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# *Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It*

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## **Abstract**

*In February 2009, the International Criminal Court's Special Working Group on the Crime of Aggression concluded its efforts to draft the 'provision' called for in Article 5(2) of the Rome Statute 'defining the crime [of aggression] and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime'. It produced two draft Articles: Article 8bis, the 'definition', and Article 15bis, the 'conditions'. There was substantial agreement on the definition (and on 'Elements' of the crime produced in June 2009); there was much disagreement concerning the conditions. The author examines the most significant drafting issues. For the definition, these include: applying General Assembly Resolution 3314 to individual responsibility; articulating the 'leadership' nature of this crime; the threshold requirement that the violation of the United Nations Charter be 'manifest'; and consistency with provisions in the Statute, especially those in the 'general part'. In respect of conditions, the difficult issue surrounds the role of the Security Council and the many variations on that theme in draft Article 15bis. The contribution concludes with a fundamental procedural question: can the amendment be applied erga omnes or does it apply only to those states specifically accepting it?*

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## 1 Introduction

Consistently with Article 5 of the Rome Statute,<sup>1</sup> the Final Act of the Rome Conference instructed the Preparatory Commission for the Court 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’.<sup>2</sup> The task not having been completed by the end of the life of the Preparatory Commission, the Court’s Assembly of States Parties created the Special Working Group on the Crime of Aggression (‘SWGCA’) open to all states, members of the ICC and non-members alike.

The Group’s final effort on provisions and conditions is contained in its Report to the Assembly in February 2009.<sup>3</sup> It will be the main item on the agenda of the Review Conference on the Rome Statute to be held in Kampala, Uganda, in the middle of 2010. The essence of the draft comprises two articles for addition to the Statute: Article 8*bis* which contains the definition, and Article 15*bis* which deals with the conditions for exercise. Article 8*bis* does not contain any alternatives, representing a substantial consensus, although not everyone at the Working Group was entirely happy with everything; Article 15*bis* offers many alternatives – notably variations on the theme of involvement *vel non* of the Security Council. Draft Elements of Crimes were produced, apparently with substantial agreement, at an informal inter-sessional meeting of the Assembly held in June of the same year.<sup>4</sup>

In what follows, I discuss what seemed to me to be the most significant drafting choices that were made (and in a few cases, especially involving Draft Article 15*bis*, postponed until Kampala).

## 2 The Basic Structure of Article 8*bis*

Draft Article 8*bis* uses a drafting convention that distinguishes between an ‘act of aggression’ (what a state does) and the ‘crime of aggression’ (what a leader does). ‘Act

<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (Rome Statute).

<sup>2</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, para. 7, UN Doc A/CONF.183/10 (1998), at 8–9.

<sup>3</sup> Report of the Special Working Group on the Crime of Aggression, Doc ICC-ASP/7/SWGCA/2 (2009) (2009 Working Group Report).

<sup>4</sup> Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009, Doc ICC-ASP/8/INF.2 (2009) (2009 Inter-sessional Report), at 12, Annex I (Draft Elements of Crimes). There is a useful explanatory note on the elements in Annex II, Appendix II of the 2009 Report, at 15 (‘Non-paper by the Chairman on the Elements of Crimes’). Art. 9 of the Rome Statute required the production of Elements for genocide, crimes against humanity, and war crimes. Resolution F required them for aggression; the SWGCA recommended an amendment to Art. 9 to make clear that aggression, too, requires its Elements. It is apparently not intended at this point that The Elements will be formally approved as part of a package in Kampala, but delegates there will no doubt examine them carefully for the light they throw on draft Art. 8*bis*. The bulk of the serious drafting took place in informal meetings under the auspices of the Liechtenstein Institute.

of aggression' is defined as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations'.<sup>5</sup> This language is followed by a reference to a list of 'acts' which 'shall, in accordance with General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression'.<sup>6</sup> Resolution 3314 deals with state responsibility but had considerable support as the basis for a definition in the present context. Using it was a challenge. The drafting of Article 8bis is aimed at avoiding the open-ended nature of Resolution 3314 which says, essentially, that the Security Council may decide that something which 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. As a political body, the Security Council may act in a completely unprincipled and arbitrary manner. A criminal Court constrained by the principle of legality<sup>7</sup> must be under more restraint. The list in Article 8bis (2) may be open-ended to the extent that it does not say that no *other* acts can amount to aggression. However, any other potential candidates must surely be interpreted *ejusdem generis* with the existing list.

'Crime of aggression', for the purpose of the Statute, '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.'<sup>8</sup>

The crime of aggression is thus a 'leadership' crime, a proposition captured by the element that the perpetrator has to be in a position effectively to exercise control over or to direct the political or military action of a state. There was considerable discussion about how this applies to someone like an industrialist who is closely involved with the organization of the state but not formally part of its structure.<sup>9</sup> It seems to be generally agreed that such persons could be liable to prosecution. Some support was shown for clarifying the matter by choosing language closer to that used in the United States Military Tribunals at Nuremberg, namely 'shape and influence' rather than 'exercise control over or to direct'.<sup>10</sup>

Note should also be taken at this point of the 'threshold' clause at the end of the definition of 'crime of aggression', indicating that not every act of aggression is the basis for criminal responsibility. It is only those which by their character, gravity, and

<sup>5</sup> Draft Art. 8bis(2), Report, *supra* note 3, Annex I, at 11.

<sup>6</sup> *Ibid.*

<sup>7</sup> Rome Statute, *supra* note 1, Art. 22 – 'Nullum crimen sine lege'.

<sup>8</sup> Draft Art. 8bis(1).

<sup>9</sup> See Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', 18 *EJIL* (2007) 477.

<sup>10</sup> See Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, from 11 to 14 June 2007, Doc ICC-ASP/6/SWGCA/INF.1 (2007), at 3.

scale constitute a manifest violation of the Charter. The need for such a limitation was strongly debated,<sup>11</sup> but most participants finally accepted that they could live with it in return for removal of any requirement that there be a ‘war of aggression’<sup>12</sup> or that the list of acts in the definition of ‘act of aggression’ be more limited than the list in General Assembly Resolution 3314.<sup>13</sup> More will be said about this threshold in the section below on Elements.<sup>14</sup>

### 3 Consistency with Existing Parts of the Rome Statute

It seems obvious that the crime of aggression (listed in Article 5(1) as being one of the crimes already within the subject-matter jurisdiction of the Court) needs to be drafted in such a way as to ‘fit’ the basic structure of the Rome Statute. It was not so obvious exactly how that was to be achieved. Part II of the Statute deals with ‘Jurisdiction, Admissibility and Applicable Law’. The ‘definition’ of the crime presumably fits within this framework, along with genocide, crimes against humanity, and war crimes. But there are provisions such as ‘preconditions to the exercise of jurisdiction’<sup>15</sup> which may or may not be simple to apply. Article 17 (‘Issues of admissibility’), which gives operational effect to the Statute’s principle of complementarity, may cause some problems. Then there was the ‘general part’ of the Statute (Part 3 on ‘General Principles of Criminal Law’) which needed careful examination. For the most part, the principles in Part III are default rules which apply in the absence of other choices. Do (or should) the provisions of Articles 25(3) (‘Individual criminal responsibility’) and 28 (‘Responsibility of commanders and other superiors’) apply without modification? Does the basic structure of Article 30 of the Statute which distinguishes between ‘mental’ and ‘material’ elements of the crimes provide a suitable framework for

<sup>11</sup> See, e.g., 2009 Working Group Report, *supra* note 4, at 3: ‘[i]t was argued that the clause was unnecessary because any act of aggression would constitute a manifest violation of the Charter . . . and that the definition should not exclude any acts of aggression. . . . Other delegations expressed support for the threshold clause which would provide important guidance for the Court, and in particular prevent the Court from addressing borderline cases’.

<sup>12</sup> The Nuremberg Charter had a puzzling requirement of a ‘war of aggression’ which prompted the International Military Tribunal to draw an unclear distinction between the conquests of Austria and Czechoslovakia (achieved without actual fighting) on the one hand, and the invasions of Poland and others (achieved with considerable fighting) on the other. The former were classified as ‘acts of aggression’ (and not yet ‘criminal’), the latter as ‘wars of aggression’ and proscribed under the Charter. Control Council Law No. 10 had language broad enough to treat Austria and Czechoslovakia as criminal aggressions. See Clark, ‘Nuremberg and the Crime against Peace’, 6 *Washington U Global Studies L Rev* (2007) 527, at 535–536.

<sup>13</sup> See the final Discussion paper produced by the Coordinator on the Crime of Aggression at the Preparatory Commission for the Court, UN Doc PCNICC/2002/WGCA/RT.1/Rev. 2 (2002) (Coordinator’s 2002 draft), one option of which would limit ‘act of aggression’ to one which ‘amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof: *ibid.*, at 1.

<sup>14</sup> *Infra* at notes 46–62.

<sup>15</sup> Rome Statute, *supra* note 1, Art. 12.

conceptualizing aggression?<sup>16</sup> Are the 'grounds for excluding criminal responsibility'<sup>17</sup> (Article 31) apt for aggression? What of issues of mistake of fact and mistake of law (Article 32) and superior orders (Article 33)? I turn to such issues.

Article 12 on 'Preconditions to the exercise of jurisdiction' raised some awkward conceptual and policy questions. It provides that, in the case of referrals by a state or where the Prosecutor is acting *proprio motu*,<sup>18</sup> the Court may exercise its jurisdiction if either the territorial state or the state of which the accused is a national is a party to the Statute, or has made a special acceptance of the jurisdiction.<sup>19</sup> How does this play out with respect to the crime of aggression? It is generally agreed that if a national of a non-party commits genocide, crimes against humanity or war crimes on the territory of a state party there is jurisdiction in the Court because the territorial state is a party. But, in the case of the crime of aggression, what if the aggressor state is not a party? Where is aggression committed? Is it committed only where the leader acts (in the capital of the aggressor state)? Or is it committed also where its effects take place – on the victim state? There was widespread support in the SWGCA for the view that, in accordance with the principle of *The Lotus*,<sup>20</sup> the effects in the victim state put that state into the territorial category and should thus be sufficient to trigger the jurisdiction of the Court.<sup>21</sup> Thus there would be no need for the ratification of the provisions by both the aggressor state and the victim state. On the other hand, there had been some earlier suggestions in the International Law Commission, with little support from state practice, that jurisdiction over the crime of aggression rested either in the aggressor state or in an international tribunal, but not in the victim state or in a state exercising universal jurisdiction.<sup>22</sup> If such were the case, then the argument for requiring both the victim state's and the aggressor state's consent to jurisdiction would become stronger.

Article 17 on admissibility/complementarity may raise some potential problems which have not really been addressed in the literature on complementarity. It provides that the Court shall determine a case to be inadmissible in several situations. The first is where 'it is being investigated or prosecuted by a State which has jurisdiction over it, unless that State is unwilling or unable genuinely to carry out the investigation

<sup>16</sup> On the mental side, Art. 30 speaks of intent and knowledge. On the material side, it has a structure of conduct, consequence, and circumstance elements, a structure followed in drafting the Elements of the other crimes within the jurisdiction of the Court. See generally R. Lee *et al.* (eds), *The International Criminal Court: Elements of Crimes and Rules of Evidence and Procedure* (2001); Clark, 'Elements of Crimes in Early Decisions of the Pre-Trial Chambers of the ICC', forthcoming (2009) *NZ Yrbk Int'l L.*

<sup>17</sup> A formula designed to short-circuit the debate about which 'defences' were justifications and which were excuses.

<sup>18</sup> Rome Statute, *supra* note 1, Art. 12. No state consent is needed for a Security Council referral.

<sup>19</sup> A non-party may accept the jurisdiction 'with respect to the crime in question': *ibid.*, Art. 12(3).

<sup>20</sup> *The SS Lotus (France v. Turkey)*, PCIJ, Ser. A, No. 10 (1927), at 4 (negligence on board a French ship resulting in deaths on a Turkish ship on the high seas – criminal jurisdiction in the Turkish courts).

<sup>21</sup> See Report of the Special Working Group on the Crime of Aggression, Doc ICC-ASP/7/SWGCA/1 (2008), at 6–7 (discussing *The Lotus*); 2009 Working Group Report, *supra* note 3, at 9 (discussing whether the point should be clarified explicitly or whether it was so obvious that nothing more needed to be said).

<sup>22</sup> Draft Code of Crimes against the Peace and Security of Mankind [1996] *Yrbk Int'l L. Commission*, ii (Part Two), Draft Art. 8.

or prosecution'.<sup>23</sup> A second situation is where '[t]he 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>24</sup> A third is where the person 'has already been tried for conduct which is the subject of the complaint' and a trial by the Court is not permitted under the *ne bis in idem* provisions of the Statute.<sup>25</sup> The difficult question here, which may have to be resolved ultimately by the judges, is what is meant by 'a State which has jurisdiction'. Obviously territorial and nationality states must, in principle, be encompassed. But what about a state acting on a basis of universal jurisdiction? Many states claim universal jurisdiction over genocide, war crimes, and crimes against humanity. Can such an exercise of jurisdiction trump the Court? Aggression is a little more complicated. That there is universal jurisdiction over it seems more controversial<sup>26</sup> and, as has been noted,<sup>27</sup> there is even some debate about victim state jurisdiction. The problem remains to be resolved as appropriate cases arise.

These issues involving Part III were nearly all resolved, after considerable heart-searching, in favour of applying the general provisions of Rome.<sup>28</sup> Focus for this part of the discussion was provided by considering Article 25(3) of the Statute. Definitions of the crime of aggression inherited from the Preparatory Commission and the International Law Commission tended to include all the modes in which a leader could participate in the crime within a single provision.<sup>29</sup> Articles 6, 7, and 8 of the Rome Statute, on the other hand, were all drafted with the 'principal' perpetrator in mind – the responsibility of other participants fell to be decided under Article 25(3). Thus was born in the SWGCA the distinction between the 'monist' approach to drafting (that of the ILC and the Preparatory Commission's Coordinator) and the 'differentiated' approach (that of the existing criminal definitions in Articles 6, 7, and 8 of the Rome Statute).<sup>30</sup> The SWGCA opted for the latter. In itself, the distinction made little difference to who might be held responsible, and a clarification of Article 25(3) was thought necessary by some.<sup>31</sup> But it did help to structure the 'fit' with the Statute.

A comparable problem was whether the attempt provision in Article 25<sup>32</sup> should be applied to aggression, as it applied to all of the other crimes within the jurisdiction of

<sup>23</sup> Rome Statute, *supra* note 1, Art. 17(1)(a). 'Unwillingness' and 'inability' are defined in paras 2 and 3 respectively.

<sup>24</sup> *Ibid.*, Art. 17(1)(b).

<sup>25</sup> *Ibid.*, Arts 17(1)(c), and 20.

<sup>26</sup> *Supra* note 23.

<sup>27</sup> *Supra* note 22.

<sup>28</sup> In some cases this probably meant 'leaving it to the judges'.

<sup>29</sup> See Coordinator's 2002 Draft, *supra* note 13. Para. 3 of that draft also specifically rejected the application of Arts 25(3), 28, and 33 of the Statute to the crime of aggression.

<sup>30</sup> See Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression. Doc ICC-ASP/5/SWGCA/INF. 1 (2006), at 15–16; Report of the Special Working Group on the Crime of Aggression. Doc ICC-ASP/5/35 (2007), at 9.

<sup>31</sup> See draft Art. 25(3*bis*), recommended by the SWGCA, 2009 Report, *supra* note 3: '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.'

<sup>32</sup> Rome Statute, *supra* note 1, Art. 25(3)(f).

the Court. Suggestions were also made (following earlier ILC drafts) that there could be responsibility for making a threat to commit aggression. These were rejected after desultory discussion.<sup>33</sup> Ultimately, it was also agreed that, the way 'act of aggression' was drafted,<sup>34</sup> it would not be possible to conceive of an attempted aggression by a state (the definition applies only to completed acts)<sup>35</sup> but that there might be an extreme case in which a leader tried to participate in an aggression but was not able to do so. Thus no specific amendment was made to the existing attempt provision, the bizarre case being left for judicial resolution. A related issue could have been whether an inchoate conspiracy to commit aggression might be rendered criminal, as was apparently the case at Nuremberg.<sup>36</sup> There was an apparent consensus, never clearly articulated, not to go down that road.<sup>37</sup>

Article 28 of the Statute provides an alternative mode of liability to that in Article 25, namely the principle of command responsibility. It supplies what is essentially a negligence theory to connect a military commander to crimes committed by his forces if he fails to take the necessary steps to prevent or punish. In the case of other superior and subordinate relationships (such as those involving members of the Government), responsibility is based more on a theory of recklessness. It may seem unlikely that prosecutions for aggression would be brought on such theories (or that they are consistent with the basic nature of the crime), but no specific provision was made by the Working Group.<sup>38</sup>

Article 30's default rule of 'intent and knowledge' in respect of material elements was thought adequate, which is why the definition of aggression has no specific reference to a necessary mental element. More will be said about Article 30 (and its companion Article 32 on mistake) when we discuss the Elements of Aggression later in this article.<sup>39</sup>

Article 31 of the Statute has a handful of grounds for the exclusion of responsibility which could be agreed upon, like insanity, intoxication, self-defence, and duress.

<sup>33</sup> Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, Doc ICC-ASP/5/SWGCA/INF. 1 (2006), at 9–10.

<sup>34</sup> *Ibid.*, at 9. The resolution of this issue may have been influenced in part by the timing of the discussion. When it was being considered, it was still possible that the Security Council or some other United Nations organ might make the definitive decision on whether there was an act of aggression. It was inconceivable that the Security Council would ever take a decision framed along the lines that a state had committed an attempted aggression.

<sup>35</sup> Consider the words 'use of armed force' in the definition. 'Use' may include a total failure to mount a credible attack.

<sup>36</sup> By the time the German leaders were prosecuted, the conspiracy had been acted upon and the Nuremberg Tribunal made little of the inchoate aspects, other than to broaden the scope of those responsible back into the 1920s. See, generally, Clark, *supra* note 12, at 542–550.

<sup>37</sup> On a related issue of inchoate offences, the Rome Statute, *supra* note 1, Art. 25(3)(e), echoing the Genocide Convention, makes it a crime directly and publicly to incite genocide. There is no comparable inchoate incitement provision for war crimes or crimes against humanity, and there was no disposition to include one for aggression.

<sup>38</sup> See Report of the Special Working Group on the Crime of Aggression, Doc ICC-ASP/6/20/Add. 1 (June 2008), at 11–12 (tossing the question to the judges).

<sup>39</sup> *Infra* at notes 46–62.

There may occasionally be some mileage here for an accused leader. More important, though, is paragraph 3 of the Article which provides that '[a]t trial, the Court may consider a ground for excluding criminal responsibility other than those . . . where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Evidence and Procedure.'<sup>40</sup> This procedure for asserting international law defences<sup>41</sup> is likely to be particularly significant where a leader alleges that in fact the state was acting in self-defence, with the approval of the Security Council, or pursuant to any other ground which he or she alleges has the support of treaty or customary law. It is, for example, here that arguments about the legality of humanitarian intervention may need to be structured.<sup>42</sup> It is fair comment that, as was the case when Resolution 3314 was being negotiated, few in the negotiation were prepared to enter into detailed examination of potential defences. A crime, in many domestic systems, is surely a combination of the *prima facie* case minus the defences. The high water mark of such characterization is the Model Penal Code, which defined the 'elements' of an offence to include '(i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . negatives an excuse or justification for such conduct. . .'.<sup>43</sup> The Model Penal Code seems to assume that the principle of legality requires significant specificity in defining the defences. Some strategy of 'leaving it to the judges' is, however, in play in the aggression negotiations.

Article 33 of the Rome Statute is a very badly drafted provision<sup>44</sup> which permits a defence of superior orders in some cases, perhaps only in the case of war crimes. It was not possible to get a specific agreement rendering it inapplicable to the crime of aggression,<sup>45</sup> but the leadership nature of the crime renders it extremely unlikely that the defence will ever work in this context.

<sup>40</sup> Rome Statute, *supra* note 1, Art. 31(3).

<sup>41</sup> 'Defence' seems to be the right word here but must be used with some caution. The structure of Art. 31(3) suggests that the accused has some burden of showing that the defence exists in the general law. On the other hand, Art. 67(1)(i) of the Rome Statute says that the accused has the right, *inter alia*, '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'. Disproof of the factual basis for such a defence thus rests squarely with the Prosecutor.

<sup>42</sup> There were some informal NGO representations made that this was an opportunity to engage in progressive development of this branch of the law, but no Government took this up. See, generally, Leclerc-Gagné and Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention', 41 *Case Western Reserve J Int'l L* (2009) 379 (arguing that drafters should face the issue directly); Murphy, 'Criminalizing Humanitarian Intervention', in *ibid.*, at 341 (conceding that it is likely that no specific language will be included and arguing that in the long term, with prosecutions unlikely in such situation, this may give credence to the view that humanitarian interventions – even without Security Council approval – are lawful).

<sup>43</sup> American Law Institute, *Model Penal Code* (1962), Section 1, subss (9) and (13).

<sup>44</sup> See Otto Trifflerer's masterful deconstruction of the article in Trifflerer, 'Article 33, Superior Orders and Proscription of Law', in O. Trifflerer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd edn, 2008), at 915.

<sup>45</sup> Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, NJ from 13 to 15 June 2005, Doc ICC-ASP/4/32 (2005), at 364–365 (expressing just about every possible position and deciding to do nothing).

## 4 The Elements of Crimes

The Elements of Crimes for aggression<sup>46</sup> will no doubt be finalized in due course by a Committee of the Assembly of States Parties, assuming that the Draft Amendments to the Statute are approved in Kampala. But the draft available to ponder between now and the Review Conference throws some useful light on the offence and will surely be relied upon as a aid to clarity during the 2010 negotiations.

The draft begins, as in the case of Elements adopted for the other treaty crimes, with an Introduction specific to the crime. This Introduction notes first (and redundantly but harmlessly)<sup>47</sup> that ‘any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression’.<sup>48</sup> Much more important is the second statement that ‘[t]here 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’. This is an example of a finesse of Article 32(2) of the Rome Statute pertaining to mistake of law which was made several times during the drafting of the Elements of genocide, crimes against humanity, and war crimes.<sup>49</sup> Article 32(1) of the Statute says that a mistake of fact is a ground for excluding criminal responsibility only if it negates the mental element required by the crime.<sup>50</sup> Paragraph 2 of Article 32 reads:

A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.<sup>51</sup>

The relevant ‘mental element’ here is Article 30’s default rule of ‘intent and knowledge’, which must apply unless there is an attempt to trump it. Mistake is the converse of intent or knowledge. But intent and knowledge as to what? On the face of the draft definition, it could be intent and knowledge as to the legality of the use of force as measured by the United Nations Charter. It was widely felt that leaving the situation here would encourage reliance on disingenuous legal advice.<sup>52</sup> Hence, the element is

<sup>46</sup> *Supra* note 4.

<sup>47</sup> Apparently the drafters thought it awkward to list all the ‘acts’ in what is a brief set of Elements, but wanted to make sure that no misunderstanding was caused by this.

<sup>48</sup> Introduction to Elements of Aggression, Annex I to Doc ICC-ASP/8/INF.2, *supra* note 4, at para. 1.

<sup>49</sup> The Explanatory Note accompanying the Draft Elements, Doc ICC-ASP/8/INF.2, *supra* note 4, at para. 19, n. 7, lists as examples: ‘Factual circumstances establishing lawfulness of a person’s presence in an area (Elements of Crimes, article 7 (1) (d) crime against humanity of deportation or forcible transfer of population, Elements 2 and 3); the protected status of a person under the Geneva Conventions (see Elements for most of the war crimes, for example article 8 (2) (a) (i) war crime of willful killing, Elements 2 and 3); or the existence of an armed conflict (see Elements for most war crimes, for example, Article 8 (2) (a) (i) war crime of willful killing, Element 5).’

<sup>50</sup> Rome Statute, *supra* note 1, Art. 31(1).

<sup>51</sup> *Ibid.*, Art. 32(2). (Art. 33 deals with superior orders.)

<sup>52</sup> After noting the need for ‘knowledge’, the Chairman’s Explanatory Note, *supra* note 4, comments: ‘However, 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 willfully blind as to

recast as awareness (knowledge) of the factual circumstances which established that such use was inconsistent with the Charter.<sup>53</sup> The Introduction continues that the term ‘manifest’ is ‘an objective qualification’<sup>54</sup> and again executes the finesse: ‘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’.<sup>55</sup>

The Court itself has the ultimate word on whether creative elements such as these are consistent with the Statute.<sup>56</sup> No doubt that issue will be raised in due course by competent counsel.

The Elements themselves can be simply stated. The first is a conduct element: ‘[t]he perpetrator planned, prepared, initiated or executed an act of aggression’.<sup>57</sup> The second is a circumstance element: ‘[t]he perpetrator was in a position to effectively exercise control over or to direct the political or military action of the State which committed the act of aggression’.<sup>58</sup> As to each of these two elements, the default rule of intent and/or knowledge must apply, and no explicit provision is given for the mental element. The conduct in Element 1 must have been aimed at a desired result; the person in Element 2 must have been aware of his position in the hierarchy. The third Element is a reiteration of the act of aggression requirement. It is either a consequence element (consequence of what the perpetrators do) or a circumstance element: ‘[t]he 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’.<sup>59</sup> In this case, the

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the legality of his or her actions, or to rely on disreputable advice supporting the legality of State acts even if that advice is subsequently shown to have been incorrect. Also, mental elements requiring knowledge of law are regularly avoided in domestic legal systems as they are difficult to prove to the required standard.’

<sup>53</sup> Element 4 follows the Introduction in asserting: ‘[t]he perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter’.

<sup>54</sup> Introduction to Draft Elements, *supra* note 4, at para. 3. A speaker at the June 2009 informal meeting, *supra* note 4, is recorded as suggesting that ‘the Court would apply the standard of a “reasonable leader”, similar to the standard of the “reasonable soldier” which was embodied in the concept of manifestly unlawful orders in article 33 of the Rome Statute’. The argument would on the facts be shaped in part around the words ‘character, gravity and scale’ in the draft. Para. 20 of the Chairman’s Non-Paper on the Elements of Crimes, Annex II to Doc ICC-ASP/8/INF.2 (June 2009), suggests: ‘[e]xamples 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 the Security Council resolution, the existence or absence of a prior or imminent attack by another State’.

<sup>55</sup> Introduction to Draft Elements, *supra* note 4, at para. 4.

<sup>56</sup> See *supra* note 1, Art. 9(3).

<sup>57</sup> Draft Element 1, *supra* note 4.

<sup>58</sup> Draft Element 2, *supra* note 4. A footnote here adds that ‘[w]ith respect to an act of aggression, more than one person may be in a position that meets these criteria’. This is a point worth making *ex abundante cautela*. The perpetrators of aggression are usually *leaders*, not just one supreme leader. In addition, causation was a topic which was ducked during the drafting (both of the Statute and of the provision on aggression). There would appear to be no requirement of ‘but for’ causation as to any one of the players, who may no doubt be important without being a *sine qua non*.

<sup>59</sup> Draft Element 3, *supra* note 4. Nothing turns ultimately on the precise characterization of the nature of the element – consequence or circumstance – the important step in the reasoning is the knowledge (fact or law) aspect of the issue.

possible element of knowledge of the law has been put aside.<sup>60</sup> Element 5 is probably a circumstance element. It declares that '[t]he act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations'.<sup>61</sup> It is followed by the final Element, another finesse of mistake of law: '[t]he perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations'.<sup>62</sup>

## 5 Conditions for the Exercise of Jurisdiction

The Special Working Group has been less successful in resolving the issue of conditions than that of definition. The second sentence of Article 5, paragraph 2, of the Statute, added without debate in the last days of the Rome Conference, states that the provision on aggression 'shall be consistent with the relevant provisions of the Charter of the United Nations'.<sup>63</sup> By and large, the Permanent Members of the Security Council have taken the position that Article 39 of the Charter confers on them the 'exclusive' power to make determinations of the existence of an act of aggression, and thus a Security Council pre-determination of aggression is an essential precondition to exercise of the ICC's jurisdiction. Most other states point out that Article 24 of the Charter confers 'primary' power on the Council in respect of the maintenance of international peace and justice and that primary is not exclusive. They add that the General Assembly has made several findings of aggression and that the United States, the United Kingdom, and France were co-sponsors of the 1950 Uniting for Peace resolution,<sup>64</sup> which permits removal of aggression issues into the General Assembly – and that all five of them have voted pursuant to that resolution when it suited them. Non-permanent members tend to add that the International Court of Justice has addressed issues where aggression is in play.<sup>65</sup>

The major achievement in this part of the negotiation has been to de-couple the definition from the conditions. In the version of the amendment to the Statute which was on the table at the end of the life of the Preparatory Commission, the Security Council (or possibly the General Assembly or the ICJ) would make a definitive decision on the existence of the element of 'act of aggression' which was binding on the ICC.<sup>66</sup> Not only would this subvert the power of the Court to decide itself on the existence or otherwise of the elements of the crime, but it would make it extremely difficult to build a criminal offence around a structure where one of the key elements was decided elsewhere, and potentially on the basis of totally political considerations. In

<sup>60</sup> Draft Element 4, *supra* note 53.

<sup>61</sup> Draft Element 5.

<sup>62</sup> Draft Element 6.

<sup>63</sup> Rome Statute, *supra* note 1, Art. 5(2), second sentence.

<sup>64</sup> GA Res 377A (1950).

<sup>65</sup> Most recently in *Armed Activities on the Territory of the Congo (DR Congo v. Uganda)*, Judgment of 19 Dec. 2005.

<sup>66</sup> See the 2002 Coordinator's Draft, *supra* note 13.

such circumstances, there would be probably unbearable weight placed on the mistake provisions of Article 32<sup>67</sup> or on the ‘manifest’ threshold.<sup>68</sup> This has now been avoided in the Special Working Group’s draft. Any determination elsewhere is of only a preliminary nature, although it may have some evidentiary value.<sup>69</sup> This opens the way for the various options now before the Review Conference of giving the Security Council (or other United Nations organ) a ‘filter’ role, providing either a ‘green light’ or a ‘red light’ to the ICC’s proceedings.<sup>70</sup> There is, moreover, a solid group for the proposition that the Prosecutor should be able to proceed even in the absence of action by someone else.<sup>71</sup> If the members of the P5 (or at least the two who are parties to the Statute, France and the United Kingdom) do not budge from their position and agree to some compromise on this, the success of Kampala probably turns on whether the majority is prepared to force the matter to a vote and plunge ahead.

## 6 Effecting the Amendment

There is a fundamental ambiguity in the Statute on how the aggression amendment is to be done. Article 5(2) says 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 that crime’. Seizing on the word ‘adopt’ used here (deliberately?) and again in Article 121(3),<sup>72</sup> the author has in the past espoused the position that all that is needed is approval by the Review Conference.<sup>73</sup> This view is in a decided minority and the author’s scars run deep. ‘Adopt’ in Article 5(2), it is said by the majority, must mean approve the text and then get subsequent ratification – in accordance with standard multilateral practice. ‘Adopt’ in Article 121(3) means approving the text.<sup>74</sup> This then shifts 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

<sup>67</sup> *Supra* note 56.

<sup>68</sup> *Supra* notes 11–13 and 54–55.

<sup>69</sup> Draft Art. 15*bis*(5) provides: ‘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.’

<sup>70</sup> Draft Art. 15*bis*, paras 2–4.

<sup>71</sup> Draft Art. 15*bis*, para. 4, Alternative 2, Option 1.

<sup>72</sup> Rome Statute, *supra note 1*, Art. 121(3): ‘[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 States Parties’.

<sup>73</sup> Clark, ‘Ambiguities in Articles 5 (2), 121 and 123 of the Rome Statute’, 41 *Case Western Reserve J Int’l L* (2009) 413, at 416–418.

<sup>74</sup> It is fair to add that many of the negotiators accept that the ICC will have competence to receive Security Council referrals once the text is adopted – even in the absence of any ratifications. See the Nov. 2008 Report of the Special Working Group, ICC-ASP/7/SWGCA/1, at para. 38.

deposited with the Secretary-General of the United Nations'.<sup>75</sup> 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.<sup>76</sup>

The issue of interpretation is fairly stark: is the aggression provision functionally<sup>77</sup> an amendment to Article in that it removes an existing state of affairs – that the Court cannot currently 'exercise jurisdiction' over one of the four crimes listed as within its jurisdiction in Article 5(1)? If this is the case, then 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 rather than to Article 5, and the seven-eighths rule applies. Neither view is entirely persuasive, although the author leans to the latter interpretation, conceding, nonetheless, that getting seven-eighths to ratify may take a long time.<sup>78</sup> There seems, however, at this stage of the game, to be a majority in favour of treating the proposed amendments as amendments 'to' Article 5 and thus applicable only to those who specifically accept.<sup>79</sup>

<sup>75</sup> Rome Statute, *supra* note 1, Art. 121(4).

<sup>76</sup> *Ibid.*, Art. 121(5) (emphasis added).

<sup>77</sup> Formally, the proposed amendments insert new Arts 8*bis* and 15*bis* in the Statute and make changes in Arts 9, 20(3), and 25(3). While Art. 5, para. 2, is said, in the SWGCA's proposals, to be 'deleted' this hardly seems necessary on any interpretation of it.

<sup>78</sup> Waiting while decent states slowly agree one by one to accept the obligations unilaterally is not a cheerful prospect either. Those most able to use force will not be likely to be in the vanguard of ratification whatever method is adopted.

<sup>79</sup> But see on Security Council referrals *supra* note 74. There are also several possibilities in the air for 'opting in' or 'opting out' of the aggression provisions, over and above any necessary agreement. These include requirements that the alleged aggressor state have agreed to the jurisdiction in advance. See 2009 Informal Intersessional meeting, *supra* note 4, paras 32–43.