

# WHOSE CRIME IS IT ANYWAY? THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION

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## INTRODUCTION

In the early hours of June 12, 2010, a vote was taken in Kampala, Uganda that changed the face of international criminal law forever. It was at this time that the Assembly of States Parties to the International Criminal Court (ICC) came to a consensus regarding the definition of the crime of aggression and the mechanism by which the ICC will eventually exercise jurisdiction over it. However, the process of these negotiations was far from straightforward; the final text of the amendments consisted of numerous provisions and understandings in an attempt to appease the concerns of the varying factions that had descended on Kampala for this occasion. As a result, the text of the crime of aggression amendments remains ambiguous with regard to both the definition of the crime as well as its entry into force and exercise of jurisdiction provisions.

This paper seeks to parse through this ambiguity by addressing the questions that will require resolution by the judges at the ICC. The first section will provide a brief overview of the negotiations at Kampala as well as discuss the final text that became the crime of aggression amendments to the Rome Statute. The second section will analyze nine key questions that have arisen regarding the elements of the crime as well as the ICC's ability to exercise jurisdiction over it and suggest how judges at the Court will likely interpret the text when these situations come about. As the amendments will not enter into force until January 1, 2017 at the very earliest, this analysis will function as the beginning of a dialogue on these topics in order to generate a consensus over their answers and provide for a smooth transition into a new era of international criminal law.

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## I. THE HISTORY OF THE CRIME OF AGGRESSION AMENDMENTS

### A. The Rome Conference

On July 1, 2002 the Rome Statute of the International Criminal Court entered into force<sup>1</sup> giving the Court jurisdiction over three of the four crimes within its mandate.<sup>2</sup> The fourth crime, the crime of aggression, makes it a crime for an individual to wage an illegal war.<sup>3</sup> Despite being listed as one of “the most serious crimes of concern to the international community,”<sup>4</sup> this crime had been left undefined and without a mode for the Court to exercise jurisdiction over it.<sup>5</sup> This purposeful oversight was done in order to placate countries that were hesitant about an international institution having jurisdiction over such a controversial crime.<sup>6</sup> This is not to say that there had not been consensus as to the need for protection against the crime of aggression; even at Nuremberg aggression had been called the “supreme international crime”<sup>7</sup> and this belief was very much alive during the Rome Conference.<sup>8</sup> However, the crime of aggression imposes unique factors that are not present in the other three crimes under the ICC’s jurisdiction.<sup>9</sup> For instance, in determining if a war crime or crime against humanity has occurred, the ICC does not account for military deaths or civilian deaths, which are often considered “collateral damage;”<sup>10</sup> however, both factors influence a determination as to whether a situation constitutes an act of aggression.<sup>11</sup> A more contentious problem, however, is that a decision regarding a crime of aggression indirectly impacts the legal sovereignty of a State as opposed to simply influencing the rights of the accused.<sup>12</sup> In this sense, more so than the other crimes enumerated in the

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1. *About the Court*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Mar. 21, 2011).

2. *See* Rome Statute of the International Criminal Court art. 5(2), July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT’L L. 1, 1 (2009).

4. *Id.* at pmb1.

5. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L.J. 161, 162 (2008).

6. *Id.* at 170-71.

7. Jennifer Trahan, *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT’L CRIM. L. REV. 49, 50 (2011).

8. Jutta F. Bertram-Nothnagel, *A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court*, AFR. LEGAL AID Q., 9, 9-10 (Apr.-June 2010) (“[A]t the time of the adoption of the Statute in 1998, the international community recognized the horror of the crime. . .”).

9. *Id.* at 10-11.

10. *Id.*

11. *See id.* at 11.

12. *See* Robert Heinsch, *The Crime of Aggression After Kampala: Success or Burden for the Future?*, 2 GOETTINGEN J. INT’L L. 713, 722 (2010).

Rome Statute, the crime of aggression carries with it a political aspect that made the delegates at Rome uneasy.<sup>13</sup>

Instead, these delegates, aware of the fact that the entire process might unravel if they forced the debate revolving around aggression,<sup>14</sup> inserted two provisions into the Rome Statute that bought some time before any decisions had to be made. The first, Article 5(2), provided for the possibility of including the crime of aggression into the Court's mandate by stating that "[t]he 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."<sup>15</sup> The second, Article 123, as alluded to in Article 5(2), established a review conference at which the Assembly of States Parties, the legislative branch of the Court, could propose amendments to the Rome Statute.<sup>16</sup> By expressly stating "[s]uch review may include, but is not limited to, the list of crimes contained in article 5," the drafters of the Rome Statute made it evident that the crime of aggression would not be forgotten.<sup>17</sup>

## B. The Kampala Conference

From May 31, 2010 until June 11, 2010 the Assembly of States Parties held a review conference in Kampala, Uganda to assess the state of the International Criminal Court and its foundational document, the Rome Statute, pursuant to article 123.<sup>18</sup> While the early days of the conference were occupied with other tasks, the primary focus of most of the delegates was on the crime of aggression.<sup>19</sup> Luckily, between 1998 and 2010, much had occurred behind the scenes to prepare for this event. The final act of the Rome Conference had assigned a Special Working Group on the Crime of Aggression (SWGCA) to "prepare proposals for a provision on aggression, including the definition and Elements of Crimes of Aggression and conditions under which the International Criminal Court shall exercise

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13. *See id.* at 716-17.

14. *See* Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 29 (1999).

15. Rome Statute, *supra* note 2, art. 5(2).

16. *Id.* art. 123.

17. *Id.* art. 123(1).

18. *See generally* Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010, ICC Doc. RC/9/11 (2010).

19. Roger 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 GOETTINGEN J. INT'L L. 689, 690, 692 (2010).

its jurisdiction with regard to this crime.”<sup>20</sup> As a result, by the time the Kampala Conference had come about, much had been decided regarding the elements of the crime. By 2010, SWGCA had been able to provide a definition of the crime that seemed to generally be deemed agreeable.<sup>21</sup> However, provisions regarding the entry into force of the amendments and the exercise of the Court’s jurisdiction over the crime proved far more contentious.<sup>22</sup>

Specifically, much of the disagreement amongst the delegates revolved around two factors: (1) the level of involvement of the United Nations Security Council in determining whether or not the ICC could pursue an investigation into the crime of aggression and (2) the manner by which the amendments should enter into force.<sup>23</sup> Under the United Nations Charter, the Security Council has a “monopoly on stating whether a situation represents an act of aggression.”<sup>24</sup> In line with this thinking, some parties, namely permanent Security Council members France and the United Kingdom,<sup>25</sup> sought to delegate responsibility for the determination of a crime of aggression solely to the Security Council.<sup>26</sup> Other parties, fearing the encroachment of the Security Council on the ICC’s independence, sought to provide the option to pursue an investigation by State Party referral or under the Prosecutor’s *proprio motu* powers (i.e., at the Prosecutor’s discretion) for the crime of aggression,<sup>27</sup> as was the case for the other crimes in the Rome Statute.<sup>28</sup>

On a much more technical level, the delegates also debated as to how the proposed amendments would enter into force. While Article 5(2) states “[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123,” it does not

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20. *Id.* at 693.

21. Heinsch, *supra* note 12, at 719. This definition inevitably became Article 8bis which was voted on as part of the amendment to the Rome Statute at Kampala. Clark, *supra* note 19, at 694.

22. Heinsch, *supra* note 12, at 719; *see also* Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1195-96 (2010).

23. *See* Heinsch, *supra* note 12, at 716.

24. *Id.*

25. *See* Kreß & von Holtzendorff, *supra* note 22, at 1201.

26. Jennifer Trahan, *The New Agreement on the Definition of the Crime of Aggression*, <http://www.mediafire.com/?yydmndtmmdw> (last visited May 2, 2011).

27. Trahan, *supra* note 7, at 61.

28. Under the Rome Statute, the Court can gain jurisdiction over a crime through one of three triggers: (1) A State Party may refer a crime committed on its territory, or committed by one of its nationals, to the Court (State Party Referral); (2) the Prosecutor may investigate a crime committed the territory of a State Party, or committed by one of its nationals (*Proprio Motu* Investigation); or (3) the Security Council may refer a crime that has occurred anywhere in the world to the Court (Security Council Referral). Rome Statute, *supra* note 2, art. 12-15.

indicate under which subsection of Article 121 the amendments should enter into force.<sup>29</sup> Some argued that 121(3), which states “[t]he 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,”<sup>30</sup> should be the proper entry into force proceeding because the crime of aggression was to be decided at the Kampala Review Conference.<sup>31</sup> However, this subsection only discusses the “adoption” of amendments, while other subsections explicitly indicate procedures for how amendments should “enter into force.”<sup>32</sup> Other delegates claimed the amendments should enter into force under Article 121(4),<sup>33</sup> which states “[e]xcept 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.”<sup>34</sup> This interpretation gets around the “adoption” limitation that was hampering the proponents of Article 121(3), but its threshold of ratification by seven-eighths of the States Parties seems unnaturally high given the fact that the crime of aggression had already been defined as a crime under the Court’s jurisdiction in Article 5.<sup>35</sup>

A third contingent contended that the more appropriate subsection was Article 121(5), which reads:

Any amendment 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.<sup>36</sup>

Proponents of this argument noted that, not only does the subsection specifically use the language “enter into force,” but also deals specifically

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29. See Rome Statute, *supra* note 2, art. 5(2).

30. See *id.* art. 121(3) (emphasis added).

31. Kreß & von Holtendorff, *supra* note 22, at 1196.

32. *Id.*

33. Review Conference of the Rome Statute of the International Criminal Court, May 31-June 11, 2010, *Report of the Working Group on the Crime of Aggression*, at 46, I.C.C. Doc. RC/9/11, Annex III (2010) [hereinafter SWGCA Report].

34. Rome Statute, *supra* note 2, art. 121(4).

35. See Kreß & von Holtendorff, *supra* note 22, at 1198.

36. Rome Statute, *supra* note 2, art. 121(5).

with amendments to Articles 5, 6, 7, and 8.<sup>37</sup> Likewise, the second sentence of the subsection contemplates the exercise of jurisdiction “regarding a crime,” suggesting that Article 121(5) is the proper channel for amendments to substantive crimes as opposed to procedural aspects of the Rome Statute.<sup>38</sup> However, with the new amendments entering as *8bis*, *15bis*, and *15ter*, at least two, and arguably all three, of these amendments would not fall under Article 121(5)’s purview of “amendments to articles 5, 6, 7, and 8.”<sup>39</sup>

Furthermore, Article 121(5)’s second sentence posed considerable trouble when read along with Article 12(2), which defines the Court’s ability to exercise jurisdiction over the crimes under its mandate. According to Article 12(2), the Court may exercise jurisdiction over a situation if either the territory on which the situation occurred belongs to a State Party or if the accused is a national of a State Party.<sup>40</sup> However, Article 121(5)’s second sentence exempts non-ratifying States Parties—or those States that have ratified the Rome Statute but not the amendments—from the Court’s jurisdiction if the situation occurs on its territory or its national is accused of committing the crime.<sup>41</sup> These articles present a problem if a ratifying State Party’s national commits a crime of aggression on a non-ratifying State Party’s territory, or vice versa. According to Article 12(2), the ICC should have jurisdiction over the situation, but according to Article 121(5)’s second sentence, the ICC should not.<sup>42</sup>

Attempts to square this discrepancy lead to two different interpretations. Those advocating a “negative understanding” claimed the second sentence indicated the Court could only exercise jurisdiction over the crime of aggression under Article 12(2) if *both* the victim and the perpetrator had accepted the amendment.<sup>43</sup> Critics of this “negative understanding,” however, argued that this interpretation would give non-ratifying States Parties an unfair advantage over non-States Parties or those

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37. See Trahan, *supra* note 7, at 65.

38. See Kreß & von Holtendorff, *supra* note 22, at 1196-98.

39. Trahan, *supra* note 7, at 65. Some contend that *8bis* is actually an entirely new article somewhere between Article 8 and 9. *Id.* at 65 n.66.

40. Article 12(2) states:

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . . : (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

Rome Statute, *supra* note 2, art. 12(2).

41. *Id.* art. 121(5).

42. Compare *id.* art. 12(2), with *id.* art. 121(5).

43. See SWGCA Report, *supra* note 33, at 46.

States that have not ratified the Rome Statute at all.<sup>44</sup> If a “negative understanding” were to be read into Article 121(5) then a non-ratifying State Party could attack a ratifying State Party with immunity because its nationals would be exempt from prosecution under Article 121(5).<sup>45</sup> However, if a non-State Party were to do the same, because the crime would occur on the territory of the ratifying State Party, the crime would fall under the Court’s jurisdiction according to Article 12(2).<sup>46</sup>

Others advocated for a “positive understanding;” this approach suggested that the second sentence should only be read as to put non-ratifying States Parties in the same position as non-States Parties with regard to Article 12(2).<sup>47</sup> In this way, a ratifying State Party need only be either the victim state or the aggressor for the Court to exercise jurisdiction.<sup>48</sup> Critics of this position noted that it is hard to square this interpretation with the actual language of Article 121(5), which clearly states that, when a State Party does not ratify the amendments, “the Court shall not exercise its jurisdiction regarding a crime covered by the amendment[s] *when committed by that State Party’s nationals or on its territory.*”<sup>49</sup>

Out of this debate came two main proposals at Kampala: one from Argentina, Brazil, and Switzerland (the ABS Proposal) and one from Canada (the Canadian Proposal).<sup>50</sup> The ABS Proposal presented a unique split of Article 121(5) and 121(4) as a solution to the problem of Security Council control.<sup>51</sup> This proposal provided different entry into force mechanisms for the different triggers under which the Court may exercise its jurisdiction; one entry into force mechanism would apply to crimes of aggression that are referred to the ICC by the Security Council while another would apply to those that result from State Party referrals and *proprio motu* investigations. The crime of aggression would enter into force for all Security Council referrals under the rules found in the first sentence of Article 121(5).<sup>52</sup> In other words, one year after a state ratified the amendments, the Security Council would have the authority to refer,

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44. Kreß & von Holtendorff, *supra* note 22, at 1197.

45. Rome Statute, *supra* note 2, art. 121(5).

46. *Id.* art. 12(2).

47. Kreß & von Holtendorff, *supra* note 22, at 1197.

48. SWGCA Report, *supra* note 33, at 46.

49. Rome Statute, *supra* note 2, art. 121(5) (emphasis added).

50. See Trahan, *supra* note 7, at 68, 72 (“The Slovenian Proposal did not appear to significantly alter the mix.”).

51. See Laura Marschner & Isabelle Olma, *The First Review Conference of the International Criminal Court*, 9 ZEITSCHRIFT INTERNATIONALE STRAFRECHTSDOGMATIK 529, 532 (2010).

52. *Id.*

and the ICC would have the authority to exercise jurisdiction over, a crime of aggression in that State or committed by its nationals. However, the crime of aggression, with regard to State Party referrals and *proprio motu* investigations, would enter into force under Article 121(4), meaning seven-eighths of the States Parties had to ratify the amendments for the Court to exercise jurisdiction over the crime under these triggers.<sup>53</sup> While this proposal “received much praise for its ingenuity” and influenced proposals to come, it still lacked support due to its heavy reliance on Article 121(4) and the unnatural seven-eighths threshold that it requires.<sup>54</sup>

Later in the conference, the Canadian delegation responded to the ABS faction with a proposal of its own.<sup>55</sup> Unlike the ABS Proposal, the Canadian paper suggested the amendments enter into force using a modified “negative understanding” of Article 121(5). Under this regime, if the Security Council had not made a determination regarding a potential crime of aggression within six months, the Prosecutor could open an investigation under his *proprio motu* powers as long as the Pre-Trial Chamber of the ICC had authorized it and “all state(s) concerned” or “the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused” consented to the proceedings.<sup>56</sup> Yet, as with the ABS Proposal, the Canadian Proposal had its own critics, many of whom worried about whether it was realistic to believe that all the parties to a dispute surrounding an act of aggression would submit themselves to the ICC’s jurisdiction.<sup>57</sup>

As the clock wound down on the conference with no clear consensus in sight, Ambassador Christian Wenaweser, President of the Assembly of States Parties, presented a “non-paper”<sup>58</sup> of his own, which attempted to bridge the growing rift between the factions.<sup>59</sup> Specifically seeking to entice the skeptical permanent members of the Security Council, President Wenaweser’s non-paper mandated that the amendments not enter into force

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53. See Robert L. Manson, *Identifying the Rough Edges of the Kampala Compromise*, 21 CRIM. L. F. 417, 421 (2010).

54. Kreß & von Holtendorff, *supra* note 22, at 1202-03.

55. *Id.* at 1203.

56. Trahan, *supra* note 7, at 70-71.

57. *Id.* at 71.

58. A non-paper, or an aide-mémoire, is “a proposed agreement or negotiating text circulated informally among delegations for discussion without committing the originating delegation’s country to the contents.” *Aide-Mémoire Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/a/aide-memoire/> (last visited April 26, 2011).

59. William A. Schabas, *New ‘Non-Paper’ Advances Search for Consensus on Aggression*, THE ICC REVIEW CONFERENCE: KAMPALA 2010 (June 10, 2010, 3:02 PM), <http://iccreviewconference.blogspot.com/>.

until the ratification of thirty States Parties.<sup>60</sup> Furthermore, at least one year after the thirtieth ratification, and no sooner than January 1, 2017, another vote would have to be taken by the Assembly of States Parties as a whole before the amendments would come under the Court's jurisdiction.<sup>61</sup> To address those States Parties wary of the Security Council monopoly, President Wenaweser's non-paper allowed for State Party referrals and *proprio motu* investigations without requiring express Security Council permission.<sup>62</sup> Instead, President Wenaweser tempered these modes of exercising jurisdiction by instituting four filters: (1) the Security Council must take no action regarding the situation in question for six months; (2) after six months has elapsed, the Pre-Trial Chamber must grant authorization with regard to a State Party referral or a *proprio motu* investigation; (3) States Parties must be allowed to formally "opt out" of the amendments after ratifying them, and thereby prevent the Court from exercising jurisdiction over their nationals and territory; and (4) the ICC may not exercise jurisdiction over non-States Parties at all.<sup>63</sup> These filters sought to protect the ICC's independence while simultaneously moderating when the Court could exercise its control over the crime.

Around 12:20 a.m., just minutes into June 12, 2010, the President brought his final proposal to the delegates for a vote, which was passed by a consensus.<sup>64</sup> After years of definitions, discussions, and debates it was at this point that the crime of aggression amendments to the Rome Statute became a reality.

### C. The Final Agreement

#### 1. The Elements of the Crime

While the United Nations praised the agreement at Kampala as "historic" and a significant step toward a new "age of accountability,"<sup>65</sup> the final Articles 8*bis*, 15*bis*, and 15*ter* operate largely as a compromise between the many interests expressed at Kampala.<sup>66</sup> Article 8*bis*, which encapsulated the elements of the crime of aggression, is divided into two

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60. Kreß & von Holtendorff, *supra* note 22, at 1207-08.

61. *Id.* at 1208.

62. *See id.*

63. Trahan, *supra* note 7, at 80.

64. *Id.* at 82.

65. Carsten Stahn, *The 'End', The 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression'*, 23 LEIDEN J. INT'L L. 875, 875 (2010).

66. Trahan, *supra* note 7, at 82.

paragraphs.<sup>67</sup> The first paragraph defines the *crime* of aggression, or the individual responsibility that must be tied to an act of aggression. It states that the accused must engage in the actions of “planning, preparation, initiation or execution” to be liable for the crime, echoing the elements of the definition of “waging a war of aggression” used at Nuremberg.<sup>68</sup> This paragraph also emphasizes that an individual must be in a “leadership” position while committing the crime, mandating that the accused be a person “in a position effectively to exercise control over or to direct the political or military action of a State.”<sup>69</sup> Finally, this paragraph mandates that the leader must have control over “an act of aggression which, by its *character, gravity and scale*, constitutes a manifest violation of the Charter of the United Nations.”<sup>70</sup> The second paragraph, on the other hand, deals with what constitutes an actual *act* of aggression, or what physical actions can be deemed aggressive. This section draws heavily from United Nations General Assembly Resolution 3314 (XXIX)<sup>71</sup> by reciting the text of its third article verbatim and explicitly referencing that any act of aggression be found “in accordance” with the resolution.<sup>72</sup> The reasoning behind this approach seems simple: having not had a codified definition for the act of aggression since Nuremberg, the use of a definition that had support in the United Nations seemed the safest course to follow in order to satisfy all the delegates.<sup>73</sup>

While Article 8*bis* remained relatively untouched throughout the proceedings at Kampala, the final text of the definition also included a series of seven Understandings, supported by the delegations from Canada and the United States, in an attempt to clarify the boundaries of the crime. One of the United States’ main concerns was the fear that the amendments would “criminaliz[e] lawful uses of force.”<sup>74</sup> To protect against this possibility, the United States proposed the inclusion of Understanding 6,

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67. Heinsch, *supra* note 12, at 720.

68. *Id.* at 721.

69. *Id.* at 721-22.

70. Resolution Adopting Aggression Amendments to Rome Statute, Rev. Conf. of the Rome Statute, Kampala, Uganda, May 31-June 11, 2010, Annex I, art. 8*bis*(1), 13th plen. mtg., I.C.C. Doc. RC/Res.6 (June 11, 2010) (emphasis added) [hereinafter The Amendments].

71. This resolution, passed in 1974, articulates a definition of the Crime of Aggression. See Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/9890, at 142 (Dec. 6, 1974) [hereinafter Definition of Aggression].

72. *Id.*; Heinsch, *supra* note 12, at 723.

73. Heinsch, *supra* note 12, at 725.

74. Julia Martínez Vivancos, *The Crime of Aggression Amendment Adopted at the ICC Review Conference in Kampala, Uganda*, THE AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT (July 29, 2010), <http://www.amicc.org/docs/Aggression.pdf>.

which stated that aggression was the “most serious and dangerous form of the *illegal* use of force” and that a determination regarding whether an act of aggression has occurred “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.”<sup>75</sup> Canada, however, expressed concern over the fact that the amendments could be interpreted to indicate that an act of aggression could be a manifest violation of the United Nations Charter if it was “manifestly illegal” with regard to just one of the components of character, gravity, or scale.<sup>76</sup> The Canadians feared that this situation might arise “in a case where one component is most prominently present, but the other two are completely absent.”<sup>77</sup> It was at this delegation’s request that Understanding 7 came into being, which stated that, in analysing whether the act of aggression is a manifest violation of the United Nations Charter, “the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination.”<sup>78</sup> Understanding 7 went on to further clarify that “[n]o one component can be significant enough to satisfy the manifest standard by itself,”<sup>79</sup> indicating that at least two of the components must be present for an act of aggression to be deemed a manifest violation of the United Nations Charter.

## 2. The Entry Into Force and Jurisdiction Structure of the Crime

The entry into force and jurisdictional regime for the crime of aggression is split into two amendments: Article 15*bis*, which deals with State Party referrals and *proprio motu* investigations, and Article 15*ter*, which deals with Security Council referrals. As a prerequisite, the introductory paragraph of the amendments indicates that they shall enter into force following the protocol outlined in Article 121(5).<sup>80</sup> In addition to the requirements under this article, however, Article 15*bis* also incorporates the delay period rule addressed in the non-paper offered by the President at Kampala. It requires thirty State Party ratifications and a two-thirds majority approval at a revote that can occur no earlier than January 1, 2017 for the amendments to enter into force.<sup>81</sup> Further borrowing from the President’s non-paper, with regard to jurisdiction, Article 15*bis* allows for a

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75. The Amendments, *supra* note 70, at Annex III, para. 6 (emphasis added).

76. Kreß & von Holtendorff, *supra* note 22, at 1206.

77. *Id.*

78. The Amendments, *supra* note 70, at Annex III, para. 7.

79. *Id.*

80. *Id.* at para. 1.

81. *Id.* at Annex I, art. 15*bis*(2)-(3).

State Party to ratify the amendments and then “opt out” of the Court’s jurisdiction over its territory and nationals.<sup>82</sup> It likewise provides a mandatory six-month delay period between the Prosecutor notifying the Secretary General of the United Nations of his intent to investigate an act of aggression and his actual ability to do so.<sup>83</sup> This delay mechanism is presumed to allow ample time for the Security Council to make its own determination regarding the situation before the Court can act independently. However, unlike the non-paper, before engaging in an investigation under his *proprio motu* powers, the Prosecutor need not seek authorization from the Pre-Trial Chamber but instead must be authorized by the entire Pre-Trial Division.<sup>84</sup> In this sense, the Prosecutor must convince the majority of a six-judge panel as opposed to a panel composed of only three.<sup>85</sup> Arguably the most important portion of this Article, however, is 15bis(5), which states that, with regard to “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.”<sup>86</sup> This provision, ostensibly, exempts any act of aggression from being prosecuted if it occurs on a non-State Party’s territory or has been committed by one of its nationals.<sup>87</sup> While Article 15bis incorporates these numerous requirements and loopholes, Article 15ter is far more straightforward; it simply states that the Court may exercise jurisdiction in accordance with Article 13(b),<sup>88</sup> the provision of the Rome Statute that gives the Court the authority to exercise jurisdiction over situations that are “referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”<sup>89</sup>

Though the delegates in Kampala came to a consensus over the crime of aggression amendments, a plethora of questions still remain regarding their use in the courtroom. As President Wenaweser remarked, even at the Kampala Conference itself, “[t]here was a certain level of understanding for the concerns advanced [by critics], but the view prevailed that reopening the definition would inevitably lead to its total unraveling.”<sup>90</sup> While this refusal to open the “Pandora’s box” of criticism surrounding the

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82. *Id.* at Annex I, art. 15bis(4).

83. *Id.* at Annex I, art. 15bis(6)-(8).

84. *Id.* at Annex I, art. 15bis(8).

85. Trahan, *supra* note 7, at 80 n.130.

86. The Amendments, *supra* note 70, at Annex I, art. 15bis(5).

87. Trahan, *supra* note 7, at 84.

88. The Amendments, *supra* note 70, at Annex I, art. 15ter(1).

89. Rome Statute, *supra* note 2, art. 13(b).

90. Christian Wenaweser, *Reaching the Kampala Compromise on Aggression: The Chair’s Perspective*, 23 LEIDEN J. INT’L L. 883, 883 (2010).

crime of aggression was the very reason the delegates were able to achieve a consensus at Kampala, it has also left numerous questions and concerns for the judges of the ICC to interpret. The second section of this paper seeks to address these questions and concerns by first raising and analyzing them and then positing the likely interpretations judges will formulate when applying these amendments in the courtroom. It will do so in two parts: Part II.A will deal with the questions surrounding Article 8*bis* and the elements of the crime while Part II.B will assess Articles 15*bis* and 15*ter* and the questions arising from the entry into force of the amendments as well as the Court's exercise of jurisdiction over them. While the text of the amendments was solidified last summer in Kampala, it is not without its ambiguities; as a result, these inquires must be considered in order to ensure a smooth transition into this new stage of international criminal law.

## II. QUESTIONS AND CONCERNS REGARDING THE CRIME OF AGGRESSION AMENDMENTS

### A. Questions Surrounding Article 8*bis* and the Elements of the Crime

#### 1. What Is the Meaning of "Effective Control" Under Article 8*bis*?

Article 8*bis* defines the crime of aggression as "the planning, preparation, initiation or execution, by a person *in a position effectively to exercise control* over or to direct the political or military action of a State."<sup>91</sup> While a leader's ability to "direct the political or military action of a State," for the most part, can be rather easily assessed, the same cannot be said for a leader's ability to "effectively" exercise control. Generally a leader is thought to be the political figurehead of a country such as a president, dictator, or king. However, in an expanding global economy, business leaders exercise more and more influence over the economic survival of countries.<sup>92</sup> Likewise, one might plausibly see other figureheads, such as religious leaders, exercising a considerable amount of control over a country's laws and policies. As a result, one might make an argument that these business and religious leaders then "effectively" exercise control for their respective countries. While the history of the crime of aggression amendments points in this direction, it is somewhat

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91. The Amendments, *supra* note 70, at Annex I, art. 8*bis*(1) (emphasis added).

92. See RICHARD J. BARNET & JOHN CAVANAGH, GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER 14 (1994) ("The architects and managers of these space-age business enterprises understand that the balance of power in world politics has shifted in recent years from territorially bound governments to companies that can roam the world. As the hopes and pretensions of governments shrink almost everywhere, these imperial corporations are occupying public space and exerting more profound influence over the lives of ever larger numbers of people.").

inconclusive. During World War II it was accepted that German industrialists could be prosecuted for waging an “aggressive war” if they had the economic means to “support, or help to prepare” the war.<sup>93</sup> However, none were actually convicted.<sup>94</sup> Furthermore, while the crime of aggression is based on this precedent, the charge used at Nuremberg was technically not the same crime.<sup>95</sup> As a result, the question begs to be asked: what types of leaders – whether formal State officials or private actors – will be liable for the crime of aggression?

It is likely that a judge faced with unofficial leaders will still find them prosecutable for the crime of aggression. Scholars analyzing the elements of the crime have suggested that the focus for determining whether an individual can be prosecuted for the crime of aggression should be on the leadership component of the definition.<sup>96</sup> In other words, a judge faced with this scenario should focus on whether the accused was in a position of representation for the state, regardless of whether that position was formal.<sup>97</sup> However, while unofficial leaders that commit an act of aggression might be liable under this analysis, it is less likely that they will actually be convicted and sentenced than would be the case for official leaders. One factor that points to this hypothesis is Article 8*bis*(2)’s heavy focus on “armed force” in its definition of an act of aggression. This subsection states that an act of aggression must be “*the use of armed force* by a State against the sovereignty, territorial integrity or political independence of another State.”<sup>98</sup> While some have criticized this phrasing as being too narrow to include the dangers of modern warfare,<sup>99</sup> in the present scenario, it is a system of delineation for a judge to use when determining if a leader exercises control to the requisite degree.<sup>100</sup> Because of the need for there to be armed force to constitute an act of aggression, an unofficial leader must exercise control over the armed forces of a country to become criminally liable. This requirement makes it quite unlikely,

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93. Heinsch, *supra* note 12, at 722.

94. Clark, *supra* note 19, at 697.

95. At Nuremberg it was called “waging a war of aggression” while the ICC has jurisdiction over the “crime of aggression.” See Heinsch, *supra* note 12, at 721.

96. Noah Weisbord, Professor of Law, Fla. Int’l Univ., Address at The Road From Kampala Conference: An Analysis of the First ICC Review Conference of the Rome Statute (Nov. 13, 2010), available at <http://www.law.duke.edu/webcast/#webcasts> (part 1).

97. See *id.*

98. The Amendments, *supra* note 70, at Annex I, art. 8*bis*(2) (emphasis added).

99. Telephone Interview with Don Ferencz, Convener, Global Institute for the Prevention of Aggression, (Mar. 31, 2011) (noting that, with a cyber-attack, one could wipe out an entire State’s infrastructure, leading to far graver consequences than armed conflicts that might fall under the current definition of aggression).

100. Heinsch, *supra* note 12, at 723.

though still feasible, that an individual of this nature could be charged with the crime of aggression. Interestingly, however, with the development of religious extremism in the Middle East, it is not implausible for a judge to perceive a religious leader to not only impact the politics of a state,<sup>101</sup> but presumably the military actions of one as well. Article 8*bis*(1)'s definition of "effective control," while potentially too narrow to capture leaders that lack access to armed forces, is still wide enough to capture those leaders who gain this access informally and indirectly.

## 2. What Constitutes a *Manifest* Violation of the United Nations Charter Under Article 8*bis*?

Article 8*bis*(1) states that, for individual criminal liability to arise from an act of aggression, that act must "by its character, gravity and scale, constitute[] a manifest violation of the Charter of the United Nations."<sup>102</sup> While the text gives some indication as to what *factors* a judge should assess in concluding that a violation is "manifest"—the character, gravity, and scale of the attack—it does not indicate what *level* of each factor makes for a manifest violation. In other words, where does the "manifest" threshold lie along the gradient from small-scale border skirmishes to full-out war? The only guidance given to a judge interpreting this modifier is found in paragraph three of Annex II to the amendments, which states "[t]he term 'manifest' is an objective qualification."<sup>103</sup> However, this objectivity requirement does little to clear up the vagueness of what constitutes a manifest violation. Unfortunately, this term also draws no support from history, as neither the United Nations Charter nor Resolution 3314 incorporates a "manifest" requirement into their definitions.<sup>104</sup> Thus, in the history of the work on aggression, the notion of a "manifest violation" is new and, consequently, has drawn criticism for its abstraction.<sup>105</sup> As a result, judges at the ICC left with determining what constitutes a manifest violation will likely be forced to determine the threshold themselves.

Yet, evidence in the supplements to the text of the amendments, coupled with the overall mission of the ICC itself, indicates that the manifest threshold will be construed as a high one. In other words, a judge

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101. See HARRY S. TRUMAN RESEARCH INST. FOR THE ADVANCEMENT OF PEACE, THE HEBREW UNIV., RELIGIOUS RADICALISM AND POLITICS IN THE MIDDLE EAST I (Emmanuel Sivan & Menachem Friedman eds., 1990) (stating that the emergence of radical religious extremism in the Middle East has a significant impact on politics in the region).

102. The Amendments, *supra* note 70, at Annex I, art. 8*bis*(1).

103. *Id.* at Annex II, art. 8*bis*(3).

104. Heinsch, *supra* note 12, at 726.

105. *Id.*

faced with determining whether a violation is “manifest” will likely interpret this term to include only a narrow category of the gravest acts of aggression. First, any judge faced with this dilemma will likely look to Canada’s Understanding 7, which states that “the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. *No one component can be significant enough to satisfy the manifest standard by itself.*”<sup>106</sup> By requiring a combination of at least two of these components,<sup>107</sup> the delegations drafting the Understandings exempted perpetrators of violations that only satisfy one criterion. Furthermore, Article 5(1) of the Rome Statute reads “[t]he jurisdiction of the Court *shall be limited to the most serious crimes* of concern to the international community as a whole.”<sup>108</sup> Given that the act of aggression in question must satisfy at least two of the criteria of character, gravity, and scale to a sufficient degree and that the crime of aggression itself must be one of “the most serious” of all crimes of aggression for the Court to exercise its jurisdiction, it is likely that “manifest” will be interpreted to include only those situations where the violation of the United Nations Charter is so blatant that it is readily distinguishable by the reasonable observer.

### 3. What *Mens Rea* Element Must Be Satisfied by a Leader to Merit Prosecution for the Crime of Aggression?

Specifically in common law jurisdictions, it is often required that, to be found guilty, the accused must have possessed the requisite mental state, or *mens rea*, enumerated in the definition of the crime.<sup>109</sup> However, Article 8*bis* lacks any indication of what *mens rea* requirement must be fulfilled by a leader to have engaged in the crime of aggression.<sup>110</sup> Unlike Article 6’s definition of genocide,<sup>111</sup> this crime does not require special intent on the part of the perpetrator to commit the crime, which could lead to significant confusion when attempting to assess whether the person was planning,

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106. The Amendments, *supra* note 70, at Annex III, para. 7 (emphasis added).

107. Some have criticized the wording of this last sentence as it makes it unclear as to whether all three components must be present for there to be a manifest violation, or if it can be satisfied with only two. Heinsch, *supra* note 12 at 728. Either way, a judge interpreting this understanding will likely acknowledge that the drafters intend for the language to exclude lesser acts of aggression that might only satisfy one condition.

108. Rome Statute, *supra* note 2, art. 5(1) (emphasis added).

109. See Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 636 (1993).

110. Heinsch, *supra* note 12, at 732.

111. Rome Statute, *supra* note 2, art. 6 (stating that to be considered genocide, the act must be “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”).

preparing, initiating, or executing a manifest violation of the United Nations Charter.<sup>112</sup>

However, by assessing the definition in relation to both its own supplements and the Rome Statute itself, judges at the ICC will likely determine that the *mens rea* requirement is one of intent or knowledge.<sup>113</sup> First, because the actual definition lacks this fundamental component of criminal law, it is safe to assume that the drafters intended the *mens rea* requirement of the crime of aggression to be governed by the general *mens rea* provision found in Article 30 of the Rome Statute. Article 30 states that “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”<sup>114</sup> It further defines intent to include circumstances where the person “means to engage in the conduct” or “means to cause that consequence or is aware that it will occur in the ordinary course of events.”<sup>115</sup> Likewise, it defines knowledge as an “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>116</sup> Given the clause “unless otherwise provided,” Article 30 contemplates that the drafters of the different crimes under the Court’s jurisdiction might intentionally leave the *mens rea* requirement blank in order for it to be covered by this default clause.

Similarly, the amendments to Article 8*bis* make it all the more apparent that the drafters at Kampala intended for Article 30’s default provision to apply. First, paragraphs two and four of Annex II to the amendments state “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations” and “[t]here 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,” respectively.<sup>117</sup> These provisions nullify any “mistake of law” defense that the accused might raise; simply because the accused was not aware of the fact that his actions were legally inconsistent with the UN Charter or that his actions constituted a “manifest” violation does not preclude him from

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112. See The Amendments, *supra* note 70, at Annex I, art. 8*bis*.

113. This is to say that one must either intend, or act for the purpose of bringing about, a result or have knowledge, that is know or reasonably believe, that his actions will lead to a certain result. Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 911, 921 (1939).

114. Rome Statute, *supra* note 2, art. 30 (emphasis added).

115. *Id.*

116. *Id.*

117. The Amendments, *supra* note 70, at Annex II, art. 8*bis* (emphasis added).

prosecution. Instead, Annex II indicates that, to be liable for the crime of aggression, the perpetrator must be “*aware of the factual circumstances* that established that such a use of armed force was inconsistent with the Charter of the United Nations” and must be “*aware of the factual circumstances* that established such a manifest violation of the Charter of the United Nations,” respectively.<sup>118</sup> These amendments, echoing the term “awareness” from Article 30, indicate that knowledge of the factual circumstances surrounding the act of aggression is the dispositive factor in a *mens rea* analysis.<sup>119</sup>

However, the use of Article 30 as a default does present a problem unique to the crime of aggression; in both its definition of “intent” and “knowledge” Article 30 states that, to be liable, an individual must either be aware of the consequences of his actions or aware of the fact that the consequences “will occur in the *ordinary course of events.*”<sup>120</sup> This presumption that a consequence will occur in the “ordinary course of events” proves problematic for a crime where there is no established ordinary course of events. While waging an aggressive war was considered a crime in World War II,<sup>121</sup> humanitarian intervention in Kosovo was not.<sup>122</sup> Scholars, however, have addressed this concern by remarking that the *mens rea* requirement must be read along with the term “manifest violation” in Article 8*bis*.<sup>123</sup> In doing so, it becomes evident that good-faith errors<sup>124</sup> do not fall under the *mens rea* requirement because, if the action were taken in good-faith, the actor would not likely expect his actions to constitute a manifest violation in the ordinary course of events.<sup>125</sup> Instead, while the actor need not legally determine whether his action is a manifest violation or inconsistent with the Charter, this theory posits that the perpetrator needs to display malicious intent or, at a minimum, a conscious

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118. *Id.* (emphasis added). This differentiation suggests that the perpetrator must be aware that his actions actually occurred and led to the resulting consequences but not that his actions would be illegal or a manifest violation under the UN Charter.

119. See Heinsch, *supra* note 12, at 732-33.

120. Rome Statute, *supra* note 2, art. 30(2).

121. See Trahan, *supra* note 7, at 50.

122. See Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 Hous. J. Int'l L. 403, 449 (2000) (stating that the NATO intervention was in accordance with customary international law).

123. Jutta Bertram-Nothnagel, Permanent Representative to the U.N. & the Assembly of States Parties for the Union Internationale des Avocats, Address at The Road From Kampala Conference: An Analysis of the First ICC Review Conference of the Rome Statute (Nov. 13, 2010), available at <http://www.law.duke.edu/webcast/#webcasts> (part 1).

124. This is to say, actions that resulted in a manifest violation but were done in good faith.

125. Bertram-Nothnagel, *supra* note 123.

apathy as to the lawfulness of his actions in order to satisfy the *mens rea* requirement.<sup>126</sup> In this sense, the results of World War II and Kosovo can be squared with the *mens rea* requirement found in the crime of aggression amendments. The Nazi acts of aggression during World War II were in direct violation of non-aggression treaties<sup>127</sup> and therefore, in the least, constituted apathy for the law. However, the actions taken by NATO in Kosovo, which the NATO forces claimed to be consistent with United Nations Security Council Resolutions,<sup>128</sup> arguably, fall under the good-faith error category. However, this is not to say that all actions taken under the auspices of humanitarian intervention will be saved from the crime of aggression; only those acts of aggression that – on the facts of the case – can accurately be determined as good faith efforts for the sake of humanitarianism will be exempt from the *mens rea* requirement.

#### 4. Is the List of Acts of Aggression an Exhaustive List of those Acts that Will Trigger a Potential Crime of Aggression?

Paragraph two of Article 8*bis* lists seven actions that shall be considered acts of aggression “in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.”<sup>129</sup> While these enumerated acts are replicated verbatim from Article 3 of the General Assembly Resolution,<sup>130</sup> the definition does not discuss the possibility of other situations falling under the category of acts of aggression. This omission begs the question as to whether the drafters intended to limit the acts that constitute aggression to those enumerated on the list or if they intended to use these acts as a set of most common examples that are listed only for the purpose of guiding judges at the ICC in their own determinations.

While the text of Article 8*bis* is unclear in this regard, it does provide a clue in requiring that the acts shall be considered aggressive if such a determination is made “in accordance” with Resolution 3314.<sup>131</sup> Article 4 of Resolution 3314 states “[t]he acts enumerated [in Article 3] are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.”<sup>132</sup> Arguably, the

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126. *Id.*

127. *See, e.g.,* German-Polish Non-Aggression Pact (Jan. 26, 1934), available at <http://avalon.law.yale.edu/wwii/blbk01.asp>.

128. *See* Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 12 (1999).

129. The Amendments, *supra* note 70, at Annex I, art. 8*bis*(2).

130. *Compare id., with* Definition of Aggression, *supra* note 71, art. 3.

131. *See* The Amendments, *supra* note 70, at Annex I, art. 8*bis*(2).

132. Definition of Aggression, *supra* note 71, art. 4.

fact that an act of aggression with regard to Article 8*bis* is to be determined “in accordance” with Resolution 3314 indicates that it will be determined in accordance with Article 4 as well. Following this logic, the acts enumerated in Article 8*bis* are therefore also non-exhaustive. However, if one accepts this line of reasoning, further analysis must be conducted; would a judge then be limited to only those non-enumerated acts that were determined by the Security Council as to “constitute aggression under the provisions of the Charter?”<sup>133</sup> On the face of the text, yes; however, in considering the fear of numerous States Parties regarding the jurisdictional independence of the ICC from the Security Council,<sup>134</sup> one might contend that the drafters did not intend to read in the right of the Security Council to determine which acts constitute aggression under the Rome Statute. In fact, Articles 15*bis* and 15*ter* both state that “[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.”<sup>135</sup> Instead, one might infer that a determination made “in accordance with” Resolution 3314 need not follow the specific rules outlined in its articles but simply be consistent with the resolution’s object and purpose.

Furthermore, regardless of a judge’s position on the Security Council primacy issue, the Court would still be faced with another problem if it interpreted the list laid out in Article 8*bis* as non-exhaustive: the principle of legality. This principle has been a long-standing tenet of criminal law, at least on a national level.<sup>136</sup> It states that, in order to prosecute an individual for a crime, there must be a clearly defined statement of punishable acts so as to give the accused some form of notice.<sup>137</sup> A non-exhaustive list would violate the principle of legality, as new acts would consistently be open to interpretation, either by the judge or the Security Council.

Judges faced with these dilemmas will likely come to the conclusion that, while the list is non-exhaustive, it will be mandatory, for an act not already enumerated in Article 8*bis*, that the Security Council have made a previous determination that the act in question is in fact aggressive. First, given the political undertones of the crime of aggression, the ICC would likely receive great criticism—merited or not—if it were to determine an act not found on the list was one of aggression. Despite the potential for

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133. *Id.*

134. Trahan, *supra* note 7, at 61.

135. The Amendments, *supra* note 70, at Annex I, arts. 15*bis*(9) and 15*ter*(4) (emphasis added).

136. *See, e.g.,* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”).

137. Heinsch, *supra* note 12, at 724.

this backlash, the text of the definition suggests that the list of acts of aggression is an open one. Article 8*bis* does not expressly limit the list in paragraph two and instead only requires that acts of aggression must be found “in accordance with” Resolution 3314.<sup>138</sup> Consequently, it is likely that a judge will have the power to determine that a non-enumerated act was one of aggression as long as, in doing so, the judge is acting in conformity with Resolution 3314.

However, because the definition does not specify as to which subsections of Resolution 3314 judges must consider, these determinations will probably have to be in accordance with the entire resolution, including Article 4. To do so, judges will have to square Article 4 of Resolution 3314 with Articles 15*bis* and 15*ter*’s reference to the fact that another organ’s “determination of an act of aggression” does not prejudice the Court’s own determination.<sup>139</sup> This distinction can be made by differentiating a determination as to whether an act of aggression has occurred from a determination as to what constitutes an act of aggression. In making an Article 4 decision, the Security Council would not be determining if an act of aggression has occurred but rather deciding on what characteristics actually constitute an aggressive act.<sup>140</sup> Although rather nuanced, there is a distinction between the two; a *determination* of an act of aggression implies that an actual situation has occurred and the deciding body, whether the Court or the Security Council, is applying the definition for an act of aggression to the situation. Instead, a *decision* as to what constitutes an act of aggression is a theoretical one and therefore can be made in the absence of any actual situation. For example, if the Russians launch a cyber-attack on Georgia, under Article 4, the Security Council could assess the situation and decide that all cyber-attacks of this nature constitute acts of aggression under Resolution 3314. This decision would expand the definition and, as a result, the ICC could then claim jurisdiction over any cyber-attacks that constitute the requirements of the Security Council’s determination. The Security Council could then determine that this specific cyber-attack, from Russia to Georgia, is an act of aggression in its own right. It is here that Articles 15*bis* and 15*ter* allow for the ICC to make an unprejudiced determination; while the Security Council’s *decision* that a cyber-attack constitutes an act of aggression allows for the Court to take on the Russian-Georgian situation, the Security Council’s *determination* that an act of aggression actually occurred in Georgia does not mean that the ICC needs

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138. The Amendments, *supra* note 70, at Annex I, art. 8*bis*(2).

139. *See id.* at Annex I, arts. 15*bis*(9) and 15*ter*(4).

140. *See id.*; *see also* Definition of Aggression, *supra* note 71, art. 4.

to determine the same. Instead, the ICC is free to exercise its jurisdiction over this new act of aggression as it sees fit.

This analysis still leaves the principle of legality dilemma. Yet the open list in Article 8*bis*, while troubling on a national level with regard to this principle, is not as much of an issue in the international realm. Both the Statute of the International Criminal Tribunal For the Former Yugoslavia and the Rome Statute itself have areas where “open” clauses arise, indicating – to some degree – that this is an acceptable practice in international criminal law.<sup>141</sup> Yet what might be acceptable for other crimes might not be as easy to swallow for the crime of aggression given its political nature. For this reason, it is likely that judges will limit themselves to the Security Council restriction in Article 4 of Resolution 3314. In this way the drafters will be interpreting the amendment “narrowly and *ejusdem generis*<sup>142</sup> with the existing list.”<sup>143</sup> In doing so, judges will ensure that any act of aggression that falls outside of the enumerated list has been rightfully characterized as one by the Security Council, the international political institution responsible for making a decision as to what constitutes an act of aggression.<sup>144</sup> As a result, the judges of the ICC will remove themselves from the political nature of the determination of an act of aggression and instead be able to focus in the actual crime itself.

## B. Questions Surrounding Articles 15*bis* and 15*ter* and the Entry into Force and Exercise of Jurisdiction over the Crime of Aggression

### 1. When Do the Crime of Aggression Amendments Enter into Force and Over Whom Do They Grant the Court Jurisdiction?

The entry into force mechanism for the crime of aggression amendments was a topic of heated debate at the Kampala conference.<sup>145</sup> The final structure of the amendments indicates that they must enter into force under Article 121(5), which allows the Court to exercise jurisdiction over a State one year after it ratifies the amendments.<sup>146</sup> In addition, the amendments stipulate that a two-thirds majority of the Assembly of States

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141. Heinsch, *supra* note 12, at 724-25 (indicating that the ICTY statute’s definition of violations of the laws of war states “[s]uch violations shall include, but not be limited to” while the Rome Statute’s definition of crimes against humanity in Article 7(1)(k) allows for the prosecution of “other inhumane acts of similar character” to those enumerated).

142. Meaning “of the same class.”

143. Clark, *supra* note 19, at 696.

144. See U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . .”).

145. Trahan, *supra* note 7, at 84-85. The approval vote must be taken at least one year after thirty states ratify the amendment and cannot be taken any earlier than January 1, 2017. *Id.*

146. See The Amendments, *supra* note 70, para. 1.

Parties must reapprove the amendments at least one year after thirty states have ratified them, but no earlier than January 1, 2017, before they may enter into force.<sup>147</sup> Some commentators have found these additional requirements puzzling; if the amendments are so explicit about entering into force in accordance with Article 121(5), should not the amendments enter into force once the requirements of Article 121(5) have been satisfied? If so, what purpose do these extra restrictions serve? At least some scholars have suggested that this dual entry into force mechanism implies that one set of criteria is for ratifying States Parties only and the other set is for all States Parties, whether they ratify the amendments or not.<sup>148</sup> According to this theory, the amendments will enter into force immediately for those States Parties that deposit ratifications in accordance with Article 121(5) and that, upon achieving thirty ratifications and a two-thirds majority after 2017, the amendments will enter into force for *all* States Parties.<sup>149</sup>

Despite the potential for this interpretation, it is likely that the judges of the ICC will determine that both entry into force procedures will be necessary for the Court to exercise jurisdiction over any States Parties, whether it has ratified the amendments or not. First, one can decipher from the wording of Articles 15*bis* and 15*ter* that the drafters intended to give the Court jurisdiction only upon the satisfaction of these extra restrictions. The amendments state “[t]he Court may exercise jurisdiction *only* with respect to crimes of aggression committed one year” after the deposit of thirty ratifications.<sup>150</sup> Furthermore, the amendments also state that 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 a two-thirds majority.<sup>151</sup> The use of “only” and “subject to” in these clauses seems to indicate that drafters intended that the amendments should not go into force for any State, regardless of ratification, until these two requirements were fulfilled.

Practically speaking, this interpretation makes sense as well. First, the delay period built into the amendments by these extra hurdles allows for scholarly work to address the questions that remain in the text and posit interpretations that can then be assessed by judges before they need to make final determinations. Similarly, the delay period gives the legislators of the ratifying States Parties time to develop new criminal laws to fall in

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147. *See id.* at Annex I, art. 15*bis*(2)-(3).

148. Heinsch, *supra* note 12, at 737.

149. *Id.*

150. The Amendments, *supra* note 70, at Annex I, art. 15*bis*(2) and 15*ter*(2) (emphasis added).

151. *Id.* at Annex I, art. 15*bis*(3) and 15*ter*(3) (emphasis added).

line with the amendments.<sup>152</sup> As the ICC is a court of complementarity,<sup>153</sup> it cannot exercise its jurisdiction if a national court has begun a “genuine” investigation into the matter.<sup>154</sup> This delay period gives States an adequate time frame within which to establish their laws and procedures for an investigation into a crime of aggression if they so choose. Likewise, having only come into power in 2002, the ICC is still a court very much in its infancy; in fact, it has yet to even complete its first trial.<sup>155</sup> This delay period provides the Court with the opportunity to finish a case and build its legitimacy as an international institution before exercising jurisdiction over a politically infused crime like the crime of aggression.<sup>156</sup> For both these practical reasons, as well as textual ones, a judge will likely determine that the amendments have not entered into force for any States Parties until this delay mechanism is satisfied.

## 2. How Does the Entry into Force of the Crime of Aggression Amendments Under Article 121(5) Fit with the Court’s Jurisdiction Under Article 12?

In both Articles 15*bis* and 15*ter* it is stated that the Court may exercise jurisdiction over the crime of aggression in accordance with Article 12.<sup>157</sup> Article 12(1) states that “[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.”<sup>158</sup> Article 12(2) further states that the Court’s jurisdiction is triggered if the “territory of which the conduct in question occurred” is that of a State Party or “the person accused of the crime is a

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152. Heinsch, *supra* note 12, at 738.

153. As a court of complementarity, the ICC may only assume jurisdiction over a situation if the national courts of the country in which it occurred are unable or unwilling to investigate the crime. In this way, the ICC “complements” national courts. See Rome Statute, *supra* note 2, at preamble (“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . .”) and art. 17 (“ . . . the court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it . . .”).

154. *Id.* art. 17. The term genuine “connotes a certain basic level of objective quality.” A genuine investigation is defined as one in which a State is both willing and able to provide an adequate investigation and subsequent prosecution. See ICC OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE at 8 (2003), <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>.

155. The Court’s first case commenced in 2009 and is still ongoing. See *Democratic Republic of Congo: ICC-01/04-01/06–Case of The Prosecutor v. Thomas Lubanga Dyilo*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm> (last visited April 8, 2011).

156. See Heinsch, *supra* note 12, at 738.

157. The Amendments, *supra* note 70, at Annex I, arts. 15*bis*(2) and 15*ter*(2).

158. Rome Statute, *supra* note 2, art. 12(1).

national” of a State Party.<sup>159</sup> Articles 15*bis* and 15*ter* go on to provide an exemption from the Court’s jurisdiction, under Article 12, for States Parties that ratify the amendments and then lodge a declaration opting out.<sup>160</sup> However, Article 12 still poses a dilemma for States Parties that decide not to ratify the amendments at all. A State Party that has ratified the Rome Statute has already ratified Article 12 and therefore given the ICC jurisdiction, with respect to its territory and nationals, over the crimes in Article 5, including the crime of aggression, which is mentioned in Article 5(2).<sup>161</sup> However, as previously mentioned, the crime of aggression amendments indicate in paragraph one that they enter into force in accordance with Article 121(5).<sup>162</sup> According to the second sentence of Article 121(5), if that same State Party does not ratify the crime of aggression amendments “the Court shall not exercise its jurisdiction” over its “nationals or on its territory.”<sup>163</sup> Thus, Article 12(2) appears to give the Court jurisdiction over the crime of aggression with regard to the nationals or territory of any State Party to the Rome Statute. However, Article 121(5) appears to allow for States Parties to refuse the Court’s jurisdiction over this very same crime. Under this analysis, there seems to be a tension between these two articles.

However, upon closer inspection of the articles, it is evident that this tension does not actually exist. Article 12(2) specifically states “the Court *may* exercise its jurisdiction” over a State Party<sup>164</sup> while Article 121(5) says “the Court *shall not* exercise its jurisdiction” over a non-ratifying State Party.<sup>165</sup> The difference between the wording of these two articles indicates that Article 121(5) (a “shall” provision) is mandatory while Article 12(2) (a “may” provision) is permissive.<sup>166</sup> Under Article 12, the ICC has the option to exercise its jurisdiction for the crime of aggression over a State Party. But, under Article 121(5), this option is removed if that State Party has not ratified the crime of aggression amendments.<sup>167</sup> In essence, the mandatory provision of Article 121(5) trumps the permissive provision of Article

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159. *Id.* art. 12(2).

160. *See* The Amendments, *supra* note 70, at Annex I art. 15*bis*(2) and 15*ter*(2).

161. *See* Rome Statute, *supra* note 2, art. 5(2), 12(1).

162. The Amendments, *supra* note 70, para. 1.

163. *Id.* art. 121(5).

164. *Id.* art. 12(2) (emphasis added).

165. *Id.* art. 121(5) (emphasis added).

166. Robert Manson, Kampala Review Conference Delegate for the U.K. Coal. for the ICC, Address at The Road From Kampala Conference: An Analysis of the First ICC Review Conference of the Rome Statute (Nov. 13, 2010), available at <http://www.law.duke.edu/webcast/#webcasts> (part 3).

167. *See id.*

12.<sup>168</sup> A judge faced with this tension will likely have no problem deciding in this manner. This construction fits perfectly with Article 5(2) which states that “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.*”<sup>169</sup> The second half of this sentence implies that the criteria for the Court’s exercise of jurisdiction over crime of aggression are to be found in the text of Article 121. Seeing as Article 12 derives its jurisdiction by referencing the crimes in Article 5<sup>170</sup> and Article 5(2) specifically references Article 121, it is easy to interpret Article 12’s jurisdictional structure as a supplement to that which is laid out in Article 121(5).<sup>171</sup>

### 3. What Is the Difference Between a State Party Refusing to Ratify the Amendments and a State Party Ratifying but Opting Out of Them?

States Parties have two different opportunities to reject the ICC’s jurisdiction over their nationals or territory with regard to the crime of aggression. First, the second sentence of Article 121(5) states “[i]n 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.”<sup>172</sup> Second, Article 15*bis* states that the Court may 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.”<sup>173</sup> Thus, a State can either not ratify the amendments or ratify them but “opt-out” of the Court’s jurisdiction. Yet, why, if a State Party that has not ratified the amendments is exempt from the Court’s jurisdiction, would a State Party ever ratify the amendments and then subsequently opt-out? Does the opt-out provision provide a State Party with a different set of rights and obligations from those it would retain simply by not ratifying the amendment in the first place? Some have interpreted this opt-out provision as an indication that all States Parties are meant to fall under the jurisdiction of the Court once the requirements in Article 15*bis* are fulfilled, namely that thirty States Parties have ratified the amendments and

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168. *Id.*

169. Rome Statute, *supra* note 2, art. 5(2) (emphasis added).

170. *See id.* art. 12(1) (“A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court *with respect to the crimes referred to in article 5.*”) (emphasis added).

171. *See* Manson, *supra* note 53, at 424-25.

172. Rome Statute, *supra* note 2, art. 121(5).

173. The Amendments, *supra* note 70, at Annex I, art. 15*bis*(4).

a two-thirds majority votes in favor of the amendments after January 1, 2017.<sup>174</sup> In this way, States Parties who have not ratified the amendment will become *de facto* bound by it once this requirement is satisfied. Only those States Parties that have ratified the amendment and opted out can be assured that they will not be subject to the Court's jurisdiction.<sup>175</sup>

Here, the purpose of allowing for States Parties to either not ratify the amendment or ratify and opt-out seems to be a practical one. As both Articles 15*bis* and 15*ter* require thirty State Party ratifications to enter into force, ratifications will be necessary for the ICC to exercise jurisdiction regardless of whether the Security Council has referred the situation to the Court or the Court has taken on the case as a result of a State Party referral or under the Prosecutor's *proprio motu* powers.<sup>176</sup> However, a State Party might be in favor of giving the Court jurisdiction over crimes of aggression that are referred by the Security Council while still being hesitant to allow for the Court to exercise its power under the State Party referral and *proprio motu* triggers.<sup>177</sup> The opt-out provision, therefore, allows for a State Party to indicate that it seeks to give the Security Council the power to refer a situation regarding an act of aggression to the Court without giving the Court power to take on similar situations with regard to its territory and nationals under the other two triggers.<sup>178</sup> This interpretation is supported by the fact that the opt-out provision is only contained in Article 15*bis*, which deals with the State Party referral and *proprio motu* triggers.<sup>179</sup> By allowing for this loophole, the drafters have made it easier for States Parties to ratify the amendments and, presumably, for the amendments to enter into force more quickly.

Yet this analysis provides those States Parties who have ratified and opted out an unfair advantage over those parties who chose not to ratify the amendment at all. Article 121(5) states that the ICC cannot exercise jurisdiction over a crime of aggression "when committed *by that State Party's nationals or on its territory*" for those States Parties that have not ratified the amendments.<sup>180</sup> However, the clause in Articles 15*bis* states that, for States Parties that opt out of the amendments, the Court may not

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174. This interpretation falls in line with an argument rejected earlier in favor of interpreting the combination of Article 121(5) and the restrictions found in Articles 15*bis* and 15*ter* as applying to the Court's exercise of jurisdiction over *any* States Parties, including those who have ratified the amendments. See *supra* Part II(B)(1) of this section.

175. Heinsch, *supra* note 12, at 739.

176. See The Amendments, *supra* note 70, at Annex I, arts. 15*bis*(2) and 15*ter*(2).

177. Heinsch, *supra* note 12, at 739.

178. *Id.*

179. See The Amendments, *supra* note 70, at Annex I, arts. 15*bis*(4) and 15*ter*.

180. Rome Statute, *supra* note 2, art. 121(5) (emphasis added).

exercise jurisdiction over a crime of aggression “arising from an act of aggression *committed by* [that] State Party.”<sup>181</sup> This differentiation seems to indicate that, while the ICC cannot exercise jurisdiction over a crime of aggression where a non-ratifying State Party is the victim (one which is “on its territory”), it may do so for a State Party that has opted out (as it would not have been “committed by” that State Party).<sup>182</sup> This arrangement would afford an opting-out State Party protection against crimes of aggression directed toward it, while allowing the same State to claim immunity for crimes of aggression conducted by its nationals.

While this imbalance might seem troubling, politically, it provides motivation for States Parties to ratify the amendments; a State Party that ratifies the amendments but opts-out of the Court’s jurisdiction preserves its right to engage in what might be considered an aggressive act without the potential for the prosecution of its leaders but still protects its territorial sovereignty in case it finds itself on the other end of an aggressive act. Though this loophole might lend itself to abuse by States Parties, it is likely the drafters saw it as better than the alternative. Presumably, States Parties who opt out of the amendment do so because they fear their leaders will be prosecuted for their aggressive acts. Were they not given the opportunity to opt out, these States Parties would likely not ratify the amendment at all to ensure the same protection for their nationals existed under the protection of Article 121(5).<sup>183</sup> These lost ratifications might prevent the crime of aggression amendments from going into force altogether. However, if given the opportunity to have their cake and eat it too, so to speak, these States Parties will be enticed to support the overall jurisdiction of the crime of aggression, which will lead to a speedier entry into force. Furthermore, the amendments provide for a reassessment of any opt-out declaration lodged by a State Party within three years of its submission.<sup>184</sup> This mandatory reassessment might put political pressure on these countries to revoke their opt-out declaration at a later date if the international community finds that they are abusing it. Considering that the Kampala compromises probably left few states entirely happy,<sup>185</sup> the drafters likely sought to entice ratifications from those States Parties that were on the fence with regard to the amendments. While compromises, such as the opt-out provision, were not exactly considered desirable by all the delegates at Kampala, they are probably necessary to obtain the number of ratifications

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181. The Amendments, *supra* note 70, at Annex I, art. 15*bis*(4).

182. Stahn, *supra* note 65, at 878.

183. See Rome Statute, *supra* note 2, art. 121(5).

184. See The Amendments, *supra* note 70, at Annex I, art. 15*bis*(4).

185. Trahan, *supra* note 7, at 82.

required for the entry into force of the crime.<sup>186</sup> In providing these benefits to States Parties that ratify the amendments, the drafters have made it easier for the overall crime of aggression regime to move forward with the support of countries that would not do so otherwise.

#### 4. On Which State's Territory Does a Crime of Aggression Take Place?

While most crimes usually occur on the territorial jurisdiction of one state, the nature of a crime of aggression—a crime that is usually launched from one state and impacts another—makes it unclear as to where the actual crime takes place. Seeing as the crime of aggression exempts certain situations based on the country's territory on which it occurs, the answer to this question might indicate whether the Court has the jurisdiction to prosecute a case or not. The definition indicates that acts of aggression usually take place in the victim state.<sup>187</sup> Following this logic, for jurisdictional purposes, the crime of aggression should occur in the victim's territory. However, according to Article 8*bis*(1) the actual crime committed is the “planning, preparation, initiation or execution” done by a leader.<sup>188</sup> Following this logic, the acts that constitute the crime will likely take place in the territory of the aggressor.<sup>189</sup> This dual-territoriality poses an interesting problem when a ratifying State Party commits an act of aggression on either a non-State Party or on a non-ratifying State Party. For a non-ratifying State Party, Article 121(5) exempts crimes of aggression committed on its territory from the jurisdiction of the Court.<sup>190</sup> For a non-State Party, the amendments exempt crimes of aggression that occur on its territory.<sup>191</sup> However, given that the planning, preparation, or initiation usually occurs on the territory of the aggressor state, a judge might interpret that the aggressor's territory is applicable for a determination of jurisdiction, not the victims. If the aggressor is a ratifying State Party, this territorial determination might grant the Court jurisdiction over the offense,

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186. See Astrid Reisinger Coracini, Professor at the Institute of Int'l Law & Int'l Relations of the Univ. of Graz & Exec. Dir. of the Salzburg Law Sch. on Int'l Criminal Law, Humanitarian Law & Human Rights Law, Address at The Road From Kampala Conference: An Analysis of the First ICC Review Conference of the Rome Statute (Nov. 13, 2010), available at <http://www.law.duke.edu/webcast/#webcasts> (part 3).

187. See The Amendments, *supra* note 70, at Annex I, art. 8*bis* (2) (stating that acts of aggression include, *inter alia*, the “invasion,” “bombardment,” and “use of armed forces” by one state within “the territory of another state”).

188. *Id.* at Annex I, art. 8*bis* (1).

189. See Clark, *supra* note 19, at 705.

190. Rome Statute, *supra* note 2, art. 121(5).

191. The Amendments, *supra* note 70, at Annex I, art. 15*bis*(5).

even though the actual result was felt on the territory of either a non-State Party or a non-ratifying State Party.

Despite the creativity of this legal argument, a judge will likely interpret the notion of territoriality narrowly: both the victim State and the aggressor State must have ratified the amendments for the Court to be able to exercise jurisdiction over the situation. This interpretation is consistent with the rule of effect and the idea of “objective territorial jurisdiction” and further seems to be the case with the other crimes under the ICC’s mandate.<sup>192</sup> On a practical level, given that the Court is in its infancy, it is also likely that it will not want to jeopardize the development of its legitimacy by exercising jurisdiction, even if it is only partial jurisdiction, over the territory of a State that has not ratified the amendments. This action would further be in contravention of the notion of sovereignty, which is recognized under the United Nations Charter, a document that is acknowledged consistently throughout the crime of aggression amendments.<sup>193</sup> Likewise, given the fact that the drafters provided two different means by which States Parties could avoid the Court’s jurisdiction with regard to the crime of aggression,<sup>194</sup> it would seem contradictory for a judge to then exercise jurisdiction over these States Parties or non-States Parties through a backdoor mechanism.

#### 5. What Acts Must Be Taken by the Security Council to Constitute a “Determination” Under Article 15*bis*?

The role of the Security Council in determining whether an act of aggression has occurred was one of the most contentious and important issues at Kampala.<sup>195</sup> To appease both sides of this argument, the drafters of the amendments instituted a provision making the Court’s ability to exercise jurisdiction contingent on whether or not the Security Council has made a “determination.”<sup>196</sup> However, the text of the amendments does not define what a Security Council determination actually entails. Furthermore, while the text indicates what the ICC can do in the case of a positive determination by the Security Council that an act of aggression has

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192. Clark, *supra* note 19, at 705.

193. See U.N. Charter art. 2, para. 7; see generally The Amendments, *supra* note 70 (referencing the U.N. Charter several times).

194. These two means are refusing to ratify the amendments or opting out of them. See Rome Statute, *supra* note 2, art. 121(5); see also The Amendments, *supra* note 70, at Annex I, art. 15*bis*(4).

195. See Marcelo Bohlke, Legal Advisor & Sixth Comm. Delegate for the Permanent Mission for Braz. to the U.N., The Road From Kampala Conference: An Analysis of the First ICC Review Conference of the Rome Statute, part 2 (Nov. 13, 2010), <http://www.law.duke.edu/webcast/#webcasts>.

196. See The Amendments, *supra* note 70, at Annex I, art. 15*bis*(6)-(8).

occurred<sup>197</sup> and has indicated what it must do in the case that the Security Council has not made a determination at all,<sup>198</sup> it does not speak as to what happens when the Security Council has made a *negative* determination, or one in which it deems that an act of aggression has not occurred.<sup>199</sup> Article 15*bis*(9) does say “[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.”<sup>200</sup> Yet it seems redundant then to emphasize the waiting period that must occur if the Security Council has made no determination when, if the Security Council ends up making a negative determination, it would have no effect on the Prosecutor’s investigation whatsoever.

Given the concerns voiced at Kampala over the Security Council’s potential infringement on the ICC’s independence, it is no surprise that Article 15*bis* does not prevent an investigation from occurring if the Security Council makes a negative determination. While some delegates would have preferred this course,<sup>201</sup> providing the Security Council total control was criticized by the vast majority of the delegations at Kampala and could have led to a failure to garner a consensus.<sup>202</sup> Furthermore, if the Security Council were to seek to prevent ICC prosecution, it is not without options; Article 16 of the Rome Statute reads:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.<sup>203</sup>

While this measure is only temporary, it does provide the Security Council with the opportunity to halt an investigation in hopes of giving the two parties to the dispute the chance to continue negotiations on their own.<sup>204</sup>

Yet this answer still does not define what the amendments actually mean when they mention a Security Council “determination.” Instead, a judge seeking to define “determination” will have to look to the past

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197. *Id.* at Annex I, art. 15*bis*(7).

198. *Id.* at Annex I, art. 15*bis*(8).

199. David Scheffer, *The Complex Crime of Aggression Under the Rome Statute*, 23 LEIDEN J. INT’L L. 897, 901 (2010) (Neth.).

200. The Amendments, *supra* note 70, at Annex I, art. 15*bis*(9).

201. *See* Scheffer, *supra* note 199, at 902.

202. *See* Kreß & von Holtzendorff, *supra* note 22, at 1194.

203. Rome Statute, *supra* note 2, art. 16.

204. *See* Scheffer, *supra* note 199, at 902.

interaction between the ICC and the Security Council as well as the Rome Statute itself. In doing so, a judge will likely construe “determination” narrowly, that is to say, to include only formal resolutions offered by the Security Council. Under Article 13(b), the Court may exercise jurisdiction if “[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”<sup>205</sup> So far, any Article 13(b) referrals from the Security Council have come in the form of a formal resolution.<sup>206</sup> While a formal resolution might seem more difficult to obtain, especially given that three of the permanent five members wielding vetoes on the Security Council are non-States Parties,<sup>207</sup> the fact that the Prosecutor may engage in an investigation regardless of the Security Council determination means that, were the Security Council to refuse to present a formal resolution referring the situation, the Prosecutor would only need to wait six months to arrange for an investigation under his *proprio motu* powers. On the contrary, requiring a formal resolution to trigger a Security Council referral ensures that the Prosecutor does not jump the gun with regard to these six months when the Security Council has not come to a formal agreement.

#### CONCLUSION

The crime of aggression amendments passed at the Kampala Review Conference were a historic achievement in the development of the International Criminal Court. Though the text of the amendments has led to questions regarding the elements of the crime and the ICC’s exercise of jurisdiction over it, it is evident from this analysis that appropriate interpretations can be formulated by reading it in conjunction with the Rome Statute and with regard to the current state of the Court itself. With potential trials for crimes of aggression delayed until at least 2017, more analysis must be done in the upcoming years as the Court grows as an institution to determine the appropriate means by which the amendments should be interpreted. Once the Court has gained jurisdiction over the crime, the development of precedent will eventually provide an understanding that will be more easily applied to each situation it faces.

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205. Rome Statute, *supra* note 2, art. 13(b).

206. See generally S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26 2011); see also S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

207. Those three are China, Russia, and the United States. See U.N. Charter art. 23; see also *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Apr. 8, 2011).

Until that day, however, it is up to scholars, critics, and diplomats to begin this discussion.

