A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court

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I. A matter of life and death

When the Review Conference for the Rome Statute of the International Criminal Court [Statute] adopted the Resolution on the Crime of Aggression[2] , - and did so by consensus -, it achieved a breakthrough that had been desired by many but expected by few. Especially in the early days of the conference in Kampala, participants who expressed confidence in a successful outcome of the negotiations appeared to be outnumbered by those who offered more pessimistic assessments. But a strong intent to achieve the adoption of provisions on the crime of aggression permeated the conference from the beginning as well. During the general debate in the first week, Kenya, speaking on behalf of the African States Parties to the Statute, referred to the two main outstanding issues of a filter mechanism and the consent of the aggressor State and continued: "While these two questions are yet to be resolved, we are of the firm belief that the differences between the delegations are not insurmountable and that there is sufficient will at this Review Conference to overcome them. …"[3] [4]

The determination to find common ground was particularly visible in the guidance of the negotiations by both the President of the Assembly of States Parties to the Statute, Christian Wenaweser (Ambassador of Liechtenstein to the United Nations), who led the Review Conference[5], and by the Chairman of the Working Group on the Crime of Aggression, Prince Zeid Ra'ad Zeid Al-Hussein (Ambassador of Jordan to the United States)[6]. Moreover, practically all State proposals[7] were put forward with the objective to arrive at a solution and not to sabotage it. The conference was blessed too by a core of diplomats from all continents who had worked on the subject since years, knew the details and had a keen sense about the political feasibility of various options. Despite the discrepancies between their positions,

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[2] Resolution RC/Res.6, advance version, 28 June 2010. (The Resolution was differently numbered in an earlier version, Resolution RC/Res.4, advance version, 14 June 2010.

[3] Statement by Kenya on behalf of the African States Parties to the International Criminal Court, Review Conference, 31 May 2010, p.3; the statements during the general debate are available at www.icc-cpi.int/Menus/ASP/ReviewConference/Review+Conference.htm

[4] The Asian-African Legal Consultative Organization emphasized that "the Member States of AALCO realize the imperative of having a clear and broadly acceptable definition of the Crime of Aggression and consider it to be indispensable to developing the rule of law in the world. In this regard, we hope that the major definitional and jurisdictional issues would be successfully resolved at Kampala."

[5] Ambassador Wenaweser had chaired the Assembly of States Parties' Special Working Group on the Crime of Aggression 2003-2009.

[6] Prince Zeid Ra'ad Zeid Al-Hussein had also led the negotiation on the crime of aggression in the interim between the end of the Special Working Group on the Crime of Aggression and the Review Conference, specifically at an informal session in June 2009 in New York, under the auspices of Princeton University, and at the eighth session of the Assembly of States Parties in November 2009 and March 2010.

[7] Among the written proposals see especially Non-paper submitted by Argentina, Brazil and Switzerland as of 6 June 2010, and Proposal by Canada of 8 June 2010, both in Report of the Working Group on the Crime of Aggression, RC/20 (adv. version 28 June 2010), Annex II, Appendix; Non-Paper by Slovenia of 8 June2010 (on file with the author)

they were well aware of their common dedication and had forged a bond from it. On the very last evening, a bit after midnight, determination prevailed over difficulty and doubt[8].

As a matter of life and death, the breakthrough in Kampala and its consensual nature cannot be overestimated in significance.

Already before the Review Conference, the crime of aggression had been one of the core crimes within the jurisdiction of the International Criminal Court. [9] But the exercise of jurisdiction had remained dependent on the adoption of a provision "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. ..."[10] In other words, at the time of the adoption of the Statute in 1998, the international community recognized the horror of the crime, but could not agree on the substantive and procedural detail to enable prosecution.

Yet utmost deterrence of the crime of aggression has never been more urgent. No longer can the world afford being divided by crimes of aggression when it faces serious challenges to its economic, social and environmental sustainability and well-being, challenges that can only be solved by common commitment. In an age of weapons of mass destruction, the very survival of humankind is put at risk by crimes of aggression[11]. Military deterrence against aggression cannot fully substitute for non-military deterrence, including non-military deterrence based on criminal liability: Depending on the circumstances, military deterrence raises a protective shield against attack, but it also carries it own competitive risks and may be useless against potentially catastrophic side effects of wars waged by other countries, even of wars waged on other continents.

Among the many policy tools that need to be employed for the maintenance of peace, the international criminalization of aggression under the Statute promises to be an especially effective means, as it engages the personal responsibility of decision-makers on a most direct and profound level.

State responsibility for acts of aggression is not an adequate alternative in this regard. [12] The law of State responsibility[13] plays an indispensable role in the prevention of and response to prohibited uses of force[14], but it works only imperfectly, partly because the exercise of jurisdiction by the International Court of Justice is handicapped by over-dependency on State consent[15]. Moreover, the law of State responsibility deters the individual leader too obliquely, providing in effect a 'corporate veil' to hide behind. This does not mean that the legal development towards individual criminal responsibility downplays the importance of State responsibility, quite the opposite. *The provisions on the crime of aggression help to protect States not only against illegal uses of force by other States but also against misdeeds by their own leaders and against the fate of being turned into an aggressor State. The capacity of States to act in accordance with State responsibility is enhanced.*

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[8] These comments are based on personal observations at the Review Conference.
[9] Article 5 paragraph 1 of the Statute
[10] Article 5 paragraph 2 of the Statute. In the course of the negotiations on proposals for a definition and the jurisdictional conditions, the single provision anticipated under article 5 paragraph 2 of the Statute grew into multiple provisions. See in particular THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION. MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003-2009 (Stefan Barriga, Wolfgang Danspeckgruber & Christian Wenaweser eds., 2009) [PRINCETON PROCESS]
[11] See also Statement by South Africa, Review Conference, 31 March 2010, p.4, *supra* n.3
[12] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (2008) 117
[13] Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, 53rd session (23 April-1 June and 2 June-10 August 2001), UN Doc. A/56/10, Chapter IV. E. (Text 43-59, Text with Commentary 59-365)
[14] Charter of the United Nations, Article 2 paragraph 4. For detail on the prohibition of inter-State force, see in particular *supra* n.12, at 83-116
[15] As far as requirements of State consent are allowed to affect also the exercise of jurisdiction by the International Criminal Court, the increase in deterrence based on individual criminal responsibility is less than it could and should be. See below part IV.

Significantly too, the law on the individual crime of aggression can reinvigorate the normative strength of the prohibition of aggression addressed to States, even if it does so only indirectly. The need for such normative strengthening had become more than obvious in the run-up towards the Review Conference when opponents to the adoption of the provisions on the crime of aggression exhibited a terrifying nonchalance and blindness about the crime[16] : The legal nature of the prohibition of the use of force under the Charter of the United Nations was put into doubt and the political nature of the State's decision emphasized instead. Claims were put forward about the 'inexperience' and 'overload' of the Court, as if such drawbacks, even if they were correct[17], could possibly matter in the face of a crime that article 5 paragraph 1 of the Statute counts among "the most serious crimes of concern to the international community as a whole". Maybe most disconcerting, influential human rights organizations deemed the subject of the crime of aggression to be outside their mandate[18], only to actively resist the effort towards adoption in Kampala. Altogether, and contrary to its intent, the argumentation left no doubt that the adoption of provisions on the crime of aggression was needed more than ever: The provisions would be not only essential to try to *increase* deterrence but to halt the frightening *decrease* of deterrence.

Prosecution for the other three core crime under the Statute cannot substitute for prosecution of the crime of aggression:

The other three crimes do not capture the evil of aggression. The civilian bloodshed downplayed as 'collateral damage', often entailing thousands of deaths and injuries in the course of an armed conflict, typically does not amount to war crimes, crimes against humanity or genocide. The deaths and injuries of soldiers generally too do not fall under the definitions for war crimes, crimes against humanity or genocide. Criminal responsibility for the 'normal' carnage of war rests only with those who brought about the use of force in the first place and committed aggression.[19] It is they who are responsible for the human rights violations inherent in the crime of aggression, starting with a monstrous violation of human dignity, the atrocity of orders to kill and to risk being killed, all without any basis under the law of nations. [20]

Moreover, it is not always possible to establish the command responsibility of aggressive leaders for the crimes committed in the course of the armed conflict. It is even conceivable that the other three core crimes are committed primarily by the forces of the victim State and not by those of the aggressor State. Yet when the Court may only prosecute perpetrators who committed crimes in the course of the armed conflict but not perpetrators who committed the crime of aggression and thus created the very environment conducive for the commission of the other three core crimes, the sense of injustice can have a far-reaching negative effect, inflicting hurt and disappointment on the victims of aggression, undermining the stature and integrity of the Court and hampering the drive towards the universality of the Statute.[21]

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[16] Non-governmental statements giving rise to these concerns are on file with the author.

[17] Increased deterrence of the crime of aggression could actually contribute to the decrease of the other three crimes.

[18] See also Claus Kreβ, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, EIJL (2009), Vol.20 No.4, 1129-1146, 1135 n.23.

[19] See *supra* n.12, at 120: "The decisive point is that war is a cataclysmic event. There is no way in which war can be waged as if it were a chess game. In the nature of things, blood and fire, suffering and pain, are the concomitants of war. As a result, war simply must be a crime." See also EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758), Book 3, Chapter II. (Of the Sovereign who Wages an Unjust War) § 184 (Great guilt of the sovereign who undertakes it): "He is chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rape, the acts of violence, the ravages, the conflagrations, are his works and his crime. He is guilty of a crime against the enemy, whom he attacks, oppresses, and massacres without cause; he is guilty of a crime against the people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity, - against those of his subjects who are ruined or distressed by the war, - who lose their lives, their property, or their health, in consequence of it: finally he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example … " Compare the recent citation of Vattel by Don Ferencz in his contribution to the ASIL blog on the Review Conference, 8 June 2010, at http://iccreview.asil.org/?paged=2

[20] Put differently, the human rights violations start with the 'use' of human beings for the crime/act of aggression. - On war and the human right to life, see Human Rights Committee, sixteenth session, 1982, General Comment 6 (article 6: right to life) para.2; also Human Rights Committee, twenty-third session, 1984, General Comment 14 (article 6: right to life), para.2; on the human right to peace see *infra* n.118

[21] Similar concerns may arise with regard to the more restrictive aspects of the adopted jurisdictional conditions, as pointed out below.

When the Kampala Conference succeeded in adopting the definition and the jurisdictional conditions required for the Court's exercise of jurisdiction, it did not achieve a full breakthrough that would permit the prosecution of crimes of aggression *immediately*. Due to delay mechanisms built into the jurisdictional conditions, the exercise of the Court's jurisdiction will only be possible in 2017 at the earliest.[22]

Even after the delay, it is unlikely that *all* crimes of aggression can be reached in the near future. Just as in the case of the other three core crimes, the trigger mechanism of Security Council referrals under article 13(b) of the Statute will be affected by the procedural rules of that institution. The trigger mechanisms of State referrals under article 13(a) and *proprio motu* initiations by the Prosecutor under article 13(c) [*proprio motu*] have become more dependent on State consent and will thus suffer more strongly from the absence of universal jurisdiction under the Statute than in the case of the other three core crimes[23].

Altogether, the Kampala solution, as detailed below, is startling as much in its courage and progressivity as in its conservatism and constraint. Calling the crime loudly and clearly by its name and delineating the jurisdictional steps for its prosecution, the Review Conference has instantly increased deterrence against aggression. The complex choreography for these jurisdictional steps sends at the same time a potent signal that the effort to conquer this crime will require immediate further attention and an ongoing commitment into the future.

II. The preparatory groundwork

The break-through in Kampala did not happen out of the blue but was facilitated by extensive prior analysis and debate. Discussions on the definition and the jurisdictional conditions began before[24] and during the Rome Conference, continued in the Preparatory Commission for the International Criminal Court[25], and moved further forward in the Special Working Group on the Crime of Aggression [SWGCA] set up by the Assembly of States Parties[26]. In February 2009, the SWGCA concluded its work and submitted its report[27], including proposals on the crime of aggression[28], to the Assembly for consideration

[22] See below part III.2.a.
[23] See below part III.2.d.
[24] The pre-Rome discussions were held in the course of the six sessions of the Preparatory Committee on the Establishment of an International Criminal Court, with numerous States submitting proposals.
[25] Resolution F, adopted at the Rome Conference, provided the mandate for the Preparatory Commission to prepare proposals for a provision on aggression. New State proposals began being submitted in the July/August 1999 session. A Working Group on the Crime of Aggression was set up in the November/December 1999 session. It worked on the topic through all the remaining sessions of the Preparatory Commission, until the Statute entered into force. Silvia Fernandez de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court,* 25 Fordham ILJ (2001-2002) 589.
[26] Resolution ICC-ASP/1/Res.1. The SWGCA was open to all States "on an equal footing", no matter if they were Parties to the Statute or not. It met during the second, third, fourth, fifth, sixth and seventh Assembly sessions, including various resumed sessions. For its informal inter-sessional meetings at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, in 2004, 2005, 2006 and 2007, see in particular PRINCETON PROCESS, *supra* n. 10. A conference on international criminal justice hosted by Italy in 2007 in Turin contributed to the examination of the crime of aggression.
[27] Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/SWGCA/2, 20 February 2009 [2009 SWGCA Report], see also in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009, ICC-ASP/7/20/Add.1, chapter II, annex II*
[28] Proposals for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression, in 2009 SWGCA Report, id., Annex I; also in *Official Records, id., appendix I* [SWGCA Proposals]. Liechtenstein submitted the proposals subsequently as an amendment proposal to the Secretary General of the United Nations, in accordance with articles 123 paragraph 1, 121 paragraph 1 of the Statute, United Nations depositary notification C.N.727.2009.TREATIES-7, dated 29 October 2009. See also International Criminal Court, Assembly of States

at the Review Conference. Preparatory discussions for the Review Conference continued at an informal intersessional meeting in New York in June 2009[29] and at the eighth session of the Assembly of States Parties[30], especially at the second resumption in March 2010[31].

What had been already fairly clear in 1998 was the unique constellation of *Being* and *Doing* characteristic for the commission of the crime: States pursued a definition of the crime that would require commission by a person *being* in a leadership position. The definition would also require, in some form, a criminal *doing* that helped to bring about an *act of aggression,* i.e. an act constituting an international wrong under public international law.

These two elements needed to be clarified not only as a matter of definition, they greatly influenced the discussions on the jurisdictional conditions.

The definition and the jurisdictional conditions had to be consistent with the relevant provisions of the Charter of the United Nations concerning the State act[32]. They had to be consistent as well with the basic principles of international criminal law, namely the principle of legality, due process, the independence of the Court and justice and equality. These two sets of prerequisites exist for the other three core crimes too, but the law of the Charter of the United Nations relevant to the act of aggression is particularly pronounced. Under article 24 of the Charter, the United Nations Security Council carries the primary responsibility for the maintenance of international peace and security. Under article 39 of Chapter VII of the Charter, the Security Council has the authority to determine the existence of acts of aggression and to recommend or decide what measures shall be taken to maintain or restore peace and security. The negotiators on the individual crime of aggression had to keep similarly in mind the authority of the International Court of Justice and the United Nations General Assembly with regard to determinations of acts of aggression. Moreover, a fair number of States harbored concerns about politicized prosecutions. Such concerns appeared to be magnified due to the leadership requirement in the definition and due to factual and legal grey zones in the verification and evaluation of acts of aggression. In addition, it was necessary to examine whether the existing provisions in the Statute required modifications specific to the crime of aggression and which rules applied to the entry into force of the new provisions on the crime. Last but not least, the negotiators had to keep an eye on public international law in general.

This is not the space to describe the many difficulties that were already overcome before Kampala. It must suffice here to point out that the definition included in the SWGCA Proposals[33] had found broad

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Parties, Eighth session, The Hague, 18-26 November 2009, Report of the Bureau on the Review Conference, Addendum, ICC-ASP/8/43/Add.1, Annex II, Liechtenstein: Proposal of amendment.

[29] Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 19 June 2009, ICC-ASP/8/INF.2 [2009 Intersessional Report]. The June 2009 meeting had been preceded by an experts meeting hosted by Switzerland in Montreux. The experts meeting examined a proposal for the Elements on the crime of aggression that had been informally distributed by Australia and Samoa towards the end of the SWGCA. The June 2009 meeting brought preliminary agreement on Draft Elements, id. Annex I. See also *Roger S. Clark, Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It, EJIL (2009), Vol.20 No.4, 1103, 1104 n.4, 1111- 1113.* The Elements of Crimes are an instrument assisting the Court with the interpretation of the definition of the crimes under the Statute, article 9 of the Statute. (For the outcome of the Montreux meeting, see the 2009 Inter-sessional Report at Annex II, Appendix I) On the Elements of Crimes in general, see THE INTERNATIONAL CRIMINAL COURT – ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, ROY S. LEE ed. (2001)

[30] At the eighth session, it was decided to forward the Draft Elements to the Review Conference together with the amendment proposal, Resolution ICC-ASP/8/Res.6, Annex II, Appendix.

[31] Report of the Working Group on the Review Conference, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eight session (resumption), New York, 22-25 March 2010,* ICC-ASP/8/20/Add.1, Annex II [March 2010 Report]. For a collection of the proposals on the crime of aggression, submitted by the Chair and including a draft enabling resolution, the draft amendments to the Rome Statute and to the Elements, as well as the draft understandings, see Conference Room Paper on the Crime of Aggression, RC/WGCA/1 of 25 May 2010

[32] This was a specific requirement under Article 5 paragraph 2 of the Statute, but it also flows in general from article 103 of the Charter of the United Nations.

[33] *Supra* n.28, article 8 *bis,* in conjunction with article 25 paragraph 3 *bis*

support. With regard to the jurisdictional conditions, States concurred that all three trigger mechanisms under the Statute should be available, in some form, for the crime of aggression[34]. There was also basic agreement that prior determinations of an act of aggression by organs other than the Court would not be prejudicial for the Court's own findings[35], no matter if such prior determinations would ultimately play a role in the jurisdictional conditions or not. States recognized in this respect that the Statute could not take away the authority of other organs to make determinations of an act of aggression yet due process and the rights of the accused to be heard had to be strictly safeguarded.

But two tough issues remained.[36]

First, should the Prosecutor only be able to proceed after a determination of an act of aggression by the Security Council? Under the SWGCA Proposals, that question continued to be posed for all three trigger mechanisms. The Permanent Members of the Security Council had insisted on such a condition throughout the negotiations. They argued in particular that a prior determination by the Council was indispensable for the proper functioning of the international security system[37]. The prior determination by the Security Council was also seen as an effective means to protect the Prosecutor against political pressure. The only alternative jurisdictional option receiving intermittently an affirmative nod by Permanent Members was the requirement of a 'mere' green light by the Security Council, a resolution adopted under Chapter VII of the Charter of the United Nations and requesting that the Prosecutor proceed with the investigation in respect of a crime of aggression.

The vast majority of States disagreed with an absolute requirement of a prior determination by the Security Council. All three trigger mechanisms would be affected by the inequality arising from the veto power of the Permanent Members. The historical reluctance of the Council to make any determinations of acts of aggression would not bode well for the effectiveness of the Court either. As alternatives to a jurisdictional dependency on the Security Council, States pondered requirements of either an authorization by the Pre-Trial Chamber or a prior determination by the International Court of Justice or by the United Nations General Assembly[38]. While some of the States shared the concerns about politicized prosecutions, others argued against any additional filter mechanism.

Second, lack of clarity about the applicable rules for the entry into force of the provisions had crystallized into a stark question: Should the exercise of jurisdiction be dependent, in some form, on the consent of the aggressor State?

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[34] *Id.*, article 15 *bis* paragraph 1

[35] *Id.*, article 15 *bis* paragraph 5

[36] It is impossible in these few pages to give a full picture of the arguments and considerations that made these issues so vexing. If short summaries are offered here nevertheless, it is because an evaluation of the outcome of Kampala will be less fruitful without background about the starting point. For more detail see in particular PRINCETON PROCESS, *supra* n.10

[37] In the first years of the negotiations, especially during the Preparatory Commission, legal arguments based on the Charter of the United Nations were maybe most dominant, with claims of 'exclusive' Security Council authority to make determinations of acts of aggression under article 39 competing with claims of 'primary' Security Council authority under article 24, or even with claims of no authority whatsoever in the context of the International Criminal Court. During the SWGCA such arguments of legal interpretation faded into the background. The case for 'primary but not exclusive' authority was ultimately considered stronger, including by at least one of the Permanent Members. Plus, the general agreement on the non-prejudiciality of determinations by organs outside the Court, including by the Security Council, did not fit well with the exclusivity claim. Thus, arguments regarding a prior determination by the Security Council that were based on legal principle, legal policy and on political considerations moved into the foreground.

[38] The SWGCA considered also an informal written proposal by Belgium for a 'red light' by the Security Council. The last version is contained in a Non-paper submitted by Belgium on 4 February 2009. On the table was as well a proposal including the idea of a prior determination by the Security Council of a breach of the peace, Proposal on the Crime of Aggression, by Professor David Scheffer, Northwestern University School of Law, Chicago, Illinois, 23 May 2007. For the debate in the latter regard, see e.g. the Report of the CICC Team on Aggression on the June 2007 Princeton meeting, 9 f., 13, 25-27, available at www.coalitionfortheicc.org/documents/CICC_Princeton_Team_Report_2007.pdf

Under discussion was in particular if either paragraph 4 or paragraph 5 of article 121 of the Statute should be applicable and how the latter should be interpreted. Other possibilities put forward were a pure or partial application of article 121 paragraph 3 and two types of combinations of paragraph 4 and 5. In addition the SWGCA considered proposals to amend the amendment rules or to fill gaps and resolve ambiguities by new provisions and understandings that could be part of or connected to the jurisdictional condition.

Article 5 paragraph 2 of the Statute states that "[t]he Court shall exercise its jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 …"

Article 121 paragraph 3 requires for adoption either consensus or a two-thirds majority of the States Parties.

Under paragraph 4 of article 121, an amendment enters into force for all States Parties one year after instruments of ratification or acceptance have been deposited by seven-eighth of them. Under paragraph 6 of article 121, a State Party which has not accepted the amendment may withdraw from the Statute. In other words, entry into force, possibly far in the future, happens for all States Parties at once, without the opportunity for an opt-out. Significantly, paragraph 4 of article 121 applies "except as provided in paragraph 5".

Paragraph 5 of article 121 provides that an amendment to articles 5, 6, 7 and 8 enters into force only "for those States Parties which have accepted the amendment, one year after the deposit of their instruments of ratification or acceptance." In its second sentence, paragraph 5 continues: "In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory." In short, the exercise of jurisdiction may start early, but the Court's exercise of jurisdiction is curtailed in the case of a crime committed by the nationals or on the territory of a non-accepting State Party. The effect of the non-acceptance of an *amendment* stands in apparent contrast with the effect of the non-acceptance of the *Statute* under article 12. Under article 12, non-acceptance of the Statute does not prevent the exercise of jurisdiction in the case of a crime committed by the nationals of a non-accepting State if the State of the relevant territory has accepted the Statute and vice versa.

Those who thought that article 121 paragraph 5 applied, argued mainly that the paragraph was intended for amendments to the substantive provisions under article 5, 6, 7 and 8, specifically for modifications of the existing definitions as well as for new definitions. The proponents for paragraph 5 considered that the definition on the crime of aggression was clearly a substantive provision in that vein. The choice of the placement for the definition, i.e. in a new article 8 *bis*, was beside the point and a matter of technical choice. Moreover, the new provisions would require the deletion of article 5 paragraph 2. The other new provisions, notably on the jurisdictional conditions and the general principles, were closely linked in one amendment package and had to be treated the same way as the definition.

Those who argued that the provisions should enter into force under article 121 paragraph 4 used on one hand the formal argument that the new provisions did not, or not only, constitute amendments to articles 5, 6, 7, and 8. The new definition would not be added into these articles. The application of article 121 paragraph 5 would not make much sense with regard to the deletion of article 5 paragraph 2. The latter provision could practically be left alone, since it would become quite obviously outdated. Its deletion was merely a technical clean-up. Importantly, article 121 paragraph 5 was not meant for jurisdictional conditions or general principles. Moreover, it had been primarily intended for the addition of new crimes and the crime of aggression was *already included* in the Statute. According to article 12 paragraph 1, States Parties had *already accepted* the Court's jurisdiction.

A few voices pointed to the wording in article 5 paragraph 2 and argued that neither article 121 paragraph 4 nor article 121 paragraph 5 were needed. Only *adoption* under article 121 paragraph 3 was required for the *exercise of jurisdiction*. Consequently, the provisions would also have to *enter into force with adoption*. (The reference to article 121 in article 5 paragraph 2 did not and could not require the application of all its paragraphs.) After initial dismissal, that argumentation was later picked up and

gathered strength for *exercises of jurisdiction* based on Security Council referrals, albeit with little attention to the requirement and implication of *entry into force*.

To overcome the repetitive debate about article 121 paragraphs 4 and 5, Nigeria submitted to the SWGCA, at the seventh session of the Assembly (November 2008) a short proposal[39] that would provide for the application of both paragraphs. The proposal was expanded with comments and resubmitted[40] at the second resumption of the seventh session (February 2009). Under the proposal, the amendment would initially enter into force in line with paragraph 5. But once the seven-eighth minimum of acceptances for paragraph 4 was reached, the amendment would enter into force for all. [41] The proposal was especially supported by Ghana. While States differed on substance, the proposal was welcome in its intent to find a way out of the deadlock.

Many further suggestions were made in the course of the November 2008 and February 2009 meetings of the SWGCA, including the possibility of opt-outs after entry into force under paragraph 4 and various formulas for delays, such as two years in the wake of adoption under article 121 paragraph 3 or a certain minimum number of ratifications for entry into force under article 121 paragraph 5[42].

The difficulty to decide which of the paragraphs of article 121 are applicable was largely due to the half-in/half-out position of the crime of aggression under the Statute: The crime was already under the Court's jurisdiction and States Parties had accepted that jurisdiction, but the definition and the conditions for the exercise of jurisdiction were still missing.

At the same time, the debate in the SWGCA was fueled by the ambiguities in article 121:
The second sentence of article 121paragraph 5 appears to block only the exercise of jurisdiction in cases involving a non-accepting State Party and not in the case of a Non-State Party. A strong view developed fairly quickly that a differentiation between non-accepting States Parties and Non-Party States should be avoided. But the thrust towards non-differentiation was pursued with opposite goals. For some States, the goal was to extend the blockade of the second sentence to Non-States Parties, for other States the goal was to extend the reach of the Court in cases involving non-accepting States Parties.

Under the prevailing opinion in the SWGCA, the second sentence of article 121 paragraph 5 is only applicable in the case of State referrals and *proprio motu*[43]. But with regard to those trigger mechanisms, most States felt that a literal interpretation could too easily entail a complete blockade of the exercise of jurisdiction. Consequently, the Special Working Group embarked on a discussion of common understandings that could be less drastic. There was strong support to permit exercise of jurisdiction if an aggressor State Party has accepted the amendment even if the victim State Party has not[44]. For some, this interpretation of the second sentence was particularly feasible because much of the criminal conduct takes place on the territory of the State of the accused leader. The aggressor State is insofar both the relevant

[39] Non-Paper Submitted by Nigeria on the Draft Resolution of 19 November 2008
[40] Revised Non-Paper Resubmitted by Nigeria of 9 February 2009
[41] A different type of combination was suggested in a Non-paper submitted by the Republic of Poland of 21 January 2009.
[42] Non-paper on other substantive issues on aggression to be addressed by the Review Conference, 2009 SWGCA Report, supra n.27, Annex II [Other 2009 Issues] Sec. II
[43] Non-acceptance of the Statute is considered irrelevant for Security Council referrals. Thus it is argued that non-acceptance of an amendment should be likewise irrelevant. Moreover the second sentence of article 121 paragraph 5 uses the terminology of article 12, which applies only to State referrals and *proprio motu* initiations by the Prosecutor. The Chairman of the post-SWGCA negotiations has explicitly noted that Security Council referrals with regard to the crime of aggression are possible irrespective of the consent of the State concerned, Non-paper by the Chairman on outstanding issues regarding the conditions for the exercise of jurisdiction, in 2009 Intersessional Report, *supra* n.29, Annex III, Sec. II para.4. The authority of the Security Council, leaving aside the question of its extent, arises from the Charter of the United Nations and thus from State acceptance of that instrument. See also below part III.2.c.
[44] With regard to the initial proposal for a common understanding, Other 2009 Issues, *supra* n.42, Sec. III para.10

State of nationality and the relevant territorial State[45]. Opinions were more divided with regard to cases where the victim State Party has accepted but the aggressor State Party has not[46].

Neither paragraph 4 nor paragraph 5 of article 121 is explicit about entry into force *as such*, i.e. entry into force sufficient for Security Council referrals[47]. State acceptance is generally considered to be irrelevant for this trigger mechanism but the Court would require for its examination a definition and jurisdictional conditions that are in force. Entry into force *as such* matters also for the incorporation of the new provisions into the Statute and their automatic application to States ratifying the Statute. In the case of paragraph 5, it was strongly argued that Security Council referrals would be possible with the first ratification. As pointed out above, article 5 paragraph 2 could be cited to argue for entry into force *as such* with adoption under article 121 paragraph 3.[48]

At the inter-sessional meeting in June 2009, the Chairman cut through the grease surrounding State referrals and *proprio motu* and started to ask directly if the exercise of jurisdiction should be dependent on acceptance by the aggressor State. He also asked specifically if such an acceptance requirement could serve as a safeguard against politicized prosecutions.

Originally, the acceptance requirement was seen primarily as a means to move the Permanent Members of the Security Council away from their insistence on a prior determination by the Council. But over time, more and more States appeared to value the acceptance requirement for their own independent reasons, either as a means of State control or for more basic considerations about treaty law and sovereign independence and equality. Unfortunately, in terms of a filter mechanism, an acceptance requirement can be as much a double-edged sword as a Security Council determination requirement. While both requirements could prevent politicized prosecutions, both could also lead to politicized failures of prosecution. Besides, it is painfully obvious that requirements of acceptance by the aggressor State severely undermine the objective of deterrence, with the degree of the weakening effect depending on legal detail such as the required time of acceptance and the ease of the withdrawal of acceptance. Moreover, acceptance requirements for the exercise of jurisdiction over individual leaders do not harmonize well with the fundamental nature of the prohibition of aggression under the Charter of the United Nations.[49]

At the second resumption of the eighth session of the Assembly in March 2010, the Chairman aligned the two remaining issues, i.e. the Security Council filter mechanism and the acceptance issue with two procedural steps[50]. Step 1 concerned the initiation of investigations. Step 2 concerned the moment where the Prosecutor concludes that there is a reasonable cause to proceed with the investigation. With regard to Step 1 he asked about the need for acceptance by the aggressor State, with regard to Step 2 about the need of a Security Council filter. Again, he pointed out that the questions concerned only State referrals

[45] Simultaneously, the criminal conduct on the territory of the victim State, and the resulting concurrent jurisdiction must be kept in mind. Here a common understanding was proposed that the notion of conduct encompasses also its consequences, i.e. the actual act of aggression in the victim State, brought about by the perpetrator. Other 2009 Issues, *supra* n.42, Sec.IV. Practically everyone agreed to such an understanding, but not all felt that it was necessary to include it, in light of established international law. In general, States appeared to assume that the crime took place both in the aggressor State and in the victim State. See also 2009 SWGCA Report, *supra* n.27, para. 38 and 39

[46] With regard to the initial proposals for a positive or a negative understanding, Other 2009 Issues, *supra* n.42, Sec. III para.11

[47] Compare the entry into force of the Statute *as such* under article 126 paragraph 1 of the Statute and the entry into force of the Statute for the individual State under article 126 paragraph 2.

[48] In his Non-paper for the second resumption of the eighth session of the Assembly, the Chairman of the negotiations on the crime of aggression merely noted the conditions as to acceptances and ratifications of the Statute under article 12 and continued: "No such restriction applies to Security Council referrals, as they are based on Chapter VII of the United Nations Charter." Non-paper by the Chairman on outstanding issues regarding the conditions for the exercise of jurisdiction, in March 2010 Report, *supra* n.31, Appendix I para.5. At the least, the Court must nevertheless have before it a definition of the crime of aggression that has entered into force.

[49] See also below part IV.

[50] March 2010 Report, *supra* n. 31, Appendix I

and *proprio motu*. The sequential approach in two steps underlined one specific difference between the filter mechanism and the acceptance requirement; the filter mechanism would kick in later, a requirement of acceptance would prevent even initial investigation.

The notion of acceptance requirements was used loosely, relating both to ratification or acceptance of the amendment under paragraphs 4 or 5, and to other approaches entailing opt-ins or opt-outs. Moreover, the questions referred to States in general, rather than States Parties.

Starting to move from the preparatory digging to the planting at the Kampala Conference, the Chair produced a chart[51] with four possible combinations and asked for a roll call.

Combination 1 would essentially require an acceptance by the aggressor State and a Security Council filter.
Combination 2 would not require the acceptance but the SC filter.
Combination 3 would require the acceptance but not the SC filter.
Combination 4 would require neither the acceptance nor the SC filter.

Combination 2 and 4 required the acceptance by the victim State.[52]

The roll call applied only to States Parties. The Chairman underlined that it was just indicative and merely "a baseline to recognize where gravity shifts." Some States felt boxed in by the boxes of the chart. Not all States participated. Many States indicated their willingness to consider other combinations and further options. Combination 1 was chosen by roughly nine States, with nearly all of them expressing a strong openness to combination 3 or vacillating between 1 and 3. Even one of the two Permanent Members of the Security Council added that the preference for combination 1 was not written in stone. At the same time, the number of States Parties speaking for Combination 1, even if in some cases only reluctantly, confirmed that the acceptance requirement was no longer just a means to move the Permanent Members away from the requirement of a prior Security Council determination.

Only two States opted for combination 2, with both expressing their flexibility.

The vast majority, over fifty States, opted for either combination 3 or 4, more for the latter. The African States Parties were among those endorsing combination 4. Importantly, supporters for combinations 3 and 4 included both those States Parties that preferred no external filter at all and those that preferred a filter other than a Security Council filter. With respect to the latter choice, the Chart boxes referred to the external filters of the International Court of Justice and the United Nations General Assembly. In a footnote to combination 3 one of the Chart versions mentioned the possibility to use the Pre-trial Chamber of the International Criminal Court as an *internal* filter. Many States spoke specifically of their preference for a judicial over a political filter, with most of them advocating a court-internal judicial filter.

At the beginning of the Kampala Conference, Kenya speaking on behalf of the African States Parties stated: "During the Resumed 8th Session of the ASP the overwhelming majority of states parties expressed their support for combinations three and four. We are convinced that the adherents of these two combinations can work towards a consensus position."[53]

III. The adopted Resolution

[51] *Id*., Attachment.
[52] The requirement of acceptance by the victim State was treated as less of an issue since it was assumed that the victim State would either apply national jurisdiction or readily agree to the exercise of jurisdiction by the International Criminal Court. The latter assumptions may be too easy, especially if the victim State extends its jurisdiction with regard to the crime of aggression only to nationals or insofar as post-crime acceptance may not be possible, either under the jurisdictional conditions or because the aggressor State is victorious.
[53] *Supra* n. 3

In its Resolution on the Crime of Aggression the Review Conference decided to adopt[54] the Amendments to the Rome Statute[55] consisting of a deletion of article 5 paragraph 2, the definition of the crime in a new article 8 *bis*, the jurisdictional conditions in new articles 15 *bis* and 15 *ter*, an addition to the general principles in a new paragraph 3 *bis* of article 25, and technical changes to article 9 paragraph 1 and article 20 paragraph 3.

The Review Conference decided as well to adopt[56] Amendments to the Elements of Crimes[57] and Understandings regarding the interpretation of the amendments to the Statute[58].

It further decided to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction[59]. It is not completely clear if the count of seven years starts after the first actual exercise of jurisdiction in a particular case or after the exercise of jurisdiction becomes possible. The latter makes more sense, in case the actual exercise of jurisdiction never comes about or is hampered due to faults in the provisions.

The Review Conference also called upon all States Parties to ratify or accept the amendments to the Statute and expressed its resolve to activate the Court's jurisdiction over the crime of aggression as early as possible.

III.1. The Definition

The Review Conference did not reopen the definition[60] but adopted it as proposed by the SWGCA. Only the main features are quickly recapitulated here:

Under article 8 *bis* paragraph 1 the perpetrator must be "in a position effectively to exercise control over or to direct the political or military action of a State" and must have planned, prepared, initiated or executed an act of aggression "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

[54] Resolution, *supra* n.2, operative paragraph 1.
[55] Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution, *supra* n.2, Annex I
[56] Resolution, *supra* n.2, operative paragraphs 2 and 3
[57] Amendments to the Elements of Crimes, Resolution, *supra* n.2, Annex II
[58] Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution, *supra* n.2, Annex III
[59] Resolution, *supra* n.2, operative paragraph 4. For an earlier proposal to include a review clause see Non-Paper by the Chair, Further elements for a solution on the Crime of Aggression, RC/WGCA/2 of 25 May 2010 [Non-Paper May 2010]
[60] The United States, a Non-State Party, argued initially for the reopening of the definition but no State Party was willing to go along. The protectiveness of States Parties towards the amendment proposal for the definition was actually one of the early indicators of the determination to achieve adoption.
Partly, the initial stance of the United States could be explained by the country's absence from the negotiations since the middle of the Preparatory Commission. While the official reports of the SWGCA were exceptionally useful to 'catch up' on the stand of the negotiations, they could not capture every detail and nuance or convey the sense of political feasibility that builds over years. Similarly, oral and written consultations in the weeks before the Kampala Conference may not have sufficiently conveyed the strength of the drive towards adoption. Acknowledging the handicap of absence, the United States adapted its approach midway into the conference, moved away from outright rejection and submitted instead a proposal for additional Understandings for the *interpretation* of the amendments (on file with author). These suggested Understandings were mainly focused on the definition and on questions of national jurisdiction. The change in the approach of the United States was perceived as constructive. Two of the suggested Understandings were further developed in talks facilitated by Germany and included in the Understandings adopted by the Review Conference. See Understandings 6 and 7, supra n.58. Two other Understandings suggested by the United States built on related versions that had already been included in Non-paper May 2010, *supra* n.59. The Understandings adopted in this regard by the Review Conference resemble more closely those in the Non-paper May 2010, albeit with further changes. See Understandings 4 and 5, *supra* n.58. For Understandings 4 and 5 see also, respectively, *infra* n.114 and main text connected to n.120-124.

Paragraph 1 must be read together with the General Principles of the Statute, notably the rules on the mental requirements of knowledge and intent, and the rules on criminal participation. The Elements with regard to the crime of aggression[61] should be considered as well, including with regard to the mental requirements[62]. The new article 25 paragraph 3 *bis* adopted in Kampala assures that criminal liability under article 25, including for 'secondary' participation, arises only for a person in a leadership position. A footnote in the Elements clarifies that more than one person may be in a leadership position.[63]

The act of aggression referred to in paragraph 1 is defined in article 8 *bis* paragraph 2 and is built on article 2 paragraph 4 of the Charter of the United Nations and General Assembly Resolution 3314[64]. The definition of the act combines a generic formula in its first sentence with a specific list of acts in the second sentence.

Under the generic formula of the first sentence of paragraph 2, the act of aggression essentially means the use of armed force by a State against another State in a manner inconsistent with the Charter of the United Nations. The specific list of seven acts ranges from invasion to the sending of mercenaries.

Like the definitions of the other three crimes, the definition as a whole applies "[f]or the purpose of this Statute"[65].

Importantly, the Statute demands strict construction and prohibits extension by analogy (article 22 paragraph 2). This demand of the Statute, flowing from the principle of legality, applies to all elements of the definition, including the definition of the State act.

The so-called 'threshold' clause in paragraph 1 requiring a "manifest violation" of the Charter of the United Nations is intended to assure that individual criminal responsibility does not arise in factual or legal 'grey zones'. In other words, it is not sufficient that a particular use of force *can* be called aggression, as a mere matter of debate. The violation of the Charter must be manifest, and it must be manifest with regard to "character, gravity and scale". The threshold serves to *exclude* indeterminate cases, both with regard to the seriousness of the facts, e.g. in low-level skirmishes[66], and where the law may be unclear in light of good faith argumentation. In this context, article 21 of the Statute should be kept in mind. According to article 21 of the Statute, the Court shall apply the rules and principles of international law. Under article 31 paragraph 3, the Court may consider grounds for excluding criminal responsibility derived from international law[67]. Under article 66 paragraph 3, the Court must be convinced of the guilt of the accused beyond a reasonable doubt. The threshold, focusing on the act of aggression, assures in effect that the benefit of reasonable doubt goes to the accused person also with regard to this State-related definitional element[68]. But frivolous and manipulative argumentation would not be sufficient to put the manifest nature

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[61] *Supra* n. 57

[62] Relevant in this regard are not only Elements 4 and 6 for the crime of aggression but the related introductory paragraphs 2-4. It is here also essential to keep in mind the General Introduction of the Elements of Crimes.

[63] Article 25 paragraph 3 of the Statute covers joint conduct, i.e. joint '*doing*'. The clarification in the Elements was considered advisable because it may not be sufficiently clear if article 25 paragraph 3 covers also joint '*being*' in a leadership position.

[64] General Assembly Resolution 3314 (XXIX)– Definition of Aggression, UN GAOR, 29th Sess., Supp. No.31, at 142, UN Doc. A/9631 (1974). The definition is contained in the annex to the resolution.

[65] The definition of the State act is expressly devised "[f]or the purpose of paragraph 1" and thus also set out for the purpose of the Statute. In accordance with article 10 of the Statute, the provisions on the crime of aggression may not "be interpreted as limiting or prejudicing existing or developing rules of international law for purposes other than this Statute."

[66] Insofar as Understanding 6 (seriousness of the use of force), *supra* n.58, shifts the consideration of gravity out of the threshold and into the definition of the act of aggression, the threshold could remain nevertheless relevant in its emphasis on the degree of clarity with regard to both the required and actual gravity of the use of force.

[67] The Rules of Procedure and Evidence in this regard may have to be expanded, notably to facilitate the Court's consideration. See currently Rule 80, as well as article 82 paragraph 1(d) of the Statute. See also Roger S. Clark, *supra* n.29, at 1110.

[68] This does not necessarily mean that State responsibility under international law would be excluded as well. The victim State may very well be successful against the aggressor State before the International Court of Justice even where the International Criminal Court fails to establish the threshold and thus fails to convict individual leaders. In the course of the debate in the SWGCA, the delegate of the United Kingdom had pointed for comparison to the different standards of proof in civil and criminal litigation at the national level.- Similarly, the International Criminal Court may

of a violation into doubt. The introductory paragraph 3 of the Elements with regard to the crime of aggression[69] clarifies that the term "manifest" is an objective qualification. Significantly too, there is no requirement to prove that the perpetrator has made a legal evaluation with regard to the manifest nature of the violation of the Charter[70] (nor with regard to the inconsistency with the Charter[71]). Instead, the Elements direct the Court to establish that the perpetrator was aware of the factual circumstances that established a manifest violation.[72] (The Elements require also awareness of the factual circumstances establishing inconsistency with the Charter.[73])

Understandings 6 and 7[74] are relevant for the interpretation of the definition:

According to Understanding 6, "aggression is the most serious and dangerous form of the illegal use of force." All circumstances have to be considered, including the gravity and the consequences of the act, in accordance with the Charter of the United Nations. The notion that not all uses of force inconsistent with the Charter may amount to aggression is to some degree reminiscent of operative paragraph 3 of General Assembly Resolution 3314[75] which indicates that not all uses of force contrary to the Charter may amount to acts of aggression.

According to Understanding 7, "the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself." It is not clear if the Understanding adds much to the wording in article 8 *bis* paragraph 1. The provision speaks in any event of "character, gravity *and* scale", rather than "character, gravity *or* scale". And the Understanding is actually not much more specific with regard to the question if *each* or *two* of the three components *individually* and *all* or *two* of the three *together* have to amount to a manifest violation. Quite the opposite, the wording of the provision itself could be argued to point more convincingly to a fully multiple requirement. To arrive at the most meaningful interpretation, it will be helpful to keep the underlying two-partite structure of the threshold in mind: In essence, the violation must be manifest with regard to both the *factual* aspects (gravity, scale) and the *legal* aspect (character) of the use of force.

As mentioned above, the term "manifest" is an objective qualification. This does not preclude a consideration of the circumstances of a particular case[76]. For example, the concept of scale cannot be used in an absolutistic fashion, it must be considered in proportion to the size of the victim State. A small State may be conquered with relative little use of force. An absolutistic requirement of scale would wrongly preclude crimes of aggression against small States, i.e. States that are possibly most in need of protection. The Court may also come to the conclusion that a multiplicity of small scale acts, wearing a victim State down or occupying it gradually, can together fulfill the scale requirement. Here conceptions of time and continuity and the tie-in of the whole of the use of force with the conduct of the perpetrator could play a role. Put differently, the factual aspects of gravity and scale may have to be weighed together.

III.2. The conditions for the exercise of jurisdiction

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be unable to establish an act of aggression due to the obligation of a strict definitional construction and the prohibition of analogy. The Security Council will not be as much reigned in.

[69] *Supra* n.57

[70] *Id.*, introductory paragraph 4

[71] *Id.*, introductory paragraph 2

[72] *Id.*, Element 6

[73] *Id.*, Element 4

[74] *Supra* n.58. Understandings 6 and 7 were developed from two of the Understandings proposed by the United States, *supra*. n. 60.

[75] *Supra* n.64

[76] The reference to circumstances in Understanding 6 indirectly includes rather than precludes their relevance for Understanding 7.

Article 15 *bis* provides the conditions for the exercise of jurisdiction in the case of State referrals under article 13(a) and in the case of *proprio motu* under article 13(c). Article 15 *ter* does so for Security Council referrals[77].

III.2.a. The delay mechanisms

The resolve of the Review Conference to activate the Court's jurisdiction over the crime of aggression as soon as possible[78] is worth keeping in mind in the context of the *delay* built into the jurisdictional conditions for all three trigger mechanisms. According to paragraph 3 of both articles 15 *bis* and 15 *ter*, the *exercise of jurisdiction* is "subject to a decision to be taken after 1 January 2017 by the same majority of State Parties as is required for the adoption of an amendment to the Statute." It is noteworthy that common paragraph 3 does not speak of a delay of the *entry into force* of the amendment but of a delay of the *exercise of jurisdiction*. The specification of the exact day, instead of only the year, signals again that the activating decision should be scheduled as early as possible after the postponement date. The wording of paragraph 3 reflects moreover that the activating decision itself is not an amendment. It only has to be adopted by the *same* majority required for an amendment, namely a majority of two thirds of the States Parties.[79] The focus on the majority requirement points to adoption by a vote. In conversations at the Kampala conference, many delegates appeared to be confident that the two-thirds majority for the activating decision could be easily reached.

The requirement of an activating decision is not the only mechanism delaying the exercise of jurisdiction. According to paragraph 2 in both article 15 *bis* and article 15 *ter* the Court can only exercise jurisdiction over crimes that are committed after a certain event, namely "one year after the ratification or acceptance of the amendments by thirty States Parties." The wording is the one typically used for jurisdiction *ratione temporis* . Understandings 1 and 3[80] clarify jurisdiction *ratione temporis* further. Understanding 1 relates to Security Council referrals and Understanding 3 to State referrals and initiations by the Prosecutor. According to both Understandings the Court may only exercise jurisdiction with regard to crimes committed after the activating decision and after the ratification or acceptance by thirty States Parties (plus one year), whichever is later. Thus, according to the Understandings, the moment of the activating decision influences not only the effective exercise of jurisdiction *as such* but also jurisdiction *ratione temporis.* And jurisdiction *ratione temporis* influences of course the actual first exercise of jurisdiction since no prosecution can be initiated before the commission of a time-relevant crime.

Interestingly, neither the jurisdictional provisions nor the Understandings make jurisdiction *ratione temporis* dependent on the ratification or acceptance of the a*mendments* by the relevant individual State(s)[81]. Arguably, the ratification or acceptance of the *Statute* may nevertheless remain relevant for jurisdiction *ratione temporis* under article 11 paragraph 2 of the Statute.

The delay takes account of the complementary nature of the Court's jurisdiction and allows States to put national legislation on the crime of aggression into place where it might not yet exist. Yet in theory, such a delay for national preparation could have been achieved simply by a requirement of thirty ratifications or x number of years[82]. The stipulation for an activating decision (no earlier than 2017)

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[77] The split of the jurisdictional conditions into articles 15 *bis* and 15 *ter* appeared first in a Non-paper submitted by Argentina, Brazil and Switzerland as of 6 June 2010, *supra* n.7. The Non-paper was quickly termed the ABS proposal. Essentially, the proposal used article 121 paragraph 5 for entry into force with regard to Security Council referrals, and article 121 paragraph 4 for entry into force with regard to the other two trigger mechanisms. Security Council referrals would be possible one year after the first ratification, the other two triggers after ratification by seven eighth of the States Parties. In the case of Security Council referrals, the option of a 'green light' was used as an alternative to a prior Security Council determination of an act of aggression. In the case of the other two triggers, an authorization by the Pre-Trial Chamber became the proposed alternative for the Security Council determination.

[78] *Supra* part III.

[79] See article 121 paragraph 3 of the Statute. Compare also article 122 paragraph 2 of the Statute.

[80] *Supra* n.58

[81] For the complete or partial irrelevance of the ratification or acceptance of the amendments with regard to the exercise of jurisdiction in general see below part III.2.c. and d.

[82] For State referrals and *proprio motu*, an earlier proposal in Kampala used a delay of "five years after the entry into force of this article for any State Party", see Declaration (Draft as of 9 June 2010 16h00) (on file with the author).

appeared only late in the Kampala negotiations, for the first time in a draft distributed around 1.00 pm on June 11: In that draft, the activating decision was merely required for article 15 *bis*, i.e. with regard to State referrals and *proprio motu*. Exercise of jurisdiction in the case of Security Council referrals would have been possible seven years after adoption "unless States Parties decide otherwise". The African Group of States Parties, as well as States Parties in GRULAC[83] and NAM[84] appeared to be disinclined towards the requirement of any type of activating decision but particularly opposed to the different treatment of the trigger mechanisms. In a draft dated "11 June 23:00", the requirement of an activating decision after 1 January 2017 was inserted for all trigger mechanisms and became part of the whole package adopted shortly after midnight.

III.2.b. Jurisdictional conditions common to Security Council referrals, State referrals and proprio motu

Once thirty ratifications and the activating decision have been achieved, all three trigger mechanisms are in principle available for the prosecution of crimes of aggression.

Most significantly, a prior determination by the Security Council of an act of aggression is not required, no matter if the Court's exercise of jurisdiction is started by a Security Council referral, a State referral or *proprio motu*[85]. In the course of the Review Conference, the Permanent Members of the Security Council had continued to argue for the requirement of such a determination, with some of them specifically stating that reciprocal State acceptance[86] was not a sufficient substitute because the International Criminal Court, in contrast to the International Court of Justice, was not concerned with dispute settlement between States. (Indirectly and possibly unintentionally, that argument spoke in some respects against acceptance requirements as such.) Since decision-making by consensus was for several reasons favored over decision-making by vote, the two States Parties among the Permanent Members could have chosen to block adoption at the Review Conference. They did not. On first sight, the political cost of opposition in the face of an overwhelming majority could serve as an explanation. But to this observer, two other reasons appeared to play a stronger role. First, in the course of the work of the SWGCA it had become quite clear that the Permanent Members themselves shared increasingly in the desire to achieve provisions on the crime of aggression. Second, non-adoption in Kampala could have strengthened the case for a vote at a future Assembly meeting, possibly already at the next session, opening again the specter of outright division among States Parties.[87] One might add that a requirement for a Security Council determination would have increased the political tension about the Council and its procedure and that the greater pressure to make determinations could have narrowed the political discretion of the Security Council and its members[88].

Both article 15 *bis* paragraph 9 and article 15 *ter* paragraph 4 provide that determinations of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings. As described earlier[89], the provision had been already agreed upon in the SWGCA. Ensuring non-prejudiciality

[83] Group of Latin American and Caribbean States
[84] Non-Aligned Movement
[85] For the latter two trigger mechanisms, a court-internal filter is used instead, see below part III.2.d.
[86] The reciprocity of State acceptance was emphasized in a proposal by Canada, dated 8 June 2010 9:30. The proposal focused especially on reciprocal acceptance of the Court-internal filter of authorization by the Pre-trial Chamber. It originated from an earlier Canadian concept for a wider 'menu approach' centered on the possibility of reciprocal choices among several filter mechanisms.
[87] The more technical nature of the activating decision in 2017, preceded by consensus in Kampala, will much more easily allow a vote. Even then, consensus could turn out to be the preferred mode of decision-making, especially if any aspirations towards changes in the provisions are channeled towards the review conference scheduled under operative paragraph 4 of the Resolution.
[88] But note that pressure on the Security Council may also arise with regard to its authority to make referrals to the Court. This could be the case in particular when State referrals and *ex proprio motu* are not available.
[89] *Supra* main text above n.35

remained important even though prior determinations by the Security Council (or by the International Court of Justice or the General Assembly) are not required. Non-requirement does not mean non-existence of such determinations: The Statute cannot eliminate the authority of other organs to make their own decisions. It is doubtful that a contrasting outcome in the International Criminal Court, - due to the inability to conclude that the statutory definition of an act of aggression has been fulfilled or that a manifest violation of the Charter occurred - , will cause problems of disharmony in international law, as long as the differences are traceable to the principles of international criminal law and procedure, notably the principle of legality and due process.

Non-prejudiciality does not mean that the International Criminal Court could not take a prior determination into account. Instead it means, importantly, that the prior determination does not reverse the Prosecutor's burden of proof[90], including with regard to the element of the State act of aggression.

III.2.c. Jurisdictional conditions specific to Security Council referrals

In accordance with article 15 *ter*, Security Council referrals will be possible under the same terms as for the other three crimes. To make a referral, the Security Council must be acting under Chapter VII of the Charter of the United Nation. (Decisions on procedural matters require an affirmative vote of nine members, article 27 paragraph 2 of the Charter. Decisions on all other matters require an affirmative vote of nine members including the concurring votes of the Permanent Members, article 27 paragraph 3 of the Charter.) In accordance with article 13(b) of the Statute, it is sufficient to refer a "situation in which one or more of [the] crimes [under the article 5 of the Statute] appears to have been committed", i.e. the crime of aggression does not have to be mentioned. The generic referral differs in this regard from the 'green light' concept. Obviously, the Security Council is free to nevertheless cite particular crimes and paragraph 2 of article 13(b) would lead quite naturally to crime-specific referrals. It is less clear however, how much weight must be given to direct or indirect exclusions of the crime of aggression. In a direct exclusion, the Security Council would expressly state that the referral does not concern the crime of aggression. In an indirect exclusion, the referral would only refer to one, two or all of the other three core crimes. The issue is not unique to the crime of aggression. It arises whenever the Security Council might want a selective concentration on less than all four crimes. This paper cannot examine this topic in detail, it can only flag the main conflicting concerns: Strict automatic inclusion of each of the four crimes may at times discourage referrals, yet restriction can lead to unjust results. Provided that restrictive referrals are possible, they should probably be used sparingly, if at all.

According to Understanding 2[91], the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral "irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard." Since States Parties have in any event accepted the jurisdiction over the crime of aggression, the Understanding may be primarily directed at situations involving Non-Parties.

III.2.d. Jurisdictional conditions specific to State referrals and proprio motu

The main jurisdictional conditions in the case of State referrals and *proprio motu* center sequentially on the two procedural steps highlighted at the resumed eighth session of the Assembly in March 2010, one, the very start of the Court's exercise of jurisdiction, namely the initiation of an investigation, and two, the moment where the Prosecutor concludes that there is a reasonable basis to proceed with the investigation in respect of a crime of aggression[92]. Paragraph 4 and 5 of article 15 *bis* concern questions of State acceptance and are already relevant at step one. Paragraph 6-8 concern the filter mechanism and are relevant at step two.

[90] Article 66 paragraphs 2, 3, article 67 paragraph 1(i) of the Statute.
[91] *Supra* n.58
[92] *Supra* n.50 and connected main text.

The filter mechanism is addressed here first: Once the Prosecutor concludes that there is a reasonable basis to proceed, he or she has to ascertain whether the Security Council has made a determination of an act of aggression. The Prosecutor must also notify the Secretary-General of the United Nations of the situation before the Court. In the case of a Security Council determination, the Prosecutor may proceed immediately. Where no determination is made within six months after notification, the Prosecutor may proceed if the Pre-Trial Division has authorized the commencement of the investigation and provided that the Security Council has not decided otherwise in accordance with article 16 under the Statute. It should be noted that the Pre-Trial *Division*, and not just a Pre-Trial *Chamber* will have to provide the authorization. The Division is composed of "no less" than six judges[93].

The express reference to article 16 and the Security Council's power to suspend proceeding before the Court for a renewable period of one year serves as a reminder of the discussions in the SWGCA about a 'red light' proposal[94]. Under that proposal, Court proceedings would have come to a halt in the wake of a Security Council resolution indicating that it would *not* be justified to conclude that an act of aggression was committed. At the time of those discussions, a number of States argued that a 'red light' rule was not necessary because the Security Council could resort to article 16[95]. In other words, it was assumed that article 16 could be used not only for political reasons, for example to create space for peace negotiations, but also for factual/legal reasons that spoke against the commission of an act of aggression. Without going here further into questions of interpretation about article 16, it should be pointed out that express 'no-aggression' determinations or indications by any organ of the United Nations, even without a suspension under article 16, would make it exceedingly difficult for the Prosecutor or the Pre-Trial Division to assume that there is a reasonable basis to proceed, especially in light of the requirement of a "manifest violation" of the Charter of the United Nations. A reasonable basis to proceed would probably only exist if the prior 'no-aggression' determination or indication has overlooked important evidence or if new evidence has become available.

Before the Prosecutor can come to the conclusion that a reasonable basis to proceed exists and before he or she can even start initial investigations, certain State acceptances must be in place for the Court's exercise of jurisdiction:

Article 15 *bis* paragraph 4 provides:

"The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years."

Article 15 *bis* paragraph 5 provides:

[93] Article 39 paragraph 1 of the Statute. In the future, the Assembly and the Court may have to further consider rules of procedure and regulations with regard to the functioning of the Division as a whole. The idea to use a court-internal filter can be traced to a proposal by Belgium in the SWGCA. The proposal entailed authorization by a Pre-Trial Chamber composed of all judges of the Pre-Trial Division, Proposal presented by Belgium on the question of jurisdiction of the Court with respect to the crime of aggression, ICC-ASP/5/SWGCA/WP.1, 29 January 2007, and Informal proposal revising the proposal presented by Belgium at the Resumed Fifth Session of the Assembly of States Parties ICC-ASP/5/SWGCA/WP.1, 30 May 2007.

[94] Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/SWGCA/1*, 26 November 2008, para.21-23;

[95] The 'red light', in contrast to suspension under article 16, entailed a definite stop of the Court's proceedings, except if the Security Council would come to a new conclusion and make a determination of an act of aggression. *Id.* fn.5

"In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory."

Under paragraph 4, the Court's exercise of jurisdiction is in principle possible when the relevant act of aggression is committed by a State that is a Party to the Statute. The question arises[96] if the ratification or acceptance of the amendments is at all necessary for the exercise of jurisdiction. This question will be addressed further below. Looking first at the more obvious details of paragraph 4 it should be noted that the exercise of jurisdiction is only blocked in the case of an opt-out declaration by the *aggressor* State Party. An opt-out by the *victim* State Party is irrelevant in this regard[97]. - The placement of "previously" is grammatically somewhat ambiguous: Does the declaration have to be made before the commission of the act of aggression or before the exercise of jurisdiction? The former seems to be the more likely interpretation. Even without "previously", an opt-out would probably be only permitted before and not during the exercise of jurisdiction. Thus, the insertion of "previously" appears to have been directed at the earlier point in time, before the act of aggression. A State Party is required to "consider" the withdrawal of its opt-out declaration within three years. This sentence may mean that the State Party has to only *consider* the issue within that time frame, - without an obligation towards withdrawal. Or, the emphasis is on the time frame of three years within which the withdrawal *has to be* achieved.[98]

The relative informality with which the declaration of an opt-out can be made is unfortunate. Such ease was previously reserved for declarations moving in the opposite direction, namely ad hoc acceptances under article 12 paragraph 3 of the Statute. Unfortunately too, the opportunity for making opt-outs is not limited by a sunset clause. Instead, the review of the amendments scheduled under operative paragraph 4 of the Resolution may be an opportunity to consider the abandonment or restriction of the clause on opt-outs[99].

Under paragraph 5 of article 15 *bis*, the Court shall not exercise jurisdiction over the crime of aggression when committed by nationals of a Non-Party State or on the territory of a Non-Party State. On first reading, this would completely preclude the Court's exercise of jurisdiction if either the aggressor State or the victim State is a Non-Party State, - except in the case of a Security Council referral. But further consideration may permit a less strict conclusion:

Assuming a constellation where the aggressor State is a Party to the Statute and the victim State is not, exercise of jurisdiction may very well be permissible, keeping in mind that the crime is also committed on the territory of the aggressor State Party, and provided that the perpetrator is a national of the aggressor State Party. As has been mentioned earlier, the criminal conduct (including the consequences of the conduct) occurs both on the territory of the aggressor State and the territory of the victim State.

The effects of paragraph 4 and 5 of article 15 *bis*, as assumed above, may be quickly checked through in a simplified, rudimentary list of various constellations, answering with Yes or No if the exercise of jurisdiction *might be* possible when triggered by State referral or *proprio motu*[100].

i) Aggressor State Party (no opt-out) versus Victim State Party (no opt-out): Yes*

ii) Aggressor State Party (no opt-out) versus Victim State Party (with opt-out): Yes*
(opt-out by Victim State Party irrelevant)

[96] The use of the word "arising" in paragraph 4 of article 15 *bis* is not very fortunate. It is really the State act which arises from the individual crime, not the other way around. The act is brought about by the individual crime. But the choice of "arising" underlines at the same time that the crime requires the actual commission of the act, at least under the conception of the Amendments.

[97] In at least one of the conference proposals this was still different. In Declaration (Draft of 9 June 2010 16h00)(on file with author), the opt-out was not restricted to the aggressor State Party.

[98] One of the drafts of the last two conference days (on file with author) contained an expiration date of seven years, unless the opt-out declaration is affirmed.

[99] Compare the requirement of review with regard to the opt-out under article 124 of the Statute.

[100] It should be kept in mind again that Security Council referrals are possible in all the listed constellations. The only 'hold-back' in that regard is the need for the Security Council to act under UN Chapter VII of the Charter of the United Nations. *Supra* part III.2.c.

iii) Aggressor State Party (no opt-out) versus Victim Non-State Party: Yes*
(insofar as crime (conduct) takes place on Aggressor territory)

iv) Aggressor Non-State Party versus Victim State Party (no opt-out): No'

v) Aggressor Non-State Party versus Victim State Party (with opt-out): No'

vi) Aggressor Non-State Party versus Victim Non-State Party: No

vii) Aggressor State Party (with opt-out) versus Victim State Party (no opt-out): No

viii) Aggressor State Party (with opt-out) versus Victim State Party (with opt-out): No

ix) Aggressor State Party (with opt-out) versus Victim Non-State Party: No

Concerning constellations iv) and v), the No' has been marked to note that the perpetrator might have the citizenship of the Victim State Party. On first sight such a circumstance might enable the exercise of jurisdiction even when the aggressor State is a Non-Party, but it does not because paragraph 4 requires an act of aggression by a State Party.

Concerning constellations i)-iii), the Yes* has been marked to indicate that the answer may be only partially accurate. Specifically, the list does not provide definitive answers with regard to i)-iii) because the impact of the ratification or acceptance of the a*mendments* requires further considerations. The thoughts offered in this regard below are preliminary and mainly geared to alert the reader to questions of interpretation. Further examination in the future, insight from participants in the informal-informal negotiations in Kampala, and common interpretations and additional understandings by States Parties will permit a more assertive description.

One interpretation appears to be already feasible right now: The State Party referred to under paragraph 4 does not *have* to have ratified or accepted the *amendments*. But while this paper argues that ratification or acceptance of the amendments by the aggressor State Party is not *absolutely* necessary for the Court's exercise of jurisdiction, it leaves the question open if such an absence of ratification or acceptance is *partially* irrelevant, i.e. only when the victim State Party has ratified or accepted the amendments, or *completely* irrelevant, i.e. when the victim State Party has also failed to ratify or accept the amendments. Put differently, the ratification or acceptance of the amendments may be *not at all* or *not always* necessary for the Court's exercise of jurisdiction over the crime of aggression.

The argument for the complete or partial irrelevance of the ratification of the amendments does not base itself on the mistaken claim that an opt-out after ratification or acceptance fails to make much sense. For example, an opt-out after ratification could have logic for a State Party that wants to advance the date when thirty ratifications will be reached but remains reluctant about State referrals and *proprio motu*[101].

Altogether, the conclusion that ratification or acceptance of the amendments may not be required is drawn from the interplay of several aspects of the provision and the Resolution: Operative paragraph 1 of the Resolution notes that a State Party may lodge an opt-out declaration before ratification or acceptance of the amendments. Such an opt-out (relevant with regard to the aggressor State) makes only sense if the Court can at all exercise jurisdiction otherwise,[102] i.e. before the amendments come into force for the

[101] There is another reason for opting out after ratification that would appear to be highly problematic indeed: A State Party, directed by aggressive leaders, may want to 'free its hands' before a particular use of force. Such a reason may very well indicate that the contemplated use of force amounts to an act of aggression. Especially since the State Party had already ratified the amendment, sudden fears about politicized prosecutions would appear to have become less likely reasons for an opt-out.

[102] This observation relates to the triggers addressed by article 15 *bis*. Exercise of jurisdiction remains possible in the case of Security Council referrals. Opt-outs have no relevance under article 15 *ter*.

particular State Party. Moreover, operative paragraph 1 clearly indicates that the second sentence of article 121 paragraph 5 is not applicable. If it were, an opt-out would not be necessary.

In addition, as described earlier[103], jurisdiction *ratione temporis* is independent of the ratification or acceptance of the amendments by the concerned State.

Significantly, the preamble of the Resolution expressly recalls article 12 paragraph 1. Under article 12 paragraph 1, States Parties have already accepted the Court's jurisdiction over the crime of aggression.

Paragraph 4 of article 15 *bis* refers to article 12. That reference points in two directions: Article 12 paragraph 2 requires for the exercise of jurisdiction only ratification or acceptance of the *Statute*, not of the a*mendments*. This would speak for the complete irrelevance of ratification or acceptance of the amendment for the *exercise of jurisdiction*.

At the same time, article 12 requires ratification of the Statute by at least one of the States. Thus, the reference to article 12 may also indicate that a similar *pattern* was envisioned with regard to the amendment, i.e. *that at least one of the two relevant States should have ratified the amendments*. Here too, ratification or acceptance of the amendments by the aggressor State Party would not be necessary for the exercise of jurisdiction, as long as the victim State Party had ratified or accepted the amendments. Under such an interpretation, the lack of an opt-out before ratification becomes only 'risky' for aggressors if the victim State Party has ratified the amendments. Using the article 12 *pattern* theory, the answers to constellations i)-ii) would have to be further subcategorized, with the Yes dependent on the ratification or acceptance of the amendments by at least one of the two relevant States. Under constellation iii), a possible Yes might require ratification or acceptance by the aggressor State Party.

With regard to constellations i)-iii), it is crucial to note that any requirement for ratification or acceptance of the amendments for the exercise of jurisdiction, - if such a requirement exists at all -, could be affected by the relevant moment for the effective incorporation of the amendments into the Statute. A State ratifying the *Statute* after that moment may not have to proceed to a separate ratification or acceptance of the amendments but be bound by them automatically[104].

While the early opt-out in operative paragraph 1 of the Resolution speaks for the complete or partial irrelevance of the ratification or acceptance of the amendments, as well as for the inapplicability of the second sentence of article 121 paragraph 5, it cannot be overlooked that another part of operative paragraph 1 states that the amendments are subject to ratification or acceptance and that they enter into force in accordance with article 121 paragraph 5. On first sight, this may sound contradictory.

On first sight too, there appears to be tension between the reference to article 12 and article 15 *bis* paragraph 5, and to some degree between the non-application of the second sentence of article 121 paragraph 5 and article 15 *bis* paragraph 5. After all, as mentioned earlier, Paragraph 5 of article 15 *bis* requires ratification or acceptance of the *Statute* by both the State of the accused and the State where the crime was committed. Exercise of jurisdiction is only possible if both types of States have ratified or accepted the Statute or insofar as the aggressor State Party is both the State of nationality and of territory. Here one might discern the *pattern* of the second sentence of article 121 paragraph 5.

A harmonious interpretation of the Resolution's operative paragraph 1 and of paragraphs 4 and 5 of article 15 *bis* can be achieved if one differentiates between entry into force *as such* and entry into force for a particular *State*, as well as between entry into force and *exercise of jurisdiction*. A coherent reading must also keep the tasks under article 5 paragraph 2 of the Statute in mind. States had the obligation, right and discretion to freely devise conditions for the exercise of jurisdiction, within the parameters set by the Charter of the United Nations. Article 15 *bis* concerns these jurisdictional conditions and not entry into force. With regard to entry into force, article 5 paragraph 2 requires adoption in accordance with articles 121 and 123 but does not specify which of the paragraphs should be applicable, merely paragraph 3, or 4 with 6, or 5. Moreover loopholes and ambiguities in article 121 raise many questions, yet answers had to be found. Most importantly, the crime of aggression presented a unique technical situation because it was already included under the jurisdiction of the Court. In accordance with article 12 paragraph1, States

[103] *Supra* part III.2.a.
[104] See also further below.

Parties have already accepted the Court's jurisdiction over the crime of aggression. Only the exercise of jurisdiction had remained suspended. Article 121 paragraphs 4 and 5 did not take into account the unique 'half-in/half-out' position of the crime of aggression[105], mainly because this position came about only in the last hours of the Rome Conference. A strict application of article 121 would have wiped out the achievement in Rome and hindered the integration of the outstanding provisions unreasonably.

As noted earlier[106], entry into force *as such* concentrates on the provisions themselves and on their effective incorporation into the Statute. For example, in the case of the Statute itself, entry into force *as such* occurred after 60 ratifications: With these ratifications, the Court was established, the definitions of the crimes had entered into force, and so on. Entry into force *as such* is essential for the Court's exercise of jurisdiction. In contrast, entry into force *for the State* may or may not be necessary for the exercise of jurisdiction: For example, under article 12, non-ratification of the *Statute* by the State where the crime was committed does not prevent the Court's exercise of jurisdiction as long as the State of the nationality of the perpetrator has ratified. The same goes for the opposite constellation. Importantly, under either constellation, no obligations to cooperate or any other treaty obligations arise for the non-ratifying State[107].

It is here suggested that either one of two events could lead to entry into force *as such* for the amendments.

The reference of the preamble of the Resolution to article 5 paragraph 2 of the Statute argues for entry into force by adoption: According to the wording of article 5 paragraph 2, the Court can *exercise jurisdiction* with the *adoption* of the provisions[108]. Yet exercise of jurisdiction, even in the case of Security Council referrals, is impossible without the entry into force of a definition of the crime, etc. Thus, the Court's ability to exercise jurisdiction with adoption would imply entry into force *as such*. The provisions would be effectively incorporated into the Statute at the moment of adoption. The requirement of thirty ratifications and the requirement of the activating decision simply postpone the *exercise of jurisdiction*. Entry into force at the moment of adoption would harmonize with the entry into force of the amendments to the Elements[109] which also occurs with adoption.

Or, the provisions enter into force with the first ratification. In this regard one could cite that operative paragraph 2 of the Resolution declares that the provisions are "subject to ratification or acceptance" and "shall enter into force in accordance with article 121, paragraph 5[.]"Paragraph 5 of article 121 centers on entry into force for *States Parties* and is not really explicit about entry into force *as such*. Yet arguably, entry into force for a State Party presupposes entry into force *as such*. Again, the actual exercise of jurisdiction is postponed by the delay mechanisms.

One other option might come to mind, only to be pushed aside: The postponement of the exercise of jurisdiction by either one or both of the delay mechanisms might be (mis)read as a postponement of entry into force *as such*, despite their wording. This would appear to be the least satisfactory assumption, if only because the delay mechanisms are not really linked to the definition in article 8 *bis* and entry into force of this part of the amendments. It is also not altogether logical to use rules from *within* the amendments for their entry into force. Rather, the requirements for an activating decision and for thirty ratifications materialize with entry into force, not the other way around.

The choice between the two preferred options for entry into force *as such* could make little practical difference, except in two respects. First, States joining the Statute *after* entry into force of the amendments are arguably bound by them. This effect would occur either after adoption or after the first ratification of the amendments by an existing State Party. For example, at the time of this writing (August 2010), two States have ratified the Statute since the Review Conference. They might be already bound by the amendments. Or they might not, since the first ratification of the amendments by an existing State Party has not yet happened. Second, ratification of the Statute after the entry into force of the amendments may have an impact on the start of the Court's exercise of jurisdiction: If a ratification of the Statute

[105] *Supra* part II, main text after n.42
[106] *Supra* part II, main text after n.46.
[107] In the case of a Security Council referral, a Non-Party may be obligated to cooperate with the Court if specified by the Council either in the referral itself or in a related resolution under Chapter VII of the Charter of the United Nations.
[108] *Supra* part II, main text paragraph preceding n.39; see also Other 2009 Issues, *supra* n.42, Sec.I.
[109] *Supra* n.57

automatically includes the ratification of the amendments, it would be consequent to count this ratification of the Statute towards the required thirty ratifications of the amendments. Under the first option for entry into force *as such*, this inclusionary counting starts after adoption; under the second option, it starts after the first ratification of the amendments by an existing State Party. Of course, it does not much matter how one counts as long as the thirty ratifications are clearly collected before the activating decision, under any type of counting. On the other hand, in theory, if the collection of the thirty ratifications were to drag out beyond the activating decision, the type of counting applied could have a big impact indeed.

Setting aside the postponement due to the delay mechanisms, entry into force *as such* enables in principle the *exercise of jurisdiction*. This applies both for Security Council referrals and the other two triggers (assuming the conditions under article 15 *bis* paragraph 4 and 5 are met in the particular situation). For the exercise of jurisdiction with regard to State referrals and *proprio motu*, it would be here again essential to note that article 12 does not require the ratification or acceptance of the *amendments*, only of the *Statute*. Even if one applies the *pattern* theory, only the ratification or acceptance of the amendments by one of the two relevant States would be required.

One might go one step farther and argue that the exercise of jurisdiction is not only possible because of the wording of article 12 but because entry into force *as such* may have already automatically led to entry into force *for the existing State Parties*. After all, with entry into force *as such* the amendments have become incorporated into the Statute and the existing States Parties are bound by the Statute. But the reference to article 121 paragraph 5 in operative paragraph 1 of the Resolution cautions otherwise. It indicates that *entry into force* for *States Parties*, at least for the *existing States Parties* was meant to require ratification or acceptance for the amendments. Under a different reading, the reference to article 121 paragraph 5 might have been merely included for the very first ratification or for the thirty ratifications required *ratione temporis.* Such an interpretation could even fit with the disfavored third option concerning entry into force *as such*, but it does not appear to fit comfortably with the express focus of article 121 paragraph 5 on entry into force *for States Parties.*

Using article 121 paragraph 5 for entry into force for *States Parties* does not require that the second sentence is applicable and that article 12 is overruled. The second sentence of article 121 paragraph 5 centers on the *exercise of jurisdiction* not on *entry into force*. In contrast, the reference to article 121 paragraph 5 in operative paragraph 1 of the Resolution speaks of *entry into force* and not of *exercise of jurisdiction*. (The second sentence is the only one in article 121 that deals with the exercise for jurisdiction.) Determining the conditions for the exercise of jurisdiction was under article 5 paragraph 2 explicitly within the authority of States Parties. Since both the opt-out possibility in operative paragraph 2 of the Resolution and the express reference to article 12 contradict the second sentence of article 121 paragraph 5, it may be assumed that the reference to article 121 paragraph 5 in operative paragraph 1 of the Resolution should be read narrowly, relating only to the first sentence. The second sentence was meant to be excluded and the exclusion was permissible under article 5 paragraph 2.

From a technical angle, the exclusion of the exercise of jurisdiction with regard to crimes committed by the citizens or on the territory of Non-Party States under article 15 *bis* paragraph 5 is similarly explainable. This exclusion goes beyond the second sentence while using its pattern[110]. The exclusion conflicts also with article 12. But it concerns the exercise of jurisdiction and it was within the authority of States Parties to determine the conditions for the exercise for jurisdiction.

Finally, why would States Parties bother to ratify the amendments when the Court might be able to exercise jurisdiction irrespectively? Besides, the rights and obligations of States with regard to the use of force exist already under the Charter of the United Nations. Yet first of all, exercise of jurisdiction does not by itself create treaty rights and obligations for the States, such as obligations to cooperate. While it might be argued that even these treaty rights and obligations flow already from the acceptance of jurisdiction under article 12 paragraph 1, the opposite is arguable as well. Second, the irrelevance of ratification for the exercise of jurisdiction may be to some degree debatable, at least with regard to the question of complete or partial irrelevance. Thus, it would be wiser to ratify. Third, the State may want to contribute to the achievement of the thirty ratifications. Fourth, depending on the theory for entry into force *as such*, the

[110] About the treatment of Non-Parties under the second sentence of article 121 paragraph 5 see also *supra* part II, main text between n.42 and n.43.

State may want to contribute to this event as well. Fifth, ratification or acceptance of the amendments may be the best approach under national law. As stated earlier, these thoughts are tentative[111]. With greater insight gathered in the months to come, ratification by States Parties may very well be recognized as superfluous after the required thirty ratifications. The input from participants in the informal consultations towards the end of the Review Conference will be particularly influential.

IV. *Outlook*

Should the seed planted in Africa be left to dry and whither? Should it be watered and protected?

The exercise of universal jurisdiction[112] by national courts has long been a sensitive topic. In contrast, in the context of the International Criminal Court more tension has been caused by the *lack* of universal jurisdiction. As is well known, the early cases of the Court have all concerned crimes in African States. Yet it has been less an over-focus on Africa that has been disconcerting than the under-focus on other continents. The problem of under-focus is traceable not just to possible double-standards but to jurisdictional restrictions. If the International Criminal Court *had* universal jurisdiction and two of its trigger mechanisms would not require ratification of the Statute by either the State of the accused or the State where the criminal conduct occurred, the Court's reach could have been immediately more comprehensive. Looking now at the crime of aggression, the risk of jurisdictional 'exemptionalism' has in some respects diminished or stayed the same. In other respects, the risk has been aggravated. Once the delay mechanisms have run their course, the reach of prosecutions, even if based on State referrals and *proprio motu* could be, right from the start, much wider than in the early years of the Statute, simply because more States have ratified the Statute since 2002. Positively too, ratification or acceptance of the amendments is not necessarily required, i.e. mere abstention from such ratification or acceptance will not be sufficient to prevent the exercise of jurisdiction. Significantly as well, not any one of the trigger mechanisms is dependent on a prior Security Council determination of an act of aggression. To a large degree, the short-comings of any one trigger mechanism continue to be balanced by the strengths of the other two. But the opposite development, an even more pronounced 'exemptionalism' could nevertheless pose a serious threat. Under article 15 *bis* paragraph 5, non-ratification of the Statute, notably by the State of the accused[113], leads to a larger blocking effect than it does under article 12. Moreover, opt-outs by the aggressor State under article 15 *bis* paragraph 4 erect their own barriers. Leaders may be effectively shielded if protected by the non-party status or opt-out of their country and simultaneously by the veto power in the Security Council.

The jurisdictional conditions for the crime of aggression create a state of affairs quite similar to the one existing for the other three core crimes when they are committed in *internal* armed conflicts. In internal armed conflict the State of the accused and the territorial State are frequently the same. Thus, non-ratification of the Statute by the State of the accused constitutes a barrier comparable to the barriers that can arise against the prosecution of the crime of aggression. Yet the crime of aggression relates to an international conflict and the Court has typically more jurisdictional leeway when the other three core crimes are committed in international armed conflicts.

As alluded to earlier, the drive towards acceptance requirements by the aggressor State was nourished by concerns about State sovereignty and about the treaty law principle that no State should be bound without its consent. These concerns were argued to be more justified in the case of the crime of

[111] *Supra* main text between n.100 and n.101.

[112] Charles C. Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, Criminal Law Forum (2010) 21:1-65, Legal Studies Research Paper Series, Working Paper No.2009-38, March 2010, available at http://ssrn.com/abstract=1526622

[113] Due to concurrent territorial jurisdiction, non-ratification by the victim State may be compensated for by ratification of the aggressor State. *Supra* n.45 and related main text, and n.45, also main text between n.99 and n.100.

aggression because this crime is inherently linked to a State act of aggression: The International Criminal Court should not be permitted to pronounce on acts of State without State consent.

Yet the inherent linkage of crime and act might better serve for the opposite argument. Exactly because the crime is committed by leaders who "control or direct" the machinery of the State, requiring State acceptance for their prosecution would seem to be highly counterproductive, especially if such acceptance can be rather easily withheld or withdrawn.

The arguments on behalf of State acceptance requirements do not sit very well either with the fact that the obligation of States to abstain from acts of aggression, - an obligation *erga omnes* -, arises already from public international law, notably the Charter of the United Nations. For decades now, the use of force has been no longer within the discretionary authority of States. The exercise of jurisdiction by the International Criminal Court does not *create* State responsibility with regard to the use of force, it *helps* States to live up to their responsibility. Nor does the Court pronounce on State obligations arising from the act of aggression, such as on State reparations or on territorial adjustments. Moreover, the findings of the International Criminal Court and those of the organs of the United Nations are mutually independent, as has been frequently pointed out in the SWGCA. Concerning determination of acts of aggression, not only are the findings by organs of the United Nations without prejudice to the Court, the same holds true for the reverse sequence: The findings of the Court are without prejudice to the organs of the United Nations. After all, the definition of the crime, including the definition of the State act, is formulated "[f]or the purpose of this Statute".[114].

At the very least, there is something painfully disharmonious about acceptance requirements for valid measures to protect a *jus cogens* norm.

But this is not the place to detail the arguments for and against the need for State consent[115]. Besides, as shown earlier, the provisions on the crime of aggression actually succeeded in balancing a wide range of pros and cons, including with regard to the effect of the Charter of the United Nations and article 12 paragraph 1 of the Statute. What matters now is how the outcome of Kampala should be treated.

To a large degree, removing the threat of 'exemptionalism' and forestalling the uneven application of the provisions on the crime of aggression is in the hands of the States themselves. This holds true in a negative and positive sense. Taking a negative approach, the nations of this world can stall on the thirty ratifications. They can postpone the activating decision *ad infinitum*. They can refuse to ratify the Statute. They can hide behind opt-outs. There is no dearth in the ways water can be withheld and a seed be left to die.

Taking a positive approach instead, the threat of jurisdictional paralysis is conquered by taking advantage of and ultimately surpassing State consent dependencies: To achieve the thirty ratifications of the amendments, States can choose to quickly go ahead, with each deposition of an instrument of ratification serving as a signal of the determination to battle crimes of aggression. States can even band together and deliver their ratifications in one swoop, triumphantly so, long before 2017. The African States Parties alone could easily deliver that feat. With early ratifications of the Statute, they long have been at the forefront of advancement in international criminal law. They were the first ones to make use of the potency of State 'self '-referrals, in order to break out of and move beyond armed conflict and its chaos and slaughter. Even the dispute surrounding the use or non-use of an article 16 suspension of the Darfur proceedings can be argued to have contributed to international criminal law by bringing more analysis to

[114] *Supra* n.65. Understanding 4, *supra* n.58, is relevant in this context too, even though it was first suggested to address questions surrounding domestic jurisdiction. According to Understanding 4, "the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

[115] For detail see e.g. Dapo Akande, Prosecuting Aggression: The Consent Problem and the Role of the Security Council, Working Paper, May 2010, Oxford Institute for Ethics, Law and Armed Conflict, available at http://www.elac.ox.ac.uk/policy

the interplay of justice and peace[116]. African States may very well choose again to be among the pioneers, this time to increase deterrence against the crime of aggression[117].

For all the pioneers, no matter from which continent, the State consent dependencies in the jurisdictional conditions can be turned to benefit. Exactly because States have a greater measure of control against the exercise of jurisdiction, they may also exert less pressure against the Court-friendly decisions of other States. At the same time, each ratification of the Statute, each ratification of the amendments, and each abstention from an opt-out has its own power of persuasion, accelerating the movement towards universality.

In the wake of the pioneers, imagine the whole world joining. Imagine a seed that does not just get its minimum thirty drops of water, but a spring rain of early ratifications by all States Parties. Imagine an easy activating decision, be it by vote or consensus, a re-celebration of Kampala, right after New Year's Day of 2017. Imagine a taboo growing around opt-outs, turning them into scarlet letters of shame. Imagine an ever-widening circle of States Parties, and a tipping point when the recognition of the human right to peace[118] can be no longer suppressed.

For dreams to be realized they must first be envisioned. But vision alone will not suffice. In the months to come, research, explanatory writings and exchanges of thought about the amendments can be useful to assist States in their decision-making. Such analytic and informative work will be particularly helpful if it is carried forward as a common regional or international endeavor. It will be essential to gear advice towards the two typical concerns of States, i.e. the concern about politicized prosecutions and the concern about failures of prosecution, and to highlight how the amendments manage to respond to these concerns in the context of the different triggers, taking into account various political circumstances. For the sake of conquering the crime of aggression, the highest premium should be placed on interpretations that are as reassuring as possible for both sets of concerns and as authoritative as possible for the international community at large.

For example, studies on the requirement of a "manifest violation", on the non-prejudiciality of prior determinations of acts of aggression, on the functioning of the Pre-Trial Division and on article 16 suspensions can help to assuage worries about politicized prosecutions. So can inquiries about indirect safeguards such as determinations by organs of the United Nation that the use of force at issue does *not* constitute an act of aggression. Determinations of this type, including in non-binding resolutions of the General Assembly, can raise serious doubt about the existence of a reasonable basis for prosecutorial action[119].

Or, consider the opposite concern about failures to prosecute. Specifically, States may be reluctant to expose their own leaders to prosecution when doing so does not guarantee the deterrence and prosecution of the leaders of other States. Here the emphasis would first of all center on the advantages for the ratifying State, including strengthened protection against being turned into an aggressor State, an increased ability to fulfill the sovereign responsibility under the Charter of the United Nations, and a

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[116] See Address by Kofi Annan, Review Conference, 31 May2010, para.52-55, *supra* n.3

[117] For pre-Kampala comments on Africa and the crime of aggression provisions, see Charles C. Jalloh, *Regionalizing International Criminal Law*, International Criminal Law Review 9 (2009) 445, 473-474, available at http://ssrn.com/abstract=1431130

[118] "The human right to peace is but the positive expression of the negative jus cogens prohibition of the use of force." Alfred de Zayas, as cited in *UN Round Table on the Human Right to Peace*, Current Concerns (2007), No 6, available at www.currentconcerns.ch/index.php?id=229 , as of August 19, 2010, - but note at the same time that peace is more than the absence of armed conflict; see also DOUGLAS ROCHE, THE HUMAN RIGHT TO PEACE (Ottawa,ON: Novalis 2003); Luarca (Asturias) Declaration on the Human Right to Peace, as well as the subsequent Bilbao and Barcelona Declarations, originating from efforts of the Spanish Society of International Human Rights Law, available at www.aedidh.org; see most recently in the Human Rights Council, Resolution 14/3, Promotion of the right of peoples to peace, A/HRC/RES/14/3, 23 June 2010; Human Rights Council, Report of the Office of the High Commissioner on the outcome of the experts workshop on the rights of peoples to peace, A/HRC/14/38, 17 March 2010; Human Rights Council, Joint NGO Statement, A/HRC/14/NGO/47, 31 May 2010. See also *supra* n.20

[119] *Supra*, part III.2.d. (main text after n.95)

lowered risk of the misuse of the State's military. Bi-lateral and multi-lateral efforts towards universality need to be fine-tuned to pursue this quest also specifically on behalf of the Court's jurisdiction over the crime of aggression. If the Assembly of States Parties keeps close track on opt-out declarations lodged with the Registrar, it may be able to encourage their early withdrawal or discourage them in the first place.

Importantly too, national jurisdiction may help to make up for jurisdictional constraints of the International Criminal Court. Understanding 5[120] does not prevent this alternative. According to Understanding 5, "the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by *another* State." The Understanding does not set aside the principle of complementarity[121]. First, the Understanding does not touch on domestic jurisdiction with respect to crimes connected to a State's own acts of aggression. Second, the principle of complementarity gives priority to the exercise of national jurisdiction but it does not pronounce on the extent of national jurisdiction. Answers and guidance in that regard are found in domestic law and policy and in international law. The International Law Commission has taken a narrow view and argued that a State may only exercise jurisdiction over crimes of aggression 'arising' from the State's own acts of aggression[122]: Determinations by national courts over the acts of other States "would be contrary to the fundamental principle of international law *par in parem imperium non habet*" and "would have serious implications for international relations and international peace and security"[123]. But these points were put forward as an exception to the exercise of universal jurisdiction and did not specifically consider the exercise of jurisdiction by the victim State. In the context of the exercise of jurisdiction by the victim State, they sound rather ironic and cannot be given full weight[124]. It is first and foremost the act of aggression which has 'serious implications for international relations and international peace and security', not the judgment by the victim State. The exercise of national jurisdiction is tightly interlinked with the victim State's right to self-defense. The victim State suffered the act of aggression and thus gains the authority to exercise national jurisdiction, at least in the absence of credible national proceedings in the aggressor State and when international proceedings are unavailable. In other words, the international community might find it most sensible to look to the exercise of jurisdiction by the victim State as an indispensable *back-up* for the jurisdiction of the International Criminal Court and to encourage a complementary role reversal. Again, attention to these questions might support States in their decision-making with regard to the provisions on the crime of aggression.

The same goes for deeper knowledge about the interplay between peace and justice, an interplay that is particularly tight and layered in the case of the crime of aggression[125]. The adoption of the provisions on the crime of aggression, the activating decision, each ratification and each exercise of jurisdiction are not only means to advance justice, they are means to advance peace, quite directly so. Common regional approaches to the ratification of the amendments can be instrumental in the establishment of zones and continents of peace. But the study of the interplay between peace and justice must not only focus on the impact of justice on peace. In the case of the crime of aggression, the current phase towards the full activation of the Court's jurisdiction requires a stronger emphasis on the impact of peace on justice: Additional efforts towards the maintenance of peace and security help compensate for the delay in the Court's exercise of jurisdiction and simultaneously speed up the drive towards jurisdictional activation.

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[120] *Supra*, n.58 and n.60

[121] For the principle of complementarity see articles 1 and 17 of the Statute, as well as preambular paragraphs 4, 6, 10. See also Resolution RC/Res.1 on Complementarity, adopted by the Review Conference on 8 June 2010.

[122] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, Report of the International Law Commission, 48th session (1996), para.50, ILC Yearbook (1996) Vol. II part 2, p.17, Article 8 commentary para.13-15, p.30

[123] *Id*.

[124] Even with regard to universal jurisdiction, the counter arguments of the International Law Commission give too little attention to the *erga omnes* character of the obligation to abstain from the illegal use of force.

[125] Just to cite some purely technical issues that can influence both peace and justice: Does the State as victim deserve a special role in the Court's proceedings? Will State reparations in peace treaties influence the reparations to victims decreed by the Court, and vice versa, or are these two types of reparations treated completely separately? For related questions, Observations for the Intersessional Meeting of the Special Working Group on the Crime of Aggression, June 21-23, 2004, Princeton University: Applicability of Article 75 of the Statute and other provision relating to victims, Draft Rev. June 1, 2004, unpubl. (available from author)

The urgency to take further actions for peace and justice, - in parallel with and beyond international criminal law -, could not be greater. Under the cold calculations of war-making, crimes of aggression used to be deadly just while they lasted. (For accuracy, add a generation of premature deaths due to war injury.) In our day and age, the next crime of aggression may be as deadly as deadly can be, no life left whatsoever. (This time subtract maybe radiation-resistant insects.) In short, we no longer must hold back on peace. To protect this Earth, more international law must be 'grown', bringing forth richer fruit in the pacific settlement of disputes, in disarmament and arms control, in sustainable development, - there is no shortage of fields to be tilled. [126]

Seeds for peace are best sown in abundance, not sparingly. *Together* they thrive, a common matrix of roots, an oasis ever-growing.

[126] The need for cooperative regimes for arms control and disarmament was cited in the Statement of South Africa, *supra* n.11, at p.4