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IDENTIFYING THE ROUGH EDGES OF THE KAMPALA COMPROMISE

Abstract
This article analyses the Kampala compromise on the crime of aggression. It argues that the outcome of Kampala marks a significant diplomatic achievement with certain 'rough edges'. It discusses five main areas that merit further scrutiny and debate: the entry into force procedure, the necessity of acceptance of amendments, the 'opt-out' regime, the delay in the exercise of jurisdiction, the possibility of further amendments, and the treatment of Art. 12 (3) declarations.

I. INTRODUCTION

In June 2010, the first Review Conference ("RC") of the Rome Statute for the Establishment of an International Criminal Court 1998 (hereafter "the Statute"), was concluded at the Speke Resort & Conference Centre, in Munyonyo, Kampala. The principal order of business for this first review of the Statute, was the fulfilment of the implicit commitment, as set out in Art. 5(2)[1], to amend it so as to adopt provisions on both (*a*) the definition of the crime of aggression, and, much more controversially, (*b*) the conditions for the exercise of jurisdiction by the International Criminal Court ("the Court") with respect to that crime. In the event, despite much scepticism that an amendment dealing with both aspects was not currently politically possible, and following much diplomatic patience and negotiation long into the night, a Conference Resolution ("the Resolution") setting out an amendment on both aspects was adopted, and moreover by consensus, at around 00:20 am on the morning of Saturday 12 of June 2010.

The first significant part of that Resolution, which proved to be the least controversial, was the setting out of the definition of the crime of aggression placed in a new Art. 8(*bis*) in the Statute. This language comprised the culmination of quite literally a decade's work since the Rome Conference by the Special Working Group on the Crime of Aggression ("SWGCA") and its predecessor body. It comprises in essentially two paragraphs, the first setting out the definition of the individual criminal act, whilst the second then sets out the definition of the state act of aggression. The last is achieved essentially by means of the direct incorporation of the main elements of the definition, as was in turn set out previously in UN General Assembly Res 3314 (XXIX) of 14 December 1974. With the singular exception of the placement of this new article, this element of the Resolution, having been through so much examination and analysis, is now largely a fully accepted working compromise on the issue, and accordingly does not need to attract further attention by this article[2].

The second aspect, however, on the conditions for the exercise of jurisdiction by the Court, as was well appreciated long before we all came to Kampala, proved to be far more politically controversial and

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Article 5 (1) reads: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.". More to the point perhaps para.7 of resolution F, adopted by the Rome Conference, called upon the Preparatory Commission for the Establishment of the Court, to continue work towards an agreement among participant states on these provisions, which was subsequently work carried on by the SWGCA, (established in 2002 after the Statute's entry into force) under the auspices of the then Assembly of States Parties to the Rome Statute, and which concluded with a final draft resolution appended to that Group's final Report, as adopted by the resumed 7th session of the ASP in New York in 2009: ICC-ASP/7/SWGCA/2 Annex.1

[2] For further discussion, see Claus Kress, *The Crime of Aggression before the First Review of the ICC Statute,* 20 LJIL 851 (2007); Niels Blokker, *The Crime of Aggression and the United Nations Security Council*, 20 LJIL 867 (2007); Astrid Reisinger, *Defining the Crime of Aggression*, in *Future Perspectives on International Criminal Justice* (Carsten Stahn & Larissa van den Herik eds, 2010), 425; Nicolaos Strapatsas, Complementarity and Aggression: A Ticking Time Bomb?, in *Future Perspectives on International Criminal Justice, ibid.*, 450; Roger Clark, The Crime of Aggression, in *The Emerging Practice of the International Criminal Court* (Carsten Stahn & Goran Sluiter eds 2009), 709; Benjamin Ferencz, *Defining International Aggression: The Search for World Peace*, Vol. II (1975).

diplomatically vexed. In the event, two new articles have been incorporated into the Statute to deal with this aspect, as Art. 15(*bis*) and Art. 15 (*ter*) respectively[3].

Perhaps the most notable feature of these new provisions, is the absence of any limitation or condition imposed with respect to there having to be a pre-determination made, of the commission of a state act of aggression, by the United Nations Security Council ("the Council"), as previously proposed, in earlier drafts. Whilst the Prosecutor is required to ascertain whether the Council has made any prior determination on an act of aggression committed by a State Party concerned[4], in the instance where instead no such determination has been made, then, after the lapse of a further 6 months, presumably in which to allow the Council to consider the matter, the Prosecutor is then empowered to initiate an investigation, upon their only having to obtain a special authorisation from the full Pre-trial Division[5] of the Court itself. This is an example of a so-called 'internal filter' against 'politicized' allegations.

In particular, not only is there no absolute requirement for any prior determination of a state act of aggression by the Council, let alone an exclusive such role for that political body, but even the lesser proposal, for some form of so-called 'green-light' (whereby the Council resolves instead to give the Prosecutor a go-ahead to investigate, including as to a crime of aggression, but without its having to also actually pre-determine the commission of an act of aggression by any state involved) has not in the end been incorporated either. Consequently, neither of the 'Alternative 1' elements, as set out in the draft Resolution presented at the outset of the RC[6], have in the end made it into the Statute, even as merely a part and parcel of a wider package of so-called 'political' filter measures. This constitutes a remarkable apparent concession by those States Parties who are also veto wielding permanent members of the Council.

II. THE SIGNIFICANCE OF WHICH ENTRY INTO FORCE PROCEDURE IS USED

Prior to the RC there had been much debate and diplomatic speculation, in the SWGCA, on the subject of which of the alternative mechanisms or procedures, for acceptance/ratification and subsequent entry in force of an amendment to the Statute, as set out in paras. (4) and (5) of Art.121 respectively, was appropriate for application with respect to amendments made on the crime of aggression.

I will briefly explain the difference.[7] Under the para. (4) procedure, entry into force of an amendment occurs, with respect to all States Parties simultaneously, one year after instruments of acceptance or ratification have been deposited by seven-eighths of the Assembly of States Parties ("ASP"). Once entry into force has occurred, all States Parties are then bound by the amendment provisions equally and without distinction, whether or not they have themselves by then accepted them[8]. Whereas, under the para. (5) procedure, entry into force of an amendment occurs only on a state-by-state basis, one year after each State Party has deposited its instrument of ratification or acceptance. However, exercise of jurisdiction by the Court, regarding a crime covered by the amendment, is permitted only with respect to those States Parties who have thus accepted these amendments. The Court may not exercise its jurisdiction over the territory or the nationals of a State Party which has not accepted[9].

[3] 15(*bis)* "exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)" and 15 (*ter*) "exercise of jurisdiction over the crime of aggression (Security Council Referral)".

[4] In the instance where it has, the Prosecutor is then empowered to proceed forthwith, see para. 7 in the new Art.15(*bis)*

[5] Special in the sense of requiring an authorisation of the full pre-trial 'Division', as opposed to merely a 'Chamber' of only 3 judges, which is the case when authorising an investigation *proprio motu* by the Prosecutor, per any of the other existing crimes. See Art.15(3).

[6] See in particular the proposed Alternative 1 options for article 15(*bis*) paragraph 4 in the draft resolution ICC-ASP/8/Res.6, by which the ASP forwarded proposals on a provision on the CoA to the Review Conference for its consideration, and which included both (i) exclusive Council predetermination or(ii) a '*green light*' as alternate options.

[7] For the debate on whether or not the amendment is to Art. 5 or rather the Statute as a whole, see e.g. Astrid Reisinger Coracini, '*Ámended Most Serious Crimes': A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court,* 21 LJIL 699-718 (2008) and Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It,* 20 EJIL, 1103–1115 (2009).

[8] If a SP still objects to being bound by the amendment , its only option then is to withdraw from the Statute entirely instead, see Art 121 para 6.

[9] Art 121(5)'s infamous second sentence states unambiguously that *"In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory"*.

Accordingly, the 'advantage' of the para (4) procedure is a simultaneous and complete entry into force with respect to the whole ASP on an equal basis; but the 'disadvantage' is the delay, possibly of decades, whilst seven-eighths of the ASP decides to ratify. The 'advantage' of the para. (5) procedure is a potential for a relatively early entry into force; but the 'disadvantage' is the creation of a 'two-tier' jurisdiction in the Court, as between accepting and non-accepting State Parties[10].

A good deal of the pre-Kampala debate concerned the possibility that entry into force of some of the necessary amendments could occur under one procedure, while the remainder could then occur under the other. In particular, comparatively 'early' entry into force under the para, (5) procedure, for the amendment setting out exercise of jurisdiction with respect to a Council referral[11], triggered under Art.13(*b*), was widely favoured. The exercise of jurisdiction in such an instance was generally recognised as being the least controversial, as well as frankly, the least likely to occur in practice. With respect to the other two triggers mechanisms(State Party referral and *proprio motu* action by the Prosecutor) the para, (4) procedure enjoyed widespread support. The States Parties advocating this represented those who, when it came to a matter as consequential as the crime of aggression, and which inevitably involved investigation into the conduct on the part of the leadership of at least two different States Parties, had the gravest reservations about unequal treatment as between States Parties, i.e. an unequal subjection to the exercise of jurisdiction by the Court, as between accepting and non-accepting States Parties.

Whilst other States Parties perhaps feared that the seven-eighths ratification hurdle was too high for the crime of aggression subject matter, and could never realistically be achieved, these States Parties were prepared to wait, in order to eventually achieve equal subjection to the exercise of jurisdiction by the Court without distinction.

In essence, this division was the defining feature which characterised the first formal compromise proposal on this topic to come forward during the RC. This was a non-paper in the name of a tri-partite group of States Parties, namely Argentina, Brazil and Switzerland, and which came to be known simply as the "ABS proposal". However, the observation was made, and made forcefully, by at least one State Party, namely Japan, that this approach, applying differing entry into force procedures, to different aspects of the amendment, solely on the basis of which of the Art.13 trigger mechanisms already fully established in the Statute, was being referred to, was not a consistent or legally sound basis upon which to draw such an important and consequential distinction.

Instead, in a later intervention, Japan proposed that, since it was apparently the lack of flexibility or sophistication in the current article 121 language, on an acceptance/ratification and entry into force procedure, suitable for the adoption of an amendment on the crime of aggression, which was the problem, an amendment to that amending procedure itself could be adopted[12]. This would allow for a bespoke procedure to be created, especially for the differential entry into force of a subsequent amendment of the Statute, on the definition and conditions for the exercise of jurisdiction with respect to the crime of aggression. Their view was expressed that, with goodwill and a positive and consensual appreciation of the need to overcome this technical difficulty, pursuit of this 'boot-straps' solution need not necessarily involve any overly long delay. It is fair to observe, however, that the optimism inherent in this analysis, was not universally shared.

Still further pre-Kampala debate had speculated that the two different procedures were not necessarily mutually exclusive, and that it might be possible instead to combine elements from each in order to produce

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[10] In my view this provision and its construction is greatly bolstered by reference to the effect of article 40(4) of the VCT (1969) which states in short that : *"The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement;"*. Whilst I accept that states are, of course, free to agree on a settlement different to this position, this offers in my view the default position. Those who contend for a contrary position must show the evidence of a contrary agreement, such as in Art. 121(4).

[11] What is now set out in the new Art.15 (*ter*).

[12] Which, of course, would in its turn, first have had to have been be accepted/ratified and entered into force, under the Art.121(4) provisions, requiring ratification by seven-eights of the ASP a year before entry into force, and all before, in turn, it could then be later used to ratify an amendment on the crime of aggression, under the amended amendment procedure!

an innovative conglomerate procedure. However, I am persuaded by the simple argument, put forward in the debate by those who found that, on the plain reading, the fact of the matter is that the Statute, as written, provides for two separate, distinct and *mutually exclusive* mechanisms, for the acceptance and subsequent entry into force of an amendment to the Statute. To recall the opening language of para (4) states: "*except as provided in paragraph 5*", and I concur with those who argued that this is the plain language of a mutually exclusive regime, in which para (4) is the default provision, whilst para(5) is a particular or 'special' alternative procedure or mechanism for acceptance/ratification and subsequent entry into force.

In the event, Operative Paragraph 1 of the Resolution ("OP1") states quite unequivocally:

"The Review Conference … 1. Decides to adopt … the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5 ;… "

III. IS 'ACCEPTANCE' OF THE AMENDMENT BY A STATE PARTY THEN NEEDED FOR THE EXERCISE OF JURISDICTION?

Given that clear statement in OP1, coupled with what I have already stated above about the plain language of the infamous second sentence of Art 121 para (5), the answer to that question is, for me at any rate, not problematic. However, there are colleagues, who have offered a contrary perspective on the application of the relevant provisions, and which produces a completely contrary answer. Namely that, despite employing the Art.121 (5) entry into force procedure, for all of the amendments on the crime of aggression, the subsequent acceptance of a State Party is not necessary for the exercise of jurisdiction by the Court, even with respect to such a crime when committed by its nationals or on its territory. As I have been given to understand it, their contention relies principally on at least the following elements.

The preamble to the Resolution begins by specifically recalling para (1) of Art. 12, which in turn provides that *"a State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5"*. The crime of aggression is already a core crime within the jurisdiction and is referred to in the list of crimes at Art. 5(1). Therefore, Art. 5(2) calls for the adoption of an amendment under Art 121, not in order to introduce a new crime, or even amend the settled position with respect to an existing crime; but rather, merely in order to '*complete the process'* of fully incorporating the crime of aggression into the exercisable jurisdiction of the Court..

Consequently, any apparent incompatibility between the subjection to jurisdiction called for by Art. 12(1), and the exemption provided in Art. 121(5) second sentence, can be overcome if one considers Art. 12(1) as the *lex specialis,* and reads Art. 121(5) second sentence as not applying to the 'first-time adoption' of provisions on the crime of aggression. Instead, 121(5) second sentence would apply only to future amendments to the existing crimes, that are already defined in the Statute, (incl. future amendments on aggression), as well as to new crimes. In any event, the reference to Art. 121(5) in OP1 of the Resolution applies expressly only to entry into force, which is covered in the first sentence, i.e. the second sentence of Art. 121(5) which concerns exercise of jurisdiction, is not thereby applied, at least not insofar as it relates to States Parties.

While superficially an interesting iteration of operative articles and relevant references, alas, I remain unconvinced by the force of these contentions. I look at this problem from the perspective of the 'golden rule of construction' of statutory provisions, i.e. that further construction or interpretation of a provision is only required where the natural and plain meaning of the ordinary words of the text, produces an inconsistent, ambiguous or even absurd result. In doing so, I find that the contrary perspective simply fails to afford the necessary significance to the vital distinction as between, on the one hand, the existence of a jurisdiction with respect to a crime, and on the other, the further powers or special conditions explicitly stated as being required, in order to actually exercise that jurisdiction.

Prior to Kampala no one argued, or I submit could have realistically argued, that, given these plain language provisions, the Court already possessed a power for the '*exercise of its jurisdiction'* with respect to the crime

of aggression. Why not? Well because, the special provisions of Art. 5(2) (as was)[13], and which can only be read as meaning that the negotiating parties at Rome were not, as yet, then agreed on "*the conditions for the exercise of jurisdiction*" with respect to that crime, as it were, "trumped" those of the Art.12 provisions, on the agreed general exercise of jurisdiction, with respect to all of the other so-called 'core crimes'. In short, that whilst the Court already possessed a specific jurisdiction over the crime of aggression (per Art. 5(1)), and pre-conditions on the general exercise of its jurisdiction, as respecting all core crimes (per Art. 12 (2) including the crime of aggression; it did not, however, yet possess the power to exercise that general jurisdiction, with respect to the specific case of a crime of aggression, absent an agreement among States Parties, on the special and further *"conditions"* necessary for the same (per Art. 5 (2)). Accordingly, far from its being the case then that Art 12(1) set up some *lex specialis* regime for the exercise of jurisdiction by the Court, that regime was and remains the general provision on that purpose.Whilst the new provisions on the crime of aggression, introduced by amendment under the Art. 121(5) special procedure, comprise the further and 'special' provisions on the exercise of that jurisdiction, as called for by Art.5 (2), as it was.

It is important to recognise and respect the fact that the amendment concerned, in this instance, did not seek to introduce any 'new' crime into the jurisdiction of the Court, not previously there already; but rather, dealt with an agreement on a "definition" and "conditions for the exercise of jurisdiction", only with respect to a crime already within the jurisdiction. But, candidly, what difference does that distinction make, when tested against the plain language of 121(5), which to re-iterate in part, states that it applies so that "*the Court shall not exercise its jurisdiction regarding a crime covered by the amendment"* (emphasis added).

Accordingly, here the question which must be asked is whether or not the amendment to the statute in question is to be regarded as '*covering the crime of aggression"*? The language, 'covered by', has to be read in its context, as plainly meaning an amendment which is pertaining to, applying to, affecting etc. Here the amendment in question quite clearly, not merely covers the crime of aggression, but moreover sets out the only agreement there is, or ever has been, among States Parties, with respect to the very "conditions" for the special exercise of jurisdiction by the Court with specific reference to that crime. The fact that the amendment in question deals only with the subject matter of the "definition" and "conditions for the exercise of jurisdiction" with respect to this crime, rather than the introduction of new crime entire, is frankly nothing to the point.

The amendment concerned quite clearly 'covers the crime of aggression' and what is more does so in an essential respect. What counts is that, under the Art. 121(5) procedure, the acceptance by the State Party concerned, of the amendment, is a plain language pre-requisite to the subsequent application of its provisions by the Court. Here, in this instance, that fairly translates into saying that, if the State Party concerned does not 'accept' the special or further '*conditions for the exercise of jurisdiction'* over the crime of aggression, as set out in the amendment, then the Court may not apply those 'unacceptable' conditions to that task, with respect to that State Party.

Equally, whilst the language of the reference in OP1 of the Resolution to the Art. 121(5) procedure, is limited to citing its entry into force provisions, as per the first sentence, and does not expressly also refer to its effect on exercise of jurisdiction, as dealt with by the following sentence; that does not permit the Court to then simply ignore the plain language effect of that second sentence. The Art. 121(5) reference in OP1 comes together with 'the baggage' of the second sentence, to which it is tied in the Statute, whether welcome or not. With respect to colleagues, and not to over mix my metaphors, but to apply an analysis which attempts, in this instance, to sever the entry into force part of that provision from the following exercise of jurisdiction part, is not so much a case of distinguishing apples from oranges, but rather of attempting to pick cherries!

None of this is to say that the significance of the 'diplomatic context' as an aid to construction should be rejected or renounced. Far from it. Ultimately any Court, including the ICC, would have to construe these

[13] As a part and parcel of the package of amendments on the crime of aggression adopted by the Resolution, Art. 5(2) has now been deleted (see para (1) of the Annex), but its effect, as bearing upon the relevant contextual history on the adoption of these amendments, of course, remains valid.

provisions with due regard to the context of their evolution. Specifically, including as to the fact that the Kampala Resolution was adopted by consensus, which must carry a particular significance.

However, to my mind, a vital part of that diplomatic context, would also be to have regard to the fact that any existing State Party, when it ratified the Statute, prior to Kampala, cannot possibly have known or anticipated what the agreed final settlement on the conditions for the exercise of jurisdiction, with specific respect to the crime of aggression, would eventually be. All that it would reasonably have appreciated was that, if those conditions were to be subsequently adopted and then enter into force under the procedure, as set out in Art. 121(5), then, for the reasons given, its subsequent declared 'acceptance' of those conditions would be required, before they could applied against it by the Court. Given the 'reasonableness' of that construction, I would argue that the fact of that State Party's 'consent', to the consensus adoption of the Kampala Resolution, having been stated expressly as being subject to subsequent entry into force under the 121(5) procedure, weighs heavily in favour of my construction, rather than against it.

IV. IF STATE PARTY ACCEPTANCE IS NEEDED, WHAT THEN IS THE PURPOSE OR CONSEQUENCE OF OFFERING AN 'OPT OUT' PROVISION AS WELL?

A part of the new provisions, on the exercise of jurisdiction over the crime of aggression, in the case of a State Party referral or Prosecutor instigation *proprio motu*, the new Art. 15(*bis*) allows for a State Party to simply declare that it is 'opting out' of the exercise of jurisdiction by the Court, with respect to a crime of aggression "*arising from an act of aggression committed by [that] State Party"*[14]. This provision makes sense, if one considers that the circumstances in which a State Party might in practice exercise this option, were limited in application to the case where it had already accepted, or at least was in the act of accepting, the amendment (per 121(5) first sentence), but wanted, for some diplomatic rationale, to never the less remain outside the exercise of jurisdiction by the Court[15]. Thus, enabling it to both accept the amendment, but then (or later) yet still opt-out of the exercise of jurisdiction. What we might call for short an "*opt in and opt out*" option!

However, there is a statement at the end of OP1, which expressly 'notes' that, a State Party may exercise its right to opt-out, even before it has declared its acceptance of the amendment[16]. Frankly, I find this reference troubling. It could only really make legal sense on the premise that a State Party, which is yet to declare its acceptance of the amendment, is never the less subject to the exercise of jurisdiction by the Court, unless and until it makes this 'opt-out' declaration. This is clearly inconsistent with the reasoning just offered above as to why State Party acceptance is a prerequisite to the exercise of jurisdiction.

If there appeared any ambiguity or contradiction, in the plain language construction of the substantive provisions on that issue, then this inference, to be made from this aspect of the OP1 '*noting language'*, could have weighed in favour of the contrary constructional perspective. As it is, I find it can mean nothing more than that a State Party, who wants to act out of an abundance of diplomatic caution, rather than legal necessity, can make plain its position of 'non acceptance', with respect to this amendment, by declaring such an 'opt-out', despite its not having yet even declared its acceptance of the amendment in the first instance.

Again, the very existence of this 'opt-out' option, with respect to an exercise of jurisdiction derived from an amendment provision, expressly subject to entry into force under the Art. 121(5) procedure, creates further potential basic questions on how these two provisions are meant to interact in practice, that is to say the

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[14] Para (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."*

[15] Given the provisions of Art 15(*bis*) & (*ter*) common paragraph (2) see below, which defers the Court's exercise of jurisdiction until a year after the ratification or acceptance of the amendment by 30 States Parties, such a rationale for instance might well include a State Party's wanting to add its weight to the number of SP ratifications of the amendment, so as to thereby hasten the initiation of the EoJ by the Court, whilst remaining itself, at least for the time being, opted out of that very exercise of jurisdiction.

[16] "*The Review Conference .... notes that any State Party may lodge a declaration referred to in article 15 bis prior to ratification or acceptance.* ", what we may then call instead an '*opt out before opting in'* option!

existing art 121(5) second sentence exemption from the exercise of jurisdiction, as compared with the new Art. 15(*bis*)(4) opt out declaration ?

For example, take the case where the relevant state act of aggression has (at least in part) occurred on the territory of a State Party which has, at the relevant time, both accepted the amendment and yet not opted-out of the exercise of jurisdiction[17]. This putatively gives rise to the exercise of jurisdiction by the Court, by reason of the existing provisions, on general territorial jurisdiction, as per Art. 12(2)(*a*) of the Statute, an article specifically averred to in the opening part of the new Art. 15(*bis*)(4). However, let us now further suppose that, as respects the so-called '*aggressor state'*, this is a State Party which is yet to lodge a declaration, per Art.121(5), accepting this amendment, but equally it is also yet to lodge a declaration, per the new 15(*bis*)(4) opt-out, which are clearly two different declarations[18].Does the Court possess the power for the exercise of its jurisdiction over a national leader of the aggressor State Party , absent the 15(*bis*)(4) 'opt-out' declaration by that State Party; or does it not possess jurisdiction, absent the Art 121(5) 'opt-in' declaration of acceptance by that same State Party?

Clearly, given the constructional position that I have taken on the plain language effect of the application of the notorious second sentence provisions of Art.121(5), it follows in my view that, the answer in that situation is, that the Court does not have the power to exercise its jurisdiction.

Interestingly, when we came to Kampala, there was already set out in the draft Resolution, forwarded to the RC by the previous ASP, in the Annex III on proposed 'understandings' and included for approval together with the amendments themselves, though obviously not for incorporation into the Statute itself, two alternative and mutually exclusive such understandings. These specifically addressed the issue as to whether or not Art. 121(5) second sentence had the effect of barring the exercise of jurisdiction by the Court, in the very case where the "*victim state*" had, but the "*aggressor state*" had not, accepted the amendment[19]. They were termed, and perhaps more than a little prejudicially, a "*positive*" understanding, in the case where it was understood that the Court possessed the power for such an exercise of jurisdiction, and a "negative" understanding, where it did not, respectively.

However, in the event, neither made it into the Annex III on 'Understandings', as finally adopted in the Resolution. This result can only really be interpreted as meaning that, whilst the RC specifically addressed itself to this issue, it came to no conclusive and agreed position on it.

That said, I do feel that it is important to note, for reasons of comparative language as a recognised aid to construction, that, when the RC came instead to consider the next paragraph of the new 15(*bis*) provision, which sets out the agreed position on the exercise of jurisdiction by the Court with respect to a crime of aggression when committed by the nationals, or on the territory, of non-States Parties, and which was to say that the Court could not do so[20] ; it used near enough precisely the same formulation of language, as already employed in the second sentence of 121(5), with respect to the bar on the exercise of jurisdiction as regards 'non-accepting' States Parties.

Furthermore, it seems that the entire thrust of the *travaux préparatoires*, to-date, on the negotiations leading to that provision, strongly supports the view that the agreed stance was to place non-States Parties, in precisely the same position as non-accepting States Parties, in this respect. Whereas, non-States Parties had previously been seen to be 'disadvantaged' by the fact that the 121(5) bar on the exercise of jurisdiction, consequent upon the non acceptance of an amendment by States Parties, obviously did not also apply to non-States Parties as well. Similarly, the new opt-out provision in art 15(*bis*)(4) is naturally also not 'available' to non-States Parties. However, they do not now need it, given the effect of the new provision in 15(*bis*) para

[17] Just by way of a further twist it is well worth asking how would it affect matters if the "*victim state*" had both accepted the amendment, but also "opted out" of the exercise of jurisdiction? Would the opt out then destroy territorial jurisdiction per Art 12?

[18] Although there is no reason why they could not be contained within the very same declaratory communication, and in practice probably would be.

[19] RC/WGCA/1 page 7 Annex III understanding 6. Alternative 1 and alternative 2.

[20] See now para (5) of art 15(bis) which states simply that: "*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."*

(5). Equally then, neither is it legally needed by non-accepting States Parties, also wanting to be outside the jurisdiction, who are able to rely instead on the continuing effect of the language in 121(5) second sentence, and which is in effect worded identically.

All of this is, however, not to say that, a State Party which is yet to declare its acceptance of the amendment, is in precisely the same position, with respect to the bar on the exercise of jurisdiction by the Court over the crime of aggression, as would be the case were it to have accepted the amendment instead, but then gone on to have also declared an opt-out. The language of the respective provisions is subtly different. Under the Art 121(5) second sentence position, whilst a non-accepting State Party, is outside the exercise of jurisdiction by the Court with respect to any allegation of a crime of aggression made as against any of its own nationals, it is also similarly outside that jurisdiction with respect to any crime of aggression committed against it and on its own territory[21].

The question as to just where legally a crime of aggression is committed, the so-called *crimen loci*, is a matter that has been aired in some depth before the SWGCA[22]. The *travaux préparatoires* reveal that the agreed position, not specifically opposed by any State Party, was to the effect that the crime is to be regarded as occurring both (*a*) in the place where the criminal conduct (as set out in the definition on the individual criminal act (per Art. 8(*bis*) para1) occurs; and (*b*) by reason of the application of a so-called '*effects doctrine*', also in the place where the consequences of that criminal conduct are realised. Namely, the place where the state act of aggression is effected[23].

It follows, therefore, that given this appreciation, even in the case where the state act of aggression involved, relates to the conduct by an accepting State Party's nationals, but its consequential effects occur on the territory of a non-accepting State Party, then under Art. 121(5) second sentence, the Court is still denied the exercise of its jurisdiction by reason of the fact that the crime has also been committed, at least in part, on the territory of that non-accepting State Party. Thus, the effect of the Art. 121(5) bar on the exercise of jurisdiction, is at least '*fair and equal',* in the sense that States Parties who do not accept the amendment, whilst excluded from the jurisdiction with respect to the criminal liability of the conduct of their own nationals, are also and equally denied resort to the exercise of that jurisdiction, with respect to any alleged act of aggression occurring against them and on their own territory.

Conversely, the same is not true of the position with respect to a State Party which now opts-out under the new Art. 15(*bis*)(4) provision instead. Under the terms of that provision, the Court is only barred from its exercise of jurisdiction, with respect to *"... a crime of aggression, arising from an act of aggression, committed by a State Party.."* which does not accept the jurisdiction[24]. Hence, whilst once again excluding its own nationals from the Court's jurisdiction, who will be presumptively responsible for its own state act of aggression; an 'opt-out' State Party, unlike a non-accepting State Party, is nonetheless still able to invoke or benefit from that jurisdiction, in the case where the state act of aggression concerned was committed both by an accepting State Party, which has itself not opted out, and has occurred on its own territory instead. In short, there is no longer any equivalent or reciprocal loss of resort to the jurisdiction of the Court as an aggrieved State Party, in return for its own decision to be excluded from it.
Consequently, we derive at least one reason in practice why a State Party may wish to exercise an '*opt in and opt out'* option, as described above; namely in order to obtain the advantage of the deterrent protection, or punitive remedy, offered to a 'victim State Party' by the Court's exercise of jurisdiction , whilst at the same time remaining excluded from the any risk of exposure to that very exercise of jurisdiction, as an accused 'aggressor State Party' instead. I sincerely doubt, that consequence was the 'purpose' of offering this 'opt out' provision. However, it is I submit, unquestionably an effect of doing so, in these terms. An effect which, candidly, I find to be discreditable and objectionable.

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[21] Ibid see *supra* note 9 above.
[22] See for example paras 38-39(p.27) of the SWGCA Report to the 7th ASP. ICC-ASP/7/20/Add.1
[23] Indeed at one point this consensus even led to a proposed further understanding per :
"*It is understood that the notion of "conduct" in article 12, paragraph 2 (a), of the Statute encompasses both the conduct in question and its consequence",*as to which see Head IV Para 12 p.36 of Appendix II to the SWGCA Report, *ibid.* This understanding only failed to make it into the draft proposed Annex III list of 'Understandings', because, as I understand it, in the end it was felt be otiose.
[24] *Ibid*, see *supra* note 14, above.

At various points during the Kampala debate several States Parties again raised the issue of the merit in incorporating a specific element of 'reciprocity' into the amendments on the crime of aggression[25]. They were heavily criticised by others for suggesting that 'reciprocity' had any place in a criminal law statute, as if it were merely an inter-state dispute settlement mechanism instead. Interestingly, it was later to satisfy or assuage the concerns of certain of those very critics of reciprocity, that this 'one sided' opt-out provision was introduced. In my understanding, as a matter of principle, the rationale for objecting to reciprocity in a criminal law statute is based on the idea of 'equality' of all before the rule of law in a criminal jurisdiction. In my respectful submission, that principle is not respected by substituting, for an existing total opt-out provision, a one sided partial opt-out provision, that utterly destroys any pretext of equality under the rule of a criminal law jurisdiction.

V DELAY IN THE EXERCISE OF JURISDICTION IS IN TRUTH A DEFERRAL OF THE ACTIVATION

The next serious limitation on the scope of the Court's future jurisdiction over the crime derives from the two new provisions added to the amendment, both as respects the new Art. 15(*bis*) and the new article 15(*ter*)[26] in equal measure, and which were negotiated under the premise of their amounting to a delay in exercise of jurisdiction of the Court. The first of the new conditions[27] is a reasonably straight-forward provision, simply delaying the exercise of jurisdiction by the Court, until the fulfilment of a further modality, namely until one year after the acceptance or ratification of the amendment by 30 States Parties.

Two short points are worth making with respect to this provision. Firstly, this is not I perceive generally regarded as a seriously onerous new limitation, given that the entry into force of the Rome Statute itself, was made subject to the acceptance or ratification by 60 States Parties[28] and, in the event, this proved to be capable of fulfilment within only 4 years after the Rome Conference adopting the Statute itself (1998 to 2002).

Secondly, whilst this condition or modality is clearly additional to the provisions, as set out in Art. 121(5) of the Statute, on the entry into force of the amendment provisions themselves[29], this is in no sense inconsistent or incompatible with that provision, since this further modality deals with the exercise of jurisdiction by the Court, rather than the entry into force of the amendment, which, with respect, is a distinction with a difference. It is the uncontroverted and understood position that, whilst an amendment to the statute establishing the jurisdiction of a court, must naturally first enter into force, before that court may then exercise its jurisdiction with respect to that amendment, such that any suggestion of exercise of jurisdiction prior to entry into force would be incompetent; there is nothing in that which prohibits or questions the ability of the statute making body, providing for a delay in the exercise of jurisdiction by the Court, with respect to the said amended provisions on its jurisdiction, until some point in time, or fulfilment of a further condition, and which is additional to fulfilment of the conditions laid down for the entry into force of that said amendment instead.

The second such new provision on the "delayed exercise of jurisdiction", however, was a very last minute compromise, indeed the last compromise, and which may have been necessary in order to secure agreement to a consensus on adoption, by those States Parties, also permanent members of the Council, for whom the 'principle' of the exclusive right to pre-determination of a state act of aggression by the Council, remains a real concern[30]. This further provision[31] in truth provides for a complete deferral on the activation of the new

[25] See for instance the language of the text proposed by Slovenia.

[26] This new provision deals with exercise of jurisdiction over the crime of aggression in the case of a Security Council referral under the provisions of article 13(*b*) of the Statute. There is no other limitation or modality on the exercise of jurisdiction by the Court in this instance, in particular no opt-out for States Parties and no exemption for non-States Parties.

[27] As to which see para 2. In the new 15(*bis*), repeated again at para 2 in the new 15(*ter*).

[28] See Art. 126 of the Statute

[29] Which in short provides that these amendments shall enter into force for those States Parties which have accepted the amendments, one year after the deposit of their instruments of ratification or acceptance.

jurisdiction, unless and until a further decision to activate is taken by the ASP, at some opportunity after 1st January 2017.

The only factors, which to some degree, ameliorate the effect of that compulsory deferral, as opposed to mere delay, is that (*a*) the future decision can be made at any meeting of the ASP, it need not wait for a further full Review Conference called by the UN Secretary General, and (*b*) the vote, necessary to activate the Court's jurisdiction with respect to this amendment, is to be achieved by only the concurrence of two-thirds of the ASP, as per the Art. 121(3) proportion necessary, failing any consensus, for adoption of an amendment itself; rather than the requisite ratification by seven-eighths of the ASP of an amendment, as required for the entry into force of an amendment, under the Art. 121(4) provisions of the Statute instead.

VI IS THERE A CASE FOR PERFECTING THE DIPLOMATIC SETTLEMENT, BY FURTHER AMENDMENT OF THE KAMPALA AMENDMENTS

A friend has analogized the effect of this deferral on activation, as equivalent to that of a desperately fragile patient, who is placed in a chemically induced coma, in order to preserve his vital organs until conditions become more conducive to exposing his anatomy to the rigors of the 'real world'.[32] But, if this is so, then what are the essential surgical procedures, needing to be performed on the comatose patient, in order to patch him up in preparation for his eventual revival?

Perhaps the moment of highest drama in the conference, was that of an intervention again by Japan, taken immediately prior to the ASP President's motion on the consensus being put. This intervention gave every indication, until the last possible moment, that, far from it being one or other of the two States Parties, also permanent members of the Council, who were willing to declare a lack of consensus, as had been variously feared or anticipated all week by many present, it was going to be another State Party instead which was prepared to oppose such a consensus. To be clear it was by that time painfully obvious to all present, that there were simply insufficient accredited States Parties present at the conference, with instructions permitting them to be free to vote on the adoption of the Resolution, absent any such consensus, so as to prevail in a vote on adoption instead[33].

However, as I say at the last possible moment, the Japanese delegation[34] merely indicated its reluctant willingness not to stand in the way of a consensus at that moment. Perhaps somewhat surprisingly, their main objection to the Resolution was in essence a technical and constructional matter, rather than any policy disagreement in principle with its provisions. It was an aspect of this State Party's technical objection, though certainly not its only one, that the very placement of the amending provisions, as set out in the Annex to the Resolution, were not consistent with the plain reading language of the first sentence of Art.121(5). In this regard I entirely share this SP'S technical appreciation in the lack of compliance as between the Resolution and the Statute, and indeed applaud its willingness to make this an issue.

One can speculate and hypothesize as much as one wishes, as to the underlying rationale and purposes fulfilled by there being two very distinct and differing provisions, on the ratification and subsequent entry

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[30] However, the reader may be interested to know of a letter, copy seen by this author, written shortly after the Kampala Conference (dated 24 June 2010) from Mr Henry Bellingham (Minister of State at the UK Foreign Office with responsibility for the ICC) to Mr Jeremy Browne MP (also as it happens a Minister of State at the Foreign Office with responsibility for criminal law matters) and who therein specifically describes the "conditions", set out in the Kampala Resolution, as maintaining a long standing UK position that the Council must have "the primary role" in deciding when a state act of aggression has been committed. NB, the "primary" not the "exclusive" role*?* Does this represent a subtle but significant '*reformulation*' of the UK Government position, and thus explain its willingness to consent*?*

[31] As to which see now common paragraph 3 in the new article 15(*bis*) repeated in article 15(*ter*), as follows: *"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…"*

[32] See Donald M. Ferencz, *Some Personal Reflections on Kampala*, 23 LJIL (2010).

[33] This would have required a concurrent vote of 75 States Parties, being two-thirds of the current composition of the ASP, as required by Art.121(3) of the Statute, the ASP at the time comprising 111States Parties.

[34] It was the Japanese delegation who had earlier first raised objection to the ABS proposal (as above), for exhibiting a want of legal logic, regarding its approach on using both the entry into force procedures, and applying them instead differentially, as per the different trigger mechanisms.

into force of an amendment to the Statute, as set out in paras. (4) and (5) of Art. 121 respectively (see above). For my part, as already referenced[35], I suspect that compatibility with the thrust of Art. 40(4) of the Vienna Convention on the Law of Treaties remained an important consideration for many participants at the time of the Rome Conference.

Yet, in the final analysis, as I read the Statute, the only true basis for applying one provision rather than the other is, for me, quite simply and clearly set out in the language at the start of each paragraph respectively. Namely, that the Art. 121(4) procedure shall apply "*except as provided in paragraph 5*", and equally the paragraph (5) procedure shall apply with respect to "*any amendment to articles 5, 6, 7 and 8 of this Statute*"[36], and no deeper rationale than that need actually be sought when simply applying those provisions. Applying then that reasoning to the Resolution as finally adopted, I submit that that there is great force in these technical objections or concerns, however technical that matter.

The Resolution calls for the introduction of four new provisions in the Statute, namely a new Art. 8(*bis*) on the definition of a crime of aggression, a new Art. 15(*bis*) on the exercise of jurisdiction per state referral, or prosecutor *proprio motu,* a new Art. 15*(ter)* on exercise of jurisdiction per a Security Council referral, and finally a new Art. 25 paragraph 3, on limiting ancillary liability to only a perpetrator in a 'leadership' position. There are also two tidying up proposals to amend the language in the existing Arts. 9(1) and 20(3) respectively, merely in order to incorporate new references to the new Art. 8(*bis*).

Therefore, only the first amendment, as set out in paragraph 1 of the Annex to the Resolution, and calling for the deletion of the existing Art. 5(2)[37], and that alone, falls clearly and unambiguously within the operative language of the first sentence of the Art. 121(5) provision[38].

Whereas, OP1 of the Resolution asserts that this entry into force procedure, is to be applied equally to all of the other amendments as well. As much as that has doubtless proved to be a very convenient diplomatic compromise, I have to agree with those technical concerns and say that it simply amounts to an outright conflict with the plain language of Art. 121(5) first sentence, which limits is application to amendments to articles 5,6,7,or 8 of the Statute alone.

As a defence advocate, to my thinking, the significance of that error in legislative drafting, albeit of an arguably wholly technical nature alone, is that in a future trial I would be bound to try and use it to argue, on behalf of an accused client, that it has resulted in an *ultra vires* loss of constitutionality in those very amending provisions. Their 'apparent' entry into force would have then relied on a statutory procedure, which on its plain language construction, is simply not capable of providing for such entry into force as would then be said to have occurred[39]. Whether that argument would prevail at trial, or the Court would feel able, in the interests of justice, to overlook such a technical challenge, is I suggest a matter about which at this point no one can be certain.

Instead, I am of the certain view that it would be possible, in the interests of pre-empting the argument, to make a technical amendment to the placement of the substantive amendments, as adopted at Kampala, and which would have the effect of bringing those substantive amendments instead unarguably within the strict language reading of Art. 121(5) first sentence.

I suggest that this could be achieved, by a relatively simple and straightforward further amendment to the Statute, placing the current language of the new Art. 8(*bis*), 15(*bis*) & 15(*ter*) amendments, into a number of

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[35] See *supra* note 10 above.

[36] I am willing to accept that the use here of the conjunctive participle "and", in this expression, was an oversight, and that it must instead be construed in the context as if it said "or" instead.

[37] See *supra* note 13 above.

[38] As I understand it from authorities, under the Latin law rule, where the expressions (*bis*) and (*ter*) etc are typically employed, to the introduction of a new article or paragraph into a text, say after an existing art 8, and called then 8(*bis*) instead, is not to be treated as in any manner an amendment to the existing article 8, but rather simply as the introduction of a new article, equivalent to the English convention, per naming it Art. 8A.

[39] Such a speculative argument would of course lose much, if not all, force were there to have been, at the relevant time, acceptance/ratification by the 7/8ths of the ASP, thus permitting entry into force as provided by Art.121(4) language instead.

further paragraphs, (2),(3) & (4) added to article 5 instead, thereby amending only article 5. Such a technical correcting amendment could itself then be lawfully subject to acceptance and subsequent entry into force, under the Art. 121(5) procedure, as is clearly the current consensus on the appropriate procedure to use for those substantive amendments.

Unfortunately, so as to avoid the danger of the Court's becoming subject, at a future date, to the potential of there being two identical, but differently placed, and therefore competing and inconsistent sets of provisions on the crime of aggression, it would inevitably also now be necessary, indeed essential, at the same time to delete the current amendments adopted at Kampala, before their entry into force at some time after 1 Jan 2017. This would, alas, require a series of three 'deleting amendments', which could themselves only be subject to acceptance or ratification under the Art. 121(4) procedure instead, so as to remain consistent with the very logic of making them in the first place[40].

The advantage, however, would be to permit simultaneous entry into force of those deletions, as respects all States Parties equally, irrespective as to whether or not the Kampala amendments themselves had by then been accepted by any particular States Parties. Equally, the 121(4) procedure could also be lawfully employed for the necessary purpose of similarly deleting, but reiterating, the set of three further associated 'tidying-up' amendments to statute, also adopted at Kampala as subject to the 121(5) entry into force procedure, namely as respects consequential alterations to articles 9(1), 20(3) and 25(3) respectively, and which are amendments, on their face, equally incompatible with the operative language of 121(5) first sentence.

VII ARE NON-STATES PARTIES ABLE TO VOLUNTARILY ACCEPT THE EXCERCISE OF JURISDICTION OVER THE CRIME OF AGGRESSION ON AN *AD HOC* BASIS, PER ARTICLE ART 12(3)?

The final settlement, amongst participating states at the Rome Conference (1998), with respect to the appropriate scope for the Court's general exercise of jurisdiction over the core crimes, resulted as we have seen in the dual part jurisdictional provision, as now set out in Art.12(2). Namely, that States Parties would accept the automatic exercise of jurisdiction by the Court, with respect to both crimes committed on their territory, sub-para. (a), and by their nationals, sub-para. (b).

However, there was also the further vexed question, as to whether the Court's future general exercise of jurisdiction over the core crimes, should in any manner reflect the principle of '*universal jurisdiction'*, generally accepted as applying to them the under customary international law. Especially, in the sense of its being able to apply is its jurisdiction, in some appropriate fashion, also even to the territory and nationals of non-States Parties, given that specific incorporation of the core crimes under the national law of States Parties, and therefore national enforceability, was not a pre-requisite even for the principle of complementarity[41], as the crimes were of '*universal jurisdiction'* in any event.

Naturally, against this any settlement reflected in the Statute must, however, also respect that, with the exception of the case where '*the situation'* is referred to the Court by the Council, and thus where it derives its jurisdiction essentially from the UN Charter instead, the Statute is a multi-lateral treaty settlement, which could only be binding on the States Parties.
The eventual settlement, on that issue, was reflected in the provision at para. (3) of Art. 12, which essentially says that, as respects the territory or nationals of a non-States Parties, the Court is able to exercise its jurisdiction, wherever the non-State Party concerned voluntarily declares its willingness to accept it, on a case-by-case or *ad hoc* basis[42]. This further concession towards recognition of the principle or scope of universal jurisdiction, albeit as applying to non-States Parties only on a voluntary and *ad hoc* basis, was nonetheless I submit a very important aspect of that overall settlement.

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[40]Indeed, logically there might also need to be a specific further decision by the ASP, to delay the activation of any new substantive Art. 5 amendments, until a point in time after the deletions of the Kampala amendments had taken effect, that is following their acceptance or ratification by seven-eights of the ASP.

[41] On the principle of complementarity relating to the crime of aggression, see also Strapatsas, *supra* note 2.

[42] The language used in Art. 12(3) is "*with respect to the crime in question*".

That the crime of aggression, or the '*crime against peace'* as it was more forthrightly termed at Nuremberg, is now widely accepted as comprising an undoubted a part of the *jus cogens* under customary international law, and further, of its thus being applicable *erga omnes*, is I hope not now generally disputed. Certainly, given the manifest provisions of art 2(4) of the UN Charter, the terms of UNGA Res 95[1] of 1946, and the judgement of the ICJ in the matter of *Nicaragua v. the United States*, to mention but a few evidentiary references, I am left in no doubt on the subject. Consequently, therefore, I regarded the question of the application of the Art 12(3) provisions, on the *ad hoc* acceptance by non-States Parties, to the Court's future exercise of jurisdiction over the crime of aggression, even though voluntary, as a very important matter indeed.

In the Annex III 'understandings', appended to the draft Resolution when we came to Kampala, as already mentioned, there appeared at understanding #4, the following text, under the title "Jurisdiction *ratione temporis":*

"It is understood, in accordance with article 11, paragraph 2, of the Statute, that in a case of article 13, paragraph (a) or (c), the Court may exercise jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, *unless that State has made a declaration under article 12, paragraph 3*." (emphasis added)

Now clearly the thrust of this Understanding addresses itself directly to the issue of temporal retrospection, that is whether or not the Court may exercise its jurisdiction regarding the conduct of a State Party, undertaken prior to the date of the entry into force of the amendment for that State Party[43], a matter about which I should have thought there could be no real question. However, its significance, for my present purpose, is rather the express reference at the end to the exception where "the State" concerned has previously made an Art. 12(3) declaration, obviously then whilst still a non-State Party instead. The relevance being that this reference necessarily implies that such a declaration was applicable to the exercise of jurisdiction, also with respect to a crime of aggression.

Although, the Art 15(*bis*)(5) provision, specifically excluding the Court's exercise of jurisdiction with respect to non-States Parties, was a relatively late proposal, it was already in the version of the President's Conference non-Paper[44] on the penultimate day of the Conference. However, the above Understanding #4 was equally also in Annex III of the same paper and remained so, including the final version of the Annex III understandings late on the final conference day[45].

Throughout the course of most of the last two days of the conference, several delegations acknowledged ,the importance of Art.12(3) to the jurisdictional armoury of the Court, and suggested that it might be better if the text of the proposal on prohibiting exercise of jurisdiction with respect to non-States Parties, also included an express exception, recognising the ability of non-States Parties to nonetheless voluntarily make such a declaration per Art 12(3) instead.

Certain delegations suggested to this author that they had received assurance to the effect that the reference to the matter in the Understanding in the Appendix, made it adequately clear that it was not thereby intended to specifically exclude that possibility, with respect to the exercise of jurisdiction over a crime of aggression.

In the final text of the RC Resolution, as adopted by consensus, that understanding has been simply dropped entirely. It appears that it was dropped as part and parcel of the package on the final proposal, namely to defer the activation of all the amendment provisions, until a further decision is taken after 1 Jan 2017, as

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[43] In passing, I should observe that although specifically concerned with *temporal retrospection*, since entry into force "for a State Party" under Art. 121(5) *first* sentence, is expressly conditional upon acceptance by the State Party concerned, it follows that this Understanding further strongly bolstered the view that the Court is barred from the exercise of jurisdiction, with respect to a non-accepting State Party, and had it survived to be included in the final Resolution, I should have clearly cited it in further support of my separate conclusion on that matter.

[44] Electronically published at 12:00hrs on the Thursday (10th of June) as to which see then proposed provision 15(*bis*)(1)(*ter*) on p.3 thereof

[45] Electronically published 16:30hrs on the final day Friday 12th by when the text on the exclusion of non-States Parties had been finally placed at 15(bis)(5) instead.

already dealt with. The presentation in plenary of that final proposal did not include any reference to the additional effect of the deletion of this understanding, and the consequences that would have.

Despite the lack of discussion on this point, I am given to understand that it is indeed a deliberate and consequential purpose of that deletion, at least in part and as a matter of *lex specialis,* to thereby exclude such Art.12(3) declarations, applying to the exercise of jurisdiction by the Court with respect to the crime of aggression, superseded as it were now by the terms of the new art.15(*bis*)(5)[46].

In my respectful view, not only does this position now have a most unwelcome effect of seriously diluting the scope of the jurisdictional settlement reached at Rome, but moreover, it is entirely inconsistent with the concept of this Statute serving as a codification of the normative customary law position, specifically with respect to the relative importance of the crime of aggression, as compared to the other core crimes. Whilst the Court may continue to exercise its jurisdiction over the other core crimes, no matter where in the world they occur, even absent a referral by the Council, given only the acceptance of that jurisdiction by either the territorial state, or the state of nationality of the accused persons, even if only on an *ad hoc* basis; it may not now exercise such a jurisdiction with respect to aggression. Not even in the case where a State Party is accused of committing it on the territory of a non-State Party, and *both* states involved have, or are willing, to specifically declare their acceptance of the Court's exercise of jurisdiction in such a case[47]. The crime which was described in the Nuremberg Judgement as *"the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole*"[48].

Doubtless we can instead now look forward to the prospect of the political leadership of many a non-State Party, or even a State Party when having taken action on the territory of a non-State Party, in future recanting that, whilst it would be very willing to accept the exercise of jurisdiction by the Court, so as to vindicate its conduct with respect to its military action, it regrets that the Statute specifically bars such an exercise of jurisdiction, even in the case where all the States involved are expressly willing to accept it. In my submission it is the facilitation of just such 'political excuse making' as that, which alone is served by this deletion, and which otherwise has no possible legal justification or rationale whatsoever, when dealing with a supreme crime under the *jus cogens,* and *erga omnes,* under customary law.

VIII CONCLUSION

I have the very greatest respect for the dedication, patience and sheer hard work exhibited by the diplomatic delegations, and in particular the conference managers, at the Kampala RC, who succeeded despite overwhelming difficulties in achieving a final Resolution incorporating provisions on, not merely the definition of the crime of aggression, but moreover and much more significantly, setting out the terms of a true settlement on the conditions for the exercise of jurisdiction. This was a most remarkable accomplishment in the circumstances, which even up to the final minutes in the early hours of the last morning of the Conference, was an outcome far from being seen as definitely achievable by those of us merely observing.

That said, I consider that some of those 'rough edges', as I have now identified them, produced as it were, by all of the hammering out need for such a difficult compromise, bear the clear hallmarks of some very serious future disputation and contention, even among the States Parties themselves, let alone academic and juristic commentators, as to the future application and practical enforceability of the Kampala Resolution.

It is worth recalling that we are dealing here with amendment of a Statute, which sets out the precise constitutional parameters for the exercise of jurisdiction by a permanent international criminal law tribunal. Precision in such a matter is not merely desirable, but rather it is a *sine qua non*.

[46] See as per ftnote 20 above

[47] Such declaratory 'acceptance' in the case of the State Party deriving from its declaration of acceptance under Art 121(5), and where it has not then also 'opted-out', and in the case of the non-State Party from a specific Art.12(3) *ad hoc* declaration.

[48] Judgment of 1 October 1946, *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November-1 October 1946, Vol. 1, p. 186.

I also remain firmly of the view, rather like the Japanese delegation when proposing the amendment of the existing provisions on amending the Statute, that with sufficient goodwill and co-operation among the ASP, it could yet still be possible for that body to address those ‘unintended consequences’ and ‘technical imperfections’. What is more, for it to do so without thereby having to re-open negotiations on the merits of that settlement as regards the diplomatic compromises reached on the substantive provisions.

I have offered the above suggestions, with respect to an approach concerning the technical issue of repositioning the substantive amendments, so as to bring them instead within a strict reading application of entry into force under the provisions of Art.121(5) first sentence, precisely in order to illustrate the point that such improvement could be done. The setting of the date for the earliest possible decision on deferred activation of those Kampala amendments, now gives the ASP at least seven years within which to discover if such political goodwill and diplomatic concordance is available. It is, of course, for others to say whether or not such an improvement exercise is a realistic diplomatic possibility.