influence was due largely to its coordinated approach to the Conference. Participating NGOs were accredited and represented by an umbrella organisation, the Coalition for the ICC, set up in 1995 ‘as a broad-based network of NGOs and international law experts.’³⁵⁶ The Coalition – initially a 25-strong group of civil society organisations formed in response to grave violations of human rights in impunity-fuelled conflicts in Yugoslavia and Rwanda – immediately began advocating for an international criminal court. Heavily involved in discussions to establish the ICC, the Coalition grew rapidly over the years and consisted of over 800 members at the time of the Rome Conference in 1998, 236 of which were physically present in the Italian capital. This made it the largest delegation to the Rome Conference by far.

The Coalition represented human rights groups – including Amnesty International, Human Rights Watch and the International Federation for Human Rights. It also represented women’s groups, peace groups, global governance groups and religious groups among others. Given the breadth of interests contained within the group, the Coalition opted for a loose management structure: William Pace was appointed Coordinator of the CICC and a steering committee was put in place. The Coalition chose initially to formulate no common position except ‘to advocate for the creation of an effective, just and independent International Criminal Court.’³⁵⁷ It opted to be no more than a conduit of information between NGOs, state representatives, and the general public, and a resource for coordination between NGOs.

³⁵⁶ ‘MONITOR’ The Newsletter of the NGO Coalition for an International Criminal Court. Issue 1, July /August 1996, p.6. Available at: <http://www.iccnw.org/documents/monitor01.199607.pdf> (accessed 11 July 2018)

³⁵⁷ Ibid.

The influence the Coalition was able to exert is well documented.³⁵⁸ It facilitated contact between NGOs and states by arranging meetings on various ICC issues,³⁵⁹ coordinated demonstrations and press conferences. It actively lobbied governments, ministers, and parliamentarians to pressure national delegations into adopting a progressive stance to the negotiations and compiled regular reports of government positions on key issues which were then disseminated through the media.³⁶⁰ By way of example, wavering delegates from Mexico and Peru were pushed – through the Latin-American regional caucus – towards more progressive positions, partly through debates in their domestic newspapers.³⁶¹

The Coalition was also responsible for providing national experts and interns from civil society to aid governments in need of legal, technical and logistical assistance. These experts allowed state delegations to be present at more parallel meetings as well as helping to develop their legal arguments. A number of countries included NGO and academic representatives in their delegations, with some playing leading roles. These experts ‘came with independent views, which influenced state delegations from within.’³⁶² The Coalition and NGOs more generally also played a key role in providing vital information. Legal expertise and position papers containing information, expert analysis, and assessment of legal provisions in the draft texts were prepared and widely disseminated by NGOs throughout the negotiations,³⁶³ and state delegations and UN officials came to rely on these outputs.³⁶⁴

In sum, the Coalition was able to provide a coordinated and strategic approach that ensured NGOs and civil society representatives worked together as agents of change. The level of civil society involvement in the negotiations was unprecedented and the Coalition ensured that there was one focal point for UN

358 See Pearson, Z. (2006). ‘Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law’, *Cornell International Law Journal*, 39(2)

359 Durham, H. (1999) ‘Increasing the Effectiveness of the International Criminal Court: The Contribution of Non-State Actors’ (June 30, 1999, unpublished S.J.D. Thesis, University of Melbourne)

360 Weisbord, Op Cit. p.1326

361 On the Record (1998e), Op Cit.

362 Glasius, Op Cit. p.161

363 Pace, W.R. (1999) ‘The Relationship Between the International Criminal Court and Non-Governmental Organizations’, in *Reflections on the International Criminal Court* 189, 205-08 (Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking eds., 1999). Members of the CICC who regularly produced papers included AI, WCGJ, European Law Students' Association (ELSA), FIDH, Human Rights Watch, International Court of Justice, LCHR, REDRESS, the ICDA, and the International Association for Penal Law (IAPL).

364 Ibid.

officials and state representatives. The year after the Rome Conference, the Coalition was nominated for the Nobel Peace Prize in recognition of its contributions to international justice.³⁶⁵

7.3. Kampala

Carrying on that tradition, there were some organisations that played an active role in Kampala and who worked tirelessly in furtherance of a negotiated outcome that brought aggression within the remit of the Court.

The Special Working Group on the Crime of Aggression was hosted by the Liechtenstein Centre for Self Determination at Princeton University. The SWGCA incorporated state and civil society representatives and provided ‘a new and informal space to break down, tackle and resolve the most contentious issues blocking an agreement on the crime of aggression.’³⁶⁶ As Stefan Barriga recalled, these meetings ‘allowed the participants to discuss the issues in a less politicised atmosphere and to feel a sense of achievement early on... Over time, the Group developed a sense of camaraderie that can rarely be found in negotiating processes on such sensitive issues, and that had a direct impact on the manner in which discussions were conducted: more interactive, focused, open and frank than is otherwise the custom.’³⁶⁷ Active participants in the SWGCA from academia and civil society organisations also went on to play prominent roles in Kampala, many of them as members of state delegations. Claus Kreß is perhaps the standout example, playing a prominent role as a member of the German delegation as well as chairing meetings and actively contributing to the negotiations.

In addition, civil society organisations such Parliamentarians for Global Action (PGA) continue to work to strengthen the international community’s commitment to the provisions on the crime of aggression. A network of over 1,200 legislators in more than 140 elected parliaments around the globe, PGA work to encourage states to ratify and implement the aggression amendments. They also played an important role in the run-up to Kampala, encouraging their members to ensure their governments adopted

³⁶⁵ Weisbord, *Op Cit.* p.1327

³⁶⁶ *Ibid.*

³⁶⁷ Barriga (2012), *Op Cit.*

constructive positions at the Review Conference, and during the Conference where they organised a side-event: ‘an informal and inclusive discussion of the merits of proceeding with the negotiations.’³⁶⁸

The Coalition itself was also still very much present in Kampala – having grown in the intervening years to include over 2,500 organisations in 150 different countries – working in partnership to strengthen international cooperation with the ICC; ensure that the Court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity and genocide.³⁶⁹ As William Pace recalls, more than 600 representatives from 143 NGOs played a crucial role in enhancing the dialogue at the Review Conference, through parliamentary assemblies, debates, roundtables, moot courts and press conferences. Indeed, Pace notes that ‘the role played by the CICC and civil society was acknowledged in the plenary and in speeches by states and other experts, as well as in most side events and panels.’³⁷⁰ This is a view shared to some extent by state participants, Chris Whomersley, Head of the UK Delegation, among them, who recalls that NGOs did play an important role as disseminators of information, and state delegates came to rely on that information.³⁷¹ That being said, the role it played and the influence it was able to exert at the Review Conference was much diminished, in line with overall participation by civil society actors in Kampala.

In Rome, there had been proactive civil society engagement on a wide range of thematic issues, from the Statute’s general principles and its relations with states to its composition of jurisdiction rules, definitions of crimes, rules relating to prosecutions and trial, and financing. What bound them was a Coalition able to unite delegations around one simple aim: the creation of an effective, just and independent international criminal court. In Kampala, support for the aggression amendments was not nearly as uniform as it had been for the creation of the ICC. With the CICC set up specifically to work for and then maintain a strong, effective and independent Court, a lot of its civil society members were

368 Weisbord, *Op Cit.* p.1330

369 Coalition for the ICC, ‘About the Coalition’, available at: <http://coalitionfortheicc.org> (accessed 21 September 2018)

370 Pace, W.R. (2010) ‘First ICC Statute Review Conference: historic milestone in ICC evolution’, *EQ: Equality of Arms Review*. Vol.2, Issue.2, p.18

371 Interview with Christopher Whomersley, 18 February 2016. Transcript on file with the Author

divided over whether aggression would contribute to that aim, and this led to varying approaches to the negotiations.

Instead of actively pushing for the adoption of the amendments, ‘NGO participants in Kampala divested themselves of responsibility and then sat on the sidelines sniping in.’³⁷² Civil society organisations were on the whole ‘indistinguishable from diplomats advancing national or organisational agendas and making personal contributions to the discussion.’ As Christopher Whomersley recalls, “NGOs had their job to do and they had a particular objective, which they were going to pursue.”³⁷³ For William Schabas, indifference was also a problem, with NGOs appearing ‘quite indifferent to the incorporation of aggression into the Statute.’³⁷⁴

In failing to agree on a common approach, with organisations opting for different approaches to the aggression question in Kampala, civil society severely undermined its ability to influence state delegations. Before we take a look at these different approaches, it is worth considering a number of geopolitical factors that also contributed to civil society indifference when it came to the Review Conference.

7.4. Geopolitical factors

A number of geopolitical factors played a role in underwhelming civil society engagement with the Kampala process. The first of these was the physical location of the Conference. The decision to host the Conference in Kampala, Uganda had been taken in part to encourage participation amongst African states and NGOs. This was seen as particularly important at a time when African states were openly criticising the Court, objecting to the fact that all of the Court’s ongoing cases were in Africa. Helpful as this might have been for those African-based organisations, it did add to the expense incurred by organisations headquartered in western countries. With the Conference stretching from 31 May to 11

372 Weisbord, Op Cit. p.1313

373 Interview with Christopher Whomersley, 18 February 2016, transcript on file with the Author

374 Schabas, W. (2010) ‘An Assessment of Kampala: The Final Blog’, 17 June 2010, available at: <http://iccreviewconference.blogspot.be/2010/06/assessment-of-kampala-final-blog.html> (accessed 11 July 2018)

June, it was also difficult for all but the most well-funded organisations to participate. The exclusive and remote nature of the resort chosen similarly dampened civil society participation.

Second, were considerations brought to the fore as a result of renewed US engagement with the Court. For years, the US approach to the ICC was characterised by distant suspicion and at times outright hostility. The election of Barack Obama in 2008 heralded a shift in approach, and the US decided, as a non-State Party, to participate in the Review Conference and exert its influence over the crime of aggression negotiation process. Aside from indicating that the US was now serious about cooperating with the Court, it also made clear that it was opposed to the inclusion of the crime of aggression into the Rome Statute. This had an impact on some civil society organisations, who coveted future US engagement with the Court and were therefore reticent to damage this prospect by pushing forward with the crime of aggression amendments. This served to ‘dampen the enthusiasm of many civil society groups when it came to incorporating the crime.’³⁷⁵

Third, the Review Conference came at a time when much of the world was still reeling from the effects of the 2008 global financial crisis. This was felt particularly keenly in Europe, from where much of the Court’s financing derives. These financial considerations impacted certain delegations at Kampala more than others. As Christopher Whomersley recalls, Greece was only able to send one delegate to the Conference and she stayed in a hotel remote from the Conference compound. In his opinion, this limited her impact.³⁷⁶ That a state delegation could be impacted so severely certainly points to the likelihood that civil society groups were similarly affected.

Aside from direct impact, the crisis also contributed to an environment whereby states were more inclined to restrict rather than increase funding to the ICC. Funding has long been an issue for the Court, and as recently as November 2016, 11 states parties (Canada, Colombia, Ecuador, France, Germany, Italy, Japan, Poland, Spain, UK and Venezuela) put forward a proposal to limit the Court’s funding, citing the global financial crisis and inefficiencies in the court. As Amnesty International has reported,

³⁷⁵ Weisbord, *Op Cit.* p.1335

³⁷⁶ Interview with Christopher Whomersley, 18 February 2016. Transcript on file with the Author

this is part of a ‘damaging long-term effort by the biggest financial contributors to the court to curtail the ICC’s growth.’³⁷⁷ With the Court’s budget under increased scrutiny from some of its biggest donors, particularly following the financial crisis, many questioned the advisability of expanding its jurisdiction at the time.

Fourth, was the rise of non-state groups and unconventional methods of warfare. The US and coalition forces had been fighting Al-Qaida for a number of years and the group now known as Islamic State (IS) or Da’esh were beginning to increase their influence in the Middle East. These groups had launched attacks on a number of countries, and there was a growing realisation that the crime of aggression as drafted was ill-equipped to deal with non-state groups. Furthermore, unconventional forms of warfare were becoming more common. The US was rapidly developing its drone programme and cyber-attacks were growing in frequency. With warfare increasingly disconnected from the state, questions were raised about the utility of pushing forward with a framework designed to combat traditional uses of force. As observers from the Conference have pointed out, ‘most civil society organisations sat on the side-lines donning sceptical expressions. They had little to say about the advisability of including non-state attacks within the ambit of the crime of aggression, nor about the range of permissible responses to these attacks.’³⁷⁸

Perhaps most importantly, there remained a number of divisive issues still to be resolved before the crime could be adopted. Issues around self-defence and humanitarian intervention divided international lawyers, states and civil society alike. The scope of the jurisdictional remit and the extent to which states were permitted to opt-out of the provisions was also controversial. These unresolved issues served to divide civil society groups, preventing the Coalition from presenting a unified approach. Some of these issues will now be explored in more detail. They serve to demonstrate not only why civil society groups were divided and thus unable to exert much influence over the process, but also to provide context to chapters to follow that examine in more detail the divisions of state delegations.

³⁷⁷ Amnesty International, ‘States shouldn’t use ICC budget to interfere with its work’, 23 November 2016. Available at: <https://www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/> (accessed 11 July 2018)

³⁷⁸ Weisbord, *Op Cit.* p.1337

7.5. Issues that divided delegations

7.5.1. Aggression vs. Other Human Rights Concerns

The approach of a number of high profile NGOs – particularly human rights focused ones – was neutrality. In adopting this stance, Amnesty International, Human Rights Watch, the ICRC and others hoped to maintain sufficient impartiality to be able to allow them to continue to document human rights abuses.

Amnesty International argued that it ‘remains neutral on the question of the legality of the conflict so that it is seen as impartial when it addresses violation of human rights and humanitarian law by all sides to the conflict.’ Human Rights Watch adopted a similar stance in refusing to participate in the aggression discussions in the run-up to Kampala. The ICRC too argued that ‘it is precisely because the feelings we have towards the suffering of those we seek to assist are not “neutral” that we must adhere to political, religious and ideological neutrality – for that is what enables us to gain access to them.’³⁷⁹

In adopting this stance, prominent human rights organisations essentially argued that the international use of force was not a human rights issue. For the ICRC, an organisation whose effectiveness ‘relies on its ability to gain reciprocal access to prisoners of war on all sides of a conflict,’³⁸⁰ there are legitimate reasons why neutrality in times of war may be a legitimate policy position. For those less beholden to considerations of unfettered access, their stance is more questionable. As was outlined in judgment at Nuremburg, ‘a war of aggression is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.’³⁸¹ To ignore this, would be to ignore the ‘systemic violations of human rights, including the right to life, that occasion any large-scale and illegal use of armed force.’³⁸² Beyond this, it is surely

379 Harroff-Travel, M. (2003), ‘Principles under Fire: Does it Still Make Sense to be Neutral?’ Humanitarian Exchange, Vol.2

380 Rieffer-Flanagan, B. A. (2009) ‘Is Neutral Humanitarianism Dead? Red Cross Neutrality: Walking the Tightrope of Neutral Humanitarianism’, Human Rights Quarterly, 31, p.895

381 The International Military Tribunal for Germany (1946-09-30), Judgment of the International Military Tribunal for the Trial of German Major War Criminals: The Nazi Regime in Germany, The Avalon Project, Yale University

382 Weisbord, Op Cit. p.1315

right that humanitarian organisations take a stand against patently illegal wars. There is an important voice capable of exerting a great deal of pressure and scrutiny on offending states.

Beyond policy decisions taken for ostensibly pragmatic reasons, many NGOs shared some of the concerns of states about the inclusion of the crime of aggression. It is useful to introduce those here, before later chapters delve into them in more detail.

7.5.2. The Political Nature of the Crime

The first of these kind of arguments is that the crime of aggression is a political issue, and not a legal one, and as such it is inherently unsuited for adjudication at the ICC. For those who would argue this, the Council on Foreign relations among them, the decision to go to war is inherently political. As such, one side's unjust war is another side's just war, and the appropriate forum for adjudicating state disagreements that descended into war are through political processes.

This line of argument fails to recognise the decades of progress made in expanding international law norms and the many times that states have worked towards empowering judicial bodies to make determinations over wars of aggression. The reality is that politics and the law are entwined, never more so than at the international level. In seeking to ensure accountability, states have opted to ensure that the ICC is equipped to impartially apply a universally applicable legal standard to a set of verifiable facts. While there were certainly questions that needed to be answered over how best to ensure the independence of the ICC from state and Security Council control, the nature of the crime itself should not prevent it from falling within the remit of the ICC, and attempts to do so should continue to be resisted.

Closely linked to this argument were claims that the politically charged nature of the crime would weaken an already beleaguered court, overburdening it with an increased workload and opening it up to renewed criticism from disgruntled actors. As William Pace recalls, 'many of [the Coalition's members] were very worried that the aggression jurisdiction would heavily politicise the statute and the

court itself.³⁸³ This concern was even expressed by NGOs claiming to take no position on crime of aggression amendments. Human Rights Watch among them issued a press release a few days before the start of the Conference suggesting that ‘making the crime of aggression operational could link the ICC to highly politicised disputes between states that could diminish the court's role - and perceptions of that role - as an impartial judicial arbiter of international criminal law.’³⁸⁴

A similar, powerful contribution came from former ICTY Prosecutor, Richard Goldstone. Writing in the New York Times, he opined that it would be ‘a mistake to add the crime of aggression to the Court’s docket now.’³⁸⁵ Elaborating, he explained that ‘one of the greatest challenges as Prosecutor of the ICTY was convincing the Serbian people that the ICTY was not a politically motivated conspiracy against their country’.³⁸⁶ ‘This challenge would have been immeasurably greater – perhaps impossible – if the Tribunal’s jurisdiction had included the crime of aggression.’³⁸⁷ This view was echoed by the Open Society Institute and over forty NGOs who wrote a letter to foreign ministers just before the Review Conference arguing that ‘the current amendment proposal risks politicizing and overburdening the ICC, and undermining the integrity of the Rome Statute.’³⁸⁸

Despite these concerns, there were plenty of NGOs committed to the goal of including aggression within the remit of the ICC. In response to the Open Society Institute’s letter, the NGO Citizens for Global Solutions and a number of other civil society organisations issued a press release on 4 June 2010 distancing themselves from the Open Society’s position and offering their support to the definition of the crime of aggression.³⁸⁹ Halfway through the Review Conference and it was clear that NGOs

383 Interview with William Pace, 21 April 2016. Transcript on file with the Author

384 Human Rights Watch, ‘ICC: Strengthen International Justice at Kampala Conference’, 27 May 2010, available at: <https://www.hrw.org/news/2010/05/27/icc-strengthen-international-justice-kampala-conference> (accessed 12 July 2018)

385 Goldstone, R. (2010) ‘Prosecuting Aggression’, New York Times, 26 May 2010, available at: www.nytimes.com/2010/05/27/opinion/27iht-edpoint.html (accessed 11 July 2018)

386 Weisbord, Op Cit. p.1317

387 Goldstone, Op Cit.

388 Letter from A. Neier, President of the Open Society Institute, to Foreign Ministers, 10 May 2010, available at: www.opensocietyfoundations.org/sites/default/files/icc-aggression-letter-20100511.pdf (accessed 11 July 2018)

389 Citizens for Global Solutions, ‘US NGO's Support Definition of Crime of Aggression in Rome Statute’, Press Release, 4 June 2010

remained divided, unable to form a unified position over even the most basic of questions: should the ICC be granted jurisdiction over the crime of aggression.

As to the issue of whether the use of force is inherently political and thus unsuited to adjudication before the ICC, states have through inclusion in Rome and adoption in Kampala made their own determination. That civil society was unable to gather around a unified position in Kampala as they had done in Rome was fatal to their aspirations to play a decisive role. While we will have to wait for a definitive answer as to whether the crime of aggression will now come to weaken the Court, it is encouraging that the positive consensus at the Review Conference included the support of previously hostile powers such as the United States. More consideration will be given to this question in later chapters.

7.5.3. The Definition

Aside from the overarching question of ICC suitability, questions were raised over the formulation of the definition. Given the technical nature of the drafting, this occupied the academic community in particular. Even here there was division, with the academic community struggling to reach a consensus over whether the crime was in breach of the principle of legality. Again, this will be considered in greater detail in later chapters, but it is worth introducing here.

The principle of legality requires that crimes are sufficiently well defined so that it is clear what behaviour constitutes a crime at the time it is committed. Some – Tufts International law Professor Michael Glennon among them – have argued that the crime of aggression fails this test insofar as the ‘prosecution under it would turn upon factors that the law does not delineate, rendering criminal liability unpredictable and undermining the law’s integrity.’³⁹⁰ This view was, unsurprisingly, taken up by the

³⁹⁰ Glennon, M.J. (2009) ‘The Blank-Prosed Crime of Aggression’ 35 *The Yale Journal of International Law*, 71-114; in Kreß, C & von Holtzendorff, L. (2010) *The Kampala Compromise on the Crime of Aggression*, *Journal of International Criminal Justice*, p.1191

United States³⁹¹ and the Council on Foreign Relations who argued that the crime was – in contrast to the other core crimes – not reasonably well established in international law.³⁹²

A number of leading academics have challenged this view. Kevin Heller has called the contention that customary international law does not criminalise aggression ‘truly bizarre’, while Jennifer Trahan has argued that the claim ‘rests on an incorrect construction of the definition, ignorance of the extensive negotiating history and *travaux préparatoires* that exist vis-à-vis the crime, and failure to consult the elements of the crime.’³⁹³

It remains to be seen whether questions of legality will continue to be raised now the crime has come into force, but it seems unlikely. The SWGCA had already considered these complaints before Kampala and found them to be baseless. States took a similar decision in Kampala, refusing to open negotiations on an already agreed definition.

7.5.4. The Jurisdictional Regime

While issues surrounding the definition were largely confined to academics and those opposed to the crime’s inclusion, the jurisdictional regime divided civil society in much the same way it divided states. As the previous chapter on jurisdiction documented in detail, the outcome reached in Kampala was the result of painstaking negotiations and included a number of compromises necessary for an agreeable outcome. When it came to the jurisdiction of the Court, the same universal regime that applies to the other core crimes in the event of a Security Council referral was applied to the crime of aggression. When it came to cases referred by states or initiated by the Prosecutor, this jurisdiction was more limited than for the other crimes, not least through the opt-out clause.

391 Koh, H. (2010) ‘The Obama Administration and International Law’, Annual Meeting of the American Society of International Law, 25 March 2010, available at: <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> (accessed 11 July 2018)

392 Padmanadhan, V. (2010) ‘From Rome to Kampala: The US Approach to the 2010 International Criminal Court Review Conference’ (New York: Council on Foreign Relations Press), p.25

393 Trahan, J. (2012). ‘A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon’, *University of Pennsylvania Journal of International Law*, 33, p.912

For some NGOs, this compromise was a betrayal of established international standards. Amnesty International, for instance, hitherto neutral as to the negotiations decried the compromise as a ‘two-tier system of international justice where [states] can choose to stand above the law, retreating from the principles established in Rome.’³⁹⁴ Amnesty International must have been aware that the “two-tier” system created was necessary in order to prevent the negotiations from failing, and had decided that – in spite of this – their all-or-nothing approach was necessary to preserve the Court’s integrity. Others disagreed. FIDH and Citizens for Global Justice were just two of the prominent NGOs who decided that it was a compromise worth making. For these NGOs, the perfectionist stance adopted by Amnesty International was seen as a betrayal.³⁹⁵ To have followed their purist stance would have been to collapse the negotiations in line with the desired approach of the US and others that would have preferred the crime never entered the ICC statute books.

The jurisdictional regime continues to be a divisive issue among civil society and the international community, not least because it substantially limits the ability of the Court to exercise jurisdiction over the crime. The extent to which this negotiated outcome can be seen as an important step forward for the ICC and international justice more broadly is assessed in later chapters. What is clear is that civil society was not immune from the division created by compromises over the Court’s jurisdiction.

That being said, there were elements of the jurisdictional regime on which most civil society groups could agree: that giving the Security Council exclusive power to determine an act of aggression would threaten core principles of legality and undermine the independence of the Court. As Rutgers Law Professor and long-time participant in the SWGCA, Roger Clark, explained, ‘not only would a Security Council predetermination subvert the power of the Court to decide itself on the existence or otherwise of all the elements of the crime, but it would make it extremely difficult to build a criminal defence

394 Christopher Hall, Senior Legal Advisor, quoted in Amnesty International Press Release: ‘Opt Out System Risks Undermining ICC’, 15 June 2010. Available at: <https://www.amnesty.org/en/press-releases/2010/06/opt-out-system-risks-undermining-icc/> (accessed 11 July 2018)

395 Weisbord, *Op Cit.* p.1312

around a structure where one of the key elements was decided elsewhere and potentially on the basis of totally political considerations.’³⁹⁶

In any case, the majority of states also agreed, and as we have already seen, the Security Council was prevented from wielding *exclusive* power to make such a determination. This was an important provision, and came to be one of the few points of contention that civil society could agree on.

7.6. Conclusion

Civil society played a decisive role in establishing the International Criminal Court, preparing the groundwork for the Conference in Rome and working tirelessly to facilitate negotiations. As this chapter has documented, the same degree of influence was lacking in Kampala.

Certain groups did play a positive and progressive role, particularly through the dissemination of information; civil society groups do continue to advance the aggression cause through encouraging states to ratify and adopt the provisions; and the academic community remains engaged with the crime of aggression and the issues still to be resolved. Regardless, a lack of unity amongst the NGO community curtailed civil society’s overall impact and clipped the wings of the usually influential Coalition for the ICC. While it is true that there were a number of geopolitical factors that served to dampen civil society engagement with the aggression amendments, it was the disparate policy positions of some of the largest and most influential NGOs and a fundamental failure to agree on a desired outcome from the negotiations that explains why civil society took a back seat in Kampala.

As other chapters have documented, there remains a great deal of work to be done if the progressive ideal of ending impunity for the aggressive use of force is to be realised. This includes maintaining momentum by encouraging states to ratify and implement the amendments, helping to clarify the scope of the jurisdictional remit adopted, and working through legal and procedural issues before the first

³⁹⁶ Clark, *Op Cit.* p.1113

defendants appears in the dock. Now that we have an agreed definition and jurisdictional remit for the crime of aggression, civil society should regroup and endeavour to lead these efforts.

Having assessed in detail the amendments adopted, the following chapter will seek to apply those provisions to historic and contemporary conflicts to offer the reader an insight into the type of crimes the international community had in mind when the crime was added to the Rome Statute. It will also offer thoughts on the likelihood of future prosecutions for the crime of aggression in order to prepare the ground for later chapters looking at whether the provisions represent a step forward for the Court and its mission to end impunity for atrocity crimes.

Chapter 8 – Going Forward: The Likelihood of Investigations and Prosecutions

Previous chapters have documented in detail the background to the crime, the negotiating processes that brought us to where we are, and the provisions that were adopted in Kampala and at the ASP in December 2017, and which came into force in July 2018. This chapter will briefly recap the provisions adopted and seek to cast light on the likelihood of future investigations and prosecutions. In order to do so, the definition will be applied to historic and contemporary conflicts to offer the reader an insight into the type of crimes the international community had in mind when the crime was added to the Rome Statute. We will then apply the Court's jurisdictional regime to these conflicts, providing practical insight into the restrictive nature of the regime adopted. The final section will offer thoughts on the likelihood of future prosecutions for the crime of aggression, and the extent to which the amendments alter the international order by imposing additional considerations on those that might seek recourse to war. This chapter will prepare the ground for the following chapter that looks at whether the provisions represent a step forward for the Court in its mission to end impunity for atrocity crimes.

8.1. Introduction

As will become apparent, the definition of *acts* of aggression adopted is broad enough to cover a great deal of conventional conflicts that have taken – and still are taking – place around the world, though modern trends towards decentralised and non-state-led forms of warfare pose challenges to the crime's continued relevance.³⁹⁷ The extent to which these acts will be considered of such gravity that they reach the manifest threshold will be key to determining whether they can also be considered *crimes* of aggression. The jurisdictional provisions place further limitations on the extent to which the Court will be able to intervene in situations absent Security Council referral.

These shortcomings bring into serious doubt the extent to which the Court will be able to exercise its jurisdiction over crimes of aggression. Its success will therefore depend on the extent to which giving the crime a name and a clearly defined definition will act as a deterrent to state leaders. It will also

³⁹⁷ Previous chapters have documented potential shortcomings in the aggression amendments, not least the failure to extend the definition to cover cybercrimes, or to adequately provide jurisdiction over non-state actors.

depend on whether the aggression amendments will come to be seen as a first step towards eradicating impunity for waging aggressive war, rather than representing the upper ceiling of the international community's ambitions for the crime. The extent to which it is indeed a step forward is discussed in following chapters. In order to facilitate discussion as to whether this represents a forward step, it will be useful to conceptualise the application of the amendments. This section, will apply the definition to relatively recent uses of armed force to give an insight into the type of crimes the Court may come to have jurisdiction over.

8.2. The Definition

As chapter 3 on the definition documented, Article 8 *bis* sets out that the '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.³⁹⁸ An '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. Such use of armed force includes invasion, bombardment, blockade, attacking the armed forces of another state, contravening an agreement to station forces in another state, allowing one's territory to be used by another state to attack a third state, and the sending of armed bands.

As the following section will demonstrate, there are a multitude of examples of armed force having been used since 1945. Indeed, most examples of armed conflict will have involved the use of one of the enumerated acts that constitute an act aggression. What elevates the use of armed force from an act of aggression to a crime of aggression are the subjective elements contained with Article 8: that the act of aggression, *by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*. It is this additional, high threshold that ensures only the most flagrant violations will be considered a crime of aggression.

³⁹⁸ ICCSt, Art.8 bis

The test for the Court will always be: was there a use of armed force by a state against another state; and was that use of force serious enough to constitute a manifest violation of the Charter of the UN? Only then can we seek to establish who has individual criminal responsibility for those acts, i.e. who exercised effective control in planning, preparing, initiating or executing the use of force.

Applying the definition adopted to past conflicts only tells part of the story. In order to fully assess whether the Court will truly be empowered to take action in response to future violations of international law it is also necessary to consider the restrictive jurisdictional remit of the Court and the limiting impact it will have, and this consideration will form part of the final section of this chapter.

8.2.1. Applying the Aggression Amendments

There have been many wars since 1945. Based on the definition we now have, which ones were crimes of aggression?

The Security Council has been reluctant to pass resolutions expressly condemning aggressive acts and has only passed 31 such resolutions since its inception.³⁹⁹ Some of the more controversial uses of armed force have passed without Security Council condemnation. Now that we have a court equipped to try individuals responsible for the gravest breaches of international criminal law, the Security Council will be under increasing pressure to make appropriate determinations, free of political bias, and refer situations for investigation to the Prosecutor. This section will look briefly at some of the historical situations, which, had the Court been granted jurisdiction in advance of their commencement, might have resulted in international criminal law charges.

These illustrative examples have been chosen primarily because they are some of the most well-known examples of the use of force of the past 30 years. This is partly due to the visibility that acts of aggression are now given in the age of modern media, but is also due to the involvement of Western states. As

³⁹⁹ Weisbord (2008), *Op Cit.* p.169. Nineteen condemning South Africa for aggression against several African States (between 1976 and 1987); six condemning the minority regime of Southern Rhodesia for aggression against various African States (between 1973 and 1979); two condemning acts of aggression perpetrated against Seychelles (in 1981 and 1982); two condemning Israel for aggression against Tunisia (in 1985 and 1988); one condemning aggression against Benin (in 1977); and one condemning Iraq for aggression against diplomatic premises in Kuwait (in 1990).

readers will likely be familiar - at least in a cursory sense - with the debate surrounding the legality of these interventions, it may be useful to demonstrate how they might have been measured against the crime in force today.

It is certainly the case that the crime of aggression will not apply retrospectively and as such, there is no question that the Court will ever have jurisdiction over any of the following situations. In addition, these case studies are included along with the important caveat that they are illustrative only. A full exploration of the legality of these situations would, in any case, have been a role for the Court itself, utilising all of the investigative and prosecutorial expertise at its disposal. Something remotely close to replicating that is not in the slightest bit possible here, and nor is it attempted.

Their inclusion is, rather, designed to provide practical application to the provisions adopted, breathing life into legalistic text and offering an insight into the type of crimes the court may one day have jurisdiction over. Perhaps more importantly, it should help to shed light on the impact the jurisdictional regime adopted will have on the ability of the Court to act in future.

8.2.1.1. Iraqi Invasion of Kuwait, 1990

Following a protracted period of diplomatic discord and disagreement related to financial payments and oil extraction, Saddam Hussein – on the 2 August 1990 – ordered 100,000 Iraqi troops into neighbouring Kuwait. In the days following the invasion, Saddam Hussein declared Kuwait the 19th province of Iraq, effectively annexing the state. The annexation lasted for seven months, and was ended only by a UN-authorized military intervention of coalition forces led by the United States.⁴⁰⁰

400 See Friedman, N. (1991) 'Desert victory: The war for Kuwait: The War for Kuwait', in Simons, N. 'The Scourging of Iraq: Sanctions, Law and Justice', 2nd ed, 1998, Basingstoke: Macmillan; and Warbrick, C. (1991) 'The Invasion of Kuwait by Iraq', *International & Comparative Law Quarterly*, p.482

Along with Nazi attacks on neighbouring countries, the Iraqi invasion of Kuwait is seen as the classic example of aggression in the twentieth century, with there being little disagreement amongst international legal scholars that Saddam Hussein's use of force amounted to a war of aggression.⁴⁰¹

The Iraqi invasion of Kuwait comprised an invasion of the state of Kuwait, threatening its sovereignty, territorial integrity and political independence. The invasion and subsequent annexation constituted an outright attack on the Kuwaiti armed forces, and included a bombardment through aerial strikes of strategic Kuwaiti targets. The attack was not carried out in self-defence, nor was it undertaken for humanitarian purposes.⁴⁰² Far from being authorised by the UN, the annexation was maintained in the face of no fewer than 12 UN Security Council resolutions demanding immediate withdrawal of Iraqi forces from Kuwait.⁴⁰³ Furthermore, given the of character, gravity and scale of the invasion and annexation – with Iraqi forces overpowering Kuwaiti forces, seizing complete control of the state, forcing the ruling Kuwaiti royal family into exile, conducting summary executions in response to localised uprisings, and plundering the vast wealth of the nation – few international legal scholars would contend that Iraq's actions did not amount to a manifest violation of the Charter of the UN.

The Iraqi invasion of Kuwait undoubtedly amounts to a crime of aggression, based on the definition we have today.

8.2.1.2. NATO Intervention in Kosovo

The Kosovo War had begun in late February 1998, and was fought by the Federal Republic of Yugoslavia (the Republics of Montenegro and Serbia), and the Kosovo Albanian rebel group known as the Kosovo Liberation Army (KLA), supported by the Albanian army. Repeated Security Council

401 See also Cassese, A. (2003) *International Criminal Law*, OUP, p.113: 'Nobody would deny that the attack by Iraq on Kuwait was... an international crime of aggression.' And the informal discussion paper UN doc. A/AC.249/1997/WG.1/DP.20, 11 December 1997, at 2, put forward by German, in which 'the aggressions committed by Hitler and the one committed against Kuwait in August 1990' are qualified as 'obvious and indisputable cases' of the crime of aggression.

402 For further in-depth analysis of the legal issues arising from the Iraqi invasion, see O'Connell, M.E. (1990) 'Enforcing the Prohibition on the Use of Force: The UN's Response to Iraq's Invasion of Kuwait', vol.15 (3), pp.453-486; Greenwood, C. (1991) 'Iraq's invasion of Kuwait: some legal issues', *Cambridge Review of International Affairs*; Greenwood, C. (1992) 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', *Modern Law Review*, vol.55 (2), p.153

403 This is in sharp contrast to the international armed response, which – although undertaking force that would fall within the objective definition of acts of aggression – was taken both in collective self-defence of Kuwait – and thus permissible under Article 51 of the U.N. Charter – and pursuant to Security Council authorization – and therefore permissible under Chapter VII. As such, the international coalition's actions were clearly not of the character necessary for them to constitute a crime of aggression, see Trahan (2012), *Op Cit.* p.927

resolutions demanding the cessation of hostilities failed to end the systematic campaign of terror, including murder, rape, arson and severe maltreatments⁴⁰⁴ ongoing in the region, and in the spring of 1999 NATO intervened.⁴⁰⁵ The 11-week NATO bombing campaign against the Federal Republic of Yugoslavia that followed ‘was the first sustained use of armed force by the NATO alliance in its 50-year existence; the first time a major use of destructive armed force had been undertaken with the stated purpose of implementing Security Council resolutions but without Security Council authorisation; [and] the first major bombing campaign intended to bring a halt to crimes against humanity being committed by a state within its own borders.’⁴⁰⁶

NATO’s use of armed force was at the time – and remains – controversial.⁴⁰⁷ The use of force almost certainly falls within the definition’s enumerated acts of aggression: the air strikes – lasting from March 24 to June 11, 1999 – represented a sustained bombing campaign involving approximately one thousand aircraft operating from air bases in Italy and the aircraft carrier the USS Theodor Roosevelt stationed in the Adriatic Sea. Cruise missiles were also used.⁴⁰⁸ The extent to which the intervention could fall within the broader definition of a crime of aggression insofar as it was not authorised by the Security Council and the use of force was sufficient in its character, gravity and scale to amount to a manifest violation of the Charter of the UN is less clear.

For some, it was a welcome intervention in furtherance of humanitarian concerns from a broad international coalition, supported – if not authorised – by Security Council resolutions.⁴⁰⁹ Following UN inaction in Rwanda only a few years earlier, the NATO intervention was seen by many as morally, if not strictly legally, justifiable. Jürgen Habermas, for some the most important German philosopher

404 Case of Vuckovic, No. AP.15/2001, Supreme Court of Kosovo, 31 August 2001, quoted in Schabas, W. (2003), ‘National Courts Finally Begin to Prosecute Genocide, the “Crime of Crimes”’, *Journal of International Criminal Justice*, p.56

405 Wedgwood, R. (1999) ‘NATO’s Campaign in Yugoslavia’, *American Journal of International Law*, Vol.93, p.828

406 Roberts, A. (1999), ‘NATO’s ‘Humanitarian War’ over Kosovo’, *The International Institute for Strategic Studies*, vol.41 (3), p.102

407 For wider discussion on the legality of the use of force, see Greenwood, C. (2000) ‘International law and the NATO intervention in Kosovo’, *International & Comparative Law Quarterly*, Vol.39 (1), p.926; Wheeler, N.J. (2000) ‘Reflections on the Legality and Legitimacy of NATO’s Intervention in Kosovo’, *International Journal of Human Rights*, p.145; and Alexander, K.W. (1999) ‘Nato’s intervention in Kosovo: the legal case for violating Yugoslavia’s national sovereignty in the absence of Security Council approval’, *Houston Journal of International Law*, Vol.22, p.403

408 Glennon (2009), *Op Cit.* p.92

409 Charney, J.I. (1999) ‘Anticipatory humanitarian intervention in Kosovo’, *American Journal of International Law*, Vol.93, p.834

and social theorist of the second half of the twentieth century,⁴¹⁰ suggested the intervention was ‘illegal but morally necessary’.⁴¹¹ For Michael Walzer, ‘though NATO certainly violated the territorial integrity of Yugoslavia, it did not put the survival of the Serbian nation in jeopardy. Hence the war was not, from a moral standpoint, an act of aggression. It also was not a wrong of any lesser sort; its “moral necessity” was full justification.’⁴¹²

As the previous chapter on the definition explored in more detail, the Kosovo case is used as the archetypal example of humanitarian intervention, a ‘grey-area’ of international law that was raised frequently during the Kampala negotiations. It falls within this grey-area of international law precisely because the weighing of moral and legal considerations inevitably divides opinion, making it difficult to delineate genuine acts of humanitarian intervention from unjustifiable acts of aggression.⁴¹³ Indeed, Benjamin Ferencz has pointed out that ‘unauthorised humanitarian interventions can be morally legitimate, but it is not up to the protagonists to decide whether they are lawful. An illegal use of force does not automatically become lawful because it is done with good intentions.’⁴¹⁴

Perhaps this conflict is the reason the aggression amendments and accompanying Understandings offer no definitive answer as to whether the Court will take an expansive approach with regard to including cases of genuine humanitarian intervention, though academic opinion suggests it would be wise for the Court to focus only on the most egregious of crimes. During an informal Panel Discussion at the Kampala Review Conference, Michael Scharf stated that cases of true humanitarian intervention would not come within the ‘manifest’ qualification.⁴¹⁵ Claus Kreß, another veteran of the SWGCA process and key participant in Kampala, has also stated that ‘genuine humanitarian intervention, such as the

410 Encyclopaedia Britannica, available at: <https://www.britannica.com/biography/Jurgen-Habermas> (accessed 12 July 2018)

411 Walzer, M. (2007) ‘The Crime of Aggressive War’, Washington University Global Studies Law Review, vol.6 (3), p.638. For similar discussion, see also Chinkin, C.M. (1999) ‘Kosovo: A “Good” or “Bad” War?’, American Journal of International Law, Vol.93 (4), p.841

412 Ibid.

413 See also Robarts, A. (1999) ‘Nato’s ‘Humanitarian War’ over Kosovo’, Survival, Vol.41 (3), p.103; Schnabel, A. and Thakur, R. (2001) ‘Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship’, Refugee Survey Quarterly, Vol.20 (3), p.176; and Mertus, J. (1999) ‘Reconsidering the legality of humanitarian intervention: lessons from Kosovo’, William and Mary Law Review, Vol.41, p.1743

414 Ferencz, B. (2017) ‘Epilogue. The Long Journey to Kampala: A Personal Memoir’ in Kreß & Barriga (eds), The Crime of Aggression: A Commentary Volume 2, p.1517

415 See Scharf, M. (2010) ‘Live from Kampala: The Aggression Debate and the Manifest’ Qualifier’, American Society of International Law

1999 NATO air campaign in Kosovo, is also open to genuine debate and is thus excluded from the scope of the draft of Article 8 *bis*.⁴¹⁶

As such, there is broad academic support for the proposition that the NATO intervention in Kosovo would fail to meet the ‘manifest’ threshold on the basis that the threshold was designed specifically to exclude such cases of humanitarian intervention.⁴¹⁷ That being said, it would certainly be wise for states looking to deploy their forces to prevent humanitarian catastrophes from unfolding to first seek Security Council approval. Without it, it might fall to the Court to determine whether the resulting use of force was justified or instead a manifest violation demanding prosecution.

8.2.1.3. US-led Invasion of Iraq, 2003

As we’ve seen already, uses of armed force fall along a spectrum. Classical wars of aggression such as the Nazi attacks on neighbouring countries in 1939 and the Iraqi invasion of Kuwait in 1990 constitute both acts and crimes of aggression. Others, such as the NATO intervention in Kosovo fall towards the other side of that spectrum insofar as they are unlikely to reach the manifest threshold required by the aggression amendments. The US-led invasion of Iraq in 2003 falls somewhere between the two, and is perhaps the most controversial – and the most widely publicised – use of armed force of the twenty-first century.⁴¹⁸

The 2003 invasion of Iraq began on 19 March 2003, lasting until 1 May 2003. The initial invasion involved the deployment of over 177,000 troops, the majority from the United States.⁴¹⁹ The UK, and to a lesser extent Australia and Poland, were also major contributors. The initial invasion phase gave way to prolonged military occupation, with US troops stationed in Iraq until 2011. A conventional war, with heavy aerial bombardment, the invasion resulted in the capture of the Iraqi capital Baghdad, the

416 Kreß (2010), Op Cit. p.1140-1141.

417 For more in-depth consideration of NATO’s intervention in Kosovo, see Roberts, Op Cit. p.101-123; Henkin, L. (1999) ‘Kosovo and the Law of Humanitarian Intervention’, The American Journal of International Law, Vol. 93, No. 4, pp. 824-828; Tesón, F. (1988) Humanitarian Intervention: An Inquiry into Law and Morality, 2nd Edn NY, Transnational Publishers; Robinson, M. (1999) ‘Report on the Human Rights Situation Involving Kosovo’, UN Commission on Human Rights, Geneva, 55th session, 30 April 1999

418 Entman, R. M., & Page, B. I. (1994) ‘The News Before the Storm: The Iraq War Debate and the Limits to Media Independence’, in T. Mayer, & E. S. Greenberg (Eds.), The Gulf War, The Media, and U.S. Foreign Policy (pp. 82-101). Chicago: University of Chicago Press.

419 For a comprehensive overview of the phases of war, see Keegan, J. (2010) ‘The Iraq War’, Hutchinson, London

arrest of its President Saddam Hussein, and the eventual installation of a new Iraqi government. The invasion was premised on the existence of weapons of mass destruction in Iraq, with the stated mission of the coalition being to ‘disarm Iraq of weapons of mass destruction, to end Saddam Hussein's support for terrorism, and to free the Iraqi people.’⁴²⁰ No weapons of mass destruction were ever found.

As with the previous examples of warfare, that the coalition use of force constitutes one or more of the acts of aggression enumerated in the amendments is not in doubt. The term “shock and awe” - used by US Armed Forces officials⁴²¹ - adequately hints at the ferocity of the simultaneous aerial bombardment and ground invasion inflicted on Baghdad, tactics designed to overpower the Iraqi forces.

And so, we turn again to the legality of such use of force, and the extent to which it constituted a manifest violation of the Charter of the UN. To this end, more than one justification has been presented by those involved in the decision-making process, either at the time or subsequently: the invasion does not amount to a manifest violation of the Charter of the UN on the basis: (1) of earlier UN and Security Council resolutions authorising the use of force; (2) that it was taken in pre-emptive self-defence; and (3) that it was underlined by humanitarian considerations. The international community is broadly - although by no means unanimously – in agreement that none of these justifications render the invasion legal under international law.⁴²²

As to the claim that the invasion was justified on the basis of early Security Council resolutions, two such resolutions are central. The first is Security Council resolution 678 of 29 November 1990 which had been issued almost 13 years prior and gave states explicit authorisation to use ‘all necessary means’ to force Iraq out of Kuwait and ‘restore international peace and security in the area.’ Having never been

420 Yoo, J. (2003) ‘International law and the war in Iraq’ *American Journal of International Law*, Vol.97 (3), p.563

421 ‘Iraq Faces Massive U.S. Missile Barrage’ (CBS News, January 24, 2003, available at: <https://www.cbsnews.com/news/iraq-faces-massive-us-missile-barrage/> (accessed 26 June 2018)

422 The legality of the Iraq war has been discussed at length. See, for instance, Buchwald, T.F. and Taft, W.H. (2003) ‘Preemption, Iraq, and international law’, *American Journal of International Law*; Paulus, A. (2003) ‘The war against Iraq and the future of international law: hegemony or pluralism’, *Michigan Journal of International Law*, Vol.25, p.691; and Brunnée, J. and Toope, S.J. (2004) ‘The use of force: international law after Iraq’, *International & Comparative Law Quarterly*, Vol.53 (4), p.785

formally rescinded, it was claimed as a basis for further action against Iraq to once again restore peace and security to the region, albeit in a different context and altogether different decade.

As Kai Ambos – newly appointed Judge of the Kosovo Specialist Chambers – reasons, ‘the 2003 US-led invasion in Iraq, albeit considered by most international lawyers as an unlawful act of aggression, might not have amounted to a crime of aggression due to the absence of a ‘manifest violation’ of the UN Charter in light of the fact that a respectable scholarly opinion existed according to which the invasion was justified, especially on the basis of Security Council resolution 678 of 29 November 1990.’⁴²³ The existence of such scholarly opinion was also recognised by Claus Kreß,⁴²⁴ and indeed at least one of the current judges of the ICJ, Christopher Greenwood, opined at the time – and holds even today – that the war was legal by reason of Security Council resolution 678.⁴²⁵

The majority, however, reject Security Council resolution 678 as capable of authorising the invasion, with the International Commission of Jurists expressing shortly before the invasion their ‘deep dismay that a small number of states are poised to launch an outright illegal invasion of Iraq, which amounts to a war of aggression.’⁴²⁶ Security Council resolution 678 makes specific reference to the government of Kuwait, the coalition against Saddam Hussein having been created for the specific purpose of liberating Kuwait. The coalition of nations to which the resolution was addressed was wholly different in composition from the one which invaded Iraq, and the context completely different. To most international lawyers, and indeed this author, it is difficult to accept that Security Council resolution 678 could be interpreted – in good faith – so as to authorise the invasion of Iraq.

Similarly, UN resolution 1441 was also considered by some to be justification enough. UN resolution 1441, issued shortly before the invasion, gave Saddam Hussein ‘a final opportunity to comply with

⁴²³ Ambos (2014) Op Cit. p.201

⁴²⁴ Kreß, C. (2003) ‘Criminal law and aggressive war in light of the Iraq case, *Journal of Criminal Justice* (translated from German), ‘Strafrecht und Angriffskrieg im Licht des “Falles Irak”’, 115 *Zeitschrift für die gesamte Strafrechtswissenschaft*, at 331 (since a respectable view exists which holds that the war was legal, the Iraq war does not constitute a war of aggression).

⁴²⁵ See Greenwood, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, 2008), at para. 101; Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, 4 *San Diego Int’l LJ* (2003) 7, at 34–35

⁴²⁶ International Commission of Jurists, 18 March 2003, ‘ICJ deplores moves toward a war of aggression on Iraq’, available at: <https://www.icj.org/icj-deplores-moves-toward-a-war-of-aggression-on-iraq/> (accessed: 12 July 2018)

its disarmament obligations', but stopped short of authorising military action. In spite of this, the UK and US have pointed to repeated Iraqi violations of that and other resolutions as a pretext for war. Tony Blair's attorney general, Lord Goldsmith, suggested at the time that UN resolution 1441 might allow 'all necessary means' to remove Saddam without any further Security Council motion, though he admitted that he was not confident that any court would agree.⁴²⁷

Lord Goldsmith was right to be sceptical. He is likely to have known that representatives in the Security Council, including from the US and UK, had been clear at the time the resolution was passed that the resolution contains no 'hidden triggers' and no 'automaticity' with respect to the use of force, and as such, a further authorising resolution would be required before recourse to war.⁴²⁸ In addition, France, Russia and China, three permanent members of the Security Council, had issued a declaration indicating that the resolution excludes such authority. As the International Commission of Jurists also concluded, 'war waged without a clear mandate by the Security Council would constitute a flagrant violation of the prohibition of the use of force. Security Council resolution 1441 does not authorise the use of force. The bottom line is that nine members of the Security Council, including the five permanent members, need to actively approve the use of force – such support is blatantly lacking.'⁴²⁹

As such, there is broad consensus that the invasion took place without UN or Security Council authorisation.⁴³⁰ For Geoffrey Robertson, the 'invasion without Security Council approval took us backwards towards the lawless world described by Thucydides, in which the strong do what they wish and the weak suffer what they must'.⁴³¹ For Elizabeth Wilmschurst, deputy legal adviser to the British Foreign Office and a member of the Prep Com working group defining aggression, such an unlawful

427 Robertson, G. (2016) 'Putting Tony Blair in the dock is a fantasy', The Guardian, 5 July 2016, article available at:

<https://www.theguardian.com/commentisfree/2016/jul/05/tony-blair-in-the-dock-fantasy-wars-aggression> (accessed 12 July 2018)

428 UN Security Council Verbatim Report 4644. S/PV.4644, at 3: John Negroponte, United States, 8 November 2002

429 ICJ, March 18 2003, Op Cit.

430 This was a view expressed by UN Secretary General Kofi Annan, see Kofi Annan in Ewen MacAskill & Julian Borger (2004) 'Iraq war was illegal and breached UN charter, says Annan', The Guardian, 16 Sep 2004. Article available at: <https://www.theguardian.com/world/2004/sep/16/iraq.iraq> (accessed 12 July 2018). See also: Kofi Annan, BBC Interview (15 September 2004), reported in 'Lessons of Iraq war underscore importance of UN Charter', UN News Centre, available at: <http://www.un.org/apps/news/story.asp?NewsID=11953#WcktZcZ7Eb0> (accessed 25 September 2017). See also Slaughter, A.M. (2004) 'The use of force in Iraq: illegal and illegitimate', Proceedings of the ASIL Annual Meeting

431 Robertson, Op Cit.

use of force on such a scale amounted to the crime of aggression. She resigned her post on the eve of the invasion.⁴³²

Additionally, some would claim that the manifest threshold was not reached on the basis that the invasion was taken in pre-emptive self-defence; that Saddam Hussein was capable of launching WMD at short notice. As the previous chapter on the definition outlined, proving legitimate self-defence is fraught with difficulty under international law, pre-emptive self-defence even more so. The contention that Tony Blair and George Bush genuinely believed that Saddam Hussein had been storing weapons of mass-destruction has been raised as a defence despite WMD having never been found, and this claim has been strengthened by the recent findings of the Chilcot Report, which, in deciding whether the decision to go to war was influenced by a ‘sexing-up’ of evidence of WMDs, concluded that ‘there is no evidence that intelligence was improperly included in the dossier or that No 10 improperly influenced the text’. Tony Blair may well point to the available evidence at the time and the UK House of Commons vote authorising UK action, and additionally suggest that it would have been unlikely that Security Council consent for an authorising resolution could have been obtained. Nevertheless, the extent to which this argument would be accepted by any competent Court is at least open to question, and he would be on shaky ground arguing pre-emptive self-defence before the ICC.

As the ICJ concluded at the time, ‘the competency of the Security Council to authorize the use of force is not unlimited. It may only do so to ‘maintain or restore international peace and security’. As states resisting the use of force at this moment understand, the determination upon whether there is a present threat to international peace and security must be based on sufficient objective criteria. The evidence presented by states pressing for war is less than convincing.’⁴³³

Finally, it may be claimed that the invasion was undertaken for humanitarian purposes, with the brutality of the Saddam Hussein regime and his multiple crimes against his own people well publicised. The

432 A declassified letter of Elizabeth Wilmschurst’s resignation letter, dated 18 March 2003, is held in the National Archives, available at: <https://webarchive.nationalarchives.gov.uk/20171123123152/http://www.iraqinquiry.org.uk/media/242786/2003-03-18-minute-wilmschurst-to-wood-untitled.pdf> (accessed 25 January 2019)

433 ICJ, March 18 2003, Op Cit.

2003 invasion of Iraq, perhaps more than most conflicts, highlights the dangers of allowing humanitarian intervention and the human rights framework more generally to be used as justification for war. Saddam Hussein was certainly a tyrant and a mass-murderer, but few believe claims of humanitarian intervention justify the invasion. The hundreds of thousands killed in Iraq as a result of the invasion,⁴³⁴ the million-strong protest against it in London alone,⁴³⁵ and the subsequent instability created in the region,⁴³⁶ count against any claim of legitimate humanitarian intervention.

As ICJ Legal Adviser Ian Seiderman wrote at the time, ‘the present regime in Iraq is certainly responsible for widespread and systematic human rights violations over the years. However, this reprehensible human rights record does not by itself provide a legal basis for resort to war. The appropriate method of addressing such gross abuses is to treat them as international crimes and to use and strengthen enforcement mechanisms, such as the International Criminal Court.’⁴³⁷

Since 1945, the use of military force is regularly accompanied by an official legal justification, quite often with a far-fetched interpretation of the right to self-defence or claims of humanitarian intervention. The invasion of Iraq was no different. As ICC Judge Hans-Peter Kaul has eloquently pointed out, ‘everybody may have his or her own opinion about these so-called “justifications” for war-making. There is, however, a great risk and danger which cannot be overlooked. If these “justifications”, which often are the subject of massive propaganda campaigns, are indeed accepted by the international community, this acquiescence undermines the respect for the general prohibition of the use of military force under international law – one of the indispensable fundamentals of international peace and justice.’⁴³⁸

434 Estimates vary, but are consistently in the hundreds of thousands. See Hagopian A, Flaxman AD, Takaro TK, Esa Al Shatari SA, Rajaratnam J, et al. (2013) ‘Mortality in Iraq Associated with the 2003–2011 War and Occupation: Findings from a National Cluster Sample Survey’, University Collaborative Iraq Mortality Study. PLOS Medicine 10 (10)

435 ‘‘Million’ march against Iraq war’, BBC, 16 February 2003, available at http://news.bbc.co.uk/2/hi/uk_news/2765041.stm (accessed 25 January 2019)

436 Enterline, A. J., & Michael Greig, J. (2008) ‘Perfect Storms? Political Instability in Imposed Politics and the Futures of Iraq and Afghanistan’, *Journal of Conflict Resolution*, Vol. 52 (6), pp.880–915.

437 Ibid.

438 ICC Judge, Hans Peter Kaul, https://www.icc-cpi.int/NR/rdonlyres/6B2BA9C6-C5B5-417A-8EF4-DA3CA0902172/282974/07022011_ImplicationsoftheCriminalizationofAggress.pdf

The question of whether Tony Blair in particular⁴³⁹ could stand trial for the crime of aggression was raised even before the invasion took place, and in March 2003, the attorney general of the UK, Lord Goldsmith, sent a note to Prime Minister Tony Blair warning that, though the possibility of prosecution is remote, ‘aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognized by the common law which can be prosecuted in the U.K. courts.’ The subsequent House of Lords case of *R v Jones (2006)* established that the crime of aggression was a part of customary international law and as such was ‘sufficiently certain to be capable of being prosecuted in international tribunals’, but stopped short of agreeing that the crime of aggression is automatically part of the law of England, requiring the additional step of legislative approval before it could be enforced in a UK court.⁴⁴⁰ As such, it is well established that Tony Blair could not face prosecution in the UK for the crime of aggression, and with the crime not yet in force internationally nor can he be tried in The Hague.

That being said, there is a strong case to be made that the 2003 invasion of Iraq represented a manifest violation of the Charter of the UN. This view was supported both before the invasion and afterwards by UN Secretary General at the time, Kofi Annan, who commented that he had ‘indicated it was not in conformity with the UN charter [and] from [the UN’s] point of view and from the charter point of view, it was illegal.’⁴⁴¹ Based on the current definition it also represents a crime of aggression. Had the Court been granted jurisdiction over the crime prior to the invasion, there would have been a case to answer. What is more, as Noah Weisbord has speculated: ‘had aggression been a prosecutable crime in 2003, Prime Minister Tony Blair — who relied heavily on the legal advice of his attorney general — may have never brought his country to war in Iraq without a Security Council resolution authorizing him to do so.’⁴⁴²

439 George Bush also, but to a lesser extent given the US is not a State Party

440 Weisbord (2008), Op Cit.

441 Kofi Annan in Ewen MacAskill & Julian Borger (2004) ‘Iraq war was illegal and breached UN charter, says Annan’, The Guardian, 16 Sep 2004. Article available at: (accessed 12 July 2018). See also: Kofi Annan, BBC Interview (15 September 2004), reported in ‘Lessons of Iraq war underscore importance of UN Charter’, UN News Centre, available at: (accessed 25 September 2017)

442 Weisbord, N. (2010), ‘Who Started the Fight?’, Opinion Piece for The New York Times, available at: <http://www.nytimes.com/2010/05/04/opinion/04iht-edweisbord.html?mcubz=3> (accessed 12 July 2018)

8.3. Jurisdiction

As the previous chapter on the definition outlined, and this chapter has sought to illuminate, the aggression amendments have deliberately defined aggression more narrowly than does customary international law, incorporating a ‘manifest’ threshold that seeks to ensure that only the most egregious violations of the UN Charter are captured. This purposefully leaves out leaders implicated in ‘grey-area’ interventions.⁴⁴³ What this section also demonstrates, however, is that there are uses of force in recent history that would have met this threshold and thus there are leaders that could have faced prosecution for crimes of aggression.

Delegations in Kampala were acutely aware of this fact and sought – through the jurisdictional provisions – to limit the reach of the Court. These limitations have been well documented throughout and so will not be repeated here. For completeness though, it is important to demonstrate how those restrictions are likely to play out once the crime comes into force. The historical cases provided above are again instructive.

In addition to establishing individual criminal liability for the acts of aggression listed above, it is necessary that the Court also has jurisdiction over those individuals.

As the previous chapter on jurisdiction outlined in detail, a Security Council referral is the most expansive in that it grants the Court the power to investigate any state regardless of whether they have adopted the aggression provisions or indeed regardless of whether they are even a State Party. This means that, in theory, any state in the world could potentially fall within the remit of the Court, though of course permanent members of the Security Council *could* wield a veto to protect themselves or their allies from prosecution.

⁴⁴³ Ibid.

State referrals and proprio motu investigations far are less expansive. In these instances, the Court will only have jurisdiction over states that are party to the ICC, have ratified the aggression amendments,⁴⁴⁴ and have not subsequently opted-out of the aggression provisions, and even then, only when the acts of aggression have been committed against a State Party. As such, there are numerous situations around the world involving non-States Parties in which a Security Council referral is the only possible route for granting the Court jurisdiction.

8.3.1. Applying the Aggression Amendments

Before applying the Court's current jurisdictional regime to the historical uses of armed force outlined above, it is worth repeating the important caveat that they are illustrative only. Only a hypothetical evaluation is possible given that the Court did not have jurisdiction at the time and the provisions do not apply retrospectively. That being said, going forward the Court will need to consider in which situations it is empowered to act. This exercise mirrors that in which the Court will find itself engaged in the future, while providing an insight into the restrictive nature of the regime adopted.

8.3.1.1. Iraqi Invasion of Kuwait, 1990

And so, what would the prospects be for ICC action over the Iraqi invasion of Kuwait if it were committed today? Firstly, Iraq is not a state party. As such, the Court cannot initiate investigations and nor can another state refer the situation to the Court. The only avenue for prosecution would be via Security Council referral. Indeed, as Kuwait is also not a state party, a Security Council referral would be needed were the Court to investigate whether any of the core ICC crimes had been committed as part of the invasion and subsequent annexation.

Given the willingness of the Security Council to authorise an armed response to the Iraqi invasion, it seems sensible to postulate that such a referral would be forthcoming.

⁴⁴⁴ Based on a negative understanding of Article 121(5)

8.3.1.2. NATO Intervention in Kosovo

Turning now to the NATO intervention in Kosovo, as has been demonstrated above, it is unlikely that the manifest threshold required was met. The Prosecutor of the ICC would likely conclude, therefore, that she was not in a position to proceed with investigations into crimes of aggression arising from NATO's use of armed force. Were this not the case however, and in fact it was determined that the intervention *was* of the character, gravity and scale required, the next step would be for the Court to establish jurisdiction. This would be a somewhat more complex task given the multitude of coalition partners that intervened under the NATO umbrella. The Balkan region has also undergone significant change since the conflict, fragmenting into disparate sovereign states. Were a similar conflict to break out in the coming years, the ICC would only have jurisdiction over NATO member states that were also State Parties to the Rome Statute, had ratified the aggression amendments and had not subsequently opted-out. There are currently eight such states: Belgium, Germany, Iceland, Luxembourg, the Netherlands, Poland, Portugal, and Spain.⁴⁴⁵

The Court could then exercise that jurisdiction once two conditions had been fulfilled: the first being that it could be established that the leaders of those states were in a position within NATO whereby they could exercise effective control in planning, preparing, initiating or executing the use of force. Such an evaluation is beyond the scope of this illustrative exercise, though it is likely that high-ranking NATO officials from these eight states were in such a position. The second necessary condition is that one of the victim states was also a State Party and had ratified the aggression amendments. Again, it is purely speculative given that the target of the NATO bombing campaign, the Federal Republic of Yugoslavia, no longer exists in its current form. Serbia, Montenegro and Kosovo – as they are now known – bore the brunt of the NATO bombardment. Of these, Serbia and Montenegro are both States

⁴⁴⁵ NATO members at the time of the Kosovo intervention numbered 19 and included Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom, the United States. Of these, Belgium, Germany, Iceland, Luxembourg, the Netherlands, Poland, Portugal, and Spain have already ratified the amendments, with others having committed to doing so.

Parties to the ICC. Although neither have yet ratified the aggression amendments, they are actively working on ratification or have made concrete commitments to doing so.⁴⁴⁶

Were all these conditions to be met, or were the Security Council to refer the situation, then the Court could take action. With the UK, US and France all involved in the NATO campaign, it is unthinkable that they would refer such a situation to the Court. It is also unlikely – even if they had insulated themselves from prosecution by not ratifying the amendments – that they would sit idly by while the Court investigated one of their coalition partners. As previous chapters have documented, the Security Council retains the ability under Article 16 to halt investigations, and it is certainly not unthinkable that they would use this power in such circumstances.

8.3.1.3. US-led Invasion of Iraq, 2003

Finally, we turn to the 2003 invasion of Iraq. As was demonstrated above, there is a strong case to be made that the invasion – based on today’s definition of aggression – represented a manifest violation of the Charter of the UN and thus a crime of aggression. But what of jurisdiction? For obvious reasons, even if the Court were to have had jurisdiction over the crime of aggression at the time, we could rule out the possibility of a Security Council referral. It is inconceivable that the US and UK would willingly open themselves up to investigation by the ICC into the decision to invade Iraq. Prosecutor-initiated and state referred investigations fare no better. As Iraq is not a State Party to the Rome Statute, the Court does not have jurisdiction over any crimes of aggression committed on its territory in the absence of a Security Council referral. Even if this were not the case, the US is excluded as a non-State Party, and the UK (and Australia) have not yet ratified the aggression amendments. Poland has ratified the aggression amendments, but this comes to nothing unless those acts of aggression were committed on the territory of another State Party. In relation to Poland, questions would also arise as to the extent to which the Court would want to proceed with an investigation into a relatively minor player in the

⁴⁴⁶ Parliamentarians for Global Action, ‘Status of ratification and implementation’, available at: <https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> (accessed 12 July 2018)

conflict, the extent to which its officials exercised effective control over coalition forces, and the extent to which the Security Council would seek to halt such an investigation.

8.4. Likelihood of Future Prosecutions

A persistent criticism of the aggression amendments has been that they have been neutered to such an extent that it is unlikely the Court will have the power to act in most instances where it might wish to.⁴⁴⁷ The chapter on jurisdiction highlighted this fundamental flaw: that the consent-based regime ensures that those likely to commit acts of aggression will simply opt not to be bound by the provisions. The continued power of the Security Council opens up the possibility that the Court will be granted reach beyond States Parties and those that choose to ratify the amendments, but as this chapter has illustrated, this power is likely to be used sparingly, and rarely against the largely Western nations on the Security Council or their allies.

Following chapters will look at whether the compromise represents a step forward for international justice or not, but here it is an unavoidable conclusion that very few conflicts will fall within the current remit of the Court: those involving consenting States Parties or those without strong ties to members of the Security Council.

The power of the aggression amendments then perhaps flows not from the number of prosecutions brought, but from the strengthening of a commitment, however small, to international justice. As Noah Weisbord has suggested, ‘criminal accountability will not end war, [and a system that is only able to offer the vaguest prospect of prosecution even less so], but it may change the broader rules of domestic and international politics so that war is no longer such a tempting option.’⁴⁴⁸ Indeed, the example of the 2003 invasion of Iraq above is just one example of a situation in which the use of armed force – at least without Security Council consent – may have been avoided had the Court had jurisdiction over the crime of aggression at the time. It is certainly reasonable to suggest that an international criminal court

⁴⁴⁷ See Heller, K. (2010). ‘The Sadly Neutered Crime of Aggression’, *Opinio Juris*, 13 June 2010, available at: <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/> (accessed: 12 July 2018)

⁴⁴⁸ Weisbord (2010), Op Cit.

with the power to try leaders for crimes of aggression may make those leaders think twice before resorting to war, even if they are insulated from prosecution.

What's more, the aggression amendments will hopefully come to be seen as a first step towards ending impunity for atrocity crimes. The jurisdictional regime adopted is weak, few cases are likely to be brought as a result, and continued reliance on the Security Council does nothing to counter claims of western imperialism. But frameworks can be strengthened and jurisdictional regimes improved. As more states ratify the amendments, the Court's hand is strengthened, moving us all closer to a world free from impunity for atrocity crimes.

A key question this thesis will seek finally to answer is the extent to which the aggression amendments represent a step forward in international criminal justice or whether they weaken an already beleaguered Court. The following chapter will do that by addressing lingering concerns surrounding the Court's justiciability over the crime of aggression and whether the provisions are sufficiently defined and in accordance with established international law practice on the need for state consent; whether the crime of aggression is suited to domestic trials; and whether the aggression amendments will impede international efforts to promote peace and stability around the globe.

Chapter 9 – An Important Step Forward?

This chapter will seek to assess whether the aggression amendments represent a step forward in international criminal justice or whether they weaken an already beleaguered Court. In doing so, section 1 will address lingering concerns surrounding the Court's justiciability over the crime of aggression and whether the provisions are sufficiently defined and in accordance with established international law practice on the need for state consent. Section 2 will address concerns that aggression is ill-suited to domestic trials, looking at the way the crime of aggression applies to domestic courts through the principle of complementarity, expanded notions of jurisdiction, and challenges likely to arise should domestic courts seek to exercise jurisdiction. Section 3 will examine claims that the aggression amendments will impede international efforts to promote peace and stability around the globe by undermining state willingness to participate in humanitarian intervention, weakening the hand of negotiators in peace deals, and impeding the Courts ability to punish other atrocity crimes. Section 4 will then offer some concluding thoughts as to whether the amendments are likely to weaken rather than strengthen the ICC.

9.1. Introduction

It might have been hoped that questions about the Court's justiciability over the crime of aggression would have ended in Kampala, putting to rest critiques that the ICC is fundamentally incompetent to prosecute crimes of aggression.⁴⁴⁹ On the contrary, various arguments have since been advanced in challenge to the Court's ability to prosecute acts of aggression, in spite of the fact that the international criminal nature of wars of aggression have been affirmed in a variety of international instruments since Nuremburg.⁴⁵⁰

⁴⁴⁹ Ruys, Op Cit. p.20

⁴⁵⁰ Consider in particular the 'Principles of International Law recognized by the Nuremberg Tribunal', GA Res. 95(1), 11 December 1946; the 'Friendly Relations Declaration', GA Res. 2625(XXV), 24 October 1970 (first principle); and the 'Definition of Aggression', GA Res. 3314 (XXIX), 14 December 1974 (Art. 5(2)). Consider also: International Law Commission (ILC), 'Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal', Yearbook of the International Law Commission (1950), Vol. II, para. 97, Principle VII; ILC, 'Dra Code of Offences against the Peace and Security of Mankind', Yearbook of the International Law Commission (1954), Vol. II, Art. 2; ILC, 'Dra Code of Crimes against the Peace and Security of Mankind', Yearbook of the International Law Commission (1996), Vol. II, Art. 16.

These range from arguments that the aggression amendments are in breach of the *nullum crimen sine lege* principle insofar as the crime is insufficiently defined; that it breaches the principle of state consent as established by the *par in parem imperium non habet* rule; that they impede international efforts to promote peace and stability around the globe; and that the ‘political’ nature of aggression and its related issues of collective security and self-defence make it unsuitable for a judicial solution.⁴⁵¹ All will be considered in this chapter, along with domestic avenues for prosecution and the unique challenges national courts also face.

9.2. Are the provisions in accordance with the law?

9.2.1. Principle of Consent

Prior to the formation of international criminal courts, institutions – from the ICJ to arbitral decision-makers like the WTO – derived their authority from the consent of states. The State Sovereignty⁴⁵² and *par in parem imperium non habet* (‘an equal has no power over an equal’) maxims are accepted principles of international law, dictating that a sovereign power cannot exercise jurisdiction over another sovereign power. These principles restrict the ability of states to pronounce on the legality or otherwise of a foreign state act, including acts of aggression.

This posed a dilemma for those involved in establishing international criminal courts. With it unlikely that a government sponsoring genocide, crimes against humanity or war crimes would consent to the prosecution of its nationals, a purely consent-based regime would run the risk of ensuring that the Court was unable to obtain jurisdiction over international criminals. Rather than limit the Court’s reach solely to nationals of consenting states, with regard to the other core crimes (genocide, crimes against humanity and war crimes) the Court was also given the power to act based on a Security Council referral under Chapter VII of the United Nations Charter. In addition, Article 12 provides that the ICC will have

⁴⁵¹ ‘The [ICJ] was never intended to resolve issues of collective security and self-defence and is patently unsuited for such a role.’ See the Statement by the US State Department of 18 January 1985 on the US Withdrawal from the ICJ proceedings in Nicaragua, reprinted in (1985) 24 ILM, p.246. ^[1]_{SEP}

⁴⁵² Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law, in Steinberger, H. ‘Sovereignty’, Max Planck Institute for Comparative Public Law and International Law, Encyclopaedia for Public International Law, vol.10 (North Holland, 1987), p.414

jurisdiction to prosecute the national of any state when crimes within the Court's subject-matter jurisdiction are committed on the territory of a state that is a party to the treaty or that consents to ICC jurisdiction for that case.⁴⁵³

While this jurisdictional fix raised questions about the Court's justiciability,⁴⁵⁴ the common refrain has been that the consent rule is circumvented here because the Court is adjudicating on individual criminal responsibility for crimes committed rather than making a determination about the actions of the state from where the perpetrator was a national. Indeed, it can well be argued that any finding of individual criminal responsibility for the core crimes, particularly genocide and crimes against humanity, presuppose the involvement of a multitude of high ranking officials and that such a finding is tantamount to a finding of state responsibility. While this may well be the case, the Court is not called upon to make an explicit determination.⁴⁵⁵

Following agreement at Kampala, questions about the Court's justiciability resurfaced, particularly given that any prosecution for a crime of aggression necessarily presupposes a prior finding that the state has committed a breach of international law, notably by committing an 'act of aggression.'⁴⁵⁶ Accordingly, it is argued that any investigation by an international criminal court into a crime of aggression would require states to have first consented to the court conducting such an investigation.

It should be pointed out here that the decision to separate the process for prosecuting aggression into two - first finding that a state has committed an act of aggression, and second identifying individual involvement of a person in a leadership position - was not the inevitable consequence of the drafting process in Kampala. As Ruys recognises, it would have been possible to merge the two steps so that the determination of a state act of aggression would have been implicit rather than explicit. This would

453 Morris, M. (2001) 'High Crimes and Misconceptions: The ICC and Non-Party States.' *Law and Contemporary Problems*, Vol.64; No.1, p.13

454 US concerns. See Morris, Op Cit.

455 Such determinations could be made by the ICJ, see for example: *Bosnia v. Serbia*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007)

456 Ruys, Op Cit. p.19

have brought the crime into line not just with the approach adopted in Nuremburg⁴⁵⁷ but also with the other core crimes. This approach is also adopted in a number of national codes that criminalise the planning or preparation of an aggressive war without demanding a finding of state responsibility for an act of aggression.

Regardless, this was not the approach taken and, as a result, questions of justiciability persisted. While such justiciability issues are most prominently raised in relation to domestic prosecutions and explored below in this chapter, they are closely linked to the principle of consent and the extent to which the ICC can make a determination of state aggression in a case where not all states have consented.

Had a more expansive jurisdictional regime been adopted – perhaps in line with the positive understanding of Article 121(5) discussed in previous chapters – the issue of consent would have remained a much more prominent issue. Then states could have legitimately questioned whether the principle of consent established by both the VCLT⁴⁵⁸ and the ICJ’s *Monetary Gold* principle⁴⁵⁹ applied to the ICC and, if it did, whether it had been breached. Indeed, as Akande, the US and others warned in the run-up to ASP 16, ‘a prerequisite to the conviction of a state leader for the crime of aggression is a determination that a relevant state unlawfully used force in a manner inconsistent with the Charter of the United Nations,’⁴⁶⁰ that this determination would form the very subject matter of the decision, and as such, the absence of state consent would constitute a violation of the *Monetary Gold* principle.

However, a negative understanding of Art.121(5) prevailed, and as such, only states that have explicitly consented by ratifying the aggression amendments and not subsequently opting out are bound by the provisions. This constitutes clear consent and as such, even if the *Monetary Gold* principle were to apply to the ICC, there would be no breach in this instance.

457 Art. 6 of the Charter of the International Military Tribunal (82 UNTS 280) defines ‘crimes against peace’ as the ‘planning, preparation, ¹¹~~11~~ initiation or waging of a war of aggression, or a war in viola on of international treaties, agreements or assurances, or participation in a ¹¹~~11~~ common plan or conspiracy for the accomplishment of any of the foregoing.’ ¹¹~~11~~

458 Art. 34, Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

459 *Monetary Gold* case (Italy v. France, United Kingdom & United States), (1954) ICJ Rep 19. See also East Timor case (Portugal v. Australia), (1995) ICJ.

460 Akande, D. (2010) ‘Prosecuting Aggression: The Consent Problem and the Role of the Security Council.’ Oxford Legal Studies Research Paper No. 10/2011, p.16. Available at <http://dx.doi.org/10.2139/ssrn.1762806> (accessed 12 July 2018)

The only instance in which the crime of aggression can apply to non-consenting states is following a Security Council referral. Justification for the role of the Security Council in referring situations involving non-consenting states has been discussed in previous chapters and will not be rehashed here. Suffice to say, whatever its merits, the Security Council holds a unique position in world affairs as the primary body in respect of the maintenance of international peace and security, and it has long been accepted that it has the power to authorise investigations into atrocity crimes, even for those not party to the ICC Statute.

9.2.2. *Nullum Crimen Sine Lege*

The principle of non-retroactivity is an established principle in both domestic and international law, mandating that legal rules be proclaimed publicly before they are applied. The principle of non-retroactivity is reflected in a variety of maxims, the most relevant here being *nullum crimen sine lege* (no crime without law). Enshrined in the Magna Carta,⁴⁶¹ it has been reaffirmed in numerous documents since, from the Universal Declaration of Human Rights⁴⁶² to the European Convention on Human Rights.⁴⁶³ Indeed, the *nullum crimen* principle's importance in international tribunals was recognised by the ICC Statute, with Article 22 stating that a 'person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.'⁴⁶⁴ Closely related to this principle is the requirement that legal rules must not be so vague as to obscure their meaning or application.⁴⁶⁵

Despite being explicitly recognised by the ICC in its founding statute, some have claimed the crime of aggression to be in breach of the *nullum crimen* principle insofar as the definition suffers from overbreadth and vagueness, and as such does not provide sufficient notice to potential defendants as to what conduct is permitted and what is proscribed.⁴⁶⁶

⁴⁶¹ Holt, J. C. (1992). Magna Carta. Cambridge: Cambridge University Press. Art. 39

⁴⁶² Universal Declaration of Human Rights art. 11(2), G.A. Res. 217A (11), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

⁴⁶³ European Convention on Human Rights art. 7, Nov. 4, 1950, 213 U.N.T.S. 221. ^[1]_{SEP}

⁴⁶⁴ Rome Statute, art. 22(1).

⁴⁶⁵ Glennon, Op Cit. p.85

⁴⁶⁶ Ibid. p.88

We will return to the charge that the definition is insufficiently precise in a moment. First, it is perhaps useful to reiterate why the crime of aggression is not open to criticism that it is being applied retrospectively, a charge that has been levelled at the Nuremberg and Tokyo tribunals over the years. At Nuremberg, crimes against the peace were defined after the commission of Nazi atrocities. Furthermore, until the creation of the Nuremberg and Tokyo tribunals, no international court capable of trying perpetrators was in existence. This led to sustained criticism that the Nuremberg tribunals were applying retroactive law, and forced Justice Robert Jackson to fall back on the claim that the defendants had been charged with crimes that had been ‘recognized since the time that Cain slew Abel.’⁴⁶⁷

The crime of aggression no longer suffers from such defects. The definition of the crime of aggression was agreed at the Review Conference in Kampala in 2010 after numerous discussions between interested parties in the SWGCA. The Court now has jurisdiction over the crime of aggression, but only for crimes committed after the date it came into force - 17th July 2018. Any claims that the *nullum crimen* principle has been breached can only be made on the basis that the definition is insufficiently precise and that no crime exists under customary international law onto which the courts might fall back.

To the contention that the crime does not exist under customary international law, the influential House of Lords judgment in *R v Jones (2006)* declaratively held that ‘the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial of those accused of this most serious crime.’⁴⁶⁸ These core elements have been refined through numerous instruments. As Jon Heller points out, the London Charter, the Tokyo Charter, and Control Council Law No. 10 all criminalised aggression.⁴⁶⁹ Individuals were convicted of aggression under all three and they represent ‘the starting points for the established *opinio juris* of the international community that waging aggressive war is criminal.’⁴⁷⁰

467 See Atrocities and War Crimes: Report from Robert H. Jackson to the President (June 10, 1945), in 12 DEPT ST. BULL.

468 UK House of Lords, *R.v. Jones*, Judgment of 29 March 2006, (2006) UKHL 16

469 Heller, J. (2010) ‘Thoughts on Glennon’s “Blank-Prose Crime of Aggression”’, 29 January 2010 available at <http://opiniojuris.org/2010/01/29/thoughts-on-glennons-blank-prose-crime-of-aggression/> (accessed 12 July 2018),

470 Werle, G & Jessberger, F. (2014) *Principles of International Criminal Law*, OUP, p.536

In addition, the UN General Assembly resolution 95(I) of 1946 expressly affirmed that aggression is an international crime. Article 5(2) of the UN Definition of Aggression and Principle 1(2) of the Friendly Relations Declaration both define aggression as a crime against peace. The ILC regarded aggression as an international crime in both the 1991 and 1996 Draft Codes of Crimes Against the Peace and Security of Mankind, and, as previously mentioned, aggression was included in the Rome Statute; ‘an expression of a belief in its criminality under customary international law.’⁴⁷¹

That the crime of aggression – as defined – is too vague was a criticism levelled at Nuremburg. It seems much less persuasive in 2018. As the previous chapter on the definition detailed, the crime is now defined as the ‘planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’ This is then supplemented with a lengthy explanation of what constitutes an act of aggression. In addition, following the Review Conference – as amended by resolution RC/Res.6 – the ICC Statute now includes the elements of the crime, informing potential perpetrators of the specific elements of the crime before they commit it.

As we have seen from earlier discussions, there are aspects of the definition that require clarification. This will surely come as the international community continues to discuss the contours of the crime and as the judges of the ICC are called upon to pass judgment as a matter of statutory construction. What is also clear, however, is that the crime of aggression has long been a part of customary international law, that it will not be applied retroactively, and that it is sufficiently defined to pass the *nullum crimen sine lege* test.

9.3. Is the Court the better forum for preventing crimes of aggression?

9.3.1. Domestic prosecutions

In addition to concerns regarding the ICC’s justiciability over the crime of aggression, a number of commentators were particularly worried about the way in which aggression might be prosecuted at the

⁴⁷¹ Ibid.

national level. Indeed, the US delegation was particularly worried during the Review Conference that too little attention had been paid to the issue, and voiced concern that ‘the definition did little to limit the risk that State Parties would incorporate a definition into their domestic law, encouraging the possibility that under expansive principles of jurisdiction, government officials would be prosecuted for alleged aggression in the courts of another state.’⁴⁷² They went on to say that ‘even if states incorporated an acceptable definition into their domestic law, it was not clear whether or when it would be appropriate for one state to bring its neighbour’s leaders before its domestic courts for the crime of aggression,’ and whether it could do so in a manner that promoted peace and security.⁴⁷³

Section 2 of this chapter seeks to address some of those concerns, looking at the way the crime of aggression applies to domestic courts through the principle of complementarity, expanded notions of jurisdiction that may be employed by domestic courts, and challenges likely to arise should states seek to prosecute crimes of aggression in their own courts.

9.3.1.1. Complementarity

The principle of complementarity underpins the jurisdiction of domestic courts over crimes of aggression and is routinely used to describe the relationship between the ICC and domestic courts. Expressed in the Preamble and in Articles 1 and 17-19 of the ICC Statute, it ensures that the ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but – in reality – are unwilling or unable to genuinely carry out proceedings.⁴⁷⁴ This principle ensures that the ICC is a court of last resort, recognising that states have the primary responsibility and right to prosecute international crimes.

The principle of complementarity arose during preparatory negotiations for the ICC, and derives from a desire to: (1) respect state sovereignty and, in particular, states’ rights and duties to exercise criminal

⁴⁷² Statement by Harold Koh at the Review Conference, Op Cit.

⁴⁷³ Ibid.

⁴⁷⁴ Informal expert paper: The principle of complementarity in practice, ICC-OTP 2003, available at <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> (accessed 12 July 2018)

jurisdiction over international crimes;⁴⁷⁵ (2) recognise that states will generally have the best access to evidence and witnesses and the resources to carry out proceedings;⁴⁷⁶ and (3) ensure that serious international crimes do not go unpunished in instances where states prove unwilling or unable to prosecute domestically. This approach distinguishes the ICC from other institutions, including the ICTY and the ICTR.

While not everyone embraced the principle of complementarity during the negotiations in and before Rome,⁴⁷⁷ there is now broad agreement that the principle is a useful and even necessary feature of the Rome Statute⁴⁷⁸ and has been lauded as a critically important feature of the ICC's design and acceptance.⁴⁷⁹ In practical terms, the principle is intended to ensure that the Court is not overburdened by cases that could otherwise be prosecuted at the national level. Indeed, former Prosecutor Luis Moreno-Ocampo remarked back in 2003 that 'as a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'⁴⁸⁰

A corollary to this is that it forces the ICC and national legal systems to engage with one another, at the judicial as well as – sometimes – at the diplomatic or even political level.⁴⁸¹ It also incentivises states to incorporate the substantive provisions of the atrocity crimes into their domestic penal codes to ensure the ability to exercise jurisdiction, and as such, national laws establishing universal jurisdiction over the atrocity crimes have proliferated since the Rome Statute was adopted in 1998.⁴⁸²

475 Veroff, J. (2016) 'Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward', Yale Law Journal, p.3

476 Informal expert paper, ICC-OTP 2003, Op Cit.

477 Wrangé, 'The Crime of Aggression, Domestic Prosecutions and Complementarity' in *The Crime of Aggression: A Commentary Vol.1* (2017) (ed. Kreß & Barriga), p.705

478 Ibid.

479 Veroff, Op Cit. p.4

480 Statement by Mr. Luis Moreno-Ocampo, June 16, 2003 Ceremony for the Solemn Undertaking of the Chief Prosecutor, quoted in 480 Informal expert paper: The principle of complementarity in practice, ICC-OTP 2003 (accessed 28 June 2017), available at <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>

481 Wrangé, Op Cit. p.705

482 Veroff, Op Cit. p.4

9.3.1.1.1. Complementarity and the Crime of Aggression

The complementarity regime applies equally to all of the core crimes, including aggression. This does not mean, however, that it is unproblematic, with a number of commentators pointing out that the unique tension between aggression and complementarity demands the international community's attention.⁴⁸³ These tensions arise from concerns that the unique nature of aggression – insofar as it requires a determination that a state, rather than merely an individual, has committed a breach of international law – makes it fundamentally unsuitable to domestic prosecutions. Proponents of this line of argument contend that to hand domestic courts the power to adjudicate on the actions of other states could ‘destabilize conflict management and resolution efforts, deter states from undertaking certain military forms of humanitarian intervention, and even undermine the ICC's legitimacy and stability.’⁴⁸⁴ Furthermore, with the crime of aggression exclusively a leadership crime, immunities and political obstacles may arise more frequently than for the other crimes.⁴⁸⁵ All of these concerns will be addressed below along with other challenges unique to domestic prosecutions of aggression, but first, it is useful to consider the steps taken to bring the crime of aggression within the complementarity regime, and the types of domestic prosecutions that may arise as a result.

Prior to Rome, it had been recognised that the ‘unique character’ of the crime of aggression may require an alternative approach to the complementarity regime. In its 1996 Draft Code of Crimes, the International Law Commission recommended that the ICC enjoy exclusive jurisdiction over the crime of aggression, with a separate system of concurrent jurisdiction applying between States Parties and the ICC for the other core crimes.⁴⁸⁶ The ILC considered that asking the national court of one state to sit in judgment over another state ‘would be contrary to the fundamental principle of international law *par in parem imperium non habet*,’⁴⁸⁷ an issue returned to below. The only exception provided within the recommendation was that a domestic court should be empowered to try its own nationals for the crime

483 See Ibid. pg.2

484 Ibid.

485 Wrangé, Op Cit. p.705

486 1996 ILC Draft Code of Crimes, with Commentary (excerpts) (Article 8), in The Travaux Préparatoires of the Crime of Aggression, p.195.

487 Ibid. .

of aggression.

States Parties at Rome ultimately rejected the ILC's recommendation, opting instead for uniform application of the complementarity regime. With states unable to arrive at an agreed definition and wider jurisdictional regime for the crime of aggression at the time, a Preparatory Commission for the Establishment of an ICC was created, charged with 'preparing proposals for practical arrangements for the establishment and coming into operation of the Court,' as well as 'preparing proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime.'⁴⁸⁸ In spite of this mandate, the Commission devoted only a limited amount of time to the issue of complementarity, and discussion 'never moved beyond simple acknowledgments that a problem might exist.'⁴⁸⁹

In further preparatory meetings on the crime of aggression, the ASP's SWGCA discussed the principle of complementarity only during the first informal meeting at the Liechtenstein Institute in Princeton University in 2004. While the general feeling of the group was that there was no need for any special provisions on complementarity in relation to the crime of aggression,⁴⁹⁰ they also advised that the appropriateness of tying the crime of aggression to the complementarity regime was a question that 'merited being revisited' once the ASP agreed on a definition of aggression and the conditions for the ICC's exercise of jurisdiction.⁴⁹¹

Some seven years since the Review Conference and the issue of complementarity has yet to be formally revisited by the ASP. Even during the Kampala negotiations – and in stark contrast to proceedings in Rome – discussions on complementarity played only a very minor role. For a great many states, that the complementarity regime would apply to aggression was seen as a done deal. For others, however, 'the important and complex issues surrounding complementarity and the crime of aggression have

488 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, PP 5, 7, U.N. Doc. A/CONF.183/10, annex I (July 17, 1998).

489 Veroff, Op Cit. pg.6

490 Wrangle, Op Cit. p.705

491 Veroff, Op Cit. pg.2

remained under-theorized and under-discussed.⁴⁹²

At Kampala, the US was perhaps the most vocal with regard to the complementarity issue, consistently arguing that the Court should be granted exclusive jurisdiction over the crime of aggression. A number of the reasons underpinning US reticence to allow domestic prosecutions for the crime of aggression will be considered below. Suffice to say at this point, while the US delegation played a significant role in ultimately limiting the scope of the Court's jurisdiction vis-à-vis the crime of aggression, they were unable to persuade others to exclude aggression from the complementarity regime. As we have seen in the previous chapter on the negotiations, the US was able to secure understandings on the obligations arising from the aggression amendments. Understanding 5 is most prescient, in that it affirms 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.'⁴⁹³

In spite of this, at the time of writing 35 states have ratified the aggression amendments. Of those, eight States Parties have incorporated the definition of the crime of aggression into their domestic legislation and a further thirty-two already have pre-existing domestic laws criminalising aggression that overlap with the Kampala Amendments.⁴⁹⁴ An additional 16 States Parties are preparing to ratify the amendments with it expected that implementing legislation will follow.⁴⁹⁵ Before turning to some of the challenges these states may face if they were to initiate domestic proceedings to prosecute perpetrators, it is first useful to look at the various forms these domestic prosecutions could take in line with the complementarity regime.

9.3.2. Types of domestic prosecution

As we have seen, international law gives primacy to states willing and able to prosecute their own nationals for aggression against another state. In many ways, these are the ideal fora for prosecuting

⁴⁹² Ibid.

⁴⁹³ Annex III, Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, 11 June 2010. RC/10/Add.1

⁴⁹⁴ See the Global Campaign for the Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, available at: <https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> (accessed 2 July 2018)

⁴⁹⁵ Ibid.

crimes. States are more likely than international tribunals to have ready access to perpetrators, victims, witnesses and evidence. Trials can also have a cathartic effect, ensuring that those most impacted by the crimes feel included in the justice process.

In order for domestic prosecutions to proceed, a number of steps need to be taken:

First, laws criminalising international crimes need to be incorporated into national legislation, a process that has already begun in a number of states regarding the crime of aggression. This is an important requirement insofar as it effectively rules out domestic prosecutions on the basis of customary international law alone. In 2003, when considering the legality of any intervention in Iraq, the UK Attorney-General, Lord Goldsmith, cautioned that ‘aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognized by the common law which can be prosecuted in the UK Courts.’⁴⁹⁶ This question was answered by the House of Lords, who later held that international crimes are not automatically assimilated into English law, but require statutory enactment by Parliament.⁴⁹⁷

Second, there must be the political will to prosecute, something that will vary given the situation post-conflict, as discussed in chapter 8 looking at the likelihood of prosecutions for crimes of aggression.

Third, there must be established jurisdictional grounds for prosecution. It is to this third point that we now turn. We have discussed at length the jurisdiction of the ICC as set out in the Rome Statute, specifically jurisdiction over the crime of aggression as agreed in Kampala. Neither the Rome Statute nor the Kampala amendments to it deal with domestic jurisdiction. Domestic jurisdiction is governed by principles that have through general practice become accepted by the international community as constituting international law. As will become clear, there is much disagreement about the validity of the various jurisdictional grounds for prosecution.

Fourth, there must be no bars to prosecution. Head of State immunity is perhaps the most obvious

⁴⁹⁶ Note from Lord Goldsmith, Op Cit.

⁴⁹⁷ See UK House of Lords, *R. v. Jones*, Judgment of 29 March 2006, (2006) UKHL 16, para.23

instance of a bar to prosecution, and its applicability to the crime of aggression will be examined below.

Domestic jurisdiction is more expansive than that which applies to the ICC, and is usually granted on the basis of nationality: crimes punished by the state whose nationals were the perpetrators, or territoriality: crimes punished by the state on whose territory the acts were committed.

Domestic prosecutions on the basis of nationality are the least controversial, with few arguing against the right of a state to prosecute its own nationals, and this can extend to instances where the aggressive acts were carried out by the prosecuting state's nationals abroad. There is similarly broad acceptance among states that an act of aggression that takes place on the territory of the victim state falls under the jurisdiction of that victim state.⁴⁹⁸

While both routes are broadly accepted as legitimate avenues for exercising jurisdiction, there are practical obstacles with the potential to limit the extent to which they are utilised. For domestic prosecutions to proceed on the basis of nationality, there must be the political will for a state to prosecute its own high-level officials. As we've seen with the other core crimes where regime change has opened the door to judicial cooperation,⁴⁹⁹ this is not beyond the realms of possibility, but it would almost certainly require a change in government if there is to be any real possibility of justice and accountability for past crimes.⁵⁰⁰

Domestic prosecutions on the basis of territoriality carry their own issues. The traditional concept of territoriality holds that a victim state can prosecute individuals for acts of aggression carried out on their territory. Aside from the challenge of overcoming inevitable claims that victor's justice was being applied, the devastation and lack of institutional infrastructure as a consequence of war may impact on a victim state's ability to prosecute perpetrators of aggression.⁵⁰¹

The challenges faced by states looking to exercise jurisdiction on the basis of these well-established

498 Wrangé, *Op Cit.* p.715; and 'Report of the Special Working Group on the Crime of Aggression', ICC-ASP/7/SWGCA/1, in ASP Official Records, ICC-ASP/7/20, Annex III, 47, para. 28.

499 See instances of ICC self-referrals in CAR I & II, DRC, Mali, Uganda

500 Kestenbaum, J.G. (2016) 'Closing Impunity Gaps for the Crime of Aggression', *Chicago Journal of International Law*, 51, p.66

501 *Ibid.*

grounds has led some states and commentators to openly explore other jurisdictional avenues of prosecution. These actors are also acutely aware of the restrictive nature of the ICC's jurisdictional regime, which does not extend to states that have not ratified the Rome Statute. With this placing many of the more powerful states that stand accused of using illegal armed force beyond the reach of the Court, some see domestic prosecutions – on the basis of expansive modes of jurisdiction – as a means to close this impunity gap.⁵⁰²

9.3.3. Extraterritorial Jurisdiction

Expanded notions of extraterritorial jurisdiction include passive personality jurisdiction, protective jurisdiction, and universal jurisdiction. Each will now be considered.

9.3.3.1. Passive personality jurisdiction

This notion holds that a state has jurisdiction over crimes committed abroad *against* its nationals and is linked to the idea that states should be empowered to act to protect their nationals abroad. This notion has arisen in recognition that not all acts of aggression will take place on the victim's territory, with an attack on a state's armed forces stationed abroad an obvious example.

The extent to which this principle applies to the crime of aggression is controversial. It has been accepted in relation to other crimes, including terrorism.⁵⁰³ It is also accepted as providing jurisdiction for war crimes, and both the Netherlands and the UK have brought successful prosecutions on this basis.⁵⁰⁴ While it remains to be seen whether this principle will prove a successful route to prosecution for the crime of aggression, the fact that it is generally accepted for other international crimes suggests

502 See Arrest Warrant case, 11 April 2000, DRC v Belgium, ICJ Reports (2002). Also see Kestenbaum, Op Cit.; Schaarf (2010) Op Cit.; Randall, K.C. (1988) 'Universal Jurisdiction under International Law', 66 Tex. L. Rev. 785.

503 See the International Convention Against the Taking of Hostages of 17 December 1979, Article 9. The U.S. has also accepted the passive personality in relation to terrorism cases following the 1985 hijacking of the Achille Lauro by the Palestine Liberation Front who killed Leon Klinghoffer, an American citizen. The Anti-Terrorism Act of 1986, the Hostage Taking Act, the Anti-Hijacking Act, and the 1996 amendments to the Aircraft Sabotage Act of 1984 all use passive personality.

504 Washio Awochi, XII LRTWC 122; and Trial of Heinrich Gerike (London, 1950). See also, Rohrig, Brunner and Heinze (1950) 17 ILR 393; and Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, p. 277, 1968 (English translation), although Israel's claims on this basis, in relation to the victims who were not Israeli nationals at the time of Eichmann's offences, has been severely criticized (James E. S. Fawcett, 'The Eichmann Case' (1962) 38 BYBIL, p.181, 190–2).

it might. It is also worth noting that most states that have criminalised aggression in their domestic codes have made the decision to contain reference to passive personality jurisdiction.⁵⁰⁵

9.3.3.2. Protective jurisdiction

Protective jurisdiction would allow a state to prosecute any individual that jeopardises the state's national security interests. Although widely regarded as a legitimate means of asserting jurisdiction over extraterritorial activities that threaten state security, grounded as it is in self-defence,⁵⁰⁶ in reality, there is general agreement that the protective principle is redundant in relation to the crime of aggression. Practically all its imaginable uses in relation to international criminal law overlap with territorial, nationality or passive personality jurisdiction.⁵⁰⁷ That being said, crimes of aggression are seen as threats to international peace and security, and so it is feasible that states will look to utilise this principle.⁵⁰⁸ For instance, the invasion of a victim state coupled with the perception that the aggressor state had expansionist tendencies, may well prompt a state that shares a border with the victim state – and fears that it may be next – to employ this form of jurisdiction.

9.3.3.3. Universal jurisdiction

Universal jurisdiction – whereby any state is able to prosecute – is perhaps the most controversial ground for asserting domestic jurisdiction over the crime of aggression. There is a general presumption that universal jurisdiction impinges state sovereignty, but exceptions to this can exist in international law. A widely held view is that exceptions 'recognise that occasionally certain commonly shared interests of the international community require an enforcement mechanism that transcends the interests of the singular sovereignty.'⁵⁰⁹ As such, 'when crimes of the magnitude of genocide, crimes against humanity, and others in this limited category are capable of perpetration in a state, the international community may claim for itself some portion of that state's sovereignty and may exercise jurisdiction

⁵⁰⁵ Sayapin, *Op Cit.* p.244

⁵⁰⁶ Kestenbaum, *Op Cit.* p.7

⁵⁰⁷ Wilmschurst, *Op Cit.* p.50

⁵⁰⁸ Kestenbaum, *Op Cit.* p.7

⁵⁰⁹ Bassiouni, M.C. (2001) 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', *Virginia Journal of International Law*, 42, p.96-97

to bring the perpetrators to justice.⁵¹⁰

Indeed, there have been various instances in which universal jurisdiction has been applied for international crimes. Beginning with prosecutions for piracy earlier in the nineteenth century,⁵¹¹ the principle was later adopted in the Nuremburg and Tokyo tribunals, and was further used to prosecute Nazi war criminals in countries such as Canada,⁵¹² Australia⁵¹³ and Israel.^{514 515} Since the Second World War, there have been prosecutions or investigations for crimes under international law based on universal jurisdiction in seventeen states,⁵¹⁶ including in the United Kingdom regarding the extradition of former President of Chile, Augusto Pinochet, in the 1980s;⁵¹⁷ Denmark and Germany in trying Croatian and Bosnian Serb nationals for war crimes and crimes against humanity committed in Bosnia in 1992;⁵¹⁸ Belgium and Canada as a basis for prosecuting persons involved in the atrocities in Rwanda in 1994;⁵¹⁹ and the United States in prosecuting Charles Taylor Jr. for torture committed in Sierra Leone in the 1990s.⁵²⁰

Much has been written on the question of whether universal jurisdiction extends to the crime of aggression⁵²¹ and those arguments will not be repeated in full here, though there is a convincing case

510 Sammons, A. (2013) 'Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts', *Berkeley Journal of International Law*, 21, p.143

511 *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820). The Piracy Statute of 1819 provided, 'if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and... shall afterwards be brought into or found in the United States, every such offender... shall, upon conviction... be punished with death.' at 147; and *US v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820)

512 *R. v. Finta*, [1994] 1 S.C.R. 701 (Can.) (reaffirming universal jurisdiction over crimes against humanity committed against Jews in Hungary during Second World War, but finding that the available evidence did not meet the requisite standard for such crimes).

513 *Polyukhovich v. Commonwealth* (1991) 172 CLR 501 (Austl.) (reaffirming universal jurisdiction over crimes against humanity and war crimes committed against Jews in the Ukraine during Second World War).

514 *Attorney-General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, 1968. (Israel kidnapped Adolph Eichmann in Argentina and prosecuted him in Jerusalem in 1961 for crimes against humanity and war crimes).

515 Schaarf, M.P. (2012) 'Universal Jurisdiction and the Crime of Aggression', *Harvard International Law Journal*, Vol.53 (2), p.367

516 (Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, and the United States). Amnesty Int'l, Universal Jurisdiction: UN General Assembly Should Support this Essential International Justice Tool, at 5, IOR 53/015/2010 (October 5, 2010), (accessed June 30, 2017) available at: <http://www.amnesty.org/fr/library/info/IO53/015/2010/en>

517 *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, [2000] 1 A.C. 147 (H.L.).

518 In the 1994 case of *DPP v. T*, the defendant was tried by a Denmark court for war crimes committed against Bosnians in the territory of the former Yugoslavia. On April 30, 1999, the German Federal Supreme Court upheld the conviction of a Bosnian Serb convicted for committing acts of genocide in Bosnia.

519 Desire Munyaneza was tried and found guilty in Canada in 2009 of seven counts of genocide, crimes against humanity, and war crimes committed in Rwanda and sentenced to life in prison.

520 Schaarf (2012), Op Cit. p.367

521 See Randall, K.C. (1988) 'Universal Jurisdiction under International Law', 66 *Texas Law Review*; Bassiouni, M.C. (2001) 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', *Virginia Journal of International Law*, Vol.42; Macedo, S. (eds.) (2001) *Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, New Jersey; Amnesty International, *Universal Jurisdiction: UN*

that it does. Starting first with those sceptical, a variety of reasons are advanced as to why universal jurisdiction should not apply to the crime of aggression. Some, David Scheffer – the former US Ambassador-at-Large for War Crimes – amongst them, claim that the definition is still insufficiently defined, a contention tackled already above and in previous chapters. As was concluded already, though far from perfect, the definition of the crime should be considered detailed enough to pass any *nullum crimen sine lege* test. Furthermore, any disagreement over the scope or contours of the crime are just that, and should not deprive the offense of its character as an international offense, and one subject to universal jurisdiction.

Others claim that the Nuremburg and Tokyo trials were not in fact based on universal jurisdiction but ‘actually operated with the consent of the state of nationality of the defendants, even though such consent arose from the defeat of Germany and Japan, respectively.’⁵²² Here Madeline Morris finds herself at odds with the weight of scholarly opinion. While it is true that the Nuremburg tribunal was not a proper international court, the consent of Germany has not been cited as the basis for the tribunals’ jurisdiction in any of the Nuremburg judgements. The conventional view is that there was effectively no sovereign German government at the time, which explains why no peace treaty which might have included provisions on consent was ever signed.⁵²³

A final argument advanced is that a lack of state practice since Nuremburg undermines claims that universal jurisdiction applies. For Beth van Schaack, for instance, there is ‘little in the way of state practice or *opinio juris* in favour of the exercise of domestic jurisdiction over the crime of aggression.’⁵²⁴ In assessing whether customary law has indeed developed, a number of aspects are important, including uniformity, the quantity of state practice, official statements and so on. While it is the case that many

General Assembly Should Support this Essential International Justice Tool, at 5, IOR 53/015/2010 (October 5, 2010), available at: <http://www.amnesty.org/fr/library/info/IO53/015/2010/en>, (accessed 12 July 2018); Sammons, A. (2013) ‘Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts’, Berkeley Journal of International Law, Vol.21; Scharf, M.P. (2012) ‘Universal Jurisdiction and the Crime of Aggression’, Harvard International Law Journal, Vol.53 (2)

522 Morris, Op Cit.

523 See King Jr., H.T. (1994) ‘The Limitations of Sovereignty from Nuremberg to Sarajevo’, 20 Can.-U.S. L.J. p.167-168; Kelsen, H. (1945) The Legal Status of Germany According to the Declaration of Berlin, 39 Am. J. Int’l L. p.518-524; and Schaarf (2012), Op Cit. p.378

524 Schaack, B.V. (2012) ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’, Journal of International Criminal Justice, 10. p.137

authoritative enumerations of international crimes under universal jurisdiction have omitted crimes of aggression, there is plenty to suggest that it should be included.

Indeed, for its proponents, the crime of aggression is an international crime, and one of the four core crimes of the Rome Statute at that, and as such national courts are entitled to exercise jurisdiction over any perpetrator, even if they happen to be a national of a foreign state. As Benjamin Ferencz has pointed out, many renowned scholars, such as Professors Cherif Bassiouni, Claus Kreß, Antonio Cassese, William Schabas, and a host of other highly regarded authors, maintain that aggression is already a customary international crime that is subject to universal jurisdiction as a peremptory norm from which there can be no derogation.⁵²⁵

For these commentators, the customary nature of the crime of aggression crystallised at Nuremburg. In 1946, the UN General Assembly unanimously affirmed the principles from the Nuremberg Charter, and the International Court of Justice,⁵²⁶ the International Criminal Tribunal for the Former Yugoslavia,⁵²⁷ the European Court of Human Rights,⁵²⁸ and several domestic courts have since cited this General Assembly resolution as an authoritative declaration of customary international law.⁵²⁹ Indeed since, the International Law Commission, established by the UN to codify customary international law, finished in 1996 its decades-long project of drafting the Code of Crimes against the Peace and Security of Mankind. Article 16 of that document confirmed that the crime of aggression constitutes a crime under international law.⁵³⁰

More recently in *R v Jones*, Lord Bingham stated that ‘the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime. It is unhistorical to suppose that

⁵²⁵ Ferencz, B. (2009) ‘Ending Impunity for the Crime of Aggression’ *Case Western Reserve Journal of International Law*, Vol.41(2), p.285

⁵²⁶ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 172 (July 9).

⁵²⁷ *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment, ¶ 623 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); *Prosecutor v. Tadic*, Case No. IT-94-I-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 62 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁵²⁸ *Kolk & Kislyiy v. Estonia*, Decision on Admissibility, 17 January 2006.

⁵²⁹ Schaarf, Op Cit. p.371-372

⁵³⁰ U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10, Art. 16 (July 26, 1996), see Schaarf, p.373

the elements of the crime were clear in 1945 but have since become in any way obscure.’⁵³¹ As has been pointed out already in relation to this case, the House of Lords, while recognising aggression as a crime under customary international law, they also cautioned that domestic legislation criminalising aggression would also be necessary for UK courts to prosecute it. This is cited as authority supporting the contention that as a crime under customary international law, aggression is capable of being tried on the basis of universal jurisdiction, providing the prosecuting state has incorporated the definition of aggression into its domestic criminal code.

While the arguments for the application of universal jurisdiction to the crime of aggression are persuasive, it remains to be seen whether they will – on the basis of state practice – become conclusive. There have been plenty of attempts to frame the crime of aggression as outside the scope of universal jurisdiction and indeed outside the scope of domestic prosecutions more generally. As we have already seen, the insertion of Understanding 5 adopted at the Review Conference in Kampala is one particularly prominent example. That being said, it is widely accepted amongst commentators that only a formal change to the Kampala Amendments would be sufficient to grant the ICC exclusive jurisdiction, and even then, only over the 121 States Parties to the Rome Statute. A growing number of states have already incorporated the definition into their domestic criminal codes. It may well come to pass that universal jurisdiction provides a useful avenue for states looking to employ extraterritorial jurisdiction over the crime of aggression when the ICC’s hands are otherwise tied.

9.4. Challenges to domestic prosecutions

Establishing jurisdictional grounds for a prosecution is a vital step, but not the final one. It must also be established that there are no bars to the exercise of jurisdiction. It is these bars or challenges to domestic prosecutions that will now be discussed.

⁵³¹ *R. v. Jones*, Judgment of 29 March 2006, (2006) UKHL 16, sections 12 and 19 (Lord Bingham), 44 and 59 (Lord Hoffmann), 96 (Lord Rodger), 97 (Lord Carswell) and 99 (Lord Mance)

9.4.1. State Sovereignty and *Par in Parem Non Habet Imperium*

As we saw above, the *par in parem imperium non habet* rule has been raised by those seeking to question the justiciability of the crime of aggression before the ICC. It was the opinion stated here that - with states in Kampala agreeing to limit the jurisdiction of the Court only to those states that have explicitly consented through ratification of the aggression amendments - the issue of consent raised by the *par in parem* rule was moot. In sum, the challenge to the ICC's competence to rule on the crime of aggression on the basis that any case would breach the *par in parem* rule is weak given the restrictive nature of the regime arising from the Review Conference. The case has, however, also been raised in relation to domestic courts.

The argument is much the same and is closely linked to the consent rule: following the *Monetary Gold* and *East Timor* judgments, states are as a matter of international law barred from sitting in judgment over another state without that state's consent. As we've already documented, the definition of the crime will require 'a showing of proof beyond a reasonable doubt that a state committed an act of aggression as a predicate to assigning individual criminal responsibility'⁵³² and as such, domestic courts hearing aggression cases not involving their own nationals will essentially be sitting in judgment over the acts of a co-equal sovereign.

It was this consideration that led ILC in its Commentary to the Draft Code of Crimes in 1996, to state that: 'the determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*',⁵³³ and determine that as such 'the crime of aggression was inherently unsuitable for trial by national courts and should instead be dealt with only by an international court.'⁵³⁴ This argument has been advanced more recently by the U.S, who opined during the Review Conference that domestic prosecutions for the crime of aggression 'would ask the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and

⁵³² Schaak, Op Cit. p.149

⁵³³ 1996 ILC Draft Code of Crimes, with Commentary (excerpts) (Article 8), in The Travaux Préparatoires of the Crime of Aggression

⁵³⁴ Ibid.

security.’⁵³⁵

This view is, however, subject to two important exceptions. Firstly, the principle would not prevent domestic courts from exercising jurisdiction over aggression committed by their own state, a condition explicitly recognised by the ILC at the time. As has been suggested above, it is widely accepted that states are free to prosecute their own nationals for crimes of aggression, and logically no breach of the state consent rule should flow from it.⁵³⁶ Secondly, a victim state would be free to prosecute for crimes of aggression committed against it. While this would appear to breach the consent rule, the US Supreme Court has previously stated that: ‘the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.’⁵³⁷ As others have pointed out, where a victim state prosecutes acts of aggression committed against it, that state is in reality exercising a form of self-help – which is not proscribed (but only limited) by international law.⁵³⁸

As will now be obvious to the reader, it is well established in international law that territoriality and nationality traditionally interpreted are both routes broadly accepted as legitimate for exercising jurisdiction. The *par in parem* rule does not alter that fact. As for the other forms of jurisdiction mentioned above, opinion divides as to whether they are legitimate and the extent to which the *par in parem* principle then applies. What is clear is that the principles are linked. Those that argue that universal jurisdiction does not apply to the crime of aggression would correspondingly argue that this is based at least in part on the notion that it would breach the *par in parem* rule. Any decision on the justiciability of cases brought domestically – and outside of the traditional concepts of territoriality and nationality – will inevitably involve grappling with the extent to which these forms of extra-territorial jurisdiction comply with the *par in parem* principle.

The weight of scholarly opinion appears to have swung in favour of disregarding the *par in parem*

⁵³⁵ Statement by Harold Koh at the Review Conference, Op Cit.

⁵³⁶ Werle, G. (2007) ‘The Crime of Aggression between International and Domestic Criminal Law’. Presentation at the XVth International Congress on Social Defence: Criminal Law between War and Peace: Justice and Cooperation in Military Matters in International Military Interventions Conference. Draft Paper, unpublished. 20-22 September 2007. Available at: <http://www.defensesociale.org/xvcongreso/ponencias/GerhardWerle.pdf> (accessed 12 July 2018)

⁵³⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 423 (1964).

⁵³⁸ Akande (2010), Op Cit. p.33

principle vis-à-vis the crime of aggression. This tallies with a general trend towards accepting universal jurisdiction as a legitimate basis for domestic trials, as noted earlier. For these commentators, domestic cases can be sufficiently distinguished in nature from those of international tribunals such that any general rule established by the ICJ does not apply. In addition, the application of the *par in parem* principle to domestic prosecutions for the crime of aggression is seen as a retrogressive approach that departs from customary international law in failing to take into account the shift away from absolute notions of state sovereignty since Nuremburg, ignores the role that national courts have always played in combating impunity for international crimes, and runs contrary to the ICC's principle of complementarity.

The extent to which the ICJ's *Monetary Gold* and *East Timor* cases apply to the ICC is disputed and this is also the case with domestic courts. The ICJ is an international institution created by treaty, and as such it derives only as much authority as states allow. While establishing a general rule about the importance of state consent, it is far from clear that this should also apply to equal sovereigns in limiting the right of one state to take judicial action within its territory.⁵³⁹ Any domestic prosecution would impose no legal obligations on the aggressor state. Additionally, any domestic judgment would not carry the moral weight of a decision made by an independent judicial body which would otherwise render it difficult for a state to then argue that its use of force was in fact lawful. Any decision made by a domestic court could in theory be dismissed by the state of nationality as a disagreement between equals.

In addition, the International Law Commission did not appear to take into account relevant state practice with respect to the criminalisation of aggression, 'which had been developing since 1945 and resulted, over time, in a number of national criminal laws applicable to the crime.'⁵⁴⁰ There are numerous cases that support the ability of states to pronounce themselves on the legality of acts by foreign states, and various such examples were given above in relation to the application of universal jurisdiction. These cases also reflect the horizontal nature of international law, and mirror the international reality that

⁵³⁹ Wrangé, Op Cit. p.713

⁵⁴⁰ Schaack, Op Cit. p243

states respond to aggressive acts in various ways, from sanctions to the use of force.

While it is conceded that the crime of aggression is different from the other core crimes in that prosecution requires a predetermination of state responsibility, the case can be made that the other crimes – particularly genocide – are ‘system crimes’.⁵⁴¹ That is, any finding of genocide will usually implicate the state insofar as the crimes, by definition, are frequently controlled by the government and orchestrated in an organised and systematic way. As Michael Schaak states, ‘in a great majority of cases, crimes under international law would be inspired by the state and committed through its intermediary or with its support - and, in that sense, any qualification of a crime under international law by a foreign court might deteriorate its international relations with the state standing at the origin of the crime. Therefore, drawing a distinction between the crime of aggression and other crimes under international law, for that purpose, is quite unsubstantiated.’⁵⁴² As such, the extent to which aggression can really be distinguished from the other crimes for the purpose of asserting that the *par in parem* principle applies is questionable.

Ultimately, the extent to which domestic prosecutions can proceed extra-territorially will depend on both the application of those jurisdictional bases and the inapplicability of the *par in parem* principle to domestic prosecutions. In the view of this author, a strong case has been made for both. It is now worth looking at some of the other challenges to domestic prosecutions.

9.4.1.1. Immunity

As the crime of aggression is a leadership crime, accused individuals will usually be high-ranking officials or heads of state. As such, the issue of immunities is likely to arise. With regard to immunity before the ICC, Article 27 is clear: ‘official capacity as a Head of State or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a

⁵⁴¹ See Wrangé, Op Cit. p.714, quoting Nollkaemper, A. (2009) ‘System Criminality in International Law: Introduction’, in Nollkaemper and van der Wilt (eds.), *System Criminality in International Law*, Cambridge University Press, p.1-25

⁵⁴² Schaak, Op Cit. p.243

person from criminal responsibility under this Statute.’⁵⁴³ This is not the case before domestic courts.

There are two broad types of immunity: functional and personal immunity. Functional immunity holds that state officials shall never be held liable for state acts. That being said, the prevailing view – as set out in the Princeton Principles on Universal Jurisdiction – is that for ‘serious crimes under international law’, including crimes against the peace, functional immunity does not apply.⁵⁴⁴ Much of the authority for this position stems from Nuremburg and the London Charter, both of which referred to crimes against the peace. As such, there are some commentators willing to contend that the crime of aggression (rather than its earlier incantation) may not enjoy the same exemption from functional immunity, though that is a minority view.

It may also be possible to circumvent functional immunity if it could be demonstrated that the acts were private and unrelated to the individual’s official capacity.⁵⁴⁵ For the crime of aggression, however, any attempts to circumvent immunity on this basis would surely fail, with high-ranking officials unable to commit aggression without state action as part of official state policy.⁵⁴⁶

Personal immunity provides that certain types of officials are immune as long as they hold a certain office. This type of immunity poses problems for domestic courts seeking to employ universal jurisdiction, as it continues to apply even to international crimes. Authority for this is derived from the ICJ’s *Arrest Warrant* case,⁵⁴⁷ which reflects customary international law.⁵⁴⁸ Attempts to challenge this rule have invariably failed.⁵⁴⁹ States are of course free to prosecute their own nationals, or indeed waive immunity to allow another state to prosecute, but in both instances the consent of the aggressor state is needed. As such, any domestic court would be barred from exercising universal jurisdiction over a sitting Head of State or government official for the crime of aggression, until such time as she were to

543 Article 27, ICC Statute. (‘Irrelevance of Official Capacity’)

544 Macedo, S. (eds.) (2001) *Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, New Jersey, Principle 5

545 *Arrest Warrant* case, 11 April 2000, DRC v Belgium, ICJ Reports (2002), see dissenting opinion of Judge ad hoc Van den Wyngaert.

546 Kestenbaum, Op Cit. p.10

547 *Arrest Warrant* case, 11 April 2000, DRC v Belgium, ICJ Reports (2002)

548 Wrangé, Op Cit. p723

549 Kleffner, J. (2003) ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, *Journal of International Criminal Justice*, p.106

leave office.⁵⁵⁰

9.5. Politicisation

As we have seen, there are a number of possible avenues available to states intent on prosecuting acts of aggression committed by foreign actors. While the domestic prosecution of any international crime will inevitably draw accusations that international law is being politicised, this is particularly so for the crime of aggression. With the crime, by definition, involving individual criminal responsibility at the highest level arising from a prior determination of state responsibility, any domestic prosecution of a non-consenting foreign state will inevitably strain international relations. Beyond those countries immediately involved, such prosecutions have the potential to force third-party states to take sides, risking exacerbating an already volatile situation and raising the spectre of further retaliatory actions.

Additionally, the legitimacy of domestic prosecutions is undermined by any blurring of the lines between politics and the rule of law. Domestic prosecutions face accusations that victor's justice is being applied when the victim state commences proceedings against the aggressor state. Even in instances where third-party states intervene, there are likely to be accusations that proceedings are motivated by 'other incentives, such as political ties, geopolitical alliances, or retributive justice for past harms', all which may corrupt the legitimacy of any attempt to try alleged aggressors in a third-party state's courts.⁵⁵¹

These are certainly major concerns for those likely to engage in domestic prosecutions. Given the increased political nature of the crime of aggression, prosecutions by the ICC at least benefit from the legitimacy that comes with being instigated by an independent judicial body and with the backing of the international community. That being said, even the ICC cannot escape claims of politicisation, concerns which will now be discussed in section 3 of this chapter.

550 For a fuller discussion on immunities, see Barker, J.C. (2015). Shared foundations and conceptual differentiation in immunities from jurisdiction. In A. Orakhelashvili (Ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham: Edward Elgar Publishing, p.185-204

; Akande, D. and Shah, S. (2010) 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *European Journal of International Law*, Vol.21 (4), pgs. 815-852

551 Ibid.

9.6. Are the provisions a step forward in promoting peace and stability?

The opening words of Article 1 of the UN Charter enshrine as the UN's primary purpose the maintenance of international peace and security, while the preamble to the Rome Statute recognises that the core crimes that shape its mandate are crimes that threaten the peace, security and well-being of the world. As the Prosecutor of the ICC reminded the UN Security Council in 2014, justice plays a crucial role in relation to the maintenance of international peace and security.⁵⁵² As such, the extent to which the aggression amendments will promote peace and stability is a question that goes to the heart of the debate over whether or not the amendments represent a step forward for the Court.

This section will examine claims that the aggression amendments will impede international efforts to promote peace and stability around the globe. They centre on three core contentions: that the prospect of indictment for crimes of aggression will dissuade states from supporting legitimate acts of humanitarian intervention; rule out the possibility of amnesty granting thus undermining the prospect for any peace deal; and embroil the Court in political considerations that impede its ability to punish atrocity crimes.

9.6.1. The Crime of Aggression and Humanitarian Intervention

The extent to which the definition of the crime of aggression excludes genuine acts of humanitarian intervention was discussed at some length in previous chapters. While we will not repeat that discussion here, it is worth recapping that humanitarian intervention is a term used to describe action taken for humanitarian purposes but without Security Council authorization and without the agreement of the state concerned.⁵⁵³ Opinion remains divided over whether there is an emerging norm of customary law that allows implementation of the responsibility to protect doctrine, or whether such intervention is indeed already lawful based on the continued existence of a customary law right which has not been displaced by the UN Charter.⁵⁵⁴ A similar lack of absolute clarity persists regarding the definition of the

⁵⁵² See 'Justice plays a 'crucial role' in maintaining international peace and security: ICC Prosecutor briefs the United Nations Security Council', Press Release: 24 October 2014 available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1055> (accessed 12 July 2018)

⁵⁵³ Wilmshurst, *Op Cit.* p.324

⁵⁵⁴ *Ibid.* p.325

crime of aggression, specifically whether the requirement that any act must be a ‘manifest’ violation is enough to exclude instances of humanitarian intervention, if indeed they’re deemed desirable. Despite US efforts to insert an additional understanding into the Kampala amendments – states felt it ‘inappropriate to deal with key issues of current international security law in the form of understandings drafted not with all due care, but in the haste of the final hours of diplomatic negotiations.’⁵⁵⁵ As such, it will likely fall to the ICC’s judges to interpret the ‘manifest’ requirement.

Arguments against the legality of resort to humanitarian intervention tend to centre around interpretations of Article 2(4) of the UN Charter which requires all members to ‘refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.’⁵⁵⁶ While a few contested examples from the end of the twentieth may not yet make it possible to declare humanitarian intervention lawful *per se* under customary international law, it does fall within a grey area insofar as it is widely regarded as unlikely that genuine attempts to avert humanitarian catastrophe will be deemed to meet the ICC’s ‘manifest’ threshold.⁵⁵⁷

This growing consensus is reflected in the General Assembly’s 2005 World Summit Outcome document, in which states agreed on two points: states have primary responsibility for ensuring they protect their own civilian population from the commission of crimes under international law; and that a subsidiary international responsibility arises in case of a failure of the state concerned to properly serve this protective function.⁵⁵⁸ As Claus Kreß recognises, ‘it is therefore no longer possible to maintain that a use of force to avert humanitarian catastrophe violates the sovereignty of the state concerned.’⁵⁵⁹

This consensus has perhaps come into existence on the back of a developing view that, following catastrophes such as Rwanda and Kosovo, intervention may – in exceptional circumstances – be the

⁵⁵⁵ Kreß & von Holtzendorff, *Op Cit.* p.1205

⁵⁵⁶ UN Charter, Article 2 (4)

⁵⁵⁷ For support for this conclusion see: Trahan, J. (2015), *Op Cit.* p.78; Zimmerman, A & Freiburg, E. (2015) ‘Article 8 bis. Crime of Aggression’, in Triffterer & Ambos (eds.) *Commentary on the Rome Statute of the International Criminal Court*, 3rd edn (Munich: Beck), p.602; Ambos (2014), *Op Cit.* p.201; Werle & Jessberger, *Op Cit.* p.549; and McDougall, *Op Cit.* p.161.

⁵⁵⁸ General Assembly, 2005 World Summit Outcome, 16 September 2005, UN Doc. A/RES/60/1, paras. 138-39

⁵⁵⁹ Kreß, C. (2017) ‘The State Conduct Element’ in *The Crime of Aggression: A Commentary Vol.1* (ed. Kress & Barriga) p.525

most effective way to save the lives of people threatened by impending humanitarian catastrophe.⁵⁶⁰ As such, it is entirely plausible to argue that, while not of immediate relevance for international criminal law, such intervention may be morally justifiable.

With this in mind, and given the lack of clarity, it does seem conceivable that a ‘chilling effect’ on the willingness of states to engage in humanitarian intervention may occur, and as such, desirable that the law is clarified as quickly as possible. As Harold Koh warned, it would be ‘hugely tragic if this chilling effect discouraged states from stopping preventable genocide, war crimes, and crimes against humanity.’⁵⁶¹ While this should not challenge the justiciability of the ICC, it does stand as a legitimate concern.

That being said, there would be significant risks associated with a blanket acceptance of humanitarian intervention as a legitimate means of circumventing the aggression amendments, not least in deciding whether humanitarian concerns were indeed the motivating factor. As the ICJ warned in its *Corfu Channel* case, ‘intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself.’⁵⁶² This recognises the potential for humanitarian intervention to be used as a means of avoiding international justice, particularly for the most powerful states.

It is worth noting also that the aggression amendments do allow states to opt out of the ICC’s jurisdiction over the crime of aggression by lodging a declaration at any time, and as such, any impediment to involvement in humanitarian intervention is not absolute. It is, however, accepted that states will be unwilling to make such a public proclamation, carrying as it does the implication that those states are concerned about the prospect of indictment. As such, while there may well be a ‘chilling effect’ on military coalition partners and others looking to involve themselves in humanitarian intervention, even

⁵⁶⁰ Ibid. p.526

⁵⁶¹ Koh (2015), Op Cit. p.272

⁵⁶² *Corfu Channel (UK v. Alb.)*, 1949 ICJ REP. 4, 35 (Apr. 9)

if the virtue of certain acts of humanitarian intervention is accepted, it is difficult to propose an alternative route given the difficulty of sufficiently defining humanitarian intervention for the purposes of ensuring it does not constitute a crime of aggression.

In any case, it is likely to be the case that genuine acts of humanitarian intervention will not meet the Court's 'manifest violation' threshold, but that is a decision for the ICC's judges. As to the uncertainty that this may cause to potential coalition partners, perhaps that is simply the price that needs to be paid for ensuring that states are led by international law considerations when deciding whether to act.

9.6.2. The Crime of Aggression and Negotiating Peace Deals

The contention that the crime of aggression weakens the hand of negotiators attempting to strike peace deals is often tied heavily to the question of amnesties. The argument that amnesties can play a positive role in bringing about peace and security is also not unique to the crime of aggression, and has been raised numerous times in relation to the other core crimes. Still, it is worthy of brief consideration here.

Despite amnesties having a long tradition in regimes around the world, from Chile to South Africa, under international law generally, amnesties are now not recognised. Indeed, this has been the UN's position since the 1990s.⁵⁶³ At the ICC, the situation is much the same. The ICC Statute's preamble affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished',⁵⁶⁴ and the Prosecutor has taken a similarly dim view in refusing to take the possibility of amnesties into account when deciding which situations to pursue.⁵⁶⁵ Even with regard to domestic prosecutions, amnesties issued by one state do not bind other states or international bodies.⁵⁶⁶ With it generally accepted that the aggression amendments do not create a *duty* to prosecute aggression, it is theoretically possible that any amnesty granted may prevent the issuing state from bringing

⁵⁶³ *Prosecutor v. Kondewa*, SCSL A. Ch. 25 May 2004 para. 48. Judge Robertson of the Special Court for Sierra Leone: 'in what may be the development of an interim position is a focus on major malefactors, the intellectual or commanding 'authors' of torture and genocide, who will not be permitted to escape through a pardon that exonerates their underlings.'

⁵⁶⁴ ICC Statute, Preamble

⁵⁶⁵ ICC Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, at 3–4.

⁵⁶⁶ *Prosecutor v. Kallon and Kamara*, SCSL A. Ch. 13.3.2004 para. 67. SCSL: 'it was not unlawful for the United Nations to refuse to accept the amnesty contained in the 1999 Lomé Peace Accord and thus grant the Court jurisdiction over international crimes from 1996.'

prosecutions, though even here the failure of a state to act may simply lead to the Court exercising its powers to prosecute perpetrators itself.

Despite recent trends to refuse the applicability of amnesties to international crimes, there are still some who claim that amnesties have a role to play in bringing conflict to an end. In Kampala, the US accepted that there was consensus that there could be ‘no peace without justice’ regarding the other core crimes, and as Harold Koh has recognised, when political solutions immunise those responsible for such atrocities, more damage than good may be caused to peace itself.⁵⁶⁷ He did, however, go on to reject the notion that this consensus extends to the crime of aggression, arguing that the crime was of a ‘fundamentally different’ character. He went on to provide a hypothetical situation in support of his argument, asking whether two warring countries that are finally ready to sign a peace treaty on the basis that their leaders will not be prosecuted for starting the war, should be prevented from doing so.⁵⁶⁸

This line of argument carries the implication that combatants and others will refuse to relinquish their weapons or power without promises of amnesties, and is relevant here.⁵⁶⁹ Indeed, such a claim has been advanced by Kurt Volker, a former United States Permanent Representative to NATO, suggesting that the possibility of prosecution by the ICC led to Muammar Gaddafi holding onto power in Libya rather than fleeing.⁵⁷⁰

The persistence of claims that the aggression amendments weaken the hand of those seeking peace deals is not surprising. Similar claims have been present since the formation of the Court. In reality, there is little evidence that the Court or the aggression amendments serve to hinder peace deals, and more to suggest that the consistent and uniform application of international law will increase respect for it. There are essential, principled reasons for refusing amnesty to perpetrators of international crimes, including aggression. As Benjamin Ferencz put it: ‘to suggest immunity for those who propagate the illegal uses of force, which invariably result in the very atrocity crimes that the international community condemns,

⁵⁶⁷ Koh (2015), *Op Cit.* p.263

⁵⁶⁸ *Ibid.*

⁵⁶⁹ Anonymous. (1996) ‘Human Rights in Peace Negotiations’, *Human Rights Quarterly*, John Hopkins University Press. Vol.18 (2), May 1996. p.249

⁵⁷⁰ ASIL panel discussion on ‘The ICC Crime of Aggression and the Changing International Security Landscape’, *Op Cit.*

seems a far cry from the historic precedents established at Nuremberg. To deter the Court from enforcing the law, rather than deterring those who would break it, may be seen by some as expedient in the short term, but such an approach does nothing to advance respect for the predictable and uniform rule of law.⁵⁷¹

9.6.3. The Crime of Aggression and the Deterrence of Atrocity Crimes

A third concern often voiced is that the crime of aggression will distract attention and resources from the other core crimes, and as such ‘will impair the Court’s ability to carry out its core mission – deterring and punishing genocide, crimes against humanity, and war crimes.’⁵⁷² At the heart of this argument lies the contention that the crime of aggression is overtly political, and will overburden the Court with considerations better left to political actors. As Harold Koh has said, ‘aggression determinations are different in kind: they fundamentally require a political assessment and political management, [and] assigning that role to an ostensibly apolitical court would inject the ICC into treacherous political waters that would threaten to undermine both the Court’s credibility and that of the greater international criminal justice project.’⁵⁷³

Indeed, this is a valid concern and one that states have grappled with over the years. It was one of the reasons why defining the crime proved so difficult in Rome, and why the Review Conference over a decade was necessary to finally reach a consensus. That consensus has, however, largely taken the sting out of the argument. States in Kampala opted for a consent-based regime that has severely narrowed the Court’s jurisdiction scope. In the event that the Court proceeds on the basis of a Security Council referral, the political decision that an act of aggression has occurred will already have been taken. Absent a Security Council decision, non-States Parties are excluded entirely from the reach of the Court, and only those States Parties that have consented to the Court navigating these ‘treacherous political waters’ will be subject to it.

⁵⁷¹ Ferencz (2016), Op Cit. p.200-201

⁵⁷² Sarah Sewall, Former Under Secretary for Civilian Security, Democracy & Human Rights, US State Department, speaking on ASIL panel discussion on ‘The ICC Crime of Aggression and the Changing International Security Landscape’, Op Cit.

⁵⁷³ Koh (2015), Op Cit. p.263

This restrictive jurisdictional regime will have the practical impact that far fewer cases will make their way to the ICC than might ordinarily have been the case. This was the price for addressing concerns over politicisation of the Court, but also undermines the contention that resources will be diverted away from the other atrocity crime. While there may have been significant merit to many of the concerns listed in this section prior to Kampala, they have been largely neutered by the approach taken at the Review Conference.

9.7. Do the provisions weaken the Court?

Throughout this chapter we have addressed many of the concerns levelled at the aggression amendments, looking at justiciability issues, domestic jurisdiction and challenges, and finally the impact the amendments might have on international peace and security efforts. I will conclude with a few thoughts on the impact the amendments are likely to have on the Court itself, and whether the special nature of the crime of aggression is likely to weaken the Court and hand ammunition to its detractors.

I have sympathy for the argument that the crime of aggression is political in a way that the other core crimes are not, and that in accepting jurisdiction over the crime there will at least be the perception that the Court is involved in making inherently political decisions. The debate surrounding whether it would have been better to grant the Security Council exclusive competence to make these political decisions was addressed in chapter 4 on the negotiations and so will not be repeated here. That being said, the ICC's newfound competence does risk placing it in a position whereby it can affect day-to-day politics depending on who wants to use it and how.⁵⁷⁴ As a result, granting the ICC jurisdiction over aggression will inevitably subject the Court to criticism that exercising such jurisdiction would be a political act in keeping with the political judgment that aggression has occurred.⁵⁷⁵ This is a risk that states were acutely aware of when they reached their conclusions in Kampala.

It may be the case that the Prosecutor will need to be properly attuned to the real world impact her

⁵⁷⁴ Rostow, N. (2015) 'The International Criminal Court, Aggression, and Other Matters: A Response to Koh and Buchwald', 109 AJIL Unbound, p.234

⁵⁷⁵ Ibid.

decisions could have to a greater extent than the other core crimes. In any case, primary – even if not exclusive – competence to make these political decisions has been granted to the Security Council along with a host of limitations including Security Council recourse to Article 16 powers to halt an investigation, and state recourse to the opt-out clause. These firmly establish a consent-based regime that serves to address most of the concerns over politicising the Court.

There are concerns occasionally voiced that in imposing a distinct and less far-reaching jurisdictional regime for the crime of aggression than the other core crimes, the international community has undermined its express commitment to ensuring that ‘that the most serious crimes of concern to the international community as a whole must not go unpunished.’ And that the international community has signalled that the crime of aggression is in some way less serious than the other core crimes insofar as state sovereignty has been allowed to trump international justice for atrocity crimes. These concerns are idealistic in the extreme. Compromise was always going to be necessary in order to secure agreement at Kampala. This was particularly important for a court that relies on the cooperation of states for the enforcement of its arrest warrants and the collection of its evidence. It can certainly be argued that states went too far in limiting the scope of the Court’s jurisdiction, but the steps taken in Kampala are positive, they advance international justice, and they provide a firm base from which the crime can develop.

That the Court will be open to renewed scrutiny as a result of the amendments is also clear. Giving the Court additional powers that blur in any way the line between law and politics was always going to hand additional ammunition to those seeking to bring down the Court. This should not be a reason to halt the advance of international law, and the Court should be steadfast in facing down its detractors. What the Court needs now is the support of its State Parties, ready to remind those who would seek to diminish the Court of the important role it now plays in fulfilling the legacy of Nuremburg and ending impunity for *all* atrocity crimes.

Chapter 10 – Conclusion

This thesis has taken a critical look at the development of the criminalisation of aggression, from the Nuremberg tribunals, through the establishment of the International Criminal Court, to the outcome of the Kampala Review Conference and beyond. Despite the vast amount of work that has gone into establishing a workable legal framework to punish individuals responsible for the waging of aggressive war, the aggression amendments remain divisive. This thesis has sought to address these issues, and offer thoughts on what the amendment's imperfections mean for their future application and the legitimacy of the International Criminal Court. It is worth recapping those here.

The definition presented to the Review Conference in Kampala was largely based on one adopted by the General Assembly in 1974, and had been discussed at some length in the preparatory meetings leading up to the conference. Despite the protestations of the United States, delegations resisted the urge to re-open the definition and it was adopted without further discussion. A number of criticisms persist, chief among them the extent to which the 'manifest' threshold requirement is sufficiently high as to exclude genuine acts of humanitarian intervention and pre-emptive self-defence from the remit of the Prosecutor. Ultimately, it will be for the Court to decide the scope of the manifest threshold. It is also clear, however, that its inclusion was intended to ensure that only the gravest breaches of international law should be prosecuted. This was further reflected in the Understandings adopted in Kampala.

There is broad acceptance, including from the author of this piece, that genuine acts of humanitarian intervention would fail to reach that threshold. The status of pre-emptory self-defence as an acceptable justification for war is even less clear, though it should also be possible to imagine a case in which the use of proportionate force – based on the available evidence – and to prevent an immediate threat, was considered justifiable. The 2003 invasion of Iraq, presented as a case study above, hints at the difficulty of applying the definition to real-world events. That said, delegations – through the adoption of the aggression amendments – have placed their faith in the Court as the appropriate forum for making such

decisions. Ultimately, that is exactly what the Court will do, and the definition adopted is indispensable in that endeavour.

The jurisdictional remit adopted is similarly controversial. Wrangling over the primacy of the Security Council came to define discussions in Kampala. In the end, the Review Conference opted for a two-tier system, splitting the provisions dealing with jurisdiction in two. In doing so, and as part of the compromise package, delegations departed from the established regime that applies to the other core crimes. Opting instead for a consensual approach to the aggression amendments, States Parties were handed the power – in the absence of a Security Council referral – to formally opt-out of the Court's reach or indeed simply not to ratify the amendments at all. This so-called 'negative understanding' of Article 121(5) was the last big question to be decided by states, and represents a novel solution to reconciling the entrenched positions of opposing camps of states.

For some, these jurisdictional provisions undermine the independence of the Court by subordinating it further to the Security Council, and undermine international criminal law standards by allowing states to decide not to be bound by the Court's jurisdiction over one of the supreme international offences. These criticisms are legitimate, and in an ideal world would not have been necessary. But we do not live in a perfect world, hence the need for a Court to punish atrocity crimes. It is an inconvenient truth that the crime may well not exist at all were it not for these compromises. In the view of this author, it was a price worth paying.

That states were able to agree to the provisions is testament to the work that has been done over the years by states and non-state actors alike. For long-time supporters of the Court being given jurisdiction over aggression, the amendments are welcome even if watered-down. For others, enough safeguards have been put in place to ensure they need not be too concerned about future prosecutions.

It is evidently true that the scope of the Court is severely limited in cases where the Security Council declines to make a referral. The likely outcome of this consensual approach is that only a small number of states will be bound by the aggression amendments, and the examples of aggression committed around the world will surely come to vastly outweigh the number over which the Prosecutor is

empowered to act. This is perhaps the most damning criticism levelled at the Kampala outcome. This state of affairs, in which the Security Council will often be the only viable route to prosecution, does little to address claims that the Court is a tool of western imperialism. Nor does it demonstrate that the international community is serious about ending impunity for the waging of aggressive war. That being said, Rome was not built in a day, and the Rome Statute is no different. International law develops and is strengthened over time, and it is a political reality that the crime of aggression – politically controversial as it is – should be no different. That the crime of aggression is to be enshrined as an offence under international law, with a permanent court equipped to prosecute those responsible for breaching it, is a big step. There will be renewed political pressure on states as a result of the crime of aggression's acceptance as one of the core crimes of concern to the international community. Even in instances in which the Court is deprived of jurisdiction, political leaders will be keen to avoid accusations of being criminally responsible for waging war, even more so now that a definition of the crime is readily on hand and can be applied to the facts. Few prosecutions may result, certainly in the short-term, but the crime's ascent has the power to change the way in which the international community views the resort to violence.

The next step is for states to continue to ratify the amendments, to work productively towards solutions to some of the issues outlined above, and to give the Court the public and financial support it needs to make the amendments a success. The future of the International Criminal Court depends on it.

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Appendices

Appendix I

Resolution RC/Res.6, The crime of aggression

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute, *Recalling* paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. Decides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;
2. Also decides to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

3. Also decides to adopt the understandings regarding the interpretation of the above- mentioned amendments contained in annex III of the present resolution;
4. Further decides to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;
5. Calls upon all States Parties to ratify or accept the amendments contained in annex I.

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Article 5, paragraph 2, of the Statute is deleted.

The following text is inserted after article 8 of the Statute:

Article 8 bis

Crime of aggression

1. 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.
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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
 - (a) 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;

- (b) 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;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of 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 agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) 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 the acts listed above, or its substantial involvement therein.

Article 15 bis

Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has

previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a 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.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *ter*

Exercise of jurisdiction over the crime of aggression (Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Appendix II

Amendments to the Elements of Crimes

Article 8 *bis*

Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term "manifest" is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – 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 – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

Appendix III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 ter, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.
2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
5. 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.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.

Appendix IV

Resolution ICC-ASP/16/Res.5

Adopted at the 13th plenary meeting, on 14 December 2017, by consensus

Activation of the jurisdiction of the Court over the crime of aggression

The Assembly of States Parties,

Recognizing the historic significance of the consensual decision at the Kampala Review Conference to adopt the amendments to the Rome Statute on the crime of aggression, and in this regard *recalling* resolution RC/Res.6,

Reaffirming the purposes and principles of the Charter of the United Nations,

Recalling its resolve to activate the Court's jurisdiction over the crime of aggression as early as possible, subject to a decision according to paragraphs 3 of article 15 *bis* and article 15 *ter*,

Noting with appreciation the Report on the facilitation on the activation of the 1

jurisdiction of the International Criminal Court over the crime of aggression , which summarizes the views of States Parties,

Recalling paragraph 4 of article 15 *bis* and paragraph 5 of article 121,

Recalling also that in paragraph 1 of RC/Res.6 the Review Conference decided to adopt, in accordance with paragraph 2 of article 5 the amendments regarding the crime of aggression, which are subject to ratification or acceptance and shall enter into force in accordance with paragraph 5 of article 121; and noted that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance of the amendments,

Decides to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018;

1. Confirms that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or proprio motu investigation the

Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;

2. Reaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court;
3. Renews its call upon all States Parties which have not yet done so to ratify or accept the amendments to the Rome Statute on the crime of aggression.