

THE DOMESTIC PROSECUTION OF THE CRIME OF AGGRESSION AFTER THE INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE: POSSIBILITIES AND ALTERNATIVES

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During the International Criminal Court Review Conference in Kampala, the issue of complementarity and aggression was not given the proper attention it deserved. In principle, the application of art 17 has remained intact for all crimes of the Rome Statute of the International Criminal Court ('Rome Statute') — including aggression — but it is unclear how complementarity will interplay with other principles of international law when it is applied to aggression. Despite this uncertainty, this article claims that if certain conditions are fulfilled there exist 'solutions' that will allow domestic courts to exercise jurisdiction over this 'supreme crime'. It argues that because states have incorporated the crime of aggression — which in turn has incorporated the act of aggression — into the Rome Statute without amending the complementarity mechanism, they have not closed the door to allowing domestic courts to look into the crime under the complementarity mechanism, albeit under the jurisdictional limitations adopted in Kampala. Even the adopted understanding in Kampala on domestic prosecution, which may be viewed by some as a weakening factor for this article's claims, should not be overestimated; as a non-ratified annex it cannot be given more weight than the Rome Statute's pivotal art 17 or the amendments adopted. Finally, several uncontroversial and uncontested options for domestic prosecutions still remain. The first is when the beneficiary state decides to explicitly waive its right. The second is when national courts have primary responsibility under the complementarity mechanism to prosecute crimes of aggression committed by their own nationals. Furthermore, domestic courts will be able to prosecute non-nationals for the crime of aggression after the International Criminal Court or the United Nations Security Council has determined that an act of aggression has been committed. While there is no doubt that the issue of domestic prosecution of the crime of aggression remains contentious, the possibility of its domestic prosecution remains open — albeit requiring some creative interpretations of the amendments of the Rome Statute.

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I INTRODUCTION

Late at night on Friday 11 June 2010, the first Review Conference of the International Criminal Court ('ICC') in Kampala adopted by consensus a resolution on the crime of aggression.¹ The resolution adopted amendments to annexes I,² II³ and III,⁴ which included a definition for the crime (including an act of aggression), its exercise of jurisdiction, elements of the crime and a number of understandings on the amendments to the crime of aggression.⁵ In the midst of the worries, uncertainties and the last-minute happy ending, the issue of complementarity and aggression was not given proper attention. There was some scepticism about having a breakthrough — this was likely the force that caused delegates to shift their focus to agreeing on the proposed definition and its separate jurisdictional regime(s) without much attention being paid to the other auxiliary issues that are of no less importance. The issue of the domestic prosecution of the crime of aggression under the complementarity mechanism was one of the crucial issues that did not attract much attention although it certainly deserved it.

Most of the above concerns were sidelined and marginalised in favour of reaching an acceptable and consensual compromise. This compromise came at a heavy cost to the uniformity of the ICC's jurisdictional regime. Complementarity, as a pivotal jurisdictional regime for the ICC, was to a certain extent neglected in Kampala. Although in principle the application of art 17 has remained intact for all crimes of the *Rome Statute of the International Criminal Court* ('*Rome Statute*')⁶ — including aggression — it remains ambiguous to many how complementarity, when applied to aggression, will interplay with other principles of international law, such as acts of state and the duty to end impunity. Despite that, there are 'loopholes' and solutions that will allow domestic courts to exercise jurisdiction over this 'supreme crime' if certain conditions are fulfilled.

This article proceeds first by shedding light on the possible complications accompanying the domestic prosecution of the crime of aggression. It then focuses on aggression and complementarity in the context of the negotiation

¹ Review Conference of the Rome Statute, International Criminal Court, *Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression*, ICC Doc RC/10 (11 June 2010). See also Astrid Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression — At Last ... in Reach ... Over Some' (2010) 2 *Goettingen Journal of International Law* 745, 747.

² Review Conference of the Rome Statute, International Criminal Court, *Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression*, ICC Doc RC/10 (11 June 2010) annex I ('*Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*').

³ Review Conference of the Rome Statute, International Criminal Court, *Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression*, ICC Doc RC/10 (11 June 2010) annex II ('*Amendments to the Elements of Crimes*').

⁴ Review Conference of the Rome Statute, International Criminal Court, *Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression*, ICC Doc RC/10/Add.1 (11 June 2010) annex III ('*Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*') ('*Final Understandings*').

⁵ *Ibid*

⁶ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

process prior to Kampala. The third Part advances an analysis of aggression and complementarity in light of the package adopted at Kampala. How can domestic prosecutions take place for such a complex crime? How will this take place in the presence of divergent international law principles subsumed in such a process? The final Part is dedicated to outlining the findings of this article, arguing that domestic prosecutions for the crime of aggression are feasible under the ambit of the post-Kampala *Rome Statute*, albeit when certain conditions are fulfilled.

II THE CHALLENGES OF THE DOMESTIC PROSECUTION OF THE CRIME OF AGGRESSION AND POSSIBLE SOLUTIONS

The determination of the crime of aggression brings together a number of contentious elements that other international crimes have not faced. One of the major differences is that individual criminal responsibility for the crime of aggression is structurally linked to the commission of an act of aggression.⁷ The challenge is the crime of aggression's reliance on the occurrence of an act of aggression, which was historically inextricably linked to acts of state.⁸ Originally, domestic courts refrained from adjudicating the acts of state of other states pursuant to the principle *par in parem imperium non habet* (an equal has no authority over an equal). The maxim originated in canon law, later penetrating modern international law through the principle of equal sovereignty.⁹ From the opposite side of the *par in parem imperium non habet* coin, state immunity before foreign jurisdictions emerged. State immunity can therefore be considered as an offshoot of the maxim *par in parem imperium non habet*.¹⁰

While the principle of equal sovereignty remains as a cornerstone in international law, the trend of state immunity as an absolute doctrine has developed into a narrower, more restrictive approach among a number of states.¹¹ There has been a growing trend in international law to distinguish between acts of states in their public sovereign capacity (*acta jure imperii*) and those of a private law nature.¹² Committing international crimes cannot be considered acts of states in their sovereign capacity; these crimes are considered contrary to the interest of the international community (of states) and, therefore, are contrary to the nature of acts of states. This is the fruit of what was stated long ago at Nuremberg. In its judgment, the International Military Tribunal

⁷ *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and the Charter of the International Military Tribunal*, 82 UNTS 280 (signed and entered into force 8 August 1945) art 6.

⁸ *Definition of Aggression*, GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, Agenda Item 86, Supp No 31, UN Doc A/RES/3314 (14 December 1974) annex ('*Definition of Aggression*').

⁹ Yoram Dinstein, '*Par In Parem Non Habet Imperium*' (1966) 1 *Israel Law Review* 407, 408–12.

¹⁰ *Ibid* 412.

¹¹ See Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 327–36. See also George N Barrie, 'Sovereign Immunity of States: Acts *Jure Imperii* and Acts *Jure Gestionis* — What is the Distinction?' (2001) 26 *South African Yearbook of International Law* 156, 156–64.

¹² Barrie, above n 11, 156–8.

(‘IMT’) stated that ‘[t]o 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’.¹³ The IMT was supportive of criminalising the crime of aggression in international law, yet confessed that an agreed definition was still missing.¹⁴ Fortunately, this was resolved in 2010 at the Conference in Kampala. The IMT further added that

the very essence of the Charter [of the United Nations] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.¹⁵

In other words, individuals and officials cannot hide behind acts of state immunity when they commit offences proscribed at international law. The perpetration of the crime of aggression is not shielded by the act of state doctrine; due to its criminal nature, an act of aggression cannot be considered an act of state.¹⁶ It must be highlighted that international law does not confer immunity for acts that incur international culpability;¹⁷ one can argue that violating the *Charter of the United Nations* by committing an act of aggression raises the international responsibility of the aggressor state.

Even if one wants to dispute the argument that it does not pave the way for domestic prosecution, it remains an uncontroversial statement that domestic courts can prosecute the crime of aggression when the beneficiary state does not object. Since states have incorporated the crime of aggression — which subsumes the act of aggression — into the *Rome Statute* without amending the complementarity mechanism, they have not objected to allowing other states parties’ domestic courts to look into crimes of aggression that may have been committed by their nationals.¹⁸ This statement finds its logic in the simple fact that by agreeing to the amendments, states parties have accepted the criminalisation and the prosecution of the crime of aggression. Yet, more importantly they have also accepted the application of the complementarity mechanism — the pivotal pillar of the ICC jurisdictional regime — to the crime of aggression. Throughout the whole process of negotiations, states parties did not suggest amending the application of the complementarity mechanism to the crime of aggression,¹⁹ nor did they dispute the application of the

¹³ ‘International Military Tribunal (Nuremberg) Judgment and Sentences’ reproduced in ‘Judicial Decisions’ (1947) 41 *American Journal of International Law* 172, 186 (‘*IMT Judgment*’).

¹⁴ *Ibid.*

¹⁵ *Ibid.* 221.

¹⁶ *Ibid.*

¹⁷ See International Law Commission, *Report of the International Law Commission: Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) (‘*Test of the Draft Articles on Responsibility of States for Internationally Wrongful Acts*’).

¹⁸ Unless the state party has declared the opposite by not accepting the application of the crime of aggression and its jurisdictional regime pursuant to art 15bis of the *Rome Statute* after its entry into force post-2017.

¹⁹ Pre-Kampala and Kampala negotiations confirm this observation.

complementarity mechanism over aggression. Therefore, one can argue that these states have implicitly accepted that other domestic courts can prosecute the crime of aggression, albeit within the narrow jurisdictional parameters and conditions set in Kampala. However, the discussion above remains theoretical, since the Kampala compromise contained a number of limitations on the jurisdictional parameters over the crime of aggression compared to the other core crimes in the *Rome Statute*. This will be elaborated later in this article.

Moreover, the discussion above becomes redundant when an act of aggression has been determined by other authorised bodies, such as the ICC itself or the UN Security Council, under the Kampala package. In such cases, if the ICC builds on the Security Council determination of an act of aggression to prosecute the crime of aggression, nothing prevents domestic courts from following the same path and building on the Council's determination under a Chapter VII resolution.

Furthermore — and more importantly — after Kampala the ICC can determine whether or not an act of aggression has occurred.²⁰ Accordingly, there is nothing preventing domestic courts from prosecuting the crime of aggression after the act of aggression has been determined by the ICC. In this scenario domestic courts are not looking into the actions of foreign officials or commanders but, rather, they are exercising their duty to prosecute an international crime as stipulated in para 6 of the Preamble to the *Rome Statute*. There are a number of post-World War II cases where domestic courts prosecuted the crime of aggression based on the IMT's determination.²¹ There is

²⁰ Review Conference of the Rome Statute, International Criminal Court, *Resolution RC/Res.6: The Crime of Aggression*, 13th plen mtg, ICC Doc No RC/11 (11 June 2010) annex I art 15bis ('Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression').

²¹ See Michael P Scharf, 'Universal Jurisdiction and the Crime of Aggression' (2012) 53 *Harvard International Law Journal* 357, 370: 'The judgment of the Nuremberg Tribunal paved the way for the trial of over a thousand other German political and military officers, businessmen, doctors, and jurists under *Control Council Law No 10*'. For cases of prosecution, see *United States v Krauch* (United States Military Tribunal, Nuremberg, Case No 6, 30 July 1948) ('*Farben*'); *United States v Krupp von Bohlen und Halbach* (United States Military Tribunal, Nuremberg, Case No 10, 31 July 1948) ('*Krupp*'); *United States v von Leeb* (United States Military Tribunal, Nuremberg, Case No 12, 28 October 1948) ('*High Command*'); *United States v Weizsaecker* (United States Military Tribunal, Nuremberg, Case No 11, 14 April 1949) ('*Ministries*'). See also Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg [sic] War Crimes Trials under Control Council Law No 10* (United States Department of the Army, 1949) app L ('*Military Government — Germany, United States Zone: Ordinance No 7: Organization and Powers of Certain Military Tribunals*') 289 art X:

The determinations of the International Military Tribunal in the judgments ... that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

nothing to prevent such examples from being repeated in the future. In fact, due to the recent developments in international law in general and the *Rome Statute* in particular, such prosecutions are feasible with less contentious dimensions.

III AGGRESSION AND COMPLEMENTARITY ON THE ROAD TO KAMPALA

Long before Kampala, the International Law Commission ('ILC') acknowledged the tense relationship between domestic jurisdictions and the crime of aggression, which may instigate conflict between contrasting international legal principles.²² The *Draft Code of Crimes against Peace and Security of Mankind* (included in the ILC's report on its 48th session) tried to avoid this complexity by excluding domestic jurisdiction over the crime of aggression.²³ Jurisdiction over the crime of aggression was granted exclusively to the then proposed ICC, with the exception of an aggressor state prosecuting its nationals for aggression.²⁴ The ILC's *Draft Code* did not grant to a victim state jurisdiction over the nationals of the aggressor state. This has been criticised by a number of jurists, who consider the ILC's stance to be contrary to the principle of territoriality in criminal law.²⁵ That principle has been entrenched in domestic and international law since the *SS Lotus* case.²⁶ They further criticise the ILC's adoption of the principle of state immunity in its absolute form.²⁷ Furthermore,

According to Noah Weisbord, '[t]hese successor trials adhered closely to the jurisprudence of the International Military Tribunal at Nuremberg on crimes against peace and built upon it': Noah Weisbord, 'Prosecuting Aggression' (2008) 49 *Harvard International Law Journal* 161, 165 (citations omitted). The trial of Gauleiter Artur Greiser before the Supreme National Tribunal of Poland did not rest on the *IMT Judgment*, as it was the first conviction of a Nazi for the crime of aggression before *IMT Judgment* was delivered: see 'Trial of Gauleiter Artur Greiser' in The United Nations War Crimes Commission (ed), *Law Reports of Trials of War Criminals* (His Majesty's Stationery Office, 1947-49) vol XIII, 70. However, the Polish Tribunal rejected the defence pleas indicating that it is not in accordance with international and municipal law at the time of the trial taking into account the *London Agreement* and *IMT Charter* that was annexed to it: *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal*, 82 UNTS 280 (signed and entered into force 8 August 1945) annex ('*Charter of the International Military Tribunal at Nuremberg*'). On a different but telling note, a Polish delegation, including one of the prosecutors in the Greiser case, then attended the IMT proceedings and one of the prosecutors in the Greiser proceedings was a member of this delegation: see Mark Drumbl, "'Germans are the Lords and Poles are the Servants": The Trial of Arthur Greiser in Poland, 1946' (Washington & Lee Legal Studies Research Paper Series Paper No 2011-20, 26 October 2011) 17 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941801##>.

²² Sergey Sayapin, 'The Definition of the Crime of Aggression for the Purpose of the International Criminal Court: Problems and Perspectives' (2009) 13 *Journal of Conflict and Security Law* 333, 343.

²³ International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, UN GAOR, 51st sess, Supp No 10, UN Doc A/51/10 (1996) ch II pt D art 8 ('*Draft Code of Crimes against the Peace and Security of Mankind*') ('*Draft Code*').

²⁴ *Ibid.*

²⁵ See, eg, Nicolaos Strapatsas, 'Complementarity and Aggression: A Ticking Time Bomb?' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press, 2010) 450, 454; Astrid Reisinger Coracini, 'Evaluating Domestic Legislation on the Customary Crime of Aggression under the *Rome Statute*'s Complementarity Regime' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 725, 731.

²⁶ *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10.

²⁷ See, eg, Strapatsas, above n 25, 453.

while domestic courts have regularly prosecuted grave breaches of international humanitarian law, they have determined the nature of the conflict be it of international or non-international character.²⁸ By first determining the nature of the conflict — and since conflicts are among the acts of state *jus imperii* — these courts have in practice looked into acts of state. The writer here considers that the ILC adopted an obsolete, absolute approach to acts of state, while post-Nuremberg developments²⁹ have in reality shifted the parameters of the crime of aggression away from act of state immunities.

During the negotiations within the Special Working Group on the Crime of Aggression ('SWGCA'), the discussion on complementarity was not given sufficient attention compared to the time allocated for the definition of the crime of aggression and its jurisdictional regime. It is possible that states considered putting limitations on the exercise of domestic jurisdiction by formulating a separate jurisdictional regime rather than amending the admissibility system for the crime of aggression. This may explain why the discussions remained minimal during the whole negotiations on aggression whether within the Preparatory Committee or the SWGCA.

During the SWGCA's eight years of work, complementarity and aggression were discussed only a few times, with a very limited scope. The first discussion on the application of complementarity over the crime of aggression was at the informal inter-sessional meeting of the SWGCA in June 2004, where the SWGCA endorsed the view that there is no need for a special procedural system for the national prosecutions of the crime of aggression.³⁰ Therefore, the relevant admissibility articles remain applicable to the crime of aggression similar to other core crimes in the *Rome Statute*. On the other hand, it was indicated within the SWGCA that admissibility is related to the (then undefined) definition of aggression and its triggering mechanism.³¹ One can deduce that while there is no restriction on the applicability of the current provisions for complementarity over aggression, the practical constraints have, nevertheless, been translated through

²⁸ There are many examples of domestic prosecutions for grave breaches of the *Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). One can recall, inter alia, the German judicial system's early attempts to prosecute Tadić before surrendering him to the International Criminal Tribunal for the Former Yugoslavia ('ICTY'): see, eg, Ruth Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia' (2005) 3 *Journal of International Criminal Justice* 381.

²⁹ For some cases of domestic prosecutions of the crime of aggression post-Nuremberg and prior to the adoption of the International Law Commission's *Draft Code*, see Strapatsas, above n 25. Furthermore, in 2006 the House of Lords in the United Kingdom recognised the existence of a customary international crime of aggression, but without providing a definition. *R v Jones* [2007] 1 AC 136.

³⁰ Special Working Group on the Crime of Aggression, *Note by the Secretariat*, 3rd sess., ICC Doc ICC-ASP/3/SWGCA/INF.1 (13 August 2004) 7 [20]–[27].

³¹ *Ibid* [22]–[27].

the limitations applied to the jurisdictional regime and its triggering mechanism. This article thus disagrees with those who criticised the SWGCA for allegedly taking two contrasting and conflicting stands: first saying that the admissibility regime is to remain intact, while later indicating that this would remain correlated to the ambit of the definition and its jurisdiction parameters.³² In the opinion of this author, the apparent contradiction is deliberate and understandable, especially when one notices that the implicit objective of the states parties' was to restrict the ICC's ambit (and its complementarity mechanism) over aggression through practically limiting its jurisdictional regime and the triggering mechanism. Through this approach the complementarity mechanism will remain applicable but within a limited scope — like the proverbial 'doughnut hole' — reflecting the limitations of the jurisdictional regime of the crime of aggression.

During subsequent formal and informal sessions of the SWGCA, no further discussions on complementarity and aggression were raised. The general feeling within the SWGCA was that there is no need for a special provision concerning complementarity and the crime of aggression.³³ This confirms the approach that prevailed during the discussions (and was ultimately reflected in the so called 'differentiated' approach) over the 'monist'³⁴ approach.³⁵ The adoption of a 'differentiated' approach as a process of incorporating the crime of aggression into the *Rome Statute* meant that all other articles on general criminal law and on admissibility will apply to the crime of aggression as they already apply to other ICC core crimes. This step in the process means that states have refrained from dealing directly with the complexity of applying complementarity to the crime of aggression but, rather, focused on framing the specific conditions for the exercise of jurisdiction. These conditions on the exercise of jurisdiction will ultimately restrict domestic prosecutions of the crime of aggression to the limitations of its particular jurisdictional regime. The negotiations in the SWGCA and the Preparatory Committee did not tackle contentious issues related to the complementarity mechanism and aggression. They focused on the definition and the exercise of jurisdiction over aggression with an aim to indirectly frame the ambit of domestic prosecutions. Through this process, the complex issues on domestic prosecutions of aggression were left to be tackled indirectly. The restrictions on the applicability of complementarity to aggression have materialised, but out of jurisdictional limitations rather than from any restrictions within the complementarity mechanism itself.

³² See, eg, Strapatsas, above n 25, 453.

³³ Pål Wrangé, 'The Principle of Complementarity under the Rome Statute and its Interplay with the Crime of Aggression' in Assembly of States Parties, International Criminal Court, *Sixth Session*, ICC Doc ICC-ASP/6/INF.2 (19 October 2007) 37.

³⁴ Stefan Barriga, 'Introduction to the Negotiation History' in Stefan Barriga and Claus Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) 1, 21.

³⁵ See Working Group on the Crime of Aggression, Preparatory Commission for the International Criminal Court, *Discussion Paper Proposed by the Coordinator*, UN Doc PCNICC/2002/WGCA/RT.1/Rev.2 (11 July 2002).

On the eve of the ICC Review Conference, the SWGCA was able to provide a clean text for the definition of the act and the crime of aggression.³⁶ However in regards to the conditions of exercising jurisdiction, several things remained unsettled while various options remained open.

IV COMPLEMENTARITY AND AGGRESSION AT THE ICC REVIEW CONFERENCE

A *Complementarity and Aggression during the Negotiations*

During the early days of Kampala there was much scepticism regarding the success of the Review Conference in agreeing on the definition of the crime of aggression and its jurisdictional regime.³⁷ The political complexities that have been attached to the crime of aggression made the legal drafting cumbersome. No other core international crime has faced the complexities which burden the crime of aggression. This resulted in divisions among negotiators regarding: the method of exercising jurisdiction; the activation of the triggering mechanism; and the method of incorporation into the *Rome Statute*.³⁸ Even the like-minded states that had presented one voice in Rome did not enjoy similar solidarity vis-a-vis these disputed issues.³⁹ The Coalition for the International Criminal Court, a group of non-governmental organisations whose role as a solid coalition was crucial in Rome did not enjoy the same solidarity in Kampala. Differences of opinion emerged on how to move forward on the crime of aggression.⁴⁰ In the midst of this atmosphere of pessimism, the negotiations focussed on the crime of aggression and its jurisdictional regime, in an attempt to avoid the possibility of the Review Conference failing to agree on amending the *Rome Statute*. Therefore much less attention was given to other auxiliary issues, including domestic prosecutions of the crime of aggression.

During the Review Conference, complementarity was discussed on just two occasions: once substantially and once marginally. There was substantial discussion of complementarity as part of the stocktaking exercise during the first week of the conference, but it was later addressed only indirectly in two paragraphs of understanding annexed to the final agreement.⁴¹

Complementarity was one of the themes of stocktaking in the Conference. The stocktaking session on 3 June 2010 was mainly an overview of the application of complementarity in the last eight years. While the participants reiterated the pivotal role of complementarity in the work of the ICC, they did not give attention to the issue of complementarity and aggression during the

³⁶ Stefan Barriga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression' in Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003–2009* (Lynne Rienner, 2009) 5.

³⁷ Personal observations of the author while attending the Kampala Review Conference, May–June 2010. The author attended the Conference as part of the Coalition for the International Criminal Court.

³⁸ Beth Van Schaack, 'Negotiating at the Interface of Power and Law: The Crime of Aggression' (2011) 49 *Columbia Journal of Transnational Law* 505, 513–14.

³⁹ *Ibid.*

⁴⁰ William R Pace, 'First ICC Statute Review Conference: Historic Milestone in ICC Evolution', *EQ: Equality of Arms Review* (online), November 2010, 17 <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=624734E8-8F8D-4022-A294-80DCE32B0058>>.

⁴¹ *Final Understandings*, ICC Doc RC/10/Add.1, annex III [4]–[5].

negotiations on the crime of aggression. The issue barely attracted any attention when an understanding on domestic prosecutions was inserted and then adopted in the final package of the Review Conference.⁴²

The early conference room paper on the crime of aggression of 25 May 2010 did not contain any clauses or discussions on aggression and domestic jurisdiction.⁴³ Even the draft understandings contained in annex III focused on the following main issues: referral by UN Security Council ('UNSC');⁴⁴ jurisdiction *ratione temporis*;⁴⁵ and the method of acceptance of the amendments.⁴⁶ However, the issue of domestic jurisdiction over the crime of aggression was raised in a non-paper,⁴⁷ with the Chair indicating that it was the SWGCA's view in the early stages of its work that the applicability of art 17 of the *Rome Statute* remained intact. Yet, the SWGCA determined that it was unclear if the adoption of the definition would require encouraging states to exercise jurisdiction over the crime when the act of aggression was committed by other states.⁴⁸ The Chair therefore suggested inserting the following:

It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the *Rome Statute*, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.⁴⁹

On 4 June 2010, the Working Group on the Crime of Aggression ('Working Group') had its first formal debate. Attention was directed toward avoiding the possible failure of the Conference to come to a consensus. Since the SWGCA had previously managed to deliver a clean definition to the Conference, focus shifted to jurisdictional requirements rather than the definition. This seemed acceptable to most states.⁵⁰ Since the early days of the Conference, it was clear that states were focused on finding a distinct jurisdictional regime and a separate amending process for the crime of aggression.⁵¹ This translated into bringing in options that were dictated by political considerations regarding

⁴² Ibid.

⁴³ Review Conference of the Rome Statute, International Criminal Court, *Conference Room Paper on the Crime of Aggression*, ICC Doc RC/WGCA/1 (25 May 2010).

⁴⁴ Review Conference of the Rome Statute, International Criminal Court, *Conference Room Paper on the Crime of Aggression*, ICC Doc RC/WGCA/1 (25 May 2010) annex III [1]–[2] ('*Understandings regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*').

⁴⁵ Ibid [3]–[4].

⁴⁶ Ibid [5]–[6].

⁴⁷ Review Conference of the Rome Statute, International Criminal Court, *Non-Paper by the Chair: Further Elements for a Solution on the Crime of Aggression*, ICC Doc RC/WGCA/2 (25 May 2010) [4].

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ With the exception of the United States of America and the Islamic Republic of Iran.

⁵¹ This is proven through the outcome of the Review Conference itself with the crime of aggression being limited to more restricted jurisdictional parameters and a more stringent scrutiny of the Prosecutor's powers in regards to the crime of aggression.

balance of powers, such as the UNSC's primary prerogatives and state voluntarism.⁵² Some states' preferences for the adoption of the crime of aggression were included in the conditions for the exercise of jurisdiction and the method of amendments' entry into force, rather than in the restriction of the application of the other articles in the *Rome Statute*. Hence, whether intentional or not, it seems that states parties (and non-states parties) decided that the solution would be found in a distinct jurisdictional regime for aggression that can, inter alia, discard the ICC jurisdiction over states without their consent. On the other hand, the adopted approach remained consistent in keeping complementarity applicable vis-a-vis all core crimes of the *Rome Statute*, including the crime of aggression. States have not resorted to creating a different admissibility regime for aggression but, rather, have opted to exert indirect limitations on the complementarity regime by incorporating restrictions on the jurisdictional parameters of the crime of aggression, while keeping the other articles of the *Rome Statute* applicable. The discussions in Kampala focused on tailoring a jurisdictional regime that is rigidly based on voluntarism, state consent and a higher threshold for establishing the ICC's jurisdiction over the crime of aggression. This was reflected in a number of adopted measures, such as: imposing restrictions on exercising jurisdiction over non-states parties and states parties that have rejected the ICC's jurisdiction over the crime; limiting the method of adoption to art 121(5); establishing a separate jurisdictional regime for aggression; and creating a robust internal oversight reflected in the Pre-Trial Division's supervision of the Prosecutor when she acts on the crime of aggression.⁵³

These measures have significant implications for the exercise of domestic jurisdiction over aggression. Domestic judicial systems will not enjoy the same jurisdictional parameters which they enjoy in relation to other ICC crimes. The crime of aggression will have its own jurisdictional system, while the other crimes will remain under a different jurisdictional system. In the opinion of this author, this will create undesired complexities for national systems that are used to a uniform exercise of jurisdiction rather than having a separate jurisdictional regime for each crime.

The few sentences on complementarity that emerged in the discussions of the ICC Review Conference of the *Rome Statute* were extracted from the Chair's non-paper of 25 May 2010 and inserted in the *Conference Room Paper on the Crime of Aggression* in the form of understandings.⁵⁴ During the negotiations, the United States, which was one of only few states to have reservations to the definition and had failed to make its desired amendments to it, instead focused on achieving a number of main understandings. Claus Kreß was asked to chair the process of considering the proposed understandings.⁵⁵ After informal consultations, Kreß introduced three proposals to the Working Group

⁵² See Van Schaack, 'Negotiating at the Interface of Power and Law', above n 38.

⁵³ In situations of state referrals or *proprio motu* only.

⁵⁴ Review Conference of the Rome Statute, International Criminal Court, *Conference Room Paper on the Crime of Aggression*, ICC Doc RC/7 (10 June 2010) annex III ('*Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*') [1].

⁵⁵ Beth Van Schaack, 'Understanding Aggression I' on *IntlawGrrls* (24 June 2010) <<http://intlawgrrls.blogspot.com/2010/06/understanding-aggression.html>>.

session on 9 June 2010, including one on complementarity and jurisdictional competence. In response, the United States proposed three adjustments to the proposed understandings; these were reflected by the addition of a reference to the act of aggression alongside the crime of aggression, cutting the understanding in two and lastly including a statement indicating that the adopted definition of aggression does not constitute or reflect a customary international law definition.⁵⁶ The latter suggestion was not endorsed, but the former two suggestions were incorporated in the understandings; the subsequent draft of the conference room papers read as follows:

Domestic jurisdiction over the crime of aggression

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

It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.⁵⁷

B *The Final Compromised Package*

While the Conference managed to achieve a breakthrough in adopting the crime of aggression — subject to a number of pending requirements — it was a triumph of voluntarism and state consent. This represents a step backwards on the jurisdictional level compared to the process that was adopted in Rome. As the *Rome Statute* initially adopted the traditional modes of criminal jurisdiction — such as territoriality and active personality jurisdiction — the latter was received with reservations from some states, claiming that treaties should not apply to third parties.⁵⁸ According to the US, several articles of the *Rome Statute* violate the *Vienna Convention on the Law of Treaties* ('*VCLT*')⁵⁹ as it applies the ICC's (treaty) jurisdiction over (nationals of) non-party states.⁶⁰ This stand continued in Kampala, this time regarding the crime of aggression.

The Kampala 'triumph' in 'diluting' the demands of the Permanent Five members of the UNSC came at a heavy cost. That cost was the creation of a

⁵⁶ The United States proposed the following three changes:

- (i) Adding reference to 'act of aggression' in the first sentence alongside the crime of aggression'.
- (ii) The inclusion of a clause that the aggression amendments do not constitute a definition under customary international law.
- (iii) Separate third sentence into a separate understanding.

Beth Van Schaack, 'Understanding Aggression II' on *IntLawGrrls* (26 June 2010) <<http://www.intlawgrrls.com/2010/06/understanding-aggression-ii.html>>.

⁵⁷ *Final Understandings*, ICC Doc RC/10/Add.1, annex III [4]–[5].

⁵⁸ For more information regarding the US stance, see John Washburn, 'The International Criminal Court Arrives — The US Position: Status and Prospects' (2002) 25 *Fordham International Law Journal* 873.

⁵⁹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31–2 ('*VCLT*').

⁶⁰ Washburn, above n 58, 874–5.

separate, tailored jurisdictional regime for the crime of aggression that is different from the jurisdictional regime for the other ICC crimes. This undermines the integrity of the ICC regime, tarnishing the principle of equality before the law and the principle of legal certainty for individuals of similar *locus standi*. More importantly, this contributes to the fragmentation and disintegration of the ICC's jurisdictional regime.

Most of the above concerns were sidelined and marginalised in favour of reaching an acceptable compromise. In return for removing the exclusive role of the UNSC, the concession was a compromise that limits the ICC jurisdiction — and domestic jurisdictions under the complementarity principle — to nationals of states that have accepted the amendments and have not declared their objection to the ICC jurisdiction over the crime. This is the result of several elements of the package.

First, this materialised through favouring entry into force under art 121(5) rather than art 121(4). Article 121(5) reads:

Any amendment to articles 5, 6, 7 and 8 of this *Statute* shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

This limits the effect of the amendments to states that have ratified them and there is no means of compelling non-ratifying states parties to be subject to these amendments. If art 121(4) was chosen as a method for adopting the amendments, then only the ratification of three quarters of states parties would make the amendments binding on those remaining states parties that did not ratify the amendments. The use of the art 121(5) option came as part of this compromise, as some states (including some of the UNSC permanent members) strongly opposed allowing the ICC and national courts to exercise jurisdiction over their nationals and territories if they did not voluntarily consent to the ICC jurisdiction over the crime of aggression. Furthermore, it was decided at the last minute in Kampala that the amendments' entry into force will be subject to a decision that will be taken after their ratification by more than 30 states after 1 January 2017, in what seems to be an additional comforting step to states.

Secondly, para 5 of the adopted art 15*bis* stipulates that '[i]n 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'.⁶¹ This paragraph contradicts art 12 of the *Rome Statute* in which the ICC jurisdiction applies for the core crimes over nationals and territories of states parties. For genocide, crimes against humanity and war crimes, the ICC jurisdiction will remain applicable to nationals of non-states parties when they commit these crimes while in the territory of a state party. For the crime of aggression, the ICC will apply a separate jurisdictional regime that is implemented depending on whether the state is a state party; not a state party; a state party that has accepted the amendments; or a state that has declared that it will not accept them.

⁶¹ *Rome Statute* art 15*bis*(5).

The discussion above highlights additional variables to be taken into consideration when determining the jurisdiction of the ICC — and the domestic courts — over different acts and crimes of aggression. These variables now include whether the state is a party to the ICC or not; whether it has ratified the crime of aggression amendments or not; and if so whether it has declared not to accept the ICC jurisdiction over the crime or not. Each one of these aspects separately or cumulatively will determine the ambit of the ICC's jurisdiction — and *mutatis mutandi* the jurisdiction of domestic courts. This fragmentation of the jurisdictional regime of the ICC will determine the frame of domestic prosecutions over the crime of aggression under art 17 of the *Rome Statute*, as this fragmentation will carry itself on the national level through creating different modes of domestic jurisdictions for the crime of aggression in comparison to other ICC crimes.

V THE POSSIBILITY OF DOMESTIC PROSECUTIONS OF AGGRESSION IN LIGHT OF THE KAMPALA PACKAGE

The Kampala compromise package created a distinct jurisdictional regime that has implications for the application of the complementarity regime and on the mode of application of the indirect enforcement mechanism. It has different implications for the challenges that are to face domestic prosecutions of aggression compared to those that would have arisen if the jurisdictional regime of the other core crimes had been applied.

The implication of a separate jurisdictional regime for the crime of aggression has grave repercussions beyond the aim of reaching an acceptable compromise for prosecuting the crime of aggression. While the achievements in Kampala should not be understated, they came at a heavy price — that of sacrificing the uniformity of the jurisdictional regime of the *Rome Statute*. After 2017, the ICC will have a separate jurisdictional system, the application of which will depend first on the type of crime committed before observing the nationality of the perpetrator and the territory over which the crime has taken place. This is a setback to the fundamental principles of criminal law which the ICC rests upon and will be magnified further when national prosecutions for aggression take place under the complementarity principle.

Usually at the national level there is a uniform jurisdictional regime that is applied to all crimes or at least to crimes of similar categories, such as crimes against the internal security of the state, crimes against the external security of the state, international crimes and transnational crimes and so on. With the ICC creating a separate jurisdictional regime for aggression, national courts — under the complementarity mechanism — will be applying a separate jurisdictional regime if they are to prosecute the crime of aggression. This will be different from the jurisdictional system applied to genocide, crimes against humanity and war crimes. In other words — the national courts — which usually exercise their jurisdiction *erga omnes*, will be exercising wider jurisdiction in relation to the other ICC core crimes whilst exercising a more restricted jurisdiction vis-a-vis the crime of aggression. This creates undesirable complexities for national systems when they are prosecuting the same individual who has committed the crime of aggression along with other core crimes, or when prosecuting several individuals for committing the same crime of aggression. For

example, it would seem contradictory that an individual of a non-state party who has committed a war crime as part of aggression on the territory of a state party will not be prosecuted for aggression, while she or he will be subject to prosecution for war crimes by the territorial state party. Furthermore, how will the crime of aggression be prosecuted when the act of aggression is committed by nationals of states parties who have accepted the amendments and nationals of states parties that did not accept them? Clearly this puts states' nationals in different *locus standi* before the ICC and national courts depending on the position of their own states vis-a-vis the amendments on aggression. It is complex and cumbersome for a judge to determine jurisdiction over certain individuals while discarding others depending on their state's positions toward the crime of aggression amendments. The above argument is primarily related to jurisdiction under the *Rome Statute* rather than admissibility. Nevertheless, the absence of jurisdiction inevitably means absence of admissibility for the case. The crime of aggression's complex jurisdictional framework will indirectly impact the complementarity mechanism.

The Kampala compromise came as a triumph to voluntarism and state consent, which caused some frustration for a number of activists and non-governmental organisations attending the Conference.⁶² However, this triumph for voluntarism and state consent brought — perhaps unintentionally — a possible window for domestic determination of an act of aggression committed by another state. If one is to summarise the main features of the compromise regarding the crime of aggression, it will be by indicating that no prosecution of the crime of aggression is to take place without the explicit or implicit consent of the state of nationality. According to the adopted amendments, the ICC will not have jurisdiction over crimes of aggression for nationals and territories of non-states parties. It will only have jurisdiction over nationals and territories of states parties that have ratified the amendments and/or did not lodge a declaration of non-acceptance of the ICC jurisdiction.⁶³

The discussion above demonstrates that since Nuremberg, international law has evolved to exclude international crimes from the ambit of acts of states. On that basis, the ratification by states parties of the amendments of the crime of aggression under the *Rome Statute* and its complementarity mechanism can be interpreted as an acceptance by these states of the domestic prosecution of crimes of aggression committed by their nationals before other domestic states parties' courts. It is indisputable that the complementarity regime remains intact with respect to the crime of aggression. In Kampala, none of the participating states contested this. Therefore, one can argue that when states accepted these amendments they foresaw the applicability of the complementarity regime to the crime of aggression and therefore did not object to allowing domestic courts to determine whether acts of aggression have taken place by another state (the ratifying states party) against its territory or nationals.

The above analysis is not without some difficulty when one reads the understanding on domestic jurisdiction annexed to the resolution on the crime of aggression. First, the understanding on complementarity embedded in annex III

⁶² Personal observations of the author while attending the Kampala Review Conference.

⁶³ *Rome Statute* arts 15bis(4), (5).

of the Final Report is the product of amendments and concessions brought from a 25 May 2010 non-paper.⁶⁴ Clearly, the understanding does not bring anything new, since it reiterates what has already been stipulated in art 10 of the *Rome Statute*; recalling that the definition adopted is not to be interpreted as creating a customary definition for the crime of aggression.⁶⁵ In a textual analysis of the understanding, one can safely say that the language of para 5 is neutral. It is not progressive in pushing for domestic prosecution for aggression, but at the same time it does not prohibit conducting domestic prosecutions for the crime of aggression. It leaves it to international customary and treaty law to rule on that. The understanding prevents the amendments only from creating a right or a duty to prosecute domestically, but cannot prevent the development of international law in this direction. One can argue that this has been evolving since the days of Nuremberg.

Secondly, even if the understanding limits the adopted definition to the *Rome Statute*'s purposes only, this does not overcome the fact that the *Rome Statute* is built on the pivotal principle of complementarity. Furthermore, the Preamble of the *Rome Statute* sets out the primary role of states to prosecute the ICC international crimes. Therefore, it is the primary role of states (or at least states parties) to prosecute all core crimes under the *Rome Statute*, including the crime of aggression, and the ICC complements these efforts in cases of inaction, unwillingness or inability according to art 17 of the *Rome Statute*. Consequently, one cannot consider the above clause in the understanding as preventing states parties from prosecuting the crime of aggression on the national level if the other jurisdictional requirements are fulfilled.

Thirdly, although some can argue that the understanding reflects the will of the states not to allow the amendments to create rights or obligations for domestic prosecutions of the crime of aggression, this argument is weakened by the developments international law has witnessed with respect to the crime of aggression beyond the scope of the *Rome Statute*.⁶⁶

Fourthly and more importantly is para 5 of the understanding, which indicates that the amendments shall not be interpreted as creating rights and obligations to exercise domestic jurisdiction over an act of aggression committed by another state. This paragraph seems to weaken the argument raised above. However, there are a number of arguments that cast doubt on such a suggestion. The first argument concerns the legal value of such an understanding. These understandings not only received little discussion or resistance at the ICC Review Conference,⁶⁷ but they also have not been subject to ratification. Therefore, these understandings cannot be considered of equal weight to the amendments and the *Rome Statute* itself. Kevin Jon Heller has elaborated on that point and concluded that the understandings cannot and do not have the legal weight of the articles of the *Rome Statute*.⁶⁸ Therefore, the understanding cannot

⁶⁴ See above nn 55–6 and accompanying text. See also *Final Understandings*, ICC Doc RC/10/Add.1, annex III [4]–[5].

⁶⁵ *Rome Statute* art 10.

⁶⁶ See *IMT Judgment*, above n 13. See also Sayapin, above n 22, 343; Coracini, 'Evaluating Domestic Legislation', above n 25, 731–4.

⁶⁷ Van Schaack, 'Understanding Aggression I', above n 55.

⁶⁸ Kevin Jon Heller, 'The Uncertain Legal Status of the Aggression Understandings' (2012) 10 *Journal of International Criminal Justice* 229, 245.

override the obligations stipulated in the articles of the *Rome Statute*, including art 17. It cannot be considered of legal weight equal to that of the explicit language of the articles of the *Rome Statute*, precisely arts 17 and 12 and Preamble para 6. The understanding, as a non-ratified annex, cannot be given enough weight for it to be considered an amendment to the pivotal principle of the ICC — complementarity. It is undisputed that arts 17 and 12 remain applicable for the crime of aggression and, therefore, the understanding cannot amend their contents. In other words, such an understanding when analysed vis-a-vis the *VCLT* does not enjoy the power of amending the *Rome Statute*. The understandings cannot be considered a primary means of interpretation of the *Rome Statute* under art 31 of the *VCLT*,⁶⁹ especially as they were not adopted in ‘connection with the conclusion of the treaty’ (*Rome Statute*), but were later adopted in the absence of at least 27 states parties out of the then 111 states parties, making it extremely difficult to qualify the understandings as amendments under art 31 of the *VCLT*.⁷⁰ Furthermore, the understandings can hardly fulfil art 41 of the *VCLT* so as to be considered as an agreement to modify the *Rome Statute*. The *Rome Statute* itself has a particular method of amendment; under arts 121(4) and (5). The adoption of the understanding does not conform to either of the two articles.⁷¹ The final interpretation can give the understanding the weight of being a supplementary means of interpretation under art 32 of the *VCLT*. This second argument is the most persuasive.⁷² However, even under this interpretation, the understanding on complementarity may only be relied upon when there is ambiguity in the text or there is an obscure interpretation of the *Rome Statute* (treaty) and its amendments.⁷³ The immediate reply is that art 17 is not ambiguous or obscure and the language of the text is clear and explicit. Therefore, the simple answer is that although this understanding may fit under art 32 of the *VCLT*, it does not apply to art 17 (the complementarity mechanism). Therefore, one can conclude that the understanding on complementarity will not have a substantive effect on the application of complementarity over the crime of aggression.

In addition to the progressive reading of the scenario above regarding the amendments and the applicability of complementarity, there are other possibilities where domestic courts can prosecute the crime of aggression with no difficulties. The first uncontested possibility is when domestic courts, under the complementarity mechanism, have the primary responsibility to prosecute the crime of aggression when committed by the nationals of these courts’ countries. Such a prosecution does not collide with any of the challenges highlighted above as it falls under the exclusive national jurisdiction of the state and, thus, national courts have jurisdiction to prosecute their own nationals for the crimes they have committed. A number of jurists have shown that a considerable number of

⁶⁹ *VCLT* arts 31–2.

⁷⁰ Assembly of States Parties to the Rome Statute of the International Criminal Court, *Record of the Ninth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, ICC Doc ICC-ASP/9/20 (6–10 December 2010) annex I (‘*Report of the Credentials Committee*’) 41.

⁷¹ Heller, above n 68, 235, 243.

⁷² *Ibid* 245.

⁷³ *VCLT* art 32.

national courts are equipped in substance and procedure to prosecute the crime of aggression.⁷⁴

The second available option for domestic courts is to prosecute the crime of aggression for non-nationals after the ICC has determined that an act of aggression has been committed. In this case, it will be the ICC that determines whether an act of aggression has been committed and not the national courts. In such a scenario, the national courts will build on the findings of the ICC and complement the jurisdiction of the ICC on the crime of aggression. One important question that can be raised here concerns when the national system can challenge the admissibility of the case before the ICC to render it inadmissible under art 17. This scenario will bring in an uneasy interplay between art 15*bis* on one side and arts 18 and 19 on the other. Such interplay was neither discussed nor probably envisaged during the Review Conference. This can be noticed, for instance, in the contradictory language of arts 15*bis* and 18. Article 18 talks about a Pre-Trial Chamber's role in authorising the prosecutor at the expense of a national investigation,⁷⁵ while art 15*bis* gives such a role to the Pre-Trial Division.⁷⁶ With respect to the crime of aggression, most probably art 18 will be read as referring to the Pre-Trial Division, as art 15*bis* may be considered the *lex specialis* for an investigation related to a possible crime of aggression triggered by a state referral or *proprio motu* powers.

This suggested solution may not be able to solve all the complexities that may emerge. For example, the interpretation of art 18 will become increasingly unclear when looking into a situation where there are reasons to believe that a crime of aggression has occurred along with the crime of genocide. Will the interpretation of art 18 or that of art 15*bis* apply? This intricate question will probably be left for the ICC judges to answer. Furthermore, it will appear inconsistent to reach the conclusion that while the Prosecutor needs the Pre-Trial Division's authorisation to proceed on an investigation of a crime of aggression, she will only need the authorisation of the Pre-Trial Chamber to suspend the referral to national jurisdiction. Unfortunately, this inconsistency in the legal language between the amendments and other articles of the *Rome Statute*, including the ones on admissibility, did not attract enough attention in Kampala. Furthermore, the national system can also exercise its jurisdiction, after the ICC's determination of an act of aggression, by challenging the ICC jurisdiction under art 19 of the *Rome Statute*. The admissibility of the case before the ICC can be challenged once by the state that has jurisdiction over the crime prior to the commencement of the trial, or at a later stage in exceptional circumstances.⁷⁷

Moreover, the domestic prosecution of the crime of aggression can take place based on a determination by the UNSC. Under the Kampala package, if the UNSC determination will allow the ICC to proceed, then what prevents domestic courts, acting under the complementarity mechanism, to exercise jurisdiction and play its primary duty to prosecute?

⁷⁴ See, eg, Coracini, 'Evaluating Domestic Legislation on the Customary Crime of Aggression under the *Rome Statute*'s Complementarity Regime', above n 25, 731.

⁷⁵ *Rome Statute* art 18.

⁷⁶ *Ibid* art 15*bis*.

⁷⁷ *Ibid* arts 19(2), (4).

Despite some states' attempts to restrict domestic prosecution of the crime of aggression,⁷⁸ domestic courts under the complementarity mechanism have a number of avenues to establish jurisdiction and overcome hurdles in law and policy. This can be through a progressive reading of the *Rome Statute* and the amendments of the crime of aggression. It is hardly imaginable that the understanding on domestic jurisdiction will manage to restrict these options. The articles of the *Rome Statute* are still applicable — including those on complementarity — and states have a legal duty, as well as interest, to fulfil their primary responsibility to prosecute all core international crimes under the *Rome Statute* with no exceptions.

VI CONCLUSION

The discussion on complementarity in Kampala — aside from the stocktaking — was at best marginal. Its main focus was establishing consensus on a functional jurisdictional mechanism acceptable to the negotiators. The only direct tackling of the issue of aggression and complementarity was through paragraph 5 of annex III,⁷⁹ which was adopted without ratification or objection by the present states parties.⁸⁰

The logic behind keeping the articles on admissibility applicable to the crime of aggression was transferred from the SWGCA to Kampala. The imposition of limitations on the exercise of domestic jurisdiction over aggression was accomplished indirectly by inserting restrictions on the exercise of jurisdiction, as that by itself limits the jurisdiction of national systems under the complementarity mechanism. The heavy price for dropping off the exclusivity of the UNSC's triggering mechanism was paid by discarding the ICC's — and *mutatis mutandi* domestic courts' — jurisdiction over non-states parties' nationals and territories. Voluntarism and state consent were the stars for Kampala's relative success.

However, as mentioned above, these compromises and concessions did not eliminate the possibility for domestic systems to exercise their jurisdiction under art 17 and Preamble para 6. They did not close the door for prosecuting all international crimes under the *Rome Statute*, including the crime of aggression. The reading of the consensual adoption of the amendments by states parties did not discard the application of the complementarity mechanism over the crime of aggression. Contrary to the interpretations of many, a progressive reading of the adopted amendments tolerates the possibility of prosecuting domestically the crime of aggression, albeit within the limited jurisdictional parameters adopted in Kampala. Although the language of the understanding may give rise to a different interpretation, a non-ratified understanding can neither replace nor alter the entrenched complementarity regime that is a pivotal cornerstone of the *Rome Statute*. Furthermore, there are no obstacles to prevent domestic courts from prosecuting the crime of aggression when the UNSC has determined that an act of aggression has taken place.

⁷⁸ The US delegation's stand was in this direction: see above n 56.

⁷⁹ *Final Understandings*, ICC Doc RC/10/Add.1, annex III [5].

⁸⁰ Personal observations of the author while attending the Kampala Review Conference.

The above discussion does not claim to eliminate all the hurdles which the ICC Review Conference has failed to solve. However, it does reiterate that, notwithstanding these hurdles, the complementarity mechanism remains functional if a creative interpretation of the amendments of the *Rome Statute* is invoked. Furthermore, the door is not closed for the ICC after 2017 to provide further clarifications and solutions for what was missed in Kampala. The hope is that such future answers will remain directed towards ending impunity, both domestically and internationally, at the expense of political compromises — and not the inverse.