Biting off more than it can chew? The International Criminal Court and the Crime of Aggression

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I. Introduction

> To initiate a war of aggression...is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[1]

This article argues that states parties to the Rome Statute should not activate the International Criminal Court's (ICC's) jurisdiction over the crime of aggression (COA) until the Court becomes further established and experienced. The COA is a politically controversial and divisive crime, and could place an unsustainable strain on the Court's current resources. An initial list of indicia and the proposal to establish the *Special Working Group on Indicia for the Entry into Force of the Crime of Aggression* (SWGI) in this article will help states to judge when the time is right to activate the Court's jurisdiction over the COA.

The article begins by giving an overview of the history of the COA in the lead up to the Kampala Review Conference (RC), and then introduces the agreement reached in Kampala on the COA, arguing that it represents a positive step forward for international criminal justice.

The article then argues that the ICC is not yet adequately experienced and established to effectively deal with the controversial and politically charged COA. The article argues that taking on this politically divisive and subjective crime at this early stage in the development of the ICC risks overburdening the Court, raising

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1 International Military Tribunal, *Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, 421 <http://werle.rewi.hu-berlin.de/IMT Judgment .pdf>.

expectations, and limiting its ability to concentrate on the three crimes already within its jurisdiction.[2] Nonetheless, the article concludes by arguing that while the Court has insufficient experience at present to effectively handle the COA, when it is developed and experienced enough to do so it should begin to exercise jurisdiction over this serious crime, to help deter leaders of states from initiating illegal wars, and to punish those who have committed such acts.

In an effort to guide state decision-making before, on, or after 1 January 2017 as to whether or not to ratify the amendments on the COA, and assuming the COA enters into force, whether or not states should 'opt in' or 'opt out' of COA jurisdiction, the article proposes, as mentioned above, that the Assembly of States Parties (ASP) establish a SWGI to be tasked with developing indicia to help states judge whether the ICC is ready to bring the COA within its active jurisdiction. This article makes a first attempt at developing some of the proposed indicia.

The article concludes by demonstrating that the amendments on the COA adopted in Kampala provide a workable legal framework for taking the action this article argues states parties should take in the lead up to, during and beyond the decision to be made by states parties on the COA amendments on 1 January 2017.

II. An Overview and Brief History of the Crime of Aggression

> The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.[3]

In 1945 the London Charter established the International Military Tribunal (IMT) and invested it with jurisdiction to try, *inter alia*, 'crimes against peace.'[4] The IMT

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2 These views are also largely shared by Human Rights Watch (HRW), see HRW, *Making Kampala Count* (10 May 2010), 99 <http://www.hrw.org/node/90282/section/8>; see also Richard Goldstone, *State Aggression and Judicial Passivity* (20 May 2010) Project Syndicate <http://www.project-syndicate.org/commentary/rgoldstone1/English>; Open Society Justice Initiative, *Open Letter to Foreign Ministers* (10 May 2010) <http://www.soros.org/initiatives/justice/news/icc-aggression-20100510>. Giving the Court time to establish prior to taking on the COA is also supported by Dr Carrie McDougall and Toby Hanson (note however that Toby Hanson believes two–three years would be sufficient). See interview with Dr Carrie McDougall, International Legal Specialist, Australian Department of Foreign Affairs and Trade (Canberra, 2 September 2011) and interview with Toby Hanson, Australian lawyer and attendee of the Kampala RC (Skype Interview, 23 August 2011) (interviews on file with the author).

3 Opening Speech of United States' Chief Prosecutor, reprinted in International Military Tribunal, *Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (William S Hein & Co, 2001) 45.

4 Article 6(a) of the London Charter defines crimes against peace as the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.' For a full copy of the London Charter of the IMT see United Nations High Commissioner for Refugees (UNHCR), *Charter of the International Military Tribunal* <http://www.unhcr.org/refworld/docid/3ae6b39614.html>.

also recognised the crime against peace (now more commonly referred to as the COA) to be the 'supreme international crime.'[5] Upon his return to the United States (US), the IMT's American Chief Prosecutor Robert Jackson informed President Truman that the Nuremburg trials had set 'a judicial precedent'[6] and had become 'a law with a sanction.'[7] Despite this, states have continued to engage in armed conflict with impunity up to the present day.[8]

On 11 December 1946 the United Nations General Assembly (UNGA) recognised the Nuremburg Principles as international law,[9] and the International Military Tribunal for the Far East (IMTFE) followed the Nuremburg precedent.[10] Despite this, it was not until 1974 that an 'act of aggression' was defined by the UNGA within the meaning of Article 39 of the UN Charter.[11] According to Claus Kress and Leonie von Holtzendorff, even after the crime was defined 'nothing really changed.'[12] Kress and Holtzendorff go on to explain that:

> While Article 16 of the International Law Commission's draft *Code of Crimes against the Peace and Security of Mankind* confirmed that the crime of aggression constitutes a crime under international law, none of the international or internationalized criminal tribunals established since the 1990s to deal with specific situations of macro-criminality included the crime of aggression.[13]

Despite the COA existing as a crime under customary international law,[14] its potential to be tried as an international crime by a permanent international court was

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5 International Military Tribunal, above n 1.

6 Claus Kress and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179, 1181.

7 Ibid; Mr Justice Jackson, *Report to the President* (7 October 1946) Yale Law School <http://avalon.law.yale.edu/imt/jack63.asp>.

8 The latest dataset shows that there have been 271 armed conflicts since 1946. For a copy of this dataset see Department of Peace and Conflict Research, Uppsala University, Sweden, *UCDP/PRIO Armed Conflict Dataset* <http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset/>.

9 GA Res 95, UN GAOR, 6th Comm, 1st Sess, 55th mtg, UN Doc A/RES/95 (11 December 1946).

10 For a recent discussion of the IMTFE's contribution to international legal development see N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008) 115.

11 *Definition of Aggression,* GA Res 3314, UN GAOR, 6th Comm, 2319th mtg, UN Doc A/RES/3314 (14 December 1974).

12 Kress and von Holtzendorff, above n 6.

13 Ibid.

14 Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 *European Journal of International Law* 1117, 1118; *R v Jones and others* [2006] UKHL 16; Claus Kress, 'The Crime of Aggression before the First Review of the ICC Statute' (2007) 20 *Leiden Journal of International Law* 851, 853–54; R Cryer, H Friman, D Robinson, and E Wilmshurst (eds), *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010) 312; Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed, 2008) 155; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 4th ed, 2005) 121; M Dum e, 'Le crime d'agression' in H Ascensio, E Decaux, and A Pellet (eds), *Droit international pénal* (Pédone, 2000) 251; Claus Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2009) 20 *European Journal of International Law* 1129, 1132–33.

not established until the adoption of the Rome Statute in 1998. Article 5(2) of the Rome Statute reads, *inter alia,* that:

> 2. 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.

In order to fulfill the task outlined in Article 5(2) of the Rome Statute, a Preparatory Commission was established by Paragraph 7 in Resolution F of the Rome conference's final act which stated, *inter alia*, that the Commission:

> shall prepare proposals for a provision on aggression, including the definition...and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime.

From 1999 to 2002 the Preparatory Commission held 10 sessions on the COA. In its third session the Commission established the 'Working Group on Aggression' which was first led by Tuvako Manongi of Tanzania, and then Silvia Fernandez de Gurmendi of Argentina. While the work of the Commission helped frame the ensuing debate on the COA, it did not succeed in defining the crime, nor did it succeed in establishing a regime for the Court's exercise of jurisdiction.[15] As a result, when the Preparatory Commission was dissolved in 2002, the ICC's ASP established the Special Working Group on the Crime of Aggression (SWGCA) to continue the work of the Commission.[16]

The SWGCA conducted its work from 2003 to 2009 led by Ambassador Christian Wenaweser of Liechtenstein. By February 2009, the SWGCA had agreed on a definition of the COA in the form of 'Article 8*bis*',[17] which was ultimately adopted verbatim at the RC. Article 15*bis*, which dealt with the conditions for exercise of jurisdiction, offered several alternatives that reflected the different positions of states particularly in relation to the role, if any, of the United Nations Security Council (UNSC) in the procedure by which the Court would exercise its jurisdiction.

The five Permanent Members of the Security Council (P–5) took the view that Article 39 of the Charter had conferred upon them 'exclusive' power to determine the existence of any act of aggression, and thus the ICC should only be permitted to exercise jurisdiction over the crime once a pre-determination of the existence *vel*

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15 The Preparatory Commission released a report on 24 July 2002 that effectively summarised the major positions in relation to the definition and the conditions for the exercise of jurisdiction over the COA; see Preparatory Commission for the International Criminal Court, *Proposals for a Provision on the Crime of Aggression*, 10th sess, 2nd pt, UN Doc PCNICC/2002/2/Add.2 (24 July 2002); see also R S Clark, 'Rethinking Aggression as a Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002) 859.

16 Assembly of States Parties, *Continuity of Work in Respect of the Crime of Aggression*, ASP Res 1, 3rd mtg, ICC-ASP/1/Res.1 (9 September 2002).

17 S Barriga, W Danspeckgruber and C Wenaweser (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (Liechtenstein Institute on Self Determination, 2009), 60–61.

non of an act of aggression had been made by the UNSC. The vast majority of other states pointed to Article 24 of the UN Charter which confers upon the UNSC 'primary' as opposed to 'exclusive' power over the maintenance of international peace and security, which in turn, they argued, precludes the UNSC from exercising a monopoly over such matters.

Many non-P–5 States also argued that the UNGA had already made several findings of aggression and that the US, Britain and France had supported the 1950 Uniting for Peace Resolution, which recognised the UNGA's power not only to make act of aggression determinations, but also to make recommendations to member states as to what action should be taken 'to maintain or restore international peace and security.'[18] In the 1962 International Court of Justice (ICJ) advisory opinion on *Certain Expenses of the United Nations,* the ICJ noted that the UNGA regularly included in their annual budget resolutions provisions 'for the expenses relating to the maintenance of international peace and security',[19] adding further fuel to the argument that the UNSC does not hold an 'exclusive' power over such issues.

The ICJ has also made findings in cases involving alleged acts of aggression.[20] However, Roger Clark notes that the ICJ, like the UNSC, 'has been leery of actually using the word "aggression"'.[21] Given the vastly divergent views of states as to the question of the Court's COA jurisdiction, this was always going to be the most difficult and controversial element of the discussions in Kampala. According to some authors, it seemed unlikely that states would be successful in brokering a deal on the question of the Court's COA jurisdiction at the Kampala RC.[22]

III. The Agreement Reached in Kampala on the Crime of Aggression

The COA was not the only item on the agenda at the RC. States had also agreed that the first week of the conference would be dedicated to a 'stocktaking' exercise.'[23] Two other items were also on the agenda in Kampala; the so called 'Belgian proposal'[24] as well as the proposal to delete Article 124.[25] This left approximately

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18 *Uniting for Peace*, GA Res 377(V), UN GAOR, 302nd mtg, UN Doc A/RES/377 (V) A (3 November 1950). 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' (2010) 2 *Goettingen Journal of International Law* 689, 700.

19 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151, 160.

20 For the latest example of this see *Case Concerning Armed Activities on the Territory of the Congo (DR Congo v Uganda) (Judgement)* [2005] ICJ Rep 168.

21 Clark, above n 18.

22 For an example of this view see A Zimmermann, 'Article 5' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck, 2nd ed, 2008) 106.

23 For an overview of the outcome of the stocktaking exercise in Kampala see Assembly of States Parties' Secretariat, *Review Conference of the Rome Statute of the International Criminal Court: Official Records* (15 February 2011) International Criminal Court, 4–5 <http://www.icc-cpi.int/Menus/ASP/ReviewConference/>.

24 This was the proposal to bring within the ICC's jurisdiction the war crimes of 'employing poison or poisoned weapons, employing asphyxiating, poisonous or other

one week for states to discuss the COA amendments. On the issue of exercise of jurisdiction, four main proposals were put to the conference, including the President's 'Non-Paper' which formed the basis of the final agreement.[26] On the issue of the crime's definition, states expressed their willingness to adopt the definition as laid out in the SWGCA's 2009 proposed Article 8*bis*.[27] Recognising their opportunity to influence the debate during the meeting of the SWGCA had passed, the US (although they tried to initially) ultimately did not seek to reopen the Article 8*bis* negotiations in Kampala, but instead proposed a series of 'Understandings' that were to accompany the definition, some of which were ultimately included in the final agreement.[28]

Many academics agree that the precise legal status of the Understandings is unclear.[29] Claus Kress *et al* note that:

> the precise legal significance of what were to become the Understandings was neither debated nor decided upon in the course of the negotiations. There was, for example, no debate as to whether and where the Understandings are to be situated within the legal framework of Article 31 of the Vienna Convention on the Law of Treaties.[30]

This is in contrast to the view of the US which 'believes — passionately — that the Understandings are a critical supplement to the crime of aggression.'[31] Harold Koh, the US State Department's Legal Advisor, contended that the 'Understandings were adopted to make the definition more precise, to ensure that the crime will be

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gases, and all analogous liquids, materials and devices, and employing bullets which expand or flatten easily in the human body, when committed in armed conflicts not of an international character'. See Assembly of States Parties' Secretariat, above n 23, 6. This amendment was ultimately adopted by States Parties at the RC by adding these elements to the Elements of Crimes in relation to war crimes by creating an Article 8, para 2 (e).

25 For an excellent discussion of the outcome in Kampala in relation to the Belgian Proposal and the proposed deletion of Article 124 see Clark, above n 18, 691–92 (Proposed deletion of Article 124) and 707–11 (Belgian Proposal).

26 The other proposals were the Argentine, Brazilian and Swiss Proposal ('ABS Proposal'), the Canadian Proposal and the Slovenian Proposal. For a detailed discussion of these proposals see Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 *International Criminal Law Review* 49, 68–72.

27 Ibid 67–68.

28 For a more detailed discussion of the negotiations surrounding the so called 'Understandings' see Trahan, above n 26, 73–78. The Understandings as adopted at the Kampala RC can be found in *The crime of aggression*, 13th mtg, UN Doc RC/Res 6 (11 June 2010) annex III.

29 For example see C Stahn, 'The "End", the "Beginning of the End" or the "End of the Beginning"? Introducing Debates and Voices on the Definition of "Aggression" (2010) 23 *Leiden Journal of International Law* 875, 879; B Van Schaack, 'The Crime of Aggression and Humanitarian Intervention on Behalf of Women' (2011) 11 *International Criminal Law Review* 477, 487.

30 C Kress *et al*, 'Negotiating the Understandings on the Crime of Aggression' in S Barriga and C Kress (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2011) 81, 83.

31 Kevin Jon Heller, 'The Uncertain Legal Status of the Aggression Understandings' (2012) 10 *Journal of International Criminal* Justice 229, 246.

applied only to the most egregious circumstances.'[32] The author broadly agrees with Heller's analysis that:

> unless they [the Understandings] are adopted by all of the States Parties to the Rome Statute, the Understandings are nothing more than supplementary means of interpretation that the Court would have the right to ignore once the aggression amendments entered into force.[33]

The author agrees with Heller's analysis that the Understandings cannot form part of the primary means of interpreting the aggression amendments as they were not adopted or accepted by *all* states parties as required under Article 31(2)(a) and (b) and Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT).[34] According to Heller "a minimum of 26 states parties were not involved in 'making' the Understandings",[35] which leads to the conclusion that Article 31(2)(a) and Article 31(3)(a) of the VCLT cannot apply to their interpretation. Furthermore, the 26 states parties have been silent in response to the adoption of the Understandings which cannot be interpreted as acceptance of the Understandings as required under Article 31(2)(b) of the VCLT.[36]

Nonetheless, the author disagrees with Heller's assessment that the Court is unlikely to rely on Article 32(a) of the VCLT when interpreting the definition of the COA.[37] Given that the definition is yet to be tested in international courts, it seems

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32 Press conference with Harold Koh and Stephen J Rapp (Washington, DC, 15 June 2010) <http://www.cfr.org/international-criminal-courts-and-tribunals/koh-rapps-remarks-us-engagement-international-criminal-court-outcome-icc-assembly-states-parties-conference-june-2010/p22454>.

33 Heller, above n 31, 229. For contrary views see Michael P Sharf, 'Universal Jurisdiction and the Crime of Aggression' (2012) 53(2) *Harvard International Law Journal* 358, 359 and J Harrington, *The Aggression Negotiations at the ICC Review Conference* (8 June 2010) EJIL Talk <http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/>. Both scholars argue that the Understandings constitute a primary means of interpreting the aggression amendments under Article 31 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*VCLT*).

34 Heller, above n 31, 236–42. The relevant provisions of Article 31 of the *VCLT* provide that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
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> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
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> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

35 Heller, above n 31, 238.

36 Ibid 239.

37 Article 32 of the *VCLT* provides that:

> Recourse may be had to supplementary means of interpretation, including the

incongruous to assert that the ICC would not take into account Understandings validly adopted by consensus of those present in Kampala to aid its interpretation of this controversial, politically charged and untested definition. The Court itself is nascent and lacks a solid jurisprudential base which adds weight to the argument that the ICC is likely to look to all resolutions validly adopted by states parties when interpreting the COA definition, to the extent that this is possible under the provisions of the VCLT.

Heller himself concedes that 'there is clearly some ambiguity concerning what qualifies as a "manifest" violation of the UN Charter', but goes on to argue that the Understandings 'are designed to make it *more difficult* to find a manifest violation, not to clarify the definition of "manifest".'[38] The author contends that by making a manifest violation more difficult to satisfy, the Understandings inherently clarify the meaning of 'manifest' and should therefore be relied on by the Court if it feels the meaning of 'manifest' is unclear.

The Court would be less likely to rely on Article 32(b) of the VCLT which states that the ICC may rely on supplementary means of interpretation where an Article 31 analysis produces a result that is 'manifestly absurd or unreasonable.' This is based on an ordinary reading of the words 'manifestly absurd or unreasonable' which creates a higher threshold requirement for the Court than mere ambiguity or obscurity under Article 32(a). This does not, however, place reliance by the Court on this option, beyond the realm of possibility.

Finally, the author agrees with Heller's view that while the Understandings can be used to 'confirm the meaning resulting from the application of article 31 [of the VCLT]',[39] this does not give the Understandings any substantive effect as there is no scope for them to alter interpretive conclusions reached under an Article 31 VCLT analysis.[40]

(a) The Rome Statute's amendment procedure

The Rome Statute is ambiguous on the question of how amendments to the statute are to be adopted and subsequently entered into force. These issues have attracted much attention in the academic literature,[41] but a detailed discussion is beyond the

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preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

38 Heller, above n 31, 246.

39 *VCLT* art 32.

40 Heller, above n 31, 246.

41 Roger S Clark 'Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over it' (2009) 20 *European Journal of International Law* 1103, 1114–15; Kress and von Holtzendorff, above n 6, 1196–98; Johan D Van der Vyver, 'Prosecuting the Crime of Aggression in the International Criminal Court' (2010–11) 1 *University of Miami National Security and Armed Conflict Law Review* 1, 41; Donald Ferencz, 'Bringing the Crime of Aggression Within the Active Jurisdiction of the ICC' (2009) 42 *Case Western Reserve Journal of International Law* 531, 534–40; Robbie Manson, 'Identifying the Rough Edges of the

scope of this article. Nevertheless a limited outline is required and thus this section will give a brief overview of the uncertainties surrounding the Rome Statute's amendment procedures.

Article 121(3) outlines that amendments to the Rome Statute can be adopted by consensus or by a two-thirds majority of States Parties.[42] Articles 121(4) and (5) govern how such amendments come into force, and their effects are quite different. Under the Article 121(5) procedure, which refers only to amendments in relation to Articles 5, 6, 7 and 8,[43] changes made to these sections within the statute are only enforceable against those states parties who independently ratify the amendments. Professor Bassiouni professed the view of a majority of states parties that the proposed amendments to the COA were effectively proposals to add to Article 5(2), and were therefore to be governed by the Article 121(5) procedure.[44] The Article 121(5) procedure was tacitly accepted by most states parties at the RC as the correct procedure to use for entry into force of the COA amendments.[45]

By contrast, Roger Clark argues that the proposed COA amendments in Kampala involved several amendments that fell outside of Article 5 including, *inter alia*, Articles 8*bis*, 15 and 23, and should therefore have been governed by the Article 121(4) procedure.[46] This argument was ultimately papered over in the compromise achieved by states parties in Kampala.

The significance of adopting the Article 121(5) procedure as opposed to the Article 121(4) procedure is profound. The ultimate adoption of the Article 121(5) procedure dictates that only those states parties who by their own volition 'opt in' thus submitting themselves to the ICC's COA jurisdiction could potentially be the subject of a 15*bis* State or Prosecutor *proprio motu* referral (see discussion of Article 15*bis* below). On the other hand, had states parties adopted the Article 121(4) procedure, this would have dictated that as soon as 7/8^{ths} of states parties ratified or accepted the COA amendments then all states parties, including the 1/8th of those who had not ratified or accepted the amendments, would have been exposed to potential 15*bis* referrals.

According to Clark, there were many political reasons behind why certain states backed the Article 121(5) option as opposed to the Article 121(4) alternative. First,

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Kampala Compromise' (2010) 21 *Criminal Law Forum (Netherlands)* 417, 418–22. For a particularly in depth discussion of this issue see Roger S Clark, 'Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute' (2009) 41 *Case Western Reserve Journal of International Law* 413. For a good overview of the Article 121(4) *v.* Article 121(5) debate see Professor Bassiouni and Roger Clark, 'International Criminal Law Symposium' (Speeches delivered at the Case Western Reserve University School of Law, 26 September 2008) <http://law.case.edu/centers/cox/webcast.asp?dt=20080926&type=flv&a=0>.

42 Rome Statute of the International Criminal Court, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 121(3) (*'Rome Statute'*).

43 These are the articles that deal with the four core crimes included within the *Rome Statute* at the Rome Conference: the crime of aggression, genocide, crimes against humanity and war crimes.

44 Bassiouni, above n 41.

45 *The Crime of Aggression*, 13th mtg, UN Doc RC/Res 6 (11 June 2010), para 1.

46 Clark, 'International Criminal Law Symposium', above n 41.

some states believed the 7/8^{ths} vote required under Article 121(4) would never be reached, and so for strategic reasons opted for the Article 121(5) interpretation. Second, those states which did not want the amendments to apply to them also opted for the Article 121(5) option. According to Clark 'many States Parties did not approach the Article 121 issue as an interpretation question but more as a political question.'[47]

(b) The definition: Article 8*bis*

Article 8*bis* distinguishes between a state's 'act of aggression' and a leader's 'crime of aggression.'[48] A 'crime of aggression' is defined within the statute as:

> 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.[49]

For the purposes of paragraph 1, 'act of aggression' is defined as 'the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations.'[50] The next paragraph of the Article then refers to a list of 'acts' that are to qualify as an 'act of aggression' in accordance with UNGA resolution 3314 of 14 December 1974. These 'acts' include invasion, attack by one state on the armed forces of another, military occupation, annexation, bombardment, blockade, use of armed forces within another state beyond the terms of any agreement between those two states, providing territory to another state to help that state commit acts of aggression, and the sending by or on behalf of a state of non-military actors to commit acts of aggression upon the territory of another.[51]

(c) Conditions for exercise of jurisdiction: Articles 15*bis* and 15*ter*

The most contentious issue in Kampala was that of determining how the Court would exercise its jurisdiction over the COA. In an attempt to cater to the divergent views on the issue, Article 15*bis,* as drafted by the SWGCA, was eventually split into two parts comprising of Article 15*bis*, which deals with State referrals and Prosecutor (*proprio motu*) referrals, and Article 15*ter* which deals exclusively with UNSC referrals. Paragraph 3 of both Articles 15*bis* and 15*ter* states that the Court cannot exercise jurisdiction over the COA in accordance with those provisions until a decision is taken after 1 January 2017 'by the same majority of States Parties as is required for the adoption of an amendment to the Statute.'[52] Paragraph 2 of both Articles states that the Court may only exercise jurisdiction over the COA subject to

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47 Professor Roger Clark, Rutgers Law School, Camden, New Jersey (Skype interview, 4 October 2011). Professor Clark represented the Government of Samoa in Rome and Kampala and agreed to be interviewed in his personal capacity.

48 'Crime of aggression' is defined in *Rome Statute* art 8*bis* (1), annex I and 'act of aggression' is defined in *Rome Statute* art 8*bis* (2), annex I.

49 *Rome Statute* art 8*bis* (1), annex I.

50 Ibid art 8*bis* (2), annex I.

51 Ibid.

52 Ibid arts 15*ter* and 15*bis*, para 3.

the conditions within those articles 'one year after the ratification or acceptance of the amendments by thirty States Parties.'[53]

Paragraph one of Article 15*bis* authorises the Court to exercise jurisdiction over an alleged COA that has been referred to it by a State Party or the Prosecutor *proprio motu*. Paragraph 4 outlines what has become known as the 'opt-out' clause[54] whereby the ICC may exercise jurisdiction over a COA committed by a State Party under Article 15*bis* 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.[55]

It should be noted that the effect of Article 15*bis*(4) is unclear and many commentators and states parties have differing views on its operation. Some COA experts believe that neither Article 121(4) nor (5) were strictly speaking adopted by Article 15*bis*(4), but that instead a different procedure was adopted whereby once 30 states parties ratify the amendments and the 1 January 2017 resolution is adopted, then the 15*bis* amendments apply automatically to *all* states parties who do not subsequently opt out. This interpretation is based on the wording in Article 15*bis*(4) which states that '[t]he Court may...exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a *State Party*' (Emphasis added).[56] For the reasons outlined below, the author does not agree with this interpretation.

The author agrees instead with the view of McDougall who argues that the amendments will not automatically enter into force for all states parties once 30 states parties have ratified and the 1 January 2017 resolution is adopted.[57] This interpretation is consistent with the ordinary meaning of Resolution RC/Res. 6's first operative paragraph[58] which codifies the intentions of states parties vis-à-vis the COA's amendment procedure.[59] States parties and judges of the ICC should favour an interpretation of Article 15*bis*(4) that recognises states parties' adoption of the Article 121(5) amendment procedure at the Kampala RC. ICC judges may achieve such a result by interpreting 'state party' within Article 15*bis*(4) as

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53 *Rome Statute* arts 15*ter* and 15*bis*, para 2.

54 Clark, above n 18, 703.

55 *Rome Statute* art 15*bis*, para 4.

56 Email from Professor Roger Clark to Jack Williams, 18 October 2011.

57 Email from Dr Carrie McDougall to Jack Williams, 7 October 2011.

58 Resolution RC/Res. 6's first operative paragraph '*Decides* to adopt, in accordance with article 5, paragraph 2, of the *Rome Statute* of the International Criminal Court 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.*' (Emphasis added)

59 This is consistent with Article 31(1) of the *VCLT* which states that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' The ordinary meaning of the first operative paragraph in Resolution RC/Res 6 is clearly that States Parties intended Article 121(5) to be adopted in relation to the entry into force of the COA amendments. See *VCLT* art 31(1).

including any state party that has ratified the COA amendments in accordance with the Article 121(5) amendment procedure. Such an interpretation is consistent with Article 31(2) of the VCLT as it recognises and adopts Resolution RC/Res. 6's first operative paragraph.[60]

Lastly, the 'opt out' procedure within Article 15*bis*(4) enables states parties to ratify the COA amendments and thereby form part of the 30 states parties required to activate the ICC's COA jurisdiction, while leaving open the possibility of opting out of COA jurisdiction if they do not wish to be personally bound. This gives states the power to help activate the ICC's COA jurisdiction over other states, which they may wish to pursue for deterrence purposes,[61] all-the-while ensuring that their own nationals are immune from COA prosecution under Article 15*bis*. It also gives states the option after ratifying the COA amendments to opt out of their COA commitments if circumstances change and they no longer wish to be bound.

Paragraph 5 of Article 15*bis* protects the nationals of non-states parties from being referred by states parties or by the Prosecutor *proprio motu* for an alleged COA when committed by that State's nationals or on its territory. This Article was added to appease the three permanent members of the UNSC who have not ratified the Rome Statute, namely the US, China and Russia, as well as other non-states parties who wished to reserve the right to use military force on the territories of other states without fear of prosecution via state or *proprio motu* referrals.[62]

Paragraphs 6, 7 and 8 of Article 15*bis* deal with the relationship between the UNSC and 15*bis* referrals. Where a state refers an alleged COA to the ICC, or the Prosecutor initiates an investigation *proprio motu*, and the Prosecutor believes '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.'[63] If the UNSC has made an act of aggression determination, the Prosecutor may then proceed with a COA investigation.[64] Paragraph 8 of Article 15*bis* reads:

> 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 authorised 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.[65]

Under Article 15 and Article 39(2)(b)(iii) of the Rome Statute, three judges or a single judge of the Pre-Trial Division must decide whether to authorise the

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60 The relevant paragraph of Article 31(2) of the *VCLT* reads: 'The context for the purpose of the interpretation of a treaty shall comprise, *in addition to the text*, including its preamble and annexes...' (emphasis added). See *VCLT* art 31(2).

61 Some States may wish to see the COA amendments enter into force for a certain state or states which they see as a threat to their own territorial integrity, in the hope that this may act as a deterrent.

62 Clark, above n 18, 705.

63 *Rome Statute* art 15*bis*, para 6.

64 Ibid para 7.

65 Ibid para 8.

commencement of an investigation. Article 16 of the Rome Statute provides that the UNSC can prevent an ICC investigation from commencing or proceeding where a resolution is adopted by 9 of the 15 members of the UNSC with the support of all five permanent members.[66] Finally, in order to preserve the Court's independence over the determination of any alleged COA, paragraph 9 of Article 15*bis* adds that '[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.'[67]

Paragraph 1 of Article 15*ter* authorises the Court to exercise jurisdiction over the COA where a situation has been referred to it by the UNSC.[68] Provided that 30 ratifications are eventually received and the ASP votes by consensus or a two-thirds majority[69] to bring the COA within the active jurisdiction of the Court, the nationals of *any* state, 'irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard',[70] can be referred to the ICC by the UNSC.[71] As in Article 15*bis*, paragraph 4 of Article 15*ter* adds that '[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.'[72]

(d) The Kampala compromise: a positive step forward for international criminal justice?

The compromise reached at Kampala is a promising agreement in the sense that it has successfully defined the COA,[73] which not only gives individual states the opportunity to incorporate the crime into their own domestic law,[74] but it also lays the groundwork for potential future ICC prosecutions over the COA. The agreement also establishes the framework for the exercise of jurisdiction over the crime, which is a remarkable diplomatic achievement given the wide and divergent views that states brought to the table in Kampala. Having the conditions for exercise of jurisdiction clearly set out in a consensus agreement puts the Court in a strong position to begin prosecuting crimes of aggression once it has gained the requisite maturity and experience to do so. What constitutes 'requisite maturity and experience' is dealt with in the next section. Having an established jurisdictional

66 Charter of the United Nations art 27.

67 *Rome Statute* art 15*ter*, para 4.

68 Ibid para 1.

69 Consensus or a two-thirds majority of States Parties is what is required for the adoption of an amendment to the Statute, see *Rome Statute* art 121(3).

70 *Rome Statute* annex III, para 2.

71 Clark, above n 18, 702–03.

72 *Rome Statute* art 15*ter*, para 4.

73 Very few commentators believe that the definition adopted in Kampala is a perfect one, however many academics do contend that it is a reasonable compromise given the circumstances, and that the adoption of the definition is a better result than had States Parties adopted no definition at all in Kampala. For an example of this view see interview with McDougall, 2 September 2011 (interview on file with the author) and Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', above n 14, 1129.

74 Jennifer Trahan explains some of the positive outcomes that may be brought about by individual states incorporating the definition of the COA adopted in Kampala into their own domestic law. For further detail see Trahan, above n 26, 89.

regime removes the obstacle of states parties having to negotiate a jurisdictional framework once the decision is made to add the COA to the Court's active list of prosecutable crimes. The fact that the jurisdictional regime does not involve a UNSC monopoly over the COA is also, in the opinion of the author, a positive step forward for international criminal justice.[75]

IV. When, If Ever, Should States Parties Ratify and Not Opt Out of the Kampala Agreement on the Crime of Aggression?

This section argues that the ICC has not yet gained adequate experience and maturity to exercise jurisdiction over the COA. The section commences with an outline of the highly politicised and controversial nature of the crime, and argues that for this reason the Court should only take on such jurisdiction once it is more established and in a better position to effectively deal with the inherent difficulties associated with COA prosecution. Second, the section argues that adding the COA to the Court's list of prosecutable crimes at this point could risk overburdening a young Court that is still working to establish its authority over the three crimes already within its active jurisdiction.

On May 10 2010, the Open Society Institute sent a letter to the Foreign Ministers of all ICC member States encouraging them to postpone the activation of the Court's jurisdiction over the COA in order to give the ICC time to gain more maturity and experience, and for states to reach a broader consensus on the outstanding issues in relation to the crime's definition and exercise of jurisdiction. The letter was countersigned by more than 40 civil society organisations from around the world, including the President of the International Bar Association, Fernando Pelaez-Pier, and the head of the International Crime in Africa Program at the Institute for Security Studies, Anton du Plessis.[76]

The letter first raised concerns that the COA 'raises fundamentally political considerations about a state's initial decision to resort to the use of force.'[77] HRW agrees with this view as laid out in their pre-Kampala report, 'Making Kampala Count'. In that report HRW warns that 'taking up prosecutions of aggression could

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75 Many academics and NGOs have argued that there is no justification at law, nor is it desirable from an international legal policy perspective, for the UNSC to have a jurisdictional monopoly over the COA. For examples of this view see Niels Blokker, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 *Leiden Journal of International Law* 867; HRW, above n 2; Kress, 'The Crime of Aggression before the First Review of the ICC Statute', above n 14, 862, where he explains that such a UNSC monopoly would 'adversely affect the Court's legitimacy, as it would fly in the face of the absolutely essential aspiration of the law applying equally to all'; Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2010) 20(4) *European Journal of International Law* 1117, 1125; Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', above n 14, 1143 and Amnesty International, *'International Criminal Court: Making the Right Choices at the Review Conference'* (21 April 2010), 13 <http://www.amnesty.org/en/library/info/IOR40/008/2010>.

76 For a full list of all 40 signatories see Open Society Institute, *Open Letter to Foreign Ministers of ICC Member States* (May 10 2010), 3–7 <http://www.soros.org/initiatives/justice/news/icc-aggression-20100510>.

77 Ibid 2.

link the ICC to highly politicised disputes, such as border incursions, territorial disputes, and secession movements supported by external state actors.'[78]

According to Mark Ellis, the issue with the COA is that 'it involves an assessment of a state's intentions and actions, and what is an aggressive step by one state is not necessarily seen by other states in the same way.'[79] The other three crimes are crimes against individuals, whereas the COA is a crime against states which is inherently more political and controversial.[80] Ellis is concerned that prosecuting the COA at this stage in the Court's life could lead to accusations of politicisation which could damage the Court's reputation.[81]

The ICC already faces claims of politicisation[82] and adding the COA at this time would only exacerbate such an image.[83] According to HRW, forcing the Court to make aggression determinations could 'give rise to perceptions of political bias and instrumentalisation — even if such perceptions are wholly unfounded.'[84] Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) agrees with this view. Goldstone explains that one of the greatest challenges he faced as Chief Prosecutor at the ICTY was convincing the Serbian people that the Court had not been set up as a conspiracy against the Serbian nation. According to Goldstone, convincing the Serbian public that the ICTY was in fact a politically neutral Court set up to objectively prosecute crimes under international law would have been a much more difficult, perhaps impossible task had the ICTY also had jurisdiction over the COA.[85] Goldstone gives an example of the 'Catch 22' situation he could have been placed in as a prosecutor had he been required to investigate and prosecute crimes of aggression:

> Prosecuting that decision [the decision to go to war] would have inflamed suspicions of an anti-Serbian plot; choosing not to prosecute would have incited countervailing charges that the Tribunal was not fulfilling its mandate.[86]

Goldstone argues that such a controversy would have distracted the Court from fulfilling its mandate of investigating and prosecuting the crimes then being committed in the former Yugoslavia. This leads us to the article's next point; that exercising jurisdiction over the COA at this stage in the Court's life risks overburdening a nascent and relatively inexperienced institution.

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78 HRW, above n 2.

79 Interview with Mark Ellis, Executive Director, International Bar Association (London, 19 August 2011).

80 Ibid.

81 Ibid.

82 Open Society Institute, above n 76, 2; Richard Goldstone, 'Prosecuting Aggression', *The Opinion Pages, The International Herald Tribune* (New York), 27 May 2010. An example of such claims of politicisation includes the accusation that the Court's prosecutorial attentions have been thus far too centred on Africa. See below for a more in depth discussion of this point.

83 Open Society Institute, above n 76, 2.

84 HRW, above n 2.

85 Goldstone, above n 82.

86 Ibid.

Also included in the aforementioned Open Society Institute's open letter was the argument that adding the COA to the Court's list of prosecutable offences at this stage in the life of the ICC risks overburdening a Court that 'is still striving to prosecute and try those responsible for current crimes.'[87] After over a decade in existence, the ICC has only just completed its first full trial and successful prosecution in the case of *The Prosecutor v Thomas Lubanga Dylio.*[88] In the words of Goldstone, 'the Court still has much work to do in effectively investigating and prosecuting the crimes over which it already exercises jurisdiction.'[89]

As Ren Blattmann and Kïrsten Bowman point out, 'the *sui generis* character of the proceedings before the Court confirms...that there is no common practice to rely on.'[90] The Court needs to develop its procedural base and the expediency of dealing with cases before it takes on another complex crime within its active jurisdiction. According to Ellis, 'adding a new and fairly controversial crime to the ICC's mandate would overburden the Court; a Court that is nascent and still struggling with its own challenges in solidifying its position as *the* international Court.'[91] Ellis goes on to argue that 'it would be better to strengthen the institution in its ability to deal with the complexities of those who have committed crimes of genocide, war crimes and crimes against humanity.'[92] These are not easy crimes to deal with; the ICC and many other Courts have struggled with these crimes[93] and Ellis does not believe that now is the time to add an extra layer of burden to the Court's mandate in the form of a COA.[94] Ellis also makes the point that:

> the Court has not had a sufficient working history; the Court has only just geared up over the last several years and we're only beginning to see the Court function as it was meant to function, and it's quite limited geographically. It needs to be successful

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87 Open Society Institute, above n 76, 2.

88 Thomas Dyilo was found guilty and sentenced to 14 years imprisonment on 14 March 2012 for the war crimes of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities pursuant to article 8(2)(e)(vii) of the *Rome Statute*. See International Criminal Court, *The Prosecutor v Thomas Lubanga Dyilo* <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic% 20republic%20of%20the%20congo?lan=en-GB>.

89 Goldstone, above n 82. This view is also shared by Harold Koh, head of the United States' delegation to Kampala 31 May to 11 June 2010. See Harold Koh, (Speech delivered at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court, New York, 23 March 2010) <http://usun.state.gov/briefing/statements/2010/139000.htm>.

90 René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 711, 724.

91 Interview with Ellis, 19 August 2011.

92 Ibid.

93 The ICTY and ICTR have also had to deal with the prosecution of these crimes. For the mandate and jurisdiction of the ICTY see SC Res 808, UN SCOR, 3175th mtg, UN Doc S/RES/808 (22 February 1993). For the mandate and jurisdiction *ratione materiae* of the ICTR see SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994).

94 Interview with Ellis, 19 August 2011.

on a lot of fronts before it steps up to the next level in embracing prosecutions against the COA.[95]

The ICC has received much criticism for its lack of geographic reach. The only situations before the ICC involve African States, and this has led many to criticise the Court for being too geographically focused on the African continent. Some, including UK Barrister Courtenay Griffiths, Charles Taylor's legal counsel before the Special Court for Sierra Leone, take a more extreme view and accuse the ICC of reflecting racist attitudes at an intentional level. Griffiths also accuses the ICC of placing certain powerful countries above the law, and goes further in accusing the ICC of being 'used as a neocolonialist tool.'[96] Griffiths also believes that the ICC is used by powerful nations to indict individuals on the African continent who do not submit to the ideals and wishes of western nations.[97]

This extreme view is countered by many commentators including: Stephen Lamony, the Coalition for the International Criminal Court's (CICC's) Outreach Liaison for Africa (and a Ugandan born national); Mark Ellis; Sandile Ngcobo, former Chief Justice of South Africa's Constitutional Court; Fatou Bensouda, Gambian national and ICC Deputy Prosecutor; and Kofi Annan, national of Ghana and former U.N. Secretary–General, to name but a few. Ellis highlights the fact that 'three of the situations before the Court were situations that were self-referred. These States felt that the Court was the best place to hold individuals accountable for crimes committed within those African States.'[98] Former Chief Justice of the South African Constitutional Court, Sandile Ngcobo, argues that 'abuses committed in sub-Saharan Africa have been among the most serious, and this is certainly a legitimate criterion for the selection of cases.'[99] The ICC's Chief Prosecutor Fatou Bensouda rejects claims that the ICC is unfairly targeting Africa. Instead she argues that the Court is protecting victims of atrocities on the African continent. The fact that the ICC is so active in Africa, she contends, is a positive sign 'that African leaders are taking leadership in international criminal justice.'[100] Kofi Annan

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95 Ibid.

96 Philip Williams, Interview with Courtenay Griffiths, UK Barrister and Charles Taylor's legal counsel before the Special Court for Sierra Leone (Television Interview, 4 February 2011) <http://www.abc.net.au/news/2011-02-04/one-plus-one---friday-4-february/1931084>.

97 Ibid.

98 Interview with Ellis, 19 August 2011. Three out of the seven situations before the ICC have been self referred (Central African Republic, Democratic Republic of the Congo and Northern Uganda), two have been referred by the UNSC (Libya and Darfur) and two have been referred by the Prosecutor *proprio motu* (Kenya and most recently Côte d'Ivoire). For more information see CICC, *Cases and Situations* <http://www.iccnow.org/?mod=casessituations>.

99 Franny Rabkin, *'No Anti-African Bias' at International Criminal Court* (19 July 2010) Africa Confidential <http://allafrica.com/stories/201007200391.html>.

100 Tim Cocks, *Interview-ICC says protecting Africans, not targeting them* (June 29 2011) Reuters <http://af.reuters.com/article/centralAfricanRepublicNews/idAFLDE75S1S220110629>.

agrees with this view stating that 'in all of these cases, it is the culture of impunity, not African countries, which are the target.'[101]

Unfortunately, despite the cogent arguments in favour of the ICC's current geographical concentration on Africa, many still believe that the Court is unfairly targeting African nations. It is the author's view that jurisdiction over the COA should be delayed to give the Court, states parties, Non-Governmental Organisations (NGOs) and academics more time to convince ICC sceptics that the Court is not unfairly targeting Africa. This job will be made easier once the Court expands its geographic reach, which, as Ellis points out, the ICC 'is already doing with some of the preliminary investigations it is undertaking.'[102] Ellis espouses his confidence that 'the Court will have a much broader geographical reach in years to come.'[103] Assuming that states parties support this expansion,[104] scepticism about the Court's intentions will fade. Taking on the COA at a time when the Court is already facing much criticism about its intentions and geographical reach would not be a positive step forward for the Court. The ICC would be much wiser to delay exercising jurisdiction over the COA until the Court's geographic reach widens and scepticism about the ICC's intentions weakens.

Ellis also makes the point that the terms adopted in Kampala as part of the definition of the COA including 'gravity', 'scale' and 'manifest' are highly subjective and do not have a clear meaning in international law.[105] This is in contrast with the three crimes already within the Court's active jurisdiction which have at least been tested to a greater or lesser extent in international courts. The *Akayesu*[106] trial is one such example where a successful genocide and crimes against humanity prosecution was made out in the ICTR in 1998. These terms should be clarified before states parties submit their nationals to potential COA prosecutions.[107]

Once such terms have been properly defined and the Court further establishes itself and its control over the three crimes already within its jurisdiction, the ICC will be in a stronger position and have a concrete base of experience from which to

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101 Kofi Annan, 'Justice vs. Impunity', *The Opinion Pages, International Herald Tribune* (New York), 31 May 2010.

102 Interview with Ellis, 19 August 2011.

103 Ibid. Clark also expressed his view that the ICC is bound to widen its geographic reach in the foreseeable future, as 'political pressures will force them in that direction.' According to Clark, both the UNSC and the prosecutor are likely to refer a non-African national in the foreseeable future. See Skype interview, 4 October 2011.

104 Ellis makes the point that the success *vel non* of the Court's anticipated geographic expansion will largely depend on the support *vel non* of States Parties in relation to the Court taking on a new geographic focus. See interview with Ellis, 19 August 2011.

105 Ibid. This view was also shared by the Cuban delegation to the Kampala RC, see Assembly of States Parties' Secretariat, above n 23, 125. For further examples of this view see Michael Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 *Yale Journal of International Law* 71, 101–02 and Andreas Paulus, 'Peace Through Justice – The Future of the Crime of Aggression in a Time of Crisis' (2004) 50 *Wayne Law Review* 1, 24.

106 *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998).

107 For a further discussion of this point, see point 6 of the SWGI section below.

deal more effectively with the complexities inherent in COA prosecutions. When the requisite level of experience and control is reached, in consultation with the developed indicia below, plus any recommendations developed by the SWGI, states parties should move to endow the Court with the power to exercise jurisdiction over the COA.

The delegation of Norway at the RC also drew attention to the fact that 'the resources of the Court are limited and that any investigation concerning the COA would be extremely resource consuming, because it could entail investigating on the basis of allegations without access to substantial evidence on all relevant elements.'[108] As a result the Court should ensure it has adequate financial, human and other resources within its control before it takes on the potentially burdensome prosecutions over alleged crimes of aggression. What constitutes adequate financial, human and other resources should be determined by the SWGI in consultation with a professional auditing team.[109]

More work is also needed to improve the Rome Statute system as a whole before the ICC can be in a strong position to exercise jurisdiction over the COA. The ICC is still grappling with issues of state cooperation, complementarity legislation within the domestic jurisdictions of States Parties, the impact of the ICC system on victims and affected communities, and peace and justice debates.[110] Greater state cooperation with the Court, especially in relation to payment of monies owed,[111] and in terms of compliance with ICC arrest warrants,[112] should be

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108 Statement of the delegation of Norway at the ICC's Kampala RC. For a full transcript of this statement see Assembly of States Parties' Secretariat, above n 23, 123.

109 For a more detailed discussion of this proposal please see the indicia section below.

110 The article does not have the scope to enter into a detailed discussion of all the issues surrounding these four elements that the *Rome Statute* system is currently dealing with. For a detailed discussion of the debates on these issues in Kampala see Assembly of States Parties' Secretariat, above n 23, 77–120. For an overview of the Peace v Justice debate see Congressional Research Office, *International Criminal Court Cases in Africa: Status and Policy issues* (22 July 2011), 28–30 <http://www.fas.org/sgp/crs/row/RL34665.pdf>. See also Annan, above n 101.

111 It was noted in Kampala that under Article 112, paragraph 8, first sentence of the *Rome Statute*, which deals with financial payments to the Court, eight States Parties were in arrears of payment. Five of these states made a request to be exempt from a loss of voting rights, which was granted by the conference in its 9th and 10th meetings. See Assembly of States Parties' Secretariat, above n 23, 3.

112 Despite the ICC's issuance of an arrest warrant for Sudanese President Omar Hassan Al Bashir on 4 March 2009 for alleged war crimes and crimes against humanity, the Sudanese leader continues to travel freely through many African countries, including through the territories of States Parties to the *Rome Statute* including Chad, Djibouti and Kenya, who have all failed to arrest Al Bashir in breach of their obligations under the *Rome Statute*. For more information on this see CICC, *Cases and Situations: Darfur* <http://www.iccnow.org/?mod=darfur>. In addition. another 11 warrants of arrest are still outstanding for Mr Joseph Kony, Mr Vincent Otti, Mr Okot Odhiambo and Mr Dominic Ongwen of Uganda (outstanding since 2005), Mr Bosco Ntaganda (outstanding since 2006) and Mr Sylvestre Mudacumura (outstanding since 13 July 2012) of the DRC, Mr Ahmad Harun, Mr Ali Kushayb and Mr Abdel Hussein of Darfur, Sudan and Mr Saif Al-Islam Gadaffi and Mr Abdulla Al-Senussi of Libya (outstanding since 27 June 2011). For the latest information on the status of ICC arrest

improved before the Court takes on the COA. The ICC does not have the power to make arrests, and relies on states parties to bring alleged perpetrators of international crimes to justice. Greater complementarity legislation should also be implemented within the domestic jurisdictions of States Parties, and a greater understanding and consensus should be reached on the impact of the ICC on victims and affected communities, as well as on peace and justice issues, before the Court commits to the COA, especially given its inherently controversial attributes.

The difficulties surrounding the COA and its politicised nature will naturally diminish as the ICC widens its geographic reach, continues to run successful, objective and transparent investigations, and as NGOs, academics and governments continue their work in persuading sceptics of the Court through evidence and data that ICC prosecutions are indeed based on objective standards as opposed to subjective, politically motivated considerations. Accordingly, when the ASP is satisfied that the Rome Statute system is better established in consultation with the developed indicia below, along with any recommendations of the SWGI, States Parties, NGOs and other international criminal law experts should move to encourage states to ratify the amendments on the COA thus bringing it within the active jurisdiction of the Court.

Anton du Plessis, Mark Ellis, Fernando Peláez-Pier, Aryeh Neier, President of the Open Society Institute *et al* believe that the ICC has the potential to be an effective institution in prosecuting the COA but not until states parties reach a broader consensus on the outstanding issues already discussed in this article, and not until the Court matures and maintains some stability in carrying out its current functions.[113] The author agrees with this view, and does not believe states should ratify the amendments adopted in Kampala on the COA until the Court is in an adequate position of maturity and strength to enable it to effectively deal with the crime with an overwhelming majority of support from the international community, and in a way that does not ultimately damage the Court's integrity and reputation.

In an attempt to guide states parties in their decision-making in relation to when, if ever, they should ratify the Kampala amendments on the COA, it is proposed, as previously mentioned, that the ASP establish a SWGI, that would be established to develop a set of indicia to help inform states parties as they get closer to the 1 January 2017 deadline as to whether or not the ICC is in a position of adequate strength and maturity to begin effectively exercising jurisdiction over the COA. This knowledge will empower states to first make an informed decision as to whether or not they ratify the amendments on aggression on, before or after 1 January 2017 so as to help reach the thirty states hurdle required for entry into force of the COA amendments,[114] and whether they vote to form part of the two-thirds majority required for the adoption of the provisions on the COA.[115] Assuming that the COA receives the required votes and ratifications, these indicia could then assist

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warrants see International Criminal Court, *Cases and Situations* <http://www.icc-cpi.int/Menus/ ICC/Situations+and+Cases/>.

113 Interview with Ellis, 19 August 2011; Open Society Institute, above n 76, 1–2.

114 *Rome Statute* arts 15*ter* and 15*bis*, para 2.

115 Ibid para 3.

states parties into the future by helping to inform their decision relating to whether they 'opt in'[116] or 'opt out'[117] of the ICC's Article 15*bis* State referral and Prosecutor *proprio motu* jurisdiction.

The first point to note in relation to the indicia is that they are not intended to be binding on States Parties, but rather a set of guiding principles to help inform the ratification decisions of states parties in relation to the Kampala amendments on the COA. It is recommended that the SWGI involve diverse stakeholders including representatives from states parties, non-states parties, civil society[118] as well as key members of the academic community.

Some may argue that having an external body set criteria to judge whether the Court is 'mature' could have negative implications for the independence of the ICC. The author rejects this notion on the basis that the developed indicia are designed to be a guide only to help states parties in their decision-making vis-à-vis the COA. states parties are still free to ignore the indicia or sections of the indicia altogether, and can make decisions based on factors that the indicia do not address. The majority of the SWGI will be made up of states parties to the Rome Statute who make all decisions related to the ICC's jurisdiction in any case. The indicia are simply a means by which states parties can help themselves to clarify the issue of when, if ever, the Court will be ready to take on the COA with strength and confidence.

It is recommended that a venue similar to that of the Liechtenstein Institute on Self-Determination at Princeton University be used for the SWGI's discussions. Stefan Barriga describes the advantages of holding discussions at such a venue, in contrast with the rather sterile and formal environment of the UN in New York.[119] Such a venue will help facilitate the informal discussions required between States Parties, non-States Parties, civil society members and academics for there to be a successful outcome in terms of the SWGI's formulation of the proposed indicia.

When the idea of a SWGI was put to Dr. Carrie McDougall, she warned that in shaping any such criteria states parties should be careful so as not to come across as being openly critical of how the Court is performing its current functions.[120] States should keep this in mind when discussing the criteria, and in so doing reinforce not only the Court's successes in terms of its approach thus far to the other three crimes,

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116 States can choose to 'opt in' *vel non* to the ICC's Article 15*bis* jurisdiction by ratifying the amendments on the COA in accordance with the Article 121(5) amendment procedure.

117 States can choose to 'opt out' *vel non* of the ICC's Article 15*bis* jurisdiction by not ratifying the amendments on the COA in accordance with the Article 121(5) amendment procedure. If states do 'opt in' via Article 121(5), but then decide to 'opt out' again, they can do so at any time by lodging a declaration with the registrar in accordance with *Rome Statute* art 15*bis*, para 4.

118 Some examples could include, *inter alia*, the CICC, Amnesty International, HRW, Parliamentarians for Global Action and No Peace Without Justice.

119 For a discussion of the advantages of conducting informal negotiations in such a venue see Barriga, Danspeckgruber and Wenaweser, above n 17, 3–4.

120 Interview with McDougall, 2 September 2011. Please note that McDougall believes the idea of a SWGI is unnecessary and could be detrimental to the ICC system; email from McDougall to Williams, 12 October 2012.

and the recent completion of its first successful prosecution, but states parties should also emphasise that developing these criteria represents the commitment of states parties and civil society to ensure that the COA is brought within the Court's active jurisdiction at the right time so as not to damage the reputation and integrity of what states parties consider to be this most important international institution. Discussions on the proposed indicia should begin as soon as practicable, given that states parties have had the option to form part of the 30 states parties required for the entry into force of the COA amendments since the compromise agreement was adopted in Kampala in June 2010.

Before states parties activate the jurisdiction of the Court over the COA, and before states submit their nationals to the Court's COA jurisdiction, they should consider, subject to any discussions of the SWGI, the points outlined below.

1. Before the COA is brought within the ICC's active jurisdiction, it would be preferable for the Court to have achieved a successful prosecution for one of each of the current three crimes already within the ICC's active jurisdiction. This would demonstrate that the Court had sufficiently grappled with the crimes already within its jurisdiction and had adequately established itself in the international legal order to more effectively deal with the controversial and highly politicised COA. It should be noted that this indicia is 'positive' in nature in that a successful prosecution over the three crimes already within the Court's jurisdiction should indicate to states parties that the Court is ready to take on the COA. However, a failure of the Court to successfully complete a genocide and/or a crimes against humanity prosecution should not necessarily be viewed as an indication the Court is not ready to take on the COA if the ICC has by that stage made several successful prosecutions in relation to other crimes, and has in the process substantially refined its procedures and developed its jurisprudential base.
2. One of the concerns of HRW in adding the COA to the ICC's mandate at this stage in the Court's life was the fear that adding the crime could raise and disappoint people's expectations, 'leaving communities feeling abandoned and disinclined to trust the other work of the Court.'[121] States should ensure that if they are to activate the Court's jurisdiction over the COA in 2017 that the Court has the capability, resources and resolve to prosecute crimes of aggression from the outset of its jurisdictional mandate to ensure that people's expectations of the Court are not disappointed.
3. Sean Murphy argues that the Court currently enjoys majority but not overwhelming support from the international community.[122] Currently 121 states out of a potential 195 have ratified the Rome Statute.[123] It is

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121 HRW, above n 2.

122 S D Murphy, 'Aggression, Legitimacy and the International Criminal Court' (2009) 20 *European Journal of International Law* 1147, 1156.

123 Clark contends that the only existing 'states' other than the 193 UN members that might ratify the *Rome Statute* include Niue and the Holy See; email from Professor Clark to Jack Williams, 11 August 2012.

proposed that 80% (currently 156) of these states ratify the Rome Statute before the COA is brought within the active jurisdiction of the ICC. This will bring the ICC closer to the overwhelming support the author believes the Court requires if it is to successfully prosecute the COA without damaging the Court's integrity and reputation. Another obvious milestone to add would be that of a further P–5 Rome Statute ratification, giving the ICC majority support amongst the permanent members of the UNSC. It is however recommended that the SWGI does not add this to the indicia guidelines because it is unlikely that either the US or China will ratify the Rome Statute in the foreseeable future. On the other hand, it is possible that Russia could ratify the Rome Statute in the coming years,[124] however this is far from certain, and in any event, adding this element to the list of indicia would give too much power to Russia to influence states parties in their decision-making in relation to the COA. Having a greater support base from a wide variety of nations, particularly developing states, will reduce the ability of ICC sceptics to claim that any given COA prosecution is politically motivated if it is backed and supported by a large and varied cross-section of the international community.

4. The Court needs to see greater cooperation from states before it accepts the COA within its active jurisdiction. There are still serious problems with state cooperation and the ICC. In particular, the Court needs to see greater cooperation from states parties in terms of the carrying out of arrest warrants before the ICC takes on the COA.[125] Exactly what constitutes a minimum of state cooperation for the Court to be in a position of strength in taking on the COA is something that should be developed by the SWGI. This particular indicia should be considered 'positive' in nature. In other words, improvements in state cooperation should be seen as an indication the ICC is in a position to effectively exercise jurisdiction over the COA. On the other hand, continued or further uncooperative behavior from states should not necessarily be seen as an indication the ICC is not ready for the

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124 Clark stated that the likelihood of the Chinese and the Americans ratifying the *Rome Statute* in the foreseeable future was 'remote'. Clark did assert however that in a recent conversation with Russian officials they had informed him that a Russian ratification of the *Rome Statute* was 'possible in the foreseeable future.' In the case of the Chinese, Clark stated that China had too many problems with, *inter alia*, Tibet and Xinjiang and that a ratification in the coming years was out of the question. According to Clark the Chinese authorities are afraid of indictments for crimes against humanity for their potential future involvement in non-international armed conflicts. See Skype interview, 4 October 2011. In the case of the US, under the Bush Snr Administration the Americans withdrew all Government support for the ICC and actively disengaged with the Court (eg, the Americans were absent from the discussions of the SWGCA). Under the Obama Administration the US's approach towards the Court has been one of greater participation and engagement (eg, the US was present as a non-State Party at the Kampala RC). Despite its recent rapprochement with the Court, the American Government has made no indication that a US ratification of the *Rome Statute* is likely to be forthcoming in the foreseeable future.

125 As mentioned above, the ICC has 12 outstanding arrest warrants. For more information see above n 112.

COA as this would give too much power to recalcitrant states to influence a delay in the entry into force of the COA.

5. As mentioned above, the delegation of Norway expressed its concerns in relation to the highly resource consuming nature of any potential ICC COA prosecutions.[126] For this reason it is suggested that the SWGI engage an auditing team to determine the minimum financial, human and other resources required to ensure the Court has adequate resources to prosecute both the COA as well as the other three crimes properly and effectively. states parties should not vote to bring the COA within the active jurisdiction of the ICC until the required minimum resources are within the active resource pool of the Court. In order to encourage financial support from states parties to meet the Court's resources needs, no more than five states parties should be in arrears of payment at the time the COA is brought within the Court's active jurisdiction. The SWGI should note that this indicia could be used by certain powerful states to delay the activation of COA jurisdiction, by placing pressure on certain states to remain or become in arrears of payment. As a result, the SWGI should consider this carefully and balance the risk just outlined with the potential benefit of ensuring that the ICC has adequate resources to effectively prosecute crimes of aggression.

6. As previously mentioned, Mark Ellis *et al* make the point that the terms used within the COA definition, such as 'character', 'gravity', 'scale' and 'manifest', are ambiguous terms that do not have a settled meaning in international law.[127] As a result it is suggested that the SWGI develop an Article 8*ter*, to be adopted at the RC on 1 January 2017, that will define what is meant by the terms 'character, gravity, scale and manifest.'[128] Some may argue that it would be preferable to allow the Court to develop the meaning of these terms in its jurisprudence, rather than by imposing definitional constraints on the ICC. The author disagrees with this view, and contends that states should be given clarity to the furthest extent possible of the meaning of treaties, or parts of treaties, to which they are considering becoming a party.

   This view is consistent with the rule of law and the positivist theory of statutory interpretation. It should be the job of states to dictate the meaning of treaties to which they are party, as opposed to unrepresentative judges who are few in number and who do not represent the will of States at treaty negotiations. The new Article 8*ter* will give states more certainty and clarity when considering whether or not to submit their nationals to COA jurisdiction. In addition it will reduce the scope for COA sceptics to accuse

126 Statement of the delegation of Norway at the ICC's Kampala Review Conference, see Assembly of States Parties' Secretariat, above n 23, 123.

127 Interview with Ellis, 19 August 2011. See also Stahn, above n 29.

128 It seems sensible to adopt a new Article 8*ter* as opposed to further 'Understandings' given their uncertain legal status in international law (please refer to discussion of the legal status of the Understandings above).

the Court of being politically motivated in its decision-making as the Court will have less discretion to decide whether certain criteria are met if such ambiguous terms are more strictly defined. Until these words are defined with greater clarity states should be encouraged not to opt in to the Court's COA jurisdiction.

7. At present, accused persons before the ICC are not receiving their fundamental right to be tried without undue delay. For example, Thomas Lubanga was transferred to the Hague on 16 March 2006 but not convicted until 14 March 2012.[129] Before the ICC takes on the COA, improvements must be made to the expediency of the Court's proceedings. As Blattmann and Bowman point out, 'the present cases are the first before the ICC, and as such, every step taken by Chambers, parties, participants and the Registry are on undiscovered grounds.'[130] Such delays will naturally diminish over time as the Court gains more experience, refines its procedures and develops its jurisprudential base.

The agreement reached in Kampala on the COA offers a workable legal framework for the approach that this article has argued states parties should take going forward with respect to the COA. The delay in exercise of jurisdiction until *at least* 1 January 2017, the decision of states parties to adopt the 'opt in' Article 121(5) procedure as well as the 'opt out clause' means that in effect the ICC is highly unlikely to be faced with the challenge of prosecuting a COA in the foreseeable future. This will give the ICC *at least* four years to further establish itself, and to begin achieving some of the milestones this article has argued the Court should attain before it takes on the COA.

The vote of 30 states parties on, before or after 1 January 2017, along with the Article 121(5) 'opt in' clause and the 'opt out' clause will give states flexibility as to whether or not they decide, in consultation with the developed indicia, to:

1. Form part of the 30 states parties required to bring the COA within the active jurisdiction of the ICC on, before or after 1 January 2017;
2. Form part of the two-thirds majority required for the adoption of the COA amendments on 1 January 2017;
3. Accept the COA amendments in accordance with Article 121(5); or
4. Accept the COA amendments in accordance with Article 121(5) and subsequently 'opt out' of the ICC's COA jurisdiction.

The Kampala legal framework and the indicia model as described above will give states parties the time and the information they require to make an informed decision as to when, if ever, they should submit their country's nationals to the ICC's 15*bis* COA jurisdiction. Ensuring that the Court's COA jurisdiction is not activated too early will be crucial in protecting the reputation and integrity of this nascent institution.

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129 International Criminal Court, above n 88.
130 Blattmann and Bowman, above n 90.

V. Conclusion

This article has argued that the ICC is not yet established or experienced enough to deal with the COA which is a highly political, controversial and potentially burdensome crime for this nascent and developing international institution. It has also been argued, however, that it is imperative for the ICC to be armed with the power to prosecute blatant crimes of aggression committed by states as soon as the Court is ready, in an effort to punish leaders of states who commit crimes of aggression, and to deter individuals who consider committing such acts.

Nevertheless it has been argued that at this stage the ICC is not in a position to take on the COA, but that it should do so when it has obtained the experience and maturity it requires to prosecute the crime effectively. The article has also suggested the establishment of a SWGI which would be tasked with developing a set of indicia guidelines to help states parties identify when the Court is ready to deal with the COA. An initial set of indicia has been developed by the author, and it has been argued that the legal framework on the COA adopted in Kampala is suitable for the practical implementation of the model put forward by this article.

In sum, while it is important that the international community take action against blatant crimes of aggression under international law, it should not be done at a time and in a manner that has the potential to damage the reputation and integrity of a Court that has taken the international community approximately half a century to create.