MAKING AGGRESSION A LEADERSHIP CRIME IN 2017: THE ROME STATUTE AND THE KAMPALA AMENDMENTS*

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1. Introduction

For his opening of the case for the prosecution at Nuremberg in 1945, Justice Robert Jackson penned these immortal words about the crime against peace:

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.[1]

The trial over, enthusiasm waned.[2] In the revitalized negotiations to create a permanent International Criminal Court in the 1990s, the authors of Nuremberg were not among those pressing for the inclusion of aggression within its jurisdiction.[3] That was left to a dogged collection of small and medium powers, including members of the Non-Aligned

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[1] Nuremberg Trial Proceedings, second day, 21 November 1945, available at http://avalon.law.yale.edu/imt/11-21-45.asp. In fact, Jackson seems to have omitted this sentence as he read the text but it was emphatically contained in publications of his address published under his supervision. E-mail to 'Jackson List' from Professor John Q. Barrett, 21 November 2013.

[2] The depressing story is exhaustively documented in Benjamin B. Ferencz, *Defining International Aggression, The Search for World Peace: A Documentary History* (Oceana 1975).

[3] On their major (spurious) argument that the Security Council has 'exclusive' power over aggression. A more nuanced argument against activating the Court's jurisdiction over the crime of aggression is that 'the ICC is not yet adequately experienced and established to effectively deal with the controversial and politically charged [crime of aggression].' Jack Williams, 'Biting off more than it can chew? The International Criminal Court and the Crime of Aggression', (2012) 30 *Australian Yearbook of International Law,* 201, 201. Williams has an excellent discussion of the relevant literature. See also H. Koh & T. Buchwald, 'The Crime of Aggression: The United States Perspective' (2015) 109 *AJIL* 257.
To the extent that there is any force to the argument, which I doubt, I believe that the delay until at least 2017 built into the 2010 amendments will more than compensate for 'inexperience'.

Movement and Germany.[4] What they obtained in the Rome Statute in 1998 was a statement that aggression was within the jurisdiction of the Court, the details left to another day. Tonight I want to outline the amendments containing the details and the current moves to 'activate' them in 2017. I also offer some thoughts, inspired in part by Dr. Kennedy Graham's 2013 Bill to implement them,[5] on domestication of the crime.

2. **The Kampala Amendments on the crime of aggression**[6]

Adding appropriate material to the Statute was the primary task of the Review Conference on the Court in Kampala in June 2010. Article 5, paragraph 1 of the Statute had listed 'the crime of aggression' (along with genocide, crimes against humanity and war crimes) as within the subject-matter jurisdiction of the Court. Paragraph 2 of article 5 added that

> [t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[7]

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[4] Germany had written the following prohibition into its Basic Law in 1949: 'Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence'. Basic Law for the Federal Republic of Germany, 1949, art 26(1). Criminal legislation was duly adopted.

[5] International Non-Aggression and Lawful use of Force (Implementation of Amendment to Statute of Rome) Bill, available at https://home.greens.org.nz/bills/international-non-aggression-and-lawful-use-force-implementation-amendment-statute-rome-bill.

[6] The material in this section is based on the discussion in Roger S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010', 2 *Goettingen Journal of International Law* (2010) 689 and on Roger S. Clark, 'The Crime of Aggression', in Carsten Stahn, ed., *The Law and Practice of the International Criminal Court* 778 (2015)..

[7] Rome Statute of the International Criminal Court, 2187 UNTS 3, art. 5. On the ambiguities in the reference to arts 121 and 123, see Roger S. Clark, 'Ambiguities in Articles 5(2) 121 and 123 of the Rome Statute', 41 *Case Western Reserve Journal of International Law* (2009) 413, 421-25. Art 123 enables a Review Conference to do what the Court's Assembly of States Parties can do. Art 121 has two different

'Defining' referred to substantive criminal law issues; 'conditions' entailed primarily consideration whether some organ of the United Nations (in particular the Security Council) would be able – or even required – to participate in the process, perhaps even to make a decision in respect of part of the elements of the crime that would bind the Court. In 2002, the Court's Assembly of States Parties (ASP) created a Special Working Group on the Crime of Aggression (SWGCA) to carry forward the drafting.

The Group's final Report to the Assembly in February 2009,[8] was in front of the Review Conference. It comprised two articles for addition to the Statute: 'article 8*bis*', the definition, and 'article 15*bis*', the conditions. Article 8*bis* represented a consensus that held in Kampala where it was adopted verbatim. Article 15*bis*, on the other hand, had offered many variations, notably on the involvement of the Security Council. A difficult debate in Kampala culminated in separation of draft 15*bis* into two articles, 15*bis* and 15*ter*, incorporating new proposals.[9]

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rules for amendments. Art 121 (4) (the general rule) states the general rule that amendments come into force for all States Parties once accepted by seven-eighths of them. Art 121 (5), however, says that an amendment to articles 5, 6, 7 and 8 enters into force for those States which accept the amendment one year after the deposit of their instruments of ratification or acceptance. I am not sure that those ambiguities were totally resolved in Rome. I believed that the seven-eighths rule applied, as Kampala was not an amendment 'to' Art 5, but a fulfillment of it, but that was a minority view and the Amendments purport to come into force 'in accordance with article 121, paragraph 5' (para 1 of the adopting resolution). There is also a complex opt-out regime. See infra n 36.

[8] Report of the Special Working Group on the Crime of Aggression, Doc. ICC-ASP/7/SWGCA/2 (2009). For some additional material, see Non-paper by the Chairman on the Elements of Crimes; Informal intersessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 6-10 June 2009, Doc. ICC-ASP/INF.2, annex III.

[9] The Kampala material is contained in Resolution RC/Res.6, adopted on 11 June 2010 by consensus. For good accounts of the negotiations, see Stefan Barriga and Leena Grover, 'A Historic Breakthrough on the Crime of Aggression', 105 *American Journal of International Law* (2011) 517; Jutta F. Bertram-Nothnagel, 'A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court', *African Legal Aid Quarterly* (April-June 2010) 9; Niels Blokker and Claus Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala', 23 *Leiden Journal of International Law* (2010) 889; Leena Grover, 'Taking Traditional Realism Seriously – A Case Study of the Negotiations and Resolution on the Crime of Aggression', ESIL Conference Paper Series, No. 7/2011; Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', 11

A set of understandings, the juridical effect of which has been debated,[10] were also adopted,[11] as were "Elements" encapsulating the details of the crime.[12]

I turn to discuss the most significant decisions of Kampala.

2.1 Article 8*bis* –the Definition

The major intellectual contribution of the Nuremberg and Tokyo trials was to take what had been seen as a question of state responsibility and add an enforcement measure based on individual criminal responsibility. The Nuremberg Tribunal said famously, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[13] This not to deny that state responsibility co-exists as well.[14]

Article 8*bis* builds on this combination of state and individual responsibility. It adopts a drafting convention which distinguishes between an 'act of aggression' (what a State does) and the 'crime of aggression' (what a leader does). 'Act of aggression' is defined[15] as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the

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International Criminal Law Review (2011) 49. The documentary history is contained in Stefan Barriga and Claus Kress eds, *The Travaux Préparatoires of the Crime of Aggression* (2012). Barriga and Kress have an edited two-volume blockbuster on the process coming out in 2017.

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

[11] Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Annex III to ICC Res.RC/Res.6.

[12] On Elements in general, see Rome Statute (N 7) Art 9 and Roger S. Clark, 'Elements of Crimes in Early Confirmation Decisions of the Pre-Trial Chambers of the International Criminal Court', 6 *New Zealand Y.B. Int'l L.* 209 (2008).

[13] International Military Tribunal, Judgment and Sentences, 41 *American Journal of International Law* (1947) 172, 221.

[14] Article 25 (4) of the Rome Statute confirms this: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'.

[15] N 9, article 8*bis*(2).

Charter of the United Nations'. This language is followed by a reference to a list of 'acts' that 'shall, in accordance with General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.'[16] Resolution 3314[17] was a legendary effort of the General Assembly to define aggression. It deals with state responsibility, but there was considerable support for incorporating it in the definition of the crime, a significant drafting challenge. The ultimate wording of 8*bis* is aimed at avoiding the open-ended nature of Resolution 3314 which insists that the Security Council may decide that something that meets the definition is nonetheless not aggression and, on the other hand, that acts other than those on the list may be regarded by the Security Council as aggression.[18] As a political body, the Security Council may act in a completely unprincipled and arbitrary manner. A criminal Court governed by the principle of legality[19] must be under more restraint.

The result is, I believe,[20] quite a precise account of the 'act of aggression' that a competent prosecutor would have no trouble implementing.

For the 'crime of aggression', article 8*bis* provides:

> 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

[16] These acts are (paraphrased): invasion, annexation, bombardment, blockade, attack on the armed forces of another State, using forces that are in a State by consent in contravention of the terms of their presence, allowing a State's territory to be used for the purposes of aggression by another, and sending by or on behalf of a State armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State.
[17] GA Res 3313 (XXIX), 14 December 1974, 29 UN GAOR, Supp No 31, UN Doc A/9631 at 142, the Definition of Aggression.
[18] See arts 2, 3 and 4 of the 1974 definition.
[19] Rome Statute, n 8, art 22 – 'nullem crimen sine lege'.
[20] Although this is debated in H. Koh & T. Buchwald, 'The Crime of Aggression: The United States Perspective' (2015) 109 *AJIL* 257, 264-71.

act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[21]

The crime of aggression is thus a 'leadership' crime, captured by the perpetrator's relationship to the political or military action of a State.

Note also the 'threshold' clause at the end of the definition of the crime, indicating that not every act of aggression leads to criminal responsibility, only those which by their character, gravity and scale, constitute a 'manifest' violation of the Charter.[22] The need for such a limitation was strongly debated. It takes "minor" skirmishes out of the picture. And proponents thought it would help in analyzing a (rare) case of principled humanitarian intervention, or a case more generally in a grey area where the legality of the action was honestly in doubt.[23]

2.2 Structure of Articles 15*bis* and 15*ter* – 'Conditions'

Resolution of the 'conditions' was ultimately facilitated in Kampala by splitting the SWGCA's draft article 15*bis* into two parts, one dealing with State referrals and referrals made by the prosecutor *proprio motu* (of her own motion), the other with

[21] RC/Res.6, (n 9) art 8*bis* (1). Out of an abundance of caution, the following, underscoring the leadership quality of the crime, is added to article 25 (3) which deals with modes of criminal responsibility: 'In respect of he 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'.

[22] N 21.

[23] Such as armed support for liberation movements. Arguments about the validity of a "humanitarian" intervention may also be structured under the mental element analysis of the Rome Statute and under Article 31(3) which enables the Court to "find" and apply defences supported by the general law. The United States regards the 'manifest' elements as insufficient in rendering immune those who engage in forcible efforts to prevent genocide, crimes against humanity and war crimes without Security Council approval. H. Koh & T. Buchwald, 'The Crime of Aggression: The United States Perspective' (2015) 109 *AJIL* 257, 270-1. For the other side, see Jennifer Trahan, 'Defining the "grey area" where humanitarian intervention may not be fully legal, but is not the crime of aggression', (2015) 2 *Journal on the Use of Force* 42.

Security Council referrals.[24] These became, respectively, articles 15*bis* and 15*ter*. It will be recalled that, under the Rome Statute generally, situations may be referred to the Court either by the Security Council,[25] by a State Party,[26] or by the Prosecutor of her own motion.[27] Kampala modifies this for aggression. Security Council referrals of aggression are straightforward and it is helpful to discuss them first.

Article 15*ter* empowers the Court to exercise its aggression jurisdiction subject to two preconditions. There is jurisdiction 'only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties'.[28] That was achieved in June 2016. And there must be 'a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.'[29] The required majority in 2017 is thus two-thirds of all the then-States Parties.[30] Accordingly, the date on which these provisions can become operative is June of 2017 or the date on which the decision is made by the ASP after 1 January 2017 (whichever is later).[31]

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[24] Under articles 13 to 15 of the Statute, action may be 'triggered' either by a referral from the Security Council acting under Chapter VII of the United Nations Charter, a referral by a State Party, or by the Prosecutor acting *proprio motu*, on her own initiative.

[25] Rome Statute Art. 13 (b).

[26] Rome Statute Arts 13 (a) and 14.

[27] Rome Statute Art. 15 (proprio motu)..

[28] ibid, para 2. Security Council referrals may concern non-State Parties and State Parties that have not ratified or accepted the Kampala Amendments. See Annex III to the Kampala Amendments, Understanding 2:

> It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute regardless of whether the State concerned has accepted the Court's jurisdiction in this respect.

[29] Ibid, para 3.

[30] Art 121 (3) of the Statute provides that '[t]he adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of the States Parties'. This means all the parties, not just those present and voting. As this is being written in June 2016, there are 124 parties, so that a majority of 83 would be appropriate. More ratifications and accessions of the Rome Statute itself are perhaps in the offing, so the numbers may increase slightly by 2017.

[31] Annex III to the Kampala Amendments, Understandings 1 and 3 state that the definitive date is one year after the 30 ratifications or the date of activation by the ASP, whichever is later. With the 30 ratifications

So much for Security Council referrals. Article 15*bis*, as finally adopted, deals with the exercise of aggression jurisdiction in the case of State referrals and Prosecutorial referrals *proprio motu.* The requirement of ratification or acceptance by 30 States Parties, the passage of a year after that, and the further vote after 1 January 2017 are repeated here.[32]

Article 15*bis,* unlike 15*ter,* excludes situations involving non-State parties.[33] It was of particular significance for the three Permanent members of the Security Council not party to the Rome Statute - China, the Russian Federation and the United States. It provides that '[i]n respect of a State that is not a party to this Statute, the Court shall not exercise jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.'[34]

The general rule in Article 12 of the Statute is that there is jurisdiction if either the state of nationality or the territorial state is a party to the Statute. In the negotiations leading up to Kampala, there was widespread support for the proposition that where an aggression occurs against a State Party to the Statute, the article 12 precondition of ratification by the state of territoriality should be sufficient for the Court's jurisdiction. An aggression, so the argument went, can, as a matter of territoriality, take place both in the state where the aggression is plotted, and in the place where it is executed (the 'victim

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in hand, it is now clear that the ASP's resolution will be 'later' since the ASP meets in its regular session at the end of the year.

[32] Art 15 *bis,* paras 2 and 3.

[33] Art 15 *bis* para 5.

[34] On the literal language of this paragraph, the reverse situation is also true: consider where a State that is party to the Rome Statute as amended commits an act of aggression on the territory of a non-party. Notwithstanding the normal 'nationality' implication of article12 (2) (b), there is arguably no jurisdiction in the Court in this situation because of the conduct on the territory of a non-party. As far as I have been able to ascertain, none of the legislation so far adopted to give effect to the Kampala amendments makes any such exception to nationality jurisdiction at the domestic level. It is illegal whatever the Rome Statute status of the victim state. A State may, if it wishes, criminalize actions taken anywhere by its nationals who may thus be tried domestically even if not in the ICC.

state'). This is in accordance with the normal rules on 'effects' or 'objective territorial' jurisdiction[35] and is the case with genocide, crimes against humanity and war crimes. Thus, a citizen of a non-state party who commits genocide, war crimes or crimes against humanity on the territory (or having effect on the territory) of a State Party is subject to ICC jurisdiction for those offences.

The present provision denies jurisdiction over aggression in such cases involving non-parties. The Amendments are, however, arguably ambiguous on whether there is jurisdiction involving leaders of a State party to the Statute which has not ratified the Amendments, but the victim State has. At the least, a potential aggressor State has the power to opt out in advance.[36]

Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, *proprio motu* or following a state referral, she must first ascertain whether the Security Council has made a determination of an act of aggression. She must notify the Secretary-General of the United Nations of the situation before the Court.[37] If the Security Council has already made a determination of an act of aggression, the Prosecutor may proceed with the investigation.[38] If the Council does not act within six months the Prosecutor may proceed with the authorization of the Court's Pre-Trial Division.[39] The 'filter' in this situation is thus not

[35] As in *The Case of the SS Lotus (France v Turkey),* PCIJ, Ser. A, No 10 (1927).
[36] Seminar for States Parties to the Rome Statute of the ICC on the Activation of the Court's Jurisdiction over the Crime of Aggression, 17 and 18 June 20016, Princeton, NJ, Background Paper at 7.
[37] N 9, art 15*bis*(6).
[38] ibid art 15*bis*(7).
[39] Art 15 *bis*(8). Decisions to allow a case to go forward in other instances are made by a three-member Pre-Trial Chamber. In this instance, a majority of the six judges in the Division will be required.

the Security Council, but the Pre-Trial Division, that is, a majority of all six members of that Division sitting together *en banc*.[40]

2.3. The 'Activation' Decision

'Activation Day' is upon us. On 17 June, Iceland became the 29th State to ratify the amendments and Palestine did so on 26 June, joining stalwarts of the Court such as Liechtenstein, Samoa and Trinidad and Tobago (the first three to ratify) as well as, inter alia, Germany, Belgium, Switzerland, Austria, the Czech Republic and Slovakia,[41] to say nothing of Botswana, Costa Rica, El Salvador (the first state to join the Rome Statute in its amended form)[42] Spain and Poland.

The Kampala amendments[43] which contemplate a 'decision' to be made after 1 January 2017 contain no suggestion that there need be another Review Conference; the clear inference is that the decision will be made at a meeting of the Assembly of States Parties. There are some who advocate a special meeting devoted to the topic, but my impression is that there is a consensus developing around doing it at the regular meeting of the Assembly in late 2017.[44]

3. IMPLEMENTING THE KAMPALA AMENDMENTS DOMESTICALLY

[40] If the Security Council wishes to delay, it must put up its stop-light. Consistent with the existing Rome compromise, contained in article 16 of the Statute, which authorizes the Council to request a renewable one-year delay, a dissenting member of the Permanent Five in the Security Council cannot simply stop the process by exercising a veto. It is only where the five concur (and obtain the other necessary votes) that proceedings may be stopped in their tracks. Rome Statute (n 7) art 16 provides: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'.
[41] The presence of the Austria, Czech Republic and Slovakia trio is especially noteworthy given their history in the 1930s. They were the subject of an "act" rather than a "war" of aggression.
[42] Palestine, the next most recent state to join the Court (in January 2015), acceded at the time only to the original version of the Statute. Now it has ratified the Amendments.
[43] Articles 15 *bis* (3) and 15 *ter* (3)
[44] There is some debate about whether to effect the activation by a stand-alone resolution or as part of the 'Omnibus' resolution customarily adopted annually. A separate resolution probably underscores that this is an important milestone.

It may be helpful to raise some questions for States contemplating legislative measures, especially in light of Dr. Graham's Bill.[45] States have considerable discretion here and I raise a number of questions rather than trying to give a definitive answer of any of them.

3.1 Should a ratifying State criminalize aggression domestically?

The Rome Statute is not a "suppression convention" like the terrorism treaties and others, explicitly requiring states to criminalize.[46] But that they should do so is implicit in the Statute. Thoughtful states, including New Zealand and Samoa, have done so for the other crimes in the Statute. In terms of criminal law theory, strong arguments for so doing come from the deterrent and the expressive views of the law – emphatically spelling out for a domestic audience the illegality of aggression and the other crimes. Relevant also is preambular paragraph 5 of the Rome Statute[47] which invokes 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. This obligation, that the drafters regarded as a customary law norm, is read by some as contemplating universal jurisdiction;[48] at the very least a responsible state must assume territorial or nationality jurisdiction – unless there is something different about aggression from the other three Rome crimes.

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[45] N 5. A particularly useful resource in this respect is *Handbook: Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC, Crime of Aggression, War Crimes* (2012), published by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School of Public and International Affairs, Princeton, NJ.

[46] On 'suppression conventions', see Ellen Podgor and Roger S. Clark, *Understanding International Criminal Law* § 1.02[D] (3rd edn, LexisNexis 2013).

[47] Rome Statute of the International Criminal Court (n 7), preambular para. 5

[48] As New Zealand and Samoa do for the other Rome crimes. On aggression, see Roger S. Clark, 'Complementarity and the Crime of Aggression', in Carsten Stahn and Mohamed M. El Zeidy (eds), II *The International Criminal Court and Complementarity* (Cambridge UP 2011) 721, 731 n 30.

Then there is article 17 on admissibility/complementarity, apparently applicable to aggression.[49] The Court is to defer to a state which 'has jurisdiction' over the crimes in the Statute. A state cannot 'have' jurisdiction absent a legal basis. Complementarity is surely an incentive to legislate. Aggression should be criminalized domestically. But the question of appropriate jurisdictional theories remains.

No-one suggests that it is improper for a State to exercise jurisdiction over what its own leadership does ('aggressor state jurisdiction'). The International Law Commission (ILC), however, recommended against universal or victim state jurisdiction for aggression in its Code of Crimes against the Peace and Security of Mankind.[50] There is debate whether aggression, as opposed say to genocide, gives rise to universal jurisdiction under international law, although it was adjudicated in international forums in Nuremberg and Tokyo.[51] My impression was that many members of the SWGCA were comfortable with victim state ('effects' or 'objective territorial' jurisdiction), which is espoused in the 2013 version of Dr. Graham's Bill, and even universal jurisdiction. But

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[49] Informal intersessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States from 21 to 23 June 2004, Doc ICC-ASP/3/SWGCA/INF.1, in ASP Official Records, ICC-ASP/3/25, Annex II, 341, paras 28-34.

[50] Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, Report of the International Law Commission on the work of its forty-eighth session, art 8, discussed at 30, para (14):

> An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question whether another State has committed aggression would be contrary to the fundamental principle of international law *Par in parem imperium non habet.* Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.

On *par in parem*, see infra at nn 60-4..

[51] See Clark, n 48, 730-5 (expressing some doubts about universal jurisdiction); Michael Scharf, 'Universal Jurisdiction and the Crime of Aggression', (2012) 53 *Harvard International Law Journal* 358 (emphatic that there is universal jurisdiction over aggression, relying primarily on the precedent of Nuremberg). It is probably that case that just because something may be tried in an international tribunal does not automatically mean that it can be tried in a domestic court on a universal jurisdiction theory, but it must surely be a strong indication.

practice is somewhat thin.[52] And one of the Understandings adopted in Kampala mildly discourages the use of other than nationality jurisdiction.[53]

3.2 Immunities

Notwithstanding the specific exclusion of immunity concerning cases before the ICC itself,[54] there may be some possibilities for immunity under international (and domestic) law in domestic courts for leaders, in light of the majority decision of the ICJ in *DRC v. Belgium*[55] which concerned the immunity of the Congolese Foreign Minister in the Belgian courts. I doubt that, in the context of aggression, immunity proceeds further than heads of state, heads of government, foreign ministers and defence ministers, although this is a significant hole in those potentially amenable to domestic prosecution for the crime of aggression.[56] There is probably no immunity for generals or industrialists who fit the leadership criteria of article 8*bis*.[57] Criminal immunity of officials is a work in progress in the case-law, statutes and at the ILC[58] and it is not clear where the field is

[52] See Astrid Reisinger Coracini, 'Evaluating domestic legislation on the customary crime of aggression under the Rome Statute's complementarity regime', in C. Stahn & G. Sluiter eds, *The Emerging Practice of the International Criminal Court* (2009) 725. Of the two dozen or so examples of pre-Kampala legislation found by Dr. Reisinger Coracini several seem to have espoused victim state or universal jurisdiction although this is not always clear on the face of the legislation. Five examples of post-Kampala legislation appear on the website, Croatia, Luxembourg, Peru, Samoa and Slovenia. Samoa, read in context with the basic legislation giving effect to the Rome Statute, invokes universal jurisdiction. The others are not clear to me on their face. Like Samoa's, they may well need to be read with something else.

[53] Understanding 5 provides:

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

Samoa's Kampala legislation includes universal jurisdiction.

[54] Rome Statute, Art. 27.

[55] Arrest Warrant of 11 April 2000, *ICJ Reports 2002*, p. 3 (holding incumbent Foreign Minister of DR Congo immune from arrest at behest of Belgium on charges of grave breaches of the Geneva Conventions and crimes against humanity).

[56] Note also that Art. 98(1) of the Statute may erect immunity as a barrier to transfer of suspects to the ICC.

[57] N 21.

[58] See preliminary report on the immunity of State officials from foreign criminal jurisdiction, prepared by Ms. Concepcion Escobar Hernandez, UN Doc A/CN.4/654 (2012).

heading. A state exercising aggressor state jurisdiction will no doubt want to lift potential immunity of its own officials[59], or the exercise will be pointless.

3.3 Par in parem non habet imperium/act of state

In arguing against universal or victim state jurisdiction, the ILC commented: 'The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*.'[60] I have serious doubts about how 'fundamental' the maxim is. The principle that states do not judge the acts of other states certainly has some force – it undergirds the rules about state immunity in English and American law. The 'act of state' version of the principle is, at least in the common law, a fuzzy rule of comity and not one the courts regard as *required* by international law.[61] But the main impact seems to be in respect of what states do on their own territory – and aggression is ultimately executed elsewhere. The variant on 'act of state' that shields individuals who operate on behalf of a state was emphatically denied at Nuremberg.[62] States seem to have no qualms about judging the 'state policy' aspects of other *jus cogens* offences like crimes against humanity[63] or genocide.[64] Is aggression different? Or does Nuremberg settle the act of state question? If *par in parem imperium non habet* is really 'fundamental' one might expect substantial chapters on it in the leading works on

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[59] As States legislating for the other Rome Statute crimes have typically done.
[60] N 50.
[61] Banco Nacional de Cuba v. Sabbatino, 376 US 398 (1964).
[62] Nuremberg Charter, art 7, provided:

> The official position of defendants, whether as heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

[63] See Rome Statute (n 7), article 7 (2) (a) which contains an element that a crime against humanity includes a attack directed against a civilian population 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.
[64] An Element of Genocide requires that 'the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'. The 'pattern' will often, but not invariably, be set by a Government against its perceived enemies.

international law, or at least an entry in the index. Alas, it does not even make an appearance in the index of most of them. It is far from clear what impact this doctrine has in respect of the crime of aggression.

3.4 The implications of concurrent jurisdiction

This is an area of concurrent jurisdiction where two or more states may have respectable bases of jurisdiction, and there is no clear hierarchy of jurisdictional theories established in international law (*The Lotus*[65] again). Should a state whose theory is a universal one get the consent of the aggressor state (or victim state), or even defer to it? There are suggestions in the literature that a state contemplating universal jurisdiction over genocide should consider the position of states closely affected.[66] Does this make sense here? It does not if the aggressor government is still in power, but might if there has been a change of regime.

3.5 Defences/grounds for the exclusion of responsibility

Should specific reference be made to defences? The negotiators on the Kampala Amendments, like their counterparts in drafting the 'special part' or specific offence provisions in articles 6, 7 and 8 of the Rome Statute and the Elements thereof, did not see fit to include specific defenses. That is left to the general law which can be incorporated via article 31 of the Rome Statute.[67] Some domestic legislation dealing generally with the Rome Statute already incorporates article 31 of the Rome Statute and that may be sufficient, as may existing defences in domestic penal law.

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[65] N 35.

[66] See the excellent discussion especially the examination of relevant Spanish cases, by Cedric Ryngaert, 'Horizontal Complementarity', in Carsten Stahn and Mohamed M El Zeidy, II *The International Criminal Court and Complementarity* (2011) 855.

[67] The draft New Zealand legislation by a Kennedy Graham MP specifically lists self defence and authorization of the Security Council as (exclusive) defences. Note also that the requirement in article *8bis* (1) that a violation be 'manifest' may functionally provide a 'defence' in a 'grey area' such as the responsibility to protect or in cases of 'minor' incursions.

3.6 Triggering prosecutions

Dr. Graham's Bill contemplates the creation of a Special Prosecutor for aggression cases. Some comments in the Separate Opinion in *DR Congo v. Belgium*, addressed generally to exercises of universal jurisdiction have resonance: '[s]uch charges may only be laid out by a prosecutor or *juge d'instruction* who acts in full independence, without links to or control by the Government of that State.'[68]

Who should be able to trigger an exercise of the domestic prosecutor's function, especially in universal jurisdiction cases? Again, the Separate Opinion in *DR Congo v. Belgium* suggests some relevant considerations:

> Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or *juge d'instruction.* For example, persons related to the victims of the case will have requested the commencement of legal proceedings.[69]

Given the world's migratory patterns in response to modern strife, countries that receive large numbers of migrants, especially asylum seekers, are likely to be sheltering people who are at best *potential citizens* but for whom the protective functions of the state of asylum are perfectly reasonable. A state prosecuting in such circumstances on a universal jurisdiction basis is much more than an officious bystander; it may have a genuine link of its own to the imperatives of justice.

4. Conclusion

[68] N 55, Separate Opinion of Judges Higgins, Koooijmans and Buergenthal at p. 63, para 59
[69] ibid.

The target for 30 ratifications will be met shortly. Ratification alone is not enough. Implementation is also necessary. In my view, a State ratifying the Kampala Amendments should domesticate article 8 *bis* and its Elements as closely as possible by penal legislation. It should take jurisdiction at least over *what its nationals do*. Bolder states may wish to go further into the areas of victim state or universal jurisdiction. I do not read the Kampala Understandings or customary practice as clearly prohibiting such as a matter of law.