

The Ashgate Research  
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*Edited by*

WILLIAM A. SCHABAS

*Middlesex University, UK*

YVONNE MCDERMOTT

*Bangor University, UK*

NIAMH HAYES

*Institute for International Criminal Investigations, The Netherlands*

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# Alleged Aggression in Utopia: An International Criminal Law Examination Question for 2020

Roger S. Clark

## Introduction

*It is 2020. Because you took this course, you have obtained an internship at the Office of the Prosecutor at the International Criminal Court. The Prosecutor is contemplating the first prosecution for the crime of aggression. She has accumulated specific memos from members of her staff, but wants you to take a fresh look at the big picture. She needs a memorandum setting out what you think are the major issues that she will need to confront, both in the first instance and in response to what will be raised inevitably by the defence.*

*This is an open book exam. You should have with you the Rome Statute of the International Criminal Court and Resolution 6 adopted by the 2010 ICC Review Conference in Kampala [hereinafter the Kampala Amendments]. The Elements of Crimes and Understandings annexed to the Amendments may be especially relevant. Do not make any extensive references to secondary sources. The main idea is to examine the language of the Statute and the Kampala Amendments (of course, in light of relevant general international law). If you learned nothing else in this course, remember this: READ THE STATUTE!*

*Thirty ratifications or acceptances of the Kampala Amendments were received by 1 January 2016. Early in 2017, the Court's Assembly of States Parties adopted, by consensus, a resolution entitled 'Definitive Activation of the Court's Jurisdiction over the Crime of Aggression'.*

*Here is the basic factual situation, although investigators are still studying the nuances. Utopia is a small absolute monarchy adjoining the, slightly larger, Republic of Tapu. Both countries have surprisingly large militaries and have contributed to United Nations Peacekeeping Operations. The potential defendant, General Pickens, was at relevant times Chief of the General Staff of Tapu. Early in 2020, he was ordered by the President to invade Utopia, capture the capital and effect a regime change. The order was approved by Cabinet. General Pickens and the press were told that the Utopian regime was in the early stages of commencing an organised genocide (or at least crimes against humanity) against an ethnic*

minority in Utopia related to the majority population of Tapu. General Pickens advised Cabinet that he might not have sufficient forces to intervene quickly and successfully. He was also concerned about the legality of the operation. His own military legal team thought the legal justification weak. The President, however, presented General Pickens with a one-paragraph statement by the Attorney-General (a Cabinet member) that the operation was completely legal as an example of the responsibility to protect, which the statement described as 'a unilateral obligation of all States'. In light of this document, General Pickens concluded that his only options were to resign and lose his pension or comply with the order. The invasion did not go well. Utopia's army responded fiercely. There were many casualties on both sides. General Pickens was captured by Utopian forces deep into Utopian territory. He managed to escape to another neighboring country, Activia. This also proved unfortunate. Activia has legislation containing a definition of the crime of aggression very similar to that in the Kampala Amendments and providing for universal jurisdiction over it. Activia is a major military power and the former colonial master of Utopia and Tapu. Activia has a Special International Prosecutions Unit which is actively preparing the case for prosecution. General Pickens is languishing in prison. Activia refuses to hand him over either to Utopia or to Tapu, with whom it has no extradition treaties. Meanwhile, the President and the entire Cabinet of Tapu committed mass suicide in a bunker, in shame at the failed invasion. The United Nations Security Council was seized of the matter at the commencement of hostilities. Disagreement among the Permanent Members of the Council meant that no resolutions were adopted.

The Prosecutor has received a request from Utopia for the prosecution of General Pickens for the crime of aggression. Given the 'impunity' achieved by the civilian leadership of Tapu (by their suicide), Utopia contends it is especially important that the military leader of the operation be brought to international justice. Utopia has no domestic legislation on aggression and does not wish to prosecute him itself.

Utopia and Tapu became States Parties to the ICC well before Kampala. Neither has taken any action to ratify the Kampala Amendments, nor has either state deposited an 'opt-out' declaration thereto. Activia is not a party to the Rome Statute. It has an aversion to international criminal tribunals. It takes the position, though, that States are entitled, and perhaps even have a customary law obligation, to mount fair prosecutions domestically on behalf of the international community in cases involving crimes like those in the Rome Statute.

## Memorandum from Intern

### I. Can the General's Actions Fit within the Definition of the Crime?

My criminal law professor always said that one cannot go wrong by starting with the elements of the crime.<sup>1</sup> So I turn to the language of the Statute and the Elements.

<sup>1</sup> ICC Review Conference, 'The Crime of Aggression', Resolution RC/Res.6 (adopted by consensus at the 12th plenary meeting, 11 June 2010) ('Resolution 6') Annex II: Amendments

Article 8bis(1) of the Rome Statute, as adopted in Kampala, defines the crime of aggression as the 'planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. A 'crime of aggression', using the drafting convention followed in the Amendment, is what an individual does; an 'act of aggression' is what a State does. The latter is defined in detail in paragraph 2 of Article 8bis. Seven exemplary subparagraphs follow a general *chapeau* to the effect that an 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'.<sup>2</sup>

For now, it is necessary to refer only to subparagraph (a) of that paragraph. It gives as one of the examples of an act of aggression, '[t]he invasion or attack by the armed forces of a State against the territory of another State, or any military occupation, however, temporary, resulting from such invasion or attack'. As I understand the facts, there is little doubt that the military activity undertaken on behalf of Tapu comes within this language. There was both an 'invasion' and an 'attack' by the armed forces. Since the drafters of the Kampala definition eschewed any reference to a requirement that there be a 'war', the definition probably does not require any resistance on the part of Utopia. Be that as it may, there was clearly a substantial clash of arms. As we shall see later, in spite of any specific references to 'defences' in Article 8bis or its Elements, there may be arguable bases in the

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to the Elements of Crimes, lists the Elements:

- 'The perpetrator planned, prepared, initiated or executed an act of aggression.
- The perpetrator was a person [footnote omitted] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
- The act of aggression – 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 – was committed.
- The perpetrator was aware of the factual circumstances that established such a use of armed force was inconsistent with the Charter of the United Nations.
- The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
- The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.'

<sup>2</sup> ICC Review Conference, 'The Crime of Aggression', Resolution RC/Res.6 (adopted by consensus at the 12th plenary meeting, 11 June 2010) ('Resolution 6') Annex I: Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, para 8bis(2). The examples are (in summary): invasions and annexations; bombardments of another state; blockades, attack on the land sea or air forces of another state; use of armed forces that are within another's territory by agreement contrary to the terms of the agreement; a state allowing its territory to be used by another state for aggression; sending of armed bands, groups, irregulars or mercenaries to carry out acts of armed force.

Rome Statute and in customary international law for avoiding responsibility for this invasion and temporary occupation. Such bases may apply to the State itself (thus taking matters out of the definition of act of aggression) or may be specific to General Pickens. I doubt that these defences would succeed; the important point is that the general is entitled to make the arguments and the prosecution needs to be able to refute them.

For the moment, let us examine the language of Article 8*bis*(1). Do the General's actions fit one or more of the conduct words in the definition?<sup>3</sup> Did he engage in planning, preparation, initiation or execution? 'Execution' is probably the closest. He carried out somebody else's policy. 'Initiation' seems unpromising, given his reluctance. But, good soldier that he was, he apparently did some planning. There is probably enough here to meet the conduct requirement. There is, next, a circumstance element following the conduct words that I find difficult to apply to him. The actor must be 'a person in a position effectively to exercise control over or to direct the political or military action of a State'. Preparatory work for Kampala is replete with assertions that aggression is a 'leadership crime'. How have the drafters expressed that? No question that the general was a leader; he was the head of the military, as we understand it. Was he in a position to 'exercise control over or to direct' the *political* action of the State? It appears not. He did express some views, but his views did not seem to carry much weight with the political leadership. I doubt the words of the Statute about political action are met by the General. Was he in a similar position in respect of the *military* action of the State? The case is closer and we need to think very carefully about what these words mean and do further research about the structure of the bureaucracy (civilian and military) in Tapu. Who really 'directs' in this scenario: the head of the military or the politicians?<sup>4</sup>

<sup>3</sup> Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998, entered into force 1 July 2002 ('ICC Statute') art 30 contemplates that the structure of a typical offence includes at least a mental element (normally 'intent and knowledge') and 'material' elements, notably conduct, circumstance and consequence elements. The Elements are drafted on this understanding. Elements of a crime are those items which are necessary and sufficient to constitute 'the crime'. Each must be proved beyond reasonable doubt, per art 66(3) of the Rome Statute. Moreover, art 67(1)(i) adds that a defendant is entitled 'Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'.

<sup>4</sup> Probably out of an abundance of caution, the leadership point is repeated in art 25 of the ICC Statute, as amended. Art 25(3) sets out the various ways in which an actor may be associated with a crime, including committing it (as a principal) and other modes such as aiding or abetting. Art 25(3*bis*) contained in the Kampala Amendments, provides: '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.' If the General fits the category of leader, he also appears to fit the category 'commits' in art 25(3)(a) of the ICC Statute, so other modes of participation are irrelevant to him. A footnote to Element 2 of the Elements of Aggression, Annex II to Resolution 6 (n 1) (the leadership requirement) adds (again *ex abundante cautela*) that 'With respect to an act of aggression, more than one person may be in a position that meets these criteria'.

We must then delve a little deeper into the elements of the crime of aggression. Paragraph 2 of the Introduction thereto informs us that '[t]here is no need 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'.<sup>5</sup> This is helpful to us. It is something on which we do not need to carry any initial or final onus of proof. On the other hand, the legal analysis is germane in several ways to the General's efforts (in his account, genuine) to obtain legal advice within the Government. One is the 'circumstance' element contained in the last phrase of Article 8bis(1), 'which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. These words have two apparent objectives. One, demonstrated primarily by 'gravity and scale', aims at eliminating 'minor' cases of aggression from individual criminal responsibility, although they will probably still give rise to some degree of state responsibility. The second, captured by 'character', attempts to remove from criminal responsibility the honestly arguable cases falling within a 'grey area'. Humanitarian interventions were a typical example of such an area raised in the negotiations.<sup>6</sup> Both these objectives were controversial, but nevertheless became part of the final compromise.

There seems little problem on the facts with establishing gravity and scale. The crucial consideration in our case is that of character. Paragraph 3 of the Introduction to the Elements asserts that '[t]he term "manifest" is an objective consideration'. We need to encourage the Court to develop some sort of 'reasonable statesman or soldier' test for what is manifest. In addition, paragraph 4 of the Introduction helps us by insisting 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.<sup>7</sup> There are two provisions in the Elements themselves that help us, but will be subject to

<sup>5</sup> Annex II to Resolution 6 (n 1) Introduction, para 2.

<sup>6</sup> The customary law status or otherwise of 'R2P' was a matter of intense debate when the Kampala Amendments were being negotiated. It was too much to expect that this controversial issue, debated also in several forums in the United Nations, could be resolved in the ICC negotiations. Out of necessity, the matter had to be left to the evolution of general law. I doubt that the law is now settled. The point is that the 'manifest' requirement facilitates arguments about a margin of error. The 'pre-emptive' nature of the intervention in the present case, however, creates difficulties for the argument.

<sup>7</sup> In proving the act of aggression and its manifest nature, the prosecution should take into account Understandings 6 and 7 in ICC Review Conference, 'The Crime of Aggression', Resolution RC/Res.6 (adopted by consensus at the 12th plenary meeting, 11 June 2010) ('Resolution 6') Annex III, Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the crime of Aggression:

'6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character,



further defence legal scrutiny. Element 4 requires us to prove, not that the accused knew that there was a breach of the United Nations Charter, but merely that '[t]he 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'. Element 6 reverts to the 'manifest' problem. It requires the prosecution to prove that '[t]he perpetrator was aware of the factual circumstances that established a manifest violation of the Charter of the United Nations'. According to these provisions in the Elements, we need to prove matters of fact, not of law.

These provisions in the Elements have their origins in discussions on the Elements for the other offences within the jurisdiction of the Court in the Preparatory Commission for the Court. Article 32(2) of the Rome Statute permits a defence of mistake of law in certain circumstances.<sup>8</sup> The drafters of the Elements were concerned that disingenuous reliance on dubious legal advice might lead to unjustified acquittals. Accordingly, the finesse of re-structuring a potential legal element as a 'factual element' was used in several of the elements of war crimes. A similar effort was made here.<sup>9</sup> The defence will probably argue that such provisions are *ultra vires* the Statute. The Elements of Crimes are meant to 'assist' the judges, but the Statute itself is what ultimately governs, should the judges conclude that a particular Element is inconsistent with it.<sup>10</sup> Nonetheless, one would expect the judges, as they have done until now, to show significant deference to the work of the Preparatory Commission and the Kampala process in negotiating the Elements.

There is another way to inject the alleged reliance on the responsibility to protect into the argument. A significant feature of the Statute and the Kampala Amendments is use of a 'general part' to deal with questions that cut across the various provisions contained in the definitions of particular crimes (the 'special part'). In particular, the war crimes provisions are sometimes open to defences that have to be gleaned from the general part. Given the complexity of the definitional task, not all the defences could be agreed upon and codified. Thus Article 31(3), which codifies several significant grounds for the exclusion of responsibility, creates a procedure whereby the defence can argue in advance of trial that other grounds are supported by the general law. This provides an opportunity to make such arguments as claiming that the State was entitled to a justification based on the responsibility to protect. If that is the case, then there is no 'act of aggression' and one of the elements of the crime of aggression is missing. The argument that the responsibility to protect provides a justification under customary international law was hotly debated in 2010 and is

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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.'

<sup>8</sup> 'if it negates the mental element required by such a crime'.

<sup>9</sup> Informal inter-sessional meeting on the crime of aggression, 8–10 June 2009, 'Non-paper by the Chairman on the Elements of Crimes' ICC-ASP/8/INF.2 (25 June 2009) Annex II, Explanatory note, paras 18–19 (requirement of 'knowledge of law' may 'encourage a potential perpetrator to be willfully blind as to the legality of his or her actions, or to rely on disreputable advice').

<sup>10</sup> ICC Statute, art 9(3) requires that the Elements be 'consistent with the Statute'.

still hotly debated. The defence is much more likely to succeed with a 'grey area' argument than with one based on established customary law.

## II. The Security Council and Article 15bis

Another hotly contested issue was the role of the Security Council in state or *proprio motu* referrals. The ultimate resolution of this is found in paragraphs 5, 6 and 7 of Article 15bis. It will be necessary to follow the procedure therein. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation of aggression, she must first ascertain whether the Security Council has made a determination of an act of aggression by the State concerned.<sup>11</sup> The Prosecutor must also notify the Secretary-General of the United Nations of the situation before the Court. The Article continues that, where the Security Council has made such a determination, the Prosecutor may proceed with the investigation.<sup>12</sup> Since no such determination has been made here, paragraph 8 applies:

Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided the Pre-Trial Division has authorised the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.<sup>13</sup>

Thus it will be necessary to wait out the six-month period and the unlikely possibility that the Security Council will act one way or the other.<sup>14</sup> Then, if the Council again does nothing, action by the full Pre-Trial Division (a majority of the six judges therein) will be required.

## III. Admissibility: Do Activia's Serious Efforts to Prosecute Domestically on a Universal Jurisdiction Theory Involve the Complementarity Principle, Precluding the Court from Proceeding?

This issue arises under Article 17(1) of the Statute:

<sup>11</sup> ICC Statute, art 15bis(6).

<sup>12</sup> ICC Statute, art 15bis(7).

<sup>13</sup> ICC Statute, art 15bis(8). Art 15 requires that the prosecutor show a 'reasonable basis to proceed' and that the case 'appears to fall within the jurisdiction of the Court'.

<sup>14</sup> If it does now make a determination, this is useful procedurally but not definitive on the merits. See art 15bis (9): 'A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.'



Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine the case is inadmissible where:

The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.<sup>15</sup>

A threshold question arises because Activia is not a party to the Statute. Does complementarity still apply? There is little doubt that a non-State Party can invoke complementarity. Article 17 refers to a 'State'. There are many other instances in the Statute where the reference is to a 'State Party'. The drafters knew how to distinguish between states generally and those states which are party to the Statute. Here the reference is to any state, party or otherwise.<sup>16</sup> There are two more difficult sub-issues to this question: is there universal jurisdiction over aggression, and does a State which is exercising universal jurisdiction constitute 'a State which has jurisdiction over it'?<sup>17</sup> There is little enlightenment on these questions in the preparatory work or in the commentaries on the Statute. Clearly 'has jurisdiction over it' contemplates that steps have been taken domestically to assert such jurisdiction. This will normally mean, as in Activia, appropriate legislation. But does the language also measure the legitimacy of that jurisdiction under general international law?

When the Statute was being drafted, there was significant discussion about universal jurisdiction, especially in the context of the prerequisites for ICC jurisdiction. Negotiators regarded the states of territoriality and nationality as having the strongest jurisdictional claims, and the Statute requires as a prerequisite to the Court's jurisdiction that either the state of nationality or the state of territoriality be party to the Statute. This hardly precludes the possibility that universal jurisdiction might be appropriate for other purposes, including complementarity.<sup>18</sup> There is little dispute that genocide, crimes against humanity and war crimes attract

<sup>15</sup> There is no case 'being investigated or prosecuted' in either Utopia or Tapu, so no question of complementarity arises there.

<sup>16</sup> ICC Statute, art 17 does not seem to require that the Activia legislation be exactly the same as the Statute's. Substantial similarity is enough.

<sup>17</sup> There is a further practical question as well. If the Court concludes either that there is no universal jurisdiction over aggression or that a State acting on the basis of universal jurisdiction is not one that 'has' jurisdiction within the meaning of art 17, how does it persuade Activia to cede?

<sup>18</sup> Indeed a substantial number of states argued before and at Rome that, since there was universal jurisdiction over all the potential crimes, it was not necessary that any particular state be party – universal jurisdiction possessed by all could be delegated to an

universal jurisdiction, but there may be some special considerations about universal jurisdiction over the crime of aggression. The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, controversially, seemed to confine jurisdiction over aggression to the courts of an aggressor state or to an international tribunal.<sup>19</sup> There is some (limited) state practice asserting universal jurisdiction over aggression.<sup>20</sup> On the other hand, Understanding 5 in the Kampala Amendments asserts that 'the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction in respect of an act of aggression committed by another State'. That the amendments themselves do not create such a right is, I would suggest, neutral on the question of whether the general law permits such exercise of jurisdiction. The propriety of universal jurisdiction over aggression is debated. There is, however, not much debate in the literature about whether the phrase 'has jurisdiction' includes a State exercising universal jurisdiction.

Nonetheless, the Statute does not give the Court any clear trumping power over what a non-State Party chooses to do. Persuasion appears to be the order of the day. I doubt that much can be made of the word 'has' and the arguments become ones of policy. Does the Court really want to force its way into cases where there is a domestic prosecution (or legitimate decision not to prosecute)? Article 17 applies across the board to all crimes within the jurisdiction of the Court. There will surely be cases where the Court is content to let a state deal with the situation through universal jurisdiction. This may not be the case to force the question.

#### **IV. Does the Court have Jurisdiction where Neither the Alleged Aggressor State nor the Alleged Victim State has Ratified or Accepted the Kampala Amendments?**

This question really involves two parts: what do the Kampala Amendments say? Do they apply at all here? If they are interpreted to apply in circumstances like ours where neither relevant State Party has ratified them, are they valid or are they *ultra vires* the amendment procedures of the Statute? This is the thorniest problem left from Kampala. First, some background. Article 5 represented a compromise in Rome between those who wanted aggression within the jurisdiction of the Court and those who either did not want it in or saw no possibility of reaching agreement there on the details. Thus, aggression was listed in Article 5(1) as one of the four crimes within the subject matter jurisdiction of the Court. But Article 5(2) states that '[t]he Court shall exercise jurisdiction over the crime of aggression once a

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international entity. The non-party issue sharpened after Rome because of the attitude of the United States.

<sup>19</sup> See discussion in *Yearbook of the International Law Commission*, Vol. 1 (1996) 49–53.

<sup>20</sup> A Reisinger-Coracini, 'Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime', in C Stahn and G Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (Brill, The Hague 2009) 725.

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 that crime'. Unfortunately this formula, adopted without careful debate in the dying stages of the Rome Conference, left ambiguous just which parts of Article 121 were being referenced.<sup>21</sup> Seizing on the word 'adopt', used both in Article 5(2) and in Article 121(3), one participant-observer argued that all that was needed was approval by the Review Conference.<sup>22</sup> This view was in a minority. 'Adopt' in Article 5(2), it was said by the majority, must mean approval of the text and then subsequent ratification, in accordance with standard multilateral practice. 'Adopt' in Article 121(3) means approving the text. This then shifted the argument to whether paragraph 4 or paragraph 5 of Article 121 applies. Paragraph 4 is the general rule on amendments. It says that, except as provided in paragraph 5, 'an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them'. No one is bound until everyone is bound. Paragraph 5, provides that:

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

In this case, the amendment applies only to those states that accept it.<sup>23</sup> The issue of interpretation then shifts to the question of whether the aggression provision is functionally an amendment to Article 5(2), removing an existing state of affairs, i.e. the Court cannot currently 'exercise jurisdiction' over one of the crimes listed within its jurisdiction in Article 5(1). If this is the case, the amendment applies only to those who accept it. Or is Article 5(2) a facilitative clause which provides a mechanism for completing the work of Rome? On this reasoning, the amendment is *to the Statute* in general (or to other particular provisions) rather than *to Article 5*, and the seven-eighths rule applies. Against this historical background, I turn to what happened in Kampala.

Since the Utopia proceedings arise from a State referral, the relevant jurisdictional provisions are in Article 15*bis* of the Statute, added in Kampala. Article 15*bis* states that the Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by 30

<sup>21</sup> RS Clark, 'Ambiguities in Articles 5(2) 121 and 123 of the Rome Statute' (2009) 41 *Case Western Reserve J Int'l L* 413.

<sup>22</sup> *Ibid* 416–18.

<sup>23</sup> See also text to n 37 below.

States Parties.<sup>24</sup> This condition is met on the facts we are given. The article adds that the Court shall exercise jurisdiction over the crime of aggression, in accordance with the Article, subject to a decision taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.<sup>25</sup> This condition is also met. The timing is right and the required majority is two-thirds of the States Parties at the relevant time.<sup>26</sup> We are told that the 2017 decision of the Assembly of States Parties was by consensus. There is no suggestion that there was not a quorum of at least two-thirds of the Parties present when the decision was taken. The conditions contained in the Article are met.<sup>27</sup>

We then reach the crucial jurisdictional provision in the Article, namely paragraph 4:

The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

This language could hardly be plainer: once the other conditions just discussed are met, there is jurisdiction as long as the (alleged) crime arises from an act of aggression<sup>28</sup> committed by 'a State Party'. It does not say 'a State Party which has ratified or accepted the Amendment'. 'A State Party' must be any state that has ratified or acceded to the Rome Statute. If the drafters had meant something else, they could surely have found words to say so. Tapu's actions are alleged to be 'an act of aggression committed by a State Party'. Since Tapu ('that State Party') has not

<sup>24</sup> ICC Statute, art 15*bis*(2).

<sup>25</sup> ICC Statute, art 15*bis*(3).

<sup>26</sup> ICC Statute, art 121(3).

<sup>27</sup> See also Understanding 3, in Annex III to Resolution 6 (n 7) headed 'Jurisdiction *ratione temporis*': 'It is understood that in case of [State or *proprio motu* referrals] the Court may exercise jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3 is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.' This is merely a restatement of the conditions in the Article; they have been met.

<sup>28</sup> An 'act of aggression' is thus both jurisdictional and one of the elements of the crime that must be established beyond reasonable doubt.

exercised its right to opt out,<sup>29</sup> the plain language of paragraph 4 suggests that there is jurisdiction in the present circumstances.<sup>30</sup>

The defence will no doubt respond with paragraph 1 of the Kampala adopting resolution. The Conference:

Decides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: 'the Statute') the amendments to the Statute contained in annex I of the present resolution, *which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5*; and notes that any State Party may lodge a declaration referred to in article 15 bis prior to ratification or acceptance.<sup>31</sup>

Note my italicised clause. Does it mean,<sup>32</sup> as the Prosecutor must contend, that the references to 'ratification and acceptance' and to 'entry into force' merely relate to the need for 30 ratifications or acceptances of the amendment on aggression, and that the reference to Article 121(5) goes to the first sentence of that provision and not to the second sentence? This argument emphasises the question of entry into force, as set out in the first sentence of Article 121(5). Or does the clause mean that, although nobody is bound by the amendments on aggression until the 30 ratifications are received<sup>33</sup> and the ASP adopts the necessary resolution, an aggressor State that fails to accept the amendments is not ever bound by them for events on its territory or the actions of its citizens? Recall the language of the second sentence of Article 121(5): '[i]n respect of a State Party which has not

<sup>29</sup> During the Kampala negotiations, some States contended for 'reciprocity', i.e. that both victim and aggressor states consent specifically. There is no reference to this requirement in the final product. To the extent that the parties created a 'State consent regime', the course for potential aggressor States wishing to protect their nationals from ICC jurisdiction is clear: lodge an opt-out declaration. (Note: ratifications and accessions go to the UN Secretary-General as the depositary of the Rome Statute; opt-out declarations go to the Court's Registrar.)

<sup>30</sup> I discuss in the next paragraph of the text the effect of para 1 of the empowering resolution adopted in Kampala. In the final clause of that paragraph, the Conference 'notes that any State Party may lodge a declaration referred to in article 15bis prior to ratification or acceptance'. I understand that this attempt at clarification does not mean that it is *only* before ratification or acceptance that such a declaration may be made. Moreover, a reasonable interpretation of it supports the argument about to be made in the text: that a State Party to the Statute does not need to opt in, in order to opt out. It needs to opt out to avoid the effect of the words 'State Party' in subjecting its citizenry to jurisdiction over aggression.

<sup>31</sup> ICC Review Conference, 'The Crime of Aggression', Resolution RC/Res.6 (adopted by consensus at the 12th plenary meeting, 11 June 2010) operative para 1.

<sup>32</sup> I discuss questions of *vires* later; here the issue is one of meaning.

<sup>33</sup> This modifies the effect of para 5 which, in respect of other amendments to which it relates (such as those made to art 8 of the Statute in Kampala) applies to the first and subsequent ratifying parties *seriatim*, one year after each deposits its instrument. Here, 30 ratifications are required before any are bound.

accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory'. The argument for applying this second sentence to the Kampala Amendments perhaps relies on the words 'in accordance with' before 'paragraph 5'. The phrase 'in accordance' could be interpreted as emphasising the whole of that paragraph, including its second sentence. Of course, if that result is what they wanted, the drafters could have clarified matters by avoiding a vague phrase like 'in accordance with'<sup>34</sup> and saying something like 'subject to all the requirements of article 121, paragraph 5'.<sup>35</sup>

Indeed, there were drafters present in Kampala who faced the Article 121(5) issue head on for amendments to Article 8 of the Statute.<sup>36</sup> Relevant amendments (adding provisions on proscribed weapons in the material dealing with non-international armed conflict) were deemed amendments to Article 8 within the meaning of Article 121, paragraph 5. Accordingly, the second preambular paragraph of the Conference's adopting resolution provides:

Noting article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute.<sup>37</sup>

<sup>34</sup> Which, after all, helped create some of the problems with art 5(2) itself!

<sup>35</sup> Note that the first paragraph of the Kampala Amendments asserts: 'Article 6, paragraph 2, of the Statute is deleted.' How can that be squared with a literal application of art 121(5)? How can the paragraph be deleted for some parties, but not all?

<sup>36</sup> 'Amendments to article 8 of the Rome Statute', Resolution RC/Res.5 (adopted by consensus at the 12th plenary meeting, 10 June 2010) <[http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf)> last accessed 2 December 2011.

<sup>37</sup> The next preambular paragraph addresses an issue discussed inconclusively in the aggression negotiations but not mentioned ultimately in the aggression amendments: 'Confirming that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute.' The Vienna Convention on the Law of Treaties (1979) 1155 UNTS 331, art 40(5) is a default rule that must be subject to being set aside, expressly and perhaps impliedly. There will no doubt be some debate in the future about whether the aggression amendments apply to future parties who do not expressly accept them. I think they do, subject to opting out.



Can any indications be drawn from the obvious differences between language here and in the aggression provision? Personally, I think that the plain language of Article 15bis(4) and its reference to a 'State Party', coupled with the right to opt out, overrides any inferences to be gleaned from the less than clear statement in the adopting resolution. If there is no requirement that a state opt in, why give it a right to opt out?

Again, there is a defence response. Article 15ter, which deals with Security Council referrals, also requires 30 ratifications and a later resolution by the Parties. One could contemplate a state (especially a Permanent Member of the Security Council) wishing to support the possibility of Security Council referrals – at least in relation to other countries – but not state or *proprio motu* referrals involving itself. It might then rationally ratify the amendment package to help bring it into force, but also opt out of jurisdiction triggered other than through the Security Council.<sup>38</sup>

It is finally time to turn to the '*vires*' question, discussed inconclusively before and at Kampala.<sup>39</sup> There was a fundamental ambiguity in the Statute on how the aggression amendment should be done. Did Article 121(4) or 121(5) apply? Neither view was entirely persuasive; it was not possible to form a consensus around either in Kampala. I read what was done at Kampala as an attempt to finesse these problems. Is the finesse 'constitutional'?

From the point of view of the defence, the best argument here is that the only way to proceed was through paragraph 5, including at least the ratification of the aggressor state. If this is not what happened, then the effort is simply void. We are talking about criminal responsibility and there can be no responsibility based on an invalid amendment! From its point of view, the defence might (somewhat deviously) argue that paragraph 4 was the correct way to go, and that obviously has not happened. Or it might argue that one or other of those was necessary and neither has been followed. After all, it is both normal and legally required to follow amendment procedures in a treaty, at least until those procedures are themselves duly amended.

Can the Prosecution justify what happened in Kampala (if the 'finesse' interpretation is correct)? One simple argument is that the participants accepted

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<sup>38</sup> The second sentence of art 121(5) could be read on its face to preclude jurisdiction involving a State not accepting an amendment, even in the case of a Security Council resolution, but the Kampala Amendments contemplate that the Security Council may refer both cases involving non-Parties to the Statute and cases involving Parties to the Statute which have not accepted the Kampala Amendments (assuming that such acceptance is necessary for some purposes). This has to be the effect of Understanding 2, in Annex III to Resolution 6 (n 7): '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, irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.'

<sup>39</sup> The Court would surely find that it has express or implied power to decide this fundamental question. See ICC Statute, art 119 and *Prosecutor v Tadić* (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).

that Paragraph 3 of Article 121 ('adoption') was sufficient, but nonetheless erected some further barriers to opening up the exercise of jurisdiction over aggression. These required 30 ratifications and the later vote. The reference to 'conditions' in Article 5(2) probably provided authority for doing that. But the drafters did not expressly say anything about paragraph 3. Could it be that there was simply a conclusion that Article 121 was so dysfunctional when read with Article 5 that it was necessary to find a unique solution for a unique situation by consensus – a 'fix'?<sup>40</sup> How can an amendment procedure be applied if there is no agreement on what it means? Doing the amendment by consensus overcame any potential arguments based on the consensual nature of state obligation.

## V. Summary and Conclusions

I believe that the General's actions can be fitted into the basic definition of an 'act of aggression', either as an 'invasion', an 'attack', or both. More difficult is the question of whether all the elements of the 'crime of aggression' are present. General Pickens does not appear to be one who directs the 'political' action of the state, although he does seem to meet 'the military' criterion in the definition. He can argue that the 'humanitarian' or 'protective' nature of the military action means that the requirement of a 'manifest' violation of the Charter is not met. He also has a weak argument based on mistake (especially weak if the Court finds the relevant element as adopted in Kampala consistent with the Statute).

Since the Security Council has not spoken on whether an aggression occurred, it would be necessary to inform the UN Secretary-General of your intentions, then wait six months for any action from the Council before seeking the Pre-Trial Division's authorization to proceed.

There is a strong argument that Activia's domestic prosecution, albeit by a non-State Party, engages the complementarity provisions of the Statute. You may want to use this situation as an opportunity to argue that universal jurisdiction by a state over the crime of aggression is incompatible with international customary law, and thus that Activia is not a state which 'has' jurisdiction. I suspect, however, that there will be occasions when you will be content to defer to a state that is mounting a genuine prosecution. (This may, indeed, be such a case.)

Finally, there is the problem that neither the alleged aggressor state nor the alleged victim has ratified the Kampala Amendments, nor have they opted out. I believe that the better interpretation of the Amendments is that this is no bar to the Court's jurisdiction. Both states are parties to the Rome Statute, and Article 15 *bis*(4) speaks of jurisdiction 'over a crime of aggression, arising from an act of aggression committed by a State Party'. 'State Party' must mean a party to the Statute. We are left then with the fundamental problem of whether the Kampala Amendments were validly adopted. Given that there was no consensus on what the amendment

<sup>40</sup> See C Kress and L von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *JICJ* 1179, 1215–16.

provisions of the Statute required, I would argue that the Court should defer to the judgment of the Review Conference in adopting its 'fix' by consensus. The first 'aggression defendant' will inevitably raise these issues and now may be the time to try to resolve them.