

# UNDERSTANDING THE ACTIVATION OF THE CRIME OF AGGRESSION AT THE INTERNATIONAL CRIMINAL COURT: PROGRESS AND PITFALLS

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*The world legal order is jeopardized every time any nation, unilaterally or in coalitions, takes the law into its own hands<sup>1</sup>*

## ABSTRACT

On 14 December 2017, the Assembly of States Parties of the International Criminal Court activated the jurisdiction of the ICC over the crime of aggression. This was an accomplishment that had been in preparation throughout the 20th century. While the crime was provisioned in the Rome Statute when it was adopted in 1998, its activation and specific regime were not designed. While decision was reached in 2017 on the activation of the crime, the negotiation process was eventful and the outcome not really the most desirable. By analysing the background to the Rome Statute and the Kampala Amendments regarding the crime of aggression, the article aims to understand the agreement reached in 2017 and the ramifications thereof. The article analyzes the narrow scope of the crime of aggression in that it excludes non-States Parties and non-ratifying States Parties from the jurisdiction of the Court. It is argued that this is a reversal of the modern international criminal justice paradigm and will have the effect of undermining the fight against impunity and the protection of human rights. However, it is argued that the decision taken by consensus to activate the crime of aggression cannot be understated. It is contended that this represents unity in an area of particular sensibility for the international community. This is especially important considering the 80

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yearlong negotiation process that resulted in a regime for the crime which is extremely narrow and that will be difficult to use in practice. Thus, the narrow scope of its applicability is analyzed to see if and how the ICC will be able to apply this sui generis regime.

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## INTRODUCTION

2018 was an important year for international criminal justice. It was 20 years since the Rome Statute creating the International Criminal Court (ICC) was drafted. 2018 was also important as on 17 July 2018, the ICC's jurisdiction was extended to include the crime of aggression.<sup>2</sup> While the crime had been included in Article 5 of the Rome Statute, it was suspended until the ICC came into operation in 2002.<sup>3</sup> That suspension would remain in place until the crime was defined, and until the States Parties to the Rome Statute reached agreement on how it

<sup>2</sup> Juan José Quintana, *A Note on the Activation of the ICC's Jurisdiction over the Crime of Aggression*, 17 L. & PRAC. INT'L CTS. & TRIBUNALS 236, 236 (2018).

<sup>3</sup> William A. Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"*, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 17–32 (Mauro Politi & Giuseppe Nesi eds., 2017).

would operate.<sup>4</sup> While the States Parties reached agreement at the 2010 Kampala Review Conference,<sup>5</sup> it was only in December 2017<sup>6</sup> that the Assembly of States Parties to the Rome Statute accepted the resolution to trigger the Court's jurisdiction over the crime from July 2018.<sup>7</sup> Thus, the activation of the jurisdiction of the International Criminal Court (ICC) over the crime of aggression represented a major step in the development of international criminal justice since the adoption of the Rome Statute in 1998.<sup>8</sup> The activation of the crime of aggression represents a milestone in the development of international criminal law.

Ever since Nuremberg, the international community has been trying to recognize aggression as the most atrocious of international crimes. It has been an important issue so as to consolidate the fight against impunity and in the protection of human rights.<sup>9</sup> This was partly accomplished in 1998 by the drafting of the Rome Statute that contained processes to punish those responsible for crimes against humanity, genocide and war crimes.<sup>10</sup> Already, in 1998, there was the recognition that aggression belonged to the list of crimes included in the scope of the Court, as a way to ensure the prohibition of the illegal use of force as set out in the Charter of the United Nations (UN) was capable of being enforced. It was seen to be an important issue to offer protection to States that may be victims of aggression. Complementarily, the criminalization of aggression would act as a deterrent as persons in positions of power, or in control of a State. They would be subject to the jurisdiction of the Court over the crime of aggression, therefore playing a role in preventing aggressive war making.<sup>11</sup>

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<sup>4</sup> Marina Mancini, *A Brand New Definition for the Crime of Aggression: The Kampala Outcome*, 81 NORDIC J. INT'L L., 227, 227 (2012).

<sup>5</sup> Jennifer Trahan, *The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT'L CRIM. L. REV. 49, 53–54 (2011).

<sup>6</sup> Andreas Zimmermann, *A Victory for International Rule of Law? Or: All's Well that Ends Well?*, 16 J. INT'L CRIM. JUST. 19, 19 (2018).

<sup>7</sup> *Id.* See also Mauro Politi, *The Debate within the Preparatory Commission for the International Criminal Court*, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION, *supra* note 3.

<sup>8</sup> Rome Statute of the International Criminal Court, amend. B, July 17, 1998, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute].

<sup>9</sup> For a historical analysis, see Claus Kieß, *On the Activation of ICC Jurisdiction over the Crime of Aggression*, 16 J. INT'L CRIM. JUST. 1–17 (2018).

<sup>10</sup> Jeremy Sarkin, *Understanding the Changing Relationship of South Africa and the International Criminal Court: Towards a Culture of Greater Impunity in Africa?*, 32 THEMIS – REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE NOVA DE LISBOA 7–33 (2017).

<sup>11</sup> Christian Wenaweser & Sina Alavi, *From Nuremberg to New York: The Final Stretch in the Campaign to Activate the ICC's Jurisdiction over the Crime of Aggression*, HARV. INT'L L.J.

This article sets the context in which the activation of the crime of aggression occurred and explains how the content of the crime of aggression was agreed to. It investigates what the matters of contention were, and how agreement was reached between the States party to the Rome Statute. By analysing the background that led to the Rome Statute, and then to the Kampala Amendments adopted in 2010, the aim is to understand how agreement was reached on 14 December 2017 in New York and what the ramifications of the various decisions adopted are. The article also focuses on the scope of protection incorporated into the regime of the crime of aggression, that excludes non-States Parties and non-ratifying States Parties from the jurisdiction of the ICC. It is argued that such a result represents a reversal of the modern international criminal justice paradigm, and will undermine the fight against impunity and the protection of human rights. The decision to activate the crime by consensus cannot be understated. It is contended that it represents unity in a subject of particular sensibility for the international community. It is especially important considering that it took 80 years to reach such a decision and that it was adopted in a deeply divided global world where the protection of human rights is generally deteriorating.<sup>12</sup> The solution will not however offer the most protection to States that are victims of aggression, since its applicability scope is very narrow. If and how the ICC will apply the crime of aggression regime remains to be seen, especially in the question of the interpretation of the Kampala Amendments and the outcome of the Assembly of States Parties.<sup>13</sup>

This article first sets the context by reflecting on the situation in the twentieth century where individual criminal responsibility was starting to be recognized. The next Part shows how this journey culminated in the adoption of the Rome Statute in 1998, which aimed to establish the International Criminal Court, dedicated to hold accountable those responsible for the most atrocious crimes. However, while the crime of aggression was thought to belong with crimes against humanity,

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ONLINE J. 20, 21 (Apr. 11, 2017), <http://www.harvardilj.org/2017/04/from-nuremberg-to-new-york-the-final-stretch-in-the-campaign-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression/>.

<sup>12</sup> See generally Jeremy Sarkin, *Refocusing Transitional Justice to Focus Not Only on the Past, but also to Concentrate on Ongoing Conflicts and Enduring Human Rights Crises*, 7 J. INT'L HUMANITARIAN LEGAL STUD. 294–329 (2016).

<sup>13</sup> See some of the problems in Darin Clearwater, *When (and How) Will the Crime of Aggression Amendments Enter into Force? Interpreting the Rome Statute by Recognizing Participation in the Adoption of the Crime of Aggression Resolutions as 'Subsequent Practice' under the VCLT*, 16 J. INT'L CRIM. JUST. 31, 63 (2018).

genocide and war crimes, States were unable to find a consensus on the legal implications of its regime and its inter-linkages with the functions of the UN Security Council. The Part on the Review Conference of 2010 held in Kampala, Uganda, demonstrates how States were finally able to agree on a specific regime that “supposedly” answered the questions posed by the different States Parties. The issues reviewed include what the definition of the crime ought to be and when the ICC should exercise jurisdiction. Also evaluated are the discussions on the role of the Security Council and the creation of a middle-ground mechanism called the opt-out. The next Part describes the problems of the negotiations in New York, which led to a complex, active and eventful process of activating the crime of aggression. The article reflects on how the outcome was an explicit confirmation of one interpretation: that requires ratification of the amendments by both victim and aggressor States, making the opt-out irrelevant, but that ultimately led to the activation of the crime of aggression. The final part of the article argues that the activation decision makes the crime largely un-prosecutable, because it simply does not have a sufficiently wide scope of application. It is argued that as only 37 States have ratified the amendments, none of those being major powers, the process will not promote a culture of accountability and protection of human rights that might have been hoped for.

### I. THE HISTORICAL CONTEXT OF DEALING WITH AGGRESSION

The criminalization of aggression has been pursued throughout the twentieth century to recognize criminal responsibility of individuals in power that are responsible for the waging of aggressive wars.<sup>14</sup> In fact, efforts to criminalize aggressive warfare can be traced back to at least the end of World War I.<sup>15</sup> The Treaty of Versailles contained a provision that attempted to bring the German Kaiser<sup>16</sup> before an international tribunal to

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<sup>14</sup> On the origins and interrelationship of international human rights law, international criminal law and international humanitarian laws, see Jeremy Sarkin, *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application Since the Nineteenth Century*, 1 HUM. RTS. & INT’L LEGAL DISCOURSE 125, 152 (2007).

<sup>15</sup> William Schabas, *The Human Right to Peace*, HARV. INT’L L.J. ONLINE J. 28 (Apr. 11, 2017), <http://www.harvardilj.org/2017/04/the-human-right-to-peace/>.

<sup>16</sup> On his role in the commission of human rights abuse in Europe and Africa, see JEREMY SARKIN, *GERMANY’S GENOCIDE OF THE HERERO: KAISER WILHELM II, HIS GENERAL, HIS SETTLERS, HIS SOLDIERS* 6 (2011).

try him for the atrocious offenses committed under his command.<sup>17</sup> The adoption of the Kellogg-Briand Pact of 1928,<sup>18</sup> acknowledged that some restraint in *jus ad bellum* had to be imposed on warring parties.<sup>19</sup> However, it was only at the end of World War II, with the creation of the International Military Tribunal (IMT) at Nuremberg, and for the Tribunal established to deal with the crimes committed in the Far East that saw the real development of international criminal justice and the process to ensure international accountability.<sup>20</sup> Specifically, the Charter of the IMT referred to aggression as a crime against peace.<sup>21</sup> All the German defendants and many of the Japanese defendants that were prosecuted were indicted on that basis.<sup>22</sup> “ Justice Robert Jackson in his opening statement at the IMT stated that “That attack on the peace of the world is the crime against international society which brings into international cognizance crimes in its aid and preparation which otherwise might be only internal concerns. It was aggressive war, which the nations of the world had renounced. It was war in violation of treaties, by which the peace of the world was sought to be safe-guarded.”<sup>23</sup> Thus, an individual could be held criminally accountable for international crimes and specifically crimes against peace.<sup>24</sup>

The movement to deal with aggression and promote peace attained further impetus in 1945 when the Charter of the UN was drafted. It contained in article 2(4) the prohibition of use of force.<sup>25</sup> The Charter

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<sup>17</sup> Schabas, *supra* note 3, at 20–21.

<sup>18</sup> General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57; *see also* Benjamin B. Ferencz, *Defining Aggression: Where It Stands and Where It's Going*, 66 AM. J. INT'L L. 491, 491 (1972).

<sup>19</sup> Maria Francisca Saravia, *Major Violence (Crimes) Against the International Community*, in INTERNATIONAL CRIMINAL JUSTICE: A DIALOGUE BETWEEN TWO CULTURES 65, 86, 87 (Mateus Kowalski & Patrícia Galvão Teles eds., 2017).

<sup>20</sup> Although the IMT for Tokyo did not do so unanimously, with dissenting opinions that invoked the problem of colonial domination. *See more about it*, in Miguel de Serpa Soares, *International Criminal Justice and the Erosion of Sovereignty*, in INTERNATIONAL CRIMINAL JUSTICE: A DIALOGUE BETWEEN TWO CULTURES, *supra* note 19, at 27, 38.

<sup>21</sup> Treaties and International Agreements registered or filed and recorded with the Secretariat of the United Nations, art. 6, Aug. 8, 1945, 82 U.N.T.S. 251.

<sup>22</sup> GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 481–83 (2d ed. 2009).

<sup>23</sup> . “Second Day, Wednesday, 11/21/1945, Part 04”, in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947. pp. 98-102.

<sup>24</sup> Chris Gallavin & Kennedy Graham, *Building Criminal Accountability at the Global Level: The ICC and its Discontents*, 13 POL'Y Q. 60, 65 (2017); Soares, *supra* note 20, at 38.

<sup>25</sup> U.N. Charter art. 2 ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”). On issues of the use of

did however recognize a system of collective security.<sup>26</sup> It gave powers to the Security Council (SC) to deal with situations that may constitute a threat to peace, an attack on peace or an act of aggression, under chapter VII.<sup>27</sup> However, what constituted aggression was not defined. It took a further 29 years for the General Assembly to adopt a definition of aggression. This delay was caused by the Cold War and the famous problem of the “empty chair” that plagued the Security Council. Nonetheless, there were several efforts to draft a criminal code accompanied by the establishment of an international criminal court during the second half of the twentieth century.<sup>28</sup> Also, the GA created special committees tasked with defining aggression.<sup>29</sup> The work of these committees paid off on 14 December 1974 when the GA adopted by consensus Resolution 3314 (XXIX).<sup>30</sup> It recognized that aggression is a crime against international peace.<sup>31</sup> It defined aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations,” as set out in this definition.

It took many more years for further progress to occur.<sup>32</sup> This occurred only at the end of the Cold War, and as a result of the crimes committed in the Republic of the Former Yugoslavia and in Rwanda.<sup>33</sup> At this point a renewed discussion on the crime of aggression began. The International Law Commission’s (ILC) Draft Code of Crimes against the Peace and Security of Mankind of 1996 dealt with the topic. However, it

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force and the responsibility to protect, see Jeremy Sarkin, *Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era? How its Third Pillar Ought to be Applied*, 1 GRONINGEN J. INT’L L. 11 (2012).

<sup>26</sup> Soares, *supra* note 20, at 48.

<sup>27</sup> U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.”).

<sup>28</sup> Soares, *supra* note 20, at 41.

<sup>29</sup> To read more about the efforts undertaken in this in-between period, see Umberto Leanza, *The Historical Background*, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION, *supra* note 3, at 3, 5–6.

<sup>30</sup> G.A. Res. 3314, Definition of Aggression (Dec. 14, 1974).

<sup>31</sup> *Id.* art. 5.

<sup>32</sup> Carsten Stahn, *The End, the Beginning of the End or the End of the Beginning? Introducing Debates and Voices on the Definition of Aggression*, 23 LEIDEN J. INT’L L. 875, 877, 880 (2010).

<sup>33</sup> Jeremy Sarkin, *Enhancing the Legitimacy, Status, and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies*, 6 INTERDISC. J. HUM. RTS. L. 83, 85 (2011–12).

did not contain a list of acts that could qualify as an act of aggression.<sup>34</sup> It also did not provide specifically a definition of what constituted the crime of aggression. It is important to note that the GA Resolution 3314 contained a definition of aggression for traditional international law purposes but not for criminal law. This is an important distinction.<sup>35</sup> As far as traditional international law is concerned, an act of aggression relates with the conduct of the State, whilst for criminal law the issue is the individual criminal conduct that arises from an act of aggression. Thus, acts of aggression in the international law context give rise to State responsibility. Its determination belongs to the SC and the International Court of Justice (ICJ).<sup>36</sup> However, the determination of a crime of aggression falls within the jurisdiction of the ICC.

## II.     THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute, adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, represented an enormous step in the development of international criminal justice.<sup>37</sup> Its adoption saw the realization of a permanent universal accountability mechanism for those responsible for the most serious crimes.<sup>38</sup> Although the treaty was drafted in 1998, the ICC would begin to operate when 60 States ratified the

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<sup>34</sup> *Draft Code of Crimes Against the Peace and Security of Mankind*, 1996 Y.B. Int'l L. Comm'n 15, U.N. Doc. A/CN.4/SER.A/1996/Add.1.

<sup>35</sup> See Elizabeth Wilmshurst, *Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION*, *supra* note 3, at 91, 94; Mohammed M. Gooma, *The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION*, *supra* note 3, at 55, 64–66.

<sup>36</sup> In the famous case of *Nicaragua v. United States*, the ICJ considered that the definition contained in Resolution 3314 was in line with customary international law, although it still has not made a specific finding of an act of aggression. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 195 (June 27).

<sup>37</sup> Johan D. van der Vyver, *Prosecuting the Crime of Aggression in the International Criminal Court*, 1 NAT'L SEC. & ARMED CONFLICT L. REV. 1, 4 (2010–11).

<sup>38</sup> Jeremy Sarkin, *The Role of the International Criminal Court in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies*, 11 STUD. ETHNICITY & NATIONALISM 130, 131 (2011).



treaty, which occurred on 1 July 2002. In 2018, the Rome Statute had 123 State Parties.<sup>39</sup>

The Rome Statute confirms two modern developments. One that the exercise of criminal jurisdiction is not only confined to States, and the other that individuals are now subject to international law.<sup>40</sup> Thus, greater value is placed on the establishment of an international legal order than on State sovereignty.<sup>41</sup> The Rome Statute established four core crimes that individuals can be held accountable for: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. These were chosen as they were considered “the most serious crimes of concern to the international community as a whole.”<sup>42</sup> Including the crime of aggression was very controversial and therefore it was only finally included during the last day of the negotiations in 1998.<sup>43</sup> Those against the inclusion of this crime feared the over politicization of the Court. The contention was that States could abuse this crime by constantly referring cases to the Court, even if there was no crime.<sup>44</sup> Another argument was that there was no agreement on what the crime of aggression was and there was no precedent of what constituted aggression. It was maintained that there was no agreement on what constituted individual criminal responsibility.<sup>45</sup> Others claimed however that there was precedent at the Nuremberg trials.<sup>46</sup> It was reasoned that the crime of aggression was unsatisfactorily defined in international law. It was argued that the definition in GA Resolution 3314 and the definitions elsewhere in international law were too vague and broad and

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<sup>39</sup> 10. Rome Statute of the International Criminal Court, U.N. Treaty Collection (July 17, 1998), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY%20&mtdsg\\_no=XVIII-10&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY%20&mtdsg_no=XVIII-10&chapter=18&clang=_en).

<sup>40</sup> Mateus Kowalski, *The International Criminal Court Reflections for a Stress Test on its Foundations*, 2 JANUS.NET E-J. INT’L REL. 110, 112 (2011).

<sup>41</sup> On issues of sovereignty and its changing nature see Jeremy Sarkin On issues of sovereignty and its changing nature, see Jeremy Sarkin, *The Responsibility to Protect and Humanitarian Intervention in Africa*, 2 GLOBAL RESP. TO PROTECT 371, 377 (2010).

<sup>42</sup> Rome Statute of the International Criminal Court, *supra* note 8, at 7.

<sup>43</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 147 (2d ed. 2004).

<sup>44</sup> Mauro Politi, *The Debate within the Preparatory Commission for the International Criminal Court*, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION, *supra* note 3, at 43, 45.

<sup>45</sup> Rep. of the Preparatory Comm. on the Establishment of an Int’l Criminal Court, at 18–19, U.N. Doc. A/51/22 (1996).

<sup>46</sup> STELLA MARGARTI, *The Paradigm of Aggression: The Kampala Definition and Lessons Learnt for the Purpose of Defining International Terrorism*, in DEFINING INTERNATIONAL TERRORISM: BETWEEN STATE SOVEREIGNTY AND COSMOPOLITANISM 81, \_\_\_\_ (2017).

therefore did not allow States or individuals to know what conduct is prohibited. It was argued that this was at odds with the principle of legality.<sup>47</sup> Another criticism was how to ensure conformity of the criminalization of aggression with cases of humanitarian intervention.<sup>48</sup> The concern was that when humanitarian interventions occurred without the consent of the SC they could amount the crime of aggression.<sup>49</sup> There were also concerns about how the procedures and practices of the international community relating to *jus in bello* crimes (law governing the conduct of hostilities) and *jus ad bellum* crimes (law of recourse to force),<sup>50</sup> would conform with the procedures that would be created by the ICC.<sup>51</sup> Finally, some claimed that the inclusion of the crime of aggression in the Rome Statute would hinder its universality, because some States would not join the Court. Others countered with what the IMT noted at Nuremberg Judgment that aggression “is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”<sup>52</sup>

Those in favor of including the crime of aggression contended that it would create a deterrent effect, fight impunity and promote accountability.<sup>53</sup> It was maintained that the criminalization of aggression was contained in the IMT’s Charter, and already consolidated as international customary law. It was also argued that excluding the crime would actually represent a regression in the development of international law.<sup>54</sup> These views ended with a compromise,<sup>55</sup> when States agreed to

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<sup>47</sup> MATTHEW C. WEED, CONGRESSIONAL RESEARCH SERVICE, INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE: 2010 REVIEW CONFERENCE 6 (2011).

<sup>48</sup> Rep. of the Ad Hoc Comm. on the Establishment of an Int’l Criminal Court, ¶ 64, U.N. Doc. A/50/22 (1995).

<sup>49</sup> See Leslie Esbrook, *Exempting Humanitarian Intervention from the ICC’s Definition of the Crime of Aggression: Ten Procedural Options for 2017*, 55 VA. J. INT’L L. 791 (2015).

<sup>50</sup> See more about *jus in bello* and *jus ad bellum* and the fading of these concepts, in Carsten Stahn, ‘*Jus ad bellum*’, ‘*jus in bello*’ . . . ‘*jus post bellum*’? – *Rethinking the Conception of the Law of Armed Force*, 17 EURO. J. INT’L L. 921 (2006).

<sup>51</sup> WEED, *supra* note 47, at 4.

<sup>52</sup> Lawrence v. Göring, Judgment, at 22, 25 (Int’l Mil. Trib. sitting at Nuremberg Oct. 1, 1946), [https://crimeofaggression.info/documents/6/1946\\_Nuremberg\\_Judgement.pdf](https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf).

<sup>53</sup> Rep. of the Preparatory Comm. on the Establishment of an Int’l Crim. Court, ¶ 66, U.N. Doc. A/51/22 (1996). See also Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001).

<sup>54</sup> Rep. of the Preparatory Comm. on the Establishment of an Int’l Crim. Court, ¶ 66, U.N. Doc. A/51/22 (1996). See also Akhavan, *supra* note 53.

<sup>55</sup> Christian Wenaweser, *Reaching the Kampala Compromise on Aggression: The Chair’s Perspective*, 23 LEIDEN J. INT’L L. 883, 885 (2010).

include article 121, paragraphs 4 and 5.<sup>56</sup> These dealt with procedural issues about how to finalize the later incorporation of a definition and procedures of the issues relating to the crime of aggression into the Rome Statute.<sup>57</sup> Thus, the inclusion of those provisions cleared the way for a discussion on the crime of aggression and its inclusion in article 5, paragraph 1, as one of the core crimes prosecutable by the ICC.<sup>58</sup> Article 5, paragraph 2, provided:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Thus, while the jurisdiction of the Court regarding the other three core crimes would start as soon as the Rome Statute entered into force, the jurisdiction of the Court over the crime of aggression would only occur at a later stage when amendments to the Statute were accepted. For this reason, it was stated that: “the crime of aggression was stillborn.”<sup>59</sup>

In fact, State Parties had to wait seven years before being allowed to propose amendments to the Assembly of States Parties (ASP) or a Review Conference in accordance with articles 121 and 123. The provision also established that such amendments would have to conform to the UN Charter, thus dealing with issues such as the use of force and its prohibition and the functioning of the SC. However, so important was the issue for some that when the first ASP after the International Criminal Court came into being in 2002, it created the Special Working Group on the Crime of Aggression (SWGCA).<sup>60</sup> Its main task was to find agreement on a definition and settling issues concerning the jurisdiction of the Court. Another process called the Princeton Process, led by the Liechtenstein Institute on Self-Determination at Princeton University

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<sup>56</sup> Ferencz, *supra* note 1, at 287 n.31.

<sup>57</sup> See Tom Ruys, *Justiciability, Complementarity and Immunity: Reflections on the Crime of Aggression*, 13 *UTRECHT L. REV.* 18 (2017).

<sup>58</sup> It is reported that the effort to include the crime of aggression in the ICC Statute was mainly due to the Non-Aligned Countries, in SCHABAS, *supra* note 43, at 31.

<sup>59</sup> David Scheffer, *The Complex Crime of Aggression Under the Rome Statute*, 23 *LEIDEN J. INT'L L.* 897, 897 (2010).

<sup>60</sup> Assembly of States Parties to the Rome Statute [ASP], *Continuity of work in respect of the crime of aggression*, ICC-ASP/1/Res.1 (Sept. 9, 2009), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP1-Res-01-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-01-ENG.pdf).

was another opportunity for States to reach agreement through a variety of meetings.<sup>61</sup>

### III. THE KAMPALA AMENDMENTS TO THE ROME STATUTE

The historic<sup>62</sup> Review Conference, held from 31 May to 10 June 2010, in Kampala, Uganda, was convened with the main purpose of settling the issue of the crime of aggression. However, other amendments were also adopted, such as to Article 8 on war crimes.<sup>63</sup> Both the SWGCA and the Princeton Processes were essential in the lead up to the Review Conference in that they kept States involved in this sensitive process.<sup>64</sup>

The Review Conference had the task of deciding the following issues on the crime of aggression: 1) the definition and what elements had to be present for it to be a crime; 2) how jurisdiction would be exercised by the ICC, as well as the role of the SC; 3) the jurisdictional regime of non-State Parties and non-ratifying States Parties.<sup>65</sup>

The most controversial issue that would characterize the Review Conference would be how jurisdiction of the Court would be exercised and what the role of the SC would be. Another contentious issue would be around State consent regarding their nationals when they would not ratify the amendments.<sup>66</sup> An interesting development was the adoption of a list of *Understandings* that aimed to assist the Court in interpreting several of the provisions that were adopted by the Review Conference. However, some authors question the legal consequences of these *Understandings*.<sup>67</sup> Some have tried to understand their standing and whether they are amendments to the Rome Statute, an agreement to

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<sup>61</sup> Claus Kreß & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1186 (2010). See also Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT'L L. 517, 518–19 (2011). See generally Noah Weisbord, *Bargaining Practices: Negotiating the Kampala Compromise for the International Criminal Court*, 76 L. & CONTEMP. PROBS. 85 (2014).

<sup>62</sup> Kai Ambos, *The Crime of Aggression after Kampala*, 53 GERMAN Y.B. INT'L L. 463, 463 (2010).

<sup>63</sup> ASP, *Amendments to article 8 of the Rome Statute*, Res. RC/Res.5 (June 10, 2010), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.5-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf).

<sup>64</sup> Soares, *supra* note 20, at 25–26 n.32. Still many delegations were not present in the Review Conference, in Kevin Jon Heller, *The Uncertain Legal Status of the Aggression Understandings*, 10 J. INT'L CRIM. JUST. 229, 237 (2012).

<sup>65</sup> As well as agreeing on Elements of Crime.

<sup>66</sup> Barriga & Grover, *supra* note 61, at 524.

<sup>67</sup> See e.g., Kreß & Holtendorff, *supra* note 61.

modify the Statute or a means of interpreting the amendments. Heller argues that the *Understandings* are a secondary means to interpret the Kampala amendments.<sup>68</sup> They deal with the referrals by the SC, the exercise of domestic jurisdiction and jurisdiction *ratione temporis*, as well as with the definition of a crime of aggression itself.

#### A. THE DEFINITION ADOPTED ON AGGRESSION

The Review Conference negotiations about the definition itself revolved around the confirmation of the provision contained in Resolution 3314, the definition provided by the ILC or even creating a new one. States parties also debated including a list of acts that might qualify as acts of aggression and, if they did whether that list would be exhaustive or not.<sup>69</sup> Negotiations saw two divergent views: The hope by some delegations to criminalize each and every unlawful use of force. The contrary view was that an all-encompassing definition would be too broad and would lead to uncertainty about which conduct should be punishable.

Consensus was clear on the fact that the crime of aggression is a leadership crime,<sup>70</sup> restricted to acts committed or planned by State officials holding positions of political or military control of a State. However, the agreed definition is criticized because it did not include acts of aggression committed by non-state actors that would encompass acts such as the attacks on 9/11 in the USA.<sup>71</sup>

Thus, negotiations about the definition resulted in article 8 *bis* of the Kampala Amendments.<sup>72</sup> Article 8 *bis*<sup>73</sup> of the Rome Statute<sup>74</sup> defines the crime of aggression as

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<sup>68</sup> Heller, *supra* note 64, at 245. In contrast, Dörr suggests the understandings as examples of an agreement that would fall under article 31, paragraph 2, lit (a). OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 549 (2012).

<sup>69</sup> SCHABAS, *supra* note 43, at 33.

<sup>70</sup> Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357, 363 (2012).

<sup>71</sup> Sofia Santos, *The International Criminal Court and the Construction of International Public Order*, in INTERNATIONAL CRIMINAL JUSTICE: A DIALOGUE BETWEEN TWO CULTURES, *supra* note 19, at 154.

<sup>72</sup> See David Scheffer, *The missing pieces in Article 8 bis (Aggression) of the Rome Statute*, HARV. INT'L L.J. ONLINE J. 83 (Apr. 11, 2017), <http://www.harvardilj.org/2017/04/the-missing-pieces-in-article-8-bis-aggression-of-the-rome-statute/>.

<sup>73</sup> *Id.*

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.<sup>75</sup>

An “act of aggression” is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>76</sup>

The amendments do list acts that shall qualify as acts of aggression by referring to GA Resolution 3314. However, there is no mention that they are not exhaustive. However, some argue that this is mentioned in article 4 of Resolution 3314<sup>77</sup> and therefore it is incorporated by reference to the resolution.

Importantly, a threshold requirement is included. Thus, for it to be a crime it must constitute a manifest violation of the Charter of the UN by determining the sufficiency of the three components of character, gravity and scale. This is included in *Understanding* no. 7.<sup>78</sup> A reason to include this threshold was that there would be the automatic exclusion of humanitarian interventions as these would usually fall out of the concept of a manifest violation of the Charter.<sup>79</sup> However, Mathew Weed is of the view that there is a possibility of criminalising the responsibility to protect or self-defence under article 51 of the UN Charter.<sup>80</sup> Nevertheless, *Understanding* no. 6 states that whether a crime has been committed “requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.” According to Akande, the violation of the prohibition of the use of force

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<sup>74</sup> ASP, The Crime of Aggression, RC/Res.6 (June 11, 2010), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

<sup>75</sup> *Id.* at art. 8(1).

<sup>76</sup> *Id.* at art. 8(2).

<sup>77</sup> Article 4 of Resolution 3314 (XXIX): “The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.” G.A. Res. 3314 (XXIX), at 142–43 (Dec. 14, 1974).

<sup>78</sup> Barriga & Grover, *supra* note 61, at 522.

<sup>79</sup> Kevin Jon Heller describes it as an insistence by the USA for the ICC not to consider cases of humanitarian intervention, without authorization by the UNSC. *See* Heller, *supra* note 64, at 232. For more about humanitarian interventions, *see generally* Esbrook, *supra* note 49.

<sup>80</sup> For more critiques to the definition, *see* WEED, *supra* note 47, at 7.

must be a grave violation of the UN Charter with serious consequences,<sup>81</sup> excluding situations with a short duration or carried out by low ranking officers, or are justified by humanitarian reasons or because of self-defence.

## B. THE ICC'S EXERCISE OF JURISDICTION

By agreeing relatively easily to the definition of the crime of aggression, delegations were able to spend most of their time discussing the other major issues. New articles 15 *bis* and 15 *ter*, in their identical paragraphs 2 and 3, provide that the ICC can only exercise its jurisdiction over the crime of aggression: (a) one year after the ratification or acceptance of the amendments by 30 States Parties, (b) after 1 January 2017, and (c) after a decision has been taken by the ASP, by two-thirds majority of States Parties (if consensus is not achieved), whichever is later. The first two conditions occurred in 2017.<sup>82</sup> All that was needed was a decision by the ASP.

### 1. *The Role of the United Nations Security Council*

What the role of the UNSC in the determination of an act of aggression prior to the exercise of jurisdiction by the Court has been very contentious.<sup>83</sup> It remained so, and to some extent the role of the Security Council has been at the core of the problems that the ICC has had with the African Union and African States. In this context, some of the Permanent Five (P5) members of the Security Council argued vehemently that the jurisdiction of the Court over the crime of aggression would have to be preceded necessarily by a finding of the SC that an act of aggression had been committed by a State. If accepted, this would have meant that the ICC would be dependent on the P5 for a

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<sup>81</sup> Dapo Akande, *What Exactly was Agreed in Kampala on the Crime of Aggression?*, EJIL: TALK! (June 21, 2010), <https://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>.

<sup>82</sup> As of 1 December 2018, 37 States Parties have ratified the crime of aggression amendments. 10. b Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, U.N. Treaty Collection (June 11, 2010), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10-b&chapter=18](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18).

<sup>83</sup> Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive Is the Security Council's Power to Determine Aggression?*, 16 IND. INT'L & COMP. L. REV. 1, 1 (2005).

determination before it could exercise its jurisdiction.<sup>84</sup> However, such dependence on the SC would represent a strong limitation to the role of the Court, as it would require a decision of an overtly political body. Discussions led to the recognition by delegations of the necessity of striking a balance between the requirement of the independence of the Court and the need to respect the role played by the UNSC in the maintenance of international peace and security. These concerns are reflected in the compromise reached by the delegations present at Kampala under Articles 15 *bis* and 15 *ter* of the Kampala Resolution.

Therefore, the process determining whether a crime of aggression exists begins with the ICC Prosecutor, upon receiving a State referral, or initiating an investigation that such a crime has been committed, to determine if there is reasonable basis to continue the investigation. If the SC has already made a determination itself about the existence of an act of aggression, it must notify the UN Secretary-General (SG).<sup>85</sup> If it has made such a decision, then the Prosecutor may continue with the investigation.<sup>86</sup> If not, the Prosecutor must wait for six months for that determination. If no such determination is made within the time period, the Prosecutor may continue with the investigation after receiving the authorization of the Pre-Trial Chamber.<sup>87</sup> This adds a filter to the exercise of jurisdiction by the Court against politically motivated cases,<sup>88</sup> while simultaneously taking into consideration the role played by the UNSC, in the maintenance of international peace and security.

Paragraph 9 of article 15 *bis* and paragraph 4 of article 15 *ter* establish that the determination of the existence of an act of aggression by an organ outside of the Court shall not affect the Court's own findings about such an act. This allows the Court to act independently, without needing to wait for a decision by the UNSC about the existence of an act of aggression. This broadens the work of the Court ensuring that it can exercise its own decision over matters of jurisdiction.

Additionally, Article 15 *ter* is straightforward in the exercise of jurisdiction by the Court, unlike article 15 *bis*. It establishes the potential global jurisdiction of the Court when the questions concern UNSC

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<sup>84</sup> Rep. of the Preparatory Comm. on the Establishment of an Int'l Criminal Court, ¶ 73, U.N. Doc. A/51/22 (1996).

<sup>85</sup> ASP, Res. RC/Res.6 annex I(3) ¶ 6, (June 11, 2010), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

<sup>86</sup> *Id.* ¶ 7.

<sup>87</sup> *Id.* ¶ 8.

<sup>88</sup> Barriga & Grover, *supra* note 61, at 530.



referrals, since the UNSC is not dependent on the ratification of the Amendments by the State to be able to refer the case to the Prosecutor.

## 2. *The Opt-Out Provision in the Rome Statute*

One of the innovations of the Kampala Amendments was Article 15 *bis* paragraph 4. It provides that: “The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.”

Thus, the article establishes an opt-out clause of the jurisdiction of the Court for the crime of aggression. It does this as an incentive for States to join the ICC as they can always declare that they wish to be exempted from the jurisdiction of the Court over the crime of aggression.<sup>89</sup> A linked issue concerns whose consent was needed: the victim State Party or the aggressor State Party. Some believed that only the Victim State should be required to have ratified the amendments for the jurisdiction of the Court to apply. Others believed that ratification by the State Party of which the perpetrator is a national is also to be required.<sup>90</sup> This divergence was overcome by the “ABCS Non-Paper” in Kampala (proposed by Argentina, Brazil, Canada and Switzerland),<sup>91</sup> that contained a solution accommodating the various positions by establishing the possibility of lodging a declaration of non-acceptance of the jurisdiction of the Court by those States Parties that wish to stay out.

Thus, the opt-out comes from a compromise solution that found middle ground in order to try to respect the different interests at stake. This meant that State Parties were not required to decide to opt-in, or ratify, the amendments before they could lodge the opt-out, an indicator that the Court would be able to exercise its jurisdiction over a State Party that has not ratified the amendments.

However, this tool presents several difficult implications for the Court, considering the phrasing of paragraph 4. As Coracini argues, since this declaration of non-acceptance only affects potential acts of aggression committed by the State Party that has opted-out, the

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<sup>89</sup> Kevin Jon Heller, *The Sadly Neutered Crime of Aggression*, OPINIOJURIS (June 13, 2010), <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/>.

<sup>90</sup> Barriga & Grover, *supra* note 61, at 525–26.

<sup>91</sup> *See generally* Kreß & Holtendorff, *supra* note 61, at 1202–04.

possibility of the Court exercising jurisdiction in relation to a “State that has become the victim of an act of aggression remains unaltered.”<sup>92</sup> Heller maintains that this situation is a “hypocritical approach to aggression.”<sup>93</sup> Manson questions the conformity of this provision with the principle of reciprocity, because it goes against “equality of all before the rule of law in a criminal jurisdiction,”<sup>94</sup> and argues that the distinction between an opting-out State and a non-opting-out State, where the first receive protection if attacked, while the second remains in a precarious situation, is discriminatory. It is contended that the same position does not occur with accepting or ratifying States parties and non-accepting or non-ratifying States parties, because where a national of a State Party that has accepted the amendments commits a crime of aggression in the territory of a non-accepting State Party the ICC cannot exercise its jurisdiction.

The first operative paragraph (OP) of the Kampala Resolution states that this declaration of non-acceptance can be lodged prior to the ratification or acceptance of an amendment. The question that follows however is why would States Parties wish to make such a declaration, before proceeding with the ratification of the amendments?<sup>95</sup> According to Manson<sup>96</sup> and Akande,<sup>97</sup> a State can choose to lodge an opt-out because it wishes, for example, to contribute to the number of States Parties’ ratifications of the amendment, allowing the above-mentioned condition of 30 ratifications of States Parties to be met faster<sup>98</sup> and consequently activating the Court’s exercise of jurisdiction; but at the same time wishes to stay out of this scope of jurisdiction and avoid prosecution. However, this seems to be a problematic argument and possibly naïve line of thought. Generally, States are self-centred. It is highly doubtful that many States, besides one or two, would want to activate the protection granted by the activation of the jurisdiction only

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<sup>92</sup> Astrid Reisinger Coracini, *More Thoughts on “What Exactly was Agreed in Kampala on the Crime of Aggression”*, EJIL: TALK! (July 2, 2010), <https://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>.

<sup>93</sup> Heller, *supra* note 89.

<sup>94</sup> Robert L. Manson, *Identifying the Rough Edges of the Kampala Compromise*, 21 CRIM. L. F. 417, 432 (2010).

<sup>95</sup> Such question relates with the interpretations given to article 121, paragraph 5, in connexion with the mechanism of the opt-out. ROME STATUTE, *supra* note 8, art. 121, ¶ 5.

<sup>96</sup> Manson, *supra* note 94, at 427.

<sup>97</sup> Akande, *supra* note 81.

<sup>98</sup> Of course, at the time of writing this paper, this argument no longer applies, as the 30 ratifications have been met.

for the sake of the advancement of international criminal justice. Additionally, there is also the issue of the determination or the will of States Parties to make this declaration of non-acceptance. It can be seen as that State being against international criminal law and accountability.<sup>99</sup> Thus, the effect could be to tarnish its image in the international community. Heller is, however, of the belief that States will not have a problem opting-out, because for a State that commits an act of aggression against another State, the reputational cost that it represents is minimal.<sup>100</sup>

It is worth mentioning that Kenya was the first case where a State Party has made a declaration of non-acceptance on 30 November 2015. It was concerned with the distinction between an act of aggression and a war of aggression.<sup>101</sup>

### 3. *The Exception to the General Jurisdictional Regime*

Another innovation of the Kampala amendments was article 15 *bis*, paragraph 5. This provides “*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.*”<sup>102</sup>

This represents a complete reversal of the general principle of how jurisdiction by the ICC is exercised. According to article 12 of the Rome Statute, alleged crimes (in the case of genocide, crimes against humanity, war crimes) committed by a national of a non-State Party in the territory of a State Party are subject to the ICC jurisdiction, irrespective of the trigger mechanism, if there has been State referral, *proprio motu* by the Prosecutor or SC referral. Contrary to this, in the case of the crime of aggression, there is a total exemption of non-States Parties from the scope of jurisdiction of the Court. This represents a substantial restriction in the ability of the Court to act. This new regime applies to cases of State referral and *proprio motu* investigation by the

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<sup>99</sup> Dapo Akande, *The ICC Assembly of States Parties Prepares to Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?*, EJIL: TALK! (June 26, 2017), <https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/>.

<sup>100</sup> Heller, *supra* note 89.

<sup>101</sup> Declaration of Non-Acceptance of Jurisdiction of the Int’l Criminal Court Pertaining to the Crime of Aggression Pursuant to Paragraph 4 of Article 15 *bis* of the Rome Statute, MFA. INT. 8/14A Vol. X (86) (2015), [https://www.icc-cpi.int/iccdocs/other/2015\\_nv\\_kenya\\_declaration\\_article15bis-4.pdf](https://www.icc-cpi.int/iccdocs/other/2015_nv_kenya_declaration_article15bis-4.pdf).

<sup>102</sup> ROME STATUTE, *supra* note 8, art. 15 *bis*, ¶ 5.

Prosecutor. However, for SC referrals there is no limitation irrespective of who has accepted the jurisdiction of the Court or has made a declaration of non-acceptance. Thus, the Review Conference gave the SC universal reach. Accordingly, in the case of State referrals or *proprio motu* investigation, this regime means that the express consent of an aggressor non-State Party is needed for the Court to exercise jurisdiction.<sup>103</sup> This is unlikely to occur. The chance that the Security Council refers States to the ICC is extremely limited given the possibility of veto by Permanent Members. This seemingly leads to a situation where there will generally be a lack of jurisdiction by the Court if a national of a State Party commits an act of aggression on the territory of a non-State Party.<sup>104</sup> According to article 15 *bis*, paragraph 5, the Court cannot exercise jurisdiction concerning non-States Parties over “the crime of aggression when committed by that State’s nationals or in its territory.” This is not what happens when applying article 15 *bis*, paragraph 4, which allows the Court to exercise jurisdiction when a State party that has not opted-out commits an act of aggression in a State Party that has opted-out.<sup>105</sup>

Such a distinction in the regime is anomalous and highly damaging for the Court. Besides ignoring the culture of accountability that the Rome Statute aims to create, it has the effect of impeding the potential universality of the ICC. In fact, by excluding non-States Parties from its jurisdiction where a crime of aggression is concerned, it creates a situation where the advantages of joining the Rome Statute by the big powers, such as by the USA, China, the Russian Federation, or India, are limited. Presently, there is no risk of their leaders being indicted by the ICC. Even the existence of a crime of aggression in the territory of these States, which are outside of the Rome Statute regime, would not trigger the protection granted by the ICC. This is because article 15 *bis* paragraph 5 includes nationality and territoriality in the exclusion of non-States Parties from the jurisdiction of the Court. That is contrary to the general regime established in article 12.

Such a solution is part of the compromise reached by the States that wanted greater protection versus those states that are concerned about being held accountable for their international interventions (e.g. majority of European and Latin American States on one side, and the

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<sup>103</sup> ROME STATUTE, *supra* note 8, art. 12, ¶ 3.

<sup>104</sup> In favour of this understanding, see Heller, *supra* note 89.

<sup>105</sup> See *supra* Part III, Section B.2.

UK, France, Canada, USA, on the other side). To remove the requirement of a prior determination by the SC, States had to agree on leaving non-States Parties out of the jurisdiction of the Court. Kreß and Holtzendorff call this new regime “the ultimate compromise built upon a combination of a Security Council-based and a consent-based ICC jurisdiction over the crime of aggression.”<sup>106</sup>

#### 4. *The Legal Interpretations of the Kampala Amendments*

A key question in the negotiations was whether the Court would have jurisdiction over a national of a State Party that had not ratified the Kampala Amendments, and had not made a declaration of non-acceptance, if he or she committed a crime of aggression in the territory of a State Party that had ratified and had not made a declaration of non-acceptance of the jurisdiction of the Court? In this regard, there were two divergent positions in both 2010 and in 2017. These two positions were called “camp-consent” and “camp-protection”, as one focused on the need for consent for all States Parties involved, while the other offered a greater protection by only requiring the consent by the victim State Party.<sup>107</sup>

Although some of the discussions were centred on the entry into force of the amendments, the contentious issue was what would be the legal regime for the exercise of jurisdiction by the Court. The main two sides of the debate were focused on one hand on article 121, paragraph 5, and on the other article 5, paragraph 2, together with article 12 of the Rome Statute.

The first case (camp-consent or the narrow view) limits the entry into force of the amendments to a state-by-state basis<sup>108</sup> and where there is no ratification of the amendments there is no jurisdiction, regardless of being a victim or an aggressor State. Simply put, a State Party that does not ratify is not bound to the Amendments.<sup>109</sup> The obvious conclusion is that this argument makes the opt-out irrelevant, since States Parties would need only not to ratify the amendments to be outside of the

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<sup>106</sup> Kreß & Holtzendorff, *supra* note 61, at 1195.

<sup>107</sup> Dapo Akande & Antonios Tzanakopoulos, *The Crime of Aggression before the International Criminal Court: Introduction to the Symposium*, 29 EUR. J. INT'L L. 829, 832 (2018).

<sup>108</sup> Manson, *supra* note 94, at 420.

<sup>109</sup> Mauro Politi, Artigos 8 bis, 15 bis e 15 ter: Crime de Agressão.. in O TRIBUNAL PENAL INTERNACIONAL: COMENTÁRIOS AO ESTATUTO DE ROMA 245 (Sylvia Helena Steiner & Leonardo Nemer Caldiera Brant eds., 2016) 231.

jurisdictional scope. Manson argues that the possibility of opt-out prior to ratification by a State Party can be done by reason of “diplomatic caution, rather than legal necessity,”<sup>110</sup> to ensure that its position is known and that it absolutely does not accept the jurisdiction of the Court when a crime of aggression is in question.

The second case (camp protection or broad view) adopts a more systematic approach to the Rome Statute and the Kampala Amendments. Coracini argues that because of the jurisdiction reach adopted, the negotiations in Kampala led to the inclusion of two particularities in the final package: article 15 bis paragraph 5 to ensure the exclusion of non-States Parties from the jurisdictional scope of the Court, and paragraph 4 by creating the mechanism of the opt-out.<sup>111</sup> According to this interpretation, with ratification of the victim State Party and lack of an opt-out by the aggressor State Party, the Court would be able to intervene. Thus, the opt-out declaration would only be possible after ratification of the amendments by the State Party. According to Coracini, making this declaration prior to ratification proves difficult to conform with the prohibition of reservations established in article 120.<sup>112</sup>

Thus, the two positions have completely different interpretation of the provisions. One takes a literal interpretation and the other a systematic approach. Kreß and Holtendorff suggest that article 5, paragraph 2 (original version of the Rome Statute) and article 121 result in a “fundamental ambiguity.”<sup>113</sup> The result therefore is a deep fragmentation of the Rome Statute and the jurisdiction of the ICC over the crime of aggression. It is substantially different from the approach applied to the other three core crimes when they concern State referrals and *proprio motu* investigations by the Prosecutor. This divergence was questioned over and over again during the ASP. It basically comes down to valuing a more literal interpretation based on the law of treaties and the need to provide for legal certainty or a more systematic approach that thrives for the development of international criminal law and ensures accountability.

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<sup>110</sup> Manson, *supra* note 94, at 427–28.

<sup>111</sup> Coracini, *supra* note 92.

<sup>112</sup> *Id.*

<sup>113</sup> Kreß & Holtendorff, *supra* note 61, at 1215. On the various interpretations on article 121, see Darin, *supra* note 13.

#### IV. ACTIVATING THE ICC'S JURISDICTION OVER THE CRIME OF AGGRESSION

To move forward on the issues considered and agreed to in Kampala for the activation of the crime of aggression, at the 15<sup>th</sup> session of the ASP, States Parties decided to convene a process to enable such activation.<sup>114</sup> The facilitation had seven meetings, held in the UN Headquarters in New York, chaired by the Legal Adviser of Austria, Nadia Kalb.<sup>115</sup> Throughout the process, the majority of States Parties expressed their willingness to activate the jurisdiction of the Court at the 2017 ASP. It was widely recognized that the activation decision had to be consensual, because otherwise it would undermine the legitimacy and credibility of the Court, especially considering the dividedness that the crime of aggression embodies.<sup>116</sup> Because anything less than achieving consensus would have been a collective failure for international criminal justice and for the effectiveness of the ICC in its mandate of ensuring accountability. Thus, States Parties tried to avoid a vote or even the mention of a vote. Yet, a consensus solution was nowhere in sight.

On possible elements of activation, several proposals were submitted. The proposals by Switzerland, the UK/France, and that from Palestine were the most important. The proposal by Switzerland became known during the facilitation process, and later in the ASP, as the "simple decision," because it did not take any position on the different interpretations, as presented above. It simply decided to activate the Court's jurisdiction without any conditions. Its premise was neutrality in the choosing of a position. This it did to let the Court itself decide about its own jurisdiction, and what would be its interpretation of the Rome Statute and the Kampala Amendments.

The UK and France noted the need for certainty concerning the position of nationals of States Parties that had not accepted the amendments. Their proposal reflected the narrow view, in which a crime committed by a national, or on the territory of a State Party that had not ratified the amendments, should not be subject to the jurisdiction of the

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<sup>114</sup> ASP, Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression, at 2, ICC-ASP/16/24, at 2, (Nov. 27, 2017).

<sup>115</sup> *Id.*

<sup>116</sup> See Frederick Cowell & Ana Leticia Magini, *Collapsing Legitimacy: How the Crime of Aggression Could Affect the ICC's Legitimacy*, 17 INT'L CRIM. L. REV. 517 (2017).

Court. They argued this was necessary because of the special nature of the crime of aggression and the possibility of prosecuting Heads of State or those who exercise political or military control over a State, which is highly controversial.

On the opposite end of the spectrum was the proposal submitted by Palestine that recognized the camp-protection position. This position was based on article 15 *bis*, paragraph 4, by which the ICC can exercise jurisdiction over the crime of aggression committed by a State Party, if that State has not opted-out, irrespective of the ratification by the State.

The facilitation meetings were, therefore, characterized by continuous explanations and discussions by the various camps and by the various States about their different positions, meanings and potential effect of the various proposals. As a result, there were on going attempts by some camps and by a variety of States to reconcile the different views, and to come up with new or revised proposals to find creative solutions to achieve consensus.<sup>117</sup> Some States tried their best to avoid a weakening or an undoing of what was agreed at the Review Conference. However, the debates that were held in New York at times replicated those that occurred in Kampala. It was recognized, mainly by the supporters of camp-protection, that the call for certainty and clarification should not encroach on the judicial function of the ICC and the independence of the judges. It was recognized that the ASP did not have certain powers and functions and therefore some matters had to be left to the Court to decide.<sup>118</sup> To try and find common ground, Cyprus submitted a proposal that tried to combine several elements that had been previously suggested, known as the “simples plus approach.” It combined three previous proposals with the intention of giving the Court all the elements necessary to assist the judges in arriving at a conclusion concerning the jurisdictional regime that should be in force. It introduced the idea, mainly supported by camp-protection, of distinguishing between the entry into force of the amendments and the exercise of jurisdiction by the Court. The amendments would enter into force one year after ratification, but the Court could exercise its jurisdiction before that if the State had not made an opt-out declaration. However, the proposal eliminated the core sentence of the UK/France approach that stated that: “the court does not exercise its jurisdiction in respect of that

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<sup>117</sup> Brazil also tried to bring new worthwhile proposals to the table, although with little success. ASP, *supra* note 114, at 25.

<sup>118</sup> ROME STATUTE, *supra* note 8, art. 112.



crime when committed by a national of a State Party which has not accepted such amendments or in the territory of that State.” As this was a fundamental argument of the supporters of camp-consent, when eliminated, it meant that these States disagreed with the proposal.

To assist the process Professor Kreß and Professor Akande presented a discussion paper.<sup>119</sup> This paper was called the “Non-German Non-Paper.” It contained elements of activation with the aim of eliminating the practical relevance of the declaration of non-acceptance, by providing that it may be done by any reasoning, individually or collectively, and also recognizing the fundamental divergence between the two camps. Delegations recognized that this paper put forward two points of view that would prove essential to enable a consensual decision to be made during the ASP, namely the recognition of the two camps and the operationalization of the opt-out. However, not a lot of discussion was spent on this proposal, mainly because it did not favor any of the various positions, even though it was trying to find a compromise.

What can be said is that the negotiations were mainly a political discussion between the larger States that would more likely be subject to the jurisdiction of the Court over the crime of aggression, and the smaller States, that were trying to get protection against the possibility of such an act. While some States demonstrated some flexibility, others threatened not to join the consensus if their position was not adopted.<sup>120</sup> This was informally called the “take-it-or-leave-it” approach. This position was mainly shared by the States that supported the narrow view in their efforts to remove the ambiguity of the Rome Statute, such as the UK and France.

Additionally, regarding the opt-out, there was some restlessness about the value of this declaration. There was the belief that the opt-out position would have a high value of importance of a political nature, because it was a declaration to the world that a specific State would not grant protection to itself and to others if a crime of aggression were to be committed. During the facilitation delegations, especially those trying to be pragmatic, tried to clarify this issue and reach the conclusion that a

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<sup>119</sup> Two of the experts that briefed the delegations during the facilitation and authors of much of the doctrine existing on the subject of the crime of aggression, in their capacity as academics. *See generally* Claus Kreß, *Activation of ICC Jurisdiction over Aggression*, in 33 *QUEEN MARY STUD. INT’L L.* 55–56 n.34 (Malgosia Fitzmaurice & Sarah Singer eds., 2019); *THE ROME STATUTE OF THE ICC AT ITS TWENTIETH ANNIVERSARY* 55–56 n.34 (Malgosia Fitzmaurice & Sarah Singer eds., vol. 33 2019).

<sup>120</sup> Also recognized in the ASP, *supra* note 114, at 3–4, ¶ 14.

declaration of non-acceptance of the jurisdiction of the Court would not need to include a “valid” reasoning, it would simply be a declaration made by a State that it would not accept the jurisdiction of the Court.

Despite these efforts, no concrete results came out of the facilitation process. States remained committed to their own positions throughout the facilitations. Going into the ASP the possibility of reaching a consensus solution seemed far away. The inflexibility shown by some delegations affected the pragmatic efforts undertaken by others. However, delegations still remained committed to working together and activating the Court’s jurisdiction in 2017 even though their positions seemed irreconcilable.

#### A. THE 16<sup>TH</sup> SESSION OF THE ASSEMBLY OF STATES PARTIES (ASP)

The ASP began on 4 December 2017, with efforts to reach a consensus following a similar process as occurred during the facilitation process.<sup>121</sup> However, now there were informal consultations. A myriad of proposals, that were controversial, either for camp-consent, either for camp-protection, failed to achieve agreement.

To break the deadlock, a proposal was submitted by Brazil and Portugal, joined later by New Zealand, which saw the opt-out as a way to bridge the gap between the two views. This pragmatic approach suggested the creation of a list, annexed to the resolution to be adopted, with the names of States Parties that had made a declaration not to accept the jurisdiction of the Court on the crime of aggression. The opt-out declaration would remain a viable option for those States that wished to stay out of the jurisdiction of the Court concerning the crime of aggression. The idea of the list was to make this declaration politically irrelevant, since it would be done in the context of the ASP (although the possibility of making it afterwards was also included). If this process was to be followed then no reasoning was required for that inclusion to be made. It would therefore be less damaging for the State’s image and credibility, because it would not be as politically charged. It would even allow for a group of States to ask to be included in the list, reducing the impact that it would have if only one State individually declared not to accept the Court’s jurisdiction. However, some delegations expressed

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<sup>121</sup> See Jennifer Trahan, *From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression*, 18 INT’L CRIM. L. REV. 197, 198 (2018).

their concerns regarding the legality of this mechanism and the competence of the ASP to create it; questioning if it is within the functions of the ASP to adopt a new mechanism operationalizing what was agreed in Kampala, taking into account article 112 of the Rome Statute.

Thus, several proposals were on the table, but none of them satisfied both camps. The facilitator therefore decided to introduce a discussion paper that laid out three options: Option 1 - simple activation, without mentioning legal interpretations, as proposed by Switzerland; Option 2 - camp-consent, confirming application of article 121, paragraph 5; and Option 3 - a compilation of ideas presented by States Parties, with special focus on the possibility of making a declaration of non-acceptance of the jurisdiction, through the inclusion in the above-mentioned list, in order to make this declaration not as politically-charged as it was considered to be.

The first option was preferred by eighteen delegations, with several of them supporting Option 3 as well, that being the compromise solution, thus gathering in total the support of thirty-three delegations. Only about eight delegations expressed their support for Option 2, with some of them showing flexibility towards Option 3. Almost two-thirds of the States Parties did not pronounce themselves on which position they preferred regarding the interpretation of the Kampala Amendments. It was however the camp-consent supporters, represented by the powerful countries, and the P5, that blocked the activation of the Court's jurisdiction.

During the final days of the ASP, consensus seemed nowhere in sight. There was uneasiness about the process and mental calculations were being made about where the process stood and how progress could be made. Delegations started considering the hypothesis of a vote. They started to try and see how many States Parties would support camp-protection and camp-consent, considering the requisite of a two thirds majority for the decision to be taken.<sup>122</sup> However, it would have been damaging for the ICC to vote on a question of such political importance. It would have divided the States Parties and would have affected the legitimacy of the Court.

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<sup>122</sup> According to articles 15 *bis* and 15 *ter*, in identical paragraphs 3, a decision of activation has to be taken by the same majority of States Parties that is required for the adoption of an amendment. ROME STATUTE, *supra* note 8, art. 15 *bis*, 15 *ter*. In this case, article 121, paragraph 3, of the Rome Statute applies.

By the final day of the ASP, no consensus had been achieved on either of the proposals.<sup>123</sup> The facilitator then decided to give up her functions and transfer the work to the Vice-Presidents of the ASP. The Vice-Presidents informed delegations that they would submit a final proposal, in order to reach consensus that would not be open to negotiations. However, the negotiations on this draft were not done in an open and transparent setting, instead it required closed meetings, that facilitated, nevertheless, the reaching of common ground. Interestingly, this proposal, in its first draft, reflected the position of camp-protection by establishing that the amendments do not apply to any national of a State Party that has not ratified or accepted them. It also omitted the reference to the territory of a State Party, thus permitting the Court to exercise jurisdiction when an alleged crime of aggression was committed in the territory of a State Party. The resolution also failed to mention the trigger mechanisms of the jurisdiction of the Court, thus determining that the exercise of jurisdiction in the case of State referral or *proprio motu* would be identical to a UNSC referral, which is not in line with the Kampala Amendments. However, soon after, this paragraph was updated to include the previous omissions, even though it was a *no-further-negotiation* proposal. If it was truly a “technical mistake” or it was subject to some pressure of the powerful countries to be changed will never be known, but the final draft ended up confirming the position of camp-consent.

The paragraph in question reads as follows: “3. Reaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court.” This was the final effort of camp-protection to give the Court some manoeuvring ability and to ensure that it would decide about its own jurisdiction, irrespective of what position achieved consensus. It was simply an assertion that the decision on the jurisdiction of the Court, taking into account the legal interpretations of the Kampala Amendments connected with the Rome Statute framework, falls within the competences of the judges. Such inclusion was still subject of discussion in the room, with camp-consent strongly advocating for its elimination, while camp-protection defended to maintain the provision that at least (minimally) balanced the confirmation of article 121, paragraph 5.

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<sup>123</sup> At least 20 different proposals and discussion papers were considered throughout the facilitation and the ASP.

Activation was delayed until 17 July 2018, the date of the 20<sup>th</sup> anniversary of the Rome Statute. This was a way of allowing States to update national legislation and make the necessary arrangements, either to ratify or to opt-out. However, by confirming the interpretation of camp-consent, the opt-out became quite irrelevant, since ratification is always necessary for the Court to exercise jurisdiction.

In plenary, before taking action on the draft resolution, several countries exercised their right of giving an explanation of vote, which actually resembled more a drafting exercise than an actual explanation of vote, either to raise concerns, to ask for consensus or to ask for flexibility.

The attitude in the room was of uncertainty whether actual consensus would be reached or not. This was the case because the advocates of camp-consent were still unsure about the insertion of a provision recalling the independence of the judges and of the Court that would still undermine the certainty that they required. At the same time, the advocates of camp-protection were discouraged with the “victory” of the other position that represented a major setback in the development of international criminal justice, but continued in their struggle to adopt an activation decision.

The disagreement continued until the last minute. Advocates for camp-consent tried to replace the provision on the independence of the Court included in an operative paragraph by a preambular paragraph, as to give it less importance, but with little success. Finally, the moment to take action on the draft resolution arrived with the room unsure of what the result would be.<sup>124</sup> When the Vice-Presidents asked if any delegation opposed to the adoption of the draft resolution and silence ensued, the gavel hit the table. Then the room exploded into applause and the decision to activate the jurisdiction of the International Criminal Court over the crime of aggression was adopted.<sup>125</sup>

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<sup>124</sup> Kreß and Holtendorff report that the same uncertainty plagued the Review Conference in 2010, with delegations waiting for UK and France to break the silence. Interestingly, this may have represented a kind of *déjà vu* for some diplomats present both in Kampala and then in New York. Kreß & Holtendorff, *supra* note 61, at 1179–80.

<sup>125</sup> ASP, Activation of the Jurisdiction of the Court over the Crime of Aggression, ICC-ASP/16/Res.5 (Dec. 14, 2017), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf).

## B. THE RESOLUTION ON THE ACTIVATION OF THE JURISDICTION OF THE ICC OVER THE CRIME OF AGGRESSION

Ultimately, the confirmation of the narrow view and the restriction of the jurisdiction of the Court was the “price to pay” for the crime of aggression to finally become effective in the international criminal justice framework. For the supporters of camp-protection and for everyone that wanted the jurisdiction activated, it was more important to achieve such a milestone than to try to keep fighting for a position that did not gather consensus, regardless of what interpretation should have prevailed.

The confirmation in the Resolution will mean that the ratification of States Parties of the amendments will always be required, regardless of it being a victim or an aggressor State. This represents an effort to preserve the sovereignty of the States, with the express basis of the exercise of jurisdiction being a declaration of consent. Lamounier in this regard sees “sovereignty as a relation of independence between States in the international context and, at the same time, the position of equality between them” (own translation).<sup>126</sup> In this case, taking into account the jurisdictional regime of the ICC over the crime of aggression, it could be argued that sovereignty seems to be more about the relation of independence than equality, because States will be left in deeply asymmetrical positions, some being covered by the crime of aggression and the majority of them not. Additionally, crimes against humanity, genocide and war crimes will have a totally different jurisdictional regime, creating a fragmented system between the core crimes established in the Rome Statute. As Heller notes the crime of aggression regime establishes a “la carte approach to the ICC’s jurisdiction.”<sup>127</sup> By confirming the narrow view, a highly restrictive jurisdiction of the Court over the crime of aggression is being imposed. Besides leaving out nationals of non-States Parties and creating the opt-out mechanism, by allowing States Parties to declare that their nationals will not be subject to the jurisdiction of the ICC, the crime of aggression regime now excludes nationals of States Parties that have not ratified but that have

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<sup>126</sup> GABRIELA MACIEL LAMOUNIER, REFLEXÕES SOBRE O TRIBUNAL PENAL INTERNACIONAL: A PRINCIPIOLOGIA, O PROCESSO, O MINISTÉRIO PÚBLICO E A CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL DE 1998 65 (Belo Horizonte ed., 2011); see Politi, *supra* note 109, at 1605–06.

<sup>127</sup> Heller, *supra* note 89.

not declared an opt-out as well. This makes the opt-out useless, clearly not intended by the drafters of the Kampala Amendments.

#### V. WILL THE ICC REGULARLY PROSECUTE AGGRESSION?

Taking into account the role, functions and provisions of the ICC one has to question if the ICC will adequately be able to deal with the crime of aggression. Will the solution in the Rome Statute contribute to the prevention of the most heinous of crimes? If that is to occur it will require proactive action from the ICC and the international community. Only if positive actions are taken to avoid the commission of the most atrocious of human rights violations and to help to end them when they are already occurring will there be a real impact on the human rights situation. The question also is whether the adoption of the crime of aggression and the process to hold individuals accountable will actually promote a culture of accountability that the international community agreed to build in 1998, that reinforces “core societal values” and sends the message to the world that a crime committed by a person in a position of power or control will not escape unpunished.<sup>128</sup>

The crime of aggression’s negotiation history and the difficulties faced over the last 20 years leads us to the conclusion that actually using the crime of aggression is going to be difficult. Prosecuting a person in power or in control of a State who has committed an act of aggression against another State will jeopardize the relations between those States. It is not going to have a great deal of effect because the scope of the jurisdiction of the Court to deal with the crime of aggression is so limited. It must be noted that only 35 States Parties have ratified the Kampala Amendments. This is important considering that the ASP confirmed the position that maintains that the jurisdiction of the Court is excluded in relation to nationals or in the territory of States Parties that have not ratified the Kampala Amendments, even if the victim State Party has ratified. Thus, only acts of aggression committed by nationals of those 35 States Parties will fall within the jurisdiction of the Court. Moreover, the majority of the States that have ratified are European countries. This makes it very unlikely that one of these countries would commit an act of aggression against another state. Heller already in 2010, predicted that the jurisdiction of the Court would “almost certainly be

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<sup>128</sup> Hector Olasolo & Lucia Carcano, *The ICC Preventive Function with Respect to the Crime of Aggression and International Politics*, HARV. INT’L L.J. ONLINE J. 67 (2017).

limited to states that do not have either the motive or the wherewithal to commit the crime in the first place.”<sup>129</sup> Van Schaack notes that the States more likely to violate the prohibition on the illegal use of force by committing an act of aggression will be those that are not members of the Court and will not choose not to ratify the Rome Statute. She concludes that this activation will in practice mean: “going ahead with an empty shell that will only complicate the life of the Court.”<sup>130</sup>

The importance of the decision to activate the crime of aggression in 2017 cannot be overstated. Considering the past 20 years and the negotiating history of the activation process, finally activating the crime of aggression in the international order is considered a milestone. The fact it occurred by consensus is crucial.<sup>131</sup> The importance of demonstrating a united front in this particular matter by the ASP and by State delegations was seen to be vital.

As a result of finalising the process it is hoped that the ICC will now have the grounds to pursue cases of aggression, thereby offering greater protection to States, not only in terms of their sovereignty, but also in human rights. However, the regime as it stands does not really provide much protection. As it stands, there is very little chance of ensuring much individual criminal responsibility for the waging of aggression by one State against another.<sup>132</sup> Part of the problem is the low number of States that have, or will in the future, adopt the process and which States have or will do so. The hope is now that more and more countries will ratify the amendments and that in the meanwhile the UNSC will refer cases to the ICC when the crime of aggression is committed. The role of the UNSC but also the ICJ will, therefore, be essential to guarantee an end to impunity of these atrocities and act as a deterrent for future crimes.

By ratifying the Kampala Amendments, States are also choosing to criminalize aggression in their domestic jurisdictions, by virtue of the principle of complementarity<sup>133</sup> established in articles 1 and 17 of the

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<sup>129</sup> Heller, *supra* note 89.

<sup>130</sup> Beth Van Schaack, *The ICC Crime of Aggression and the Changing International Security Landscape*, AM. SOC'Y INT'L L. (2015), <https://www.asil.org/blogs/icc-crime-aggression-and-changing-international-security-landscape>.

<sup>131</sup> Quintana, *supra* note 2.

<sup>132</sup> See Ruys, *supra* note 57, at 32.

<sup>133</sup> The ICC can only intervene when the State in question is unable or unwilling to carry out an investigation or prosecution.



Rome Statute<sup>134</sup> Not only the seriousness of aggression would be exposed internationally and subject to the international jurisdiction of the Court, but also it would gain a different level of condemnation if States would implement it in their national legal orders, contributing to the prevention of these acts and ensuring accountability at the national level.

The hope must also lie on the belief that some non-States Parties, by not being included in the ICC system, will fear being victims of acts of aggression and by not being in the reach of the exercise of jurisdiction of the Court; and will want to join the Rome Statute to receive an added layer of protection<sup>135</sup> Maybe, in the future the international community and international law, especially international criminal law, will be ready for new developments which will allow amendments to be adopted, to article 121, paragraph 5, or article 15 *bis*, paragraph 4 and 5, of the Rome Statute, to create a uniform jurisdictional regime common to all core crimes.<sup>136</sup>

## VI. CONCLUSION

In Rome in 1998 while States agreed on the ICC and three crimes, the adoption of the crime of aggression was delayed until a later stage, when the international community would be more willing to deal with such matter. In Kampala, a compromise-solution was found in the creation of the mechanism of opt-out, in order to accommodate the existing divergent positions, but mainly to accommodate UK and France's concerns. In New York in 2017, there was the full acknowledgment of the same position, the narrow view, disregarding States that wanted to ensure more protection for their territories, but simultaneously wanted more accountability for their own nationals.

The negotiations at the ASP and the subsequent adoption of the Resolution were a result of an intense diplomatic process, which required a lot of expertise by the delegations.

The decision to activate the jurisdiction of the Court is a key breakthrough in international law, international relations and in the protection of human rights. However, this is not enough. A step further must be taken to fight impunity and guarantee an international system

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<sup>134</sup> Wenaweser & Alavi, *supra* note 11, at 21.

<sup>135</sup> William A. Schabas, *The Kampala Review Conference: A Brief Assessment*, PHD STUD. HUM. RTS. (June 17, 2010), <http://humanrightsdoctorate.blogspot.pt/2010/06/kampala-review-conference-brief.html>.

<sup>136</sup> Coracini, *supra* note 92.

based on the rule of law.<sup>137</sup> Unless changes occur, the present regime will have little or no practical effect in the exercise of jurisdiction by the ICC. Future steps must include efforts to increase the number of ratifications of the Kampala Amendments. It is necessary to raise awareness about the problems until it is viable for States Parties to propose new amendments to crime of aggression regime so as to ensure an effective system of accountability.

Peace and security in the world, in so many places where these concepts have been eluded, depend on a range of steps and a range of tools to assist the process.<sup>138</sup> The ICC's ability to prosecute the crime of aggression needs to be enhanced in the future if a real difference is to be made to the situation around the world.

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<sup>137</sup> See further some issues, in Jeremy Sarkin, *The Need to Reform the Political Role of the African Union in Promoting Democracy and Human Rights in Domestic States: Making States More Accountable and Less Able to Avoid Scrutiny at the United Nations and at the AU, Using Swaziland to Spotlight the Issues*, 26.1 AFR. J. INT'L. COMP. L. 84 (2018).

<sup>138</sup> See, e.g., Jeremy Sarkin, *Why Security Council Reform is Essential for R2P to Actually Impact the Global Level of Atrocity Crimes*, CAN. J. ON RESP. TO PROTECT (forthcoming 2019).