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The crime of aggression and public international law

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Chapter III. The Crime of Aggression today: the Kampala Amendments

3.1. Introduction

Six and a half decades after the Nuremberg Trial, the Review Conference of the Rome Statute in Kampala adopted by consensus, Resolution RC/Res.6. This Resolution contains amendments to the Rome Statute, which provide a definition and jurisdictional regime for the crime of aggression ("Kampala Amendments"). The Kampala Amendments comprise of:

- Definition of the crime of aggression (Article 8 *bis*)
- Conditions for which the court can exercise jurisdiction (Article 15 *bis* and 15 *ter*)
- Elements of the Crime
- Understandings of the Crime.

This Chapter focuses on the definition of the crime of aggression. The Elements of the Crime and the Understandings served as key tools to attain consensus for the definition of the crime of aggression.[443] The conditions for the exercise of jurisdiction depict the jurisdictional regime of the ICC, which relates to the scope of prosecution that the Court may execute sanctions against individuals for the crime of aggression. This will be examined in Chapter VI.

This Chapter begins by examining the journey from Rome to Kampala with respect to defining the crime of aggression (section 3.2), followed by introducing the Kampala Amendments (section 3.2.1). First, the state act element of the crime is examined (section 3.2.2.), followed by the elements of the crime pertaining to the conduct of the individual ("elements of individual conduct" [section 3.3]). As the Kampala Amendments have not attained customary international law status, the legal nature of the definition of the crime of aggression in Article 8 *bis* will be examined (section 3.4). Finally, a comparison will be made between the definition of the crime of aggression in the Kampala Amendments and crimes against peace in the IMT Charter and Nuremberg judgment (section 3.5).

[443] See Frances Anggadi, Greg French and James Potter, 'Negotiating the Elements of the Crime of Aggression' in Stefan Barriga and Claus Kress (eds), *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012); Claus Kress and others, 'Negotiating the Understandings on the Crime of Aggression', *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012).

3.2. From Rome to Kampala

Article 5(1) of the Rome Statute stipulates that the ICC has jurisdiction over (a) genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression ("core crimes"). However, unlike the other core crimes within Article 5(1), the crime of aggression remained undefined.[444] States were undecided amongst themselves whether or not to include the crime of aggression in the Statute.[445] The atmosphere pertaining to this issue was 'too antagonistic for a substantive negotiation, whilst some delegations feared this controversy might derail the adoption of the Statute as a whole.'[446] Thus, Article 5(2) represented a "codified impasse"[447] derived from much uncertainty between the plenipotentiaries during the Rome Statute negotiations.[448] It stipulates:

> 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

[444] See Article 5, 1998 Prepcom Draft Statute, 'Draft Statute for the International Criminal Court', Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc.A/CONF.183/2/Add.1; reprinted in Barriga and Kress (n 6) 248.

[445] See 1998 Rome Summary Records (18thJune) Committee of the Whole, Summary Record of the 6th Meeting, 18 June 1998, UN Doc.A/CONF.183/C.1/SR.6; excerpts reprinted in Barriga and Kress ibid 255–268; 1998 Rome Statute Summary Records (19th June) Committee of the Whole, Summary Record of the 6th Meeting, 18 June 1998, UN Doc.A/CONF.183/C.1/SR.6; excerpts reprinted in Barriga and Kress ibid 269–271.

[446] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression' in Stefan Barriga and Claus Kress (eds), *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012) 6.

[447] Silvia Fernandez de Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court' (2001) 25 Fordham International Law Journal 589, 589.

[448] The Non-Aligned Movement expressed disappointment as 'many of the difficulties that would allegedly result from [the crime of aggression] inclusion seemed merely to be pretexts for excluding that the "mother of crimes" –which has been recognized by the Nuremberg Tribunal some fifty years previously – from the Statute', 1998 Rome Summary Records (13 July, 10.00am), Committee of the Whole, Summary Record of the 34th Meeting, 13 July 1998, UN Doc.A/CONF.183/C.1/SR.34, para.17; excerpts reprinted in Barriga and Kress (n 6) 305–306.; Azerbaijan proposed that 'there could be a transitional clause stating that, pending a definition thereof, the provisions on crimes of aggression and treaty crimes would not come into force' 1998 Rome Summary Records (13 July, 3.00pm), Committee of the Whole, Summary Record of the 34th Meeting, 13 July 1998, UN Doc.A/CONF.183/C.1/SR.36, para.43; excerpts reprinted in Barriga and Kress ibid 307; See also 1998 Proposal by NAM, 'Amendments Submitted by the Movement of Non-Aligned Countries to the Bureau Proposal (A/CONF.183/C.1/L.59', 14 July 1998, UN Doc.A/CONF.183/C.1/L.75; reprinted in Barriga and Kress ibid 315.

> jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

The deliberate ambiguity in Articles 5(1) and 5(2) was a political move to ensure the sufficient votes necessary for adoption of the Statute. Resolution F of the Final Act adopted on the July 17th 1998, mandated the Preparatory Commission (hereinafter "PrepComm") to:

> prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime.[449]

Altogether, the negotiations post-Rome lasted from 1999 to 2010. Barriga, who played an instrumental part in the drafting process,[450] has succinctly categorized the negotiation history into four phases: (i) 1999 – 2002, the PrepComm; ii) 2003-2009, the Special Working Group on the Crime of Aggression (SWGCA); iii) Spring 2009-2010, Assembly of States Parties to the Rome Statute (ASP); iv) 31st May to 11th June 2010,the Review Conference at Kampala.[451] As the history has been well documented elsewhere, it need not be repeated here.[452] Relevant reference to the negotiation history will nevertheless be made when necessary.

3.3. The Kampala Amendments: the crime of aggression

Article 8 *bis* of the Kampala Amendments represents the first definition of the crime of aggression in a multilateral instrument. It is worth producing the provision in full.

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[449] 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 17 July 1998, UN Doc.A/Conf.183/13; reprinted in Barriga and Kress (n 6) 330–331.
[450] Kress and von Holtzendorff (n 133) 1186.
[451] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 5.
[452] See Barriga and Kress (n 6).

Crime of aggression:

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

According to Article 8 *bis*(1), the state act element is 'an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.' The elements of the crime pertaining to the conduct of the individual ("elements of individual conduct") comprises of two separate components:

- 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.

The first component refers to the different modes of perpetration that are related to the state act of aggression. The latter represents the leadership element of the crime.

There is also the additional element of *mens rea*. Overall, there are three elements of individual conduct for the crime of aggression: the modes of perpetration, the leadership element and the *mens rea* of the defendant.

3.3.1. The state act element of the crime of aggression

The state act element of the crime is undeniably an "act of aggression."[453] Yet not all recourse to force and/or acts of aggression can satisfy the underlying pre-requisite of the state act element of the definition of the crime because Article 8 *bis*(1) of the Kampala Amendments has set a significantly high threshold that the "act of aggression" by its "character, gravity and scale" constitutes a "manifest violation" of the UN Charter. The threshold for the use of force to be considered as the state act element of the "crime of aggression" appears to be set higher than the threshold for an "act of aggression" under *jus ad bellum*.

The definition of an "act of aggression" for the purposes of Article 8 *bis*(1) is contained in Article 8 *bis*(2) of the Kampala Amendments. This means that the Court will first assess whether the use of armed force by the alleged aggressor state amounts to an "act of aggression" under Article 8 *bis*(2). If this is satisfied, the Court will proceed to examine whether the "act of aggression" has reached the threshold to be considered as the state act element of the "crime of aggression."

A preliminary point should be made prior to analysing the substantive aspects of this element. It is important to understand that the "crime of aggression" is not committed by the alleged aggressor state, but by the individual who was in a position to effectively exercise control over or direct the political/military action of that state and had 'planned, prepared, initiated, and executed' the act of aggression as defined under Article 8 *bis*(2).

The definition within Article 8 *bis*(2) can be divided into two sections. The first section operates as a chapeau clause:[454]

> For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

[453] Princeton Report (2006), para.14-15; para 23.
[454] Princeton Report (2006) para 10.

The latter section gives meaning to the chapeau clause by listing acts that may qualify as aggression:

> Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression (...)

As can be observed, the definition under Article 8 *bis*(2) is verbatim of Articles 1 and 3 of the Annex to GA Resolution 3314 (albeit the slight but fundamental difference that Article 3 has been modified where 'in accordance with the provisions of Article 2' has been replaced with 'in accordance with UN GA Resolution 3314'). This has raised criticism, primarily because the legal nature of this Resolution is a non-binding multilateral instrument, which has the underlying purpose of serving as guidance to the Security Council in determining the existence of an act of aggression under Article 39 of the UN Charter.[455]

The main concern associated with this is that non-binding provisions in the Annex to GA Resolution 3314(XXIX) have been replicated in a multilateral instrument for the purposes of giving rise to individual criminal responsibility.[456] Not only is this contrary to the original drafting intentions behind the provisions of the Resolution, but as is well known, specificity and non-retroactivity are important in fulfilling the principle of legality in the context of criminal prosecution.[457] Thus the issue is that the provisions in the Annex to GA Resolution 3314(XXIX) lack the specificity to constitute a basis for individual criminal responsibility. [458]

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[455] SWGCA Report 2007 (January) para. 22; SWGCA Report 2008 (June) para.32.
[456] SWGCA Report 2009 (February), para.17; SWGCA Report 2007 (December), para.23.
[457] SWGCA Report 2007 (January), para.22; Judge Theodore Meron has written that 'the prohibition of retroactive penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals,' Theodor Meron, *War Crimes Law Comes of Age* (Clarendon Press 1999) 224; Ward Ferdinandusse argues 'the essence of the principle of legality, that an individual may not be prosecuted for conduct she could not know was punishable, requires the law to be so clear as to make its consequences forseeable', Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Springer 2006) 238.
[458] See UN GA OR, 51 st sess., sup no.10 at 9, UN Doc A/51/10(1996); Documents of the 47th Session [1995] 2 YB Intl Commn 1, 39, UN Doc. A/CN.4/SER.A/1995/ Add.1 (part 1).

Although the incorporation of Articles 1 and 3 of the Annex to GA Resolution 3314(XXIX) may not be ideal,[459] two points should be appreciated. First, the definition of an act of aggression in Article 8 *bis*(2) of the Kampala Amendments does not give rise to individual criminal liability because it is not the state act element of the crime *per se*; the latter is found in Article 8 *bis*(1). Instead, Article 8 *bis*(2) provides the definition of an "act of aggression" for the purposes of the "crime of aggression" in Article 8 *bis*(1). Thus, the act of aggression pursuant to Article 8 *bis*(2) is still subject to the threshold of "manifest violation" under Article 8 *bis*(1) in order to satisfy the state act element of the crime and give rise to individual criminal responsibility. Second, the political reality behind the negotiations should be taken into consideration that the drafters were aiming to achieve a consensus. The definition within GA Resolution 3314(XXIX) was relied upon because it was the consolidation of language agreed upon after some 20 years of negotiations, and not necessarily because of its substantive element.[460] Strategically, this was the most logical decision because the SWGCA had incorporated the normative definition of aggression under international law.[461]

[459] Some delegations preferred to make no reference to resolution 3314(XXIX) at all, see Princeton Report (2007), para.41; Kress writes that 'it would have been preferable to define the state component of the crime of aggression without reference to that document', 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, 1136.

[460] 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* (2010) 9–10; SWGCA Report 2007 (December) para.14.

[461] See SWGCA Report 2007 (January) para 20-21; in the SWGCA Report 2008 (June), it was stated that 'some delegations considered draft article 8 *bis*, paragraph 2, to constitute the best compromise, as it fulfilled several requirements: it was precise enough to respect the principle of legality; it covered only the most serious crimes; it was sufficiently open to cover future forms of aggression; and it was clearly understood that this definition only served the purpose of individual criminal responsibility under the Rome Statute. The Security Council and other organs thus remained free to continue to apply their own standards to the crime of aggression. The reference to resolution 3314(XXIX) was considered appropriate, as that resolution was a carefully negotiated instrument that reflected current customary international law,' at para.31.; See Jan Klabbers, 'Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What's the Difference' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 498–499.

3.3.2. A closer inspection of Article 8 bis(2) and GA Resolution 3314(XXIX) 1974

The explicit incorporation of Articles 1 and 3 of the Annex to GA Resolution 3314(XXIX) into the definition of an act of aggression in Article 8 *bis*(2), *prima facie* implies an omission of Articles 2, 4, 5, 6, 7 and 8.[462] This gives rise to two questions. First, what are the ramifications of the omission of Articles 2, 4, 5, 6, 7 and 8 of the Annex to GA Resolution 3314(XXIX) from the text of Article 8 *bis*(2)? Second, whether these omitted provisions may nevertheless be given effect in the context of Article 8 *bis*(2) which contains the phrase 'in accordance with UN GA Resolution 3314(XXIX).'[463]

i. the omission of Articles 2, 4, 5, 6, 7 and 8 of GA Resolution 3314(XXIX)1974.

Only Articles 2, 4 and 6 are of relevance to the present analysis. The incorporation of Articles 2 and 4 are particularly problematic because they refer to the role of the Security Council to make a determination of an act of aggression.[464] Thus, from the ommission of references to Articles 2 and 4, it can be inferred that the Security Council is excluded from determining an act of aggression as part of the state act element of the crime for the purposes of prosecution at the ICC.[465]

It should be clarified that this a separate matter from the role of the Security Council with respect to determining aggression as a condition for the exercise of jurisdiction under Article 15 *bis* Kampala Amendments, as the present matter refers to the substantive definition of the crime. The difference is that the determination by the Security Council of an act of aggression pursuant to Article 15 *bis* is a procedural matter, while the determination by the Security Council of an act of aggression for the purposes of the state act element of the crime relates to the substantive element of the crime. To allow the Security Council to play a role in the latter raises concern not only with respect to the principle of legality, but also the rights of the accused under Article 67(1)(i) Rome Statute.[466] Article 6 of the Annex to GA Resolution 3314 stipulated:

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[462] See Princeton Report (2007) paras. 38-43.
[463] Kress and von Holtzendorff (n 133) 1191.
[464] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 27.
[465] ibid.
[466] See SWGCA Report 2007 (December), para.15.

> Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

The potential gap caused by excluding Article 6 was discussed during the negotiations.[467] Some delegates suggested that a reference to "unlawful" should be inserted before the phrase 'use of armed force' in draft article 8 *bis*, paragraph 2,[468] as this was 'intended to make clear that not all uses of armed force constituted aggression, in particular, in case of self-defence.'

This stemmed primarily from the concern that by excluding Article 6 in the definition in Article 8 *bis*(2), all uses of armed force by a State against another State, even in situations of self-defence and approval by the Security Council, are *prima facie* acts of aggression. [469] On the other hand, others objected to this suggestion, stressing that the wording of General Assembly Resolution 3314(XXIX) should not be changed.'[470] It is apparent that the latter view prevailed.

Although an ordinary reading of the text of Article 8 *bis*(2) could suggest that an act of aggression may also encompass situations of the use of force which are lawful, this is not logical in the context of Article 8 *bis* and in the light of its object and purpose. The most simple object and purpose of defining aggression is to characterize the circumstances that result in the breach of primary norms to refrain from the use of force against other states.

Thus, to suggest that the definition of an act of aggression may encompass situations of force that are consistent with *jus ad bellum* and the UN framework of collective security appears to be contrary to the object and purpose of ascertaining the situations where unlawful recourse to force may be considered as aggression.[471] More

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[467] SWGCA Report 2009 (February), para.15; SWGCA Report 2008 (June), para.77; SWGCA 2007 Report (December), para.17; see Michael J Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 Yale Journal of International Law 71, 89.
[468] SWGCA Report 2009 (February), para.15.
[469] See Glennon (n 467) 88–89.
[470] SWGCA Report 2008 (June), para.33; McDougall is of the view that 'given the passion with which States defend their reserved right to use force it is surprising that they have adopted a definition of an act of aggression that deals with permissible uses of force so opaquely', McDougall (n 7) 101.
[471] Kress and von Holtzendorff argue that 'the recognition of such an odd concept can be avoided by way of a harmonious interpretation of Articles 1, 3 and 6 of the annex of Resolution 3314, as is required by Article 8 of that same annex. The absence of a ground precluding the wrongfulness of the use of armed force constitutes an implicit negative

importantly, in the overall context of Article 8 *bis,* defining an act of aggression under Article 8 *bis*(2) is to give meaning to "an act of aggression" in Article 8 *bis*(1) for the purposes of defining the state act element of the "crime of aggression." Article 8 *bis*(2) cannot be read separately from Article 8 *bis* (1) as both of these provisions form Article 8 *bis*, the definition of the crime of aggression.[472]

The act of aggression as defined in Article 8 *bis*(2) is still subject to an additional threshold within Article 8 *bis*(1), which would serve to exclude lawful instances of the use of force. Thus, the threshold of a "manifest violation" of the UN Charter under Article 8 *bis*(1) overcomes any drafting inadequacies in Article 8 *bis*(2) with respect to lawful situations of the use of force.

ii. Is GA Resolution 3314(XXIX)1974 to be incorporated in its entirety?

Some of the participants in the negotiations had expressed the view that a provision on the state act of aggression must refer to GA Resolution 3314(XXIX) in its entirety, stressing that the resolution was a package and that all its provisions were interrelated, as evidenced by Article 8.[473] The question is whether the phrase 'in accordance with' in Article 8 *bis*(2) can be read to incorporate GA Resolution 3314(XXIX) in its entirety into the definition of an act of aggression.[474] This suggests that the aforementioned omitted provisions will nevertheless be incorporated into the definition in Article 8 *bis*(2) because the definition of an act of aggression in GA Resolution 3314(XXIX) must be read in its entirety. Yet, reading GA Resolution 3314 (XXIX) in its entirety would give effect to the discretion of the Security Council under Articles 2 and 4 with respect to the determination of the state act element of the crime. To exclude the role of the Security Council from determining an act of

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element of the concept of 'act of aggression' as defined in the annex to Resolution 3314. As this construction of the term is 'in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974', it should also be adopted under draft Article 8 bis,' Kress and von Holtzendorff (n 133) 1192.

[472] ibid.

[473] Princeton Report (2006), para 33 mentions a "generic reference" to GA Resolution 3314(XXIX): such a reference would be consistent with the need to preserve the integrity of the resolution, respect the interconnected nature of its provisions (article 8) and, in particular, cover also articles 1 and 4, which were relevant in this context. This approach would further, avoid time-consuming discussion surrounding the selection of specific acts, Princeton Report (2007), para.39; SWGCA Report 2007 (December), para.15; see Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 27; McDougall (n 7) 99.

[474] McDougall (n 7) 97.

aggression for the purposes of establishing the state act element of the crime would exclude Articles 2 and 4 of GA Resolution 3314(XXIX) from being applicable. Thus, the only logical approach is to read Article 8 *bis*(2) without incorporating GA Resolution 3314(XXIX) as a whole so as to exclude the Security Council from playing a role in determining the state act element of the crime.

Notably, the Security Council has a specific role to play in determining an act of aggression as an external mechanism prior to the initiation of an investigation of the crime of aggression (Article 15 *bis* (6)). The Security Council may also refer a situation of aggression to the ICC (Article 13(b)), or defer proceedings relating to a crime of aggression (Article 16). It is worth clarifying that these are procedural actions and do not affect the substantive element of the state act element of the crime of aggression pursuant to Article 8 *bis*. Be that as it may, such procedural actions in relation to the prosecution of the crime of aggression at the ICC is indicative of a relationship between the Security Council and the Court, and an unforeseen role for the Security Council to play in relation to determining an act of aggression at the time when GA Resolution 3314(XXIX) was adopted in 1974.

Lastly, an argument can be made that if it was intended for other provisions of GA Resolution 3314(XXIX) to be incorporated into Article 8 *bis*(2), the relevant provisions could have also been included in the draft together with Articles 1 and 3. As such, it is submitted that Article 8 *bis*(2) should be read without the incorporation of GA Resolution 3314(XXIX) as a whole. Support for this argument can be found in the February Report of the Special Working Group on the Crime of Aggression (2009), where it had been observed that 'the point was made that the reference to General Assembly Resolution 3314 did not import the content of that resolution as a whole.'[475] Thus, only Articles 1 and 3 of GA Resolution 3314 are to be given effect in Article 8 *bis* (2). The phrase 'in accordance with' acts as a reference to the source from which the definition is obtained, i.e. GA Resolution 3314 and should not serve as a point of reference for incorporation.[476]

[475] SWGCA Report 2009 (February), para.17.
[476] Princeton Report (2007), para.41.

iii. The enumerated list: open or closed?

In the negotiations leading to Kampala, the SWGCA held extensive discussions over the question whether the definition should be specific or generic in nature.[477] The former refers to a definition that includes a concrete list of acts of aggression,[478] whilst the latter focused upon more general acts such as 'armed attack'[479] or 'use of armed force.'[480] It appears that in subsequent discussions, the majority appeared to favour the specific approach based on GA Resolution 3314(XXIX).[481] By mirroring the acts defined under Article 3, it is possible that this was a strategic move to appease the states that wanted a specific definition of list of acts.[482] Article 3 GA Resolution 3314(XXIX) was adopted in its entirety as the participants were reluctant to revisit the illustrative list of acts.[483]

The SWGCA also considered the question of whether the enumerated list within Article 8 *bis*(2) is open or closed.[484] Those in favour of a closed list were focused upon the importance of the principle of legality, expressing the view that 'the ambiguity of the nature of the list was in itself problematic under the principle of

[477] See Barriga and Kress (n 448) 24; Princeton Report (2005), para.75; Princeton Report (2006), para.7.
[478] See Princeton Report (2006), para.7; Barriga informs us that 'Arab and AM countries, in particular, favored a definition based on GA Resolution 3314, especially since it contained strong references to the right of self-determination and the 'right to struggle to that end and to seek and receive support,' and that it appealed to the permanent members of the Security Council as 'it stressed the autonomy of the Security Council in determining the existence of an act of aggression', in Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 24–25.
[479] 'Proposal Submitted by Germany: Definition of the Crime of Aggression', 30 July 1999 ("Proposal by Germany") UN Doc. PCNICC/1999/DP.13; reprinted in Barriga and Kress (n 6) 340.
[480] 'Proposal Submitted by Greece and Portugal', 7 December 1999, UN Doc.PCNICC/1999/WGCA/DP.1; 'Proposal Submitted by Greece and Portugal', 28 November 2000, UN Doc.PCNICC/2000/WGCA/DP.5; reprinted in Barriga and Kress, ibid 343, 375.
[481] Princeton Report (2006), paras.7-13; SWGCA Report 2006 (November), para.8; SWGCA Report 2007 (January), paras.14-15.
[482] Princeton Report (2007), para.46: Support was expressed for the list of acts contained in the non-paper, taken from article 3 of resolution 3314(XXIX). It was stated that the list represents current customary international law, though some took the view that was only true for subparagraph (g). It was stated that most of the acts contained in the list were reflected in the practice of the Security Council, while for some acts there was no Council practice.
[483] SWGCA Report 2007 (December), para.19.
[484] SWGCA Report 2008 (June), para 34-35; SWGCA Report 2007 (December), para 18-21; SWGCA Report 2007 (June), 47-53; Princeton Report (2007), para.47.

legality.'[485] Whilst, on the other hand, those in favour of the open or semi-open list 'indicated that there was a need to provide room for future developments of international law and to ensure that perpetrators would not enjoy impunity.'[486] Apparently, the matter was never definitely resolved.[487] However, it was 'emphasized that the generic and specific approaches could easily be combined by including a general chapeau and a non-exhaustive list of specific acts.'[488]

As mentioned above, Article 8 *bis*(2) contains the chapeau clause, whilst the list demonstrates examples of acts which may *qualify* as aggression under the chapeau clause. The use of the term 'qualify' implies that the listed acts have been determined to meet the chapeau definition, but this does not mean that the list is necessarily exhaustive. My interpretation is that the list under Article 8 *bis*(2) is open to the extent that the acts which fall outside the enumerated list can be considered aggression provided they meet the definition of an act of aggression within the chapeau clause, i.e. '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.'[489]

As there is the possibility that acts which potentially fall outside the list may be considered as an act of aggression under Article 8 *bis*(2), this may raise concern with respect to the principle of legality. Kress suggests that the threshold under the chapeau clause would serve as the limiting factor to curtail the potential acts which fall outside the enumerated list, and that this is sufficiently specific to fulfil the principle of legality for the purposes of international criminal law.[490]

From the list, it may be argued that some of the illustrative acts may not meet the threshold in the chapeau clause or may not be sufficiently grave to be considered a "serious crime of international concern" as set out under the general ambit of the Rome Statute.[491] For example, (f) refers to 'the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that State

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[485] Princeton Report (2007), para.50; SWGCA Report (January), 2007 para.20; See Kai Ambos, 'The Crime of Aggression after Kampala' (2010) 53 German Yearbook of International Law 463, 487.
[486] Princeton Report (2007), para.51.
[487] McDougall (n 7) 103.
[488] Princeton Report (2006), para.10.
[489] Princeton Report (2007), para 48; SWGCA Report 2008 (June), para.34; McDougall (n 7) 103; See Kress and von Holtzendorff (n 133) 1191.
[490] Kress (n 459) 1137; See also Princeton Report (2006), paras.11-12.
[491] SWGCA Report 2007 (December), para 23.

for perpetrating an act of aggression against a third State'. It is questionable as to whether this is sufficient enough for judges to consider that this amounts to an "act of aggression" which is a use of armed force which is "inconsistent with the UN Charter" under the chapeau clause or a "crime of serious international concern"? As there is no apparent reason why this act was incorporated into the enumerative list, it can be inferred that this was the result of the general reluctance of the participants to open the Pandora's Box of re-examining each act under the list individually. Once again, this is why the threshold clause in both the chapeau and Article 8 *bis*(1) is so important.[492]

3.3.3. An act of aggression that by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations

Article 8 *bis*(1) contains a threshold that the act of aggression by its "character, gravity and scale" must constitute a "manifest violation of the UN Charter." The need for a threshold had already originated in the July 2002 Coordinator's Paper ("character, gravity and scale, constitutes a flagrant violation of the Charter of the UN.") The 2006 Princeton Report shows that some participants stressed there was no need for an additional qualifier as an act of aggression under Article 1 of GA Resolution 3314(XXIX) was serious enough,[493] others however, were in favour of this threshold as it "excluded borderline cases."[494] In general, there appeared to be a preference for the term "manifest" in lieu of "flagrant."[495]

A threshold implies that some acts of aggression are more serious than others and should give rise to individual criminal responsibility, and this 'would not only exclude minor border skirmishes and other small-scale incidents but also acts whose illegal character was debatable rather than manifest.'[496] Thus, the threshold is intended to preserve the criteria under Article 5(1) of the Rome Statute that the crimes within the jurisdiction of the ICC should be limited to those that were considered "the most serious crimes of concern to the international community as a whole."[497]

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[492] SWGCA Report 2008 (June), para 24.
[493] Princeton Report (2006), para.18.
[494] Princeton Report (2006), paras.18-20.
[495] Princeton Report (2006), para.20; see Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) footnote 146.
[496] SWGCA Report 2007 (January), para. 16; SWGCA Report 2008 (June), para.24; SWGCA Report 2009, para.13.
[497] SWGCA Report 2007 (January), para.17; SWGCA Report 2007 (December), para.23.

The threshold also appears to serve another purpose, which is to rectify any drafting inadequacies within Article 8 *bis*(2) Kampala Amendments, especially in the light of the potential gap caused by the omission of Articles 2, 4 and 6 of the Annex to GA Resolution 3314(XXIX). This would help to overcome concern that the definition in Article 8 *bis*(2) may not necessarily differentiate between a breach of Article 2(4) and an act of aggression; nor clearly exclude situations of use of force which fall within exceptions to Article 2(4) of the UN Charter.

That said, there is no reference to a "manifest violation" in either the UN Charter or GA Resolution 3314: this threshold is a new construct. This meaning is not entirely clear and is subject to the discretion to the judges. This is where ambiguity arises. What does "manifest violation" mean? According to the simple dictionary definition, "manifest" is "to show something clearly, through signs or actions;"[498] "able to be seen: clearly shown or visible."[499] This suggests that a "manifest violation" is the clear, visible, and obvious breach of the laws of the use of force as enshrined within the UN Charter.

Upon referring to the Elements of the Crime of Aggression, in the Introduction, it is written that the term "manifest" is an objective qualification.[500] The fifth Element of the Crime is verbatim with Article 8 *bis*(1) which states that:

> The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

If the Elements of the Crime are meant to be instructive, then 'character, gravity and scale' should be taken into consideration to identify a "manifest violation." It can be inferred:

- the character of an act of aggression is a "manifest violation"
- the gravity of an act of aggression is a "manifest violation"
- the scale of an act of aggression is a "manifest violation"

The terms "character, gravity and scale" therefore assist the court in determining that the act of aggression represents a "manifest violation" of the UN Charter.[501] Yet, none

[498] Cambridge Online Dictionary
[499] Merriem-Webster Dictionary Online
[500] Paragraph 3, Introduction, Elements of the Crime of Aggression, Resolution RS/Res.6.

of these terms are defined, which suggests that there is discretion for interpretation by the judges.

The more important question is whether all three factors have to be present. At first glance, the use of the conjunctive 'and' implies that all three factors must be present – to what extent is this true? [502] Understanding 7 states:

> in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

The first sentence suggests that each of the three components must be independently sufficient to be considered as a 'manifest' determination,[503] whilst the second sentence infers that two of the three components are sufficient to assist the Court to determine that the use of force was a "manifest" violation. However, the latter does not necessarily convey that two components *are* sufficient for a finding of a 'manifest violation' of the UN Charter. Instead, it suggests that in the absence of one of the components, the Court is not precluded from finding that an act of aggression pursuant to Article 8 *bis* (2) has amounted to a 'manifest violation' of the UN Charter.

Therefore, the correct approach is that an act of aggression pursuant to Article 8 *bis* (2) should be assessed in the light of all three components. In a situation when one of the components is absent, this should not preclude the Court from finding that the act of aggression has amounted to a 'manifest violation' of the UN Charter in the light of the two components that are present.

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[501] See McDougall (n 7) 130.

[502] Robert Heinsch, 'The Crime of Aggression After Kampala: Success or Burden for the Future' (2010) 2 Goettingen Journal of International law 713, 729.

[503] Claus Kress, who was the focal point for the negotiations relating to the Understandings, explains that, 'the idea behind this sentence was to exclude the determination of manifest illegality in a case where one component is most prominently present, but the other two not at all. It was thought that use of the word 'and' in the formulation of the threshold requirement in draft art 8 *bis* (1) excluded a determination of manifest illegality in such a case and that the understanding should properly reflect this fact', see Kress and others (n 443) 96.

3.3.4. Grey areas of jus ad bellum: the question of humanitarian intervention

As already mentioned in section 1.5, humanitarian intervention was discussed during the negotiations in Kampala. The Head of the US delegation intervened at the Review Conference on 4 June 2010:

> The current definition in Article 8 *bis* does not fully acknowledge, as President Obama did in his recent Nobel acceptance speech, that certain uses of force remain both lawful and necessary. If Article 8 *bis* were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide, the very crimes that the Rome Statute is designed to deter – do not commit 'manifest' violations of the U.N. Charter within the meaning of Article 8 is. Regardless of how states may view the legality of such efforts, those who plan them are not committing the 'crime of aggression' and should not run the risk of prosecution.[504]

The US Delegation then proceeded to prepare a set of proposed draft Understandings ("US Non-Paper 2010"), which covered the issue of humanitarian intervention in its proposed third Understanding:

> It is understood that, for the purpose of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter of accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of one of the core crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression.

[504] See ibid 95; The US delegation proceeded to introduce a set of proposed draft Understandings that addressed this issue, see 2010 non-paper by the United States; reprinted in Barriga and Kress, id 751; see 'Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression', 11 June 2010, in Review Conference Official Records, RC/10/Add.1, 2010 (with particular reference to Understandings 3 and 4), reprinted in Barriga and Kress, id, 805.

As can be seen in the final Understandings to the Kampala Amendments, this had been rejected. However, Kress *et al* observe:

> the great majority rejected Understandings 3 and 4. […] there was the widespread concern that it would be inappropriate to deal with key issues of current international security law in the haste of the final hours of diplomatic negotiations. Therefore the widespread rejection of Draft Understandings 3 and 4 of the US must not be interpreted as widespread rejection of their content.[505]

As such, it can be reasonably presumed that the US was not the only nation present at the Review Conference that had concern with respect to the potential qualification of humanitarian intervention and other grey areas of *jus ad bellum* as the state act element of the crime of aggression under Article 8 *bis*(1). Thus, some States Parties may still be concerned that the definition of the act of aggression (Article 8 *bis*(2)) and the crime of aggression (Article 8 *bis*(1)) may encompass humanitarian intervention. This suggests that individuals who satisfy the leadership element under Article 8 *bis*(1) are not protected from prosecution at the Court for humanitarian intervention as a crime of aggression, even though the alleged act of aggression was a "good act" or benign aggression which served the purposes of protecting human rights. Creegan goes even further by arguing:

> [I]n the context of humanitarian intervention, the crime of aggression and the other crimes of the Rome Statute are put into violent contrast: humanitarian intervention is a tool to prevent war crimes, genocide and crimes against humanity – yet it is indictable elsewhere in the Rome Statute. Again, this contrast underscores the fundamental wrongness of war crimes, genocide and crimes against humanity in any context, as the true highest crimes of the international system, while aggression remains a way to both precipitate and alleviate these wrongs.[506]

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[505] ibid.

[506] Creegan (n 133) 70; She also writes that 'the two groups of offences, human rights crimes and the polticial crime of aggression simply cannot be compared', 81.

In my view, to create a distinction between a good aggression and bad aggression is not entirely consistent with a positivist approach to *jus ad bellum*. An act of aggression is an act of aggression regardless of whether it is a "good" aggression or a "bad" aggression.

The underlying criterion is that the aggressor state has acted in violation of Article 2(4) of the UN Charter, regardless of the nature or justness of this act. To take into consideration the justness of the act of aggression to determine if it is a good aggression or a bad aggression is precarious as the determination is entirely political and subject to the agenda of the interpreter.

Any assessment of the justness of the cause of war, or the use of force, is incompatible with a positive approach to the international legal framework that governs the use of force. The legality of the use of force should be assessed with respect to the existing framework, and not the moral validity or justness of its cause. The same objective standards should be applied in determining whether a situation amounts to an act of aggression (Article 8 *bis*(2)) and/or whether an act of aggression amounts to a crime of aggression (Article 8 *bis*(1)), irrespective of the cause of the underlying use of force.

It is therefore possible that humanitarian intervention may be considered as an "act of aggression" under Article 8 *bis*(2). But, to satisfy the state act element of the crime, it must amount to a "manifest violation" of the UN Charter under Article 8 *bis*(1).Thus, it can be argued that the threshold excludes cases of insufficient gravity and the grey areas *of jus ad bellum* by virtue of the three qualifiers of 'character, gravity and scale.'[507] This way, only the clear and obvious acts of aggression attract individual criminal responsibility for the purposes of prosecution at the ICC.

The threshold in Article 8 *bis*(1) may potentially act as a safeguard to prevent judges from prosecuting individuals for the planning, preparation, initiation and execution of acts of aggression, whereby the international community is divided with respect to the legality of the underlying use of force.[508] Be that as it may, it is not for the ICC, or the framework of international criminal law to clarify the grey areas within the *jus ad bellum.*[509] The purpose of determining the act of aggression is only to establish the state act element of the crime.

[507] SWGCA Report 2008 (June), para.24.
[508] McDougall (n 7) 159.
[509] ibid.

3.4. The crime of aggression and the act of aggression: the tale of two thresholds

The state act element of the crime of aggression entails a significantly higher threshold ("manifest violation" of the UN Charter) than an act of aggression under *jus ad bellum* (presumably a "serious violation" of the UN Charter).[510] Thus, not all acts of aggression may give rise to individual criminal responsibility, but only those, which by their character, gravity and scale constitute a "manifest violation" of the UN Charter.[511]

The significantly higher threshold under Article 8 *bis* (1) in comparison to the existing threshold required by *jus ad bellum* for an act of aggression has given rise to two broad concerns. First, some have expressed concern that such inconsistencies have the ramification of diluting/eclipsing the current definition of aggression under *jus ad bellum*.[512] Second, some fear that such a high threshold will indirectly condone the use of force or acts of aggression.[513] In my view, both concerns are unfounded.

3.4.1. Myth One: diluting/eclipsing jus ad bellum

O'Connell and Niyazmatov have argued that 'public international law experts are right to be concerned about the rise of two competing definitions of aggression in public international law. They especially need to be concerned about the newer ICC definition eclipsing the *jus ad bellum* definition.'[514] They submit that 'the immediate concern is the potential to dilute the *jus ad bellum.*'[515] They explain:

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[510] SWGCA Report 2009 (June), paras.26-28; Mary Ellen O'Connell and Mirakmal Niyazmatov, 'What Is Aggression? Comparing the Jus Ad Bellum and the ICC Statute' (2012) 10 Journal of International Criminal Justice 189, 119.
[511] Princeton Report (2006), paras 18-19.
[512] O'Connell and Niyazmatov (n 510) 200.
[513] Daniel D Ntanda Nsereko, 'Aggression under the Rome Statute of the International Criminal Court' [2002] Nordic Journal of International Law 497, 501–504; Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 European Journal of International Law 1117, 1124.
[514] O'Connell and Niyazmatov (n 510) 200.; Sean Murphy also argues in a similar vein that 'adoption of the definitions on "act" and "crime" of aggression may have collateral implications outside of the criminal context, especially on rules relating to the *jus ad bellum'*, Sean D Murphy, 'The Crime of Aggression at the International Criminal Court' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 556–557.
[515] O'Connell and Niyazmatov (n 510) 201.

> Article 8 bis (1) requires that the conduct by its 'character, scope and gravity' constitutes a 'manifest' violation of the UN Charter to constitute aggression. Yet, the GA has already made a determination than the examples in Article 3 of its Definition are serious violations of the Charter. In other words, Article 3 acts are 'manifest' violations. International law experts will need to emphasize this point so that government leaders do not come to think that leaving troops on the territory of another state, as Uganda did in Congo, or other conduct is not a violation of the UN Charter because it is not a 'manifest' violation for the ICC Statute.[516]

They appear to equate a serious violation of the UN Charter pursuant to GA Resolution 3314(XXIX) with a manifest violation of the UN Charter in Article 8 *bis* (1). They suggest that every act of aggression should rightfully qualify as the state act element of the crime. However, this would appear contrary to the object and purpose of the threshold of a "manifest violation" in Article 8 bis (1) as it is clearly intended that not every act of aggression may amount to the state act element of the crime of aggression.

In further criticism, the second part of their submission that government leaders may act in the belief that their conduct is not a violation of the UN Charter because it is not a "manifest" violation for the ICC Statute is rather groundless. Regardless of the applicability of the Kampala Amendments and the Rome Statute, States have primary obligations under the UN Charter with respect to their conduct of recourse to force. These obligations fall upon Government leaders, within their official capacity as organs of the State.[517] Thus, regardless of the legal effect of the Kampala Amendments or Rome Statute, government leaders have a duty to comply with their primary obligations under *jus ad bellum* to refrain from violating the UN Charter. Paulus had argued in a similar vein that:

> What happens to the remaining 'ordinary' violations of the prohibition on the use of force? Are they less meaningful because they are not criminalized? The true impact of the definition as adopted by the Working Group may well lie in

[516] ibid 200.
[517] Article 3, ARSIWA 2001.

> the derogation from the existing comprehensive prohibition on the use of force rather than its clarification.[518]

I disagree with his premise. Irrespective of whether an act of aggression may amount to a crime of aggression for the purposes of the Rome Statute, states are prohibited from 'ordinary' and all violations of the prohibition of the use of force. The prohibition of the use of force is a peremptory norm, which aside from compliance pull, gives rise to a special set of consequences under the secondary rules of state responsibility.[519] This means that 'ordinary' violations of the prohibition of the use of force are by no means less meaningful as there are consequences for the aggressor state under the secondary rules of state responsibility.

O'Connell and Niyazmatov conclude that 'the crime of aggression has been included in the ICC Statute, but is based on a different definition than that found in the *jus ad bellum*. This is regrettable.'[520] However, there is a different definition for the crime of aggression than an act of aggression, this does not necessarily have a detrimental effect on the obligations of states with respect to *jus ad bellum.* Regardless of whether the act of aggression meets the threshold to be considered as the state act element of the crime of aggression, *jus ad bellum* is applicable.

Therefore, it is submitted that violations of *jus ad bellum* that are not criminalized should not be viewed as "less meaningful" nor should the entire legal framework be viewed as "diluted or eclipsed" or "derogated from." It is not disputed that two thresholds for the act of aggression under international law may have the potential to cause confusion. The point is that despite any potential concern, the threshold for the state act element for the crime of aggression does not necessarily "dilute" or "eclipse" the definition under *jus ad bellum* because it pertains to the prosecution of an individual and not for invoking legal consequences against the aggressor state.

3.4.2. Myth Two: condoning the use of force which gives rise to "lesser violations" of the UN Charter

Another concern which arises in relation to the threshold under Article 8 *bis* (1) is that acts of aggression which fall short of the threshold become implicitly condoned

[518] Paulus (n 513) 1124.
[519] Article 26, and Chapter III, ARSIWA 2001
[520] O'Connell and Niyazmatov (n 510) 207.

as they do not give rise to individual criminal responsibility. In other words, states believe there is a green light to commit acts of aggression, which fall beneath a "manifest violation" of the UN Charter because there are no consequences of criminal punishment.[521] Nserenko, writing before the Review Conference submitted:

> to exempt small-scale armed attacks on other states' sovereignty, territorial and political independence from the reach of international criminal law will be to encourage leaders of powerful states to launch repeated short, sharp armed attacks on less powerful states with impunity. Weak states must be protected from such bullying by powerful ones.[522]

This is rather pessimistic and rather unwarranted. Leaving aside his conceptual distinction between powerful and less powerful states, 'short, sharp, armed attacks' are still prohibited under Article 2(4), which means that every state has obligations to refrain from such conduct, regardless of whether the leader may face the criminal prosecution. Both 'weak' and 'powerful' states are rights-holders of the enjoyment of the norms that prohibit aggression. Paulus had also expressed similar concern that:

> in the absence of prosecution by the Court, states can easily view such abstention as an unjustified bill of clean health. Thus, in the end, criminalisation may lead to the unintended consequence of rendering the use of force easier rather than sanctioning it more effectively.[523]

As I had argued above, regardless of criminalisation of aggression, the rule of the prohibition of the use of force under *jus ad bellum* will confer primary obligations on states. The high threshold under Article 8 *bis*(1) is directly relevant to individual criminal responsibility. Once again, it must be clarified that this qualifier applies in isolation, strictly in the context of when individuals may be prosecuted and should not be interpreted as affecting the legal framework of jus ad bellum.

Regardless of whether the state act of aggression can satisfy the criteria to be considered as the state act element of the crime of aggression and thus prosecutable, it

[521] See McDougall (n 7) 133.
[522] Nsereko (n 513) 103.
[523] Paulus (n 513) 1124; for a reply, see Kress (n 459) 1135.

is still prohibited conduct and a violation of *jus ad bellum.* Thus, all acts of aggression are prohibited under international law, regardless of whether or not the relevant individuals who are part of the state organ may face criminal prosecution. It should not be presumed that the high threshold required in order for an act of aggression to be considered as a crime of aggression would condone – or encourage state officials to commit violations of Article 2(4) of the UN Charter which fall short of a manifest violation of the UN Charter.

3.5. Elements of Individual Conduct

The elements of individual conduct in Article 8 *bis*(1) comprise two components:

- Planning, preparation, initiation or execution ("perpetration phase")
- Position effectively to exercise control over or to direct the political or military action of a State ("leadership element").

The former describes the material element or *actus reus* of the crime, while the latter is the necessary pre-requisite which enables the perpetrator to be in a position to conduct the relevant *actus reus*. The necessity of the latter can be seen by the incorporation of the use of the word 'by' to connect both the perpetration phrase and the leadership element. Suffice it to say, like all crimes – the *actus reus* must be accompanied with the mental elements (*mens rea)*. Therefore, there are three elements altogether which give rise to the elements of individual conduct of the crime of aggression: *actus reus*, leadership element and the *mens rea.*

3.5.1. Leadership element

The leadership element was a relatively uncontentious issue in the negotiations leading up to the Kampala Amendments.[524] The basic assumption is that one has to be in a high position within the hierarchy of a state to be considered as a perpetrator of the crime of aggression. Under Article 8 *bis*(1) the individual must be in a position to exercise control over or direct the political or military action of a State ("control or

[524] The leadership element was already contained in the Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.193/2/Add.1; in the Coordinator's 1999 Consolidated Text of Proposals on the Crime of Aggression, PCNICC/1999/WGCA/RT.1(9 Dec.1999); Princeton Report (2006), para.88; 'Proposal for Alternative Language on Variant (a) Prepared by the Chairman for the Informal Consultations', in Princeton Report (January) 2007, Annex (Appendix); reprinted in Barriga and Kress (n 6) 577.

direct"). This is a substantive component of the definition, and should not be interpreted as merely jurisdictional in nature.[525]

The negotiation history supports this claim. The 2007 Proposal by the Chairman on Variant (a) (January), annexed to the 2007 SWGCA Report (January), was criticised by some delegations that 'the new formulation seemed to link the leadership element to the scope of jurisdiction of the Court, and no longer to the definition of the crime of aggression itself.'[526] Some participants had 'stressed the importance of retaining the leadership clause in the definition itself, since it constituted an integral part thereof.'[527] In response, the 2007 Chairman's Non-Paper on Defining the Individual's Conduct included the leadership clause as part of the definition of the crime. It can be inferred that it was intended that the leadership element should be a substantive component of the definition of the crime.[528]

The importance of the leadership element is further reinforced by the following addition to Article 25(3) of the Rome Statute:[529]

> In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

The leadership element is imposed on all modes of perpetration, implying that all secondary perpetrators must also fulfil the "control or direct" criteria.[530] The footnote in the second Element of the Crime of Aggression states that 'more than one person may be in a position that meets these criteria.' Thus, subject to these conditions, there can be more than one perpetrator of the crime.

The leadership element can be understood in two parts: i) the role of the perpetrator in the context of the hierarchy of the State political/military structure that enables him/her to carry out the requisite conduct; ii) the requisite conduct of the

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[525] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 23; see also 2007 Proposal by the Chairman on Variant (a) (January); 2007 SWGCA Report (January), para.11.
[526] SWGCA Report 2007 (January), para.11.
[527] Princeton Report (2007), para.9.
[528] SWGCA Report 2007 (December), para.6.
[529] Princeton Report (2007), para.11.
[530] See Barriga and Kress (n 6) 23; SWGCA Report 2009, para 25: it was noted that this provision was crucial to the structure of the definition of aggression its current form.

perpetrator to control or direct the political/military action of the State. The requirement that the person must be 'in a position', implies that the perpetrator must formally attain a position where he/she has the capacity to carry out the requisite conduct, i.e. an official leadership position. This would involve examining the official title of the defendant and the relevant powers and duties affiliated with such position.

However, the inclusion of the word "effectively" suggests that the perpetrator must possess the actual ability to exercise sufficient authority to carry out the requisite conduct, in addition to a formal leadership position. Thus, 'in a position effectively' suggests a de facto leadership position, where the person is able to carry out the requisite conduct of 'controlling/directing' the political or military action of a state, who is not a mere figurehead who lacks the capacity to carry out those functions.

The simple definition of "control" is "to order, limit or rule something, or someone's actions or behaviour";[531] "the power to influence or direct people's behaviour or the course of events."[532] The simple definition of "direct" is "to give authoritative instructions to; command; order or ordain";[533] "to cause (someone or something) to turn, move, or point in a particular way";[534] "to control the operations of; manage or govern."[535] Put in context, this suggests that the perpetrator must have the power or authority to have a direct effect on the 'political or military' action of the aggressor state by having a decisive say or command, or order, limit, rule, govern, regulate, supervise the political or military action of the relevant state which is aimed at achieving the objectives which lead to the act of aggression which by its character, gravity and scale constitutes a manifest violation of the UN Charter.

The next question that needs to be addressed is the scope of the persons with respect to the leadership element.[536] Should "control or direct" adhere to a strict interpretation or does it provide ambit for nuance? The former suggests that the defendant must be a de facto leader who must have effective control and/or direction, whilst the latter suggests that the defendant may not necessarily have to be a political

[531] Cambridge online dictionary
[532] Oxford online dictionary
[533] Dictionary.com
[534] Merriam-Webster online
[535] Oxford online dictionary
[536] McDougall interprets the scope of perpetrators as 'de facto "leaders" who are in position to have a decisive say over, govern, instruct or command the deeds of the political or military establishments of a State aimed at achieving particular objectives' and that business and religious leaders are excluded,' McDougall (n 7) 203.

or military leader but one who nevertheless attains de facto effective control and/or direction over the political/military action of the relevant state.

This may arguably include leaders of non-state parties (e.g. private economic actors) or religious leaders. This issue was touched upon in the negotiation history, [537] as it had been raised that 'the content of the leadership clause merited greater consideration, and that the Nuremberg precedent (indictments under the IMT and Control Council Law No.10) referred to persons outside formal government circles who could "shape or influence" the State's action [...].[538]

Some delegations had considered the 'language to be sufficiently broad as to permit the prosecution of more than a single leader, including persons outside formal government circles'[539] and it was subsequently expressed that 'the language of this provision was sufficiently broad to include persons with effective control over the political or military action of a State but who are not formally part of the relevant government, such as industrialists.'[540]

Heller argues that 'the SWGCA rejects the "shape or influence" standard because it believes that the IMT and NMT applied the more restrictive "control or direct" requirement.'[541] However, McDougall disagrees and argues that the participants of the negotiations were aware of the broader scope of perpetrators applied by the NMT, and 'made a conscious choice to narrow the scope of perpetrators captured.'[542] This was perhaps also the most logical decision, as Barriga reflects that 'given that the wording of the clause already enjoyed widespread support, […] there was limited interest in exploring alternative formulations. There was also concern that this formula would open the doors too far, especially in relation to democracies where a

[537] See SWGCA Report 2007 (January) para 13; Princeton Report (2007), para.12; 'Elements of the Crime of Aggression – Proposal Submitted by Samoa', 21 June 2002, UN Doc.PCNICC/2002/WGCA/DP.2; 'Proposed text on the Definition of the Crime and Act of Aggression – Proposal Submitted by the Delegation of Colombia', 1 July 2002, UN Doc. PCNICC/2002/WGCA/DP.3; 'Elements of Crimes', 9 September 2002, in ASP Official Records, ICC-ASP/1/3, Part II, 108; reprinted in Barriga and Kress (n 6) 418.
[538] Princeton Report (2007), para.12.
[539] SWGCA Report 2007 (December), para.9.
[540] SWGCA Report (2009), para. 25.
[541] Heller (n 336) 479.
[542] McDougall (n 7) 183.

very large circle of persons could be said to 'shape or influence' the State's action.'[543] Thus, it is intended that the scope of perpetrators should be narrow.

Heller criticises the leadership element in the Kampala Amendments as representing 'a significant retreat from the Nuremberg principles – not their codification.'[544] He expressed concern that:

> Adopting the 'control or direct' requirement also entails rejecting the principle – central to both the IMT and NMT – that non-governmental actors can commit the crime of aggression, because no private economic actor and very few complicit third-state officials could ever be in a position to control or direct an aggressive state's political or military action.[545]

However, including non-state actors in the scope of perpetrators may be rather problematic, especially in the broader context of non-state actors and/or private economic actors (businesses and/or multinational corporations) having a *locus standi* at the ICC. Also, it would have been unrealistic to expect a consensus if the definition of the crime allowed for the potential prosecution of non-state actors. The implications of the leadership element will propagate the Court to concentrate upon the endeavour of prosecuting the few who are truly responsible for making decisions relating to the use of force. This may perhaps be more effective in achieving the deterrent objectives. [546]

Be that as it may, there does appear to be ambit for discussion that the scope of perpetrators under Article 8 bis (1) is sufficiently broad so as to encompass a key leadership role attained by a religious leader or industralist. The decision as to whether an individual may fall within the leadership element is ultimately for the discretion of the Court.

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[543] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 22.; 'Proposal for a Definition of the Crime of Aggression Submitted by the Delegation of Germany', 19 February 1997, UN Doc.A/AC.249/1997/WG.1/DP.3; reprinted in Barriga and Kress (n 6) 223–225; see Princeton Report (2007) para.12; 1997.
[544] Heller (n 336) 497.
[545] ibid 488–489.
[546] McDougall (n 7) 46–47.

3.5.2. Actus reus: planning, preparing, initiation or execution

In the negotiations leading up to Kampala, the participants were divided between two drafting approaches with respect to the forms of individual participation within the definition of the crime. The starting point is the July 2002 Coordinator's Paper:

> a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a state, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.[547]

As it was considered difficult to reconcile this with the secondary forms of participation within Article 25(3),[548] it was initially suggested that:

> The provisions of articles 25, paragraphs 3, 28 and 33 of the Statute do not apply to the crime of aggression.[549]

This has been described as the "monist" approach because the definition contains a description of different forms of participation, whilst excluding application of the various modes of participation enlisted within Article 25(3).

As the negotiations carried on towards the 2005 Princeton Meeting, there was a shift towards a preference for adopting an approach which was more consistent with the other crimes in the Rome Statute, where the formulation was: the conduct of the principal perpetrator, in addition to the other forms of participation contained in

[547] It is also interesting to note that 'the requirement in the July 2002 Coordinator's Paper for the perpetrator to be 'in a position effectively to exercise control over or to direct the political or military action of a State' also made its way unchanged into article 8 bis of the resolution adopted in Kampala', Barriga and Kress (n 6) 10.
[548] Princeton Report (2004), para.37; Princeton Report (2005), para.19.
[549] 'Discussion Paper Proposed by the Coordinator', 11 July 2002, UN Doc.PCNICC/2002/WGCA/RT.1/Rev.2, in Report of the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2002/2/Add.2, Part II, 3, para.3.

Article 25(3). [550] This was called the "differentiated approach" as it intended to include the modes of participation in Article 25(3).[551]

Some had found that the difference between the two options was very minimal as they were largely predicated upon the same rationales. Although, many delegations indicated in the light of the above that they were flexible, they nevertheless expressed a preference for one of the two variants. [552] As can be seen, the "differentiated approach" ultimately prevailed[553] and the definition of the crime of aggression is drafted in a similar manner to the other core crimes, where there is the conduct of the principal perpetrator, in conjunction with the other forms of participation found in Article 25(3).[554]

However, to be able to adopt the "differentiated approach," the challenge for the participants was to decide upon the series of conduct verbs to describe how the principal perpetrator committed the crime of aggression:[555]

> in the case of the crime of aggression the underlying collective act is not broken down in a list of possible individual types of conducts, as is the case with the crime of genocide (killing, causing serious bodily or mental harm etc) and the crime against humanity (murder, extermination, etc); that means that it is the collective act as such that constitutes the point of reference for any definition of what the individual principal perpetrator actually does.[556]

It was argued that the term "participates" should be excluded from the definition in order to avoid the forms of participation under Article 25(3) Rome Statute.[557] Possible words that were suggested included "organize and direct", "direct" and "order" as

[550] Princeton Report (2005), paras.20-25; Princeton Report (2006), para.84.
[551] Barriga informs that 'the conceptual challenge of the differentiated approach, however, was to find a single conduct verb for the definition that properly describes what the principal perpetrator actually does', Barriga and Kress (n 6) 21.
[552] See SWGCA Report (January) 2007, para.9.
[553] Princeton Report (2006), para.84; SWGCA Report 2007 (January), para.6: the main advantage of this approach was that the existing provisions of the Statute would be applicable to the greatest extent possible.
[554] See 'Discussion Paper Proposed by the Chairman', 16 January 2007, ICC-ASP/5/SWGCA/2; reprinted in Barriga and Kress (n 6) 101.
[555] Princeton Report (2006), para.85; see also Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 20–22.
[556] SWGCA Report 2005 (June), Appendix III, Discussion Paper I, Section III(1)(a), Discussion Paper on *the Crime of Aggression and Article 25, paragraph 3 of the Statute.*
[557] Princeton Report (2006), para.87.

alternative conduct words.[558] The discussion included whether to keep the phrase "planning, preparing, initiation and execution' which was already contained in the 2002 PrepCom Paper.

In the course of the negotiation process, some had wished to delete this phrase as the elements of this notion were contained in the forms of participation under Article 25(3) Rome Statute and thus 'the inclusion of these terms in the conduct element might blur the distinction between primary and other perpetrators.'[559]Those who wished for the phrase to be retained noted that it 'reflected the typical features of aggression as a leadership crime, and its retention in the text would highlight the criminalized conduct and thus increase the deterrent effect of the provision.'[560] It was then suggested that the terms in this phrase should be used as conduct verbs. [561]

In 2007, the Chairman of the SWGCA suggested that paragraph 3 *bis* should be added to Article 25:

> With respect to the crime of aggression, the provisions of the present article shall only apply to persons being in a position effectively to exercise control over or to direct the political or military action of a State.[562]

This ensured the leadership requirement applies to both primary and secondary perpetrators.[563] Barriga writes:

> This approach squared the circle in many ways: it allowed for retaining the Nuremberg precedent in the definition, it allowed for fully applying article 25(3) to the crime of aggression, and it brought the cumbersome search for an innovative conduct verb to an end.[564]

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[558] Princeton Report (2006), para.89.
[559] SWGCA Report (2006), para.92.
[560] SWGCA Report (2006), para.92.
[561] SWGCA Report (2006), para.92.
[562] 'Proposal for Alternative Language on Variant (a) Prepared by the Chairman for the Informal Consultations', in 2007 *Princeton Report (January),* Annex *(Appendix);* reprinted in Barriga and Kress (n 6) 104.
[563] ibid
[564]Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 21; Princeton Report (2007), para.8: The point was made that with respect to the conduct verb, the Chairman's alternative language followed the Nuremberg precedent. The proposal would thus cover all forms of conduct and would be qualified by the leadership element. The proposal would furthermore replicate the structure used for the other crimes under the Statute, which

Criticism had been raised with respect to the addition of the verbs 'planned' 'prepared' 'initiated' or 'executed' to the modes of liability covered in Art 25(3);[565] and that 'multiplication of modes of liability will create unnecessary confusion in the current structure of the Statute.'[566] However, excluding the perpetration phrase would have resulted in the lack of a direct nexus between the conduct of the individual and the state act of aggression. Also, this would have departed from the legal construct of the crime of aggression with respect to the Nuremberg Trial.

3.5.3. Mens Rea

As the Kampala Amendments do not refer to any special intent requirement,[567] it is assumed that Article 30 of the Rome Statute applies. This was mentioned in the 2009 Chairman's Non-Paper on the Elements of the Crime:

> where no reference is made in the Elements to a particular mental element for any particular material element listed, the relevant mental element set out in article 30 – intention, or knowledge, or both – applies. Usually, intention applies to a conduct or consequence element, and knowledge applies to a circumstance or consequence element.'[568]

Thus, it is useful to examine the Elements of the crime of aggression to decipher whether they are a 'conduct or consequence' element (intention) or a 'circumstance or consequence element (knowledge)'. Elements 1 and 2 describe the conduct of the individual, Elements 3 and 4 on the other hand refer to the state act element, whilst Elements 5 and 6 relate to the threshold requirement.

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would satisfy the principle that the drafting of the provisions on aggression should follow the structure of the other crimes, wherever possible.

[565] SWGCA 2006 (June), para.92.

[566] Dov Jacobs, 'The Sheep in the Box: The Definition of the Crime of Aggression at the International Criminal Court' in Christoph Burchard, Otto Triffterer and Joachim Vogel (eds), *The review conference and the future of the ICC* (Kluwer law International 2010) 142.

[567] This is in contrast with genocide, as there is a special intent requirement, i.e. dolus specialis which requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, Article 6 Rome Statute; see Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press 2012) 44–49.

[568] 'Non-Paper by the Chairman on the Conditions for the Exercise of Jurisdiction' in 2009 Princeton Report, annex III, para.10; reprinted in Barriga and Kress (n 6) 677.

Element 1 contains the perpetration phrase, which is a conduct element and not a circumstance or consequence element, which means that 'intention' must be present. In other words the perpetrator must have intended to plan, prepare, initiate or execute the act of aggression. Knowledge is not necessarily applicable here. [569]

Element 2 confirms that the perpetrator was in a position effectively to "control/direct" the political/military action of the State which committed the act of aggression. This is a circumstance element, which means that 'the perpetrator must have known (that is, been aware) that he or she was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression.'[570]

Elements 3 and 4 refer to the act of aggression under Article 8 bis (2) and are circumstance elements which mean that knowledge is applicable. In particular, Element 4 states that:

> the perpetrator was aware of the *factual* circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations (emphasis added).

It is important to understand that 'there is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.'[571]

In the 2009 Chairman's Non-Paper on the Elements of Crimes, it is explained that the mental element of "knowledge of fact" means that 'the perpetrator is not required to have knowledge of the legal doctrine and rules used to evaluate whether a State use of force is inconsistent with the Charter of the United Nations, but is only required to have awareness of the factual circumstances establishing this inconsistency.'[572] To satisfy the "factual circumstances" element:

> it would not be sufficient merely to show that the perpetrator knew of the facts indicating that the State used armed force. It would also be necessary to show that the perpetrator knew of facts establishing the inconsistency of the use of

[569] Ibid, para.12.
[570] Ibid, para.14.
[571] Ibid, para.2.
[572] Ibid, para.6.

> force with the Charter of the United Nations. Examples of relevant facts here could include: the fact that the use of force was directed against another State, the existence or absence of a Security Council resolution, the content of a Security Council resolution, the existence or absence of a prior or imminent attack by another State.[573]

Heller points out that the jurisprudence at the NMT differs in terms of *mens rea*, as these tribunals held that 'participating in an act of aggression was criminal only if the defendant knew that the act was illegal under international law.'[574] Although this was indeed acknowledged by the Chairman, he expressed concern that:

> a mental element requiring that the perpetrator positively knew that the State's acts were inconsistent with the Charter of the United Nations (effectively requiring knowledge of law) may have unintended consequences. For example, it may encourage a potential perpetrator to be wilfully blind as to the legality of State acts even if that advice is subsequently shown to have been incorrect. Also, mental elements requiring knowledge of the law are regularly avoided in domestic legal systems as they are often difficult to prove to the required standard.[575]

Elements 5 and 6 relate to the threshold of the "manifest' violation of the UN Charter. The introduction to the Elements of the Crime clarifies that 'the term "manifest" is an objective qualification'[576] and that 'there is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.'[577]

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[573] Ibid, para.20.
[574] Heller (n 336) 379.
[575] 'Non-Paper by the Chairman on the Elements of the Crimes', in 2009 Princeton Report, annex II, para.18; reprinted in Barriga and Kress (n 6) 677.
[576] Elements of the Crime, Resolution RC/Res.6, para.3; In the Chairman Non-Paper on Elements of the Crime (2009), it is clarified that 'Paragraph 3 clarifies that the use of the term "manifest" in proposed Elements 5 and 6 is an objective qualification. In other words, the Court's determination whether the particular violation of the Charter of the United Nations is objectively a "manifest" violation is decisive, rather than whether the perpetrator considered it to be a manifest violation, at para.7, Appendix II; reprinted in Barriga and Kress, ibid 680.
[577] Elements of the Crime, Resolution RC/Res.6, at para.4.

Once again, in Element 6, there is the requirement of knowledge of "factual circumstances." This should be read in conjunction with Element 4 because 'there may be instances where an accused is aware of facts establishing that a State use of force is an act of aggression, but not aware of other facts establishing that this act of aggression constitutes, by its character, gravity and scale, a manifest violation of the Charter of the UN.'[578] In other words, the perpetrator may fulfil the mental elements of the act of aggression under Article 8 bis (2) but not the mental elements required of a "manifest" violation of the UN Charter to be liable for the crime of aggression.

It appears that the perpetration phrase is the only component of the definition of the crime of aggression where the mental element required is the intention of the perpetrator. The other components, i.e. the leadership element and state act element require the mental element of factual knowledge. To satisfy the mental elements required for a successful conviction for the crime of aggression means that the individual must first acquire factual knowledge that the intended use of force is "inconsistent with the UN Charter"; and the acts which such use of force entails will constitute a "manifest" violation of the UN Charter. Upon such knowledge, the defendant must intend to plan, prepare, initiate or execute such acts.

The threshold for the mental elements appears to be relatively low, especially in comparison with the high threshold required to satisfy the leadership element and the state act element. However, it can be logically assumed that if the perpetrator fulfils the leadership element, he/she has an inherent knowledge of being in such a position and of his/her scope of powers to exercise control over or to direct the political/military action of a State.

Having attained such a high-level governmental position, it is likely that the person will be able to acquire the necessary knowledge of the factual circumstances that the intended use of force is inconsistent with the UN Charter. However, knowledge that such intended use of force will constitute a "manifest violation" of the UN Charter may be more difficult to satisfy. Perhaps the latter will be the most difficult mental element to satisfy.

[578] 'Non-Paper by the Chairman on the Elements of Crimes', in 2009 Princeton Report, annex II, para.25; reprinted in Barriga and Kress (n 6) 684.

3.6. The legal nature of the Kampala Amendments

Article 8 *bis* (1) and Understanding 4 affirm that the definition of the crime of aggression is only for the purposes of this Statute. Thus, the definition in Article 8 *bis* (1) does not *prima facie* have customary international law status, nor is it a universally binding definition. What then is the legal nature of the Kampala Amendments? Do the Kampala Amendments confer substantive obligations to refrain from the conduct proscribed in Article 8 bis? If so, who are the duty-bearers of these obligations, and who are the rights-holders of the enjoyment of the proscribed conduct?

The legal nature of the Rome Statute should first be considered.[579] Milanovic has argued that there are two possible ways of reading the Rome Statute:

> First, like the statutes of other international criminal tribunals the Rome Statute could be seen as being purely jurisdictional in nature. Its provisions defining international crimes would be addressed to the Court itself, setting out the scope of its subject-matter jurisdiction, but they would not be addressed to individuals directly. Rather, the source of substantive norms of criminal law, which are directly addressed to individuals would be elsewhere, in customary international law.[580]

The answer is not at all straightforward, as he points out 'it is impossible to resolve this fundamental ambiguity about the legal nature of the Rome Statute by reference to the text alone or to its drafting history.'[581]

The first step is to examine the relationship between the State Party and the ICC. When a State Party ratifies the Rome Statute, it accepts the jurisdictional competence of the Court over the crimes in Article 5(1), whereby the ICC may enforce sanctions against the perpetrators of these crimes provided they are nationals or had committed the crime on the territory. The classical jurisdictional nexus of nationality or territorial

[579] See Marko Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 Journal of International Criminal Justice 25, 26; see also Marko Milanovic, 'Aggression and Legality: Custom in Kampala' (2012) 10 Journal of International Criminal Justice 165, 171.
[580] Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 171.
[581] ibid 172.

principle is reflected in Article 12 of the Rome Statute. Thus, the acceptance of jurisdictional competence by the ratification of the Kampala Amendments signifies the delegation of enforcement powers against a crime (nationality principle and territorial principle) from the State Party to the ICC.

Yet, enforcement powers are concomitant with the powers to prescribe. In other words, for punishment to be executed against these crimes, there must first be a legal source that confers substantive obligations on individuals to refrain from the proscribed conduct relevant to each crime. Thus, if the ICC may enforce sanctions against the crimes that it proscribes, it is only logical that the Rome Statute carries some substantive legal effect that creates obligations on individuals to refrain from the criminalized conduct.[582]

However, the Rome Statute does not place obligations on States Parties to proscribe the crimes under Article 5(1) into their domestic criminal legislation. Whether States Parties proceed to codify these crimes into their domestic legislation is dependent upon their domestic ratification process. Some States Parties do not require a separate implementation process with respect to ratification, which means that the Rome Statute acts directly as a substantive legal source, while other States Parties need to implement the core crimes (Article 5(1) Rome Statute) into their domestic legislation as part of the domestic ratification process. As such, the legal source that confers obligations on the relevant individuals is domestic legislation.

Any substantive effect with respect to obligations to refrain from proscribed conduct of the crimes appears to be predicated upon the ratification of the Rome Statute.[583] As the State Party clearly consents to the jurisdictional competence of the ICC over the crimes in Article 5(1), it is presumed that Articles 6, 7 and 8 confer obligations on individuals that have a national or territorial jurisdictional link to the State Party. Such obligations may be directly applicable; or incorporated into domestic legislation (and then applicable).

In the context of the Kampala Amendments, the same discussion applies, i.e. whether Article 8 *bis* is jurisdictional or substantive in nature. If the answer is the former, then no substantive legal obligations are conferred on any legal personality.

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[582] Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)'(n 576) 29–30,32,38,45,51–52.

[583] Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 175. His premise is that 'the rule on the Statute's substantive scope of application should trace the Statute's jurisdictional regime, but do so while avoiding ex post facto application', at 177.

Thus, the definition in Article 8 *bis* describes the subject matter of the crime of aggression in the Rome Statute.

The legal obligations stem from another legal source, i.e. customary international law; whilst Articles 15 *bis* and 15 *ter* create the jurisdictional regime whereby sanctions can be executed against the individual for the breach of obligations to refrain from conduct relating to the crime of aggression. Thus, if Article 8 *bis* does not confer any substantive legal obligations, there is no need to contemplate the relevant duty-bearers or rights-holders. The opposing argument is that Article 8 *bis* does create substantive obligations when a State Party has ratified the Kampala Amendments. Once again, such obligations may be directly applicable or incorporated into domestic legislation. In my view, it is only logical that the Kampala Amendments assimilate the legal nature of the Rome Statute.

Thus, it is presumed that in situations where the Court has jurisdiction over the crime of aggression, the Rome Statute confers substantive obligations on the individuals to refrain from the proscribed conduct under Article 8 *bis* (on the basis of a nationality or territorial nexus to the ratifying State Party). However, it should be noted that the jurisdictional regime of the Court over the crime of aggression is *sui generis* and different from the other crimes. This *sui generis* jurisdictional regime will be examined in more detail later in Chapter VI. At present, it will suffice to submit that the delegation of domestic competence to prosecute the crime of aggression under the nationality or territorial principle is predicated upon the ratification of the State Party to the Kampala Amendments.[584]

The next question is whether the duty-bearer of these obligations is the State Party or individuals that have a jurisdictional nexus with the State Party under the nationality or territorial principle. As the ICC has jurisdiction over natural persons (Article 25(1) Rome Statute) and serves as an enforcement mechanism against international crimes by punishing individuals by means of criminal sanctions, it is only logical that the duty-bearer of any substantive obligations in relation to the Kampala Amendments are individuals.

Yet, what about the State Party? This question is relevant because Article 8 *bis*(2) refers to state conduct. Does Article 8 *bis*(2) confer obligations on States Parties that ratify the Kampala Amendments in relation to how they conduct their use of force?

[584] ibid 175–183.

In my view, it is rather difficult to argue in the affirmative. In the light of the object and purpose of Article 8 *bis* and the overall Kampala Amendments, the definition of the "act of aggression" provides a definition for the state act element of the crime, from which the elements of individual conduct can subsequently be evaluated.

Thus, it can be inferred that the inclusion of the definition of the "act of aggression" is to clarify the state act element, and not to impose legally binding obligations on States Parties as subjects of international law with respect to recourse to force. Indeed, if Article 8 *bis*(1) and *bis*(2) had intended to impose such obligations on States Parties, it is unlikely that a consensus would have been achieved.

The next step is to delineate the underlying norms that formulate the substantive obligations upon individuals pursuant to a nationality or territorial link of the ratifying State Party. The definition under Article 8 *bis*(1) stipulates 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].

The conduct within the brackets, i.e. the state act element of the crime, is carried out by the alleged aggressor state and need not be discussed here. How should the substantive obligations on individuals be depicted? The leadership element, as emphasized in italics above, suggests that these obligations fall specifically on individuals who satisfy this criterion.

Thus, in the course of duties performed in official capacity with regard to this criterion, the relevant individuals have obligations to refrain from planning, preparation, initiation or execution of any political or military action of a State, which would amount to an act of aggression.

In other words, the duties, responsibilities or activities of the individual who is in a position to effectively exercise control over or direct the political/military action of a state must not encompass the planning, preparation, initiation, or execution by means of any actions which result in the state committing an act of aggression which by its character, gravity and scale constitutes a manifest violation of the UN Charter. It should be noted that there are no direct obligations on individuals to refrain from an act of aggression, as such obligations can only be conferred onto states. The duty, which falls on individuals is to comply with obligations to refrain from all of the modes of perpetration connected to the state act of aggression.

Article 8 *bis*(1) has criticised as being too vague.[585] Prior to the Review Conference, Glennon has submitted that:

> the proposed definition would constitute a crime in blank prose (…). The high level of specificity needed to impose individual criminal liability—as opposed merely to guide state conduct—has therefore proven unattainable.[586]

His premise is based on the principle of legality;[587] where he submits that 'the definition, suffering from overbreadth and vagueness, does not provide sufficient notice to potential defendants as to what conduct is permitted and what is proscribed,'[588] and is 'irretrievably vague.'[589]

Two points can be made in relation to this. First, the definition of the other crimes also provide ambit for interpretation. As such, the criticism of vagueness is not entirely unique to the crime of aggression.[590] It is the ICC that will ultimately deal with any interpretation relating to the definition of the crime of aggression. Second, the question is how much specificity is required in light of the fact that it is not the state that is prosecuted for an act of aggression, but the individual for participating in one or more of the modes of perpetration. An argument can be made that it is sufficient that individuals are aware that international criminal law confers a duty on them to comply with obligations to refrain from the planning, preparation, initiation or execution stages of an act of aggression committed by a state.

In general, the legal determination of an act of aggression is not a straightforward endeavor. The contours of the primary norms that prohibit the use of force are not entirely clear, and neither is the threshold for an act of aggression. Yet, the very existence of the crime of aggression is predicated upon the ascertainment of breach of primary norms relating to the prohibition of the use of force.

As the breach of primary norms is inherently unspecified under international law as to what constitutes a state act of aggression, the criticism that the state act element of the crime of aggression is too vague or imprecise runs deeper than Article 8 *bis* (1).

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[585] Glennon (n 467) 101–102.
[586] ibid 72.
[587] ibid 85.
[588] ibid 88.
[589] ibid 102.
[590] Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 170.

It involves questioning the fundamental construct of the definition of the crime of aggression,[591] as the obligations on individuals to refrain from the modes of perpetration are intrinsically connected with the obligations on states to refrain from an act of aggression.

Although the legal construct of the crime of aggression may be rather complex, to question its very existence is rather unhelpful to the present analysis. As per Lord Bingham in *R v Jones*, 'the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime. It is unhistorical to suppose that the elements of the crime were clear in 1945 but have since become in any way obscure.'[592]

Thus, the Kampala Amendments, although far from being perfect and entirely precise, are nevertheless representative of a positive step towards formulating a substantive definition of the state act element of the crime of aggression; as nicely put by Milanovic, 'while these problems are real, they are not necessarily fatal to the Kampala definition.'[593] Furthermore, in the absence of any substantive legal effects on State Parties, it can be argued that the specificity of the state act element was intended to satisfy the interests of the principle of legality, and concomitant due process rights of the defendant.[594]

3.7. The Kampala Amendments and the IMT Charter: a comparison

The legal construct of crimes against peace at Nuremberg is representative of the substantive definition of the crime under customary international law. Thus, the Kampala Amendments should be examined in the light of customary international law with respect to whether and to what extent the definition of aggression has encapsulated or departed from the substantive norms of the crime.[595]

[591] See Glennon (n 467) 102.
[592] R v Jones, UKHL [2006], para 19.
[593] Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 170.
[594] For a contrary view, see Glennon (n 467) 101.
[595] See Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 171.

3.7.1. Overview

The table below shows the comparison between the crime of aggression in the Kampala Amendments and crimes against peace at Nuremberg. This enables deductions to be made as to what extent the Kampala Amendments reflects or departs from the customary international law scope of the crime of aggression.

Table 1: Comparison between Kampala Amendments and Nuremberg

	Kampala Amendments	**Nuremberg**
State act element	Act of aggression which by its character, scale and gravity constitutes a "manifest violation" of the UN Charter	**War of aggression** or war in violation of international treaties, agreements or assurances
Elements of individual conduct	• Position to effectively control or direct the political or military action of the relevant State • Planning, preparing, initiation, or execution [of an act of aggression]	Planning, preparing, initiation or waging [a war of aggression or war in violation of …]
Mental element	• **Intention** - Planning, preparing, initiation or execution. • **Knowledge** – position to effectively control or direct the political or military action of the relevant State • **Factual Knowledge** - the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner is inconsistent with the UN Charter.	• **Knowledge** of Hitler's aggressive plans – 'planning, preparing, initiation' • **Knowledge** that the nature of the war is aggressive – 'waging'[596]

[596] It is unclear as to whether this encompasses legal knowledge or factual knowledge. I have assumed that both legal and factual knowledge apply simultaneously and/or interchangeably to satisfy the requirement of "knowledge."

	• **Factual knowledge –** the act of aggression, by its character, gravity and scale, constituted a manifest violation of the UN Charter.	

3.7.2. The state act element of the crime

The question is whether an act of aggression by its character, gravity, scale, which constitutes a manifest violation of the UN Charter (Kampala Amendments) is of equal gravity to a war of aggression or a war in violation of international treaties, agreements and assurances.[597] In the previous chapter, it was submitted that a "war of aggression" for the purposes of the Nuremberg Trial (and thus customary international law) encompasses the following:

- the use of military force ("war")
- war with the objective of annexation, occupation of territory or annihilation of the intended victim state
- occupation with the objective for further purposes of aggression against other countries
- war for the purposes of gaining military advantage over other adversaries by preventing them from assisting a previously aggressed state
- war for the purposes of expansion of territory
- formal declaration of war in support of a third state's war of aggression

It is difficult to directly assess whether the threshold of "manifest violation" of the UN Charter under Article 8 *bis* (1) will encompass the acts listed above. The centralized system of collective security enshrined within the UN Charter had only been established during the time of the Trial. Prior to the formation of the UN Charter, only a normative framework existed with respect to the prohibition of the use of force. Thus, the Tribunal had to assess the acts committed by Germany under a different framework than the one applicable to the ICC. It is difficult to envisage a threshold for the Tribunal with respect to the state act element, which will amount to a "manifest violation" of the UN Charter. As such, it is difficult to assess whether the

[597] Princeton Report (2006), para.24 (note that opinions differed on what customary international law required).

12 wars committed by Germany will satisfy the threshold within Article 8 *bis*(1). Presumably Germany's war of aggression and occupation of Poland would satisfy this criterion, but not the war of aggression declared on the USA. Yet, it is difficult to be certain that the threshold under Article 8 *bis*(1) represents a narrower scope of the state act element than customary international law.[598] For example, it can be argued that the normative value of a 'war' encompasses a greater magnitude of armed force than a 'manifest violation' of the UN Charter. In this regard, the state act element under Article 8 *bis*(1) is broader. McDougall submits:

> Articles 1 and 3 of the 3314 Definition, which are replicated in Article 8 *bis* (2), capture an extremely broad range of conduct. The effect of the additional threshold in draft Article 8 *bis* (1) is not entirely clear; nevertheless it seems highly unlikely that in requiring a certain level of seriousness and evident illegality it sets the bar as high as importing a de facto requirement that a 'war' has taken place. The intention of the majority of the SWGCA was certainly for a much broader range of acts to be captured by the definition.[599]

She concludes that:

> Article 8 *bis* criminalises a significantly broader range of conduct than the customary definition of the State act element of the crime.[600]

Another point to consider is that the state act element of a "war of aggression" under customary international law must include the initiation of military force and the *animus aggressionis.* In the 1999 Proposal by Germany for the definition of the crime of aggression, the state act element of the crime was put forward as:

> an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or

[598] Id.
[599] McDougall (n 7) 154.
[600] ibid.

result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.[601]

The 'object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof' could perhaps be seen as the *animus aggressionis*. However, most participants were against this for reasons such as 'the fact that the object extended into the *jus in bello*, whereas the crime of aggression fell within the *jus ad bellum*; the difficulties in making an exhaustive enumeration of the objects or results; the fact that articles 3 and 5 of GA Resolution 3314(XXIX) only included military occupation or annexation as examples of aggression; the Security Council did not refer to the object or result in its decisions relating to aggression.'[602] Ultimately, Article 8 *bis* (1) does not include any explicit reference to objectives of the act of aggression – or the *animus aggressionis*.

However, this does not mean that the drafters of the Kampala Amendments should be faulted for excluding the *animus aggressionis.* First of all, it is a concept of natural law, which suggests that the *animus aggressionis* is 'based on "sentiment" (impression) and not on legal constructions.[603] Such natural notions appear seemingly irreconcilable with a positive approach to the *jus ad bellum*.

Furthermore, it is worth pointing out that at the time of the events that preceded the Nuremberg Trial, the primary instrument that prohibited the use of force was the Kellogg-Briand Pact. Thus, every violation of this instrument *prima facie* gave rise to war. As such, war needed to be accompanied with the *animus aggressionis* to be regarded as a war of aggression for the purposes of individual criminal responsibility. In the light of the current *jus ad bellum*, as there is now a legal framework that prohibits the use of force, it is possible to establish the state act element of the crime on objective considerations.

That said, the IMT Charter had not included an explicit reference to the *animus aggressionis*, and yet the Tribunal considered the *animus aggressionis* when determining the state act element of the crime. Thus, it is possible that judges at the

[601] 'Proposal Submitted by Germany: Definition of the Crime of Aggression', 30 July 1999, UN Doc. PCNICC/1999/DP.13; reprinted in Barriga and Kress (n 6) 340.
[602] Princeton Report (2006), para. 26.
[603] Yearbook of the International Law Commission 1951, Vol II, Second report by Mr. J. Spiropoulos, Special Rapporteur (A/CN.4/44), at para.151.

ICC may nevertheless consider the *animus aggressionis,* particularly if they adopt a non-positive interpretation to *jus ad bellum*.

Overall, the Kampala Amendments appear to have a more specific definition of the state act element of the crime of aggression than the IMT Charter. By reason of the two-tier process involved in determining the state act element of the crime under Article 8 *bis,* it is only logical that a narrow scope of acts committed by the aggressor state may satisfy the requirements of the overall test. The inference is that a narrower scope of situations of aggression may be prosecuted at the ICC than at the IMT, or domestic courts. Thus, in my view, the threshold for the state act element of the crime of aggression is narrower in the Kampala Amendments than customary international law.

3.7.3. Elements of individual conduct

The first difference is that the definition of crimes against peace in the IMT Charter does not have any explicit reference to a leadership element, whilst the definition in the Kampala Amendments has a specific leadership element. The IMT did not work with any set scope of perpetrators, but assessed the relationship between the defendant and Hitler to ascertain whether this was professional or personal, followed by the official position and role in the government or military. At the NMT, despite inconsistencies between the Tribunals, the prevailing opinion appeared to be that the perpetrator must be able to "shape or influence" policy.[604]

Therefore, the Kampala Amendments appear to have put forward a narrower definition ("control or direct"), which has become one of substantive components within the definition of the crime. As a result, the scope of perpetrators that can be prosecuted at the ICC is presumably narrower than that at the IMT and NMT. The perpetration phrase is nearly verbatim with the exception of the use of the term 'execution' in lieu of 'waging' in the Kampala Amendments; it can be presumed that this does not have any substantive implications. That said, it should be noted that the modes of perpetration in Article 8 *bis* (1) are connected to the leadership element in the definition, i.e. that the perpetrator can only participate in the conduct within the perpetration phrase if he/she is in a position to effectively direct or control the military/political action of the relevant State.

[604] Princeton Report (2007), para.12.

There also appear to be more detailed requirements for the mental elements in the Kampala Amendments than was required at Nuremberg. The former is consistent with the Rome Statute which contains a specific provision for mental elements (Article 30) and a set of Elements of the Crime. It is established that the required knowledge can be factual knowledge and does not necessarily have to be legal knowledge.

At the IMT, it was not clear as to whether the knowledge required at Nuremberg was predicated upon a legal or a factual basis. It is inferred that both are applicable, either interchangeably or simultaneously, i.e. a defendant may have both factual and legal knowledge. It is worth pointing out that the pre WWII framework pertaining to the use of force as applied by the IMT was much simpler than the *ius ad bellum* of the present UN era, which made the requirement of such legal knowledge easier to acquire than it would today.

3.8. Conclusion

This Chapter, which has focused on the substantive definition of the crime of aggression, should not be read in isolation from Chapter VI, which focuses on the conditions for the exercise of jurisdiction of the ICC over the crime of aggression. The reason why the substantive definition of the crime in the Kampala Amendments was examined prior to, and in isolation from the jurisdictional regime of the ICC over the crime of aggression, is because the former is relevant to the study of the legal definition of the crime, which falls into this Part of the dissertation (Part I: Background), while the latter is relevant to understanding when a situation of aggression may be prosecuted as a crime of aggression (Part III: Enforcement).

This Chapter has studied the substantive constituents of the definition of the crime of aggression in the Kampala Amendments. There appears to be two tiers for an alleged situation of aggression to satisfy the definition of the crime of aggression. First, it must be satisfied under Article 8 *bis*(2) that a state has used armed force against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Upon being satisfied that Article 8 *bis*(2) has been met, the next step is to determine that this act of aggression is by its 'character, gravity and scale', a 'manifest violation of the Charter of the United Nations' pursuant to Article 8 *bis*(1). Once the state act element of the crime is established under Article 8 *bis*(1), the defendant will be assessed

whether he/she is in a position to exercise control over or direct the political or military action of the State (and must be aware that he/she is in such a position) and had planned, prepared, initiated or executed the act of aggression.

This Chapter has analysed how the legal definition of the crime of aggression has developed since the Nuremberg Trial. The definition and scope of the crime in the Kampala Amendments appear to be different from the Nuremberg definition in some respects, namely that the latter is significantly more detailed and specific with regard to the state act element and gives rise to a narrower scope of perpetrators that may be potentially prosecuted as a result of the leadership element. This can be used to infer that the Kampala Amendments do not appear to reflect customary international law. That said, the Kampala Amendments do not depart entirely from customary international law either, and may eventually attain customary international law status.