

The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some

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Abstract

The first review conference to the Rome Statute of the International Criminal Court, held in June 2010 in Kampala successfully concluded decades of negotiations over a statutory definition of the crime of aggression and its prosecution by a permanent international criminal court. The main unresolved issues to be addressed by the review conference concerned the determination of an act of aggression as a (procedural) prerequisite for the exercise of jurisdiction over the crime of aggression and the appropriate activation procedure for a provision on aggression. Most importantly, the compromise of Kampala could safeguard an independent and effective criminal prosecution of the crime of aggression by not subjugating the Court's exercise of jurisdiction to decisions of outside organs. However, in case of a referral of a situation by a State Party or the initiation of a *proprio motu* investigation, the Court's reach over perpetrators is significantly narrowed with a view to crimes of aggression involving a non-state party or a state-party that does not accept the Court's exercise of jurisdiction. These concessions, built on state consent to the exercise of criminal prosecution over individuals and elements of reciprocity, concepts that are alien to the Rome Statute, form part of a political compromise that enabled the activation of the Court's jurisdiction over the crime of aggression.

A. Introduction

In the late night hours of 11 June 2010 the first Review Conference of the Rome Statute of the International Criminal Court (ICC Statute)¹ convened in Kampala consensually adopted a Resolution on the Crime of Aggression (the Resolution)². By “defining the crime”³ and “setting out the

¹ 2187 U.N.T.S. 90. Articles without further specification are those of the ICC Statute.

² See Draft Resolution submitted by the President of the Review Conference. The Crime of Aggression, RC/10, dated 11 June 2010, 17:30, complemented by untitled fragment, 15*bis* para. 3 and 15*ter* para. 3, submitted by the President, dated 11 June 23:00, adopted at the 13th plenary meeting, on 11 June 2010, by consensus; republished as one document in Resolution RC/Res.4, 14 June 2010, 11:00, RC-Res.6-ENG.advance.16Jun1200 and Resolution RC/Res.6, advanced version of 28 June 2010, 18:00, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited 27 August 2010); references to Art. 8*bis*, Art. 15*bis* and 15*ter* without further specification are those of Annex I of the Resolution.

³ Art. 5 (2); see Art. 8*bis*, Annex I of the Resolution.

conditions under which the Court shall exercise jurisdiction with respect to this crime”⁴, the Resolution delivers the necessary requirements for the ICC’s exercise of jurisdiction over the crime of aggression in accordance with Article 5 (2) ICC Statute. In addition, the Resolution formulates Elements of Crimes⁵ and contains several “understandings” regarding the amendments to the ICC Statute on the crime of aggression⁶.

The success of Kampala is an important step for international criminal justice. More than sixty years after the trials of major war criminals in Nuremberg and Tokyo for the crime against peace, the “supreme international crime”⁷, and more than 10 years after the adoption of the ICC Statute that lists the crime of aggression as one of the “most serious crimes of concern to the international community as a whole” over which the Court has jurisdiction⁸, the international community finally agreed on the parameters under which a permanent international criminal court can enforce this crime⁹.

The road has been stony and not all hurdles have yet been cleared. In particular, the Resolution provides for a sequence of procedural steps until the ICC will eventually be able to exercise its jurisdiction over the crime of aggression. Annex I of the Resolution, which contains the relevant amendments to the Statute, is subject to ratification or acceptance and needs to enter into force in accordance with Article 121 (5)¹⁰. Moreover, the ICC’s exercise of jurisdiction is limited “to crimes of aggression committed one

⁴ Art. 5 (2); see Art. 15*bis* and 15*ter*, Annex I of the Resolution.

⁵ Para. 7 of Resolution F, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries of the Establishment of an International Criminal Court, available at <http://www.un.org/icc/iccfnact.htm> (last visited 17 August 2010); see Annex II of the Resolution and amendment contained in para. 6 Annex I of the Resolution.

⁶ Annex III of the Resolution.

⁷ Judgment of the International Military Tribunal at Nuremberg, International Military Tribunal (ed.), *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 -1 October 1946*, Vol. I (1947) 186.

⁸ Art. 5 (1).

⁹ For an account of almost a century of negotiations in the International Law Commission, legal, special, *ad hoc* and preparatory committees, working and special working groups in the era of the League of Nations and the United Nations, see e.g. B. Ferencz, *Defining International Aggression: The Search for World Peace* (1975) and M. Ch. Bassiouni, ‘Historical Survey: 1919-1998’, in M. Ch. Bassiouni (ed.), *International Criminal Law* 2nd edition (1999), 597. For post Rome developments see *infra* note 33 and 35.

¹⁰ Para. 1 of the Resolution.

year after the ratification or acceptance” by thirty States Parties and needs to be activated by “a decision to be taken after 1 January 2017”¹¹.

With a view to the negotiations leading to the review conference, the jurisdictional regime laid down in Articles 15*bis* and 15*ter* is innovative in various aspects. Most importantly, the Court's exercise of jurisdiction over the crime of aggression does not require a prior determination by an outside organ that an act of State aggression has occurred¹². Even if such a determination exists, it has no binding effect for the purpose of the criminal proceedings¹³. This is independent of whether the Court is seized with a matter following a referral of a situation by a State Party, a referral by the Security Council or the initiation of a *proprio motu* investigation by the Prosecutor. In practice, therefore, inactivity by an outside organ will not impede the Court from exercising its independent jurisdiction. However, these acknowledgements were counterbalanced by far-reaching exceptions to the Court's reach over perpetrators of the crime of aggression in case of a State Party referral or a *proprio motu* investigation. The Court may only “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”¹⁴ and “shall not exercise its jurisdiction over the crime of aggression” when committed by a national or on the territory of a non-State Party¹⁵.

In light of this rough outline of the conditions under which the ICC may exercise its jurisdiction over the crime of aggression, this paper will first take a glance back at the negotiations leading up to and at the review conference and will subsequently concentrate on legal questions arising from the compromise solution adopted in Kampala and their implications for the prosecution of individuals for the crime of aggression.

B. From Rome to Kampala

I. The Compromise of Rome

Article 5 lists the crime of aggression as one of the “most serious crimes of concern to the international community as a whole” within the

¹¹ Art. 15*bis* and 15*ter* common paras (2) and (3) Annex I of the Resolution.

¹² Art. 15*bis* (8) and Art. 15*ter* Annex I of the Resolution.

¹³ Art. 15*bis* (9) and Art. 15*ter* (4) Annex I of the Resolution.

¹⁴ Art. 15*bis* (4) Annex I of the Resolution.

¹⁵ Art. 15*bis* (5) Annex I of the Resolution.

jurisdiction of the ICC¹⁶. However, the Court shall exercise this jurisdiction only “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”¹⁷.

The ICC’s jurisdiction over the crime of aggression was a major component of the final package, which led to the adoption of the Rome Statute¹⁸. Article 5 confirms its status as a “core crime” and clearly distinguishes it from other crimes, which were not generally accepted as crimes under international customary law at the time of the Rome Conference and consequently not included in the Statute¹⁹. More importantly, the inclusion of the crime of aggression in Article 5 has legal consequences. Since the Rome Statute does not allow reservations²⁰, every State that ratifies, accepts, approves or accedes to the Statute²¹, accepts the jurisdiction of the ICC, including the crime of aggression, in accordance with the Statute²² and its obligation to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”²³. The provisions of the Statute are therefore in principle applicable to the crime of aggression and become operative, once the Court’s jurisdiction is activated in accordance with Article 5 (2). They have been accepted however under the caveat that the conditions under which the Court may exercise its jurisdiction may provide otherwise.

Next to the “definition” of the crime of aggression, the “conditions” govern procedural aspects of the Court’s exercise of jurisdiction. Both components of the provision on the crime of aggression “shall be consistent with the relevant provisions of the Charter of the United Nations”²⁴. This

¹⁶ Art. 5 (1) (d).

¹⁷ Art. 5 (2).

¹⁸ See *e.g.* P. Kirsch and D. Robinson, ‘Reaching Agreement at the Rome Conference’, in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Vol. I, 2002) 67.

¹⁹ See generally *e.g.* O. Triffterer, ‘Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article* 2nd ed. (2008), mn. 33.

²⁰ Art. 120.

²¹ Art. 125.

²² Art. 5 (1); see expressly Art. 12 (1). In this sense also *e.g.* Report of the informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, June 2005, ICC-ASP/4/32, paras 8 & 12.

²³ Art. 86.

²⁴ Art. 5 (2).

requirement provides little guideline for the drafting of conditions for the ICC's exercise of jurisdiction, as the Charter is not directly concerned with the exercise of criminal jurisdiction²⁵. Considering that the definition of the crime of aggression requires the determination of an act of aggression by a State²⁶, which also falls under the competencies of the Security Council²⁷, the clause has been interpreted as requiring particular respect for the role of the Security Council in the maintenance of international peace and security²⁸. Next to consistency with the UN Charter, statutory limitations²⁹ and core values of the Rome Statute³⁰ further govern its content. Moreover, in order to safeguard the integrity of the Statute, the SWGCA agreed that only "indispensable minimal modifications should be made to the Statute"³¹.

Negotiations on the conditions have been dominated by defining an appropriate filter for the exercise of jurisdiction over the crime of aggression with a view to the determination of a State act of aggression. However, Article 5 (2) leaves the drafters with considerable discretion to arrive at a provision on the crime of aggression. It does neither exclude the addition of further procedural steps, nor the modification of provisions of the existing

²⁵ In light of Art. 103 UN Charter the call for consistency even appears superfluous.

²⁶ Art. 8*bis* Annex I of the Resolution.

²⁷ Art. 39 UN Charter.

²⁸ See *e.g.* Report of the informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, June 2006, ICC/ASP/5/SWGCA/INF.1, para. 57. As a legal argument for an exceptional treatment of the crime of aggression, this is not entirely convincing, since all the crimes falling within the jurisdiction of the ICC "threaten the peace, security and well-being of the world", Preamble (3) and consequently fall within the scope of Chapter VII UN Charter. An interpretation understanding this clause as reflecting an exclusive power in the determination of an act of aggression under the UN Charter is widely rejected as legally unsound. See in this respect M. S. Stein, 'The Security Council, The International Criminal Court and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?', 16 *Indiana International & Comparative Law Review* (2005) 1; C. McDougall, 'When Law And Reality Clash – the Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression', 7 *International Criminal Law Review* (2007) 277.

²⁹ *E.g.* the principle of legality, Arts. 22 & 23 and non-retroactivity, Art. 24 .

³⁰ *E.g.* the independence of the Court, Preamble (9); the principle of effective prosecution, Preamble (4) & (9); and the fight against impunity, Preamble (4), (5), (6) & (9).

³¹ Report of the informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, June 2004, ICC/ASP/3/SWGCA/INF.1, conclusions after para. 18 [2004 Princeton Report].

judicial framework, nor the unconditional application of the Statute to the crime of aggression³².

II. Continued Efforts

With a view to activate the Court's jurisdiction over the crime of aggression, the Rome Conference mandated a Preparatory Commission for the ICC with the preparation of "proposals for a provision on aggression"³³. After the entry into force of the Rome Statute, the Assembly of States Parties of the ICC (ASP) secured continuity of the negotiations by establishing a Special Working Group on the Crime of Aggression (SWGCA), open to all States on equal footing³⁴. The SWGCA completed its work at the seventh session (second resumption) of the ASP with the adoption of proposals for a provision on the crime of aggression³⁵.

The SWGCA proposals delivered a widely accepted definition of the crime of aggression³⁶. With a view to the conditions under which the Court may

³² For the view that Art. 5 (1) requires that the crime of aggression should not be treated differently than any other crime under the jurisdiction of the Court, see *e.g.* Report of the Special Working Group on the Crime of Aggression, June 2008, ICC-ASP/6/20/Add.1, Annex II, para. 58; 2004 Princeton Report, *supra* note 31.

³³ Established by Resolution F of the Final Act, *supra* note 5. For the final work product see Report of the Preparatory Commission of the ICC, Part II, PCNICC/2002/2/Add.2, 24 July 2002; see also S. Fernandez de Gurmendi, 'Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court', 25 *Fordham International Law Journal* (2002) 589; R. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002) 4, 859. On the different mandates of Art. 5 (2) and Resolution F see *e.g.* A. Reisinger Coracini, 'Defining the Crime of Aggression for the Rome Statute of the International Criminal Court', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (2010) 425, 445-6.

³⁴ ICC-ASP/1/Res.1, para. 2.

³⁵ Proposals for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression, Report of the Special Working Group on the Crime of Aggression, 20 February 2009, ICC-ASP/7/SWGCA/2 [February 2009 SWGCA Report], Annex I, Appendix [SWGCA Proposals]. See *e.g.* S. Barriga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression', in: R. Bellelli (ed.), *International Criminal Justice* (2010), 621.

³⁶ Draft Art. 8bis of the SWGCA proposals; equally no controversy surrounded the proposed changes to Arts. 9 (1), 20 (3) and 25 (3) ICC Statute foreseen in paras (4), (5) and (6) of the SWGCA proposals, February 2009 SWGCA Report, *supra* note 35, paras 25-26.

exercise its jurisdiction, the SWGCA could reach agreement on the applicability of the three trigger mechanisms provided for in Article 13³⁷. The proposals reflected the “primary role of the Security Council in the maintenance of international peace and security”³⁸ by obliging the Prosecutor to “ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned” in order to proceed with an investigation in respect of a crime of aggression³⁹, whereas such a determination would constitute a purely procedural requirement⁴⁰. Furthermore, the proposals establish 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”⁴¹. Draft Article 15*bis* of the SWGCA proposals presented a fairly clean text, but still offered two alternatives with several options concerning the potential function of the Security Council in the determination of an act of aggression⁴². Alternative 1 assigned the Security Council a mandatory role in the procedure by either demanding the actual and explicit determination of an act of aggression (option 1) or a request “to proceed with the investigation in respect of a crime of aggression” by a resolution adopted under Chapter VII of the Charter of the United Nations (option 2, so called “green light option”). Alternative 2 aimed at identifying other procedural benchmarks for the Prosecutor to proceed with an investigation “[w]here no such determination is made within [6] months after the date of notification”. These related to the mere expiration of the six months period (option 1), an authorization of the commencement of an investigation by the pre-trial chamber in accordance with the procedure contained in Article 15 (option 2) or the determination of an act of aggression by either the General Assembly (option 3) or the International Court of Justice (option 4). The SWGCA proposals also did not specify the procedure to activate the Court’s exercise of jurisdiction with respect to the crime of aggression⁴³. With little movement of the delegations regarding these open issues, the way forward was opened by a non-paper discussed at the last meeting of the

³⁷ Draft Art. 15*bis* (1) of the SWGCA proposals, *supra* note 35.

³⁸ Art. 24 (1) UN Charter.

³⁹ Draft Art. 15*bis* (2) of the SWGCA proposals, *supra* note 35.

⁴⁰ *Id.*, Draft Art. 15*bis* (3).

⁴¹ *Id.*, Draft Art. 15*bis* (5).

⁴² *Id.*, Draft Art. 15*bis* (4).

⁴³ Para. 1 Resolution of the SWGCA proposals; see also Non-paper on other substantive issues on aggression to be addressed by the Review Conference, February 2009 SWGCA Report, *supra* note 35, Appendix II.

SWGCA that indicated “further substantive questions to be addressed by the Review Conference”⁴⁴. Largely in the form of “understandings” potentially to be included in the resolution by which the provisions on aggression were to be adopted, or elsewhere in the final act of the review conference, they address procedural or policy options and formulate clarifying language where the provisions of the Rome Statute allow different interpretations. They include the question whether the Court’s jurisdiction on the basis of a Security Council referral will be activated upon adoption or entry into force of a provision of aggression⁴⁵, whether, in the latter case, it would require a minimum number of ratifications⁴⁶ and whether the jurisdiction could be exercised with respect to all States, independent of acceptance⁴⁷. With a view to a State Party referral and *proprio motu* investigation the potential application of Article 121 (5), in the context of which States Parties had voiced different interpretative approaches to the provision’s last sentence, prompted explanatory language, as to whether the Court may exercise its jurisdiction over a crime of aggression, if committed by a (national of a) State Party that has accepted the provision on aggression against a State Party that has not accepted the provision or a non-State Party and vice versa⁴⁸. Further understandings concerned the concurrent territorial jurisdiction of an aggressor and a victim State, which both would be able to provide the Court with a jurisdictional link in the sense of Article 12 (2) (a)⁴⁹ and the Court’s non-retroactive exercise of temporal jurisdiction, before the adoption or entry into force of the provision on the crime of aggression⁵⁰.

From this groundwork, an informal inter-sessional meeting of the ASP strived to bridge the remaining gaps through “further discussions, including

⁴⁴ February 2009 Non-paper, *supra* note 43.

⁴⁵ *Id.*, para. 3.

⁴⁶ *Id.*, para. 5; no support was expressed for such an option, February 2009 SWGCA Report, *supra* note 35, para. 30.

⁴⁷ February 2009 Non-paper, *supra* note 4, para. 4.

⁴⁸ *Id.*, paras 6-11. The understandings were also drafted under the prerogative not to discriminate between non-States Parties and States Parties that have not accepted the amendment, February 2009 SWGCA Report, *supra* note 35, para. 31.

⁴⁹ February 2009 Non-paper, *supra* note 43, para. 12.

⁵⁰ *Id.*, paras 13-14. The understandings are drafted analogously to Art. 11. Similar to the entry into force of the ICC Statute, adoption or entry into force is considered an absolute limit of the Court’s exercise of temporal jurisdiction. For States that accept the amendment in accordance with Art. 121 (5), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under Art. 12 (3).

on the basis of new ideas and suggestions”⁵¹. A chairman’s non-paper, which formed the basis for the discussions, departed from the assumptions that the three existing trigger mechanisms are applicable to the crime of aggression, second, that in case of a Security Council referral, the Court’s exercise of jurisdiction would not require the consent of the State concerned, and that third, in case of a State Party referral or *proprio motu* investigation, the alternative requirements of Article 12 (2) would apply⁵². Striving to overcome paralyzed views on draft Article 15*bis* (4) of the SWGCA proposals and Article 121 ICC Statute, the chairman’s non-paper focussed the debate on exploring common grounds for the employment of State consent as a condition for the exercise of jurisdiction or as a jurisdictional filter in order to meet “substantive concerns of delegations”. Next to the acceptance of the provision on the crime for aggression, such State consent was suggested potentially to be addressed through the use of opt-in or opt-out declarations⁵³.

As a result of these efforts, some of the previously discussed understandings on the irrelevance of State consent in the context of a Security Council referral, the Court’s jurisdiction *ratione temporis* and the interpretation of Article 121 (5) last sentence were annexed to the draft resolution on the crime of aggression and submitted to the review conference⁵⁴. An

⁵¹ Non-paper by the Chairman on the conditions for the exercise of jurisdiction, para. 1, referring to February 2009 SWGCA Report, *supra* note 35, para. 19; Report of the informal inter-sessional meeting on the crime of aggression, June 2009, ICC-ASP/8/INF.2 [2009 Princeton Report], Annex III. Next to outstanding issues regarding the conditions for the exercise of jurisdiction, the 2009 Princeton meeting finalized the Elements of Crimes of the crime of aggression that had been drafted during an informal retreat on the Elements of Crime at Montreux, Switzerland, 16-18 April 2009.

⁵² June 2009 Non-paper, *supra* note 51, paras 3-5.

⁵³ *Id.*, paras 9-12. In that regard the Report contemplates: “Some participants expressed interest in the idea of an opt-out declaration, combined with a system that would otherwise not require that the alleged aggressor State have accepted the amendment on aggression. Such an approach would strongly reduce the number of States who were beyond the Court’s jurisdictional reach, as it would exclude only those States who took an active step to that effect. A system that required potential aggressor States to accept the amendment would not be effective: It was unlikely that such States would move to take such a step. An opt-out declaration, however, reversed that default situation and provided an incentive for States to reflect on the amendment and to come to a decision as to whether they could live with the amendment or not.”, 2009 Princeton Report, *supra* note 51, para. 41.

⁵⁴ Conference Room Paper on the Crime of Aggression, RC/WGCA/1, 25 May 2010; for the origin of the understandings see *supra* note 48. Further understandings were

accompanying non-paper laid out further elements with a view to enabling a compromise solution on the crime of aggression⁵⁵. They included the possibility to delay the Court's exercise of jurisdiction for a still to be defined period of time and a review clause. Furthermore, the non-paper introduced a previously not discussed understanding on domestic jurisdiction over the crime of aggression, reiterating in several variations the language and content of Article 10.

III. Negotiations at the Review Conference

The Review Conference commenced with a promising general debate. Delegations underlined the importance to complete the ICC Statute by adopting a provision on the crime of aggression, their spirit of compromise and dedication to arrive at a solution in the course of the first review conference⁵⁶. After a brief introduction of the chairman's conference room paper and non-paper⁵⁷ on Tuesday 1 June and a sequence of bilateral meetings⁵⁸, the working group on the crime of aggression (WGCA) had its first formal debate on Friday 4 June. The contributions, which focused on the outstanding issues⁵⁹, significantly enhanced the positive working atmosphere. At the same time, Brazil introduced the idea of "successive modalities" on the entry into force of a provision on aggression⁶⁰.

proposed by the United States at the review conference. See Untitled, undated non-paper, distributed on 7 June 2010 (on file with the author).

⁵⁵ Non-Paper by the Chair. Further elements for a solution on the Crime of Aggression, RC/WGCA/2, 25 May 2010.

⁵⁶ The strong support of delegations during the general debate on 31 May and 1 June made up for the disappointing silence of the UN Secretary-General on the issue in his opening statement. But he is reported having positively referred to the crime of aggression in a speech during a dinner at the eve of the Review Conference, see W. Schabas. 'Kampala Diary 31/5/10', available at <http://iccreviewconference.blogspot.com/2010/05/kampala-diary-31510.html> (last visited 19 August 2010).

⁵⁷ *Supra* note 54.

⁵⁸ Informal consultations with the chairman were held on 2 and 3 June.

⁵⁹ Delegations voiced particular strong support for the definition and Elements of Crimes of the crime of aggression. The United States delegation's attempts to spread doubts about the existence of a consensus on issues of substantive law were univocally rejected. See *e.g.* Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes on 1 June, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-USA-ENG.pdf and Statement by Harold Hongju Koh, Legal Adviser, U.S. Department of State on 4 June, available at <http://www.state.gov/s/l/releases/remarks/142665.htm>, (last visited 19 August 2010).

⁶⁰ Non-paper presented by Brazil, '2 successive modalities on the entry into force of the amendment on the crime of aggression', 4 June 2010 (on file with the author).

Seemingly based on an innovative entry into force mechanism, an amendment on the crime of aggression would enter into force after a certain number of ratifications. Whereas, the definition of the crime and referrals by the Security Council would subsequently be immediately applicable by the Court, the exercise of jurisdiction on the basis of a State Party referral or *proprio motu* investigation would be delayed until one year after ratification of seven-eighths of the States Parties.

The first revision of the chairman's conference room paper, presented at the beginning of the second week of the review conference significantly reduced the options of draft Article 15*bis* (4) of the SWGCA proposals⁶¹. In the absence of a Security Council determination of an act of aggression by the State concerned, the remaining two alternatives foresaw that the Prosecutor may either not proceed with an investigation in respect of a crime of aggression (alternative 1)⁶² or may, after [six] months, proceed upon authorization of the commencement of the investigation by the pre-trial chamber in accordance with Article 15 (alternative 2)⁶³. The green light option⁶⁴ was not completely eliminated but moved to a footnote. Omitting reference to the General Assembly and the International Court of Justice⁶⁵ marks the end of a lengthy process that had gradually decreased support for the use of alternative external filters⁶⁶. With regard to the internal filter stipulated in alternative 2, a footnote reflected a proposal to seize the pre-trial division with the authorization of an investigation⁶⁷. Finally, all three further elements of the chairman's non-paper made their way to the revised conference room paper⁶⁸. It would be the aim of the remaining days to find a compromise solution based on alternative 2 that would not prompt the permanent members of the Security Council to risk a vote.

⁶¹ Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.1, 6 June 2010; the paper was circulated on 6 June and formally introduced on 7 June.

⁶² Alternative 1 option 1 of the SWGCA proposals, *supra* note 38.

⁶³ *Id.*, Alternative 2 option 2.

⁶⁴ *Id.*, Alternative 1 option 2.

⁶⁵ *Id.*, Alternative 2 options 3 und 4.

⁶⁶ See *e.g.* Report of the Special Working Group on the Crime of Aggression, 13 December 2007, ICC-ASP/6/SWGCA/1 [December 2007 SWGCA Report], para. 39.

⁶⁷ Revised Conference Room Paper of 6 June, *supra* note 61, fn. 2.

⁶⁸ *Supra* note 55. See fn. 2 of the draft resolution for the review clause, fn. 1 of draft Art. 15*bis* with respect to the time element and Understanding 4*bis* on domestic jurisdiction.

On the same day Argentina, Brazil and Switzerland introduced a non-paper⁶⁹. The ABS proposal did not suggest substantive changes but applied the general idea behind the earlier Brazilian proposal to the chairman's conference room paper, while remaining faithful to the entry into force mechanisms foreseen in Article 121 (4) and (5). The proposals suggested all substantive provisions and those related to a Security Council referral to formally amend Article 5 (2) in accordance with Article 121 (5). The provisions dealing with a referral by a State party and *proprio motu* investigation would enter into force in accordance with Article 121 (4). Most importantly, all elements of the provision on the crime of aggression would be adopted jointly and ratified by one single instrument of ratification⁷⁰. Thereby, the proposal would prevent States Parties ratifying only certain parts of the provision. Following the strong support expressed by delegations, the chairman adopted the ABS structure, splitting the procedural part of the provision on aggression in Article 15*bis* and 15*ter* in the second revision of his conference room paper⁷¹. However, due to some concerns, the different modalities for the entry into force were not taken up. Instead, the discussion on an "objective" entry into force for the Court as opposed to the "subjective" entry into force for States Parties under Article 121 (5) was reopened⁷².

Regretfully, the intriguing dynamic of the first days of the SWGCA debate was seriously disturbed by the discussion following a Canadian non-paper (referred to by the sponsoring State as a "menu approach")⁷³, which significantly divided the views between "western European and other" on one side and of African, Latin American and Caribbean States on the other. The Canadian proposal built upon draft Article 15*bis* (4) alternative 2 of the revised chairman's conference room paper, suggesting a combination of pre-trial chamber authorization and State consent as an additional judicial filter. Its main pillars, a State Party's choice to declare acceptance of the Court's jurisdiction on the basis of a State Party referral or *proprio motu* investigation without a previous determination of an act of aggression by the Security Council "at the time of deposit of its instrument of ratification or

⁶⁹ Non-paper submitted by Argentina, Brazil and Switzerland as of 6 June 2010, ABS proposal (on file with the author).

⁷⁰ Para. 1 draft resolution, ABS proposal, *supra* note 69.

⁷¹ Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.2, 7 June 2010, formally introduced on 8 June 2010.

⁷² Second revised conference room paper, *supra* note 71, fn. 2.

⁷³ Proposal by Canada, 8 June 2010, 9:30 (on file with the author).

acceptance or at any time thereafter”⁷⁴ and the requirement of double (or multiple) State consent⁷⁵ was subject to serious criticism, particularly for introducing an element of reciprocity alien to the ICC Statute and the system of international criminal justice.

Reiterating the multiple consent element of the Canadian proposal with a view to reach out to its opponents, a Slovenian proposal mandated the Prosecutor to readdress the possibility of a Security Council referral in case not all States concerned have accepted the amendment on the crime of aggression⁷⁶. In addition, it suggested a mandatory review conference to be convened by the Secretary-General after the deposit of instruments of ratification or acceptance by seven-eighths of States Parties (calculated at the time of the adoption of the amendment by the Review Conference) “to consider the applicability of the amendment of the crime of aggression to all State Parties”⁷⁷. The proposal regenerated some interest, though particularly from delegations that also supported the Canadian proposal.

In this unfortunate situation, the WGCA ended its work forwarding the second revised version of the chairman's conference room paper to the plenary of the review conference⁷⁸. However, there were only a few, short plenary meetings until the last day of the conference and no formal debate was conducted regarding the following proposals, the various president's non-papers and the final compromise. Discussions moved entirely to bilateral consultations and informal regional and “like-minded” group meetings.

⁷⁴ Art. 15bis (4) of the Canadian proposal, *supra* note 73. Similar ideas had previously been discussed on an informal basis at meetings of the SWGCA in 2008 and 2009. See also *e.g.* December 2007 SWGCA Report, *supra* note 66, para. 19.

⁷⁵ Art. 15bis (4) (ii) of the Canadian proposal required that “[all state(s) concerned with the alleged crime of aggression] [the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused of the crime] have declared their acceptance”.

⁷⁶ Art. 15bis (4bis) of the Non-paper by Slovenia, 8 June 2010 (on file with the author).

⁷⁷ Art. 15bis (4bis) and Understanding 2 of the Slovenian proposal, *supra* note 77.

⁷⁸ The Draft Report of the Working Group on the Crime of Aggression, RC/WGCA/3 of 6 June 2010 had already been adopted on 7 June 2010 (except for paras 16 and 20) before convening in informal format. The previously not adopted paragraphs were revised to accurately reflect that only “one view” had expressed doubts regarding the existence of a consensus on the definition of the crime of aggression, its reflection of customary international law and the need to redraft the Elements of Crimes, and adopted on Wednesday, 9 June 2010 (see also document dated 8 June 2010, 22:00); republished as one document, Report of the Working Group on the Crime of Aggression, RC/5, 10 June 2010.

After the completion of the WGCA, all States which had previously submitted proposals joined by like-minded States engaged in a last effort. Their “declaration” proposed the Court’s exercise of “jurisdiction over the crime of aggression committed by a State Party’s nationals or on its territory in accordance with Article 12, unless that State Party has filed a declaration of its non-acceptance of the jurisdiction of the Court”⁷⁹. Such a declaration was to be submitted to the Secretary General of the United Nations latest until 31 December 2015, or upon ratification or accession for States acceding to the Rome Statute at a later stage, and may have been withdrawn at any time⁸⁰. Full application of Article 12, combined with the possibility to opt-out of the Court’s thereby established jurisdictional reach over a crime of aggression involving a State Party that has not accepted the amendment addressed most points of critique brought up against the Canadian proposal. States Parties would not “opt-in” with regard to the Court’s jurisdiction of the crime of aggression, which is already part of the Statute, exercise of criminal jurisdiction was not subjected to reciprocal consent and the possibility to file a declaration of non-acceptance was limited in time. In addition to elements that had been covered by previous proposals, the joint declaration provided that “[i]n respect of a State which 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”⁸¹. Read in the context of draft Article 15*bis*, this provision would further limit the Court’s reach over perpetrators of the crime of aggression involving non-State Parties. Such exclusion would introduce a novelty to the statutory system, however in line with the previously determined policy consideration to treat non-State Parties and States Parties not accepting the amendment equally⁸². To give States the opportunity to make themselves familiar with this jurisdictional system, the proposal delayed the exercise of the Court’s jurisdiction for five years after the entry into force of draft Article 15*bis*⁸³.

The joint declaration was never formally discussed, but the first non-paper of the President of the review conference reflected the idea of a

⁷⁹ Art. 15*bis* (4*bis*) of the Declaration (draft of 9 June 2010 16h00). Based on the Chairman’s Conference Room Paper Rev.2, jointly elaborated by Argentina, Brazil, Switzerland, Canada, Slovenia and other “like-minded” countries.

⁸⁰ *Id.*, Art. 15*bis* (4*ter*).

⁸¹ *Id.*, Art. 15*bis* (4*cor*).

⁸² See *supra* note 48; see also *e.g.* June 2009 Princeton Report, *supra* note 51, para. 33.

⁸³ Art. 15*bis* (1) of the joint declaration, *supra* note 79.

declaration of non-acceptance⁸⁴. Draft Article 1*bis* provided that “[t]he Court may, in accordance with Article 12, exercise jurisdiction with respect to an act of aggression committed by a State Party, unless that State has lodged a declaration of non-acceptance with the Registrar”, accompanied by footnote 3, which reflected the time element of the joint declaration. Draft Article 1*ter* confirmed that “[t]he Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State Party”. Different from the joint declaration, which focused on the jurisdictional links provided by Article 12 (2) and opened a possibility to opt-out with regard to the effects of these jurisdictional links, the President’s non-paper chose the commission of an act of aggression by a State Party as a point of reference. Consequently, Article 12 ICC Statute would *per se* not be applicable to an act of aggression committed by a non-State Party and a State Party that has lodged a declaration of non-acceptance. This point of reference, which seriously departed from the formulation of the ICC’s jurisdiction over persons⁸⁵, contrary to acts of States, the exclusion of acts of aggression by non-States Parties against States Parties that accept the Court’s jurisdiction, as well as the fact that a declaration of non-acceptance would be lodged with the Registrar and not with the Secretary General as depositary of the ICC treaty, met with (partly strong) resistance. The non-paper further settled the entry into force of the amendments relating to the crime of aggression in accordance with Article 121 (5)⁸⁶ and the exercise of jurisdiction on the basis of a Security Council after entry into force of the amendments⁸⁷. Almost unnoticed in the heated debate over draft Article 15*bis*, brackets and a footnote added to draft Article 15*ter* suggested to delete the requirement of a prior determination of an act of aggression by the Security Council in the case of a Security Council referral⁸⁸.

The 10 June 23:00 o’clock version of the President’s non-paper reflected some critique by redefining the point of reference for the exercise of jurisdiction as “jurisdiction over a crime of aggression arising from an act

⁸⁴ Non-paper by the President of the Assembly, 10 June 2010, 12:00, draft resolution: The crime of aggression, available at http://gojil.uni-goettingen.de/joomla/images/stories/Non-Paper_PASP_CoA_10_June_12_00__2_.non_paper.pdf (last visited 18 August 2010).

⁸⁵ Art. 1.

⁸⁶ Para. 1 draft resolution of the 10 June, 12:00 President’s non-paper, *supra* note 84.

⁸⁷ *Id.*, Understandings 1 and 3.

⁸⁸ *Id.*, fn 8.

of aggression by a State Party”⁸⁹. Explicit language regarding the non-exercise of jurisdiction over acts of aggression committed by a non-State Party⁹⁰ was omitted, though still applicable interpreting draft Article 1*ter a contrario*⁹¹. In addition, the non-paper included a provision regarding the non-exercise of jurisdiction over crimes of aggression committed by nationals or on the territory of non-States Parties⁹², as stipulated by the joint declaration⁹³. Finally, it executed all footnotes and reflected them in the text. The non-paper conditioned the exercise of jurisdiction, independent of the trigger mechanism, by five years after the adoption of the amendments and thirty ratifications.⁹⁴ The declaration of non-acceptance was garnished with some modalities relating to withdrawal and reconsideration⁹⁵. Draft Article 15*bis* (4) alternative 1 was adorned with the “green light option”⁹⁶, Alternative 2 obtained the pre-trial division as an enhanced internal trigger and resurrected the long abandoned “red light option”⁹⁷. Article 15*bis* lost its requirement of a prior determination of an act of aggression by the Security Council and the complete jurisdictional regime was subjected to a mandatory review, “seven years after the beginning of the Court’s exercise of jurisdiction”⁹⁸.

On 11 June at the afternoon plenary, the President announced the long awaited break-through: the deletion of alternative 1. At the same time, the “red light option” in alternative 2 was downgraded to a decision by the Security Council in accordance with Article 16 ICC Statute⁹⁹. However, the

⁸⁹ Draft Art. 15*bis* (1*ter*) of the Non-paper by the President of the Assembly, 10 June 2010, 23:00, draft resolution: The crime of aggression, available at http://gojil.uni-goettingen.de/joomla/images/stories/Non-Paper_PASP_CoA_10_June_23_00__3_.pdf (last visited 18 August 2010).

⁹⁰ See *supra* text after note 84.

⁹¹ Draft Art. 15*bis* (1*ter*) of the 10 June, 23:00 President’s non-paper, *supra* note 89.

⁹² *Id.*, draft Art. 15*bis* (1*quarter*).

⁹³ See *supra* note 79.

⁹⁴ Draft Art. 15*bis* (1*bis*) and 15*ter* (2) and Understandings 1 and 3 of the 10 June, 23:00 President’s non-paper, *supra* note 89.

⁹⁵ *Id.*, draft Art. 15*bis* (1*ter*).

⁹⁶ See *supra* text after note 42.

⁹⁷ See *e.g.* December 2007 SWGCA Report, *supra* note 66, paras 21-23.

⁹⁸ Draft Art. 3*bis*, Annex I of the Resolution of the 10 June, 23:00 President’s non-paper, *supra* note 89.

⁹⁹ Draft Art. 15*bis* (4), untitled, undated fragment related to 15*bis* para. 4, 4*bis* and 15*ter*, submitted by the President, dated 11 June 2010, 2 p.m., 15*bis* para. 4 announced as agreed at 17:00; see also Non-paper by the President of the Review Conference, dated

discussions continued with a particular focus on time elements and no compromise was yet in sight. Should the Court be able to exercise its jurisdiction over the crime of aggression after the expiry of a certain period of time unless the ASP would decide otherwise¹⁰⁰ or would it not be able to exercise its jurisdiction until the ASP so decides¹⁰¹? Should such an affirmative decision be taken no earlier¹⁰² or not later than 2017? A further time element was also introduced in the context of a declaration of non-acceptance. Should such a declaration automatically expire after a period of seven years, unless confirmed¹⁰³? The final compromise proposal submitted to the review conference by its President for adoption by consensus at 00.19 a.m.¹⁰⁴. It subjected the Court's exercise of jurisdiction to a decision to be taken after 1 January 2017 by a qualified majority but did not alter the modalities of the declaration of non-acceptance¹⁰⁵.

C. Towards a Factual Exercise of Jurisdiction

I. Adoption

The Review Conference decided to adopt the amendments to the Statute contained in Annex I, "in accordance with Article 5 paragraph 2"¹⁰⁶. This specification was introduced at a rather late stage¹⁰⁷ to accompany the plain reference to adoption in the enabling Resolution. Article 5 (2) mandates the Court to exercise its jurisdiction over the crime of aggression,

11 June 2010, 16:30, available at http://gojil.uni-goettingen.de/joomla/images/stories/draft_resolution_CoA_11_June_1630_TRACK.pdf (last visited 18 August 2010).

¹⁰⁰ Draft Art. 15ter, fragment of 11 June 2010, 14:00, *supra* note 99.

¹⁰¹ *Id.*, draft Art. 15bis (4bis).

¹⁰² *Id.*, draft Art. 15bis (4bis).

¹⁰³ Draft Art. 1ter, untitled, undated fragment 1ter submitted by the President on 11 June 2010, 14:00; see in this regard Art. 124.

¹⁰⁴ See the accurate description of the dramatic last hours in Kampala by W. Schabas, 'Success', available at <http://iccreviewconference.blogspot.com/2010/06/success.html> (last visited 16 August 2010).

¹⁰⁵ Untitled fragment, 15bis para. 3 and 15ter para. 3, submitted by the President, dated 11 June 23:00 to complete draft Resolution submitted by the President of the Review Conference. The Crime of Aggression, RC/10, dated 11 June 2010, 17:30.

¹⁰⁶ Para. 1 of the Resolution.

¹⁰⁷ Para. 1 of the draft Resolution of the 10 June, 23:00 President's Non-paper, *supra* note 89. On different accounts of the phrase "in accordance with article 5 (2)" see *e.g.* fn 2 of the second revised conference room paper, *supra* note 71; informal inter-sessional meeting of the of the Special Working Group on the Crime of Aggression, June 2005, ICC-ASP/4/32, para. 15.

“once a provision is adopted in accordance with Articles 121 and 123”. Of these Articles, only Article 121 (3) relates to adoption, providing that the adoption of an amendment “on which consensus cannot be reached shall require a two-thirds majority of States Parties”¹⁰⁸. During the general debate most States Parties emphasized their preference for a consensus adoption of the provision on the crime of aggression. But many clarified that consensus meant also to previously compromise. Despite these assurances, the potential threat of a vote was never entirely discarded, even if it was subject to wild speculations whether a qualified majority could be reached¹⁰⁹.

The quorum of Article 121 (3) could have been easily identified as the proper provision without such an addition. But the explicit reference to Article 5 (2) may provide further elements for the interpretation of the Resolution. It recalls the mandate to complete the Rome Statute by adopting a provision on the crime of aggression. During the negotiations one option repeatedly put forward for the procedure activating the Court’s jurisdiction over the crime of aggression was the simple adoption of a provision in accordance with Article 5 (2) in order to complete the Statute. In that sense

¹⁰⁸ Art. 121 (3). Differently, Art. 9 (1) provides the adoption of Elements of Crimes by a two-thirds majority of States Parties. Given the consensus procedure, one might wonder whether this quorum was fulfilled in Kampala (see also note 109). On the other hand, Art. 9 is not (yet) applicable to Elements of Crimes of the crime of aggression. The adoption, as well as the adoption of “Understandings” which are not regulated in the Statute, might therefore have been governed by Art. 112 (7) (a). The deviating language of paras 1 and 2-3 of the enabling Resolution as well as the different treatment regarding entry into force suggests that the adoption of these texts did not follow Art. 121.

¹⁰⁹ With 111 States Parties, an affirmative quorum of two-thirds would require 74 States Parties. The draft Report of the credentials committee noted the receipt of formal credentials of representatives by 72 States Parties. Further credentials of 12 States Parties, which were communicated during the conference, were accepted (Draft Report of the Credentials Committee, RC/L.2 of 9 June 2010, paras 4-7. However, not all of these 84 States Parties were actually present in Kampala, some delegations had not come at all, some did not attend the full conference and some had their return flight booked on Friday evening. Some States Parties had previously transferred their voting rights to another delegation and the request of 5 out of 8 States Parties in arrears for an exemption of the loss of their voting rights was approved by the review conference (Draft Report of the Review Conference, RC/L.1 of 11 June 2010, para. 20). The Secretariat kept busy getting hold of the exact numbers of delegations present at the last evening of the conference but they were kept confidential. An emergency scenario, in case the required majority were not reachable or not reached, would have been to close the deal in Kampala and (re)submit it to vote at the next session of the ASP in New York.

Article 5 (2) was understood as merely referring to Article 121 (3) for the required quorum of adoption, but would not mandate the application of a full amendment procedure. The Court's exercise of jurisdiction over the crime of aggression would thus be activated and without the need for a supplemented entry into force mechanism¹¹⁰.

The Review Conference did not go as far as adopting a provision without subjecting it to an entry into force mechanism. But still, reference to Article 5 (2) plays an important role in the interpretation of the Resolution, in that it underlines the specific position of the crime of aggression, which upon adoption and ratification of the Rome Statute has been accepted as one of the crimes of concern to the international community as a whole for which the Court has jurisdiction¹¹¹.

II. Entry into Force

While adopting amendments to the Statute, amendments to the Element of Crimes and Understandings¹¹², only the amendments to the Statute contained in Annex I are subject to ratification or acceptance¹¹³. The Resolution contemplates that they shall enter into force in accordance with Article 121 (5)¹¹⁴.

The background to this decision is a lengthy debate that considerably separated States Parties over the question, whether Article 121 (3)¹¹⁵, Article 121 (3) and (4)¹¹⁶ or Article 121 (3) and (5)¹¹⁷ contain the

¹¹⁰ See *e.g.* February 2009 SWGCA Report, *supra* note 35, para. 10; June 2005 Princeton Report, *supra* note 107, para. 14; June 2004 Princeton Report, *supra* note 31, para. 14; see also R. S. Clark, 'Ambiguities in Articles 5 (2), 121 and 123 of the Rome Statute', 41 *Case Western Reserve Journal International Law* (2009) 2&3, 413, 416–418.

¹¹¹ Art. 5(1); for details see *supra* at B I.

¹¹² See *supra* note 108.

¹¹³ Paras 1 & 5 of the Resolution.

¹¹⁴ Para. 1 of the Resolution.

¹¹⁵ See *supra* C I.

¹¹⁶ Art. 121 (4) provides for the entry into force of an amendment „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“. Before that point in time, the amendment is not applicable; thereafter it applies to all States Parties. With regard to States Parties that have not accepted the amendment, Art. 121 (6) formulates the possibility to withdraw from the Statute with immediate effect.

¹¹⁷ Amendments in accordance with Art. 121 (5) only “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

appropriate procedure to activate the Court's jurisdiction over the crime of aggression¹¹⁸. On a textual basis, Article 5 (2) merely requires the adoption of a provision on the crime of aggression¹¹⁹. In this light, its reference to Articles 121 and 123 would simply specify the forum and the required quorum for such an adoption. If an entry into force mechanism was required, the plain language of Article 121 (5) excludes its applicability to a provision on the crime of aggression. Since the crime of aggression already falls within the jurisdiction of the ICC, the activation of the Court's jurisdiction would not constitute an amendment to Article 5¹²⁰, let alone Articles 6 to 8. Consequently the catch clause of Article 121 (4) would come into play. From a teleological point of view, Article 121 (5) was advanced as covering amendments to all provisions of the Statute that concern the Court's subject matter jurisdiction. But even if such an argument were accepted for the definition of the crime, it is questionable why the procedural component of the provision on the crime of aggression should equally submitted to this procedure¹²¹.

Beyond statutory interpretation, the discussion was widely influenced by policy considerations. From early on, the SWGCA intended applying one single procedure to the complete package necessary to activate the Court's jurisdiction over the crime of aggression¹²². While most States were sceptical towards a mere adoption, the argument that the Court's subject matter jurisdiction over the crime of aggression already is an integral part of the Statute, was also fundamental for those States that favoured an entry into force in accordance with Article 121 (4). On the other side, the thus implied entry into force for all States Parties was strongly opposed by others. A further controversy surrounded the interpretation of the last sentence of Article 121 (5) and its potential detrimental effects on the Court's

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“.

¹¹⁸ See *e.g.* February 2009 SWGCA Report, *supra* note 35, paras 28-37; June 2008 SWGCA Report, *supra* note 32, paras 6-14; June 2005 Princeton Report, *supra* note 107, paras 5-17; June 2004 Princeton Report, *supra* note 85, paras 10-19.

¹¹⁹ See *supra* text before note 110.

¹²⁰ Fulfilling the mandate of Art. 5 (2) does not require its deletion.

¹²¹ But see in this respect *e.g.* A. Seibert-Fohr, 'Das Verbrechen der Aggression im Rom Statut: Fragen der Vertragsänderung und Jurisdiktion', 3 *Zeitschrift für Internationale Strafrechtsdogmatik* (2008) 8, 361, available at http://www.zis-online.com/dat/artikel/2008_8_254.pdf (last visited 16 August 2010).

¹²² See already 2004 Princeton Report, *supra* note 31, Conclusions after para. 18; reaffirmed *e.g.* by November 2008 SWGCA Report, *supra* note 74, para. 18.

jurisdiction over the crime of aggression, relating to the Court's exercise of jurisdiction with regard to States Parties. Its language can either be understood (narrowly) as a confirmation of the Article's first sentence, in that States Parties that do not ratify an amendment are not bound by it or (broadly) as limiting the Court's jurisdictional reach over perpetrators of crimes covered by an amendment when committed by a national or on the territory of a State Party that has not accepted the amendment¹²³. To avoid a deadlock evolving from controversies over the applicable activation procedure, also more creative solutions going beyond the seemingly inconclusive statutory options were encouraged¹²⁴. At the review conference, the discussion on Article 121 mainly evolved in the context of the ABS proposal. But some States showed little willingness to overcome somewhat petrified positions regarding the "right" activation mechanism.

By reference to Article 121 (5), the Resolution takes a decision with regard to an entry into force mechanism. But it still leaves some room for interpretation. At one end of the spectrum, underlining the legal requirement of an adoption of the provision on the crime of aggression in accordance with Article 5 (2)¹²⁵, this reference may be understood as adding an (otherwise not required) entry into force mechanism to the activation procedure as a condition under which the Court may exercise its jurisdiction. Application of the relevant entry into force language of the first

¹²³ For a detailed analysis, see A. Reisinger Coracini, "Amended Most Serious Crimes": A New Category of Core Crimes Within the Jurisdiction but out of the Reach of the International Criminal Court?, 21 *Leiden Journal of International Law* (2008) 3, 699 [Reisinger Coracini, Amended Most Serious Crimes]. Under a broad understanding of the last sentence, the limiting effect on the Court's exercise of jurisdiction would arguably be of relevance independent of the way by which the jurisdiction of the Court is triggered in accordance with Art. 13, *id.*, at 707. The SWGCA however has taken the view that it should not affect the referral of a situation by the Security Council (*supra* D II). In the context of a State Party referral and *proprio motu* investigations, the focus of the discussion moved significantly from the relationship between Art. 121 (5) and 12 (2) to the question whether an aggressor State (independent of whether it is a State Party or a non-State Party) would need to have accepted the amendment in order for the Court to exercise its jurisdiction ("negative understanding") or not ("positive understanding"), whereby the consent of the victim State was not seen as decisive. Understandings in that respect were ultimately not included in the Resolution. One may wonder whether the issue has been finally clarified by para. 2 of Resolution RC/Res.5 on Amendments to Art. 8 of the Rome Statute, adopted by consensus on 10 June 2010; see also note 180.

¹²⁴ See *e.g.* WGCA Report, *supra* note 78, para. 14; November 2008 SWGCA Report, *supra* note 74, paras 39-40.

¹²⁵ See *supra* text before note 110.

sentence of Article 121 (5) would destine the provision on the crime of aggression to “enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance”¹²⁶.

If the reference intended to invoke the complete amendment mechanism set forth in Art. 121 (5), the understanding of its second sentence would be decisive for the interpretation of its contents, in particular the reference to an exercise of jurisdiction “in accordance with Article 12”¹²⁷. Under a narrow understanding, no interpretive difficulties would evolve and the declarative reference to Article 12 would simply confirm its applicability. If the last sentence were to be understood as establishing a specific jurisdictional regime for crimes covered by an amendment, which requires the cumulative establishment of two jurisdictional links, including under Article 12, it would still be arguable, that such a regime was not applicable to the crime of aggression given, firstly, its prior inclusion under the jurisdiction of the Court¹²⁸, secondly, States Parties’ acceptance of the Court’s jurisdiction over the crime of aggression upon ratification¹²⁹, and thirdly, the fact that the conditions under which the Court may exercise its jurisdiction over the crime of aggression¹³⁰ do not provide otherwise but explicitly confirm the Court’s jurisdiction in accordance with Article 12¹³¹.

Only if Article 121 (5) last sentence was to be understood as (a) implicitly amending Article 12 and (b) applicable even to the crime of aggression, the reference to Article 12 in Article 15*bis* (4) would need to be understood as constitutive. In that sense, it would override the limiting effect of Article 121 (5) last sentence by virtue of being *lex posterior* and *lex specialis*¹³² with a view to the Court’s exercise of jurisdiction over a

¹²⁶ As an explicit reference to entry into force, it could be particularly directed at Art. 121 (5) first sentence, or may comprise the complete Article if the second sentence was to be understood in a narrow way as confirming the subjective entry into force mechanism laid down in the first sentence; for details see Reisinger Coracini, Amended Most Serious Crimes, *supra* note 123, 707-8. The fact that the drafters abandoned the Understanding regarding Art. 121 (5) may be seen as a hint that the question is not of relevance anymore under the current constellation.

¹²⁷ Art. 15*bis* (4) Annex I of the Resolution; for details see *infra* D 2.

¹²⁸ Art. 5 (1).

¹²⁹ Art. 12 (1).

¹³⁰ Art. 5 (2).

¹³¹ Art. 15*bis* (4). Annex I of the Resolution.

¹³² While Art. 121 (5) is applicable to “[a]ny amendment to articles 5, 6, 7 and 8”, Art. 15*bis* is only concerned with the crime of aggression. For a discussion whether Art. 121 (5) was amended by Art. 15*bis* Annex I of the Resolution see also A. Reisinger

crime covered by an amendment when committed by a national or on a territory of a State Party that has not accepted the amendment. Under such an interpretation, the question would arise, whether the consensual adoption of the Resolution could be understood as the States Parties' legally binding renunciation of rights they have previously attributed to themselves or whether to achieve this effects, States Parties would first need to ratify the amendments. But then, a further question, whether such an amendment to Article 121 (5) last sentence would be subject to the amendment procedure of Article 121 (4) or whether, as part of the package on the crime of aggression, it would follow the procedure of Article 121 (5), would need to be solved. In the latter case, Article 121 (5) last sentence would continue to be applicable to those States Parties, which have not ratified the amendments. In the former case, the provision would continue to be applicable for all States Parties until one year after seven-eighths of them have deposited their instruments of ratification, at which point in time it would enter into force for all States Parties. Both scenarios appear far from what seems to have been intended by the drafters when establishing an opt-out system for States Parties¹³³.

III. Delayed Exercise and Activation of Jurisdiction

In 1998, when the crime of aggression was listed as one of the most serious crimes of concern to the international community as a whole for which the ICC has jurisdiction¹³⁴, the Court's exercise of jurisdiction was delayed until a time when the ASP would adopt a provision defining the crime and setting out the conditions for the Court's exercise of jurisdiction¹³⁵. The provision adopted in 2010 further postpones the ICC's exercise of jurisdiction. "The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendment by thirty States Parties"¹³⁶. In addition, the

Coracini, 'More Thoughts on "What Exactly was Agreed in Kampala on the Crime of Aggression"', EJIL:talk!, available at <http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited 16 August 2010)

¹³³ For details see *supra* D I 1 b. Under both scenarios, the relationship of Art. 15*bis* Annex I of the Resolution Annex I of the Resolution and Art. 121 (5) ICC Statute would have been simplified, if the amendments entered into force for all States Parties after thirty ratifications; see *supra* note 139.

¹³⁴ Art. 5 (1).

¹³⁵ Art. 5 (2).

¹³⁶ Art. 15*bis* and Art. 15*ter*, common para. (2). Annex I of the Resolution.

activation of the jurisdictional regime over the crime of aggression is “subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute”¹³⁷.

The Court’s delayed exercise of jurisdiction specified by a minimum number of ratification and an activation decision can be understood as a condition for the exercise of jurisdiction in accordance with Article 5 (2). They are not to be seen as a condition for the entry into force in accordance with Article 121 (5) and consequently do not amend this provision¹³⁸.

The requirement of ratification by thirty States Parties opens the question, whether following one year after thirty ratifications the amendments would be applicable for all States Parties. Different from the entry into force procedure according to Article 121 (4), Article 121 (5) clearly does not provide for an *erga omnes* effect. Nevertheless, such an effect may have been foreseen by the drafters as a condition for the exercise of jurisdiction in accordance with Article 5 (2). However, lacking clear wording in that regard, it seems difficult to deduce such an application from Article 15*bis* (2) and the reference to entry into force according to Article 121 (5) rather suggests the contrary¹³⁹.

The package adopted in Kampala comprises all relevant substantive and procedural issues of a provision on the crime of aggression in accordance with Article 5 (2). The decision to be taken after 1 January 2017 is therefore a merely formal decision to finally activate the Court’s exercise of jurisdiction over the crime of aggression. Reference to the adoption of an amendment specifies that if consensus cannot be reached, the activation decision requires a two-third majority of States Parties¹⁴⁰. This is a considerably higher quorum as foreseen in the previous draft that suggested

¹³⁷ Art. 15*bis* and Art. 15*ter*, common para. (3). Annex I of the Resolution.

¹³⁸ See expressly in this regard *e.g.* Non-paper of 25 May, *supra* note 55, para. 2. For a discussion, see also February 2009 Non-paper, *supra* note 43, para. 5.

¹³⁹ If such an effect were indeed intended by the drafters, a clear interpretive statement would be essential. But see R. 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 Journal of International Law* (2010) 2, 707, in this issue, arguing for the entry into force of the amendments for all States Parties.

¹⁴⁰ Art. 121 (3).

a decision by two-thirds of those States Parties, which are present and voting¹⁴¹.

One interpretative question that might be subject to discussions, concerns the Court's jurisdiction over acts of aggression committed one year after ratification by thirty States Parties, but before the ASP decides to activate the jurisdictional regime. According to the wording of Articles 15*bis* and 15*ter*, such acts might be prosecuted, once the activation decision is taken. This understanding would advance the provision's deterrent effect while not contravening the principle of *nullum crimen sine lege*, as the amendment would already be in force for those States that have ratified it¹⁴². Understandings 1 and 3's reversed structure and "whichever is later" language, on the other side, suggest that the minimum number of ratifications and the activation decision are cumulative conditions for the Court to exercise jurisdiction over crimes of aggression. Should a swift ratification of thirty States unfold such a scenario, the Court's exercise of jurisdiction will depend on its interpretation of the Understandings, in particular whether an agreement that is to be taken into account when establishing the context of a treaty for the purpose of legal interpretation may have an influence on a seemingly unambiguous textual setting of the legal norm as such¹⁴³.

D. Jurisdictional Framework

Annex I of the Resolution distinguishes two procedural regimes according to the way the Court's jurisdiction is triggered in accordance with Article 13. Article 15*bis* applies where a situation is referred to the prosecutor by a State Party or when the Prosecutor initiates an investigation *proprio motu*¹⁴⁴. Article 15*ter* governs the referral of a situation by the Security Council acting under Chapter VII of the UN Charter¹⁴⁵. The requirements for a minimum number of ratification and a decision by the

¹⁴¹ See the unspecified decisions contained in draft Art. 15*bis* (4*ter*) and Art. 15*ter*, fragment, *supra* note 99, in accordance with Art. 112 (7) (a) or even Art. 112 (7) (b).

¹⁴² Art. 121 (5); see also *supra* note 50. For a similar discussion see K. Schmalenbach, 'Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen', 15/16 *Juristen Zeitung* (2010), 745, 752.

¹⁴³ Art. 31 (2) (a) *Vienna Convention on the Law of Treaties*, 23 Mai 1969, 1155 U.N.T.S. 331 [VCLT].

¹⁴⁴ Art. 15*bis* (1) Annex I of the Resolution Annex I of the Resolution; see Art. 13 (a) and 14 ICC Statute, Art. 13 (c) and 15 ICC Statute respectively.

¹⁴⁵ Art. 15*bis* (1) Annex I of the Resolution; see Art. 13 (b) ICC Statute.

ASP to activate the Court's jurisdiction that apply to both jurisdictional strands have been discussed above¹⁴⁶, the following section will therefore concentrate on other conditions provided for the Court to exercise its jurisdiction over the crime of aggression¹⁴⁷.

I. State Party Referral and *proprio motu* Investigation

1. A Limited Jurisdictional Basis

According to Article 15*bis* (4), the Court may “exercise jurisdiction over a crime of aggression, arising from an act of aggression by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction”. Consequently, the ICC may not exercise jurisdiction over a crime of aggression, arising from an act of aggression committed either by a non-State Party or by a State-Party that has previously lodged a declaration of non-acceptance. Using the act of aggression by a State as a point of reference, the drafters ascribed a double function to it. On one side, a State act of aggression is a material element of the crime of aggression¹⁴⁸ that needs to be proven as a requirement to establish individual criminal responsibility¹⁴⁹. On the other side, it serves as a judicial filter. In order to

¹⁴⁶ Art. 15*bis* (1) and (2) as well as 15*ter* (1) and (2) Annex I of the Resolution; see *supra* C III.

¹⁴⁷ The following discussion is based on the understanding of the use of the term “State Party” in the Resolution as referring to a State Party of the Rome Statute independent of whether the State Party has accepted the amendments. The introduction of the categories of a State Party that accepts an amendments and a State Party that does not accept an amendment as opposed to a non-State Party (to the unamended Staute) through Art. 121 (5) ICC Statutewas crucial for the discussions in Kampala. This use of terms seems also reflected in the language of the Resolution, *e.g.* in the reference to States Parties in Art. 15*bis* (2) and (3) Annex I of the Resolution Annex I of the Resolution. If the term “State Party” were to be understood as referring to a State Party of the amended treaty only, a State Party to the Rome Statute that does not ratify the amendment would, as a non-State Party to the amended treaty, simply fall under the provision of Art. 15*bis* (5) ICC Statute.

¹⁴⁸ Art. 8*bis* (1) and (2) Annex I of the Resolution; Elements 3 to 6 Annex II of the Resolution.

¹⁴⁹ For the different standards of proof foreseen at the respective stage of the proceedings, see *e.g.* “reasonable basis to proceed with an investigation” for the initiation of an investigation, Art. 15 (3) and (4), see also Art. 53 (1); “reasonable grounds to believe” at the arrest warrant stage, Art. 58 (1) (a) ICC Statute; “sufficient evidence to establish substantial grounds to believe” to confirm charges, Art. 61 (7); and “beyond reasonable doubt” with a view to conviction, Art. 66 (3) ICC Statute.

ascertain whether jurisdiction may be exercised, the Court must therefore satisfy itself¹⁵⁰ that an act of aggression has been committed, and if so, by which State.

By accepting the amendments, the Court's jurisdiction, including Article 12, over the crime of aggression is activated for the accepting State Party¹⁵¹. The Court may in principle establish a jurisdictional link in respect of that State Party with a view to crimes committed by its nationals or on its territory. The declaration of non-acceptance under this constellation excludes the application of Article 12 *ab initio*, in cases where the respective State Party is an aggressor State¹⁵². This limitation of the Court's exercise of jurisdiction is an additional condition for the Court's exercise of jurisdiction over the crime of aggression established by Article 15*bis* in accordance with Article 5 (2) with particularly far-reaching consequences. The non-exercise of jurisdiction comes close to an annihilation of the Court's jurisdiction over the crime of aggression arising from an act of aggression by a non-State Party and a State Party that has lodged a declaration of non-acceptance¹⁵³.

2. The Rule: Application of Article 12

With regard to a crime of aggression arising from an act of aggression by a State Party that has not previously lodged a declaration on non-acceptance, the ICC may exercise jurisdiction "in accordance with article 12" of the ICC Statute¹⁵⁴.

Article 12 comprises key principles for the Court's exercise of jurisdiction upon the referral of a situation by a State Party or the initiation of a *proprio motu* investigation, which, alongside the compromise on the crime of aggression, were at the heart of the final package that led to the adoption of the Rome Statute¹⁵⁵. It endorses the principle of automatic or "inherent" jurisdiction of the ICC for all "crimes referred to in Article 5",

¹⁵⁰ Art. 19 (1).

¹⁵¹ Art. 121 (5).

¹⁵² For a detailed discussion see *supra* DI 3.

¹⁵³ Against this background one may wonder whether the activation of the Court's exercise of jurisdiction over the crime of aggression limited to crimes of aggression, arising from an act of aggression by a State Party that has not declared its non-acceptance, ultimately fulfils the mandate of Art. 5 (2) and whether the deletion of this provision provided by Annex I (1) of the Resolution might be premature.

¹⁵⁴ Art. 15*bis* (4) Annex I of the Resolution.

¹⁵⁵ See Kirsch, *supra* note 21, 85.

which States accept by becoming a party to the Statute¹⁵⁶. No further formal consent is required for the Court to exercise its jurisdiction¹⁵⁷. More specifically, Article 12 (2) provides two alternative jurisdictional links. The Court may exercise its jurisdiction, if either “[t]he State on the territory of which the conduct in question occurred” or “[t]he State of which the person accused of the crime is a national” is a State Party¹⁵⁸. In addition, such jurisdictional link may be established with respect to a non-State Party that lodges a declaration accepting the Court’s jurisdiction *ad hoc* with regard to a situation in question¹⁵⁹.

By explicit reference to Article 12, Article 15*bis* (4) confirms the application of this jurisdictional regime to the crime of aggression. This reference is of a declarative nature in that it substantiates that States Parties have accepted the Court’s jurisdiction over the crime of aggression upon ratification, under the constraint that the conditions under which the Court may exercise its jurisdiction over the crime of aggression do not provide otherwise¹⁶⁰. In some regard, the conditions adopted in Kampala do indeed provide otherwise, since they limit the Court’s exercise of jurisdiction in accordance with Article 12 to crimes of aggression arising from an act of aggression by a State Party. However, within this jurisdictional limitation,

¹⁵⁶ Art. 12 (1). See W. Schabas & S. Williams, ‘Article 12’, in O. Triffterer *supra* note 19, mn 13; Triffterer, Preliminary Remarks, *supra* note 19, mn 85.

¹⁵⁷ The system of the International Law Commission’s draft Statute (Draft Statute of an International Criminal Court, Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994 (A/49/10), 43, at 82–4) that was based on specific State consent and similar proposals were rejected at Rome. See *e.g.* D. N. Nsereko, ‘The International Criminal Court: Jurisdictional and Related Issues’, 10 *Criminal Law Forum* (1999) 1, 87, 93–4. For the same reasons, the Canadian proposal did not find widespread support; for details see *supra* text around note 75.

¹⁵⁸ Art. 12 (2) (a) and (b).

¹⁵⁹ Art. 12 (3) in connection with Rule 44 ICC RPE. On the misleading term “case” in Art. 12 (3) see *e.g.* M. Ch. Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of the International Criminal Court’, 32 *Cornell International Law Journal* (1999) 3, 443, 453–454. See in this regard also the practice of Art. 12 (3) declarations. By declaration lodged on 1 October 2003, Ivory Coast accepted the exercise of the jurisdiction of the Court under Art. 12 (3) with respect to alleged crimes committed from 19 September 2002. Similarly, the declaration lodged by the Palestinian National Authority on 22 January 2009, relates to acts committed on the territory of Palestine since 1 July 2002. For details see <http://www.icc-pi.int/Menu/ICC/Structure+of+the+Court/Registry/Declarations.htm> (last visited 17 August 2010).

¹⁶⁰ For details see *supra* text around note 128.

Article 12 is applicable and confirmed, in order not to leave any doubt, by express reference to Article 12.

The application of Article 12 (as the application of the amendments *in extensu*) is further relativized by reference to Article 121 (5) in the enabling Resolution. Since, in accordance with this provision, the amendments only enter into force for those States Parties that have accepted them, ratification or acceptance is a precondition also with respect to Article 12 (2). Therefore, the Court may exercise its jurisdiction over the crime of aggression only if either the "State on the territory of which the conduct in question occurred" or the "State of which the person accused of the crime is a national" has accepted the amendments. If one of these alternative links¹⁶¹ can be established, the Court's jurisdiction may as a matter of exercising criminal jurisdiction, cover acts committed by nationals or the territory of States that have not accepted the amendments.

Such a jurisdictional link can equally be provided if either the State of territoriality or the State of nationality has accepted the jurisdiction of the Court in accordance with Article 12 (2). Since Article 15*bis* (4) limits the application of Article 12 to a crime of aggression arising from an act of aggression by a State Party that has not lodged a declaration of non-acceptance, it seems that a victim State's declaration in accordance with Article 12 (3) may not successfully activate the exercise of jurisdiction over a crime of aggression arising from an act of aggression by a non-State Party or a State Party that has lodged a declaration of non-acceptance. The application of Article 12 (3) only becomes relevant, once the condition of Article 15*bis* (4) is established. The scope of application of such a declaration is therefore significantly limited. However it could be of relevance with respect to a crime of aggression arising from an act of aggression committed by a State Party that has not accepted the amendments against another State Party that has not accepted the amendments. It would be unfortunate not to allow a State Party that is

¹⁶¹ For a discussion of potential implications of the last sentence of Art. 121 (5) ICC Statute on the interpretation of Art. 15*bis* (4) Annex I of the Resolution, see *supra* C II; critical as to whether jurisdiction in accordance with Art. 12 ICC Statute may be exercised, see *e.g.* R. Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future?', 2 *Goettingen Journal of International Law* (2010) 2, 731 in this issue; Schmalenbach, *Das Verbrechen der Aggression*, *supra* note 142, 752.

willing to submit itself under the jurisdiction of the Court, by an *ad hoc* declaration to do so, for instance in case of regime change¹⁶².

3. Exception: Declaration of Non-Acceptance

With a view to a crime of aggression, arising from an act of aggression committed by a State Party the Court may in principle exercise jurisdiction in accordance with Article 12, “unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar”¹⁶³. Such a declaration may be withdrawn at any time and shall be considered by the State Party within three years¹⁶⁴.

The declaration aims at excluding the Court’s exercise of jurisdiction in accordance with Article 12 over a crime of aggression arising from an act of aggression committed by a State Party that has lodged a declaration of non-acceptance¹⁶⁵. The declaration of non-acceptance only affects potential acts of aggression by a State Party that has lodged a declaration of non-acceptance, the ICC’s exercise of jurisdiction if such a State becomes the victim of an act of aggression consequently remains unaltered. Insofar States Parties have introduced a privilege that may also serve as an incentive to ratify the Statute. The opt-out clause, which has to be understood as a condition for the exercise of jurisdiction in accordance with Article 5 (2), undermines the explicit inclusion of the crime of aggression under the jurisdiction of the ICC in accordance with Article 12 (1) with a view to a

¹⁶² A State Party may wish to use Art. 12 (3) *ad hoc* instead of going through a lengthy domestic ratification process or a State Party that accepts the amendments after the ICC’s exercise of jurisdiction over the crime of aggression is activated may wish to extend the scope of temporal jurisdiction until the activation date, see *supra* note 50; see also the declaration of Uganda, *supra* note 159.

¹⁶³ Art. 15*bis* (4) Annex I of the Resolution.

¹⁶⁴ Art. 15*bis* (4) Annex I of the Resolution. The consequences of the obligation to “consider”, if any, remain open.

¹⁶⁵ According to Art. 15*bis* (4) Annex I of the Resolution a declaration of non-acceptance even prevails when the Security Council has determined that an act of aggression has taken place. Previous drafts had limited the possibility to opt-out of the Court’s exercise of jurisdiction to situations where the Security Council has not previously made such a declaration. The Canadian proposal, *supra* note 73 and the joint declaration, *supra* note 79 where both still placed under alternative 2 of the Second revised conference room paper, *supra* note 71. Insofar, Art. 15*bis* (4) Annex I of the Resolution broadens the exceptional regime. But where the Security Council has determined the existence of an act of aggression, the situation could arguably also be referred to the Court through Art. 13 (b) ICC Statute.

declaring State Party, which it had accepted by ratifying the Statute and consequently activated by ratifying the amendments¹⁶⁶. Given the wide discretion entrusted to the drafters in formulating the conditions for the exercise of the Court's jurisdiction over the crime of aggression, a limitation even of expressly provided provision cannot be seen as *contra legem*¹⁶⁷. The applicability of the provisions of the Rome Statute to the crime of aggression remained under the caveat of Article 5 (2). However, different from adding conditions to the statutory framework, the changing of existing obligations may have a different effect with regard to State Parties that do not become a party to the amended treaty.

Article 15*bis* (4) refers to a previous declaration. The formulation appears to intend excluding the lodging of an *ad hoc* declaration upon the commission of an act of aggression. This does not only include declarations lodged in the immediate context of an act of aggression. A declaration lodged "previously" with the intent to avert the exercise of the Court's jurisdiction, may be conduct that depending on the circumstances falls under the definition of the crime of aggression as part of the planning and preparation of an act of aggression¹⁶⁸. As a criminal act falling under the jurisdiction of the Court, it may eventually be considered invalid.

A more detailed reference is contained in para. 1 of the enabling Resolution: the declaration may be lodged "prior to ratification or acceptance". The provision does not give any further indication as to whether the declaration of non-acceptance is linked to a process of ratification or acceptance. From the plain wording, "prior to" rather seems to indicate a purely consecutive order in time between the declaration and ratification or acceptance. In that regard, ratification or acceptance may follow immediately up to any distant unforeseeable point in time¹⁶⁹. Thus,

¹⁶⁶ Accepting an amendment that activates a jurisdictional regime, in order to opt-out of this regime seems odd. However, since the declaration of non-acceptance is limited to a crime of aggression arising from an act of aggression by the State Party that declares its non-acceptance, this State Party may wish to submit itself under the protection of the Court's jurisdiction for the case it becomes a victim of aggression, or it may wish to contribute accelerating the commencement of the Court's exercise of jurisdiction.

¹⁶⁷ See *supra* B I.

¹⁶⁸ Art. 8*bis* (1) Annex I of the Resolution.

¹⁶⁹ This was, for instance, the position contemplated by the Canadian proposal, *supra* note 73, but limited in time by the drafters of the joint declaration, *supra* note 79. Offering States Parties that do not accept the provision on aggression and non-States Parties a possibility to opt out from the effects of the Court's jurisdiction in

States Parties to the Rome Statute that do not accept the amendments may lodge a declaration of non-acceptance directed at blocking the Court's jurisdictional reach in accordance with Article 12.

The assumption that a declaration of non-acceptance may be lodged outside the process of ratification or acceptance involves some interesting aspects. The legal basis for a declaration of non-acceptance is set forth in the amendments, which only enter into force for those States that have ratified them¹⁷⁰. Offering States Parties that have not ratified the amendments a possibility to lodge a declaration of non-acceptance is justifiable under the maxim *pacta tertiis nec nocent nec prosunt*¹⁷¹. Accordingly, a State Party would not have to ratify the amendments in order to avail itself of such a privilege, but may accept it as a "third State" with regard to the amended treaty. However, it seems peculiar that, against the background of the amendments' entry into force in accordance with Article 121 (5), a relatively small number of State Parties may grant such a right that may involve serious consequences for other State Parties that have not (yet) ratified the amendments. Furthermore, it is debatable whether third States to the amended treaty, which are also State Parties to the unamended Statute, may legally accept such a right. The Rome Statute does not foresee a possibility to opt out of Article 12¹⁷². On the contrary, it expressly provides that upon ratification State Parties accept the jurisdiction of the ICC over the crime of aggression in accordance with the Statute¹⁷³. It will ultimately be up to the Court to decide whether a declaration of non-acceptance would be covered by the undeniably wide discretion provided in Article 5 (2) or whether such a declaration would amount to a prohibited reservation according to Article 120¹⁷⁴.

accordance with Art. 12 (2) had previously been suggested, but not discussed in detail, 2009 Princeton Report, *supra* note 85, para. 40.

¹⁷⁰ Para. 1 of the Resolution and Art. 121 (5).

¹⁷¹ Art. 36 (1) VCLT.

¹⁷² For States Parties that lodge a declaration of non-acceptance independent of their ratification of the amendment, the declaration would exempt that State to be subject to the Court's jurisdiction in accordance with Art. 12, based on a link provided by another State Party.

¹⁷³ Arts. 5 & 12.

¹⁷⁴ For a comparable argument brought up in the context of applying Art. 121 (5) last sentence under a broad understanding (*supra* note C II), see February 2009 SWGCA Report, *supra* note 35, para. 9. Both problems cease to exist, if the ratification of thirty States Parties were to be effective for all States Parties. From that point in time on, the legal basis for granting rights to third States would be legitimized by all States Parties and the opt-out of Art. 12, as a genuine part of the treaty in force for all States, would not contravene Art. 120.

The lodging of a declaration of non-acceptance with the registrar has been subject to strong criticism, particularly from individual experts of the NGO community. Although the lodging of declarations with the registrar is not unfamiliar to the Rome Statute¹⁷⁵, it is indeed questionable why the Secretary General of the United Nations as depositary of the treaty and recipient of declarations in accordance with Article 124 was not considered the appropriate organ. The practice of the registrar was particularly criticized as intransparent and declarations under Article 12 (3) were said to have been long unknown to the public. To avoid detrimental effects in this regard, the ASP might consider appropriate ways to ensure the publishing of declarations under Article 15*bis* (or in general)¹⁷⁶.

4. Exception: Crimes Committed by Nationals or on the Territory of Non-State Parties

Article 15*bis* (5) contains an exception to the Court's jurisdictional reach provided by Article 12: "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory".

This provision, previously formulated in the joint declaration¹⁷⁷, contains further concessions with regard to non-States Parties. However, to some extent, it remains symbolic, since the exercise of jurisdiction over a crime of aggression arising from an act of aggression by a non-State Party is already excluded by Article 15*bis* (4). Acts committed by nationals or on the territory of a non-State Party that amount to an act of aggression will in many instances be attributable to that State and therefore fall under the

¹⁷⁵ See Art. 12 (3).

¹⁷⁶ Neither the Statute, nor the Rules and the Regulations of the Registry in accordance with Rule 14 ICC Rules of Procedure and Evidence do foresee a particular procedure for the publishing of declarations received by the registrar. The registrar dedicates a section of the ICC website to declarations in accordance with Art. 12 (3), available at <http://www.iccpi.int/Menus/ICC/Structure+of+the+Court/Registry/Declarations.htm> (last visited 18 August 2010). The site includes information, though not the original and complete text, about declarations lodged by Ivory Coast on 1 October 2003 and the Palestinian National Authority on 22 January 2009. It does not provide information of a "declaration on temporal jurisdiction" by Uganda; see thereto, W. Schabas & S. Williams, 'Article 12', in O. Triffterer *supra* note 19, mn 17.

¹⁷⁷ See *supra* text around note 81.

category of an act of aggression by that State¹⁷⁸. Paragraph 5 might be an additional safeguard in the context of joint acts of aggression by non-States Parties and States Parties, where for instance command structures are interlinked and not clearly attributable. The exclusion of nationals of non-States Parties from the Court's jurisdiction further guarantees that such persons may not be held accountable before the ICC even when involved in an act of aggression by a State Party.

The exclusion of crimes committed on the territory of a non-State Party however, has another consequence. Since a crime of aggression is usually considered to take place concurrently on the territory of the aggressor State as well as on the territory of the victim State¹⁷⁹, the provision also excludes jurisdiction over a crime of aggression committed by a State Party (that would otherwise fall within the jurisdiction of the Court) against the territorial integrity of a non-State Party. Insofar the provision introduces an element of reciprocity so far unknown to the Rome Statute¹⁸⁰. It affects the relationship between State Parties and non-State Parties, different from the relationship among States-Parties that accept the amendments, States Parties that do not accept the amendments and States Parties that lodge a declaration of non-acceptance. As a consequence of shielding nationals of non States-Parties from the jurisdiction of the Court, their protection from acts of aggression committed by States Parties is equally removed. At the same time, the Court may not exercise jurisdiction

¹⁷⁸ In particular, it is assumed that in most instances, "a person in a position effectively to exercise control over or to direct the political or military action of State" (Art. 8*bis* (1) Annex I of the Resolution) will be a national of that State.

¹⁷⁹ February 2009 SWGCA Report, *supra* note 35, paras 38-39; November 2008 SWGCA Report, *supra* note 74, paras 28-29.

¹⁸⁰ Neither Part 2, nor Art. 121 (5) establish a specific jurisdictional regime where non-States Parties are concerned. The latter provision simply leaves Art. 12 untouched with regard to non-States Parties (under any Understanding, see *supra* C II). The introduction of a consent requirement as a condition for the exercise of jurisdiction over the crime of aggression considerably deviates from Art. 12 but does, strictly speaking, not amend Art. 121 (5). For a different view, see the statements made by Japan before and after the consensual adoption of the Resolution in Kampala available as audio file at <http://www.radioradicale.it/scheda/306439/the-international-criminal-court-giornata-conclusiva-dei-lavori> (last visited 18 August). Since deviations from the statutory provisions can only be justified by Art. 5 (2) and are consequently limited to the exercise of jurisdiction over crime of aggression, the exclusion of the Court's jurisdiction over crimes committed by nationals or on the territory of non-States Parties in the context of other crimes would be contrary to the Statute, see also *supra* note 123.

over a crime of aggression committed by a State Party that has accepted the amendments, and should therefore be under a higher scrutiny, against a non-State Party.

In light of the exception of Article 15*bis* (5) the question arises whether a declaration of acceptance of the Court's jurisdiction in accordance with Article 12 (3)¹⁸¹ could be a basis for the Court's exercise of jurisdiction over the crime of aggression where a non-State Party is involved. Does Article 15*bis* (5) constitute a *lex posterior* exception with regard to Article 12 (2) or Article 12 (2) and (3)? Article 15*bis* is not clear in that regard. On first sight the wording of Article 15*bis* (2) seems to be directed at Article 12 (2). If the reason for the exclusion were to grant third States a privilege to consent to the exercise of jurisdiction of the Court¹⁸², the *ratio* behind the provision would not impede the exercise of the Court's jurisdiction if the State in question accepts the jurisdiction of the Court pursuant to Article 12 (3). The situation would however be different if the provision aims at establishing a strictly reciprocal relationship among State Parties and non-State Parties.

If a declaration in accordance with Article 12 (3) may substitute a jurisdictional link in the sense of Article 12 (2) despite Article 15*bis* (5), jurisdiction could be established *ad hoc* for a crime of aggression arising from an act of aggression committed by a State Party that has accepted the amendments against a non-State Party and a crime of aggression arising from an act of aggression committed by a State Party that has not accepted the amendments against a non-State Party.

5. Synopsis

The following chart provides an overview, under which circumstances the ICC will be able to exercise its jurisdiction over the crime of aggression in accordance with Article 15*bis*.

¹⁸¹ See *supra* note 159 for the assumption that a non-State Party may only accept the jurisdiction of the Court with regard to a situation.

¹⁸² This privilege goes far beyond the requirements for the exercise of jurisdiction under international criminal law and under the Rome Statute. Even more, as a shield against the exercise of jurisdiction by the ICC, it is in sharp contrast to the goals of the Statute to end impunity, see Preamble (4), (5), (6) and (9).

Article 15bis Resolution on the Crime of Aggression, Annex I: The ICC may exercise its jurisdiction over the crime of aggression arising from an act of aggression				
By \ Against	a State Party that has accepted the amendments	a State Party that has not accepted the amendments	a State Party that has declared not to accept the ICC's jurisdiction	a non-State Party
a State Party that has accepted the amendments	YES (Art. 15bis (4))	YES (Art. 15bis (4) in accordance with Art. 12 (2) (a)) ¹⁸³	NO (Art. 15bis (4))	NO (Art. 15bis (4), <i>a contrario</i>)
a State Party that has not accepted the amendments	YES (Art. 15bis (4) in accordance with Art. 12 (2) (a) or (b)) ¹⁸⁴	NO jurisdictional link under Art. 12 (2) in accordance with Art. 121 (5) first sentence; but <i>ad hoc</i> acceptance of jurisdiction by State Party in accordance with Art. 12 (3)? [YES, if provision is applicable to all states parties after 30 ratifications] ¹⁸⁵	NO (Art. 15bis (4))	NO (Art. 15bis (4), <i>a contrario</i>)
a State Party that has declared not to accept the ICC's jurisdiction	YES (Art. 15bis (4) in accordance with Art. 12 (2) (a) or (b)) ¹⁸⁶	YES (Art. 15bis (4) in accordance with Art. 12 (2) (a)) ¹⁸⁷	NO (Art. 15bis (4))	NO (Art. 15bis (4), <i>a contrario</i>)
a non-State Party	NO (Art. 15bis (5); <i>Ad hoc</i> acceptance of jurisdiction by non-State Party in accordance with a Art. 12 (3)?	NO jurisdictional link under Art. 12 in accordance with Art. 121 (5) first sentence; <i>ad hoc</i> acceptance of jurisdiction by State Party/by either State in accordance with Art. 12 (3)? [NO even if provision is applicable to all states parties after 30 ratifications (Art. 15bis (5))]	NO (Art. 15bis (4))	NO (Art. 15bis (4), <i>a contrario</i>)

¹⁸³ Since the crime of aggression *per definitione* requires cross border activities, jurisdiction based on Art. 12 (2) (a) can be established by way of the aggressor State and by way of the victim State; see also *supra* note 179.

¹⁸⁴ See *supra* notes 178 & 183.

¹⁸⁵ See *supra* note 172.

¹⁸⁶ See *supra* note 184.

¹⁸⁷ See *supra* note 183.

6. Role of the Pre-Trial Division

“Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned”¹⁸⁸. If the Security Council has made such a determination, it fulfils a judicial filter function with regard to the Court's exercise of jurisdiction over the crime of aggression and the Prosecutor may proceed with his or her investigation¹⁸⁹. A determination of the Security Council does not bind the Court in substance, it is without prejudice to the Court's own findings¹⁹⁰, but can be assumed to have strong probative value for the Court's determination of an act of aggression as an element of the crime of aggression.

The structure of Article 15*bis* respects the primary role of the Security Council in the maintenance of international peace and security but clearly rejects the claim of an exclusive role¹⁹¹. Where, after notification of the relevant situation before the Court, the Security Council does not make a determination within six months, “the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the Security Council has not decided otherwise in accordance with Article 16”¹⁹². By reference to the pre-trial division, not the pre-trial chamber, Article 15*bis* incorporates the idea of an “enhanced

¹⁸⁸ Art. 15*bis* (6) Annex I of the Resolution.

¹⁸⁹ Art. 15*bis* (7) Annex I of the Resolution.

¹⁹⁰ Art. 15*bis* (9) Annex I of the Resolution confirms this principle with a view to any outside organ.

¹⁹¹ See *supra* note 28 and text around note 38. In explanations after the consensus adoption of the Resolution, the permanent members of the Security Council took position in that respect. While only France reiterated language with a view to an alleged exclusive role, the United States and the United Kingdom expressly referred to the primary role of the Security Council according to the UN Charter.

¹⁹² Art. 15*bis* (8) Annex I of the Resolution.

internal filter”¹⁹³. The pre-trial division currently consists of six judges, which is its minimum number of judges¹⁹⁴. This equal number of six judges raises the question of the appropriate quorum for the authorization of an investigation in respect of a crime of aggression. Would the presiding judge have the decisive voice? Would a qualified quorum be required? Or should the number of judges of the pre-trial division be increased? A clarification of this issue, *e.g.* in the ICC Rules of Procedure and Evidence would certainly be helpful.

The authorization by the pre-trial division is required in case of a referral of a situation by a State Party as well as in case of a *proprio motu* investigation in accordance with Article 15. Insofar, the language “in accordance with the procedure contained in Article 15” extends the application of Article 15 (3)-(5) to State Party referrals¹⁹⁵ and constitutes an additional internal filter. With respect to *proprio motu* investigations, where such a filter already exists with regard to all crimes under the jurisdiction of the Court, it increases the number of deciding judges.

As a judicial filter, the involvement of the pre-trial division may have a double function. Foremost, it shall authorize the commencement of an investigation, without prejudice to subsequent findings of the Court, if it “considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court”¹⁹⁶. But this decision, based on a rather low standard of proof, needs to be distinguished from a decision following a challenge to the jurisdiction of the Court, that may be brought before the Court by a “State from which acceptance of jurisdiction is required under Article 12”¹⁹⁷. The Court is likely to encounter such challenges at an early stage of the proceedings, where the involvement of States Parties that have accepted the amendments on the crime of aggression, States Parties that have lodged a declaration of non-acceptance and non-State Parties may warrant a determination of an act of aggression in order to establish the Court’s ability to exercise jurisdiction in accordance with Article 12¹⁹⁸. The impact of such a decision confirming the

¹⁹³ Draft Art. 15*bis* (4) alternative 2 of the 10 June, 23:00 President’s Non-paper, *supra* note 89; see also fn. 5 of the previous draft, 10 June, 12:00 President’s Non-paper, *supra* note 84.

¹⁹⁴ Art. 39 (1).

¹⁹⁵ See in this regard *e.g.* February 2009 SWGCA Report, *supra* note 35, para. 21.

¹⁹⁶ Art. 15 (4).

¹⁹⁷ Art. 19 (2) (c).

¹⁹⁸ For details see *supra* D 1.

Court's exercise of jurisdiction on future findings with regard to the act of aggression as an element of crime may also require some clarification.

II. Security Council Referral

The ICC's exercise of jurisdiction over the crime of aggression in case of a referral of a situation by the Security Council does not provide any limitations or extensions vis à vis the Statute. Next to confirming the applicability of Article 13 (b)¹⁹⁹, it only contains provisions on the delayed exercise and activation of the Courts jurisdiction over the crime of aggression and the non-prejudicial nature of the determination of an act of aggression by an outside organ and the exercise of jurisdiction over other crimes referred to in Article 5, that are common to Articles 15*bis* and 15*ter*²⁰⁰.

According to Article 13 (b), “[t]he Court may exercise its jurisdiction over a crime referred to in article 5 [...] 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”. Thereby the Statute acknowledges the Chapter VII powers of the Security Council to establish *ad hoc* tribunals for the prosecution of crimes under international customary law and opens the option to seize the permanent ICC with situations involving crimes that equally fall under its jurisdiction.

On the basis of a Security Council referral, the Court may exercise its jurisdiction “irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard”²⁰¹. The jurisdictional reach accordingly includes States Parties (independent of their ratification or previous declaration of non-acceptance) as well as non-States Parties. Similar to the reference to Article 13 (a) and (c) in Article 15*bis* (1) and the reference to Article 12 in Article 15*bis* (4), Article 15*ter* (1) confirms the applicability of Article 13 (b) to the crime of aggression in a declarative way. Article 13 regulates the Court's exercise of jurisdiction with respect to a crime referred

¹⁹⁹ Art. 15*ter* (1) Annex I of the Resolution.

²⁰⁰ Compare Art. 15*ter* (2), (3), (4) & (5) with Art. 15*bis* (2), (3), (9) & (10) Annex I of the Resolution. Against this background, the wisdom of a separate provision may be questioned. The splitting of Art. 15*bis* and 15*ter* in the ABS proposal was originally mandated by the application of different entry into force mechanisms, see *supra* text after note 69. It was maintained and served a good purpose in facilitating to concentrate the discussions on open issues in the context of Art 15*bis*.

²⁰¹ Understanding 2, Annex III of the Resolution.

to in Article 5, which at the time of the adoption of the Statute and consequent ratification already included the crime of aggression. The express reference underlines that the conditions do not provide otherwise.

Understanding 2 confirms that the entry into force of the amendments in accordance with Article 121 (5) does not impede the Court's exercise of jurisdiction. In case of a referral of a situation by the Security Council, the Court may not only exercise its jurisdiction over those States Parties that have accepted the amendment, but over all States. Article 121 (5) in principle does not distinguish between different trigger mechanisms in accordance with Article 13. Its potential limitations are therefore arguably applicable independent of the way the jurisdiction of the Court is triggered²⁰². Article 121 (5), which is based on a system of subjective entry into force with regard to States Parties, does not expressly deal with the question of an "objective" entry into force of an amendment, vis-à-vis the Court. It has however been argued, that with the entry into force of an amendment upon its first ratification by a State Party, the subject matter jurisdiction of the Court could be seen as amended for the Court. Article 13, which refers to the list of crimes in Article 5 would therefore automatically be applicable to a crime covered by an amendment²⁰³. Furthermore, an unconditional exercise of jurisdiction of the Court based upon a referral by the Security Council seems in line with the general understanding of the role of the Security Council under the ICC Statute and the intention of the drafters.

The Security Council may only refer situations to the Court, within which the Prosecutor remains free to determine the direction of the investigation with a view to the crimes and persons involved when he or she finds that there is a reasonable basis to proceed²⁰⁴. Different from earlier drafts, Article 15*ter* does not require a prior determination of an act of aggression by the Security Council²⁰⁵. Certainly the Security Council is not impeded from making such a determination, in which case Article 15*ter* (4)

²⁰² Reisinger Coracini, Amended Most Serious Crimes, *supra* note 123, 707; see also *e.g.* November 2008 SWGCA Report, *supra* note 74, para. 8.

²⁰³ Reisinger Coracini, Amended Most Serious Crimes, *supra* note 123, 706. The SWGCA had also discussed an entry into force "for the Court" immediately with the adoption of a provision on the crime of aggression. See *e.g.* June 2009 SWGCA Report, *supra* note 35, para. 28-9, as still reflected in the second revised conference room paper, *supra* note 71, Annex III, Understanding 2.

²⁰⁴ Art. 53 (1).

²⁰⁵ See *supra* text before notes 88 & 98.

would apply, but it is not a prerequisite for the Court's exercise of jurisdiction over the crime of aggression.

E. Conclusions

By defining the crime and setting out the conditions under which the ICC may exercise its jurisdiction, the Resolution on the crime of aggression, adopted in Kampala, delivers the necessary requirements to activate the Court's jurisdiction over the crime of aggression as stipulated in Article 5 (2). That alone is a success which should not be diminished by the, though unfortunate, fact that the actual exercise of jurisdiction is conditioned by a specific number of ratifications and an activation decision to be taken after 1 January 2017. These purely procedural steps should not constitute a hurdle, if States Parties stand behind the provision on the crime of aggression and, especially, if a significant number of States Parties will have ratified the amendments by the time of the activation decision.

The jurisdictional regime laid down in Article 15*bis* and 15*ter* upholds several significant principles of the ICC Statute and in this regard clearly exceeds the expectations of many as to what could be achieved in Kampala. All trigger mechanisms foreseen in the Statute apply to the crime of aggression. The independence of the Court and its organs is safeguarded, not only regarding the establishment of individual criminal responsibility but also with a view to the determination of an act of aggression by a State, as a prerequisite for individual criminal responsibility. Firstly, the exercise of jurisdiction does not require a prior determination by an outside organ that an act of State aggression has occurred. In practice, therefore, inactivity by an outside organ will not impede the Court from exercising its jurisdiction. Secondly, if such a determination exists, it has no binding effect for the purpose of the criminal proceedings. These important elements also contribute to an effective jurisdiction and guarantee the rights of the accused.

However, the protection of these principles came with a price. Highly disputed until the end of the review conference, the Court's exercise of jurisdiction in case of a referral of a situation by a State Party or *proprio motu* investigations by the prosecutor, independent of a determination by the Security Council that an act of aggression has been committed, is counterbalanced by far-reaching exceptions to the Court's reach over perpetrators of the crime of aggression. Most importantly, the Court may exercise jurisdiction in accordance with Article 12 only with respect to a crime of aggression arising from an act of aggression by a State Party that

has not previously declared that it does also do not accept such jurisdiction. A crime of aggression arising from an act of aggression by a non-State Party or an act of aggression committed by a State Party that has declared its non-acceptance does also not trigger the application of Article 12. This limited jurisdictional basis determined by the status of a State committing an act of aggression vis-à-vis the Court is further narrowed by exceptions regarding the exercise of jurisdiction over individual perpetrators. Arguably, also a State Party that does not ratify the amendments may lodge a declaration of non-acceptance, in which case the declaration would constitute an opt-out from the reach of the Court's jurisdiction in accordance with Article 12. In addition, crimes of aggression committed by a national or on the territory of a non-State Party are exempt from the Court's exercise of jurisdiction. Accordingly, States Parties that do not accept the amendments and non-States Parties are both under a dual shield, which can be activated on the level of an act of aggression as well as on the level of the crime of aggression. With a view to non-States Parties the non-exercise of jurisdiction over the crime of aggression is the rule; a rule unprecedented in the Rome Statute. With a view to States Parties the non-exercise of jurisdiction is foreseen as an exception. Insofar the Resolution acknowledges the inclusion of the crime of aggression as a crime falling under the jurisdiction of the Court at Rome. The compromise of Kampala could not resolve all ambiguities in the applicable law of the Rome Statute, in particular with a view to Article 121 (5) and its relationship with Article 12 in the context of the crime of aggression. Divergent interpretations may also be put forward regarding the declaration of non-acceptance and implications following the ratification of the amendments by thirty States Parties. A final decision on these issues will ultimately be up to the Court, which may receive further guidance from the ASP and scholarly opinions until the time the provision on the crime of aggression will be applied for the first time.

This jurisdictional regime differs considerably from the Court's exercise of jurisdiction over genocide, crimes against humanity and war crimes. Its establishment was not mandated by legal but rather warranted by political considerations. The legal basis for such a deviating regime is the reference to the elaboration of conditions for the exercise of jurisdiction in Article 5 (2), which provided the drafters with considerable flexibility. Nevertheless, the opening of substantial exceptions to the Court's reach over perpetrators of the crime of aggression is highly regrettable and questionable considering the aims of the Statute as expressed in its Preamble. It was ultimately the price to operationalize the crime of

aggression within an independent judicial framework. The responsibility to counter shortcomings in the context of State Party referrals and *proprio motu* investigations now rests with the States Parties. The Court's jurisdictional reach grows with each unconditional ratification of the amendments. Once the regime is well accepted, a review of Article 15*bis* in light of a uniform jurisdictional regime for all core crimes is not excluded.