

The Kampala Compromise on the Crime of Aggression[‡]

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Abstract

The word 'historic' suffers from exaggerated use, but the adoption of the package proposal on the crime of aggression by the First Review Conference on the Rome Statute, on 11 June 2010 in Kampala, deserves that label. This development concludes decades of preparatory work and completes the Rome Statute. The authors describe and analyse the major steps leading to the Kampala compromise from an insider's perspective, and characterize the consensus decision as a breakthrough that, if nurtured, may eventually bring to fruition the famous Nuremberg promise given by Robert Jackson.

1. Introduction

Nobody present will forget the dramatic night of 17–18 July 1998 in Rome, when the final text of the Statute of the International Criminal Court (ICC Statute)¹ was put before the diplomatic conference. The clocks had been

[‡] This article is dedicated to Benjamin Ferencz in admiration. Ben's leading contribution to the debate on aggression is widely known. He has, amongst numerous other writings, published the monumental study *Defining International Aggression – The Search for World Peace: A Documentary History and Analysis*, 2 vols (Dobbs Ferry, New York: Oceana Publications, 1975). Equally importantly, he has followed the diplomatic negotiations at all crucial junctures and was tireless in reminding delegates of their responsibility to move forward in a constructive spirit.

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1 A/CONF.183/9, 17 July 1998, and corrected by *proces-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 16 January 2001 and 17 January 2001 (entry into force: 1 July 2002).

stopped and the great majority of the delegates burst into celebrations after the adoption of the final compromise package. The night of 11–12 June 2010 in Kampala, when the First Review Conference of the ICC Statute reached agreement on the crime of aggression, was similarly breathtaking. Again the clocks were stopped at midnight, which was when the First Review Conference was scheduled to end. Sometime later, when Ambassador Christian Wenaweser, the President of the Conference, put his ‘best attempt’ to achieve a compromise before the room in the hope that there would be no objections, nobody could be sure whether or not the silence would be broken. Since the delegations of France and the UK, to whom all attention was directed, showed no movement, the President was about to raise the hammer to declare the proposition adopted. Suddenly, Japan raised its flag and voiced its dissatisfaction. When the head of the Japanese delegation used the words ‘it is with a heavy heart’ the conference held its breath. A deeply felt release followed only when the same delegate continued his intervention to say that, despite its concerns, Japan did not wish to break consensus. Immediately thereafter, the presidential hammer went down, causing an outburst of collective joy that was accompanied by Benjamin Ferencz’s son, Donald, playing his bagpipes.²

While the ultimate climax of the Kampala Review Conference thus gave rise to a feeling of triumph reminiscent of that experienced at Rome over a decade earlier, one conspicuous difference is noteworthy. Unlike in Rome, the decision in Kampala was made by consensus, and the United States, while as a non-State Party not formally part of the decision making, felt that a serious attempt had been made to accommodate some of its key concerns. In the article that follows, we give an account of how the near-century-long debate on the crime of aggression culminated in Kampala. We shall also attempt to make an initial assessment of what we suggest has been a remarkable breakthrough towards further consolidating the emerging international criminal justice system.

2. The Creative Precedent and the Decades of Suspense: From Nuremberg to Rome

If Nuremberg marks the start of international criminal law *stricto sensu*,³ the crime of aggression was very much at the heart of that crystallizing moment.⁴ Driven above all by the American view that ‘the crime which comprehends all

2 For Donald Ferencz’s most recent scholarly contribution to the debate, see ‘Bringing the Crime of Aggression Within the Active Jurisdiction of the ICC’, 42 *Case Western Reserve Journal of International Law* (2009) 531–542.

3 International criminal law *stricto sensu* establishes individual criminal responsibility directly under international law. See C. Kreß, ‘International Criminal Law’, in R. Wolfrum (ed.), *Max Planck-Encyclopedia of Public International Law* (forthcoming), paragraph 10; the electronic version is available at <http://www.mpepil.com> (visited 5 October 2010).

4 For a useful recent summary of the developments before Nuremberg, see J. Nyamuya Maogoto, ‘Aggression: Supreme International Offence still in Search of Definition’, 6 *Southern Cross University Law Review* (2002) 278–317, 278–289.

lesser crimes, is the crime of making unjustifiable war;⁵ the London Charter that established the International Military Tribunal (IMT) included 'crimes against peace,'⁶ and the IMT recognized the waging of a war of aggression as the 'supreme international crime.'⁷ Soon thereafter, the American Chief Prosecutor Robert Jackson reported back to his President that the prohibition of aggressive war, by force of 'a judicial precedent,'⁸ had become 'a law with a sanction.'⁹ Yet Jackson's famous promise that, from that moment on, the new international criminal law against aggressive war would be applied against all violators,¹⁰ was doomed to remain unfulfilled for many subsequent decades.

Despite the fact that the General Assembly of the United Nations (UN) had soon recognized the Nuremberg Principles as international law,¹¹ and that the Tokyo judgment had followed the Nuremberg precedent,¹² the 'supreme international crime' not only remained undefined, but soon even turned into a stumbling block for the realization of the project to codify those principles.¹³ Even when this stumbling block seemed to have been removed in 1974 through the adoption, by consensus, of a definition of an 'act of aggression' within the meaning of Article 39 of the UN Charter, nothing really changed.¹⁴ While Article 16 of the International Law Commission (ILC)'s draft *Code of Crimes against the Peace and Security of Mankind* confirmed that the crime of aggression constitutes a crime under international law,¹⁵ none of the international or internationalized criminal tribunals established since the 1990s to deal with specific situations of macro-criminality included the crime of aggression.

5 *Report to the President by Mr. Justice Jackson*, 6 June 1945, sub IV.; available at <http://avalon.law.yale.edu/imt/jack63.asp> (visited 5 October 2010).

6 Art. 6(a) of the London Charter defines those crimes as the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'; 82 UNTS 280.

7 'To initiate a war of aggression, therefore, is not only an international crime, it is the supreme crime', in 'Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences', 41 *American Journal of International Law* (1947), at 186.

8 For a short summary of the debate as to whether this 'creative' precedent violated the principle of *nullum crimen*, see C. Kreß, 'Nulla Poena Nullum Crimen Sine Lege', in Wolfrum, *supra* note 3, paragraph 16; available at <http://www.mpepil.com> (visited 26 October 2010).

9 *Report to the President by Mr. Justice Jackson*, *supra* note 5.

10 Opening Speech of the Chief Prosecutor for the United States, reprinted in *Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (Buffalo: William S. Hein & Co., 2001), at 45.

11 UN Doc. A/RES/95 (1946), paragraph 1, 11 December 1946.

12 For an excellent recent reappraisal of the contribution of the Tokyo International Military Tribunal to legal development, see N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), at 115.

13 E. Wilmshurst, 'Aggression', in R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn., Cambridge: Cambridge University Press, 2010), at 314.

14 Annex to UN Doc. A/RES/3314 (XXIX), 14 December 1974 (Res. 3314).

15 A/51/10 (1996); the 1996 Draft Code does not, however, spell out the elements of the crime. An attempt to do so had been undertaken (and remains controversial) in Art. 15 of the 1991 Draft Code (A/46/10 (1991)); on the latter attempt see Nyamuya Maogoto, *supra* note 4, 304–309.

The absence of this crime from the scope of jurisdiction *ratione materiae* was most conspicuous when the Iraqi Special Tribunal (later renamed Iraqi High Tribunal) was established to prosecute the crimes committed by Saddam Hussein.¹⁶ The international law against the crime of aggression lay dormant.

The adoption of the ICC Statute only led to its partial re-awakening. Once more, it had proved impossible to agree on a definition of the crime, and states were also divided as regards the possible role of the Security Council with respect to proceedings for the crime before the Court. There remained, however, a widespread belief that the crime of aggression should form part of the ICC's jurisdiction *ratione materiae*.¹⁷ This resulted in the compromise contained in Articles 5(1)(d) and (2) ICC Statute, which read as follows:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

...

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once 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. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

While this solution was to preclude the Court from exercising jurisdiction over the crime of aggression at least for the next seven years,¹⁸ Article 5(1)(d) ICC Statute implicitly confirmed the existence of the crime under customary international law.¹⁹ The Rome compromise on the crime of aggression was complemented by the following Paragraph 7 in Resolution F of the conference's Final Act:

The (Preparatory; *C.K./L.v.H.*) Commission shall prepare 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. The Commission shall submit such proposals 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. The provisions relating to the crime of aggression shall enter into force for the State Parties in accordance with the relevant provisions of this Statute.²⁰

16 C. Krefß, 'The Iraqi Special Tribunal and the Crime of Aggression,' 2 *Journal of International Criminal Justice (JICJ)* (2004) 347–352.

17 For a succinct summary of the debates in Rome, see G. Westdickenberg and O. Fixson, 'Das Verbrechen der Aggression im Römischen Statut des Internationalen Gerichtshof', in J.A. Frowein et al. (eds), *Negotiating for Peace. Liber Amicorum Tono Eitel* (Berlin: Springer, 2003), at 496–498.

18 Art. 123(1) ICCSt.

19 The British House of Lords added its weighty voice to this view in *R. v. Jones et al.* (2006) UKHL 16, §§ 12, 19 (Lord Bingham), §§ 44, 59 (Lord Hoffmann); § 96 (Lord Rodger); § 97 (Lord Carswell); § 99 (Lord Mance).

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

3. The Road to Compromise: From Rome to Kampala

A. The 2002 Discussion Paper and the 2009 Proposals

In accordance with the above-mentioned mandate, the Preparatory Commission for the ICC took up the matter. The Commission held 10 sessions between spring 1999 and summer 2002. In its third session, it created the Working Group on Aggression, which was guided first by Tuvako Manongi (Tanzania) and then by Silvia Fernandez de Gurmendi (Argentina), who now serves as a judge of the ICC. This working group did not make significant progress, but its efforts resulted in a helpful summary of the main positions in the Coordinator's Discussion Paper of 11 July 2002 (2002 Discussion Paper).²¹ As this text was instrumental in shaping the parameters of the ensuing debate, its relevant part deserves citation in full:

1. For the purpose of the present Statute, a person commits a 'crime of aggression' when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

Option 1: Add 'such as, in particular, a war of aggression or an act which has the object or result of establishing military occupation of, or annexing, the territory of another State or part thereof.'

Option 2: Add 'and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof.'

Option 3: Neither of the above.

2. For the purpose of paragraph 1, 'act of aggression' means an act referred to in United Nations Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,

Option 1: Add 'in accordance with paragraphs 4 and 5'.

Option 2: Add 'subject to a prior determination by the Security Council of the United Nations.'

3. The provisions of articles 25, paragraph 3, 28 and 33 of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate:

Option 1: under Article 39 of the Charter of the United Nations.

Option 2: in accordance with the relevant provisions of the Charter of the United Nations.

21 For the best account of this part of the debate, see R.S. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law (LJIL)* (2002) 859–890. For the views of the last coordinator, see S. Fernandez d Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court', 25 *Fordham International Law Journal* (2001–2002) 589–605.

5. Where the Security Council does not make a determination as to the existence of an act of aggression by a State:

Variant (a) or invoke article 16 of the Statute within six months from the date of notification.

Variant (b) [Remove variant a]

Option 1: the Court may proceed with the case.

Option 2: the Court shall dismiss the case.

Option 3: the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.

Option 4: the Court may request

Variant (a) the General Assembly

Variant (b) the Security Council, acting on the vote of any nine members, to seek an advisory opinion from the International Court of Justice, in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court, on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

Option 5: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.²²

Soon after the entry into force of the ICC Statute on 1 July 2002, the Assembly of States Parties (ASP)²³ expressed its desire to continue and complete the work on the crime of aggression. Consequently, the ASP established the *Special Working Group on the Crime of Aggression* (SWGCA).²⁴ This group met for the first time in September 2003 and concluded its work in February 2009. As will be seen, the proposals for a provision on aggression elaborated by the SWGCA (2009 Proposals) represent a 'watershed in the negotiations on the crime of aggression'²⁵ and paved the way for the Kampala compromise. The SWGCA Proposals 2009 read as follows:

1. Article 5, paragraph 2, of the Statute is deleted.

2. 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

22 UN Doc. PCNICC/2002/WGCA/RT1/Rev.2, 11 July 2002.

23 Art. 112 ICCSt.

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

25 The term is borrowed from S. Barriga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression', in R. Bellelli (ed.), *International Criminal Justice. Law and Practice from the Rome Statute to Its Review* (Farnham, Burlington: Ashgate Publishing, 2010), 621–643, at 640, which is the best account of the SWGCA's work.

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.

3. *The following text is inserted after article 15 of the Statute:*

Article 15 bis

Exercise of jurisdiction over the crime of aggression

- 1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
- 2. 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.
- 3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
- 4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

- 4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

Option 3 – add: provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;

Option 4 – add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.

5. 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.

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

4. The following text is inserted after article 25, paragraph 3 of the Statute:

3 bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

5. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.

6. The chapeau of article 20, paragraph 3 of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court.²⁶

B. Some Noteworthy Features of the Work within the SWGCA

Ambassador Christian Wenaweser of Liechtenstein presided over the SWGCA. With the support of his outstanding team, in which Stefan Barriga was the impeccable mastermind, Wenaweser guided the negotiations in a skilled manner, displaying just the right combination of authority, expertise, patience and good humour. Step by step, the Liechtenstein team created the widespread feeling that, despite the numerous obstacles that lay ahead, the SWGCA had a realistic chance of fulfilling its mission. Early on, a felicitous decision was made to conduct an essential part of the work in an informal setting. During four meetings held between 2004 and 2007, delegates enjoyed the enthusiastic hospitality of the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School in Princeton University and its director Wolfgang Danspeckgruber. The Princeton Process was an inclusive one, allowing representatives of non-States Parties and experts from interested NGOs to take an active part in the debate.²⁷ The Princeton Process was also particularly

²⁶ ICC-ASP/8/Res.6.

²⁷ Non-States Parties made ample use of this opportunity. The single regrettable exception was the United States, during the GW. Bush administration. The degree of participation from within the NGO community varied. Sadly, and somewhat surprisingly, Amnesty International and Human Rights Watch interpreted their respective mandates so as to preclude them from a

transparent. Its informal consultations have been extensively documented in a series of Working Group Reports,²⁸ and were complemented by a number of academic conferences.²⁹ This enabled international legal scholarship to closely follow and continuously comment upon the negotiations as they unfolded.³⁰

meaningful engagement, which, at times and perhaps inadvertently, created the impression that these two important organizations sided with those few delegations which remained sceptical of the overall process. There were a few NGOs, however, which took a less timid approach and shared their rich expertise with state delegates throughout the process; Jutta Bertram-Nothnagel and Noah Weisbord deserve special credit for their significant intellectual input.

- 28 The reports are usefully collected in S. Barriga, W. Danspeckgruber, S. Wenaweser (eds), *The Princeton Process on the Crime of Aggression* (Boulder: Lynne Rienner Publishers, 2009).
- 29 For two important examples, see the Torino Conference on International Criminal Justice of May 2007 (Bellelli, *supra* note 25) and the Symposium on the crime of aggression of September 2008 hosted by the Case Western Reserve University School of Law (41 *Case Western Reserve Journal of International Law* (2009) 267–467).
- 30 The amount of scholarly writing on the crime of aggression has increased significantly in the last 10 years. Space does not allow us to list the publications comprehensively. For a selection of (partly very critical) studies in addition to those cited in *supra* note 29, see: M. Kamto, *L'agression en droit international* (Paris: A. Pedone, 2010); R.S. Clark, 'Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over it', 20 *European Journal of International Law (EJIL)* (2009) 1103–1115; *idem*, 'The Crime of Aggression and the International Criminal Court', in J. Doria, H.-P. Gasser and M.C. Bassiouni (eds), *The Legal Regime of the International Criminal Court. Essays in Honour of Professor Igor Blishchenko* (Leiden-Boston: Martinus Nijhoff, 2009) 661–699; M.J. Glennon, 'The Blank-Page Crime of Aggression', 35 *The Yale Journal of International Law* (2009) 71–114; C. Kreß, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', 20 *EJIL* (2009) 1129–1146; A. Paulus, 'Second Thoughts on the Crime of Aggression', 20 *EJIL* (2009) 1117–1128; S.D. Murphy, 'Aggression, Legitimacy and the International Criminal Court', 20 *EJIL* (2009) 1147–1156; R. Schaeffer, 'The Audacity of Compromise. The UN Security Council and the Pre-Conditions to the Exercise of Jurisdiction by the ICC with Regard to the Crime of Aggression', 9 *International Criminal Law Review (ICLR)* (2009) 411–433; L. May, *Aggression and Crimes Against Peace* (Cambridge: Cambridge University Press, 2008); A. Reisinger Coracini, 'Amended Most Serious Crimes': A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court? 21 *LJIL* (2008) 699–718; N. Weisbord, 'Prosecuting Aggression', 49 *Harvard International Law Journal* (2008) 161–220; N. Blokker, 'The Crime of Aggression and the United Nations Security Council', 20 *LJIL* (2007) 867–894; A. Cassese, 'On Some Problematic Aspects of the Crime of Aggression', 20 *LJIL* (2007) 841–849; C. McDougall, 'When Law and Reality Clash – the Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression', 7 *ICLR* (2007) 277–333; O. Solera, *Defining the Crime of Aggression* (London: Cameron May, 2007); T. Stein, 'Aggression als Verbrechen im Statut des Internationalen Strafgerichtshofs – "A Bridge too Far"?' in H. Müller-Dietz et al. (eds), *Festschrift für Heike Jung* (Baden-Baden: Nomos, 2007), 935–944; M. Stein, 'The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?' 16 *Indiana International and Comparative Law Review* (2005) 1–36; J.N. Boevig, 'Aggression, International Law and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute', 43 *Columbia Journal of Transnational Law* (2005) 557–611; A. Paulus, 'Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis', 50 *Wayne Law Review* (2004) 1–35; M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate, 2004); R. Fife, 'Criminalizing Individual Acts

Furthermore, the Princeton Process, displaying a strong sense of realism, focused on legal and technical questions. While the political 'question of questions' of the possible role of the Security Council was not ignored, relatively little time was wasted with rehearsing the divergent and well-entrenched views on this subject. Instead, and much more fruitfully, most intellectual energy was applied to reducing the differences of opinions on a host of other issues of a less politically sensitive nature.

It is less clear whether it was an accepted and overarching guideline of the SWGCA to define the crime within the confines of existing customary international law. As is well known, in Rome there was agreement to list and to define the crimes within the ICC's jurisdiction *ratione materiae* in accordance with existing general customary international law,³¹ and this agreement extended to the crime of aggression.³² This basic approach met with one technical and one substantive difficulty. First, it quickly became apparent that most delegations wished the definition of the crime of aggression to avoid, to the greatest extent possible, deviations from the already agreed ICC Statute. This created the challenge of formulating a definition to be applied together with the 'General Part' contained in Part 3 of the ICC Statute, which did not exist when international criminal law against aggression came into existence. Secondly, and more importantly, the precise status of customary international law was difficult to ascertain, especially as regards the state component of the crime. While this explains why references to customary international law were perhaps less regularly made during the Princeton Process than in Rome, it was never disputed that the precedents of Nuremberg and Tokyo provided crucial guidance in defining the crime.

C. The Three 'Baskets' of Issues at Stake

The work of the SWGCA was soon sub-divided into three 'baskets': individual conduct, the conduct of the state and the conditions for the exercise of jurisdiction.³³

of Aggression by States', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjorn Eide* (Leiden: Nijhoff, 2003) 53–73; D.D. Ntanda Nsereko, 'Defining the Crime of Aggression: An Important Agenda Item for the Assembly of States Parties to the Rome Statute of the International Criminal Court', *Acta Juridica* (2003) 265–286; M. Schuster, 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword', 14 *Criminal Law Forum* (2003) 1–57; R.L. Griffiths, 'International Law, the Crime of Aggression, and the *Ius ad Bellum*', 2 *ICLR* (2002) 301–374; I.K. Mueller-Schieke, 'Defining the Crime of Aggression under the Statute of the International Criminal Court', 14 *LJIL* (2002) 409–430; T. Meron, 'Defining Aggression for the International Criminal Court', 1 *Suffolk Transnational Law Review* (2001) 1–15; and, M. Hummrich, *Der völkerrechtliche Tatbestand der Aggression* (Baden-Baden: Nomos, 2001).

31 A. Zimmermann, 'Article 5', in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court* (2nd edn., Munich-Oxford-Baden-Baden: C.H. Beck/Hart/Nomos, 2008), at paragraph 1.

32 Westdickenberg and Fixson, *supra* note 17, at 500–503.

33 See the 2007 Report of the SWGCA, § 5 *et seq.*; Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 109 *et seq.*

1. Individual Conduct

Agreement proved easiest to reach on the first of these baskets. After some discussion, it was decided to abandon the 'monistic' approach³⁴ suggested in the 2002 Discussion Paper. That approach used the catchall term 'actively participates' to describe the conduct necessary for an individual to perpetrate the offence. Instead, and in line with the accepted guiding principle to deviate as little as possible from Part 3 of the ICC Statute, the Nuremberg formula of 'planning, preparation, initiation or execution'³⁵ was used. This description of acts must be read together with the various forms of participation listed in Article 25(3) ICC Statute. It is precisely because of this distinction between the different forms of participation that this approach has been labelled 'differentiated'.

Early on, there developed a solid consensus that the crime of aggression is an absolute leadership crime. Both the 2002 Discussion Paper and the 2009 Proposals expressed the leadership requirement through the phrase 'by a person in a position effectively to exercise control over or to direct the political or military action of a State'. This formula, which goes back to Nuremberg,³⁶ distinguishes the crime of aggression from other crimes under international law. Once the decision in favour of the 'differentiated' approach had been made, it was necessary to express the absolute character of the leadership requirement through a new draft Article 25(3) *bis* ICC Statute.³⁷ This provision makes it plain that the ordinary soldier who serves in the ranks of the aggressor state will not be criminalized as an aider or abettor pursuant to Article 25(3)(c) ICC Statute.

Contrary to what was intended by Paragraph 3 of the 2002 Discussion Paper, no other provision contained in Part 3 of the ICC Statute is made inapplicable or qualified with respect to the crime of aggression. The extent to which those provisions are of practical relevance in aggression cases will have to be determined with respect to each individual provision. It is highly unlikely that Articles 28 and 33 of the ICC Statute will gain practical relevance. Contrary to the 2002 Discussion Paper, the 2009 Proposals do not define the mental elements of the crime, but rely on the application of Article 30 ICC Statute. Yet, the Draft Elements of the crime of aggression, which we will treat

34 For the distinction between a 'monist' and a 'differentiated' approach to the individual component of the crime, see Discussion Paper 1 submitted by Claus Kreß in Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 184 *et seq.*

35 Note, however, that the Nuremberg formula (*supra* note 6) includes the word 'waging' instead of 'executing'.

36 There has been some debate, however, as to whether this language is broad enough to fully cover the customary *acquis*. See K. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', 18 *European Journal of International Law* (2007) 477–497, and C. Kreß, 'The Crime of Aggression before the First Review of the ICCSt.', 20 *LJIL* (2007) 851–865, at 855.

37 See *sub* 4. of the 2009 Proposals For a critique of this solution, see K. Ambos, 'The Crime of Aggression after Kampala', 53 *German Yearbook of International Law* (2010) (forthcoming). On the possible 'wisdom' of the solution, see, however, Kreß, *supra* note 30, at 1134.

below,³⁸ contain some indication as to the interplay between draft Article 8 *bis* and Article 30 of the ICC Statute.

2. State Conduct

A policy argument can be made that the crime of aggression should extend to certain violent conduct of transnational private organizations,³⁹ especially at a time when the UN Security Council is prepared to qualify massive transnational non-state violence as a threat to international peace and when such violence is often recognized as amounting to an armed attack within the meaning of Article 51 of the UN Charter.⁴⁰ In the context of negotiations over the crime of aggression, however, states decided to stay within the confines of existing customary international law, and the 2002 Discussion Paper restricted the collective component of the crime to the conduct of a state. The requirement of an internationally wrongful state act constitutes another peculiarity (in addition to the leadership requirement) of the crime of aggression compared to other crimes under international law.

Early in the negotiations, it became clear that the state act underlying the crime of aggression has to be an illegal use of armed force. The primary norms of international law to be protected by the secondary norm against the crime of aggression are thus the prohibitions of the use of force contained in Article 2(4) of the UN Charter⁴¹ and the same prohibition under general customary international law. That consensus proved to be the only uncontroversial aspects of the negotiations on state conduct. The two most difficult, hotly debated and intimately intertwined problems related to the question of how best to define the illegal use of armed force for the specific purpose of the criminalization of aggression.

Strongly divergent views were held, first, as to whether reference should be made to the definition of ‘act of aggression’ in the annex to Resolution 3314,⁴² and second as to whether the scope of application of the crime of aggression should be confined to certain forms of illegal uses of armed force by a state. Simplifying a much more nuanced picture, it can be said that one camp (comprising many of the non-aligned countries) favoured a more inclusive definition that referred to the list of acts contained in Article 3 of the annex to

38 The mental elements are, however, to some extent dealt with in the Elements of Crimes. See *infra* 3.D.

39 The point has been made, for example, by C. Stahn, ‘International Law at a Crossroads? The Impact of September 11’, 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002) 183–255, at 250; see also, A. Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2008), at 157.

40 For some references to the controversy surrounding this aspect of the current *ius contra bellum*, see C. Kreß, ‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts’, 15 *Journal of Conflict & Security Law* (2010) 245–274, at 248 (notes 9–12).

41 To the extent that Art. 2(4) of the UN Charter also prohibits the threat to use armed force, it exceeds the realm of conduct that is subject to international criminalization.

42 *Supra* note 14.

Resolution 3314 without any additional threshold, while another camp (to which many NATO states belonged) insisted that there be a higher threshold for criminal conduct.⁴³ In light of the delicacy of the matter, it is remarkable that the SWGCA managed to reach a compromise on the definition of the state act that amalgamated elements of both positions. This compromise combines a reference to Resolution 3314 with a threshold requirement.⁴⁴

The reference to Resolution 3314 in Article 8 *bis* (2) in itself constitutes a most carefully drafted reconciliation of competing views. The first sentence of this reference, whose language is taken from Article 1 in the annex to Resolution 3314, operates as a chapeau clause. The second sentence illustrates the meaning of the chapeau clause listing acts contained in Article 3 in the annex to Resolution 3314. This drafting technique does not preclude the Court from determining that a state act that does not fall under one of the listed examples still meets the requirement of the chapeau clause.⁴⁵ Finally, the addition of the phrase 'in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974' in the second sentence of Article 8 *bis* (2) is constructively ambiguous in that it leaves open the question whether and in what way provisions other than Articles 1 and 3 in the annex of Resolution 3314 may become relevant for the ICC. In answering this question, the Court will be guided by its normative framework including inter alia, the pertinent human rights standards as referred to in Articles 21(3) and 67(1)(i) of the ICC Statute. The *prima facie* effect, which Article 2 in the annex to Resolution 3314 accords to any first use of armed force, thus remains confined to the decision-making by the Security Council and will not guide the judicial work of the ICC.

In a thoughtful article, Michael Glennon has criticized the definition of 'act of aggression' in Article 8 *bis* (2) of the 2009 Proposals on the grounds that it does not contain a requirement of illegality. By implication, he argues, military action taken in self-defence might be said to qualify as an act of aggression within the meaning of Article 8 *bis*.⁴⁶ This critique rightly highlights a drafting difficulty, but on closer inspection turns out to be unfounded. The drafting problem stems from the fact that Articles 1 and 3 in the annex to Resolution 3314 appear to define the term 'act of aggression' without regard to grounds precluding the wrongfulness of a use of force, such as the right to self-defence. Those grounds are only alluded to in Article 6 in the annex of Resolution 3314, which states that '(n)othing in this Definition shall be construed as

43 See the different options in paragraph 1 of the 2002 Discussion paper.

44 See Art. 8 *bis* paragraphs 1 and 2 of the 2009 Proposals.

45 R.S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May–11 June 2010', 2 *Göttingen Journal of International Law* (2010) 689–711, at 696; the list contained in Art. 8 *bis* paragraph 2(a)–(g) may thus be called 'semi-closed'. In our view, this does not contradict the principle of legal certainty under international law (on this principle, see Kreß, *supra* note 8, paragraphs 29–31) because the chapeau requirement ensures a sufficient degree of legal certainty. For a different view, see Ambos, *supra* note 37.

46 Glennon, *supra* note 30, at 88–90.

in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful. This structure of the annex of Resolution 3314 makes it possible to recognize ‘acts of aggression’ within the meaning of Articles 1 and 3 even when there exists a legal justification for the use of force, as alluded to in Article 6. As Glennon rightly observes, the rather awkward possibility of construing a ‘lawful act of aggression’ has now been imported into Article 8 *bis* of the 2009 Proposals. Yet, the recognition of such an odd concept can be avoided by way of a harmonious interpretation of Articles 1, 3 and 6 of the annex of Resolution 3314, as is required by Article 8 of that same annex. The absence of a ground precluding the wrongfulness of the use of armed force constitutes an implicit negative element of the concept of ‘act of aggression’ as defined in the annex to Resolution 3314. As this construction of the term is ‘in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974’, it should also be adopted under draft Article 8 *bis*. In addition, it should be stressed that draft Article 8 *bis* of the 2009 Proposals does not attach any legal consequence to an ‘act of aggression’ per se. The ‘act of aggression’ is only one of two necessary components of the state conduct element of the crime of aggression in the 2009 Proposals. For the purposes of this definition, the ‘sub-element’ of ‘act of aggression’ in draft Article 8 *bis* (2) cannot be divorced from, but must be read together with, the additional ‘sub-element’ of ‘manifest illegality’ in draft Article 8 *bis* (1).⁴⁷

For a number of reasons, it would have been highly problematic to define the state conduct element of the crime of aggression by way of a mere reference to Resolution 3314. The definition of the term ‘act of aggression’ contained in Articles 1 and 3 in the annex of Resolution 3314 was not written with the agreed understanding that it subsequently be used for defining the state conduct element of the crime of aggression under international criminal law. This lack of a shared understanding is made plain in the Resolution itself, where the first sentence of Article 5(2) in the annex only refers to a ‘war of aggression’ as a crime against international peace.⁴⁸ For this and other reasons,⁴⁹ it is difficult to argue that Articles 1 and 3 in the annex of Resolution 3314 embody the state conduct element of the crime of aggression under general customary international law.

Furthermore, a mere reference to Resolution 3314 would not have adequately responded to the fundamental challenge posed to any attempt to define the crime of aggression. It is an undeniable fact that the relevant primary norms of international law, that is, the prohibitions of the use of force under the UN

47 It is likely that the concerns voiced by D. Scheffer, ‘The Complex Crime of Aggression under the Rome Statute’, 23 *LJIL* (2010) 897–904, at 898–901, about the distinction between *crime* and *act* of aggression are also based on such a problematic divorce.

48 For a more detailed analysis, see T. Bruha, *Die Definition der Aggression* (Berlin: Duncker & Humblot, 1980), at 126 *et seq.*

49 See generally Wilmschurst, *supra* note 13, at 320 *et seq.*

Charter and under customary international law, although being clear in their core content, are surrounded by a grey area of legal controversy.⁵⁰ Although this certainly constitutes an imperfection of the current inter-state law on peace and security, it is not one that can be remedied through the backdoor of international *criminal* law. A mere reference to Resolution 3314 would, therefore (to paraphrase Ambassador Rolf Fife, the Norwegian Focal Point for the preparation of the Kampala conference), create the very serious risk of not placing the definition of the crime of aggression on 'rock-solid foundations', thereby risking the ICC becoming a forum for 'a continuation of politics'.⁵¹

Despite these concerns, the overwhelming majority of states favoured referring to Resolution 3314 rather than retaining the classic concept of 'war of aggression'.⁵² At the same time, it soon became clear that a reference to Resolution 3314 needed to be qualified if consensus were to be achieved. In that respect, the negotiators were essentially left with the choice between a stringent collective intent requirement⁵³ and a threshold requirement, which would satisfy those states that maintained that the state use of force should be sufficiently serious and that its illegality should be reasonably uncontroversial. A provisional agreement was finally reached on the basis of the second alternative. Draft Article 8 *bis* (1) *in fine* in the 2009 Proposals consequently requires that the act of aggression 'by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.⁵⁴ While the criteria of 'gravity' and 'scale' capture the requirement of 'sufficient seriousness', the criterion of 'character' (mainly) refers to the problem of the 'grey area' mentioned above.⁵⁵

Although the formulation of the state conduct element of draft Article 8 *bis* in the 2009 Proposals probably did not satisfy anybody completely, it clearly

50 For a masterfully succinct exposition of this grey area, see Wilmshurst, *supra* note 13, at 322–325.

51 Fife, *supra* note 30, at 73.

52 Note that this concept is still referred to in options 1 and 2 for draft Art. 8 *bis* in the 2002 Discussion Paper.

53 For some reflections on the different candidates, see C. Kreß, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression Against Iraq', 2 *JICJ* (2004) 245–264, at 256–259.

54 The 2002 Discussion Paper uses the term 'flagrant' instead of the term 'manifest'. There does not seem to be an 'official' explanation for the choice of the term 'manifest'. Paragraph 20 of the report of the 2006 Princeton meeting just states that there was a 'general preference ... for the term "manifest" rather than "flagrant" if a qualifier was to be retained.' See Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 144.

55 'Discussion Paper 3', which was submitted to the SWGCA in 2005, referred to this second function of the threshold requirement in somewhat cautious terms. The double function of the threshold was, however, the clear understanding of most of those states which insisted on the inclusion of the threshold. This is clear from the following passage of the report on the June 2008 SWGCA meeting: 'Delegations supporting this threshold clause noted that it 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 falling within a grey area.' Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 87 (paragraph 68).

emerged as the most promising candidate for the final package, and was therefore sent without brackets to Kampala.

3. *The Conditions for the Exercise of Jurisdiction*

From a political perspective, the possible role of the Security Council had become the most delicate question in the negotiations. Article 23(2) of the ILC's 1994 Draft ICC Statute suggested making ICC proceedings for the crime of aggression dependent upon a prior determination of the Security Council of an act of aggression.⁵⁶ This proposal, however, provoked criticism from within the ILC in that it 'would introduce into the statute a substantial inequality between State members of the Security Council and those that were not members, especially between the Permanent Members of the Security Council and other States'.⁵⁷ This criticism was shared by the overwhelming majority of states that participated in the negotiations, and critics within the ILC were, therefore, correct to predict that such a solution 'was not likely to encourage the widest possible adherence of States to the statute'.⁵⁸ The question as to whether a Security Council monopoly over the determination of an act of aggression is warranted, as suggested in the 1994 ILC Draft Statute, has received tremendous attention over the past 10 years and we do not wish to rehearse this debate here. Suffice it to say that, in light of the extensive international scholarly discussion of the matter, a compelling case can be made that neither Article 39 of the UN Charter nor Article 5(2) of the ICC Statute required the negotiators to grant the Security Council the monopoly in question.⁵⁹

Nevertheless, the Permanent Members of the Security Council adopted the ILC proposal and defended it with the greatest possible vigour until the last minutes of the negotiations. To agree on a solution that bridged the wide gap between the monopoly claim of the five permanent council members on the one end and the rejection of any role for the Council beyond the one already recognized in Article 16 of the ICC Statute on the other end of the spectrum posed a formidable challenge. The alternative formulation of draft Article 15 *bis* (4) in the 2009 Proposals with its various options demonstrates that the SWGCA, as could be expected, was unable to resolve the 'question of questions'. The highly contentious issue of the Security Council's role was therefore left for decision at the end game in Kampala.

56 The text is reproduced in M.C. Bassiouni (ed.), *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* (Ardsey: Transnational Publishers, 2005), at 130.

57 *Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994*, UN Doc. A/49/10, 43, at 87 *et seq.*

58 *Ibid.*

59 For detailed expositions of the correct legal position, see Schaeffer, *supra* note 30, at 412 *et seq.*; McDougall, *supra* note 30, at 279 *et seq.*; and, Stein, *supra* note 30, at 5 *et seq.* The most recent attempt by Glennon, *supra* note 30, at 105–109, to make the case for a Security Council monopoly has not adduced new arguments. It is largely based on considerations of legal *policy*, and Glennon's argument fails to convince us also on that account as well.

Yet a comparison between the options contained in the 2002 Discussion Paper on the one hand and in the 2009 Proposals on the other reveals how far the SWGCA had come even on this most thorny terrain. The most important achievement of the SWGCA in its work on the third 'basket' was to establish a consensus that any role of the Security Council with respect to aggression proceedings could only be a procedural one.⁶⁰ The members of the SWGCA agreed that, for the specific purpose of establishing individual criminal responsibility, it is exclusively for the ICC to determine whether or not the state conduct element of the crime of aggression has been fulfilled. Thus 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',⁶¹ which makes it plain that determinations of the Security Council as to the (non-)existence of an act of aggression, in particular those foreseen in Articles 2 and 4 of the annex to Resolution 3314, are not to be binding upon the ICC. The second important achievement in the third 'basket' was to secure consensus on the fact that all three trigger mechanisms listed in Article 13 ICC Statute would also apply to the crime of aggression. Article 15 *bis* (1) of the 2009 Proposals expressed this agreement.

The longer the negotiations within the SWGCA lasted, the more it became clear that the controversy about the possible role of the Security Council was intimately linked to another question relating to the conditions for the exercise of jurisdiction. This 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 has not consented to the new provision(s) on the crime of aggression. It was not unreasonable to assume that it would be easier for the Permanent Members of the Security Council to tolerate initiation of proceedings before the ICC even without the consent of the Council if it was agreed that proceedings could not be initiated unless the alleged aggressor state had consented to the new provision(s) on the crime of aggression. This foreshadowed the possibility of an eventual ultimate compromise built upon a combination of a Security Council-based and a consent-based ICC jurisdiction over the crime of aggression.

The way towards such a compromise was, however, far from obvious for reasons of both policy and law. From a policy perspective, a large number of delegations (not only from the group of non-aligned states) favoured the application of Article 12 ICC Statute without any modification.⁶² Those in favour of conditioning the ICC's exercise of jurisdiction (in the absence of the Security Council's consent to the initiation of proceedings) on the consent of the states to the crime of aggression, mostly relied on the argument that the second

60 Clark, *supra* note 45, at 700.

61 See draft Art. 15 *bis* (5) of the 2009 Proposals. This important stipulation has made its way into the Kampala compromise in the form of draft Art. 15 *bis* (9) and draft Art. 15 *ter* (4) ICCSt. See *infra* 4.F.

62 On the story behind the ICCSt.'s jurisdictional regime, see H.-P. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Rome Statute on the International Criminal Court: Principles and Compromises', 2 *Yearbook of International Humanitarian Law* (1999) 143–175.

sentence of Article 121(5) of the ICC Statute required such a solution as a matter of law. This argument, however, was highly controversial both as far as the interpretation of the relevant sentence is concerned, and with respect to the applicability of Article 121(5) to the new provision(s). This controversy results from the ‘fundamental ambiguity’⁶³ of Articles 5(2) and 121 of the ICC Statute with respect to the role of state consent in cases of aggression proceedings and the entry into force of any new provisions on the crime of aggression. In order to fully understand the final stage of the negotiations and to entirely appreciate the complex Kampala compromise, one has to bear in mind that four different interpretations of Article 5(2) of the ICC Statute in conjunction with Article 121 of the ICC Statute have been advanced within the SWGCA.⁶⁴

The ‘Adoption Model’ consists of applying only Article 121(3) of the ICC Statute, which reads as follows:

The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

Under the ‘Adoption Model’, the Court can exercise its jurisdiction over the crime of aggression in accordance with Article 12 of the ICC Statute once the new provisions have been adopted at an ASP meeting or at a Review Conference. This interpretation is based on the wording of Article 5(2) of the ICC Statute, which, along with Article 121(3) of the ICC Statute, only uses the term ‘adopted’. The problem with this interpretation is that it would be surprising if the ICC Statute did not distinguish between *adoption* and *entry into force* in the case of aggression when it does so even in the case of ‘amendments to provisions of an institutional nature’, as provided by Article 122 of the ICC Statute. Also, it would follow from the ‘Adoption Model’ that ratification of the provision(s) on the crime of aggression by states is legally irrelevant, which would be an astonishing consequence, given the political importance of the matter.

The ‘Article 121(5) Model with a Negative Understanding’ is situated at the other end of the spectrum. Article 121(5) of the ICC Statute reads as follows:

Any amendments to articles 5, 6, 7 and 8 of this Statute 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. 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.

63 The term is borrowed from the abstract of a recent article by one of the leading experts on the matter. See R.S. Clark, ‘Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute’, 41 *Case Western Reserve Journal of International Law* (2009) 413–427, at 413.

64 Most of them are already reflected in the report of the 2005 Princeton meeting; Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 167–169 (paragraphs 5–17). For the final picture, see *ibid.*, 50–51 (paragraphs 6–11), and 56–57 (paragraphs 31–37). Importantly, the controversy about the four models described in the following text did not include the special case of a Security Council referral. Here all members of the Special Working agreed that the ICC should be able to exercise its jurisdiction irrespective of any state consent. See *ibid.*, at 55–56 (paragraphs 28–29).

The 'Article 121(5) Model with a Negative Understanding' precludes the ICC from exercising its jurisdiction over the crime of aggression when either the State Party of nationality of the alleged offenders or the State Party on whose territory the crime is alleged to have been committed, has not accepted the provision(s) on the crime of aggression.⁶⁵ The initial and very significant problem with this interpretation is that Article 5(2) of the ICC Statute does not speak of 'entry into force'. On the face of it, it is difficult to read the reference in the latter provision as being directed to Article 121(5) of the ICC Statute. If, however, the provision(s) on the crime of aggression is (are) regarded as an amendment that has to enter into force in some form not governed by Article 121(3) of the ICC Statute, it remains unclear whether such an amendment is one 'to articles 5, 6, 7 and 8 of this Statute', as Article 121(5) of the ICC Statute requires. It can either be argued that the amendment in question does not affect those articles, or that the amendment goes beyond those articles to the extent that it deals with the conditions for the exercise of jurisdiction. Finally, this model ignores the fact that the crime of aggression, other than crimes newly added to the list, already forms part of the ICC's jurisdiction by virtue of Article 5(1)(d) of the ICC Statute.

According to the 'Article 121(5) Model with a Positive Understanding', the second sentence of Article 121(5) of the ICC Statute only has the limited effect of placing non-accepting States Parties on precisely the same footing as non-States Parties for the purpose of the application of Article 12(2) of the ICC Statute.⁶⁶ This would mean, most importantly, that the ICC would not be categorically precluded from exercising jurisdiction over the alleged perpetrators of a crime of aggression where the state of nationality has not accepted the provision(s) of the crime of aggression. Rather, the Court would possess the power to exercise its jurisdiction in accordance with Article 12(2)(a) of the ICC Statute if only the victim state had accepted the provisions in question.⁶⁷

The less rigorous reading of the second sentence of Article 121(5) of the ICC Statute as suggested by the 'Article 121(5) Model with a Positive Understanding' avoids the problem of an unfair discrimination between non-accepting States Parties and non-States Parties. The 'Article 121(5) Model with a Negative Understanding' inevitably faces this discrimination problem. As we have just seen, under this model the second sentence of Article 121(5)

65 As noted, *supra* note 64, those in favour of this model did not wish to apply the second sentence of Art. 125(2) ICCSt., in the case of a Security Council referral. While this sentence does not explicitly distinguish between the three trigger mechanisms, an argument can be made that this sentence has been formulated with a view to Art. 12(2) ICCSt., which is inapplicable in the case of a Security Council referral under Art. 13(b) ICCSt.

66 For an exposition of this model, whose relevance, of course, exceeds the crime of aggression, see A. Reisinger Coracini, "Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court?, 21 *LJIL* (2008) 699–718, at 707–714.

67 This is based on the view that the territory of the victim state forms part of the territory on which the crime of aggression is committed within the meaning of Art. 12(2)(a) ICCSt. This view was generally shared by the members of the SWGCA. See Barriga, Danspeckgruber, Wenaweser, *supra* note 28, at 57 (paragraphs 38 and 39).

of the ICC Statute constitutes a deviation from Article 12(2) of the ICC Statute. This deviation, however, would then seem to only apply with respect to States Parties because the second sentence of Article 121(5) ICC Statute only mentions those States.⁶⁸ While it certainly constitutes an advantage of the 'Article 121(5) Model with a Positive Understanding' not to run into this discrimination problem, one can hardly deny that the 'positive understanding' of the paragraph's second sentence does not naturally flow from its wording.⁶⁹ In addition to this general problem of the 'positive' reading of the second sentence Article 121(5), the 'Article 121(5) Model with a Positive Understanding' as a model designed to apply in the special case of the crime of aggression faces the same basic difficulty as the 'Article 121(5) Model with a Negative Understanding', namely, that the wording neither of Article 5(2) of the ICC Statute nor of Article 121(5) of the ICC Statute clearly suggests the application of this provision in the special case of the crime of aggression.

The 'Article 121(4) Model' treats the provision(s) on the crime of aggression as an amendment to the ICC Statute, but for at least one of the reasons set out above, not as an 'amendment to articles 5, 6, 7 and 8 of this Statute' within the meaning of Article 121(5) of the ICC Statute. This leads to the application of Article 121(4) of the ICC Statute, which reads as follows:

Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

After what has been said so far, it is clear that the 'Article 121(4) Model' also faces the problem that Article 5(2) of the ICC Statute, on the face of it, only speaks of 'adoption'. In addition, the legal effect of applying Article 121(4) of the ICC Statute to the crime of aggression would be rather odd when compared with the introduction of new crimes foreseen in Article 121(5) of the ICC Statute. While the Court would be able to exercise its jurisdiction over such a new crime one year after the deposit of the first ratification in accordance with the first sentence of Article 121(5) of the ICC Statute, the ratification of seven-eighths of the States Parties would be needed to establish the Court's jurisdiction over the crime of aggression even though this crime already forms part of the Court's jurisdiction under Article 5 of the ICC Statute.

Unfortunately, the intriguing problem of interpretation highlighted in the preceding paragraphs cannot be resolved by reference to the *travaux préparatoires*. As Roger Clark (who was directly involved in the negotiations of Part 13 of the ICC Statute) has shown, there is simply no clear intent of the drafters on how Articles 5(2) and 121 of the ICC Statute (formulated by two different

68 It bears mentioning that also most states favouring the 'Art. 121(5) Model with a Negative Understanding' felt uncomfortable with the discrimination between non-accepting States Parties and non-States Parties and were agreeable to arriving at a joint understanding eliminating this discrimination. See also *infra* in note 119.

69 For an eloquent case in favour of 'Article 121(5) Model with a Positive Understanding', see Reisinger Coracini, *supra* note 66.

working groups in Rome) are to be read together.⁷⁰ In light of this impasse, the reasonable suggestion was made both within the SWGCA and outside it, much before Kampala, to formulate a 'special entry-into-force mechanism' in order to cut the Gordian Knot.⁷¹

D. *The Agreement on Draft Elements of Crimes*

Resolution F of the Rome Conference's Final Act instructed States Parties to also adopt Elements of Crimes within the meaning of Article 9 of the ICC Statute.⁷² Accordingly, the Preparatory Commission's Working Group on Aggression had given some thought to how the Elements could look, and a draft was included in the 2002 Discussion Paper.⁷³ Any further work on the Elements was then suspended until provisional agreement on draft Article 8 *bis* was found. When this agreement was reached in 2009, the delegations of Australia and Samoa⁷⁴ took the initiative to prepare a new draft.⁷⁵ In April 2009, this draft was the subject of intensive discussion during an informal retreat convened by Switzerland in Montreux. The text and detailed explanations that resulted from this meeting⁷⁶ were submitted to all delegations in June 2009 at an inter-sessional meeting at the Princeton Club in New York. At that meeting, a provisional agreement was reached on the following draft Elements to be agreed upon in Kampala:

Introduction

- (1) It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.
- (2) 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.
- (3) The term "manifest" is an objective qualification.
- (4) 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.

Elements

- (1) The perpetrator planned, prepared, initiated or executed an act of aggression.
- (2) The perpetrator was a person (footnote omitted; C.K./L.v.H) 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.

⁷⁰ Clark, *supra* note 63, at 421–425.

⁷¹ Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 51 (paragraph 11); Reisinger Coracini, *supra* note 66, at 716.

⁷² *Supra* note 20.

⁷³ *Supra* note 22 (*sub* II); the draft has not been reprinted as part of the citation accompanying this note in the above text.

⁷⁴ For some early conceptual groundwork on the Elements, see the scholarly contribution of the Samoan delegate Roger S. Clark, *supra* note 21.

⁷⁵ This initiative is alluded to in the report on the 2009 SWGCA meeting. See Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 58 (paragraph 42).

⁷⁶ Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 36–42.

- (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 or 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.⁷⁷

The draft Elements for the crime of aggression deal exclusively with the definition of the crime. They generally follow the structure of the existing Elements of the other crimes under the ICC's jurisdiction, and are to be read in light of the 'General Introduction' to those Elements.⁷⁸ While the draft Elements for the crime of aggression refrain from attempting to explicitly define some key concepts of the definition, they do provide two important clarifications.

The third Element makes it plain that the state conduct must, in fact, occur. Consequently, individual conduct at the early stages of planning or preparing an act of aggression gives rise to individual criminal responsibility only if a manifestly illegal state act actually takes place. Here again, states demonstrated their will to stay within the confines of pre-existing customary international criminal law. The question remains whether participation in at least some cases of incomplete state acts is covered by virtue of the provision on attempt in Article 25(3)(f) ICC Statute.⁷⁹ This would be a very far-reaching consequence of the application of the concept of attempt, and one of the authors of this article has expressed rather serious doubts with respect to the idea of an 'attempted collective act'.⁸⁰

The fourth and sixth draft Elements, which are to be read together with introductory Paragraphs 2 and 4, provide for an important clarification as to how Article 32(2) of the ICC Statute is to be applied to the crime of aggression. It is stipulated that a mistake about the manifest illegality of the state's use of armed force does not constitute a ground for excluding criminal responsibility. At first glance, this exclusion of the possibility to rely on a mistake of law may seem problematically severe. However, 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

⁷⁷ ICC-ASP/8/Res.6.

⁷⁸ Barriga, Danspeckgruber, Wenaweser, *supra* note 28, at 38 (paragraphs 1–3).

⁷⁹ Note that, other than the 2002 Discussion Paper, the 2009 Proposals do not exclude the application of this provision to the crime of aggression.

⁸⁰ 'Discussion Paper 1' as reproduced in Barriga, Danspeckgruber, Wenaweser, *supra* note 28, at 192.

cases.⁸¹ An additional mistake of law defence is, therefore, neither necessary nor desirable.

4. The End Game in Kampala

The very significant progress made within the SWGCA that was reflected in the 2009 Proposals⁸² opened a window of opportunity for the First Review Conference of the ICC Statute. However, when the delegations arrived in Kampala on 31 May 2010, it was entirely unclear whether this opportunity would lead to concrete results, and it is probably fair to say that scepticism prevailed—at least outside Kampala. The three basic prerequisites for success were that States Parties would stand by their provisional agreement on the definition of the crime embodied in draft Article 8 *bis* of the 2009 Proposals and in the draft Elements; that those states would find a solution for the Court's exercise of jurisdiction over aggression (including the 'question of questions' on the possible role of the Security Council); and, that the overall package would not cause a major confrontation between States Parties and non-States Parties. While it was legally possible to make the final decision by a two-third majority of States Parties (Article 121(3) of the ICC Statute), the political will to vote at all was uncertain, and it was even unclear whether a sufficient number of delegations would be present to secure the necessary majority. Therefore, the 'threat to vote' was largely absent as an incentive for compromise. In this not-altogether-easy situation, the best negotiation strategy was to focus the debate to the greatest extent possible on the conditions for the exercise of jurisdiction, and to first seek an agreement on the role of state consent. Only once such an agreement was reached could it be hoped that France and the UK would move away from their adamant insistence on a Security Council monopoly over aggression. Fortunately, the strategy ultimately prevailed, thanks in large part to the inspired leadership of the chairs of the Working Group and of the Review Conference.⁸³

81 For a more detailed exposition of the functional equivalence of an objective manifest illegality principle and a subjective mistake of law defence in the case of the crime of aggression, see Kreß, *supra* note 53, at 260–261.

82 The *Conference Room Paper on the Crime of Aggression* of 25 May 2010 (RC/WGCA/1), on which basis the negotiations were to be taken up at the Review Conference, documented this progress in a masterfully condensed manner. The paper encapsulated the 2009 Proposals and the draft Elements and suggested a convenient structure for the final result comprising a draft enabling resolution, the draft amendments to the Rome Statute on the crime of aggression, the draft amendments to the Elements of Crimes and draft understandings regarding the interpretation of the amendments. The final document RC/Res.6, Annex II., Amendments to the Elements of Crimes, adopted by consensus at the 13th plenary meeting, on 11 June 2010, advance version, 28 June 2010, 18:00, 1–6, at 5; available at <http://www.icc-cpi.int/iccdocs/asp.docs/Resolutions/RC-Res.6-ENG.pdf> (visited 5 October 2010), follows this structure.

83 H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein, the Ambassador of Jordan to the United States and the first President of the ASP, chaired the negotiations in the Working Group on the Crime of

A. Prelude: Eliminating the Unpromising Options

The work on the crime of aggression began behind the scenes in the form of a sequence of bilateral consultations of interested delegations with the Chairperson of the Working Group of the Crime of Aggression (WGCA). The first formal debate took place on Friday, 4 June 2010 and, on the whole, the interventions displayed an understanding of the historic opportunity and a willingness to seize the moment. In light of the widely recognized need to move forward swiftly and decisively at Kampala, the Chairman's first *Revised Conference Room Paper*⁸⁴ suggested deleting the two compromise options in case of Security Council inactivity, namely, to involve the General Assembly or to give a procedural role to the International Court of Justice in such a case.⁸⁵ As those options had over time exhausted their potential, the suggestion to drop them met with no opposition.

B. First Act: The Opening Move by Argentina, Brazil and Switzerland

On Sunday, 6 June 2010, the final part of the negotiations was opened by the submission of a non-paper by Argentina, Brazil and Switzerland, which will be remembered as the 'ABS Proposal'.⁸⁶ It constituted a creative attempt to bridge the gap between the differences surrounding the state-consent problem,⁸⁷ by drawing a distinction between the Security Council trigger and the two other forms of initiating proceedings listed in Article 13 of the ICC Statute. The entry into force of the Security Council trigger was to be governed by the first sentence of Article 121(5) of the ICC Statute and, in accordance with Article 13(b) of the ICC Statute, there would be no further conditions for the exercise of jurisdiction. Conversely, the entry into force of the two other triggers was to follow Article 121(4) of the ICC Statute. In that respect, the conditions for the exercise of jurisdiction would have been those generally foreseen under Article 12(2) of the ICC Statute. On Monday, 7 June 2010, the 'ABS Proposal' received much praise for its ingenuity and it significantly influenced the further course of the negotiations. The proposed distinction between the treatment of the Security Council trigger and the two other triggers was taken up in the Chairman's *Conference Room Paper on the Crime of Aggression*

Aggression. As the President of the ASP, Christian Wenaweser presided over the Review Conference.

84 RC/WGCA/1/REV.1, 6 June 2010.

85 For the wording of these options, see Art. 15 *bis* paragraph 4, Alternative 2, options 3 and 4 of the 2009 Proposals.

86 *Non-paper submitted by Argentina, Brazil and Switzerland as of 6 June 2010*. The proposal, which is on file with the authors, has not been circulated in the form of an official working group document.

87 *Supra* 3.C.3.

of 7 June 2010.⁸⁸ Still, because of its heavy reliance on the 'Article 121(4) Model', the proposal was unlikely to secure the support of the firm adherents of the 'Article 121(5) Model with a Negative Understanding' and even less likely to gain the support of France and the UK. Thus, more movement was to follow.

C. *Second Act: The Canadian Response*

On Tuesday, 8 June 2010, Canada responded to the 'ABS Proposal' and submitted what it called a 'menu approach'.⁸⁹ The Canadian proposal translated the 'Article 121(5) Model with a Negative Understanding' into an 'opt-in' mechanism for cases in which the Security Council had not made a determination of an act of aggression. The Court should then be able to commence an investigation, provided the Pre-Trial Chamber had given its authorization and 'all states concerned' had declared their opt-in. In the absence of a Security Council determination, this proposal would have amounted to a strictly reciprocal state-consent-based jurisdictional regime. As could be expected, the Canadian proposal provoked a measure of unhappiness amongst the many supporters of the 'ABS Proposal' and made it imperative that both 'camps' enter into direct negotiations.

D. *Third Act: Bridging the Gap*

In the afternoon of Wednesday, 9 June 2010, those negotiations resulted in a joint declaration, which, for the sake of convenience, will be referred to as the 'ABCS Non-Paper', although some other interested delegations also took part in bringing it about.⁹⁰ The 'ABCS Non-Paper' started from the by now firmly agreed assumptions that, in case of a Security Council referral, the ICC would exercise its jurisdiction without further conditions. The ABCS Non-Paper focussed entirely on the jurisdictional regime for the two remaining triggers. As this declaration paved the way to the ultimate compromise, it deserves to be reproduced *verbatim*:

Article 15bis
Exercise of jurisdiction over the crime of aggression
(State referral, *prorio motu*)
 4. (*Alternative 2*)

...

4bis The Court may exercise its jurisdiction over the crime of aggression committed by a State Party's nationals or on its territory in accordance with article 12, unless that State Party has filed a declaration of its non-acceptance of jurisdiction of the Court under paragraph 4 of this Article.

⁸⁸ See draft Arts 15 *bis* and 15 *ter* in RC/WGCA/1/Rev.2, 7 June 2010.

⁸⁹ The proposal, which is on file with the authors, has not been circulated in the form of an official working group document.

⁹⁰ *Declaration (Draft of 9 June 2010 16h00)*. The non-paper, which is on file with the authors, has not been circulated in the form of an official working group document.

4ter Such a declaration may be submitted to the Secretary General of the United Nations at any time before December 31, 2015 or, in the case that ratify or accede to the Rome Statute after that date, upon ratification or accession. This declaration may be withdrawn at any time, in which case the Court, subject to the provisions of paragraph 1, may exercise its jurisdiction in respect of the State concerned.

4cor In respect of a State which is not party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression as provided for in this article when committed by that State's nationals or on its territory.

The 'ABCS Non-Paper' thus embraced the idea of subjecting the crime of aggression to the application of Article 12 of the ICC Statute, but added two important *caveats*. First, any State Party should have the right to opt out, and, second, the Court should be precluded from exercising its jurisdiction over crimes committed by nationals of non-States Parties or on the territory of such states. The ingenious compromise consisted in taking from the 'Article 121(4) Model' the starting point of applying Article 12 of the ICC Statute, but considerably 'softening' the consequences of this model through recognizing the absence of state consent in two different ways. This scheme was completed by an 'activation clause' for the exercise of the Court's jurisdiction. While the first sentence of Article 121(5) of the ICC Statute was taken as the point of reference for the entry into force, draft Article 15 *bis* (1) set an additional condition for the exercise of jurisdiction, requiring that five years must have passed 'after the entry into force of this article for any State Party'. The 'ABCS Non-Paper' soon gathered wide support. Its impact on the dynamics of the final two days of the conference was critical because it prepared the ground for an agreement amongst States Parties. Yet France and the UK remained to be persuaded to join this consensus because the 'ABCS Non-Paper', in adopting 'Alternative 2', unsurprisingly rejected the idea of a Security Council monopoly. In fact, those two states and the three Permanent Members of the Security Council who are not parties to the ICC Statute could hardly be expected to greet the 'ABCS Non-Paper' with open arms. This expectation proved to be accurate.

E. Interlude: Engaging with the United States

Almost in parallel to the informal negotiations leading to the 'ABCS Non-Paper', consultations on a rather different topic were taken up. In his opening statement of 4 June 2010, the Head of the US delegation and Legal Adviser of the US Department of State expressed the dissatisfaction of the United States with the substantive definition of the crime of aggression in draft Article 8 *bis*.⁹¹ He identified the two main risks of criminalizing lawful uses of force and of departing from customary international criminal law. Importantly, however, he

⁹¹ The full text of the statement by Harold Hongju Koh, available at <http://www.state.gov/s/1/releases/remarks/142665.htm> (visited 5 October 2010).

did not insist on changing the wording of draft Article 8 *bis* but alluded to the possibility of addressing these two concerns through understandings accompanying this provision. On 7 June 2010, the American delegation followed up on these remarks and formally introduced a lengthy list of draft understandings on draft Article 8 *bis*.⁹² 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. For this reason, the German delegation was entrusted with the mission of acting as a Focal Point for consultations on these draft understandings and exploring possible avenues for agreement.⁹³

After extensive bilateral and regional consultations on the 8 and 9 June, it became clear that there was not even a distant chance of agreeing on those parts of the proposals which aimed at divorcing draft Article 8 *bis* from customary international criminal law and purported to explicitly exclude certain instances of state use of force from the definition of the crime of aggression. Importantly, the fact that the exclusion of certain instances of the use of force by a state was not discussed further does not mean that there was necessarily disagreement with the United States on substance. It is worth specifically underlining this point with respect to the single most sensitive American proposal, which purported to explicitly exclude genuine forcible humanitarian interventions from the scope of draft Article 8 *bis*. The main concern here was that it would not be appropriate to address 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.

The German delegation thus decided to pursue a 'minimalist approach' and to reach agreement on two more generally worded proposals that appeared to be important to the American delegation. On 9 June 2010, the Focal Point submitted the following two draft understandings to delegations that had gathered for a single round of informal consultations to conclude the matter:

1. Understanding X

It is understood 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.

2. Understanding Y

92 Untitled paper as presented to the WGCA by William K. Lietzau, Deputy Assistant Secretary of Defense (Detainee Policy); the paper is on file with the authors.

93 The first of these two authors acted in that capacity for the German delegation, and the second author assisted him in this task.

It is understood 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.⁹⁴

Both proposals were generally well received, but engendered some debate on specific elements. With respect to draft Understanding X, the delegation of Iran suggested staying closer to the language of Article 2 of the annex of Resolution 3314. The American delegation agreed to this, and this led to what eventually became the sixth Understanding adopted by the Review Conference. It reads as follows:

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.⁹⁵

Understanding Y was reformulated at the request of the Canadian delegation. Canada was concerned that one might conceive of a state’s use of its armed force that is almost manifestly illegal with respect to one component, but definitely manifestly illegal with respect to the other two components. Canada explained that such a use of armed force should also meet the threshold requirement in draft Article 8 *bis* (1), but that this seemed not to be the case pursuant draft Understanding Y. At the same time, Canada held the view that, in the above-mentioned scenario, the Court would also consider the fact that one component was almost satisfied. In Canada’s view, the combination of the three components was relevant. Therefore, Canada suggested rewording draft Understanding Y as follows:

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.

The United States agreed to this, subject to the addition of the following sentence:

No one component can be significant enough to satisfy the manifest standard by itself.

The idea behind this sentence is to exclude the determination of manifest illegality in a case where one component is most prominently present, but the other two are completely absent. It was thought that the use of the word ‘and’ in the formulation of the threshold requirement in draft Article 8 *bis* (1) precluded a determination of manifest illegality in such a case.

The reformulation of draft Understanding Y into the two consecutive sentences as suggested by Canada and the United States met with no opposition,

94 *Non-Paper on possible further understandings (Annex III of the Conference Room Paper)*. The non-paper, which is on file with the authors, has not been circulated in the form of an official working group document.

95 RC/Res.6, *supra* note 82, Annex III. *sub* 6.

and so they eventually became the seventh Understanding adopted by the Review Conference.⁹⁶

It is important not to misread the second sentence of this Understanding. To state that 'no one component can be significant enough ...' is different from stating that the Court must make a determination of 'manifest illegality' whenever two of the components are present. On the contrary, the first sentence of the Understanding makes it plain that the Court must always look at all three components, although they need not all be present to the same degree.⁹⁷

The authors are inclined to think that the seventh Understanding may usefully draw the judges' attention to the fact that the criteria of 'gravity' and 'scale' can be satisfied to a lesser or greater extent. The problem of a sliding scale does not, however, arise with respect to 'character', which is (at least primarily) designed to solve the 'grey area' problem. Judges will thus always have to ascertain that the state use of armed force is of a character that makes its illegality reasonably uncontroversial. The second sentence of the seventh Understanding does not stand in the way of this interpretation, *quod erat demonstrandum*.

It is premature to make a firm judgment as to whether or not the inclusion of the two Understandings on draft Article 8 *bis* will facilitate future judicial work. What may be said, is that the harmonious conclusion of the debate on the American initiative, roughly at the time when the 'ABCS Non-Paper' bridged one of the two key gaps on the main front of the negotiations, contributed to further clearing the path to an overall agreement.

E. The Finale: A Midsummer Night's Drama at Lake Victoria

In the late hours of Thursday, 10 June 2010, Ambassador Wenaweser⁹⁸ submitted a non-paper that closely mirrored the 'ABCS Non-Paper'.⁹⁹ In an attempt to further accommodate the five Permanent Members of the Security Council, this proposal emphasized the idea of an extra delay in the activation of the ICC's jurisdiction through the additional threshold of 30 ratifications or

⁹⁶ RC/Res.6, *supra* note 82, Annex III, *sub* 7.

⁹⁷ This (admittedly rather subtle) point is perhaps not fully appreciated by either R. Heinsch, 'The Crime of Aggression After Kampala: Success or Burden for the Future?' 2 *Göttingen Journal of International Law* (2010) 713–743, at 728–729 or by Scheffer, *supra* note 47, at 900.

⁹⁸ Upon completion of its work, the WGCA transferred the outstanding issues back into the hands of the President of the conference; for the Report of the WGCA, see RC/20 (advance version of 28 June 2010); available at <http://www.icc-cpi.int/iccdocs/asp.docs/RC2010/RC-20-ENG-Annex.II/WGCA.report.pdf> (visited 5 October 2010).

⁹⁹ *Non-Paper by the President of the Assembly, 10 June 2010 23h00*. The non-paper, which is on file with the authors, has not been circulated in the form of an official conference room document. The earlier *Non-Paper by the President of the Assembly, 10 June 2010, 12h00* (on file with the authors) had already taken up the essence of the 'ABCS Non-Paper', but room for improvement remained from a drafting perspective.

acceptances of the amendments.¹⁰⁰ Interestingly, the draft-enabling resolution stated at the same time that the amendments should enter into force in accordance with Article 121(5) of the ICC Statute.¹⁰¹ Finally and crucially, the non-paper still refrained from confronting the ‘question of questions’ of what should happen if the Security Council did not make a determination of an act of aggression after a State Party referral or a *proprio motu* investigation by the ICC Prosecutor.

It was only in the afternoon of the final day of the conference that the President issued a non-paper that made the inevitable choice. It had become abundantly clear at that point that the retention of a Security Council monopoly had not the slightest chance of securing a consensus or even coming close to a two-third majority. The only realistic way to consensus was thus to abandon this idea, and the President’s non-paper of 4:30 pm on 11 June 2010 did just that. It was unknown what the reaction of the five Permanent Members of the Security Council, in particular of France and the UK, was going to be. Since the non-paper left one paragraph open to formulation of a further condition for the activation of the Court’s jurisdiction, it could be assumed that the last concession to the five Permanent Members of the Security Council might take the form of yet another hurdle for the amendments to pass, and that negotiations would now concentrate on that point.

The time for decision came shortly after midnight. The President submitted his final compromise proposal, which contained the additional condition of ‘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’. The complete text of the draft-enabling resolution and of the two draft provisions on the conditions for the exercise of jurisdiction was (and is) as follows:

The Crime of Aggression

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,

100 Draft Art. 15 *bis* (1) *bis* and draft Art. 15 *ter* (2) of the non-paper of 6 June 2010, 23:00; *supra* note 99.

101 *Ibid.*, operative paragraph 1 of the draft enabling resolution.

- (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.

Annex I

...

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.

The plenary meeting was suspended one final time to give delegations an opportunity for final consultations. The President then returned to the room and, without further ado, asked whether he could take it that his ultimate proposal met with the consensus of the room. The rest of the story is known to the reader of this article. The terrace of the vast Kampala Conference Resort with its splendid view on the Lake Victoria turned into the place where the delegates to the First Review Conference of the Statute of the International Criminal Court celebrated an historic achievement.

5. The Kampala Compromise: Modesty Enables a Breakthrough

As a matter of legal policy, the inclusion of the crime of aggression in the ICC Statute was controversial, and critics made their voices heard throughout the negotiation process.¹⁰² This is not the proper place to continue this debate.¹⁰³ Instead, the following observations will provide an initial assessment of the key components of the Kampala compromise.

A. *The Definition of the Crime*

If the benchmark for the evaluation of the definition is the expectation that it meets the 'highest standards of codification'¹⁰⁴, draft Article 8 *bis* of the ICC Statute¹⁰⁵ will be unlikely to pass: the reference to Article 3 in the annex to Resolution 3314 remains problematic, and the essence of an criminal state use of armed force would probably better have been expressed through a

102 See, above all, the thoughtful contributions by Paulus and Glennon, *supra* note 30.

103 For a recent exchange of views, see the debate between A. Paulus, 'Second Thoughts on the Crime of Aggression', 20 *EJIL* (2009) 1117–1128, and Kreß, *supra* note 30, at 1129–1146.

104 Meron, *supra* note 30, at 3.

105 RC/Res.6, *supra* note 82, Annex I *sub* 2; as we have seen *supra* 3.C.1., draft Art. 8 *bis* must be read in conjunction with draft Art. 25(3) *bis* ICCSt. (*ibid.*, Annex I *sub* 5). In addition, draft Art. 8 *bis* is accompanied by the draft Elements (*ibid.*, Annex II, and *supra* 3.D) and draft Understandings 6 and 7 (*ibid.*, Annex III, *sub* 6. and 7., and *supra* 4.E).

requirement of a collective intent.¹⁰⁶ However, to set such a high standard for the definition of the crime of aggression would come very close to simply giving up on the project of defining that crime. If a more realistic yardstick is chosen, it is possible to recognize how much has been achieved. The narrow definition of the crime is in line with the general approach of the drafters of the ICC Statute to confine ICC jurisdiction to conduct that clearly warrants a collective judicial intervention. More particularly, the requirement of 'manifest illegality' takes due regard of the fact that, regrettably, the primary norm of the prohibition of the use of force suffers from considerable ambiguity. The judges of the ICC have been given the tools they need to make sure that the Court will not be overburdened by the task of deciding major controversies about contemporary international security law through the backdoor of the international criminal justice. Clearly, there remains considerable room for judicial refinement of the definition, especially with respect to the threshold requirement. It is an important challenge for the future to explore the extent to which customary international law can be of assistance in further elucidating the content of the norm. In any event, state leaders are now on notice that, as of 2017, they risk criminal punishment whenever they decide to initiate a massive use of armed force when its illegality is reasonably uncontroversial. The negotiators could have done far worse.

B. The Jurisdictional Regime

1. The Security Council-based Pillar

The power of the Security Council to refer a situation involving the allegation of a crime of aggression to the ICC was uncontroversial and draft Article 15 *ter* of the ICC Statute recognizes this power. Interestingly, this provision does not require the Council to make a determination of an act of aggression and thus embraces the idea that the Council may wish to give the 'green light' to an investigation without making the strongest determination available under Article 39 of the UN Charter.¹⁰⁷ How this will affect Security Council practice under Article 39 of the UN Charter and Article 13(b) of the ICC Statute is a fascinating question pertaining to the future development of international security law. Importantly, the Security Council-based pillar of the Court's exercise of jurisdiction will not be conditioned by the requirement of any state's consent to the Kampala amendments.¹⁰⁸ It is noteworthy that even those states that

106 For a more detailed exposition of this critique, see Kreß, *supra* note 30, at 1136–1142.

107 Different 'green light' options were usefully discussed before the Kampala conference especially by D. Scheffer, 'A Pragmatic Approach to the Crime of Aggression', in Bellelli, *supra* note 25, at 609–619.

108 This is made explicit by the second Understanding; RC/Res.6, *supra* note 82, Annex III *sub* 2. The exercise of the Court's jurisdiction is, however, conditioned by the ratification or acceptance by at least 30 States Parties and by the activation decision to be taken after 1 January 2017; see draft Art. 15 *ter* (2) and (3) ICCSt. There is a question mark about the Court's exercise of jurisdiction in case of a crime of aggression committed after the one year following the

adhered to 'Article 121(5) Model with a Negative Understanding' were readily amenable to the Council's power to trigger the ICC's universal jurisdiction over the crime of aggression.¹⁰⁹

2. *The (Softly) Consent-based Pillar*

This is by far the most complex part of the negotiations related to the question of whether there should be a Security Council monopoly with respect to aggression proceedings. Draft Article 15 *bis* of the ICC Statute, which deals with State Party referrals and *proprio motu* investigations, answers this question in the negative and only provides for the special judicial filter that the Pre-Trial Division must, in all cases, authorize the commencement of an investigation.¹¹⁰ This in itself constitutes a major achievement in light of the fundamental aspiration of the ICC Statute towards the equal application of international criminal law. Yet the insistence on a Security Council monopoly was a most powerful one, and it thus comes as no surprise that a high price had to be paid for overcoming it. Partly for this reason, draft Article 15 *bis* ICC Statute is of quite considerable complexity. Its complexity is further due to fundamentally ambiguous meaning of Article 5(2) of the ICC Statute if read in conjunction with Article 121 of the ICC Statute and the controversies that resulted from that ambiguity during the negotiations.¹¹¹ In its statement upon the adoption of the Kampala compromise, Japan expressed its regret that draft Article 15 *bis* of the ICC Statute was based 'on such a dubious legal foundation'.¹¹² Such a concern deserves to be taken most seriously and it would be unduly ambitious to try to provide a full answer in this article. We wish, however, to make a modest attempt at shedding some light on the matter. Ideally, this might contribute to a constructive debate about this most delicate component of the Kampala compromise.

The first sentence of draft Article 15 *bis* (4) of the ICC Statute provides for the application of Article 12 of the ICC Statute to the crime of aggression. This application is, however, significantly qualified by the fact that the alleged crime of aggression must arise from an act of aggression committed by a State Party that has not previously declared that it does not accept such jurisdiction. This means, first, that the Court will not be able to exercise its jurisdiction over an alleged crime of aggression arising from an act of aggression of a non-State

ratification or acceptance of third States Parties, but before the activation decision by States Parties (if the latter is made at a later date). While draft Article 15 *bis* (2) and (3) ICCSt. would seem to leave open the possibility for the Court to exercise its jurisdiction over such a crime, the first Understanding (RC/Res.6, *supra* note 82, Annex III *sub* 1.) stipulates otherwise; the practical importance of this question is not likely to be dramatic and we shall not pursue it any further in this article.

109 This strongly points towards the existence of uniform subsequent practice to interpret the second sentence of Art. 121(5) ICCSt. as inapplicable to Security Council referrals.

110 Draft Art. 15 *bis* (8) ICCSt. On the Pre-Trial Division, see Arts 34(b), 39(1) ICCSt.

111 *Supra sub* 3.C.3.

112 *Statement by Japan (11 June 2010)*; on file with the authors.

Party. This first restriction makes draft Article 15 *bis* (5) of the ICC Statute partly redundant. What this paragraph essentially adds to the previous one is the further restriction that the Court will also not be able to exercise its jurisdiction in the case of an alleged crime of aggression that arises from an act of aggression by a State Party that has ratified the aggression amendments without declaring an opt out *against* a non-State Party.¹¹³

Draft Article 15 *bis* (4) of the ICC Statute further qualifies the application of Article 12 of the ICC Statute by providing that the Court cannot exercise its jurisdiction over an alleged crime of aggression arising from an act of aggression of a State Party which has previously opted out of the jurisdictional regime. This second qualification does *not* mean, however, that the Court can exercise its jurisdiction over an alleged crime of aggression arising from an act of aggression of a State Party only where this state has ratified or accepted the aggression amendment.¹¹⁴ The formulation of draft Article 15 *bis* (4) of the ICC Statute does not suggest such a restriction, nor would such a restriction be in line with the genesis of the formulation.¹¹⁵ 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 (ABS Proposal) and those in preference of a strictly consent-based regime (Canadian Proposal). To not require the ratification of the alleged aggressor State Party, but to grant that state the right to opt out, amounts to a 'softened consent-based regime' that is situated somewhere between the two poles and is, therefore, a suitable basis from which to reach a compromise.

One may wonder, however, whether the requirement that the alleged aggressor state has ratified the aggression amendments results from the statement in the first operative paragraph of the enabling resolution, which states that the aggression amendments 'shall enter into force in accordance with article 121, paragraph 5'. This reference could be read as including the latter provision's *second* sentence and this, based on a *negative* understanding of this sentence, would then indeed require the ratification of the alleged aggressor state. If this was, in fact, the legal effect of the latter reference, the 'opt-out mechanism' would lose its compromise-building ability. Furthermore, the main point of draft Article 15 *bis* (4) of the ICC Statute is precisely that the ICC will, in principle, exercise its jurisdiction over the crime of aggression 'in accordance with article 12'. This principle would be completely undermined if the ratification of the alleged aggressor state was required under all

113 This further restriction cannot be circumvented through an ad hoc acceptance pursuant to Art. 12(3) ICCSt. by the alleged victim non-State Party. Draft Art. 15 *bis* (5) ICCSt. constitutes a *lex specialis* with respect to Art. 12(3) ICCSt. and prevents non State Parties from deriving asymmetrical benefits from the ICCSt.'s new regime against the crime of aggression. Undecided on this point, see A. Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last ... in Reach ... over Some', 2 *Göttingen Journal of International Law* (2010) 745–789, at 780–781.

114 Clark, *supra* note 45, at 704.

115 *Supra* sub 4.D.

circumstances. It would then be difficult to deny the existence of a flat contradiction between draft Article 15 (4) *bis* of the ICC Statute and the first operative paragraph of the enabling resolution. On somewhat closer inspection, however, such a contradictory reading can be avoided. It should be recognized that the enabling resolution refers to Article 121(5) of the ICC Statute for the specific purpose of the entry into force and that it is only the resolution's first sentence which deals with that question.¹¹⁶ It is thus perfectly possible and hence preferable to construe the enabling resolution and draft Article 15 *bis* (4) of the ICC Statute harmoniously as both the wording of the latter provision and the genesis of the negotiations suggest it.

The question remains how precisely Article 12(2) of the ICC Statute is to be applied in a case of a crime of aggression arising from an act of aggression committed by a State Party that has not opted out. It is at this point of the analysis that the first operative paragraph of the enabling resolution comes into play with its statement that the aggression amendments shall enter into force in accordance with Article 121(5) of the ICC Statute. The first sentence of this provision determines that amendments governed by it '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.' 'Entry into force of an amendment for a consenting State Party' essentially means that this State Party is now capable of providing the Court with either of the two jurisdictional links listed in Article 12(2) of the ICC Statute. One of two consequences follows. Where the alleged aggressor State Party has ratified the aggression amendments, then in accordance with Article 12(2)(b) of the ICC Statute, the ratification by the alleged victim State Party is immaterial. Where the aggressor State Party has not ratified the aggression amendments, then the ratification of the victim State Party will be necessary.¹¹⁷

On the whole, such a jurisdictional regime may perhaps be called '*softly*' consent-based to distinguish it from the '*strictly*' consent-based 'Article 121(5) Model with a Negative Understanding'. Japan's important question is whether the former regime rests on a solid legal foundation. It is true that the interpretation of draft Article 15 *bis* (4) of the ICC Statute does not correspond with any of the different models mentioned above.¹¹⁸ It bears emphasizing that this is also true for the 'Article 121(5) Model with a Positive Understanding'. The fact that States Parties did not want to agree on this interpretation of the second sentence of Article 121(5) of the ICC Statute through the Kampala compromise is obvious from the fact that the second preambular paragraph of the 'Amendments to articles 8 of the Rome Statute' does *not* endorse the 'positive

116 If the second sentence is 'negatively' understood, it does not deal with the entry into force but poses limits to the exercise of the Court's jurisdiction.

117 Arguably, the victim State Party may also provide the Court with the necessary jurisdictional link through an ad hoc acceptance pursuant to Art. 12(3) ICCSt. We shall not pursue this question any further in this article, but see Reisinger Coracini, *supra* note 113, 775–776.

118 *Supra* 3.C.3.

understanding'.¹¹⁹ Nor has there been an agreement on the latter understanding just for the crime of aggression, because other than under the 'Art. 121(5) Model with a Positive Understanding' crimes of aggression arising out of acts of aggressions committed by or against non-States Parties are excluded from the Court's jurisdictional reach through the combined effect of draft Article 15 *bis* (4) and (5) of the ICC Statute.

Japan is therefore right in assuming that the jurisdictional regime embodied in draft Article 15 *bis* ICC Statute reflects neither Paragraphs 4 nor 5 of Article 121 ICC Statute and thus constitutes a creative solution *sui generis*. Perhaps it can be said that the 'softly consent-based pillar' of the Kampala compromise takes the 'Adoption' and the 'Article 121(4)' Models as its starting point, and then qualifies these by the entry into force mechanism enshrined in Article 121(5) ICC Statute and a *sui generis* set of fairly far-reaching conditions for the exercise of jurisdiction.

The critical question is whether States Parties had the legal power to be as creative as they were without first going through the cumbersome amendment procedure provided in Article 121(4) of the ICC Statute. In our view, such a power existed as the necessary consequence of the fundamental ambiguity of the legal framework within which states had to operate. Whatever one's preference was (or is), fairness requires recognition of the fact that there is no model that would satisfactorily explain the interplay between Articles 5(2) and 121 of the ICC Statute. Faced with a reference to Article 121 of the ICC Statute that amounts to a legal conundrum, and entrusted with the wide power to '(set) out the conditions under which the Court shall exercise jurisdiction with respect to this crime', Article 5(2) of the ICC Statute must be taken to entitle States Parties to devise the *sui generis*-regime which has made its way into draft Article 15 *bis* (4) of the ICC Statute. The latter's legal foundation is perhaps not rock solid, but it is as solid as it could be under the prevailing circumstances. Ideally, and Japan is right to make a call in this direction, states will reach a common understanding on the interpretation of draft Article 15 *bis* (4) of the ICC Statute. Should this prove impossible, however, one should not be afraid of leaving the matter for judicial clarification as it arises.

The ICC's jurisdictional reach under the 'softly consent-based pillar' certainly falls considerably short of fulfilling lofty expectations that the crime of aggression might be enforced equally in all contexts. The most significant restriction of the Court's exercise of jurisdiction over this crime is, without doubt, the categorical exclusion of crimes of aggression arising from acts of aggression committed by non-States Parties. From a strictly legal standpoint, this decision was not necessary, and from a legal policy perspective it is certainly to be

119 *Resolution RC/Res.5*. Adopted at the 12th plenary meeting, on 10 June 2010, by consensus, Advance version 16 June 2010 13:00; available at <http://www.icc-cpi.int/iccdocs/asp.docs/Resolutions/RC-Res.5-ENG.pdf> (visited 5 October 2010). Note that the same preambular paragraph also expresses the joint understanding that there will be no discrimination between non-accepting States Parties and non-States Parties; cf. *supra* note 68.

deplored. Yet it is a fact of international life that there was very powerful resistance against treating the crime of aggression in the same way as other crimes under international law. Under those extremely difficult circumstances, it is most remarkable that it was at all possible to complement the Security Council-based jurisdictional pillar by a pillar based on state consent. It exceeds the expectations that one could have reasonably entertained before Kampala that the application of the principle of consent has even been somewhat softened through the decision to apply Article 12(2) of the ICC Statute in conjunction with an opt-out mechanism.

C. *The Crime of Aggression and the Complementarity Principle*

Comparatively little attention has been given to the question of how the ICC Statute's complementarity principle will apply in the case of an alleged crime of aggression.¹²⁰ The point was discussed during the 2004 Princeton meeting, and the view prevailed that Articles 17 *et seq.*, of the ICC Statute should apply without modification.¹²¹ The issue was then taken up by the US delegation, which expressed its concern that 'States Parties will incorporate a definition into their domestic law, encouraging the possibility that, under expansive principles of jurisdiction, government officials will be prosecuted for alleged aggression in the courts of another state.'¹²² The fifth Understanding constitutes the implicit reaction to this concern. It reads as follows:

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.¹²³

On the face of it, this understanding seems to state the obvious, because the ICC Statute is generally not designed to create rights or obligations of States Parties with respect to domestic legislation and adjudication. The intention behind this Understanding is somewhat more subtle, however. Generally, the aspiration underlying the ICC Statute's complementarity principle is that States Parties will make sure that they are able to exercise jurisdiction over a crime listed in Article 5 of the ICC Statute at least in cases where they are connected with the alleged crime through a jurisdictional link as referred to in Article 12(2) (a) and (b) of the ICC Statute. The fifth Understanding suggests that the same aspiration does not apply to the crime of aggression, except for the case where the alleged crime has arisen from an act of aggression committed by the state in question. In light of this Understanding, states may thus not feel encouraged to provide for domestic jurisdiction other than that based on the active nationality principle over the crime of aggression. It will be

120 For one of the very few scholarly analyses of the issue, see P. Wrange, 'The Crime of Aggression and Complementarity', in Bellelli, *supra* note 25, 591–607.

121 Barriga, Danspeckgruber and Wenaweser, *supra* note 28, at 201–202 (paragraphs 20–27).

122 See the US statement of 4 June, *supra* note 91.

123 RC/Res.6, *supra* note 82, Annex III sub 5.

interesting to see whether this Understanding will, in fact, exercise a dissuasive effect on national legislatures.

6. Looking Ahead

Obviously, the Kampala compromise does not make everybody happy. Perhaps it is also true to say that it makes nobody entirely happy. However, after almost a century of heated debate, States Parties to the ICC Statute have made the decision to prepare the ground for the exercise of the Court's jurisdiction over the crime of aggression, and they have done so by consensus. Whatever the flaws and the complexities of the ultimate compromise, it constitutes a milestone in the development of international law. States Parties and NGOs in support of the ICC should now rally firmly behind the compromise and should not leave the slightest doubt regarding their commitment to activate the ICC's jurisdiction immediately after 1 January 2017. Until then, the ICC can and must prepare for the new challenge. The Court will have the opportunity to demonstrate that it is capable of exercising its jurisdiction over the crime of aggression in a manner that is politicized as little as in cases concerning the other crimes within its jurisdiction. If it succeeds, it is not unreasonable to assume that world opinion will begin to slowly exert its soft power towards the expansion of the ICC's jurisdictional reach. Robert Jackson's famous Nuremberg promise, to which we alluded at the beginning of this article, was that:

The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.¹²⁴

This promise continues to resonate. The Kampala compromise has opened the gate for its eventual fulfilment.

124 *Supra* note 10.

