The Crime of Aggression: Will the Amendments be Adopted?

I. Introduction

In June of 2010, the State parties to the International Criminal Court (the ICC) adopted a new set of provisions to the Rome Statute that define the parameters and trigger mechanisms for the Crime of Aggression, adding the crime to the ranks of war crimes, crimes against humanity, and genocide. After more than a decade of deliberation and compromise, the UN Charter now has the opportunity to be fulfilled, and the ICC will become the world’s first competent tribunal to prosecute aggressive uses of force since the Nuremberg trials. Though the Crime of Aggression amendments will not take effect until 2017 at the earliest, adopting the prohibition on the use of force provides a meaningful way to hold the aggressors of war accountable and promote peaceful relations amongst all of the states.

However, the Crime of Aggression amendments have been the subject of much debate and compromise. There are significant questions remaining as to what was actually agreed upon in Kampala.¹ These questions concern not only the procedural steps required to prosecute aggression at the ICC, but also the elements and parameters of the crime itself.² Many have criticized the amendments for politicizing the ICC and jeopardizing its judicial role and function. The definition of the crime and the

² Id.
amendments to be adopted have further been criticized for vagueness and as difficult to apply in holding States accountable. Even the adoption process for State parties has been criticized. This paper highlights many of the issues that have arisen and summarizes the effects the adoption of the Crime of Aggression will have on the ICC and State parties. I will propose that, though the Crime of Aggression is vague and riddled with issues, State opinions on its adoption suggest that the amendments will pass.

II. Politicization

The United Nations’ Security Council’s role in the exercise of the ICC’s Jurisdiction

The main debate in negotiations on the conditions for the exercise of jurisdiction was whether an outside body must determine if the State concerned has committed an act of aggression before the Court may proceed. Under Resolution 6, the UN Security Council has an increased capacity to impede the Prosecutor’s investigation into the Crime of Aggression. The most contentious issue relates to the relationship between the Security Council and the Court, in particular in situations where the Security Council has not (yet) determined that the State concerned has performed an act of aggression.

Some delegations expressed the view that under Article 39 of the UN Charter, the Security Council has exclusive competence to determine a state act of aggression. Under this view, the Court would not be able to proceed with a case in the absence of a Security

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4 Id.
Council determination. Article 39 says, “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” There are two outlooks that support this approach. First, there is the view that the UN Charter, and its articles concurrently, were designed in a specific way that the majority of States agreed to. Essentially, the idea is maintain the status quo, which is favored by most delegations with a background in public international law. Second, as Meron put it, is “[t]o ask the ICC, in the absence of a determination by the Security Council, to decide that an act of aggression has taken place would force the ICC to become immersed in political controversies between states. Such an immersion would endanger the ICC’s judicial role and image.”

Other delegations argued that the Security Council has primary, but not exclusive authority to determine an act of aggression, and that the absence of a Security Council determination should not preclude the Court from proceeding with a case. Still others expressed that since the Security Council may already refer a situation to the Court and defer an investigation in accordance with Article 13 and 16 of the Rome Statute.

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5 Id.
6 UN Charter, art 39.
respectively, no additional provision on a prior determination on an act of aggression is necessary.\textsuperscript{10}

The take away from the debates at Kampala is that there is a divided consensus on the role of the Security Council, an inherently political organization, having a significant role in the introductory procedural proceedings. Fears that the ICC will become less independent, will sacrifice some of it’s judicial role, or will be supplanted by political wills or trends, have become paramount and are discussed throughout this paper.

**Conditions for the Exercise of Jurisdiction**

Article 23(2) of the International Law Commission’s (ILC) 1994 Draft ICC Statute suggested making ICC proceedings for the Crime of Aggression dependent upon a prior determination of an act of aggression by the Security Council.\textsuperscript{11} This proposal provoked criticism from within the ILC in that it “would introduce into the statute a substantial inequality between State members of the Security Council and those that were not members, especially between the Permanent Members of the Security Council and other States.”\textsuperscript{12} The overwhelming majority of States that participated in negotiations shared this criticism, and the critics within the ILC noted that this proposal “was not likely to encourage the widest possible adherence of States to the statute.”\textsuperscript{13} Nevertheless, the Permanent Members of the Security Council pushed to adopt the ILC proposal. Controversially, this is because it potentially benefited the Permanent Members from ever

\textsuperscript{10} Id.
\textsuperscript{12} Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994, UN Doc. A/49/10, 43, at 87 et seq.
\textsuperscript{13} Id.
being prosecuted for the Crime of Aggression. The Permanent Members, who retain the power of veto on the Security Council, could shield their citizens or the citizens of their allies from prosecution through a veto of any proposed act of aggression.14 This polarized the States: the Permanent Members on one end with a monopoly claim, and the rest of the States who rejected any role for the Security Council beyond the one already recognized in Article 16 of the ICC Statute on the other.15 The Special Working Group for the Crime of Aggression (SWGCA), which was tasked with completing work on the crime of aggression after initial agreement on it could not be reached, collected proposals for the amendments to be discussed at Kampala. The proposals were described as a “watershed in the negotiations on the crime of aggression.”16

The most important achievement of the SWGCA was to establish a consensus that any role of the Security Council with respect to aggression proceedings could only be a procedural one.17 The political dimension of the Security Council and any determination it makes with respect to aggression confers a political context to the ICC’s jurisdiction, which undermines its role as an independent court.18 The members of the SWGCA agreed that, for the specific purpose of establishing individual criminal responsibility, it is exclusively for the ICC to determine whether or not the state conduct element of the

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18 Cale Davis, supra pg. 11
Crime of Aggression has been fulfilled.\textsuperscript{19} Accordingly, a “determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute,”\textsuperscript{20} such that determinations of the Security Council as to the existence of an act of aggression are not binding on the ICC.

Thus, Article 15\textit{bis} (8) allows for the Prosecutor to proceed with an investigation into a Crime of Aggression if authorized to do so by the Pre-Trial Division of the ICC. While this may remove the political element of the Security Council from initiating an investigation, by implication, it is also argued that it creates a higher threshold for the Prosecutor to meet.\textsuperscript{21} If the Security Council determines that an act of aggression has not occurred, or remains silent for six months, the entire Pre-Trial Division is required to sit instead of an individual Chamber. This means the Prosecutor must satisfy a larger bench than for the other crimes listed in Article 5 of the Rome Statute. Further, although the Prosecutor may ultimately be authorized by the Pre-Trial Division to continue an investigation, the investigation may still be deferred by the request of the Security Council.\textsuperscript{22} Prevailing diplomatic and political circumstances within the Security Council may cause the higher threshold to be applied selectively,\textsuperscript{23} if one of the Permanent

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\textsuperscript{19} Claus Kreß, \textit{supra} pg. 1195.
\textsuperscript{20} Rome Statute, art. 15(9)\textit{bis}.
\textsuperscript{21} Robert Manson, Identifying the Rough Edges of the Kampala Compromise (2010, Crim.L.F 1,3.
\textsuperscript{22} Rome Statute, art. 16. (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”)
Members decides to veto or a collection of other member states sitting at the time share a particular ideology or objective.

Ultimately, the issue seems to be that using the Security Council, an inherently political organ, as a quasi-jurisdictional filter raises questions of whether the Crime of Aggression is merely a “policy in disguise of the law.” Some argue that few cases of aggression will ever reach the ICC because the Security Council has been historically reluctant to determine acts of aggression, which will result in constant application of the higher Pre-Trial Chamber threshold. Although it has been suggested that the Security Council may be more likely to determine an act of aggression has occurred now that the ICC provides an avenue for prosecution, it has been argued that the Security Council may not be prepared to compromise its power.

Conversely, it is worth noting that some commentators do not perceive the Security Council’s role in its determination of an act of aggression as one that weakens the ICC or affects its independence. They argue that the ICC currently makes political determinations in the context of other international crimes and this has not proven

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27 Vimalen Reddi, *supra* at 664.
inconsistent with its judicial function.\textsuperscript{28} Further, the inclusion of the qualifiers in the definition serves the goal of preventing the ICC from entering into controversial grey areas of \textit{jus contra bellum}.\textsuperscript{29} However, in the end, the inclusion of the Security Council in even procedural matters still creates the \textit{opportunity} for political motivations to affect the independence of the ICC, which has the potential to violate the ICC’s judicial function.

**Opt-in and Opt-out**

Another prominent issue of debate was whether the ICC should have the power to exercise jurisdiction over the Crime of Aggression in cases where the State has not consented to the new provisions on the Crime of Aggression. “It is not unreasonable to assume that it would be easier for the Permanent Members of the Security Council to tolerate initiation of proceedings before the ICC even without the consent of the Council if it was agreed that proceedings could not be initiated unless the alleged aggressor state had consented to the new provision(s) on the crime of aggression.”\textsuperscript{30} Related to the issue above, this would allow non-consenting States, such as the United States, to have complete immunity from the Crime of Aggression, but the Permanent Members would still have a critical role in initiating Crime of Aggression proceedings through the Security Council.

This creates an issue of both policy and law as to how States should adopt the Crime of Aggression provisions. From a policy perspective, many delegations favored

\begin{footnotes}
\item[28] Claus Kreß, \textit{supra} at 1144.
\item[29] \textit{Id.}
\item[30] Claus Kreß, \textit{supra} at 1195.
\end{footnotes}
the application of Article 12\textsuperscript{31} without any modification.\textsuperscript{32} Delegations that wanted to condition the exercise of jurisdiction, in the absence of the Security Council’s consent, on the consent of States to the Crime of Aggression relied on the argument that Article 121(5)\textsuperscript{33} required such a solution as a matter of law.\textsuperscript{34} However, this creates several complications for the application of the Crime of Aggression. Article 15\textit{bis}(4) specifically provides for the application of Article 12, should States choose to exercise it.\textsuperscript{35} The idea of an opt-out declaration was a matter of compromise meant to bridge the gap between those in favor of applying the jurisdictional scheme under Article 12(2) without modification and those in preference of a strictly consent-based regime.\textsuperscript{36} The consequences of this compromise appear to severely limit the Court’s ability to exercise jurisdiction. First, the Court will not be able to exercise jurisdiction on a non-State party, which is problematic and discussed below. Second, the Court will not be able to exercise jurisdiction in the case that an act of aggression by a State party that has ratified the

\textsuperscript{31} Rome Statute, art 12. (“1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. . . .
3. If acceptance of a state which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question . . .”).
\textsuperscript{33} Rome Statute, art. 121(5). (“Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory”).
\textsuperscript{34} Claus Kreß, \textit{supra} at 1196.
\textsuperscript{35} Rome Statute, art. 15\textit{bis}(4) (“The Court may . . . exercise jurisdiction over a crime of aggression . . . unless that State Party has previously declared that it doe not accept such jurisdiction . . .”).
\textsuperscript{36} Claus Kreß, \textit{supra} at 1213.
aggression amendments without declaring an opt-out against a non-state party.\footnote{Id.} Third, the Court cannot exercise jurisdiction over an act of aggression of a State party which has previously opted-out of the jurisdictional regime. Conversely, the ICC will still have jurisdiction over an opted-out state as a victim of aggression.

As such, there are only two possible circumstances over which the Court will be able to exercise jurisdiction. First, in cases where a State that has opted-in commits an act of aggression against another State that has also opted-in. Second, where a State that opted-in commits an act of aggression against another State who opted-in and subsequently opted-out. Critics argue that this approach will weaken the ICC’s ability to apply the rules of international criminal law independently and equally to all State parties, even going so far as to say it has been “utterly destroyed.”\footnote{Robert Manson, \textit{supra} at 15.}

Because these two situations require that both States have opted-in (at some point), it is arguable that the Crime of Aggression may be rarely applied, and the ICC will not address all of the relevant crimes of a conflict equally. More specifically, it is possible that the ICC does not have jurisdiction over a Crime of Aggression for a conflict but will still have jurisdiction over the other crimes in relation to the same conflict.\footnote{Id. at 12.}

Jurisdiction over war crimes, crimes against humanity, and genocide can be established through the nationality of the perpetrator or by virtue of the territory where the crimes are committed, and if either one of the two States involved ratified the Rome Statute, the Court will have jurisdiction. This will create a discrepancy that will make Crime of Aggression likely prosecuted significantly less than it’s counterparts.

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\begin{itemize}
\item \footnote{Id.}
\item \footnote{Robert Manson, \textit{supra} at 15.}
\item \footnote{Id. at 12.}
\end{itemize}
Ultimately, the nature of the political compromise encompassed in Article 15\textit{bis} weakened the Courts ability to apply the Crime of Aggression the same way the other crimes can be applied. This appears inconsistent with the court’s judicial function and the nature of the Crime of Aggression being an equally serious crime as the other crimes under the Court’s jurisdiction.

### III. Issues with the Definition of Aggression

#### A. 8(2)\textit{bis}: Crime of Aggression

The first requirement under the definition of aggression is the occurrence of an act of aggression. It is thus prudent to look at 8(2)\textit{bis} first, because the Crime of Aggression can only proceed once an act of aggression has been established.

Article 8(2)\textit{bis} defines an act of aggression in two sub-parts. The first part sets out the general definition (“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”).\textsuperscript{40} The second part provides a list of examples of acts that will qualify as acts of aggression.

**“Armed Force”**

At first glance, the term ‘Armed Force’ appears to have the same meaning where it is used throughout the Rome Statute and for other crimes. Armed force appears to mean forced directed against an opponent through military weaponry or blockades backed up by such weaponry.\textsuperscript{41} Consequently, it does not include non-force attacks, such as

\begin{footnotesize}
\textsuperscript{40} Rome Statute, art 8(2)\textit{bis}  
\textsuperscript{41} See Stefan Barriga, ‘Against the Odds: The Results of the Special Working Group on the Crime of Aggression’, \textit{The Princeton Process on the Crime of Aggression: Materials} \end{footnotesize}
economic embargoes or cyber warfare. The second part of the definition, the list of acts that will qualify as an act of aggression, further signifies meaning the use of military force. Thus, the demonstration of the use of armed force in the military sense will stand as a condition precedent for any charge of aggression before the ICC. Further, the elements of the Crime of Aggression require that an act of aggression is committed. Threats of aggressive acts will therefore not be considered an act of aggression, no matter how serious.

The problem with this definition is likely to balance on what it does not account for, rather than what is included in this definition. For example, a well-targeted bombing attack could destroy a State’s energy grid. Likewise, with cyber warfare, a cyber attack theoretically could destroy a nation’s energy grid as well. If ‘Armed Force’ has a consistent meaning throughout the Rome Statute, the first scenario would be considered a use of armed force, and may be a Crime of Aggression. However, the second scenario does not utilize conventional military weaponry as it is currently interpreted within the Rome Statute. Thus, armed force has not been utilized, and there cannot be a Crime of Aggression. It appears, then, that the inclusion of ‘Armed Force’ in the definition may thereby balance upon the means of enacting aggression, rather than the effect it caused when viewed as a whole. Some would argue that in defining an act of aggression you are attempting to describe what the act actually is, or the whole of the event, and not

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42 See, e.g., Resolution 3314, Article 1; Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Judgment of 27 June 1986 (Merits), 1986 ICJ Reports 14, para.163 (accepting that “cross-border military attacks” could constitute aggression).
43 Matthew Gillet, supra at 8.
specifically the way in which an act is carried out. Here, instead, armed force refers to the ways in which an individual may participate in the Crime rather than just defining the objective act itself.

**“By a State”**

By defining an act of aggression as the use of armed force “by a State,” the amendments exclude uses of force by non-State entities and make the act of aggression a State function and not an individual function for individual criminal responsibility. The intent of this statute in defining it as “planning, preparation, initiation or execution, by a person in a position to effectively to exercise control over or to direct the political or military action of a State…” was to hold States responsible as a member-function of the United Nations. However, violent attacks committed by terrorist groups, insurgents, criminal factions, mercenaries, or dissident groups will not per se satisfy the definition, even if committed on a large-scale with grave effects equivalent to an attack by State forces.\(^{44}\) Non-State entities can be as capable as State entities in perpetrating attacks. For example, Al-Qaeda has demonstrated a number of attacks that many have argued may or should constitute acts of aggression. These include the attacks on the World Trade Center and other targets in 2001, and the bombings on public transport vehicles in London in 2005. These attacks, in conjunction with many other examples worldwide from different groups, show the ability of non-State actors and organizations to unleash violent and grave attacks of an aggressive nature. However, without the inclusion of non-State actors in the definition, the aggression amendments do not extend to attacks of this nature. This

means that Osama Bin Laden, for example, would have been immune from prosecution for the Crime of Aggression. Although he was the leader of Al-Qaeda, he was not in a position to have overall or effective control of a State or direct the military or political action of a State and thus would not fulfill the elements of the definition of the Crime of Aggression. Accordingly, even if the Taliban were found to have sufficient control over Al-Qaeda to be held responsible for the attacks and its leaders were prosecuted, the self-declared mastermind behind the attacks would have escaped any conviction for aggression.

Conversely, while there is no jurisdiction over acts of non-State actors in isolation, the ICC will have jurisdiction if an armed attack by a non-State actor can be attributed to a State. Here, there is ambiguity as to how the ICC will interpret “by a person in a position effectively to exercise control over or to direct the political or military action of a State.” The ICC will likely have to decide whether to adopt the “effective control” test from the ICJ in the Nicaragua case, or the “overall control” test established by the ICTY in the Tadić case. The ICC is also free to establish its own rule or test. While all options have a strong legal standing in the international context, the ambiguity of which rule will apply leaves States unsure as to the specific applicability of the Crime of Aggression and how it may be used against an alleged perpetrator.

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45 Id.
46 Id.
47 Nicaragua v. USA
48 Prosecutor v. Duško Tadić
“Against the Sovereignty, Territorial Integrity or Political Independence of Another State, or in any other Manner Inconsistent with the Charter of the United Nations”

The use of armed force will only satisfy the general definition of aggression in Article 8bis if used against the “sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” The inclusion of these qualifiers mirrors the definition in Resolution 3314 and seems nearly redundant, as it largely replicates the terms of Article 2(4) of the U.N. Charter that says, “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.”

These qualifiers thus do not per se limit the definition of aggression to any significant degree. However, it is unclear whether the qualifiers concern the subjective purpose for which the force is used (to the extent a State may have a subjective will), or the objective results of the use of force.⁴⁹ Although the distinction seems arbitrary, it could be dispositive in certain circumstances. For example, if a State attack is directed against a target that does not fulfill any of these qualifiers (such as a terrorist group operating within the State’s own borders), but the attack had unintended but grave effects in another State (such as if missile strikes against the terrorist group also caused damage outside the State’s borders, whether due to inaccurate targeting or simply the magnitude of the strikes), could those unintended consequences constitute an act of aggression?

A plain reading of the text in Article 8(2)bis would suggest not, thus predicating

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⁴⁹ Matthew Gillet, supra pg. 11.
the act of aggression on a malevolent purpose, or *animus malus*, held by the attacking State, rather than the mere objective responsibility for damage to another State.\textsuperscript{50}

However, interpretation of international case law and State responsibility could provide a basis for State responsibility under the Crime of Aggression.\textsuperscript{51} In the *Corfu Channel* case,\textsuperscript{52} the International Court of Justice held that it was sufficient, in order to establish Albanian responsibility for a wrongful act, that Albania knew, or must have known, of the presence of mines in its territorial waters and did nothing to warn other States of their presence.\textsuperscript{53} Accordingly, Article 8(2)\textit{bis} could be read to extend to acts of aggression caused by negligence or recklessness. The issue at hand is an uncertainty by States as to whether the adoption of the Crimes of Aggression will open them up to this kind of potential criminal responsibility.

Further, “in any other manner inconsistent with the Charter of the United Nations” is slightly ambiguous and begs the question of which entities may be victims of an act of aggression. More specifically, are attacks against non-State entities sufficient to qualify as aggression? For example, if State A were to attack an insurgent group composed wholly of members from State B that were not under the control of the State B, could that be interpreted as an act of aggression against State B via the responsibility to

\textsuperscript{50} Id.

\textsuperscript{51} See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, Article 2, Commentary paras. 3-4 (noting that different obligations in public international law have intention, knowledge, or even inadvertence standards to attribute responsibility).

\textsuperscript{52} *United Kingdom v. Albania*

\textsuperscript{53} *United Kingdom v. Albania; Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949, I.C.J. Reports 1949, pg. 4, pp. 22-23.
The list of acts that qualify as acts of aggression all refer to acts committed against another State. Moreover, the question is mostly theoretical, because an attack against a non-State entity is likely to also constitute an attack against the territorial State where the entity is based, which would qualify under a plain reading of the text. States do not appear to have any definitive guidance on this question, and the ambiguity will leave States at odds, again.

**Article 8(2)bis: The List of Acts**

The list of acts of aggression is not exhaustive, nor is it meant to be. Inclusion of the list was a matter of drafting compromise and does not preclude the ICC from finding that other uses of armed force fitting the general definition can constitute an act of aggression. Some argue that prosecuting acts that are not specified in the list would breach the principle of *nullum crimen sine lege* in Article 22(2) of the Rome Statue, as

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54 The responsibility to protect may extend to the Crime of Aggression as an internationally recognized crime; *See Outcome Document of the 2005 United Nations World Summit A/RES/60/1*, para. 138-140; *See Also Secretary-General’s 2009 Report (A/63/677) on Implementing the Responsibility to Protect.* (saying, “The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing and their incitement.”).

55 See Report of the Special Working Group on the Crime of Aggression (ICC-ASP/6/20/Add.1/Annex II), para.34 (noting that “Those delegations that supported the drafting of paragraph 2 Article 8 bis (2) expressed their understanding that the list of crimes was, at least to a certain extent, open. Acts other than those listed could thus be considered acts of aggression, provided that they were of a similar nature and gravity to those listed and would satisfy the general criteria contained in the chapeau of paragraph 2.”)


58 Rome Statute, art. 22(2) (saying, “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.”).
it would extend the enumerated definition of acts of aggression, by way of analogy.\textsuperscript{59} Moreover, they suggest that the ambiguity as to whether the list constitutes an exhaustive definition should be interpreted in favor of the accused.\textsuperscript{60}

However, through negotiations the drafting of the amendment intended an open-ended list\textsuperscript{61} and the wording of the first two sentences of Article 8(2)\textit{bis} support this approach. The first sentence establishes the governing definition of the act of aggression, using the same formula used to define other crimes in the ICC’s jurisdiction in Articles 6, 7, and 8, (i.e. “‘war crimes’ means …”, “‘act of aggression’ means …”). The second sentence then sets out examples that “shall” qualify under that definition without commenting on the other acts, which may also qualify.\textsuperscript{62} This approach “does not contradict the principle of legal certainty under international law because the general definition ensures a sufficient degree of legal certainty.”\textsuperscript{63}

The result is that Article 22(2) and the non-exhaustive list may be legally contradictory. State parties are, again, left in limbo and will likely have to wait for a determination by the Court to see if \textit{nullum crimen sine lege} or the result of the negotiated amendment applies as customary international law.


\textsuperscript{60} \textit{Id}.

\textsuperscript{61} \textit{See} Report of the Special Working Group on the Crime of Aggression (ICC-ASP/6/20/Add.1/Annex II), para. 34.

\textsuperscript{62} \textit{See} Gillet \textit{supra} at 13.

Exceptions

When is the use of armed force not an act of aggression? “Of all the unresolved issues surrounding the substantive definition of the crime of aggression, the applicability of exceptions to the prohibition on the use of force is likely to be the most intractable.”64 The availability of exceptions will determine whether an act of aggression has occurred or not. An act of aggression is a necessary element in establishing liability for the Crime of Aggression, and the applicability of an exception to the prohibition on the use of force may prevent liability. In this way, the exceptions to the general prohibition against the threat or use of force will distinguish lawful conduct from criminal aggression.65 No exceptions are explicitly mentioned in the amendments, but the issue is contentious due to the uncertainty surrounding the potentially available exceptions under public international law.

First, the definition of a Crime of Aggression is predicated on an act inconsistent with the “sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” Thus, acts that are consistent with the Charter are not acts of aggression by definition. This could cover self-defense66 and acts authorized by UNSC resolution.67 The requirement that the act be

64 Matthew Gillet, supra at 15.
65 Keith Petty, Criminalizing Force: Resolving the Threshold Question for the Crime of aggression in the Context of Modern Conflict. 33 Seattle University Law Review (2009) 105-150, pg. 120.
66 See UN Charter, art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”); See also Nicaragua v. USA, para. 176 (establishing self defense under public international law).
67 See UN Charter, art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such
a “manifest” violation of the UN Charter also leaves room for potential exceptions, such as implicit authorization\textsuperscript{68} or the defense of nationals abroad.

Second, Article 32 of the Rome Statute provides that, “at trial, the ICC may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from law.” This means that the ICC could determine that an alleged perpetrator is not liable for, or is exempted from, the Crime of Aggression. For example, if an alleged perpetrator’s act of aggression is not in the list of acts, the Court could exempt him/her from prosecution under the principle of \textit{nullum crimen sine lege}.

Third, it has been argued that the aggression provisions could be read to import an implicit negative element where the prosecution must prove the absence of a legal justification for the use of armed force.\textsuperscript{69} This approach seems unlikely, as it is in the perpetrator’s interest to propose any and all defenses applicable to their case, and seems counterintuitive that the prosecution should be required to prove the non-existence of a defense the perpetrator may not have proffered as a defense in the first place. Regardless, this is still a possibility.

The result is that there is uncertainty as to whether there will be exceptions to the prohibition on the use of force at all, and, if so, which ones will apply, and generally whether or not the Crime of Aggression will be applied in circumstances where an

\textsuperscript{68} “Implicit authorization” is a doctrine that means interpreting a UNSC resolution to authorize the use of force when the resolution does not do so explicitly, which emerged as a purported legal justification for the invasion of Iraq in 2003.

\textsuperscript{69} Claus Kreß, \textit{supra} at 1192.
exception may preclude liability for a State. This had led to States taking issue with the definition, which may hinder the desire of States to opt-in to the enforcement of the Crime of Aggression amendments.  

B. 8(1)bis: Crime of Aggression

The Crime of Aggression entails individual criminal responsibility, whereas an act of aggression is a form of State conduct. Once an act of aggression has occurred, the ICC will look at the additional elements in Article 8bis and the relevant, related articles to determine whether an individual can be held responsible for the Crime of Aggression.

“Planning, Preparation, Initiation or Execution . . . of an Act of Aggression”

The text of 8(1)bis states that “‘Crime of Aggression’ means the planning, preparation, initiation or execution . . . of an act of aggression.” This varies from the definitions of war crimes, crimes against humanity, and genocide, as it refers to the ways in which an individual may participate in the crime rather than just defining the objective crime itself.

The reference to planning, preparation, initiation or execution is not a new development, as the wording reflects the Charter of the International Military Tribunal at Nuremberg (a.k.a. the Charter of London), which set up the Nuremberg Tribunal under

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70 Beth Van Schaack, Negotiating at the Interface of Power & Law: The Crime of Aggression. 49 Columbia Journal of Transnational Law 505-601 (2011), note 7, pg. 515-516, (noting that “from the moment it began participating in negotiations on aggression in 2009 (under the Obama administration), the US vocalized its concerns about the draft definition of the crime.” Van Schaack explains that “the central problem was that Article 8(2)bis is worded in such a way that it deems any violation of territorial integrity, political independence, or sovereignty of another state, as well as any use of armed force that is inconsistent with the U.N. Charter, to be an ‘act of aggression’.”)

71 Matthew Gillet, supra pg. 22.
Article 6(a). However, the Rome Statute complicates this wording by way other articles, such as through the Article 25(3) attempt provisions.\textsuperscript{72} The biggest issue is whether Article 8\textit{bis} and Article 25(3) will be conjunctive or disjunctive regarding modes of liability, which raises a number of questions. Will the prosecution have to show that the perpetrator planned, prepared, or initiated an act of aggression and also that they fulfilled the elements of a mode of liability under Article 25? Does the prosecution only have to show that they fulfilled any of the various ways of participating in an act of aggression in either article? How would the prosecution prove that a perpetrator attempted to plan an act of aggression in the first place?

Further, there is a discrepancy between the terms of the Statute, and the elements of the Crime of Aggression adopted at Kampala. Article 8(1)\textit{bis} says the Crime of Aggression means the “planning, preparation, initiation or execution” of an act of aggression. This is contradictory to the elements of the Crime of Aggression, however, which indicates that even if a Crime of Aggression is planned or prepared by someone, and sanctioned by a State who has control over the military, this will not be sufficient for a conviction. The act of aggression must not merely be planned or prepared or initiated, it has to be committed.\textsuperscript{73} To resolve this discrepancy, Article 9 provides that the “Elements of Crimes shall assist the Court in the interpretation and application of Article 6, 7 and

\textsuperscript{72} UN Charter, art. 25 (“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: . . . (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commissions.”).

\textsuperscript{73} Elements of Crimes, art. 8\textit{bis}, element 3 (“The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.”).
“but this does not mean that judges are bound by them. However, this raises another potential issue for State parties. Until such time as there has been a judicial decision on the issue, the States are left with ambiguity and uncertainty as to how the Crime of Aggression will be applied.

C. Threshold Requirements

Article 8(1)bis limits criminal responsibility for acts of aggression to uses of force that “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” This was considered a necessary addition in order to avoid the over-criminalization of uses of force considered minor, such as border skirmishes, or less grave uses of force such as minimal property destruction not resulting in physical harm to persons, which are not of a patently illegal character.74

“Manifest Violation”

“The requirement that the act of aggression constitute a “manifest” violation of the Charter in order for criminal liability to arise is the fulcrum of the aggression definition”75 The inclusion of “manifest” in the definition “emerged as a compromise modifier to bridge the gap between those delegates who wanted no threshold at all, on the theory that every act of aggression should be subject to prosecution, and those who wanted a higher threshold that would limit prosecutions to ‘flagrant’ breaches of the Charter, wars of aggression, ‘unlawful’ use of force, or acts of aggression geared toward occupying or annexing territory.”76 However, the term “manifest” is unclear, as it has no

74 Claus Kreß, supra at 1138.
75 Matthew Gillet, supra at 24.
76 Van Schaack, supra at 10.
legal definition under the Statute or amendments. “It may be seen as referring to the degree of clarity or ambiguity surrounding the illegality of the act of aggression or else as relating to the level of seriousness or even the willfulness of the attack.”\textsuperscript{77} In any case, the “manifest” threshold requirement leaves States with more ambiguity and uncertainty as to the applicability of the Crime of Aggression being prosecuted.

\textbf{“Character, Gravity, and Scale”}

The inclusion of these qualifiers suffers from the same problem as “manifest” in that they are ambiguous as to the parameters of their applicability. Some argue that the “manifest” threshold requirement will be met or based on an assessment of these three qualifiers.\textsuperscript{78} Annex II of Resolution 6 (which adopted the Crime of Aggression) provides, “It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.”

This means two things: first, the three threshold qualifiers are viewed together to constitute a “manifest” violation. If all three are sufficient, then a manifest violation has occurred. It may be possible that two qualifiers are strongly established but the third is not, and manifest violation may still be found to have occurred. However, if one qualifier is strongly established and the other two are weak or non-existent, this is insufficient to constitute a manifest violation.

Second, as discussed above, what “character, gravity and scale” and “manifest”

\textsuperscript{77} Matthew Gillet, \textit{supra} pg. 24.
mean are vague at best. Annex II turns the definition of character, gravity, and scale in on ‘manifest’. Thus, when applied to the Article 8(1)bis text, the definition of manifest relies on itself to prove it is in fact manifest. In other words, a violation will be “manifest” if the character, gravity and scale are sufficiently “manifest.” While character, gravity and scale may be used to determine whether an act of aggression is a “manifest violation”, the act is only a “manifest violation” when it is “sufficient to justify a manifest determination.” To break that down further, a “manifest violation” is “manifest.” The problem with this circular logic is that it does little to provide a means for States to understand or interpret what a “manifest” violation is, even in regards to character, gravity, and scale. This will likely take a judicial determination or clarification to provide a real basis for States to evaluate, and in the meantime the States are left with another example of uncertainty.

IV. State Opinion

Thus far, the issues and ambiguities surrounding the adoption of the Crime of Aggression and the State adoption process have proven numerous. These issues have clouded the States ability to know exactly what they are signing on to when they do choose to opt-in or opt-out of the Crime of Aggression provisions. If State parties are unwilling to accept the ICC’s jurisdiction over aggression, it will likely reduce support for the ICC and undermine its efforts in international justice. However, to accept the provisions would significantly politicize the prosecution of the Crime of Aggression and thereby affect (or undermine) the ICC’s independence and judicial function.

The Review Conference at Kampala attempted to overcome these concerns in
their debates and in reaching a finalized definition of the Crime of Aggression. However, in light of so many potential issues, the fundamental purpose of the ICC will be altered. While many argue that the Court is young and developments are only natural, others argue that developments should only be made to strengthen the ICC and that weakening it will set precedence that may someday make the ICC an obsolete mechanism. The jurisdictional reliance on the Security Council erodes the independence of the prosecutor to pursue all crimes equally under its jurisdiction, which will lead to impunity.79 Allowing States to determine for themselves whether the ICC will be able to exercise jurisdiction for the Crime of Aggression against them creates a political disincentive to adopt the provisions and fails to uphold the tenets of the UN Charter. Further, the definition of the Crime of Aggression is so compromised, and accordingly vague, that States are unable to know precisely what they will be adopting, should they choose to opt-in. In that light, it seems that the problems with the adoption of the crime of aggression may be too substantial. Yet, despite all of that, State opinion on adopting the Crime of Aggression appears mostly positive, and seems to suggest that the Crime of Aggression will be adopted.

Initial Forecasting

On November 30, 2010, only four months after the Kampala Conference that agreed on the amendments of the Crime of Aggression, the UN General Assembly passed Resolution 65/13 without reference to a main committee. Resolution 65/13 “invites the International Criminal Court to submit, in accordance with Article 6 of the Relationship Agreement, a report on its activities for 2010/11, for consideration by the General

79 Cale Davis, supra at 12.
Assembly at its sixty-sixth session.\textsuperscript{80} The recorded vote for Resolution 65/13 of 112 to 9, with 54 abstentions, seems to suggest that a significant majority General Assembly is open to the proposal of the Crime of Aggression.\textsuperscript{81}

However, there are two important implications of this vote. First, for the 12 States that voted against the Resolution, this is a clear showing of disapproval to the adoption of the Crime of Aggression. If they will not concede to a vote just to hear the ICC submit its proposal, it seems farfetched to conclude they would adopt the Crime of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} \textit{In Favor}: Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia (Plurinational State of), Botswana, Brazil, Brunei Darussalam, Burkina Faso, Cambodia, Chile, China, Comoros, Costa Rica, Côte d’Ivoire, Cuba, Cyprus, Democratic People’s Republic of Korea, Djibouti, Dominican Republic, Ecuador, Egypt, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Lao People’s Democratic Republic, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Paraguay, Philippines, Qatar, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, Sri Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Tajikistan, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, United Arab Emirates, United Republic of Tanzania, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia, and Zimbabwe.
\item \textit{Against}: Australia, Canada, Israel, Japan, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, and the United States of America.
\item \textit{Abstaining}: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Cameroon, Colombia, Croatia, Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Papua New Guinea, Peru, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Samoa, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Tonga, Ukraine, United Kingdom of Great Britain and Northern Ireland, and Uruguay
\end{itemize}
\end{footnotesize}
Aggression, regardless of their reasons for opposing the amendments. Additionally, voting against the resolution at this early stage may be advantageous for them to preserve a record as persistent objectors to the Crime of Aggression, which may render them immune to prosecution for the crime ultimately. Second, it is important to note how the Permanent Members of the Security Council voted. Only one of the Permanent Members of the Security Council, China, voted in favor of Resolution 65/13. The United States is the only Permanent Member that explicitly voted against the Resolution, and France, the United Kingdom, and Russia all abstained from voting. An abstention does not imply any bias or opinion on a matter colloquially. However, in the political realm, an abstention often expresses either mild disapproval that does not rise to the level of active opposition, or when a State has a certain position about an issue that is adverse to the popular sentiment. For France, the UK, and Russia, it may have been the case that it would not be politically expedient for them to voice their concerns at this time, in juxtaposition to the United States, which has always been a persistent objector to the ICC, and China, whose position on the Crime of Aggression has always been favorable insofar as there is a precise definition of the crime and that there is a link between the Security Council and the enforcement of the Crime of Aggression.

82 See (List of things the United States has objected to)
A. The Permanent Members

The Permanent Members of the Security Council will have an increased role in finding an act of aggression and referring situations to the ICC as described above. The advantage of holding the veto power on the Security Council will ultimately give these five countries an increased role in enforcement of the Crime of Aggression when compared to all other member States of the United Nations. Consequently, many member States will be looking to the opinion of these five States, as the permanent members may have some ability to laud the Crime of Aggression over other States, while making themselves immune, and hold a certain degree political sway in the international context accordingly.

The United States

It should be noted from the outset that the United States has been a persistent objector to the ICC’s jurisdiction in its entirety. The United States has disfavored all jurisdiction of the ICC over any American citizen. Under the Bush Administration, Under Secretary of State for Arms Control and International Security Affairs John Bolton famously wrote to the UN secretary-general to “un-sign” the Rome Statute. The United States thereafter boycotted the Court, declining to participate in the meetings of the Assembly of States Parties, the SWGCA established by the Assembly of States Parties, or the “Princeton Process,” the informal intercessional meetings established to help develop

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a package of draft aggression amendments for the anticipated ICC Review Conference. The United States was characterized by overt hostility to the Court. More recently, however, Under the Obama administration, Secretary of State Hillary Clinton showed new openness to the Court, saying “Whether we work toward joining or not, we will end hostility toward the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.”

Speaking directly about the Crime of Aggression, Jamison Borek, Deputy Legal Advisor for the Department of State, said “this is fundamentally a crime of States, as to which the Security Council would have to play a central role. It thus presents all the risks of politicization in a serious form. It is, moreover, a crime which is still very ill-defined. The Nuremburg Tribunal did not have to confront this problem, as it was dealing, after the fact, with a clear and specific case. In the abstract, however, it is not at all universally established what fits even within the limited concept of “waging a war of aggression.” What are the possible defenses or mitigating factors in connection with such a charge? What if it concerns disputed territory?” The U.S. representative went on to question how “controversial concepts such as humanitarian intervention or a war of liberation” would be handled, saying that “[i]ncluding the Crime of Aggression would require clear,

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87 Id. (citing Nomination of Hillary R. Clinton to Be Secretary of State, Hearing Before the Senate Comm. on Foreign Relations, 111th Cong. 135 (2009), at http://www.nytimes.com/2009/01/13/us/politics/13text-clinton.html.).
universally-accepted answers to these questions.” She urged that it would be far better for
the negotiators to focus, instead, “on the core crimes of international humanitarian law
for which there is universal support.”  

Further, David Scheffer, Ambassador-at-Large for War Crimes Issues, speaking
before the United States Congress, pointed to the elusiveness of a widely acceptable
definition of the crime, noting that there was no guarantee that the definition would be
linked with a prior UN Security Council decision that a state had committed aggression,
and that the U.S. concern that how the provisions on aggression “will be resolved is too
unclear for so important an issue.”

Finally, Harold Hongju Koh, Legal Advisor for the Department of State, has
highlighted that many issues arise from the Crime of Aggression being too vague and
unclear in it’s applicability, saying, “The United States considered the definition of
aggression flawed, but a number of important safeguards were adopted. Understandings
were adopted to make the definition more precise, to ensure that the crime will be applied
only to the most egregious circumstances. And while we think the final resolution took
insufficient account of the Security Council’s assigned role to define aggression, the
states parties rejected solutions that provided for jurisdiction without a Security Council

States Perspective. The American Journal of International Law, Vol. 109, No. 2 (April
Statement by Jamison S. Borek, Deputy Legal Adviser, United States Department of
State, at the 50th Session of the United Nations General Assembly, Sixth Committee)

90 Id. (citing Is a U.N. International Criminal Court in the U.S. National Interest?,
Hearing Before the Sub comm. on Int’l Operations of the S. Comm. on Foreign Relations,
105th Cong. 10 – 47 ( July 23, 1998) (statement of David J. Scheffer, ambassador-at-
large for war crimes issues); UN GAOR, 53d Sess., 9th mtg., para. 58, UN Doc
A/C.6/53/SR.9 (Nov. 4, 1998) (remarks of David J. Scheffer before the 6th Committee of
the General Assembly on Oct. 21, 1998).
or consent-based screen. We hope that crime will be improved in the future and will continue to engage toward that end.”

Popular commentary from the U.S. Department of State has largely centered on the ambiguities of the amendments, but there is largely a push in favor of clarifying the uncertainties in order to bring the amendments in line with the United States. In short, the U.S. will not agree to the Crime of Aggression unless a majority of the vague provisions highlighted above are clarified. Ultimately, while the United States has shown efforts to re-engage with the ICC, the current political standing is adverse, and it seems unlikely that the United States will agree to adopt the Crime of Aggression amendments in the end.

**China**

Initially, China voted against the Rome Statute, and international criminal responsibility. The Head of the Chinese delegation to the Rome Conference in an interview for a Chinese national newspaper, the *Legal Daily*, said that that China consistently supports the establishment of the ICC, which would in its operation be independent, impartial, effective and universal, on condition that the ICC would supplement the function of existing national legal systems. He said that China would treat all major issues covered by the Rome Statute in a cautious manner to prevent the Court from becoming a political tool for intervention in the internal affairs of States. When asked the reason why China voted against the Rome Statute, he replied that China disagreed with the provisions allowing the Court to exercise universal jurisdiction, that

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China had serious reservations over the extension of the Court’s jurisdiction to war crimes arising from non-international armed conflicts, in relation to which China preferred an opt-in mechanism to engage the competence of the Court, that China would like to see the UN Security Council to first act upon possible cases of aggression, without, in addition, the limitation that the Security Council’s power in this regard be segmented by 12-month periods, that China had serious reservations over the power of the Prosecutor to initiate investigation *proprio motu*, which could entail interference with the internal affairs of States, and that China also regarded crimes against humanity as linked with armed conflict.  

Since that time, many of China’s initial concerns have been reflected in the negotiation process for the Crime of Aggression, which has made China’s outlook on the Crime of Aggression generally positive. This is reinforced by China’s vote in favor of Resolution 65/13. However, the Chinese position on the Crime of Aggression specifically is subject to two conditions. First, there should be a precise definition of the crime; and second, there should be a link between the Security Council and the ICC.

While there is a definition of the Crime of Aggression, it can be presumed that the definition is ‘precise’ enough, even with the ambiguities, given China’s extensive involvement in the negotiating process that created the final amendments. However, the link between the Security Council and the ICC is still somewhat problematic. At the signing of the Rome Statute, an important issue for China was limiting the power of the

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93 See Id.
Prosecutor in accordance with the Rome Statute. China expressly disagreed with giving the Prosecutor the power to initiate investigations or to prosecute *proprio motu*, which it considered to be exercisable “without checks and balances against frivolous prosecution,” thus amounting to “the right to judge and rule on State conduct”. This concern is not resolved in the final amendments, however the ability to defer any investigation by the request of the Security Council for one year, renewable each year, maintained what is believed to be a sufficient link between the Council and ICC for the Chinese delegation, despite their initial disfavor towards the deferral period.

In sum, despite reservations of their own, and a negotiated compromise to settle their own discomforts, China’s position on the Crime of Aggression has been generally positive. It appears likely that China will vote in favor of adopting the Crime of Aggression amendments.

**France and the United Kingdom**

Thus far, it does not appear that France or the United Kingdom (the UK) have made any official comments on their position for the Crime of Aggression. While they did take part in the negotiation process extensively, for the most part their concerns mirrored those of the other permanent Security Council members, who participated as vocal observers. However, there have been two interesting events that raise question to their opinion on the Crime of Aggression.

First, on the last night of the Kampala Conference, just before midnight, the President of the Conference presented all of the delegates a package of the proposed amendments. Not all of the delegates were present, and there were not enough delegates

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94 See Id. at 5 (citing A/CONF.183/SR.9, para. 39.).
remaining to meet the two-thirds threshold of State parties, however the UK and France voted in favor of the proposed amendments without any protests.\(^95\) W.A. Schabas expressed doubts as to whether the position of the permanent members of the Security Council was a bluff or an expression of political shifts and changes in the world.\(^96\) Schabas hypothesizes that, at the time, it appeared that The UK and France wanted to express favor for the proposed definition of the Crime of Aggression, the will to fight against impunity, terrorism and that lead to armed conflicts. On the other hand, they could count on non-ratification of the resolution by the requisite majority of countries.\(^97\) In the preamble to Resolution RC/Res. 6 it was decided that the provision defining the Crime of Aggression would enter into force if it were ratified by at least 30 States Parties to the ICC Statute. The number of States that must ratify the amendments to the Statute results from the requirements provided for in paragraph 2 of the draft Article 15bis and 15ter of the ICC Statute.\(^98\) If a threshold of 30 countries that have ratified the amendments to the ICC Statute is not reached by January 1, 2016, the Assembly of States Parties could vote on introducing the provisions for the Crime of Aggression into the ICC Statute, but it would not cause that the provisions on the Crime of Aggression come into force.\(^99\) As such, France and the UK’s initial vote may have been a way to subvert the Crime of Aggression from becoming an actionable crime in the international arena for the


\(^{96}\) Id.

\(^{97}\) Id.

\(^{98}\) Id.

time, while showing political favor in a manner of speaking. At the same time, it also sent a message of support for the amendments as a whole, even if it was ineffectual at the time.

Second, France is one of two countries, along with Columbia, to have preemptively opted-out of the ICC’s jurisdiction for the Crime of Aggression. France and the UK advocated for the Security Council to have “exclusive power to control prosecutions for the Crime of Aggression.” Essentially, as the two Security Council Permanent Members that are also members of the Rome Statute, France and the UK advocated to give the exclusive jurisdiction to the Security Council to retain the power of the Security Council, as opposed to giving the Prosecutor the power to act *propio motu*. France and the UK are thus concerned that Prosecutor could weaken the power of the Security Council. Additionally, France has thereby shown some reluctance to the amendments being adopted for itself. However, that is a mixed message for the amendments as a whole, to say the least. France opting out is a clear showing that France will not submit to jurisdiction over the Crime of Aggression. As France cannot claim a persistent objector status like other members of the Security Council, this was seemingly their chosen method of avoiding jurisdiction. However, this is not a clear stance against the amendments themselves being adopted, even if France is not part of its jurisdiction. The midnight approval of the proposed amendments at Kampala shows support for the rest of the Rome Statute members to favor the Crime of Aggression amendments.

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Russia

Russia, along with China and the United States, has not ratified the Rome Statute. During the October 17, 2012, Security Council debate, Russia’s UN Ambassador Vitaly Churkin provided a revealing overview of the official Russian attitude towards the Court.101 Ambassador Churkin indicated displeasure concerning the outcome of the Kampala compromise over the Crime of Aggression, which he said “does not fully take into account the powers of the Council.” He said, “[w]e have concerns about the Court exercising jurisdiction with regard to the Crime of Aggression in the absence of any definition of the Crime of Aggression by the Security Council.”.102 In short, the Russian position, suggests concern that the ICC risks undermining what is seen as the established roles of the Council. Churkin’s emphasis on how the ICC must carry out its activities highlights a case-by-case approach in which Russian policymakers will focus on Council equities and security/stability/peacemaking as much as, if not more than, principles of accountability and justice.103

Further, in light of recent events, it seems unlikely that Russia will adopt the Crime of Aggression amendments, because Russia is currently one of the largest international aggressors. It is conceivable that Russia’s invasion of Ukraine, and annexation of Crimea in 2014, constituted an act of aggression. If Russia were to adopt, or submit to the jurisdiction of the ICC for the Crime of Aggression, it is foreseeable that Russia would be essentially condemning itself to an investigation into it’s own acts. Consequently, Russia has an extreme disincentive not only to adopt the amendments, but

102 Id.
103 Id.
also to promote the adoption by other countries so as to make it within the ICC’s jurisdiction, or a matter of customary international law. As such, it’s a safe presumption that Russia will not promote or adopt the amendments.

B. Other States and Member States

Leading up to the review conference for the Crime of Aggression in 2010, opinions were divided between two main camps.\textsuperscript{104} The first camp included states who wanted the ICC to investigate an alleged act of aggression using the same referral mechanisms that are in place for the other core crimes in international law outlined in Article 13 of the Rome Statute, namely by a state party, the Security Council, or an investigation started by the Prosecutor acting \textit{proprio motu}. This camp included a group of African states, the Latin American Caribbean states and some other smaller states.\textsuperscript{105} The other camp, including France and the UK (supported by non-member but vocal observer states China, Russia and the U.S., which are all permanent members of the Security Council) wanted the Security Council to have “exclusive power to control prosecutions for the crime of aggression”.\textsuperscript{106} From the various papers of the Special Working Group on the Crime of Aggression (SWGCA), proposals for a Security Council pre-determination were the most prominent recommendation, although other proposals were also made, such as a predetermination by the General Assembly or the International Court of Justice. It was clear from the beginning of the dialogue on the Crime of

\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} 2008 Discussion paper on the crime of aggression proposed by the Chairman (revision
Aggression that it was going to be treated differently than the other core crimes. Accordingly, despite the reservations of the Permanent Members of the Security Council, many States have begun to ratify and adopt the amendments of the Crime of Aggression.

**Ratification**

As of November 13, 2015, 24 State parties have ratifications registered with the depositary of the Rome Statute. The 24 States that have ratified both Kampala amendments are: Andorra, Austria, Belgium, Botswana, Costa Rica, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Germany, Latvia, Liechtenstein, Luxembourg, Malta, Poland, Samoa, San Marino, Slovakia, Slovenia, Spain, Switzerland, Trinidad & Tobago, and Uruguay.109

**In Progress**

According to the information available, government or parliamentary officials in at least the following 33 States Parties are currently actively working on the ratification of the amendments on the crime of aggression: Albania, Argentina, Australia, Bolivia, Brazil, Bulgaria, Burundi, Chile, Dominican Republic, Ecuador, El Salvador, Finland, Greece, Honduras, Hungary, Iceland, Italy, Lesotho, Lithuania, Macedonia (FYROM), Madagascar, Mongolia, Montenegro, the Netherlands, New Zealand, Panama, Paraguay,

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Peru, Portugal, Romania, Senegal, Serbia and Venezuela.\textsuperscript{110}

In eight other States Parties, the process is in its early stages: Ghana, Guatemala, Ireland, Japan, Mexico, Moldova, Republic of Korea and Tunisia.\textsuperscript{111}

In Chile, on April 22, 2012, the Foreign Affairs committee of the Chamber of approved the draft bill submitted by President Sebastian Piñera for the ratification of both Kampala amendments. A supplementary report is necessary from the Constitution, Legislation and Justice Committee before approval by the Plenary and before consideration by the Senate.\textsuperscript{112}

In November 2012, the Government of The Netherlands submitted to Parliament the Kampala Amendments bill. On March 13, 2014 the Kampala Amendments were discussed in a written debate in the upper house of the Dutch parliament. They were debated in the lower house of the Dutch Parliament in September 2015.\textsuperscript{113}

On August 13, 2013, the Government of Paraguay sent a bill to the Chamber of Deputies to ratify the Kampala Amendments.\textsuperscript{114}

On June 23-24 and June 30 – July 1, 2014, the Legislative Assembly of El Salvador held expert hearings on the ratification and implementation of the amended Rome Statute. President Funes had previously transmitted the relevant bills to the Assembly for its consideration.\textsuperscript{115}

On December 4, 2014, the government of Finland’s bill on the acceptance and implementation of the Kampala Amendments was submitted to parliament. As of

\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
November 2015, the ratification process was entering the final stages, with deposit of the instrument of ratification is expected before the end of 2015.\textsuperscript{116} On February 3, 2015, Senator Alberto Airola submitted draft legislation for the ratification of the Kampala Amendments in the Senate of Italy.\textsuperscript{117}

On November 12, 2015, the Seimas (parliament) of Lithuania approved ratification of the Kampala Amendments. Only the President’s signature is required to complete the ratification procedure, and Lithuania’s deposit is expected before the end of 2015.\textsuperscript{118}

\textbf{Commitments to Ratify}

At the ninth and tenth sessions of the Assembly of States Parties (ASP; December 2010 and 2011), the following States Parties made concrete commitments to ratify the amendments on the crime of aggression: Argentina, Bolivia, Peru and South Africa. In addition, the following countries made positive references to the amendments: Brazil, Burkina Faso, Canada, Democratic Republic of the Congo, Denmark, Fiji, Finland, Ghana, Hungary, Japan, Jordan, Kenya, Lesotho, Mexico, Nigeria, Norway, Republic of Korea, Senegal, Serbia and the United Kingdom.\textsuperscript{119}

On February 16, 2012, at the Pacific Outreach Roundtable on the ICC in Sydney, participants from Australia, Cook Islands, Marshall Islands, Palau, Papua New Guinea, Samoa, Tonga, Tuvalu and New Zealand agreed that it was desirable for all Pacific Island Countries to become States Parties to the Rome Statute and called upon the region to consider acceding to the Statute as amended in 2010 (i.e. including the amendments on

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id.
\end{enumerate}
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war crimes and on the Crime of Aggression).\footnote{120}

On June 11, 2012, the Ministers of Foreign Affairs of the Union of South American Nations (UNASUR) Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela called upon all State Parties to ratify the amendments adopted in Kampala.\footnote{121}

In the context of the General Assembly High-Level Meeting on the Rule of Law on September 24, 2012, the following countries made pledges regarding the ratification of the amendments on the Crime of Aggression: Argentina, Bulgaria (by the end of 2014), and the Netherlands.\footnote{122}

At a side event to the High-Level Meeting on the Rule of Law on “Preventing the illegal use of force through judicial accountability”, organized by Liechtenstein on September 24, 2012, the Minister of Justice of South Africa, Mr. Jeffrey Thamsanqa Radebe, announced that South Africa will ratify the amendments before 2017.\footnote{123}

At the opening of the eleventh session of the Assembly of States Parties (ASP) in The Hague on November 14, 2012, the President of Senegal, Mr. Macky Sally, announced that his country will ratify the amendments without delay. Besides Senegal, the following States Parties stated commitments to ratify the amendments on the Crime of Aggression: Chile, Ecuador, Finland, Panama, Peru and Romania. Other States Parties made positive references to the Kampala Amendments on the Crime of Aggression, such as Bolivia, Ghana, Guatemala, Japan, Jordan and Sierra Leone.\footnote{124}
The following States have accepted a recommendation to ratify the amendments on the Crime of Aggression in the context of the Universal Periodic Review of the Human Rights Council: Ecuador (May 2012), Burkina Faso (April 2013), and Montenegro (April 2013), Côte d’Ivoire (April 2014), Portugal (April 2014).\textsuperscript{125}

On October 20, 2013, the Latin-American Parliament adopted resolution AO/2013/07, which recognizes the jurisdiction of the ICC over the four core crimes and encourages member states to initiate and/or follow up the process of ratification and implementation of the Kampala amendments. It also calls on all members to submit a report on the implementation of the Rome Statute and the obligations of cooperation with the ICC as well as the ratification of the Kampala amendments.\textsuperscript{126}

At the twelfth session of the Assembly of States Parties (ASP) in The Hague on November 20-21, 2013, States Parties made positive references to the Kampala Amendments on the Crime of Aggression, including Brazil, Democratic Republic of Congo and Guatemala.\textsuperscript{127}

In its 2013 submissions regarding the Plan of Action for achieving universality and full implementation of the Rome Statute, Finland gave notice that an expert group was currently preparing the government proposal regarding ratification of the amendments, which would be presented to parliament in 2014. Senegal likewise informed of its plans to ratify the amendments.\textsuperscript{128}

At the 18th session of the Universal Periodic Review, Afghanistan, Chile, Macedonia and Dominican Republic agreed to examine recommendations to ratify the

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
Kampala Amendments. New Zealand committed to taking a formal decision on the ratification of the Kampala Amendments in the first quarter of 2014. Previously, the parliament of New Zealand had unanimously called on the government to ratify the Kampala Amendments to the Rome Statute and to become “one of the 30 ratifying countries needed by 2017 in order to implement this amendment.”\(^{129}\)

At a regional seminar about the Kampala amendments for Eastern European States on May 15-16, 2014, five States of the Eastern European Group (EEG) announced their intention to ratify before the end of the year (Albania, Czech Republic, Georgia, Macedonia, Poland), while the remaining nine EEG States Parties are working on the ratification process. The region continues to hold the highest percentage of States that have ratified the Crime of Aggression.\(^{130}\)

On 17 July 2014 the European Parliament adopted resolution 2014/2724(RSP), which calls on the European Union to adopt a common position on the Kampala Amendments. It also calls on EU Member States to ratify and implement the amendments and to support their activation. The EU is also encouraged to include the Kampala Amendments in its external actions, including through the provision of technical assistance.\(^{131}\)

On 9 October 2014, the Legislative Assembly of Honduras adopted a motion requesting the government to submit a bill on the ratification of the Kampala Amendments. A government response is still outstanding.\(^{132}\)

At the eight session of the Consultative Assembly of Parliamentarians for the ICC

\(^{129}\) Id.
\(^{130}\) Id.
\(^{131}\) Id.
\(^{132}\) Id.
and the Rule of Law on December 4-5 2014, 148 members of Parliament from 49 countries from all regions of the world adopted the Rabat Plan of Action through which they resolved to ensure the ratification of the Kampala Amendments by their countries and to achieve 30 ratifications before 2016. The Plan of Action also calls on parliamentarians to “individually or collectively, submit for consideration of the Nobel Peace Prize committee the results of the Kampala Review Conference and of those individuals that have relentlessly fought to proscribe the illegal use of force among nations.”

In response to a parliamentary question asked by Dip Garrido, a member of Parliamentarians for Global Action, on November 5, 2014, the government of Argentina indicated that the Technical and Legal Secretary of the Presidency had recommended ratification of the Kampala Amendments. The bill for ratification would be submitted to Congress following the completion of inter-ministerial consultations.

At the thirteenth session of the ASP (December 2014), the following States Parties made commitments to ratify the amendments on the Crime of Aggression: Albania, Brazil, Chile, Finland, Iceland, South Africa and Tanzania. In addition, the following countries made positive references to the amendments: Austria, Mexico, New Zealand, South Africa, as well as the European Union (in a statement delivered by Italy).

At the 22nd session of the Universal Periodic Review on May 14-15, 2015, Bulgaria, Marshall Islands and Maldives agreed to examine recommendations to ratify

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133 Id.
134 Id.
135 Id.
the Kampala Amendments. During its presentation to the Human Rights Council, Mongolia gave notice that its ratification procedure was expected to be completed in 2015.  

Finally, At a Side Event during the 4th World Conference of Speakers of Parliament on September 1, 2015, the Presidents of the Parliament of Senegal and Madagascar pledged to work towards the speedy ratification of the Kampala Amendments by their countries.

**Conclusion**

The Crime of Aggression amendments are riddled with uncertainties, vagueness, and issues that prevent States from knowing exactly what they are signing should they choose to adopt the amendments. Many issues are substantive, some are speculative, and more are a question of interpretation, but despite these issues it appears that the majority of the UN Members called to adopt the amendments are positively moving forward with them.

There is a sharp divide amongst the Permanent Members of the Security Council, and the rest of the world. With the exception of China, all of the permanent members have been reluctant to give support to the amendments or to adopt them for their own countries. This initially appeared strange in the international context, as the Security Council would be given the increased role of finding an act of aggression and referring situations to the ICC, and there were fears of politicizing and weakening the ICC accordingly. However, it appears the fears are the reverse. The chief concern of the Permanent Members appears to be the loss of power to the Security Council, by allowing
the Prosecutor to initiate investigations *propio motu*. In essence, this threatens what they believe to be a vital function of the Security Council. Rather than weakening the ICC, the amendments are instead weakening the Security Council.

The other Members see this as a positive. The passing of the Crime of Aggression amendments will fulfill the roster of crimes the Rome Statute set out when it was created, and full adoption will demonstrate a commitment to accountability and international justice. The ICC will be the first and most effective tool to achieve the goal of fighting impunity for uses of force that the UN Charter prohibited from its inception.

As of November 2015, 24 States have already ratified the amendments. Only six more are needed before the January 1, 2016, deadline. While the next month will be probative, to say the least, despite all of the issues with coming to the compromised amendments, the Crime of Aggression seems likely to become an actionable crime for the ICC.