

# The crime of aggression after Kampala\*

*Prof. Dr. Kai Ambos, Göttingen, Judge Provincial Court (Landgericht)*

## Abstract

*The first ever Review Conference of the Rome Statute of the International Criminal Court, held in Kampala, Uganda, from 31 May to 11 June 2010, succeeded in reaching an agreement on the definition and the conditions for the exercise of jurisdiction for the crime of aggression pursuant to article 5 (2) of the Rome Statute. This paper will, after some preliminary remarks (infra I.), first attempt to succinctly summarize the compromise reached (II.), distinguishing between the definition (II.A.) and the conditions regarding the exercise of jurisdiction (II.B.). On this basis a critical analysis will be presented (III.), examining, after some preliminary clarifications (III.A.), the most relevant substantive (III.B.) and procedural issues (III.B.). The paper intends to show that the final agreement constitutes a historic achievement – despite some flaws and inevitable compromises.*

**Keywords:** *International Criminal Court – Review Conference – crime of aggression*

## I. Preliminary remarks

The crime of aggression<sup>1</sup> has been prosecuted for the first time as “crime against peace” by the Nuremberg and Tokyo Tribunals defining it as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances ...”<sup>2</sup> Individual criminal responsibility was defined broadly, encompassing, on the one hand, as part of the crime definition, “participation in a common plan or conspiracy for the accomplishment” of any of the acts of aggression;<sup>3</sup> on the other, extending to “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or

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<sup>1</sup> For a recent thorough historical account *Oscar Solera*, *Defining the crime of aggression* (2007), 15 *et seq.*; *Gerhard Kemp*, *Individual criminal liability for the International Crime of Aggression* (2010), 73 *et seq.*; for more succinct accounts see *Gerhard Werle*, *Principles of International Criminal Law* (2<sup>nd</sup> ed. 2009), marginal note (hereinafter “mn”), 1312 *et seq.*; *Elizabeth Wilmshurst*, *Aggression*, in: Robert Cryer/Håkan Friman/Darryl Robinson/ Elizabeth Wilmshurst, *An introduction to international criminal law and procedure* (2<sup>nd</sup> ed. 2010), at 312 *et seq.*; *Giorgio Gaja*, *The long journey towards repressing aggression*, in: Antonio Cassese/Paola Gaeta/John Jones (eds.), *The Rome Statute of the International Criminal Court: a commentary*, vol I (2002), 427 *et seq.*; *Claus Kreß/Leonie von Holtendorff*, *The Kampala Compromise on the Crime of Aggression*, *JICJ* 8 (2010) 1179, 1180 *et seq.*

<sup>2</sup> See Art. 6 (a) of the Statute of the International Military Tribunal (8 August 1945, 82 UNTS (1951), 280); Art. 5 (a) of the Statute of the International Military Tribunal for the Far East (1 January 1946). See also Principle VI (a) (i) of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (“Nuremberg Principles”), adopted by the ILC on its second session in 1950 (Yearbook ILC 1950 II, at 374 *et seq.*).

<sup>3</sup> Art. 6 (a) IMT; Art. 5 (a) IMTFE; Principle VI (a) (ii) Nuremberg Principles.

conspiracy to commit” a crime against peace “for *all* acts performed by *any* persons in execution of such plan.”<sup>4</sup> On 14 December 1974 the UN General Assembly adopted with Resolution 3314 (XXIX)<sup>5</sup> a groundbreaking definition of an “act of aggression”<sup>6</sup> which served as the basis for any further discussion leading up to the Kampala compromise. In June 1998 the Rome conference granted the ICC jurisdiction over the crime of aggression (article 5 (d) ICC Statute)<sup>7</sup> but was unable to reach a consensus on the concrete definition of the crime and further possible conditions for the exercise of jurisdiction.<sup>8</sup> This task was assigned to a “Working Group on the Crime of Aggression” (1999-2002) of the Preparatory Commission<sup>9</sup> and then to the “Special Working Group on the Crime of Aggression” (hereinafter “SWGCA”) (2003-2009) which presented its final report to the Assembly of States Parties (“ASP”) on 13 February 2009.<sup>10</sup> The SWGCA’s proposal was adopted by the ASP on 26 November 2009 by con-

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<sup>4</sup> Art. 6 IMT and Art. 5 IMTFE, both last clauses.

<sup>5</sup> Reprinted in *Stefan Barriga/Wolfgang Danspeckgruber/Christian Wenaweser* (eds.), *The Princeton Process on the Crime of Aggression. Materials of the Special Working Group on the Crime of Aggression, 2003-2009*. (2009), 231 *et seq.*

<sup>6</sup> Res. 3314, Annex, Definition of Aggression:

*Article 1*

“Aggression is 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 ...”

*Article 3*

“Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Art. 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

<sup>7</sup> Articles without explicit reference belong to the ICC Statute.

<sup>8</sup> See for the Rome negotiations *Solera* (note 1), 356 *et seq.*; *Kemp* (note 1), 194 *et seq.*; *Wilmshurst* (note 1), 316-17; *Gaja* (note 1), at 430 *et seq.*, 435 *et seq.*

<sup>9</sup> On its work see *Silvia A. Fernández de Gurmendi*, *An insider’s view*, in: Mauro Politi/Giuseppe Nesi (eds.), *The International Criminal Court and the crime of aggression* (2004), 175, at 176 *et seq.*

<sup>10</sup> February 2009 Report of the SWGCA, ICC-ASP/7/20/Add. 1, Annex II, reprinted in *Barriga et al.* (note 5), at 49 *et seq.* See on the post Rome negotiations *Roger S. Clark*, *The crime of aggression*, in: Carsten Stahn/Göran Sluiter (eds.), *The emerging practice of the International Criminal Court* (2009), 709 *et seq.*; *Kemp* (note 1), 207 *et seq.*; *Kreß/von Holtendorff* (note 1), 1183 *et seq.*; *Jennifer Trahan*, *The Rome Statute’s amendment on the crime of aggression: negotiations at the Kampala Review Conference*, ICLR 11 (2011), 49, at 54 *et seq.*

sensus<sup>11</sup> and presented to the Kampala review conference as a “Conference Room Paper on the Crime of Aggression” on 25 May 2010.<sup>12</sup> In Kampala, as in Rome, delegates strived to reach consensus, otherwise a two-thirds majority would have been necessary.<sup>13</sup>

## II. The Kampala compromise

Pursuant to article 5 (2) ICC Statute the Court’s exercise of jurisdiction<sup>14</sup> over the crime of aggression depends on two requirements: States Parties must agree on a definition and “the conditions under which the Court shall exercise jurisdiction”. While the definition of aggression was already agreed on in the SWGCA February 2009 session, the jurisdictional issues almost led to the failure of the whole enterprise boiling down to the question whether France and the UK (as the two States Parties being permanent members of the UN Security Council) would give up their position on imperative Security Council pre-determination of an act of aggression and how dissenting States could be accommodated.<sup>15</sup>

### A. The definition

The definition proposed in the February 2009 report<sup>16</sup> was adopted, *tel quel*, by the ASP in November 2009<sup>17</sup> and also by the Kampala conference.<sup>18</sup> It was only opposed by those States that, like the USA in particular, did not take part in the SWGCA and rejected the crime of aggression for reasons of principle.<sup>19</sup> The definition reads as follows:

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<sup>11</sup> Res. ICC-ASP/8/Res.6. The proposal is annexed as appendix I to the February 2009 Report (note 10) and reprinted in *Barriga et al.* (note 5), at 60 *et seq.*

<sup>12</sup> RC/WGCA/1, 25 May 2010; thereto *Christian Wenaweser, Reaching the Kampala compromise on aggression: the Chair’s perspective*, *LJIL* 23 (2010), 883, 884.

<sup>13</sup> See Rule 49 (2), 51 of the Review Conference Rules of Procedure, available at <http://www.icc-cpi.int/NR/rdonlyres/06108524-8AE2-44EF-AFA5-A46C83E250A5/0/ICCASP6Res2Anx4ENG.pdf> (last accessed 3 November 2010). See also *Kreß/von Holtzendorff* (note 1) at 1201 on the uncertain political will to vote at all and the uncertainty as to the sufficient number of delegates; “on the power of consensus” in this context *Niels Blokker/Claus Kreß, A Consensus Agreement on the Crime of Aggression - Impressions from Kampala*, *LJIL* 23 (2010) 889, 890-891. On the negotiations also *Wenaweser* (note 12), 883 *et seq.*

<sup>14</sup> Note that, according to article 5 (1), the crime of aggression was already within the jurisdiction of the Court and thus the question for the States to solve were the *conditions for the exercise of this jurisdiction*, see also *Robert L. Manson, Identifying the rough edges of the Kampala compromise*, *CLF* 21 (2010), 417, 425.

<sup>15</sup> See also *Hans-Peter Kaul, Kampala 2010 – A first review of the ICC Review Conference*, *Goettingen Journal of International Law* (hereinafter “GoJIL”) 2 (2010), 649, 663: “The real debate was on three related issues regarding the exercise of jurisdiction by the Court.”; similarly *Robert Heinsch, The Crime of Aggression After Kampala: Success or Burden for the Future?*, *GoJIL* 2 (2010), 713, 716; *Kirsten Schmalenbach, Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen*, *Juristen Zeitung* ( hereinafter “JZ”) 65 (2010) 745, at 746-747.

<sup>16</sup> February 2009 Report (note 10), appendix I. See for the different “definitional models” also *Hans-Peter Kaul, The crime of aggression: Definitional options for the way forward*, in *Politi/Nesi* (note 9), 97, at 99 *et seq.*

<sup>17</sup> *Supra*, note 11.

<sup>18</sup> Resolution RC/Res.6, advance version, 16 June 2010.

<sup>19</sup> See “Statement by *Harold Hongju Koh, Legal Adviser, U.S. Department of State, Review Conference of the International Criminal Court*” (4 June 2010), p. 6: “Finishing the unfinished business of Rome does not mean rushing into a premature conclusion on institution-transforming amendments [without] genuine consensus.”

## **Article 8 bis**

### **Crime of aggression**

1. For the purpose of this Statute, “crime of aggression” means 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.

2. For the purpose of paragraph 1, “act of aggression” means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

While para. 2 of this definition adopts a conservative approach regarding the definition of an “act of aggression” repeating essentially articles 1 and 3 of Resolution 3314 (XXIX),<sup>20</sup> para. 1 is innovative in at least two aspects: First, it limits individual responsibility to persons in command or leadership positions, i.e., “in a position effectively to exercise control over or to direct the political or military action of a State”. Article 25 (3) was adjusted accordingly with a para. 3bis limiting individual responsibility for the crime of aggression to these responsible leaders.<sup>21</sup> Secondly, it introduces a threshold requirement, limiting a “crime of aggression” to an act that “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” In contrast, the conduct required (“planning, preparation, initiation or execution”) follows the historical precedents of Nuremberg and Tokyo.<sup>22</sup> The first three forms of conduct are identical and thus preparatory acts are still covered. The change in the last form – “execution” instead of “waging of a war of aggression” – is only a change of words but does

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<sup>20</sup> Cf. *supra*, note 6.

<sup>21</sup> Resolution RC/Res.6 (note 18), Annex I no. 5.

<sup>22</sup> Cf. *supra*, note 2.

not entail a difference in substance: In both cases the actual carrying out of an act of aggression is required.

Arguing that the definition contained considerable deficits,<sup>23</sup> the U.S.A. proposed supplementary “understandings” on its interpretation.<sup>24</sup> Following informal discussions moderated by the German focal point, the six U.S. proposals could be converted into *three additional understandings*:

- a clarification that any amendment solely affects the Rome Statute;<sup>25</sup>
- the understanding that aggression is “the most serious and dangerous form of the illegal use of force” to be determined considering “all the circumstances of each particular case” in accordance with the UN Charter,<sup>26</sup> and
- the threshold required for a “manifest” violation of the UN Charter presupposes that the “three components of character, gravity and scale” exist not only isolated but in a combined form, i.e., two out of three elements must be present.<sup>27</sup>

The SWGCA also discussed *Elements of Crimes* for the crime of aggression since its June 2004 Princeton meeting.<sup>28</sup> On the basis of a discussion paper prepared by the delegations of

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<sup>23</sup> See *Koh* (note 19), pp. 3 *et seq.* In the view of the US, certain uses of force would remain both lawful and necessary and the proposed definition did not truly reflect customary international law. Furthermore, *Koh* criticized the risk of unjustified domestic prosecutions as too little attention had been paid on the application of the principle of complementarity and that the dependence of the definition on the trigger mechanism was not sufficiently addressed.

<sup>24</sup> See *Trahan 73 et seq.* *J. Trahan, “The new agreement on the definition of the crime of aggression” (2010), p. 2, <http://www.mediafire.com/?yydmndtmmdw> (last accessed 3 November 2010);* *Blokker/Kreß* (note 13), 892; on the U.S. engagement in the negotiations *Kreß/von Holtzendorff* (note 1), 1204 *et seq.*

<sup>25</sup> See RC/Res. 6 (note 18), Annex III (Understandings regarding the amendments to the Rome Statute on the ICC on the Crime of Aggression):

“4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with Art. 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.”

These understandings respond to concerns voiced at the beginning of the Conference, see “Non-Paper by the Chair: Further elements for a solution on the Crime of Aggression”, RC/WGCA/2, 25 May 2010, para. 4, at p. 2.

<sup>26</sup> *Ibid.*:

“6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression 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.”

<sup>27</sup> *Ibid.*:

“7. 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.”

<sup>28</sup> First mentioned under “list of issues” in June 2004 Report, Appendix, section II, reprinted in *Barriga et al.* (note 5), at 210; see then – in chronological order with increasing importance – June 2005 Report, Appendix II no. 4, in *ibid.*, at 183; June 2006 Report, Appendix II, section II, in *ibid.*, at 159-160 (preliminary draft); Decem-

Australia and Samoa<sup>29</sup> Draft Elements have been adopted at the June 2009 Princeton inter-session meeting.<sup>30</sup> The Draft was approved by the ASP in November 2009,<sup>31</sup> presented to the Kampala conference<sup>32</sup> and so adopted.<sup>33</sup> The Elements now read:

### Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

### Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person<sup>34</sup> in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
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.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

## B. The exercise of jurisdiction

### 1. The starting point

The most contentious issue with regard to the Court’s jurisdiction over aggression was the role of the UN Security Council.<sup>35</sup> While its primary responsibility in determining an act of aggression flows directly from its exclusive responsibility for the maintenance of international peace and security (articles 24, 39 UN Charter), it is an entirely different matter if this entails, going beyond the UN Charter, its exclusive authority to trigger an ICC investigation into the crime of aggression.<sup>36</sup> While this position was, for obvious reasons, defended by the five permanent members, many other States favoured, in accordance with article 13 (c), 15 ICC Statute, an additional *proprio motu* power of the Prosecutor submitted to an internal judicial

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ber 2007 Report, para. 40, in *ibid.*, at 106; June 2008 Report, para. 93 *et seq.*, in *ibid.*, at 92-93; November 2008 Report, para. 30 *et seq.*, in *ibid.*, at 76-77; February 2009 Report, section IV, in *ibid.*, at 58.

<sup>29</sup> June 2009 Report, Annex II no. 2 and Appendix I, reprinted in *Barriga et al.* (note 5), at 36 *et seq.*

<sup>30</sup> June 2009 Report, Annex I, reprinted in *ibid.*, at 35.

<sup>31</sup> Res. ICC-ASP (note 11), Annex II Appendix, at p. 7.

<sup>32</sup> RC/WGCA/1 (note 12), Annex II, at p. 6.

<sup>33</sup> RC/Res. 6 (note 18), Annex II, at p. 5. See also *Roger S. Clark*, Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010, *GoJIL* 2 (2010), 689, at 694; *Heinsch* (note 15), 720.

<sup>34</sup> With respect to an act of aggression, more than one person may be in a position that meets these criteria.

<sup>35</sup> See also *Barriga*, Against the odds: The results of the Special Working Group on the Crime of Aggression, 11; *Wenaweser* (note 12), 883, 884.

<sup>36</sup> See *Clark* (note 33), 699-700; *Schmalenbach* (note 15), 749 left column. On the correct legal interpretation see *infra*, note 173.

check by the Pre-Trial Chamber.<sup>37</sup> In addition, particularly the European States (with the exception of Switzerland and Greece) demanded the consent of the aggressor State to trigger jurisdiction, whereas mainly African, Latin American and the Caribbean States strongly opposed this demand. Linked to this question was the issue of the appropriate amendment procedure according to article 121 (3)-(5).

Thus, the SWGCA's proposal,<sup>38</sup> as adopted by the ASP<sup>39</sup> and presented to the Review Conference,<sup>40</sup> read as follows:

**Article 15 bis**

**Exercise of jurisdiction over the crime of aggression**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
4. (**Alternative 1**) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,
  - Option 1 – end the paragraph here.*
  - Option 2 – add:* unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.
4. (**Alternative 2**) Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,
  - Option 1 – end the paragraph here.*
  - Option 2 – add:* provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;
  - Option 3 – add:* provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;
  - Option 4 – add:* provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.
5. 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.
6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

The gist of the issue resides in para. 4 with its two alternatives referring to the situation where the Security Council has abstained from making a determination of an act of aggression.<sup>41</sup> While according to alternative 1 that is the end of the story, i.e., there is no *proprio motu* trig-

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<sup>37</sup> See *J. Trahan* (note 24), p. 2.

<sup>38</sup> February 2009 Report (note 10), appendix I Annex no. 3.

<sup>39</sup> Resolution ICC-ASP (note 11), Annex II no. 3.

<sup>40</sup> RC/WGCA/1 (note 12), Annex I no. 3.

<sup>41</sup> See also *Barriga* (note 35), 14.

gering power of the Prosecutor, alternative 2 grants such a power after the lapse of a certain time leaving, however, the final word to another organ, namely either the Pre-Trial Chamber, the UN General Assembly or the International Court of Justice (“ICJ”) (options 2-4). It is important to note that the SWGCA saw no necessity to split the triggering procedure of article 13 into two, distinguishing between, on the one hand, a State referral and a *proprio motu* investigation of the Prosecutor and, on the other, a Security Council referral.

## 2. The negotiations

In the course of the negotiations, the different positions were expressed in different “non papers”.<sup>42</sup> The first move was made by Argentina, Brazil and Switzerland on 6 June (so-called “ABS proposal”). This proposal distinguished for the first time between a Security Council referral (amendment 1) and a state referral/*proprio motu* action of the Prosecutor (amendment 3) and provided for different modalities for the entry into force of these different amendments (operative para. 1 of the proposal): amendment 3 should enter into force for *all* States Parties according to article 121 (4), i.e., one year after the ratification of *seven-eighths* of the States Parties; in contrast, amendment 1 should, as all other remaining amendments, enter into force according to article 121 (5), i.e., one year after the ratification by a given State Party for that Party only (opt-in regime).<sup>43</sup> As a consequence, the Court would have *immediate* jurisdiction (one year after the first ratification) for Security Council referrals only while the jurisdiction for state referrals or *proprio motu* action of the Prosecutor would be considerably delayed. Two days later, Canada proposed an article 15*bis* taking as the basis the Working Group’s proposal of para. 4, alternative 2, option 2 as quoted above (*proprio motu* investigation after 6 months with authorization of the Pre-Trial Chamber), but limiting it insofar as at least both the victim and the aggressor State must have accepted this paragraph. On the same day, Slovenia presented a further proposal of article 15*bis* trying to combine the ABS and Canadian proposals by giving the Prosecutor the possibility to “read[d]ress the possibility of the Security Council referral” if the States Parties concerned have not accepted the *proprio motu* investigation. On 9 June, 16.00 h, still within the SWGCA negotiations, the ABS group and Canada presented a joint proposal for the contentious issue of state referral/*proprio motu* action

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<sup>42</sup> All non-papers quoted here are on file with the author; they are also reproduced in [Trahan 96 et seq.](#) For detailed daily summaries see the blog of *W. Schabas*, “The ICC Review Conference: Kampala 2010” (2010), <http://iccreviewconference.blogspot.com> (accessed 27 June 2010); see also *Astrid Reisinger Coracini*, The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some, *GoJIL* 2 (2010) 745, at 756 *et seq.*; *Schmalenbach* (note 15), 746; [Trahan 68 et seq.](#); on the four boxes regarding the filter mechanisms *ibid.* 62-63.

<sup>43</sup> See also *Barriga* (note 35), 15-16; [Wenaweser](#) (note 12), 885; [Kreß/von Holtzendorff](#) (note 1), 1202; [Manson](#) (note 14), 421.



(article 15*bis*) introducing two innovations: first, a postponement or suspension clause as to the beginning of the Court's exercise of jurisdiction pursuant to a state referral/*proprio motu* action (“... five years after the entry into force ... for any State Party”, article 15*bis* para. 1), thereby trying to respond to concerns already voiced at the beginning of the negotiations;<sup>44</sup> secondly, an opt out clause for States Parties (“declaration of non-acceptance of the jurisdiction”) which do not want to accept jurisdiction on the basis of a state referral/*proprio motu* action (para. 4*bis*).

Moving from the SWGCA to the plenary a series of “informal informal” meetings took place and the President of the ASP, Christian Wenaweser, issued various non-papers on 10 and 11 June containing a draft resolution.<sup>45</sup> The splitting of the triggers in an article 15*bis* (state referral/*proprio motu*) and article 15*ter* (Security Council referral) was now accepted but it was still unclear whether the Prosecutor could, in absence of a determination of an act of aggression by the Security Council, proceed with an investigation. Only the last proposal of 11 June 16:30 decided this question in favour of the Prosecutor's *proprio motu* power after six months of inactivity of the Security Council “provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise **in accordance with article 16.**” (article 15*bis* para. 8).<sup>46</sup> While this was clearly a success for the States in favour of a strong prosecutor, i.e., most States Parties except the five permanent members of the Security Council, it was not for nothing. The same proposal confirmed the postponement (articles 15*bis* and *ter* para. 3)<sup>47</sup> and opt out clauses (operative para. 1 and article 15*bis* para. 4)<sup>48</sup> introduced by the ABS-Canada proposal and excluded non States Parties from the jurisdiction over aggression even if committed by those States on the territory of a State Party (article 15*bis* para. 5).<sup>49</sup> In fact, as to the entry into force, a double postponement was proposed: in addition to the delay clause of para. 3, still to be defined exactly, the Court's

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<sup>44</sup> See RC/WGCA/2 (note 25), para. 2, at p. 1: “**Timing of the entry into force of the amendments:** Concerns have been raised at the prospect of an early entry into force of the amendments on the crime on aggression in case Art. 121, paragraph 5, of the Statute was to be applied. Such concerns could possibly be addressed by a provision specifying that the Court should begin exercising jurisdiction over the crime of aggression at a later stage only. Such a provision would not as such affect the timing of the entry into force of the amendments, but would effectively delay the Court's exercise of jurisdiction ...” (emphasis in the original).

<sup>45</sup> Wenaweser (note 12), 886.

<sup>46</sup> The emphasis is in the original to make clear that the bold part was added to this last proposal.

<sup>47</sup> Para. 3 reads: “[3. *insert provision on delayed entry into force*]” (italics and brackets in original).

<sup>48</sup> Para. 4 reads: “The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.”

<sup>49</sup> Para. 5 reads: „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.” (emphasis added).

exercise of jurisdiction should only be possible one year after ratification of 30 States Parties (article 15*bis* para. 2).

### 3. The final compromise

The last draft resolution paved the way for compromise and negotiators only had to agree on a concrete date for the postponement of the entry into force (para. 3) and to make sure that the UK and France, as the only States both Parties and permanent members of the Security Council, and their possible allies would not question the carefully drafted deal.<sup>50</sup> When the President of the Conference shortly after midnight, i.e., already on 12 June 2010 (the clocks in the conference hall had been taken off),<sup>51</sup> put up the motion for consensus, neither France nor the United Kingdom asked for the floor, only Japan stated that it had “serious doubts on the legal integrity of the amendment”<sup>52</sup> but finally also accepted the compromise. The new key provisions, articles 15*bis* and *ter* read:<sup>53</sup>

#### Article 15*bis*

##### Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed *one year after* the ratification or acceptance of the amendments by *thirty States Parties*.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken *after 1 January 2017* by the same majority of States Parties as is required for the adoption of an amendment to the Statute;
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does *not accept such jurisdiction* by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is *not a party* to this Statute, the Court shall *not* exercise its *jurisdiction* over the crime of aggression when committed by that State’s nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the *Security Council* has made a *determination* of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

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<sup>50</sup> According to *Blokker/Kreß* (note 13), 893 the consensus solution became possible because “the delegations of the United Kingdom and of France had to realize their isolation within the community of States Parties to the Rome Statute.”

<sup>51</sup> According to *Reisinger Coracini* (note 42), 763 it was 00.19 a.m.

<sup>52</sup> *Manson* (note 14), 434-435; *Schmalenbach* (note 15), 746; *Kreß/von Holtzendorff* (note 1), 1180.

<sup>53</sup> RC/Res. 6 (note 18), Annex I, no. 3 and 4, at p. 3-4 (emphasis added).

8. Where *no* such *determination* is made within *six months* after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the *Pre-Trial Division* has *authorized* the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the *Security Council* has not decided otherwise in accordance with *article 16*.

9. 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.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

#### **Article 15ter**

##### **Exercise of jurisdiction over the crime of aggression (Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed *one year after* the ratification or acceptance of the amendments by *thirty States Parties*.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken *after 1 January 2017* by the same majority of States Parties as is required for the adoption of an amendment to the Statute;

4. 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.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

As to the entry into force the interplay of para. 2 and 3 (of both article 15*bis* and *ter*) entails that the ICC may exercise its jurisdiction *at earliest* after 1 January 2017 if a majority of the States Parties has decided so pursuant to para. 3 *and* if at that time one year has passed since the acceptance of the amendment by the first *thirty* States Parties (para. 2). In other words, the exercise of jurisdiction requires a (further) positive collective decision of the States Parties (presumably the ASP) and individual acceptance decisions of up to thirty States Parties. The importance of these postponement rules is reinforced by the first three *understandings* adopted.<sup>54</sup> Understandings 1 and 3 confirm that in both a Security Council referral pursuant to article 15*ter* (understanding 1) and a state referral/*proprio motu* investigation pursuant to article 15*bis* (understanding 3) the Court may only exercise jurisdiction if the decision regarding the 2017 date has been taken and, in addition, one year has passed since the ratification or acceptance of thirty States Parties. As to a Security Council referral it is, in addition, clarified (understanding 2) that the Court “shall” exercise jurisdiction “irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard”, i.e., unlike in a case of a state referral/*proprio motu* investigation, a Security Council referral is also binding for non States Parties.

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<sup>54</sup> RC/Res. 6 (note 18), Annex III, at p. 6.

### III. Critical analysis

#### A. Preliminary clarifications

Before assessing the Kampala compromise some preliminary clarifications are warranted. First, the final assessment is predicated on one's own preconceptions towards the existence or codification of the crime of aggression. While the customary law character of the crime is beyond controversy among both supporters and sceptics of its criminalization,<sup>55</sup> it is an entirely different matter and thus highly controversial whether a workable and legally satisfactory definition can be achieved at all and whether it has effectively been achieved in Kampala. In fact, radical sceptics are opposed to any attempt to define the crime of aggression in the first place<sup>56</sup>. Yet, while such a radical position may be academically sound, it was no option for the SWGCA in light of article 5 (2) of the Rome Statute and its clear mandate. While one may, with good reasons, question whether it was a wise decision to impose on the States parties the burden to work for years on a consensus instead of using these resources for the consolidation of the ICC project in times where the Court is still struggling at various fronts,<sup>57</sup> the fact that this decision has been taken and the subsequent developments make this and other questions<sup>58</sup> futile.

While then the successful outcome of the Kampala negotiations makes it necessary to look ahead and try to make the best out of it, there is a second issue which, albeit going beyond the mere text of the compromise reached, also influences its assessment and perhaps even the

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<sup>55</sup> See on the one hand *Claus Krefß*, Time for decision: some thoughts on the immediate future of the crime of aggression: A reply to Andreas Paulus, EJIL 20 (2009) 1129, at 1132-33 and on the other *Andreas Paulus*, Second thoughts on the crime of aggression, EJIL 20 (2009) 1117, at 1118. See also *Richard L. Griffiths*, International law, the crime of aggression and the *ius ad bellum*, ICLR 2 (2002) 301, 313; *Werle*, (note 1), at mn. 1322 *et seq.*; *Wilmshurst* (note 1), 312, 321; *Kai Ambos*, Internationales Strafrecht (2<sup>nd</sup> ed. 2008), § 7 mn. 254, all with further references; *Antonio Cassese*, International Criminal Law (2<sup>nd</sup> ed. 2008), at 155, 158; *Vimalen J. Reddi*, The ICC and the crime of aggression: A need to reconcile the prerogatives of the SC, the ICC and the ICJ, ICLR 8 (2008) 655, at 686; *Astrid Reisinger Coracini*, Evaluating domestic legislation on the customary crime of aggression under the Rome Statute's complementarity regime, in Carsten Stahn and Larissa van den Herik (eds.), Future Perspectives on International Criminal Justice (2010) 725, at 725; *Mohammed M. Gomaa*, The definition of the crime of aggression and the ICC jurisdiction over that crime, in: Politi/Nesi (note 9), 55, at 72 *et seq.*; *Manson* (note 14), 439 (even *ius cogens*). From the case law see most recently *R. v. Jones et al.* [2006] UKHL 16, at paras. 12 and 19 (Lord Bingham), 44 and 59 (Lord Hoffmann), 96 (Lord Rodger), 97 (Lord Carswell), and 99 (Lord Mance).

<sup>56</sup> See e.g. *Matthias Schuster*, The Rome Statute of the ICC and the crime of aggression: A Gordian knot in search of a sword, CLF 14 (2003), 1, at 2 suggesting to delete aggression from the Statute because a "legally sound" definition is not possible and because its codification cannot be supported by arguments of precedent, supremacy or deterrence (*id.*, 9 *et seq.*, 18). For a "cautious attitude towards ... the invocation of criminal law to regulate the use of force by States" also *Wilmshurst* (note 1), 332.

<sup>57</sup> See also *Paulus* (note 55), at 1127 with the similar argument that the Court "grappling with problems partly of its own making, partly being the inevitable result of its remoteness from the scenes of the crimes under its jurisdiction, it needs to keep the ranks closed ..."

<sup>58</sup> For example the question whether the prosecution of *jus as bellum* violations has a negative impact of the compliance with the *jus in bello* rules by the State concerned, see *Paulus* (note 55), 1126; *contra Krefß* (note 55), 1133 *et seq.*

subsequent interpretation. I refer here to the unprincipled approach in the international criminal law making process as far as the underlying normative foundations and justifications of the international core crimes are concerned. While scholars have increasingly examined such questions as the legal interests protected and the specific wrong caused by these crimes as well as the ultimate purpose of their criminalization and punishment,<sup>59</sup> albeit without finding conclusive answers, the policy driven and pragmatic norm creating process always took a predominantly positivist, anti-normative approach as if the general recourse to the Nuremberg and Tokyo precedents (or on any other norm of international law) would render the discussion of the underlying normative questions superfluous. In fact, the opposite is true since these questions will haunt the international criminal justice project as long as they are not satisfactorily answered and will regularly come up in court. As to the crime of aggression the positivist approach is particularly doubtful given the widespread criticism of the Nuremberg law (not

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<sup>59</sup> See for example *Larry May*, *Crimes against humanity. A normative account* (2005), at 7 and 21, suggesting three bases for prosecution (no domestic prosecution, crimes committed by State, crimes targeting whole groups) and two principles (security and international harm) as the normative philosophical basis of the universal prosecution of international crimes. While the security principle limits state sovereignty by allowing for international and transnational prosecution of particular grave human rights abuses (*id.*, at 63 *et seq.*), the international harm principle justifies international prosecutions in case of group-based harms (*id.*, at 80 *et seq.*). In his later study (*Aggression and crimes against peace* (2008)) *May* develops (at 324 *et seq.*) a “diversity of norms defense” arguing that ICL can be defended by “a combination of the norms of retribution, deterrence, and reconciliation but not by any one of these norms alone.” See also *Mark Drumbl*, *Atrocity, punishment, and international law* (2007), arguing for a more comprehensive approach going beyond the traditional purposes of punishment (retribution, deterrence, expressivism, at 60 *et seq.*, 149 *et seq.*) and replacing pure criminal law by a broader concept of justice: a “cosmopolitan pluralist vision” fostering “an obligation-based preventative model, operationalized from the bottom-up through diverse modalities that contemplate a coordinated admixture of sanctions calibrated to each specific atrocity.” (at 207, for more details and concrete adjustments see 181 *et seq.*, 206 *et seq.*; defending expressivism, at least partly, *May*, *Aggression*, *op.cit.*, 329 *et seq.*). On the justification of punishment of international crimes see also recently *Deirdre Golash*, *The justification of punishment in the international context*, in: *Larry May/Zachary Hoskins* (eds.), *International Criminal Law and Philosophy* (2010) 201, at 211 *et seq.* discussing prevention and expressivism (expressing condemnation) as justifications. *Katrin Gierhake*, *Begründung des Völkerstrafrechts auf der Grundlage der Kantischen Rechtslehre* (2005), 165-166, 297, 299 and *passim* attempts to encounter the foundations of ICL in the legal doctrine of Immanuel Kant taking as the starting point the autonomy of the free and reasonable subject and considering that international punishment compensates, on the individual level, for the material injustice within the inter-personal relationship brought about by an international crime, and, on the general, universal level, operates as a restitution of the universal law and peace, equally violated by the international crime. In an earlier study *Mark Osiel*, *Mass atrocity, collective memory and the law* (1997), 22-23, 293 argued that criminal prosecution of state sponsored mass atrocities contribute to social solidarity “embodied in the increasingly respectful way that citizens can come to acknowledge the differing views of their fellows” and does not see any incompatibility to traditional purposes of punishment (deterrence and retribution). – As to aggression in particular see *May*, *Aggression*, *op. cit.*, 3 *et seq.*, 44, 55, 208, 222-223 rejecting a mere sovereignty based understanding of aggression (focusing on the border crossing of the aggressor State) and instead calling for a human rights based understanding (indirect human rights violation by undermining human rights protection of the victim state and/or because of the human rights violations linked to an aggression); *Mark Drumbl*, *The push to criminalize aggression: Something lost amid the gains? Case W. Res.J.Int’l L.* 41 (2009) 29, at 306-307, 313, 318 (identifying four collective “first-category” interests protected by the crime of aggression, i.e. stability, security, sovereignty and human rights, and emphasizing the expressive value in justification for a broad criminalization); *Noah Weisbord*, *Conceptualizing aggression*, *Duke J. Comp. & Int’l L.* 20 (2009-2010) 1, at 5 *et seq.* with further (also earlier) references (calling himself for a sociological, future-oriented approach to update the definition and make it socially relevant today and foreseeable in the future, *id.*, at 7 *et seq.*).

only by German defence lawyers)<sup>60</sup> and of GA Resolution 3314.<sup>61</sup> Indeed, in the SWGCA it was more than once recognized – in stark contrast to Benjamin Ferencz’s quite romantic glorification of Nuremberg<sup>62</sup> – that one had to do better<sup>63</sup> and that Resolution 3314 constitutes a quite problematic starting point for a definition.<sup>64</sup>

All this said it is now time to submit the Kampala result to a critical legal analysis and elaborate a constructive, *bona fide* interpretation in order to mitigate as far as possible negative (unintended) consequences. Such an analysis should proceed step by step along the lines of the normative structure now before us, but it must not, with a view to the overall assessment, focus on its individual elements in isolation running the risk of losing sight of the whole picture. By way of example: an isolated analysis of the “act of aggression” as defined in article 8bis (2) without taking into account the definition of the “crime of aggression” in article 8bis (1) does not do justice to the result achieved, effectively bringing together the collective (= act) and individual (= crime) level in one common definition.<sup>65</sup> We will return to the underlying structural issue in a moment. Similarly, an overall assessment must not separate the crime definition from the jurisdictional compromise either but take into account the overall result of the negotiations.

## **B. The definition**

### **1. The dual nature of the crime of aggression and the threshold clause**

As explained elsewhere<sup>66</sup> the crime of aggression has a dual nature encompassing, at a macro level, the collective state act of aggression and, at a micro level, the individual crime of ag-

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<sup>60</sup> For a recent reappraisal of the classical criticism in terms of the principle of legality see *May*, Aggression (note 59), 146 *et seq.*; *Michael J. Glennon*, The blank-prose crime of aggression, *Yale J. Int’l L.* 35 (2010) 71, at 74 *et seq.* See also *Werle*, (note 1), mn. 1324 with further references.

<sup>61</sup> Cf. *Glennon* (note 60), at 78 *et seq.*

<sup>62</sup> See most recently *Benjamin F. Ferencz*, Ending impunity for the crime of aggression, *Case W. Res.J.Int’l L.* 41 (2009) 281 considering that the crime has been “adequately defined”.

<sup>63</sup> As put by one of the drafters himself: “The ultimate challenge that Nuremberg leaves us with in respect of the crime against peace is whether twenty-first century drafters can do better than those in London sixty-one years ago. It is still a daunting task.” (*Roger Clark*, Nuremberg and the Crime against Peace, 6 *Wash. U. Global Stud. L. Rev.* 6 (2007) 527, at 550).

<sup>64</sup> See June 2005 SWGCA Report, Discussion paper 3, reprinted in *Barriga et al.* (note 5), at 196; June 2006 SWGCA Report, in *ibid.*, at 142-43, 145-46; January 2007 SWGCA Report, in *ibid.*, at 134; June 2007 SWGCA Report, in *ibid.*, at 116-17; December 2007 SWGCA Report, in *ibid.*, at 101; June 2008 SWGCA Report, in *ibid.*, at 89. See also *Barriga* (note 35), in *Barriga et al.* (note 5), at 9-10; *Kreß* (note 55), at 1136.

<sup>65</sup> See also *Roger S. Clark*, Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction, *EJIL* 20 (2009) 1103, at 1104-05. But see the quite isolated analysis of *Glennon* (note 60), at 88 *et seq.*, 98.

<sup>66</sup> *Kai Ambos*, Strafrecht und Krieg: strafbare Beteiligung der Bundesregierung am Irak-Krieg?, in: *Arnold/Burkhardt/Gropp et al.* (eds.), *Festschrift für Albin Eser* (2005) 671, at 672 *et seq.*; *id.* (note 55), § 7 mn. 253.

gression.<sup>67</sup> From this follows that the existence of an (unlawful) act of aggression as defined by article 8bis (2) on the basis of Resolution 3314 does not automatically entail the individual criminal responsibility of the persons involved in this act. While this has not yet been the view of the Nuremberg law<sup>68</sup> relying essentially on the Kellogg-Briand Pact's<sup>69</sup> prohibition for the criminalization of the Nazis' aggressive war,<sup>70</sup> Resolution 3314 itself distinguishes between an act of aggression and a "war of aggression", qualifying only the later as a "crime against international peace" (article 5 (2)).<sup>71</sup> Yet, since Resolution 3314 was only concerned with the macro level, i.e., the definition of the collective state act of aggression, it did not further elaborate on the qualitative difference which turns the merely unlawful act into a crime entailing individual criminal responsibility. This qualitative difference is now captured by the threshold clause of article 8bis (1) requiring an "act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"<sup>72</sup> and purporting to clearly exclude minor incidents (e.g. border skirmishes) or legally controversial cases (e.g. a humanitarian intervention) from criminalization.<sup>73</sup> While the threshold clause remained controversial until the end of the SWGCA's mandate,<sup>74</sup> the principled decision for an objective qualification was already taken in 2002 by the Working Group of the Preparatory Commission with a slightly different formula.<sup>75</sup> The alternative subjective approach calling for a specific aggressive intent or purpose (*animus aggressionis*), coupled with the aim of (long-term)

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<sup>67</sup> For the three different levels (Security Council, ICJ, ICL) of the „notion of aggression“ see also *Reddi* (note 55), 660.

<sup>68</sup> *Supra*, note 2.

<sup>69</sup> Treaty for the Renunciation of War as an Instrument of National Policy of 27 August 1928, available at [www.yale.edu/lawweb/avalon/imt/kbpact.htm](http://www.yale.edu/lawweb/avalon/imt/kbpact.htm) (last accessed 3 November 2010).

<sup>70</sup> See *Kai Ambos*, *Der Allgemeine Teil des Völkerstrafrechts* (2nd ed. 2004), 111 *et seq.* with further references in note 229.

<sup>71</sup> See also *Clark* (note 33), 695 ("drafting convention that builds on this combination of state and individual responsibility.").

<sup>72</sup> According to *Kreß* (note 55), at 1138 "gravity and scale" are to be understood quantitatively and "manifest" qualitatively. For a basis in ICJ case law and a comparison to the grave breaches regime of IHL see *Heinsch* (note 15), 726, 727, 731.

<sup>73</sup> See June 2005 SWGCA report, discussion paper 3, no. 3, in *Barriga et al.* (note 5), at 197; see also *Barriga* (note 35), at 8. On the non-punishability of a humanitarian intervention as a matter of principle *May*, *Aggression* (note 59), 273 *et seq.*

<sup>74</sup> See June 2009 SWGCA report, para. 23 *et seq.*, in *Barriga et al.* (note 5), at 27-28; see also November 2006 SWGCA report, in *ibid.*, at 140; January 2007 SWGCA report, in *ibid.*, at 133; June 2007 SWGCA report, in *ibid.*, at 119; December 2007 SWGCA report, in *ibid.*, at 103; June 2008 SWGCA report, in *ibid.*, at 87-8; February 2009 SWGCA report, in *ibid.*, at 51; see also *Barriga* (note 35), at 8-9; *Solera* (note 1), 409 *et seq.*

<sup>75</sup> „Flagrant“ instead of „manifest“ violation, see Discussion paper on the definition of the elements of the crime of aggression prepared by the Coordinator of the Working Group on the Crime of Aggression during the Preparatory Commission of the ICC, in Assembly of States Parties to the Rome Statute of the International Criminal Court, Second session, New York, 8-12 September 2003, Official Records ICC-ASP/2/10, at 234; see also June 2005 SWGCA report, discussion paper 3, no. 3, in *Barriga et al.* (note 5), at 197.

occupation, subjugation or annexation,<sup>76</sup> albeit still mentioned in the 2002 Working Group discussion paper,<sup>77</sup> did not find enough support and was no longer pursued by the SWGCA.<sup>78</sup> It should be clear from this explanation that there was hardly an alternative to a threshold clause to capture the qualitative difference between act and crime of aggression.<sup>79</sup> The remaining question then is whether this difference could have been expressed in more precise terms as insinuated by those who point, with quite some reason, to the vagueness and ambiguity of the threshold clause.<sup>80</sup> I seriously doubt that more precision can be achieved and I see these doubts confirmed by the fact that the critics do not propose anything more precise (maybe because they are, as suggested above,<sup>81</sup> opposed to the whole enterprise in the first place).<sup>82</sup> In fact, the lack of precision is embedded in the primary norm regulating the use of force. Indeed, if it is not possible to clearly delimitate the lawful from the unlawful use of force how could the lines be drawn any clearer at the level of the secondary norm criminalizing the unlawful use of force?<sup>83</sup> Apart from that, given the highly normative contents of any qualifier trying to capture the criminal essence of a certain act and the general problem of describing concrete human conduct with abstract legal terms in a sufficiently precise form I cannot think of any *objective* definition which would express the substance of the threshold clause more precisely. Also, if Paulus is right and “any lawyer of some quality [may] find reasons why almost anything is legal or illegal under prevailing circumstances” a more precise definition would, at most, diminish legal uncertainty gradually but not get rid of it completely.<sup>84</sup> I believe that a high threshold, as expressed by the term “manifest”, to be understood objective-

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<sup>76</sup> Cf. *Werle* (note 1), mn. 1331, 1342, *Cassese* (note 55), at 157, 160; *Wilmshurst* (note 1), 325, 327; *Solera* (note 1), 423 *et seq.* (427). See also *May*, Aggression (note 59), 14-15 arguing that such an aggressive intent may frequently be missing since State leaders are often only aiming to advance legitimate State interests; see also *ibid.*, 257-258.

<sup>77</sup> *Supra*, note 75.

<sup>78</sup> *Kreß* (note 55), at 1139-1140.

<sup>79</sup> See also *Clark* (note 33), 698-699 quoting the Legal Adviser to the U.S. Department of State; *Phani Dascalopoulou-Livada*, Aggression and the ICC: Views on certain ideas and their potential for a solution, in: *Politi/Nesi* (note 9), 79, at 83; *Elizabeth Wilmshurst*, Definition of the crime of aggression: state responsibility or individual criminal responsibility?, in *ibid.*, 93 *et seq.*

<sup>80</sup> See *Glennon* (note 60), at 101-02; *Paulus* (note 55), 1121; *Sean D. Murphy*, Aggression, legitimacy and the International Criminal Court, *EJIL* 20 (2009) 1147, at 1150-1151; *Wilmshurst* (note 1), 326-27; *Heinsch* (note 15), 726-727.

<sup>81</sup> See *supra*, note 56 and main text.

<sup>82</sup> See especially *Glennon* (note 60), at 101 (“A statute permitting the prosecution of only clear-cut, blatant instances of “impropriety” would still be vague. This is the central difficulty in seeking to eliminate vagueness merely by announcing that marginality is excluded: it is impossible to know from the terms at issue what within their reach is marginal and what is essential.”) and at 102 arguing that the threshold clause is “irretrievably vague”.

<sup>83</sup> See *Murphy* (note 80), at 1152 *et seq.* providing a table with forms of coercive acts which *may* amount to unlawful use of force and a crime of aggression.

<sup>84</sup> *Paulus* (note 55), at 1123.



ly,<sup>85</sup> and the combined existence of character, gravity and scale,<sup>86</sup> albeit confused by understandings 6 and 7,<sup>87</sup> is necessary to stress the difference between the act and crime of aggression and to avoid its trivialization.<sup>88</sup> In contrast, I do not share the concern that a too high threshold combined with the absence of prosecution entails the unintended consequence of legalizing or even legitimizing controversial forms of use of force.<sup>89</sup> I think that this concern overstates, on the one hand, the impact a negative prosecutorial decision can possibly have on the question of the lawfulness of the use of force and, on the other hand, does not fully account for the fundamental distinction between the prohibition (regarding the act of aggression) and the actual crime. Concretely speaking, while classical aggressive wars, e.g. the Nazi attacks on neighboring countries since 1939 and the Iraq invasion in Kuwait in 1990, constitute both an act and a crime of aggression, the 2003 US-led invasion in Iraq, albeit considered by most international lawyers as an unlawful act of aggression,<sup>90</sup> might not amount to a crime of aggression for the absence of a “manifest violation” of the UN-Charter in light of the fact that there existed a respectable scholarly view according to which the invasion was justified, especially on the basis of SC-Resolution 678.<sup>91</sup> All this said, I would still have preferred that the alternative *subjective* requirement mentioned above would – despite its obvious evidentiary problems<sup>92</sup> – have been included in article 8*bis* as an *additional* threshold.<sup>93</sup> The combination of an objective-subjective threshold makes it easier to decide the hard cases for the simple fact that one has not only one (objective) but two (objective and subjective) qualifiers at its disposal. Thus, for example in the case of a humanitarian intervention, the subjective qualifier would more clearly exclude criminality than a mere objective threshold since the

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<sup>85</sup> Elements (note 33), introduction no. 3. See also June 2009 SWGCA Report, para. 25 and Appendix II no. 7, in *Barriga et al.* (note 5), at 28, 39. Especially crit. of this term *Wilmshurst* (note 1), 326.

<sup>86</sup> See *supra*, note 27 and main text.

<sup>87</sup> See *supra*, note 23 and 24. While Art. 8*bis* (1) treats “character, gravity and scale” equally, understanding 6 focuses on gravity. In addition, while a literal reading of Art. 8*bis* (1) implies that the three qualifiers must exist cumulatively (“and”), the second sentence of understanding 7 suggests that two “components” would suffice (for the first reading *Schmalenbach* [note 15], 748 right column). Also, understanding 7 speaks of a “manifest determination” but Art. 8*bis* (1) of a “manifest violation”; admittedly, the reference is clear but it is unclear how the three qualifiers can contribute to the qualification of a violation as “manifest” (for a good critique see *Heinsch* (note 15), 728-729; crit. also *David Scheffer*, *The Complex Crime of Aggression under the Rome Statute*, LJIL 23 [2010] 897, 898 *et seq.*

<sup>88</sup> Cf. *Kreß* (note 55), at 1142; in favour as a matter of principle also *May*, *Aggression* (note 59), 73; *Wilmshurst* (note 1), 321; for the same result *David Scheffer*, *A pragmatic approach to jurisdictional requirements for the crime of aggression in the Rome Statute*, Case W. Res. J. Int’L. 41 (2009), 397, at 400, 409; *Kemp* (note 1), 234, 243, 249.

<sup>89</sup> See *Paulus*, (note 55), at 1124, 1127; *Murphy*, Case W. Res. J. Int’l L. 41 (2009) 341, at 361 *et seq.*

<sup>90</sup> See *Kreß*, 115 ZStW 2003, 294, at 313 *et seq.* (331) with further references; see also *K. Ambos/J. Arnold* (Hrsg.), *Der Irak-Krieg und das Völkerrecht*, 2003.

<sup>91</sup> *Kreß*, 115 ZStW 2003, 294, at 331; see also *Ambos* (note 66), 680-681; crit. *Paulus* (note 55), at 1123.

<sup>92</sup> See already *Ambos* (note 66), 681-82; see also *Solera* (note 1), 428 *et seq.*

<sup>93</sup> For this subjective element as the “determinant factor” *Solera* (note 1), 415, 423 *et seq.*; for a “special intent” (in relation to conspiracy) *May*, *Aggression* (note 59), 260 *et seq.*

essence of such an intervention is, if the States involved act *bona fide*, its humanitarian purpose.<sup>94</sup> Even in the more controversial case of the Iraq invasion the subjective threshold would confirm the objective negation of a crime of aggression for one can hardly argue that the US-led coalition acted with a specific *animus aggressionis* with a view to the long-term occupation of Iraq.<sup>95</sup>

## 2. The reference to Resolution 3314

The interplay of para. 1 and 2 of article 8*bis* – para. 2 as the primary conduct norm containing the prohibition and para. 1 as the secondary decision norm providing for a criminal sanction<sup>96</sup> – is a consequence of the above explained dual nature of the crime of aggression and shows that the SWGCA was well aware of this dual nature.<sup>97</sup> This entails the further consequence, already explained above,<sup>98</sup> that para. 2 must not be interpreted in isolation and detached of para. 1. After all, to do justice to the drafters, one must recognize that the combined adoption of articles 1 and 3 of Resolution 3314 – instead of agreeing on an autonomous and generic definition of an act of aggression<sup>99</sup> – was quite controversial and for many delegations only acceptable in light of the high threshold in para. 1.<sup>100</sup> In fact, as often in diplomatic negotiations, Resolution 3314 was finally used because it was “already there” and carried some authority as a General Assembly resolution which has been invoked in various subsequent occasions.<sup>101</sup> The obvious problem with this approach is that Resolution 3314 was never drafted for criminal law purposes but only to help the Security Council to determine an “act of aggression” in the sense of article 39 of the UN Charter with a view to its powers under Chapter

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<sup>94</sup> In the same vein *Kreß* (note 55), at 1141 arguing that in the case of humanitarian intervention “a specific collective intent ... is conspicuously absent.” For the same result *Solera* (note 1), 461 *et seq.* with regard to NATO’s “humanitarian intervention” against Yugoslavia in favour of Kosovo (462: “difficult to assert that NATO acted with the specific *animus aggressionis* ...”; “difficulty of establishing an aggressive intent”); *May, Aggression* (note 59), 294-295 considering that the *mens rea* element is the most difficult to prove. **For an explicit exclusion of the humanitarian intervention from the offence definition *Trahan* 78.**

<sup>95</sup> See already *Ambos* (note 66), 681. The recent withdrawal of US-troops from Iraq confirms this view (see <http://www.bbc.co.uk/news/world-middle-east-11020270> [last accessed 3 November 2010], 19 August 2010, “Last US combat brigade exits Iraq”). For *Solera* (note 1), 477 *et seq.*, 500 “the Iraq case illustrates the difficulties of establishing the mental element ... when various defenses can be introduced to justify action.”

<sup>96</sup> For two different legal regimes *Cassese* (note 55), at 155 *et seq.*

<sup>97</sup> I do not therefore understand why *Glennon* (note 60), at 79 with note 52 states that the “SWGCA ignored this distinction.”

<sup>98</sup> *Supra*, note 65 and main text.

<sup>99</sup> See June 2005 SWGCA report, discussion paper 3, no. 1, in *Barriga et al.* (note 5), at 196. See *ibid.*, no. 2 on the different terms (use of force, armed attack, use of armed force) discussed as an alternative to “act of aggression”.

<sup>100</sup> See *Barriga* (note 35), at 9-10; *Kreß*, (note 55), at 1136.

<sup>101</sup> See *Glennon* (note 60), at 79 (“... recurring presence in subsequent efforts to define aggression ...”); in favour for this reason *Heinsch* (note 15), 725-726; for a thoughtful critique of the Resolution see *Weisbord* (note 59), at 21 *et seq.*

VII.<sup>102</sup> As a consequence, the Resolution equates “aggression” with “use of force”<sup>103</sup> and its articles 2 and 4 give the SC special powers of definition which are incompatible with the “self contained” criminal law regime of the Rome Statute where, according to the principle of legality (article 22-24), criminal responsibility cannot be established *ex post facto* and the crime definitions must be strictly construed.<sup>104</sup> For this reason the list of acts contained in article 8bis (2) can neither be open nor “semi-open” but must be considered exhaustive.<sup>105</sup> A semi-open interpretation in the sense of accepting further acts not listed but falling within the generic definition of the existing acts<sup>106</sup> could only be compatible with the principle of legality if article 8bis (2) would provide for such an “extension” by referring, as for example article 7 (1) (k) does, to other similar acts. Yet, even such an interpretation would be difficult to reconcile with a strict reading of the *lex certa* element of the legality principle.<sup>107</sup> Apart from that, the actual list contains a number of acts which do not even constitute a use of force *stricto sensu*, e.g. lit. (c) and (e), and therefore are far below the gravity threshold of article 8bis (1).<sup>108</sup> Also, from a criminal law perspective, lit. (f) and (g) confuse the proper use of force in the sense of perpetration with the assistance to the use of force by another State (lit. (f)) or non-state actors (lit. (g)).<sup>109</sup> Last but not least, the first strike principle contained in article 2 of Resolution 3314 is but one possible test of identifying an aggressor State and does not sufficiently account for the pre-emptive reaction to imminent threats by long distance weapons.<sup>110</sup>

While most of these flaws may not become relevant at the crime level because of the threshold clause or a reasonable restrictive interpretation by the Court the reference to Resolution 3314 entails the more fundamental problem that the definition of aggression turns out to be

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<sup>102</sup> See *Paulus* (note 55), at 1121; *Glennon*, (note 60), at 79; *Wilmshurst* (note 1), 326; *Heinsch* (note 15), 723.

<sup>103</sup> *Crit. Murphy* (note 80), at 1151.

<sup>104</sup> See also *Barriga* (note 35), 12.

<sup>105</sup> For the discussion in the SWGCA see November 2006 Report, in *Barriga et al.* (note 5), at 140; June 2007 Report, in *ibid.*, at 117-118; December 2007 Report, in *ibid.*, at 102-103; June 2008 Report, in *ibid.*, at 89-90. See also *Barriga* (note 35), at 10-11. The Elements do not provide any clarification since they only repeat that “any of the acts ... qualify as an act of aggression” (note 33, introduction no. 1).

<sup>106</sup> See *Kreß* (note 55), at 1117; *Clark* (note 65), at 1105; *id.* (note 33), 696.

<sup>107</sup> Against such a strict reading apparently *Kreß* (note 55), at 1137 who does not even require a “similar acts” clause as contained in Art. 7 (1) (k). Without such a clause the extension of the list would, however, violate the *lex praevia* in the first place. In any case, *Kreß* is right in that the principle of legality is not clearly defined in ICL and especially the *lex certa* component has been largely ignored, see *Kai Ambos*, *Nulla poena sine lege* in international criminal law, in: Roelof Haveman/Olaoluwa Olusanya (eds.), *Sentencing and sanctioning in supranational criminal law* (2006), 17, at 23 *et seq.* For a more flexible approach also *Heinsch* (note 15), 724-725, 742; against an open ended list *Kemp* (note 1), 236, 249. Far too imprecise is however *Scheffer's* proposal (note 88, at 409) according to which the “elements of the crime of aggression shall draw [sic!], inter alia [sic!], from Art. 2 and 3” of Resolution 3314.

<sup>108</sup> Cf. *Kreß* (note 55), at 1137.

<sup>109</sup> Cf. *Paulus* (note 55), at 1121; conc. *Kreß* (note 107).

<sup>110</sup> See for a discussion *May*, *Aggression* (note 59), 21, 81 *et seq.*, 90 *et seq.*, 217 *et seq.* calling for a more normative understanding of first strike as “first wrong”.

exclusively state-centric<sup>111</sup> and thus unable to capture modern forms of aggression carried out by non-state actors in asymmetric conflicts.<sup>112</sup> While, from a traditional state-oriented perspective, such an expansion of the crime may be questioned or even rejected,<sup>113</sup> the human being oriented approach of international criminal law, focusing on *individual* criminal responsibility, strongly suggests the inclusion of non-state actors.<sup>114</sup> The essence of the crime of aggression is not so much determined by the actor but by the wrongfulness of the act. This brings us back to the already criticized unprincipled approach of the drafters<sup>115</sup> which prevented them from inquiring more fundamentally the interests and values to be protected by a modern crime of aggression. Depending on the outcome of such an inquiry the crime definition must be formulated more narrowly or broadly, in the latter case going beyond the state-centric approach of the Nuremberg law and Resolution 3314. To be sure, I do not think that the state-centric approach of the SWGCA cannot be defended (for example with the argument of the maintenance of the existing legal order which is predicated on States)<sup>116</sup> but such a defence cannot be limited to a merely formal recourse to pre-existing international law. In any case, as the law stands now it is difficult, if not impossible, to read non-state acts of aggression into article 8bis (2). Any extension of the list, especially by way of an analogy,<sup>117</sup> conflicts, as explained above, with the principle of legality. Apart from that it would not get rid of the state-centric nature of the definition which already follows from the first sentence of article 8bis (2) where reference is made to the “armed force by a State”. A broad reading of the term “armed” – if at all compatible with the principle of legality – would not change this requirement either, it may only be more inclusive with a view to other State attacks, for example by way of the internet (cyber attacks).<sup>118</sup>

### 3. The special offence character of the crime and the leadership clause

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<sup>111</sup> In the same vein *Solera* (note 1), 416 *et seq.* (418).

<sup>112</sup> See for a thoughtful analysis in this regard *Weisbord* (note 59), at 23 *et seq.*; *Drumbl* (note 59), at 305; see also *May*, Aggression (note 59), suggesting to treat non-State actors like States if they act like States (298), applying this affirmatively to terrorist groups (306 *et seq.*) and arguing in favour of their prosecution for aggression (308 *et seq.*).

<sup>113</sup> Cf. *Wilmshurst* (note 1), 318, 319.

<sup>114</sup> Cf. *Cassese* (note 55), at 157. See also the “Protocol of Non-Aggression and Mutual Defense in the Great Lakes Region”, 30 November 2006, extending aggression to “an armed group” as a non-state actor but always directed against the territorial integrity of a State (Art. 1 para. 2).

<sup>115</sup> See *supra*, note 59 and main text.

<sup>116</sup> The recognition of non-State actors as a *legal* category disrupts this order; see similarly *May*, Aggression (note 59), 298.

<sup>117</sup> See *Weisbord* (note 59), at 40 which however sees the conflict with Art. 22 (2) of the Rome Statute.

<sup>118</sup> See for this interpretation *Weisbord* (note 59), at 40-41.

The leadership character of the crime of aggression has long been recognized.<sup>119</sup> It is ultimately a consequence of the collective nature of the crime of aggression as a state crime which can only, if at all, be brought about by the leader(s) of the aggressive State acting in a collective form.<sup>120</sup> Yet, the leadership requirement does not answer the question who exactly belongs to the leadership circle (insider, *intraneus/intranei*) and how should the possible criminal responsibility of persons outside the circle (outsider, *extraneus/extranei*) be treated. As to the first question, the definition of article 8bis (1) – “a person in a position effectively to exercise control over or to direct the political or military action of a State” – does focus on *de facto* effective control and direction, not formal status. For that reason, leadership is not *per se* limited to political leaders and/or members of government but may also extend to business or religious leaders.<sup>121</sup> While it is true that the “effective control” requirement is stricter than the Nuremberg “shape or influence policy” criterion,<sup>122</sup> this “retreat from Nuremberg”<sup>123</sup> is justified since the “shape or influence” or similar “major role”<sup>124</sup> standards are too broad in that, especially in democracies, a too large group of people would be covered.<sup>125</sup> Criminal responsibility requires more than mere influence, namely effective control over aggressive policy. After all, this standard does cover non-political leaders with sufficient effective control<sup>126</sup> and still extends for some too far down the political hierarchy.<sup>127</sup> Indeed, the Nuremberg prosecutions of top bureaucrats, high ranking military officials and industrialists show how difficult it

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<sup>119</sup> See *Ambos* (note 66), 677 with various references in note 40. There was also a quite early consensus on this question in the SWGCA, see June 2006 Report, para. 88, in *Barriga et al.*, (note 5), at 154; see also *Weisbord* (note 59), at 43; *Clark* (note 10), 718-19; *May*, Aggression (note 59), 11, 14, 16; *Cassese* (note 55), at 159; *Wilmshurst* (note 1), 318; *Kemp* (note 1), 236-237.

<sup>120</sup> Thus, the leadership element does not entail the lonely conduct of “un dictateur absolu” (misleading insofar *Luigi Condorelli*, Conclusions générales, in *Politi/Nesi* [note 9], 151, at 157). See for an interesting discussion about the “conceptual puzzle” arising out of the state and individual nature of the crime of aggression *May*, Aggression (note 59), 229 *et seq.* (232).

<sup>121</sup> Cf. *Barriga* (note 35), at 8; *Clark* (note 65), at 1105; *Schmalenbach* (note 15), 748 right column; earlier already *Kemp* (note 1), 251. See also February 2009 SWGCA Report, para. 25, at 54. For a more restrictive understanding apparently *Heinsch* (note 15), 722-723 referring to political and military leaders (but see *infra*, note 126).

<sup>122</sup> See June 2007 SWGCA Report, para. 12 with note 5 referring to the Nuremberg case law, in *Barriga et al.*, (note 5), at 111. See also December 2007 SWGCA Report, para. 9, in *ibid.*, at 100 and June 2006 Report, para. 88, in *ibid.*, at 154 (“ability to influence policy”).

<sup>123</sup> See *Kevin Jon Heller*, Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression, *EJIL* 18 (2007) 477-497, at 478-479 arguing that the SWGCA' approach is more restrictive than what he identifies as the “shape or influence” standard articulated at Nuremberg by both the Nuremberg IMT and the subsequent military tribunals. Conc. *Wilmshurst* (note 1), 319. Crit. also *Drumbl* (note 59), 316.

<sup>124</sup> June 2004 SWGCA Report, para. 44, in *Barriga et al.* (note 5), at 204.

<sup>125</sup> Cf. *Barriga* (note 35), at 8. Too imprecise also *Scheffer's* proposal (note 88), at 404, 409 requiring effective control and direction only “in whole or substantial part”.

<sup>126</sup> See also June 2004 SWGCA Report, para. 49, in *Barriga et al.*, (note 5), at 205 (“broad enough to encompass most influential leaders.”). Similarly *Heinsch* (note 15), 723 focusing on the influence over policy; *Schmalenbach* (note 15), 748 right column. Clearly, the scope of liability depends on the concept of “business” or “religious leader”, for a definition of the former see *Hans Vest*, Business leaders and the modes of individual criminal responsibility under international law, *Journal of International Criminal Justice* (“JICJ”) 8 (2010) 851, at 852.

<sup>127</sup> Crit. for example *Glennon* (note 60), at 99-100.

is to hold persons right below the actual leadership of a criminal regime responsible for a crime of aggression, at least if one wants to prove their personal responsibility, especially their *mens rea*.<sup>128</sup>

The second question as to the responsibility of *extranei* depends on the extent to which the leadership requirement reaches into the forms of participation recognized under the differentiated model of article 25 (3) of the ICC Statute.<sup>129</sup> While the SWGCA's decision to apply article 25, in principle, to the crime of aggression is convincing, above all for systematic reasons, since it is in line with the Rome Statute's general application of the general principles (the general part) to the crimes (the special part),<sup>130</sup> the extension of the leadership clause to article 25 (3) by incorporating a subpara. *3bis* reduces the effect of this differentiated solution to practically nothing. An unreserved differentiated solution would mean that *extranei* could be liable as "ordinary" participants to a crime of aggression. Thus, for example, the bureaucrat who prepares the plan for the invasion but does not belong to the leadership level could be responsible as an aider to the crime according to articles 25 (3)(c), *8bis*.<sup>131</sup> The soldier who forms part of the invasion army could be a direct (physical) perpetrator of the crime according to articles 25 (3)(a), *8bis*. In contrast, the new para. *3bis* of article 25 means that all these and other *extranei* are exempted from criminal responsibility for their possible participation in a crime of aggression. Thus, article 25 (3)*bis*, by limiting the application of article 25 for the crime of aggression exclusively to *intranei*, creates impunity for *extranei* (at least as far as aggression is concerned).<sup>132</sup> While this was apparently a conscious policy decision,<sup>133</sup> albeit

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<sup>128</sup> Cf. *May*, Aggression (note 59), 153 *et seq.*, 165 *et seq.*, 185 *et seq.* convincingly demonstrating by way of the cases of *Karl Dönitz/Erich Raeder* (accused before the International Military Tribunal in the Trial against the Major War Criminals), *Ernst von Weizsäcker* (Ministries case) and *Alfried Krupp/Karl Krauch* (Krupp/IG Farben cases) how difficult it is to prosecute top responsible close to, but not immediate part of the leadership.

<sup>129</sup> In fact, Art. 25 (3) follows the Austrian and Swedish Unitarian concept of perpetration in a functional sense (*funktionelle Einheitstäterschaft*) since it distinguishes at least terminologically between the different forms of participation already at the level of allocation of responsibility (*imputatio*) and not only at the sentencing stage, see *Kai Ambos*, in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> ed., 2008), Art. 25 mn. 2. For an interesting terminological suggestion to grasp the peculiarity of art. 25 (3) see now *Vest* (note 126), 856 with fn. 19: "differentiating model with uniform (unified) range of punishment".

<sup>130</sup> On the respective dispute along the lines of a so called "monistic" and "differentiated" approaches see especially June 2005 SWGCA Report, Discussion paper 1, in *Barriga et al.* (note 5), at 184 *et seq.* (190). See also for the sometimes confusing discussion in the SWGCA June 2006 Report, para. 84 *et seq.* and appendix III item 1), in *ibid.*, at 153-154, 161; January 2007 Report, para. 6 *et seq.*, in *ibid.*, at 131-132; June 2007 Report, para. 5 *et seq.*, in *ibid.*, at 109-110; December 2007 Report, para. 6 *et seq.*, in *ibid.*, at 100. For a summary of the discussion see *Barriga* (note 35), at 7; *Clark* (note 10), 719; *Kemp* (note 1), 212 *et seq.*; *Noah Weisbord*, *Prosecuting aggression*, *Harv. Int. L. J.* 49 (2008) 161, at 191 *et seq.*

<sup>131</sup> See also *Barriga* (note 35), at 8 (responsibility of leader's personal assistant).

<sup>132</sup> Crit. also *Drumbl* (note 59), at 314 stating that the combined effect of Art. *8bis* (1) and 25 (3)*bis* "bestows collective innocence on all involved in aggressive war below the levels of the state political and military elite."

<sup>133</sup> A number of delegations certainly wanted to restrict participation in the crime of aggression as much as possible (see for example June 2007 SWGCA Report, para. 11, in *Barriga et al.*, note 5, at 110, where it is stated that the unreserved application of Art. 25 (3) could "undermine" the leadership character of the crime; see also *Barriga*, note 35, at 7-8).

related to the decision in favor of the differentiated approach,<sup>134</sup> the ensuing wide exemption of responsibility of everybody who does not belong to the leadership circle is highly questionable and will certainly give rise to much criticism.

Apart from that, it is questionable whether the leadership concept, rooted in a Weberian, Prussian model of organization with a clear hierarchy and chain of command<sup>135</sup> and in this sense equally state-centric as the concept of act of aggression already criticized above,<sup>136</sup> can be interpreted flexibly enough so as to capture modern, post-bureaucratic forms of organization as represented, for example, by paramilitary or terrorist non-state actors.<sup>137</sup> This may be the case if one interprets the effective control criterion broadly and reads into its second part (“... or to direct ...”) a form of decisive influence,<sup>138</sup> but here again the limits imposed by the principle of legality must be respected and the will of the drafters to narrow responsibility by the leadership requirement must not be ignored. In any case, what remains from the differentiated approach is only the application of the forms of participation of article 25 (3) to leaders,<sup>139</sup> i.e., in practice their responsibility as direct, indirect or co-perpetrators (subpara. (a)),<sup>140</sup> for ordering, instigation (both subpara. (b)) or any form of assistance (subpara. (c)). In contrast, responsibility for a contribution to a crime of aggression by a group of leaders (subpara. (d)) does not appear of great relevance because a leader will normally belong himself to the criminal group committing such crime. Similarly, responsibility for attempt (subpara. (f)) is of little practical importance. We will return to this anticipated form of responsibility in the next

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<sup>134</sup> The combination of the differentiated solution with the transfer of the leadership qualifier to Art. 25 (3) was already discussed at the SWGCA June 2004 Meeting, see June 2004 Report, para. 52-53, in *Barriga et al.* (note 5), at 205-206. See also June 2005 Report, para. 19 *et seq.* and Discussion paper 1, sect. A. I. 2., *ibid.*, at 169 *et seq.*, 185.

<sup>135</sup> Max Weber, *Wirtschaft und Gesellschaft* (Grundriß der Sozialökonomik, Abteilung III), 1922, 650 *et seq.* = 5. rev. ed. 1980, 551 *et seq.*; in English in H.H. Gerth/C. Wright Mills, *From Max Weber: Essays in Sociology*, 1946, 196 *et seq.* On these roots see Weisbord (note 59), at 44 *et seq.* (describing the classical concept of leadership as “an individual holding high office or a high top position within a complex bureaucracy, exercising formal and effective control over the political or military action of a state.”).

<sup>136</sup> See *supra*, note 112 and main text.

<sup>137</sup> Crit. Weisbord (note 59), at 46 *et seq.* (stating that the Nuremberg leadership concept “is not a sociologically accurate description of leadership within Al Qaeda and the vast number of aggressive organizations emerging today” and that the effective control concept “does not go far enough to capture the leaders of post-bureaucratic organizations.”). See also Drumbl (note 59), at 316, arguing that “the decentralized and fragmented groups that pose major security threats today do not proceed in the highly organized and hierarchical lines of the *Wehrmacht* or Imperial Army and, accordingly, an absolute leadership requirement may not square so cleanly with fighters whose call to arms is not animated by a strict sense of national obligation but, rather, in some cases by a more independent assertion of agency.”

<sup>138</sup> See Weisbord (note 59), at 47 *et seq.*

<sup>139</sup> See also June 2004 SWGCA Report, para. 52, in *Barriga et al.* (note 5), at 205; June 2005 SWGCA Report, para. 19 *et seq.*, in *ibid.*, at 169 *et seq.*; January 2007 SWGCA Report, para. 6, in *ibid.*, at 132; June 2007 SWGCA Report, para. 6 *et seq.*, in *ibid.*, at 110; December 2007 SWGCA Report, para. 9, in *ibid.*, at 100; June 2008 SWGCA Report, para. 62, in *ibid.*, at 87; February 2009 SWGCA Report, para. 25, in *ibid.*, at 54.

<sup>140</sup> In this regard the SWGCA states the obvious if it says that “more than one person may be in a leadership position”, see June 2009 Report, para. 15 and Appendix II no. 15, in *Barriga et al.* (note 5), at 25, 40; see also the corresponding note to the Elements (note 34).

section. Finally, superior responsibility within the meaning of article 28, indeed discussed in the SWGCA,<sup>141</sup> is logically impossible since it rests on the commission of the “base crimes” by the subordinates which however, due to the existence of the leadership clause, cannot be perpetrators (and not even secondary participants) of aggression.<sup>142</sup>

#### 4. The conduct verbs and the criminalization of preparatory acts

As to the actual conduct entailing criminal responsibility article 8*bis* (1) again borrows from Nuremberg, adopting the same words except for the last verb where “execution” instead of “waging of a war” is used.<sup>143</sup> Thus, again, the drafters took the decision to rely on the Nuremberg precedent – again “mainly for historical reasons”<sup>144</sup> – instead of using the opportunity to start a principled discussion with a view to reach an improved codification. In fact, the criminalization of clearly preparatory acts (“planning”, “preparation”) and the ensuing anticipated early intervention of criminal law is not only problematic for well known reasons of principle – the harm principle or the *Rechtsgutslehre* require the actual causation of harm or the actual violation of a protected legal interest to justify criminal law intervention but preparatory conduct creates, at most, certain risks which may lead to actual harm or a violation of a legal interest<sup>145</sup> – but also with regard to the current state of (customary) international law. For the latter supports the criminalization of the preparation of aggression only, at best, if hostilities are actually initiated.<sup>146</sup> Thus, the criminalization of “planning” and “preparation” presupposes that the collective act of aggression has at least been “initiated”, i.e., reached the attempt stage. In any case, it seems as if article 8*bis* (1) requires, as to the *collective* act, more than a

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<sup>141</sup> See June 2004 Report, para. 54, in *Barriga et al.* (note 5), at 206; June 2005 Report, para. 47 *et seq.*, in *ibid.*, at 173; June 2007 Report, para. 13, in *ibid.*, at 111; June 2008 Report, para. 63 *et seq.*, in *ibid.*, at 87.

<sup>142</sup> See also *Weisbord* (note 59), at 57 (“nonsensical”); *Clark* (note 10), 720-21.

<sup>143</sup> For a detailed analysis of the conceptual roots and problems of the conduct verbs see *Weisbord* (note 59), at 49 *et seq.*

<sup>144</sup> November 2008 SWGCA Report, para. 29, in *Barriga et al.* (note 5), at 76; see also December 2007 Report, para. 8, in *ibid.*, at 100.

<sup>145</sup> This is a core question of criminal law theory which has been extensively treated in several academic writings. See for example *Jens Puschke*, Grund und Grenzen des Gefährdungsstrafrechts am Beispiel der Vorbereitungsdelikte, in: Roland Hefendehl (ed.), *Grenzenlose Vorverlagerung des Strafrechts?* (2010), 9-39, at 23-24 calling for a strictly limited criminalization of preparatory acts with a view to their potential to violate *Rechtsgüter*; see also *Larry Alexander/Kimberly Kessler Ferzan*, Crime and Culpability. A Theory of Criminal Law (2009), at 289-90, criticizing overcriminalization, i.e., punishing “conduct that does not risk harm to any interest the criminal law might wish to protect” in the form of a too early intervention of criminal law (“only ... attenuated connection to legally protected interests”) or its “overinclusiveness”. For the same twofold approach see the recent Resolution of the *XVIII AIDP International Congress of Penal Law* (Istanbul, 20-27 September 2009) calling for strict conditions to consider the punishment of preparatory offences and autonomous acts of participation as legitimate, reprinted in *ZStW* 122 (2010), 474-475; see on the discussions of the respective section I (General Part), *Tim Müller*, Bericht über die Verhandlungen der I. Sektion: Strafrecht Allgemeiner Teil: erweiterte Formen der Vorbereitung und der Teilnahme, *ZStW* 122 (2010), 453 *et seq.* For a general critique of “overcriminalization”, *Douglas Husak*, Overcriminalization (2008), proposing internal and external constraints (at 55 *et seq.*, 120 *et seq.*) and arguing that offences of risk prevention may be acceptable under certain conditions in that the criminal law may also be employed to reduce the “risk of harm” (159-60).

<sup>146</sup> Cf. *Werle*, (note 1), mn. 1341; see also *Ambos* (note 66), 675 with references in note 29.



mere attempt or threat since the drafters focused on the actual “act of aggression” abandoning any preliminary action, in particular a mere threat to commit such an act.<sup>147</sup> This is confirmed by the Elements which make clear that the act of aggression must be “committed”.<sup>148</sup>

If this is the correct reading any form of *individual* conduct contained in article 8bis (1) can only become relevant if a qualified (*collective*) act of aggression in the sense of para. 1 in connection with para. 2 has actually occurred. While this makes sense with a view to the generally restrictive tendency of the crime definition, the problem remains that the first three conduct verbs (“planning”, “preparation”, “initiation”) of para. 1 refer to a stage of the *iter criminis* before the actual “execution”, namely apparently to the stages of attempt (“initiation”) and preparation (“planning”, “preparation”).<sup>149</sup> How can this be reconciled with the general criminalization of (individual) attempt according to article 25 (3) (f) which by way of the differentiated solution mentioned above<sup>150</sup> also applies to the leaders (Article 25 (3)bis) involved in a crime of aggression? The answer depends on the exact meaning of these three conduct verbs with regard to attempt in the sense of article 25 (3) (f). If one argues, as insinuated above, that the latter – “action that commences its execution by means of a substantial step” – corresponds to the “initiation” phase of aggressive conduct while “planning” and “preparation” belong, similar to conspiracy, to an earlier phase preceding attempt,<sup>151</sup> only “planning” and “preparation” would criminalize a conduct that is not already covered by article 25 (3) (f) while the separate codification of “initiation” by article 8bis (1) would be superfluous. Notwithstanding, the possibility of an attempt of a crime of aggression (articles 8bis (1), 25 (3) (f)) entails, taken at face value, the criminalization of attempted preparatory acts (“planning”, “preparation”) and attempted attempt (“initiation”). I fail to see the *raison d’être* of such an overcriminalization.

From a more fundamental perspective of principle and policy one wonders whether the anticipated intervention brought about by the new international criminal law of aggression makes sense at all. I am inclined to answer this question in the negative.<sup>152</sup> First of all, such an unprincipled extension of punishability is, at least with regard to the mere preparatory acts, dif-

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<sup>147</sup> The inclusion of a „threat“ of aggression has been discussed in connection with attempt (see June 2005 SWGCA Report, para. 39, in *Barriga et al.* (note 5), at 172; June 2006 SWGCA Report, para. 47 *et seq.*, in *ibid.*, at 147 but was finally abandoned (*Clark* (note 65), at 1109). See also *Murphy* (note 80), at 1150, 1152 (crit.); *Wilmshurst* (note 1), 320; on the different forms of threats May, *Aggression* (note 59), 14.

<sup>148</sup> Elements (note 33), Element 3.

<sup>149</sup> On the difficult distinction between planning and preparation in the case law *Wilmshurst* (note 1), 320.

<sup>150</sup> *Supra*, note 130 and main text.

<sup>151</sup> The SWGCA’s debate on the relationship between attempt and the preparatory acts indicates some confusion, see for example June 2006 Report, para. 45-46, in *Barriga et al.* (note 5), at 147.

<sup>152</sup> In favour of the “criminalization of the early stages of preparation”, *Cassese* (note 55), at 161.

difficult to justify in light of the harm principle and the *Rechtsgutslehre* as explained above (although it is mitigated by the fact that an act of aggression must actually have occurred).<sup>153</sup> More importantly, such an over criminalization will not have any tangible practical effect. In the SWGCA itself it was suggested that attempt is of little practical relevance<sup>154</sup> and this applies, *a fortiori*, to mere preparatory acts. It is confirmed by the fact that attempt has, as an autonomous form of responsibility, never played any role in international criminal proceedings<sup>155</sup> and was only implicitly recognized in the Nuremberg and Tokyo crimes against peace' preparatory acts but even there it became only judicially relevant as conspiracy<sup>156</sup> (which is not included in article 8bis!).<sup>157</sup> In fact, prosecutors and courts normally only take recourse to preparatory acts if the actual crime has not been executed or consummated, not least for the evidentiary challenges involved in proving anything before the actual execution.<sup>158</sup> While this could theoretically happen in the case of an aggression,<sup>159</sup> it is not very probable that it will happen in the practice of the ICC given the generally restrictive definition of article 8bis (1) and the restrictive conditions for the exercise of jurisdiction. Indeed, taken together definition and jurisdiction it is not very likely that any case of aggression still in the preparation or attempt stage will come before the Court.

## 5. The mental element

As to the mens rea of a leader participating in the crime of aggression it was quite early recognized by the SWGCA that article 30 applies as a default rule and therefore any reference to mental elements in the crime definition, even to a special *animus aggressionis*,<sup>160</sup> would be superfluous.<sup>161</sup> As a consequence, the specific mental requirement depends on the qualifica-

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<sup>153</sup> *Supra*, note 145 and main text. Crit. also *Glennon* (note 60), at 98-99 arguing that responsibility for “planning” and “preparation” is far too broad.

<sup>154</sup> June 2007 Report, para. 13, in *Barriga et al.* (note 5), at 111; June 2005 Report, Discussion paper 1, sect. B. II. 1 b), in *ibid.*, at 191 (“rather theoretical in nature” but giving two example, see *infra*, note 159). See also *Clark* (note 65) at 1109 (“bizarre case”).

<sup>155</sup> Cf. *Ambos* (note 55), § 7 mn. 71.

<sup>156</sup> Cf. *Ambos* (note 70), 101-102 (Nuremberg), 136 *et seq.* (Tokyo).

<sup>157</sup> See *Clark* (note 65), at 1109; crit. of conspiracy *May, Aggression* (note 59), 198 *et seq.*, 254 *et seq.*; in favour *Cassese* (note 55), at 161.

<sup>158</sup> See also *Weisbord* (note 130), at 190 pointing to the evidentiary challenging to prove attempted aggression.

<sup>159</sup> See June 2005 report, Discussion paper 1, sect. B. II. 1 b), in *Barriga et al.* (note 5), at 191 (admitting that “cases of attempt remain rather theoretical in nature” but giving the example of the high-ranking State official who has commenced to participate in the preparation of the collective act of aggression but is then prevented from taking part in the actual decision making; and the example of a high-ranking military leader who was about to give an important order in the course of the State use of force but is then prevented to complete his act of ordering); see also Discussion paper 3, no. 6, in *ibid.*, at 197 (attempt “conceivable”).

<sup>160</sup> See *supra*, notes 76 *et seq.* and main text.

<sup>161</sup> June 2004 Report, para. 55, in *Barriga et al.* (note 5), at 206; June 2005 Report, para. 51, in *ibid.*, at 174; June 2009 SWGCA Report, para. 13, in *ibid.*, at 25. See also *Clark* (note 65), at 1109; *Solera* (note 1), 420-421. Generally on the importance of the mental element in the crime of aggression *May, Aggression* (note 59), 180-181, 184, 198 *et seq.* (202), 250 *et seq.* (267).

tion of the corresponding objective element as conduct, consequence or circumstance (article 30 para. 2 (a), (b) and para. 3).<sup>162</sup> Thus, for example, as to the leadership qualifier, being a circumstance in the sense of article 30 (3), awareness of the factual position to effectively control and direct State action is required.<sup>163</sup> As in the other international crimes<sup>164</sup> the mental element serves as the linking interface between the objective acts and the overarching criminal context, i.e. the aggressive state conduct.<sup>165</sup> Thus, the respective leader must be aware of the state act of aggression and of its criminal character.<sup>166</sup>

Yet, this awareness does not, as in the other crimes of the Statute,<sup>167</sup> amount to a legal understanding, i.e., to a knowledge of the legal elements that turn a certain use of force into an unlawful act of state or even a crime of aggression.<sup>168</sup> Awareness presupposes actual knowledge, not any lower standard as constructive knowledge or even recklessness.<sup>169</sup> Thus, for example, as to the use of force, it is required that “the perpetrator knew of facts establishing the inconsistency of the use of force with the Charter of the United Nations.”<sup>170</sup> The preference of “knowledge of facts” over “knowledge of law” entails that, in principle, only a mistake of fact (article 32 (1) Rome Statute) would be relevant while a mistake of law (article 32 (2)) would be *a limine* precluded,<sup>171</sup> unless it negates the mental element required by the crime (article 32 (2) cl. 2). This may be the case if the mistake refers to normative elements of the actus reus, i.e., *in casu*, to “manifest” or “use of force”.<sup>172</sup>

### III. The exercise of jurisdiction

#### A. The trigger procedures and the role of the Security Council

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<sup>162</sup> See also June 2009 SWGCA Report, Appendix II no. 9-10, in *Barriga et al.* (note 5), at 39.

<sup>163</sup> June 2009 SWGCA Report, para. 14 and Appendix II no. 14, in *Barriga et al.* (note 5), at 25, 40.

<sup>164</sup> Cf. *Kai Ambos*, Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes, in: L.C. Vohrah *et al.* (eds.), *Man’s Inhumanity to Man. Essays in Honour of Antonio Cassese* (2003) 11, at 17-18, 26-27, 32 *et seq.*

<sup>165</sup> See also *May*, Aggression (note 59), 234 *et seq.* (238-239) considering the state aggression as an “overarching” circumstance (referring to the concept of a “contextual circumstance” discussed in the ICC negotiations).

<sup>166</sup> See Elements 4 and 6 (note 33).

<sup>167</sup> See Elements of Crimes, 2 November 2000, PCNICC/2000/1/Add.2, general introduction No. 4 and the respective elements to the crimes (see insofar *Ambos* [note 164], 15-16). The general introduction also applies to the elements for aggression, see June 2009 SWGCA Report, para. 8, in *Barriga et al.* (note 5), at 24.

<sup>168</sup> Elements (note 33), introduction no. 2 and 4 and Elements 4 and 6. See also June 2009 SWGCA Report, para. 17 and Appendix II no. 6, 19, in *Barriga et al.* (note 5), at 26, 38, 41.

<sup>169</sup> June 2009 SWGCA Report, para. 19, in *Barriga et al.* (note 5), at 26; less clear *id.*, Appendix II no. 22, in *ibid.*, at 41.

<sup>170</sup> June 2009 SWGCA Report, Appendix II no. 20, in *Barriga et al.* (note 5), at 41.

<sup>171</sup> See also June 2009 SWGCA Report, Appendix II no. 21, in *Barriga et al.* (note 5), at 41.

<sup>172</sup> Cf. *K. Ambos* (note 70), 811 *et seq.*; see also *Clark* (note 10), at 716-17. For availability “[P]resumably ... in certain circumstances” also *Wilmshurst* (note 1), 328.

In light of the Security Council's primary, albeit not exclusive, power in determining an act of aggression (articles 24, 39 UN Charter)<sup>173</sup> and the options on the table in Kampala, including the Council's exclusive authority to trigger an investigation,<sup>174</sup> it is fair to say that the final result is a success in that the Court's autonomy and integrity towards the Security Council was secured. The first achievement in this respect, already brought about by the SWGCA overcoming the former position of the Preparatory Commission's working group,<sup>175</sup> was to de-couple the definition of the crime of aggression (article 8*bis*) from the conditions for the exercise of jurisdiction (articles 15*bis/ter*).<sup>176</sup> If this had not been achieved, the Security Council would have obtained the power to determine the jurisdiction by way of the definition and this would have ensued an unacceptable politicization and disastrous subversion of the Court's authority.<sup>177</sup> To be sure, while the Security Council is not – indeed, cannot be (article 24 UN Charter) – prevented from making a determination of an act of aggression (article 15*bis* (6)-(8)), such a determination “by an organ outside the Court” is “without prejudice to the Court's own findings” (articles 15*bis* (9), 15*ter* (4)) and, more importantly, is not a pre-requisite of the exercise of jurisdiction given that all “ordinary” triggers (article 13) apply (articles 15*bis* (1), 15*ter* (1))<sup>178</sup> and the Security Council operates as a kind of “jurisdictional

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<sup>173</sup> For a thorough analysis see *Carrie McDougall*, When law and reality clash – The imperative of compromise in the context of the accumulated evil of the Whole: Conditions for the exercise of the ICC's jurisdiction over the crime of aggression, ICLR 7 (2007) 277, at 281 *et seq.* concluding “that granting the ICC the jurisdiction to determine independently the existence or occurrence of an act of aggression for the purpose of assessing the State act element of the crime of aggression would not contravene the Charter.” (*ibid.*, 307). See also *Robert Schaeffer*, The audacity of compromise. The UN Security Council and the pre-conditions to the exercise of jurisdiction by the ICC with regard to the crime of aggression, ICLR 9 (2009) 411, at 414 correctly arguing that “[T]he only exclusivity for the Security Council lies with its power to make binding enforcement measures under Chapter VII.” For the same result *Blokker/Kreß* (note 13), 894 (“rejection of a Security Council monopoly ... is beyond serious argument”); *Reddi* (note 55), 663-664; *Clark* (note 33), 699-700; *Reisinger-Coracini* (note 42), 783; *Wilmschurst* (note 1), 329-330; *Gomaa* (note 55), 75-76 *Saeid Mirzaee Yengejeh*, Reflections on the role of the Security Council in determining an act of aggression, in *ibid.*, 125, at 127 *et seq.* (good discussion); *Paula Escaramaia*, The ICC and the Security Council on aggression: overlapping competencies?, in: *ibid.*, 133, at 139 *et seq.* Contra *Theodor Meron*, Defining aggression for the ICC, Suffolk Transnational Law Review 13 (2001) 1, at 14 and *Glennon* (note 60), 104 *et seq.* (107-108) both arguing, albeit with mainly policy reasons, for an exclusive (plenary) power of the Security Council.

<sup>174</sup> See *supra*, note 36 and main text.

<sup>175</sup> See discussion paper Coordinator (note 75), section I.

<sup>176</sup> *Clark* (note 65), 1113; *id.* (note 33), 700.

<sup>177</sup> This is a quite generalized view among scholars, independent of their principled position towards the crime of aggression; see on the one hand *Paulus* (note 55), 1124 *et seq.* and on the other *Kreß*, (note 55), 1143-1144; *Clark* (note 33), 700. See also *Werle*, (note 1), mn. 1351; *May*, Aggression (note 59), 227; *Reddi* (note 55), 665 *et seq.* See also *Giorgio Gaja*, The respective roles of the ICC and the Security Council in determining the existence of an aggression, in *Politi/Nesi* (note 9), 121, at 124 arguing that exclusive dependence on SC determination would deprive the provision of aggression “of almost all its meaning”; *McDougall* (note 173), 307 *et seq.* discussing the policy arguments in favour and against Security Council determination. Crit. on the politicization argument invoked against any autonomous determination of the ICC *Marja Lehto*, The ICC and the Security Council: About the argument of politicization, in *Politi/Nesi* (note 9), 145 *et seq.*

<sup>178</sup> *Barriga* (note 35), 12; SWGCA June 2009 report, para. 30, in *Barriga et al.* (note 5), 29. Obviously, the triggers refer to a crime, not a mere act of aggression (cf. Art. 15*bis/ter* (1)). Thus, contrary to *Scheffer's* assertions (note 87), 900-901 the respective situations of crimes, not acts of aggressions are referred. I do not see therefore

filter”.<sup>179</sup> Thus, not only the Court’s independence is secured<sup>180</sup> and it remains the “master of its own decisions”,<sup>181</sup> but also the Prosecutor’s *proprio motu* authority (article 15) has been maintained and even reinforced since he may proceed even in absence of a Security Council determination after six months “provided that the Pre-Trial Division authorizes the commencement of an investigation” (article 15*bis* (8)). Similarly to the control of the “ordinary” *proprio motu* authority of the Prosecutor under article 15 the negotiators succeeded in avoiding external (preemptive) interference (by a political organ like the Security Council) leaving it to the Court itself to make sure that the Prosecutor does not abuse its power. The only difference is that article 15*bis* (8) provides for an “enhanced internal filter”<sup>182</sup> entrusting the Pre-Trial Division instead of a mere Pre-Trial Chamber (see article 15 (3)) with the control, i.e. a majority of all six members of that Division (article 39 (1)) sitting together *en banc*.<sup>183</sup> To be sure, the Security Council may suspend an ongoing investigation or prosecution pursuant to article 16 but this is, again, a power which it possesses already under the ordinary procedure<sup>184</sup> and which has not yet been used to this effect.<sup>185</sup> It is not entirely clear, however, what will happen if the Security Council makes a *negative* determination. This situation is not explicitly regulated in article 15*bis* since it only speaks of a “determination” (para. 6-9), obviously referring to a positive determination (this follows from para. 6 –“determination of an act of aggression committed” – which serves as the basis of para. 7, 8 – “*such* (a) determination”).<sup>186</sup> Consequently, a negative determination must be treated equally to a non-determination in the sense of para. 8 and its procedure applies. It may well be in such a situation that the Prosecutor and/or the Pre-Trial division take the negative determination as a strong argument against

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how the problems he discusses could arise. Apart from that, the existence of a threshold is not unique to the crime of aggression; it also exists, one way or the other, in the case of the other ICC crimes in the form of their context elements.

<sup>179</sup> *Barriga* (note 35), 12; SWGCA June 2009 report, para. 30, in *Barriga et al.* (note 5), 29.

<sup>180</sup> *Reisinger Coracini* (note 42), 787; *Carsten Stahn*, The ‘end’, the ‘beginning of the end’ or the ‘end of the beginning’? Introducing debates and voices on the definition of ‘aggression’, *LJIL* 23 (2010), 875, 877 (“victory for the independence of the ICC”); *Manson* (note 14), 419 (“concession” of veto powers).

<sup>181</sup> *Clark* (note 33), 703; similarly *Reisinger Coracini* (note 42), 749.

<sup>182</sup> *Reisinger Coracini* (note 42), 783 with references in note 198. For *Blokker/Kreß* (note 13), 893-894 this “specific institutional device complements” the substantive threshold clause.

<sup>183</sup> *Kaul* (note 15), 665 sees here a challenge for the organization of the Court; crit. with regard to quorum etc. also *Reisinger Coracini* (note 42), 783-784.

<sup>184</sup> And which also has been recognized by alternative (academic) proposals, see e.g. *McDougall* (note 173), 328, 331.

<sup>185</sup> But only to exclude non-State Parties from the ICC’s jurisdiction, see Res. 1422 (2002), 1487 (2003) and 1479 (2003); see also *Schmalenbach* (note 15), 751 right column.

<sup>186</sup> For the same result *Scheffer* (note 87), 902.

proceeding with an investigation but formally, pursuant to para. 9 (“without prejudice to the Court’s own findings”), they are not obliged to do so.<sup>187</sup>

All in all then it is fair to say that the final compromise reconciles the conflicting views,<sup>188</sup> namely those that did not want to renounce the Security Council’s authority (i.e. especially its permanent members) and those that wanted to ensure the integrity and autonomy of the Court on the basis of the ordinary rules (especially article 15). Indeed, the compromise certainly achieved the realistic (and at the same time unexpected)<sup>189</sup> maximum in terms of ensuring the Court’s independence<sup>190</sup> and also accounts for the fears of those critics who predicted a (further) politicization of the Court by a too strong involvement of the Security Council.<sup>191</sup>

### **B. Conditions for the exercise of jurisdiction and jurisdictional limitations (article 15bis (4) and (5))**

As described above, the interplay of para. 2 and 3 (of both article 15bis and *ter*) makes the Court’s exercise of jurisdiction dependant on two separate, but *cumulative*<sup>192</sup> mechanisms whose final outcome in terms of substance and timing is difficult to predict. What is clear is that the Court cannot exercise jurisdiction before 1 January 2017, i.e. before the “majority of States Parties” (i.e. two-thirds, see below<sup>193</sup>) has taken the decision required by para. 3, even if the thirty States Parties necessary pursuant to para. 2 have already ratified or accepted the amendment until 31 December 2015,<sup>194</sup> i.e. one year before the postponement date provided for in para. 3.<sup>195</sup> It is much more probable, though, that the exercise of jurisdiction is delayed<sup>196</sup> well beyond 1 January 2017, either because the respective decision required according to para. 3 will be taken months or years later – indeed para. 3 only speaks of a decision to be taken “after” – or because thirty States Parties will not have ratified or accepted the

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<sup>187</sup> Crit. *ibid.* („yawning gap“), but his own proposal (note 88) does not explicitly address a negative determination either.

<sup>188</sup> *Kaul* (note 15), 664.

<sup>189</sup> See *Reisinger Coracini* (note 42), 787 arguing that the achieved limitation of the Security Council’s power and the maintenance of the Court’s independence „clearly exceeds the expectations“; in a similar vein for a qualified role of the Security Council already *Kemp* (note 1), 236, 254.

<sup>190</sup> Compare e.g. the proposal by *McDougall* (note 173), 328 *et seq.* which correctly acknowledged that “*realpolitik* may prevent the adoption or successful operation of any model that allows for ICC determination independent of any special role for the Council.” (*ibid.*, 328). In a similar vein *Schaeffer* (note 173), 419 *et seq.* emphasizing the need for compromise and giving the Security Council a veto power which could only be overturned by the General Assembly (see his proposal at 421-422). According to *Schmalenbach* (note 15), 749 right column the consensual adoption of Art. 15bis came “*für viele überraschend*” [“for many as a surprise”].

<sup>191</sup> See e.g. *Paulus*, (note 55), 1124 *et seq.* warning of dependence on the Security Council and further politicization.

<sup>192</sup> See understandings 1 and 3 (note 54) and main text.

<sup>193</sup> *Infra*, note 206.

<sup>194</sup> Even this is not uncontroversial, see *Reisinger Coracini* (note 42), 771.

<sup>195</sup> *Kaul* (note 15), 666 considers this as “quite likely”.

<sup>196</sup> In fact, para. 3 of art. 15bis/*ter* establishes a “delayed activation” of the Court’s jurisdiction, see *Wenaweser* (note 12), at 887; *Manson* (note 14), 433-434.

amendment until this date.<sup>197</sup> Even worse, if the “majority of States Parties” does not take the decision provided for in para. 3 at all – admittedly not a likely scenario given the current momentum<sup>198</sup> – the compromise in Kampala could turn out to be a paper tiger only. In practical terms, it is probable that the ASP decides to hold a new Review Conference in 2017 or once the 30 ratifications become effective (if that is later); or it takes the adoption decision itself.<sup>199</sup> A different issue is whether the Court can exercise its jurisdiction over a crime of aggression committed before the para. 3 decision has been taken but after the ratification of the 30<sup>th</sup> instrument of ratification pursuant to para. 2. While this is incompatible with understandings 1 and 3,<sup>200</sup> which provides for a cumulative fulfillment of paras. 2 and 3, the legal nature of the understandings is controversial.<sup>201</sup>

Against this background it seems to be of minor importance according to which provisions exactly the said decisions must be taken. In fact, this rather technical question has been largely ignored in academic discussion so far. The starting point is Article 5 (2)<sup>202</sup> which refers, in not unambiguous terms,<sup>203</sup> to article 121 and 123, the former being the relevant article for amendments. According to article 121 (3) an amendment may be “adopted” by the ASP or a Review Conference with a two-thirds majority if consensus cannot be reached. Yet, “adoption” in the sense of article 121 (3) only requires a simple approval by the Review Conference giving full effect to the amendment without further ado, in particular a national ratification procedure is not required. This may be adequate for amendments of an institutional nature according to article 122 but does not suffice for a substantive amendment creating an actionable crime which can hardly be accepted by States without an internal process of approval (even if its basis was already laid in Rome with article 5 (2) and this kind of “automatic” adoption seems to be in line with the automatic jurisdiction regime of article 12 (1)).<sup>204</sup> Thus, “adopted” in article 5 (2) means more than “adoption” in article 121 (3), calling for a qualified

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<sup>197</sup> See also *ibid.*, 665 (“it will take quite some time ...”); more optimistic apparently *Blokker/Kreß* (note 13), 892 (“taken not too long after 1 January 2017”).

<sup>198</sup> See also *Blokker/Kreß* (note 13), 891 (“generally expected that it is wish of the overwhelming majority of the States Parties to activate this jurisdiction ...”).

<sup>199</sup> *Roger Clark*, email to the author, 28 August 2010.

<sup>200</sup> See *supra*, note 54 and main text.

<sup>201</sup> See on this point *Schmalenbach* (note 15), 752 arguing that there is a contradiction between Art. 15bis (2) and (3) and these understandings. Generally on the controversial legal nature of the understandings *Heinsch* (note 15), 729-730.

<sup>202</sup> On its “ambiguous” wording *McDougall* (note 173), 280.

<sup>203</sup> See also *Blokker/Kreß* (note 13), 893 (“fraught with very considerable ambiguity”); on the “open issues” see also *Trahan* 64 et seq.

<sup>204</sup> See also the preamble of Kampala Resolution 6 “recalling” Art. 12 (1) and 5 (2) of the Rome Statute.

adoption procedure going beyond mere approval in the sense of article 121 (3).<sup>205</sup> While “same majority of States Parties” in article 15*bis/ter* para. 3 refers to the two-thirds majority of States Parties of article 121 (3) (articles 15*bis/ter* para. 3 only require a “decision”),<sup>206</sup> articles 15*bis/ter* para. 2 require an individual ratification of States Parties to ensure the qualified adoption procedure mentioned. It must be read together with para. 1 of the operative part of the Resolution stipulating that the amendment is “subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5.”<sup>207</sup>

Article 121 (5), in turn, refers to amendments of articles 5-8 and is *insofar lex specialis* to article 121 (4) which applies to other (jurisdictional or procedural) amendments.<sup>208</sup> Yet, the hard question is whether the adoption in the sense of article 5 (2) is an “amendment” in the sense of article 121 (5). While this is debatable and indeed has been debated quite extensively during the negotiations,<sup>209</sup> the different consequences of both provisions are pretty clear. While para. 4 of article 121 binds all States Parties but requires a seven-eighths majority, para. 5 provides for an individual acceptance procedure *per State* and thus corresponds, in essence, to para. 2 of articles 15*bis* and *ter*.<sup>210</sup> In any case, the fact that para. 4 of article 121 is no longer mentioned in the final resolution but para. 5 explicitly in its para. 1 and implicitly in para. 2 of articles 15*bis/ter* and para. 5 of article 15*bis* quite clearly indicates that the drafters, ultimately, opted for para. 5 of article 121.<sup>211</sup> This provision is predicated on the distinction between States Parties that accept an amendment and those that do not. In the latter case the Court cannot exercise jurisdiction over the respective crime “when committed by that State Party’s nationals or on its territory.” Taken at face value this means – in the sense of a so

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<sup>205</sup> See for discussion *R. Clark*, Ambiguities in Articles 5 (2), 121 and 123 of the Rome Statute, Case W. Res. J. Int’l L. 41 (2009) 413, at 416 *et seq.*; *id.* (note 65), 1114-1115; *Reisinger Coracini* (note 42), 764-765; see also SWGCA, June 2005 Report, para. 5 *et seq.*, in *Barriga et al.* (note 5), 167 *et seq.*; June 2004 report, para. 10 *et seq.*, in *ibid.*, 199 *et seq.*; February 2009 Report, para. 6 *et seq.*, in *ibid.*, 50-51. In any case, the issue is debatable and the automatic adoption argument can be made for the reasons mentioned in the text with note 204, see also SWGCA, February 2009 Report, para. 29, in *ibid.*, 55-56; *Clark* (note 205), 418; see also *infra*, note 219 with main text.

<sup>206</sup> *Clark* (note 33), 702; *Reisinger Coracini* (note 42), 770-771; *Schmalenbach* (note 15), 752 left column; *Manson* (note 14), 434.

<sup>207</sup> For *Heinsch* (note 15), 736 this is “a clear statement in favour of the Art. 121 (5) procedure ...”

<sup>208</sup> *Conc. Manson* (note 14), 422.

<sup>209</sup> See *Barriga* (note 35), 15-16; see also *Reisinger Coracini* (note 42), 766-767; *Clark* (note 205), 418 *et seq.*; *Heinsch* (note 15), 735-736; ~~See also~~ *Kreß/von Holtzendorff* (note 1), at 1196 *et seq.*; *Manson* (note 14), 435 *et seq.* (with an alternative proposal).

<sup>210</sup> See for the difference between Art. 121 (4) and (5) also *Clark* (note 205), 418-419; *Murphy* (note 80), 1149; *Manson* (note 14), 420-421.

<sup>211</sup> See also *Schmalenbach* (note 15), 750 left column; crit. *Scheffer* (note 87), 903, for whom the delegates’ “radical tinkering with amendment procedures arguably merits an Art. 121 (4) amendment of the Rome Statute’s amendment procedures.”



called negative understanding<sup>212</sup> – that the Court has no jurisdiction over the nationals of an aggressor State Party if this State has not accepted the amendment.<sup>213</sup> Concretely speaking, if State Party A (aggressor State), that has not accepted the amendment, invades State Party B (victim State), that has accepted it, the nationals of State Party A could not be prosecuted by the Court although the territoriality principle (article 12 (2)(a)) – A acts on the territory of B! – would demand so. This negative understanding has two further implications. First, it creates two jurisdictional regimes for aggression and the other crimes of the Rome Statute since for the latter the territoriality principle fully applies without any opt-out possibility for States Parties or even other States (not Parties).<sup>214</sup> Secondly and more importantly, it discriminates Non-State Parties which do not have the possibility to not accept the amendment for the very fact that they are not State Parties (article 121 (5) only addresses States Parties!).<sup>215</sup>

To avoid this discrimination and respect State sovereignty to the fullest extent possible para. 5 of article 15*bis* generally excludes jurisdiction over Non-State Parties (adopting the wording of article 121 (5) cl. 2 last part!)<sup>216</sup> and para. 4 provides for an opt-out declaration – pretty similar to article 124 – for States Parties.<sup>217</sup> Both provisions establish true “conditions” for the exercise of jurisdiction in the sense of article 5 (2)<sup>218</sup> but raise some critical questions. Para. 4 recognizes article 12 and thus implicitly amends article 121 (5) second sentence in that the jurisdiction over the crime of aggression is automatic (article 12 (1));<sup>219</sup> yet, at the same time, para. 4 creates an exception from this by allowing an opting-out.<sup>220</sup> The declaration must be made “previously”, even “prior to ratification or acceptance” (para. 1 Resolution), i.e., in any case before the actual commission of an act of aggression.<sup>221</sup> The problem is, apart from the

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<sup>212</sup> According to the “positive” understanding, hardly compatible with the wording, the territoriality principle of Art. 12 (2) (a) would fully apply and extend jurisdiction also to an aggressor State Party that has not accepted the amendment (see SWGCA June 2009 Report, Annex III, Non-paper by the Chairman on the conditions for the exercise of jurisdiction, para. 9, in *Barriga et al.* [note 5], 44-45; see also February 2009 Report, para. 31 *et seq.*, in *ibid.*, 56-57; *Reisinger Coracini* (note 42), 767-768).

<sup>213</sup> Cf. *Barriga* (note 35), 16; **For the need of an acceptance of the amendment also *Manson* (note 14), 423 et seq.**

<sup>214</sup> Crit. also SWGCA June 2009 Report, para. 36, in *Barriga et al.* (note 5), 30. See also *Clark* (note 205), 419 with note 31.

<sup>215</sup> See also *Barriga* (note 35), at 16; SWGCA June 2009 Report, para. 33, in *Barriga et al.* (note 5), 29-30; crit. also *Wilmschurst* (note 1), 328.

<sup>216</sup> “... when committed by that State Party’s nationals or on its territory.”

<sup>217</sup> See on the opt-out or opt-in declarations Non-paper (note 212), para. 11-12; SWGCA June 2009 Report, para. 38 *et seq.*, in *Barriga et al.* (note 5), 31-32. See also *Kreß/von Holtzendorff* (note 1), **1213; *Manson* (note 14), 429-430.**

<sup>218</sup> Cf. *Reisinger Coracini* (note 42), 776 (for para. 4).

<sup>219</sup> Cf. *Schmalenbach* (note 15), 750 left column affirming the compatibility with international treaty law. See already notes 204 and 205 with main text.

<sup>220</sup> For a discussion see *Reisinger Coracini* (note 42), 773 *et seq.*; **crit. (only) as to the procedure *Trahan* 90-91.**

<sup>221</sup> See also *ibid.*, 777; *Schmalenbach* (note 15), 750 left column.

difficult relationship with article 121 (5) 2<sup>nd</sup> sentence,<sup>222</sup> that para. 4 could lead to the rather strange situation that a State Party first ratifies the amendment and helps to reach the thirty States Parties threshold of para. 2 and then decides to opt out.<sup>223</sup> Why would it do that? To make the crime enforceable but not against itself?<sup>224</sup> To only make it possible that the Security Council can refer cases to the Court?<sup>225</sup> Para. 5 in fact privileges the three permanent members of the Security Council that are not States Parties (China, Russia, U.S.A.) over other non States Parties since the Security Council could, initiated by these three members, refer a situation concerning other non States Parties (article 15<sup>ter</sup> applies to all States!) but will obviously never use this power against its own members.<sup>226</sup> Yet, apart from that, para. 5 should not be interpreted extensively implying a form of reciprocity which would also exclude jurisdiction over States Parties which act together with a non-State Party or commit the crime of aggression against a non-State Party.<sup>227</sup> Para. 5 only impedes jurisdiction for acts “committed by that State’s [i.e. the non-State Party’s] nationals or on its [i.e. the non-State Party’s] territory.” In contrast, if a State Party is the aggressor, alone or jointly with a non-State Party, only para. 1-4 of article 15<sup>bis</sup> apply, i.e., the Court’s jurisdiction depends on the type of referral (para. 1), the general entry into force (para. 2, 3) and the absence of an opt-out declaration (para. 4). If all these conditions are fulfilled, the general rule of article 12 applies, i.e., jurisdiction can be based on the territoriality or the nationality principles.<sup>228</sup> Thus, if, for example, State Party A attacks non-State Party B the Court’s jurisdiction could be based either on territoriality (article 12 (2)(a)) for the acts carried out on A’s territory or on nationality (article 12 (2)(b)) for the acts carried out on B’s territory as far as A’s nationals participate in the aggression.

To be sure, the restrictions of paras. 4 and 5 refer to State referrals and *proprio motu* proceedings only but not to Security Council referrals. The Security Council acts on the basis of its

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<sup>222</sup> One tricky issue is whether Art. 121 (5) 2<sup>nd</sup> sentence entails that an opt-out declaration is only effective if the respective state Party has accepted the amendment, against this view *Schmalenbach* (note 15), 750 left column; for further problems see *Reisinger Coracini* (note 42), 768-769.

<sup>223</sup> Crit. also *Clark* (note 33), 704-705: “It would take some nerve to help make up the thirty and then opt out, but one should never underestimate the acrobatic ability of the diplomatic mind in construing the national interest!”. Crit. also *Manson* (note 14), 426 et seq.

<sup>224</sup> In more concrete terms, to invoke it as a victim of aggression but to exclude it as an aggressor state itself, see crit. *Manson* (note 14), 431.

<sup>225</sup> On these questions see also *Heinsch* (note 15), 739.

<sup>226</sup> Crit. also *Clark* (note 33), 705 (“another example of a small but powerful minority protecting its own position in a consensus negotiation.”); *Reisinger Coracini* (note 42), 788 (rule unprecedented in the Rome Statute); in favour *Heinsch* (note 15), 739-740.

<sup>227</sup> For this view *Schmalenbach* (note 15), 749 right column; *Reisinger Coracini* (note 42), 780-781 who, however, on the other hand, considers para. 5 “to some extent” as “symbolic”; *Trahan* 91-92 (“intended to facilitate coalition building”).

<sup>228</sup> An ‘understanding 4’ allowing for the application of article 12 (3) has finally been deleted (*Manson* [note 14], 438 et seq.) but the question remains how this possibility can be reconciled with art. 15<sup>bis</sup> (5) (see *Stahn* [note 180], 880).

chapter VII authority and thus may extend the jurisdiction to Non-State Parties once the amendment entered into force (article 15*ter* omitting para. 4 and 5 of article 15*bis*); nothing different follows from article 15*ter* (2) since the ratification of thirty States Parties is only a “procedural hurdle” to the entry into force.<sup>229</sup> Also, quite remarkably, a Security Council referral is not predicated on a (explicit) Security Council determination of an act of aggression.<sup>230</sup>

A further controversial question, referring to both article 15*bis* and *ter*, is whether with the ratification of the thirty States Parties (para. 2) and the two-thirds majority decision to be taken after 1 January 2017 (para. 3 in connection with article 121 (3)) the new provisions enter into force for *all* States Parties.<sup>231</sup> While this seems to fly in the face of article 121 (5) since this provision requires an entry into force *per* State (“for those States Parties that ...”), it would give the opt-out clause of article 15*bis* (4) its full effect leaving it then in the hands of each State Party if it wants to be bound by the (new) crime of aggression.<sup>232</sup> I think this is a convincing interpretation. The apparent conflict with article 121 (5) could be resolved by interpreting para. 2 of articles 15*bis/ter* as a partial *lex specialis* and *posterior* to article 121 (5) as to the number of ratifications required. In other words, article 121 (5) applies with the view to articles 15*bis/ter* (2) (only) until thirty ratifications have been reached.

Taken together the general conditions for the exercise of jurisdiction (article 15*bis/ter* (2) and (3)) and the jurisdictional limitations only applicable to State referral and *proprio motu* investigations (article 15*bis* (4) and (5)) lead to a situation which an experienced observer has aptly described as the “patchy coverage” of the crime of aggression.<sup>233</sup> Indeed, while under the current jurisdictional regimes the Prosecutor must basically distinguish, except in case of a Security Council referral, between States and Non-States Parties (article 12), the new crime of aggression will make a more sophisticated analysis necessary to determine jurisdiction.<sup>234</sup> If the current regime and proliferation of international criminal courts makes the life for interested observers, especially journalists, difficult things will get much worse once the jurisdiction over the crime of aggression can be exercised. Apart from that the overall assessment is mixed: While the “delayed” start for the jurisdiction is beneficial for both the States and the

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<sup>229</sup> Clark (note 33), 702-703; see also Reisinger Coracini (note 42), 785-786; Schmalenbach (note 15), 751-752.

<sup>230</sup> See also Blokker/Kreß (note 13), 894.

<sup>231</sup> See Heinsch (note 15), 737, 739; Reisinger Coracini (note 42), 770.

<sup>232</sup> Similarly *ibid.*, 770.

<sup>233</sup> Scheffer (note 87), 904; conc. Stahn (note 180), 879 (“highly fragmented”).

<sup>234</sup> See also the chart on “Jurisdictional scenarios” in SWGCA February 2009 Report, Appendix II, Non-paper on other substantive issues on aggression to be addressed by the Review Conference, para. 8, in *Barriga et al.* (note 5), 65.

Court in that it leaves enough time to prepare for the entry into force,<sup>235</sup> the jurisdictional exceptions constitute significant limitations which may undermine the Court's legitimacy, at least with regard to its treatment of the crime of aggression.<sup>236</sup>

#### IV. Conclusion

Given the years and decades long efforts to codify the crime of aggression, the complex issues involved and the generally pessimistic expectations as to the actual implementation of article 5 (2)<sup>237</sup> the result of Kampala can rightly be qualified as a success.<sup>238</sup> Only time will tell if this success will also, despite the flaws and inconsistencies of the final outcome, translate into an effective instrument to fight and ultimately reduce aggressive wars by means of classical criminal law deterrence.<sup>239</sup> The delegates' successful attempt to maintain the integrity of the Court and to reduce the interference of the Security Council to the unavoidable thereby preventing the politicization of the crime of aggression at the outset gives reason to hope that the Judges of the ICC will, indeed, as stated by its current Vice-President, "reject every attempt to politically exploit the Court."<sup>240</sup> Not much more can be hoped for right now.

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<sup>235</sup> See *Heinsch* (note 15), 737; *Blokker/Kreß* (note 13), 892 ("ample time to prepare ...").

<sup>236</sup> Crit. also *Reisinger Coracini* (note 42), 787-788 ("highly regrettable and questionable"); *Scheffer* (note 87), 904 ("slap at the equality of nations, or at least the theory of equality ..."); less crit. *Kaul* (note 15), 666 ("... significance of these limitations should not be overestimated.").

<sup>237</sup> See instead of many *Andreas Zimmermann*, in: Triffterer (note 129), Art. 5 mn 39 ("... quite unlikely that the Parties to the Statute will be able during the upcoming Review Conference to include the crime within the list of crimes ..."). For a different view *May*, *Aggression* (note 59), 228 ("defining aggression ... is a manageable task and certainly should not cause the international community to shy away from prosecuting this important crime.").

<sup>238</sup> In the same vein *Blokker/Kreß* (note 13), 889 ("historic achievement"); *Kreß/von Holtzendorff* (note 1), at 1216 ("exceeds expectations one could have"); *Schmalenbach* (note 15), 745 (",Wunder von Kampala"); 752 right column ("*Meilenstein*"); *Scheffer*, *States Parties Approve new Crimes for International Criminal Court*, *ASIL Insight*, vol. 14, Issue 16, June 22, 2010 ("historic milestone"); *Kaul* (note 15), 666 ("a giant step forward"), but see also 665 ("result is not revolutionary"); *Reisinger Coracini* (note 42), 748, 787 ("important step for international criminal justice", "success"); *Wenaweser* (note 12), 883, 887; *Stahn* (note 180), 875, 880; *Trahan* 49, 93 et seq. ("historic", "solid achievement"). For a more critical view see *Scheffer*, *LJIL* 23 (2010), 897, 903-904; *Donald M. Ferencz*, *The crime of aggression: some personal reflections on Kampala*, *LJIL* 23 (2010), 905, 907 ("akin to a doctor putting a patient in a medically induce coma in order to save its life."); conc. *Manson* (note 14), 434 with additional criticism at 442-443.

<sup>239</sup> For hypothetical scenarios see also *Trahan* 88-89.

<sup>240</sup> *Kaul* (note 15), 657 continuing: "I might be proven wrong, but at the present stage I am convinced that the judges at our Court will be able to assess whether a crime against peace has been committed or not, just as the judges at Nuremberg have been in 1946."