

---

# Treaty Law and ICC Jurisdiction over the Crime of Aggression

Dapo Akande\* and Antonios Tzanakopoulos\*\*

## Abstract

*This article examines the question of who will be subject to International Criminal Court (ICC) jurisdiction with respect to the crime of aggression. One of the most contentious questions in the negotiations regarding the crime of aggression was whether the Court would have jurisdiction over nationals of a state that does not ratify the Kampala Amendments, but which is alleged to have committed an act of aggression on the territory of a state that has accepted the aggression amendments. The question is examined here against the background of the rules in the law of treaties regarding amendments and treaty interpretation. The article considers the legal effect that the resolution adopted by the ICC Assembly of States Parties in New York in December 2017 will have in determining this jurisdictional question. A resolution of an international conference adopted by consensus can, in principle, be regarded as subsequent practice or a subsequent agreement of the parties to the Rome Statute that establishes the authentic interpretation of the Statute within the meaning of the Vienna Convention on the Law of Treaties. It is argued, however, that this particular resolution does not, in itself, provide the definitive answer on the correct interpretation of the Rome Statute. Despite being adopted by consensus, and despite being highly relevant for the interpretation of the Rome Statute and the Kampala Amendments, this resolution does not necessarily amount to a subsequent agreement or subsequent practice that the Court is legally bound to follow. Nevertheless, it is further argued that the position adopted in New York with regard to the jurisdiction of the Court over nationals of states parties that do not ratify the Kampala Amendments is the correct legal position and the one that the Court ought to adopt. The answer to the question over whom the Court will have jurisdiction with respect to aggression is to be found in Rome rather than in Kampala, or even in New York. We argue that the key to addressing this issue is to understand how the amendment provisions of the Rome Statute work in conjunction with basic principles of the law of treaties.*

\* Professor of Public International Law, University of Oxford; Fellow, Exeter College, Oxford; Co-Director, Oxford Institute of Ethics, Law and Armed Conflict, Oxford, United Kingdom; Emeritus Editor, *European Journal of International Law*. Email: [dapo.akande@bsg.ox.ac.uk](mailto:dapo.akande@bsg.ox.ac.uk). The research leading to these results has received funding from the European Research Council (ERC) under the European Union's Seventh Framework Programme (FP/2007–2013) and ERC Grant Agreement no. 340956–IOW.

\*\* Associate Professor of Public International Law, University of Oxford; Fellow, St. Anne's College, Oxford; Secretary-General, International Law Association, London, United Kingdom. Email: [antonios.tzanakopoulos@law.ox.ac.uk](mailto:antonios.tzanakopoulos@law.ox.ac.uk).

## 1 Who Is Subject to ICC Aggression Jurisdiction? Looking for an Answer in Rome, Kampala and New York

In the early hours of the morning of 15 December 2017, the states parties to the Rome Statute of the International Criminal Court (ICC), gathered in New York City, took the historic step of ‘activating’ the jurisdiction of the Court over the crime of aggression.<sup>1</sup> It was decided by a resolution of the ICC Assembly of States Parties (ASP),<sup>2</sup> adopted by consensus, that the crime of aggression would be subject to the Court’s jurisdiction from 17 July 2018. This move was the final step in the long journey towards the criminalization of crimes against peace. Not since the Nuremberg and Tokyo tribunals had an international criminal tribunal been competent to adjudicate on the individual criminal responsibility of state leaders for engaging in aggressive wars. Although there had been numerous stumbling blocks in the quest to, once again, subject the crime of aggression to international jurisdiction, they had been overcome, one by one, along the way from Rome, where the Rome Statute was adopted in 1998, to Princeton,<sup>3</sup> to Kampala,<sup>4</sup> and, finally, to New York. After agreement in the ICC’s Special Working Group on the Crime of Aggression on the definition of the crime of aggression, the Kampala Amendments to the Rome Statute endorsed that definition and set out the circumstances in which the crime would fall within the jurisdiction of the Court.<sup>5</sup> However, in Kampala, states parties were not ready to take the final decisive step with regard to ICC jurisdiction over aggression. They decided that the Court’s exercise of jurisdiction over aggression would require 30 ratifications or acceptances<sup>6</sup> and also decided to subject the ICC’s jurisdiction to a further decision by states parties to activate that jurisdiction, with that decision not to be taken before 1 January 2017.<sup>7</sup> Nevertheless, they ‘[r]esolved to activate the Court’s jurisdiction over the crime of aggression as early as possible’.<sup>8</sup>

Almost as soon as the ink dried on the Kampala Amendments, a division of views emerged as to one aspect of the ICC jurisdictional regime over the crime of aggression.<sup>9</sup> It transpired that who would be subject to ICC jurisdiction over aggression was

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

<sup>2</sup> Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression (New York ASP Resolution), Doc. ICC-ASP/16/Res.5, 14 December 2017 (adopted by consensus at the ICC Assembly of States Parties).

<sup>3</sup> Where several sessions of the Special Working Group on the Crime of Aggression were held. For the reports of the Special Working Group, see ‘History of the Special Working Group on the Crime of Aggression’, available at [https://asp.icc-cpi.int/en\\_menus/asp/crime%20of%20aggression/Pages/History-CoA.aspx](https://asp.icc-cpi.int/en_menus/asp/crime%20of%20aggression/Pages/History-CoA.aspx).

<sup>4</sup> Where the International Criminal Court (ICC) Review Conference was held in 2010.

<sup>5</sup> Kampala Amendments on the Crime of Aggression (Kampala Amendments), Resolution RC/Res. 6, 11 June 2010, reprinted in S. Barriga and C. Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (2012), at 101–107, available at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf). For an overview of the Kampala Amendments and an overview of the negotiations in Kampala, see Kreß and von Holtzendorff, ‘The Kampala Compromise on the Crime of Aggression’, 8 *Journal of International Criminal Justice (JICJ)* (2010) 1179.

<sup>6</sup> Rome Statute, *supra* note 1, Arts 15bis(2), 15ter(2) (emphasis in original).

<sup>7</sup> *Ibid.*, Arts 15bis(3), 15ter(3).

<sup>8</sup> See Kampala Amendments, *supra* note 5.

<sup>9</sup> See D. Akande, ‘What Exactly Was Agreed in Kampala on the Crime of Aggression?’, *EJIL:Talk!* (21 June 2010).

neither obvious nor easily answered. The dispute centred on ICC proceedings that are triggered by state referral or by the prosecutor taking up the matter *proprio motu*. In such a situation, according to one view, the Court would not have jurisdiction over an alleged crime of aggression committed by nationals of, or on the territory of, a state party to the Rome Statute that had not ratified or accepted the Kampala Amendments. As will be discussed below, this 'narrow view' is based on the argument that the second sentence of Article 121(5) of the Rome Statute provides a treaty right to states parties, which, under the law of treaties, cannot be taken away without their consent. This provision states: 'In respect of a State Party which has not accepted [an] ... amendment [to Articles 5, 6, 7 or 8], the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.' However, according to the 'broad view', where a national of a state party commits the crime of aggression on the territory of a state party that has ratified the Kampala Amendments, that person would be subject to ICC jurisdiction over the crime, in accordance with Article 12(2) of the Rome Statute, which provides for ICC jurisdiction over crimes committed on the territory of a state party irrespective of the nationality of the accused. On this view, jurisdiction would only be excluded where the state of nationality has opted out of ICC jurisdiction over the crime of aggression as provided for in the Kampala Amendments.<sup>10</sup>

This division of views came to the fore during the process instituted prior to the ASP in New York to facilitate the making of the activation decision.<sup>11</sup> Although states parties to the Rome Statute may choose to opt out of the ICC's jurisdiction over aggression under Article 15bis(4) of the amended Rome Statute by simply lodging a declaration with the Registrar of the Court, some states, relying on the narrow view, adopted the position that they should not be required to opt out in order for their nationals to be exempt from ICC jurisdiction over aggression. In March 2017, Canada, Colombia, France, Japan, Norway and the United Kingdom submitted a paper to that facilitation process setting out the narrow view.<sup>12</sup> In response, Liechtenstein and then Argentina, Botswana, Samoa, Slovenia and Switzerland also submitted papers adopting the broad view of jurisdiction.<sup>13</sup>

The significance of the question can be seen from the names that came to be given, by some, to those in the different camps. Those who took the broad view referred to themselves as 'camp protection' because adoption of their position would mean that states parties that ratified the Kampala Amendments would be protected from aggression committed by states parties that had not ratified the amendments.<sup>14</sup> The other

<sup>10</sup> Kampala Amendments, *supra* note 5, Art. 15bis4 provides that the states may, prior to any alleged act of aggression, declare that they do not accept the jurisdiction of the Court with respect to the crime of aggression.

<sup>11</sup> See Report on the Facilitation on the Activation of the Jurisdiction of the International Criminal Court over the Crime of Aggression (Crime of Aggression Report), Doc. ICC-ASP/16/24, 27 November 2017, paras 11–22; Kreß, 'On the Activation of ICC Jurisdiction over the Crime of Aggression', (2018) 16 *JICJ* 1, at 7–8.

<sup>12</sup> Reprinted in Crime of Aggression Report, *supra* note 11, Annex II(A).

<sup>13</sup> Reprinted in *ibid.*, Annex II(B), (C).

<sup>14</sup> See S. Barriga, 'The Scope of ICC Jurisdiction over the Crime of Aggression: A Different Perspective', *EJIL:Talk!* (29 September 2017).

side was characterized as ‘camp consent’ because they insisted that the Court could only have jurisdiction to determine whether they had committed acts of aggression where the alleged aggressor state had granted jurisdiction to the Court.<sup>15</sup> Given that by the end of 2017 only 35 states parties to the Rome Statute had ratified or accepted the aggression amendments (fewer than 30 per cent of the total number of state parties), adopting one view rather than the other would have greatly expanded or limited the range of persons over whom the ICC has jurisdiction with respect to the crime of aggression in cases of state referrals and prosecutions *proprio motu*.

The issue is significant for one more reason. According to the ‘normal jurisdictional regime’ of the ICC, crimes committed on the territory of states that have accepted the jurisdiction of the Court come within the Court’s jurisdiction irrespective of the nationality of the alleged perpetrator. Does this normal jurisdictional regime apply to the crime of aggression,<sup>16</sup> or is the regime for the crime of aggression different from that of other crimes under the Rome Statute?

At the ASP, the supporters of the ‘narrow view’ refused to budge, and the ASP resolution, adopted by consensus on 15 December 2017,<sup>17</sup> states that the ASP:

1. *Decides* to activate the Court’s jurisdiction over the crime of aggression as of 17 July 2018;
2. *Confirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments.<sup>18</sup>

The resolution thus takes a stand on the central jurisdictional question. Adherents of the narrow view surely had hoped that this would constitute the definitive answer to the question of who will be subject to ICC jurisdiction over the crime of aggression. However, the resolution contains one more operative paragraph:

3. *Reaffirms* paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court.

This paragraph was inserted by the states taking the broad view, as a reminder that the question of who is subject to the Court’s jurisdiction is ultimately one for the Court to decide.

As will be shown, the confirmation by the ASP of the narrow view may not, on its own, be sufficient to establish this position as the authoritative interpretation of the provisions regarding jurisdiction over the crime of aggression. Since the first steps of any potential prosecution for aggression will be taken by the Office of the Prosecutor (OTP), this is the organ of the Court that will first have to engage with the question of

<sup>15</sup> *Ibid.*

<sup>16</sup> See Rome Statute, *supra* note 1, Art. 12(2), (3).

<sup>17</sup> For an account of the developments leading up to, and at, the 16th session of the ICC Assembly of States Parties (ASP), which took place in New York in December 2017, see Kreß, *supra* note 11, at 7–8.

<sup>18</sup> New York ASP Resolution, *supra* note 2 (emphasis in original).

who exactly is subject to ICC jurisdiction over the crime. In addition to taking a decision on the narrow or broad view, in cases of state referrals and prosecutions *proprio motu*, the OTP, and perhaps also the judges, may have to consider other questions that remain unsettled regarding the jurisdictional regime of the ICC over aggression. These other questions include the following:

- What is the position with respect to states that become parties to the Rome Statute after the adoption of the Kampala Amendments? Are they to be regarded as having ratified the amended Rome Statute of 2010 or the original Rome Statute of 1998?<sup>19</sup>
- May non-parties to the Rome Statute make declarations under Article 12(3) accepting the jurisdiction of the Court over aggression, as they can do – and have done – with respect to the other crimes within the Court’s jurisdiction?<sup>20</sup>
- In the case of United Nations (UN) Security Council referrals, will the Court be entitled to exercise jurisdiction over an alleged crime of aggression, committed by a national of, or on the territory of, a state party to the Rome Statute that has not ratified or accepted the Kampala Amendments? This question arises because, if ICC parties have a treaty right under Article 121(5) not to have amendments applied to crimes committed on their territory or by their nationals, it is not clear from the text of Article 121(5) that this right becomes inapplicable in the case of UN Security Council referrals.

This contribution focuses on the main issue that has thus far has divided states and scholars as to the jurisdiction of the Court over alleged crimes of aggression committed by nationals of, or on the territory of, those ICC state parties that have not ratified the Kampala Amendments. It will not consider all of the questions listed above, though some of the points made along the way will be of relevance in seeking to answer some of these other questions.

## 2 The Characterization of Consensus Decisions of International Conferences/Organizations in Treaty Interpretation as Subsequent Practice or Subsequent Agreement

Given that the ASP has confirmed by consensus the narrow view in its New York resolution, it might be thought that the dispute regarding the jurisdiction of the Court over nationals of ICC states parties that have not ratified the Kampala amendments is definitively settled. However, some of the statements that were made by state parties immediately after the adoption of the resolution, and by way of explanation of their

<sup>19</sup> See A. Zimmermann, ‘Does 19 + 11 Equal 30?: The Nitty Gritty of the Law of Treaties and the Kampala Amendment to the Rome Statute on the Crime of Aggression’, *EJIL:Talk!* (27 November 2014).

<sup>20</sup> For a brief consideration of this question, see Barriga and Blokker, ‘Conditions for the Exercise of Jurisdiction Based on State Referrals and Proprio Motu Investigations’, in C. Kreß and S. Barriga, *The Crime of Aggression: A Commentary* (2017) 652, at 656.

positions, show that while no state was prepared to block consensus and thus prevent activation of ICC jurisdiction over aggression, many states that took the broad view did not abandon their legal position.<sup>21</sup> The question to be asked is what is the legal effect of the confirmation of the narrow position in the ASP resolution activating the crime of aggression. To what extent is this resolution dispositive in that it provides a definitive legal answer to the question of jurisdiction in this circumstance?

As will be explored more fully below, the question regarding ICC jurisdiction over the crime of aggression is ultimately a dispute over the interpretation of the Rome Statute. In particular, the question relates to a dispute over the interaction between the statute adopted in Rome and the amendments to the statute adopted in Kampala. A significant aspect of that dispute relates to the interpretation to be given to the amendment provisions of the Rome Statute. As has already been mentioned, those who take the narrow view base their position on Article 121(5) of the Rome Statute. According to that provision:

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

The adherents of the narrow position are of the view that the second sentence of that provision has the effect of precluding the ICC from exercising jurisdiction over nationals of ICC states parties that have not ratified the Kampala Amendments. It is this view that is confirmed by the New York Resolution, which simply applies the second sentence of Article 121(5) to the crime of aggression. Moreover, the resolution asserts that the position there 'confirmed' is 'in accordance with the Rome Statute'.<sup>22</sup>

Given that the ASP resolution is a statement of the parties to the Rome Statute that explicitly purports to give meaning to a provision of the Rome Statute (Article 121(5)), and that sets out how that provision applies in a particular circumstance, the resolution is the practice of the parties to the Statute regarding the interpretation of that treaty. Furthermore, since the resolution was adopted by consensus, it might be thought that the position taken is decisive in the interpretation of the treaty, either because it represents a subsequent agreement of the parties to the Rome Statute regarding its interpretation (within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties [VCLT]) or because it amounts to subsequent practice that establishes the agreement of the parties to the treaty regarding its interpretation (within the meaning of Article 31(3)(b) of the VCLT).<sup>23</sup>

<sup>21</sup> See N. Stürchler, 'The Activation of the Crime of Aggression in Perspective', *EJIL:Talk!* (26 January 2018).

<sup>22</sup> New York ASP Resolution, *supra* note 2, para. 2.

<sup>23</sup> It should be noted the International Court of Justice (ICJ) has stated on several occasions that Art. 31 of the VCLT represents customary international law. See *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, ICJ Reports (1999) 1045, at 1059, para. 18. See further Fox, 'Article 31 (3) (a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case', in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010) 63. Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

Indeed, both the International Court of Justice (ICJ) and the International Law Commission (ILC) have expressed the view that resolutions of conferences of states parties to treaties, or of plenary bodies of international organizations, may constitute subsequent agreements or subsequent practice under Article 31(3)(a) and (b) of the VCLT. In *Whaling in the Antarctic*, the ICJ considered the effect of resolutions of the International Whaling Commission (IWC) on the interpretation of the Whaling Convention.<sup>24</sup> The Court stated:

First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.<sup>25</sup>

The clear implication of the statement of the ICJ is that, where relevant resolutions are adopted with the support of all states parties, they may be taken into account under Article 31(3)(a) or (b). Furthermore, the Court appears to have taken the view that when a resolution that bears upon treaty interpretation is adopted by consensus, it is of such a nature as to be regarded as an authentic interpretation of the treaty. Not only did the Court make specific note (on several occasions) that a particular resolution being relied on in its judgment had been adopted by consensus, it also stated more generally that '[t]hese recommendations [of the IWC], which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.'<sup>26</sup>

Although the ILC also recognizes that a decision adopted within the framework of a Conference of State Parties may embody, explicitly or implicitly, a subsequent agreement or subsequent practice under Article 31(3)(a) or (b) of the VCLT, it does not seem to accept that a consensus decision will necessarily qualify as an agreement or practice under those provisions. Nor does it accept that the interpretative position taken in such a decision is to be regarded as binding on interpreters. According to the ILC, a decision will qualify under those provisions 'in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, *regardless of the form and the procedure by which the decision was adopted, including adoption by consensus*'.<sup>27</sup> The words italicized in the last sentence were included 'in order to dispel the notion that a decision adopted by consensus would necessarily be equated with agreement in substance. Indeed, consensus is not a concept which necessarily indicates any

<sup>24</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, 31 March 2014, ICJ Reports (2014) 226. International Convention for the Regulation of Whaling 1946, 161 UNTS 72.

<sup>25</sup> *Whaling in the Antarctic*, *supra* note 24, para. 83.

<sup>26</sup> *Ibid.*, para. 46.

<sup>27</sup> ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (ILC Draft Conclusions) (2018), Draft Conclusion 11(3); *Report of the International Law Commission, Seventieth Session* (ILC Report 70th Session), UN Doc. A/73/10 (2018), at 20 (emphasis added).

particular degree of agreement on substance'.<sup>28</sup> The ILC went on to note that '[i]t follows that adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3(b)'.<sup>29</sup> In other words, adoption by consensus or unanimity appears to be a necessary, but not a sufficient, property of a decision or resolution coming within the scope of Article 31(3)(a) or (b).

If the essence of a subsequent agreement or subsequent practice under Article 31(3) (a) and (b) is that the parties (meaning all of the parties<sup>30</sup>) to the relevant treaty are to be taken as agreeing in substance to the interpretation given, the question that arises is whether all parties to the Rome Statute are to be regarded as agreeing to the interpretation of the Rome Statute that is expressed in the resolution. While none of them objected to the resolution at the moment of adoption, some of them did make it clear, in their statements after the adoption, that they did not share the position taken in the resolution.<sup>31</sup> This leads to the question of whether the moment of adoption is to be regarded as the moment of agreement, such that if there were to be a lack of agreement later there was still a moment, even if fleeting, in which all of the parties agreed on a particular interpretation. That would be a somewhat odd understanding of 'agreement'. Indeed, the ILC notes that accepting a consensus decision simply means that the state concerned has decided not to block the adoption of the decision, but it does not necessarily indicate its consent to all aspects of that decision. Thus, the statements made in explanation of positions after the aggression activation resolution was adopted really do indicate there was no agreement in substance, by all of the parties, on the points covered in the resolution.

Furthermore, the New York activation Resolution does not necessarily represent a subsequent agreement as to the interpretation of the Rome Statute, which must be taken into account in its interpretation, because not all of the parties to the Statute were present at the moment of adoption.<sup>32</sup> For that same reason, the resolution cannot be said to necessarily represent subsequent practice that establishes the agreement of (all) the parties as to the interpretation of the Rome Statute under Article 31(3)(b) of the VCLT. Whether the resolution can be finally determined to represent either subsequent agreement or subsequent practice must further depend on the reaction of the parties not present at the moment of adoption in New York.<sup>33</sup> Given the theoretical power of an Assembly or Conference of States Parties to adopt authentic

<sup>28</sup> ILC Report 70th Session, *supra* note 27, at 111, para. 30.

<sup>29</sup> *Ibid.*, para. 31.

<sup>30</sup> See the ILC's Commentary to what became Art. 31(3)(b) of the VCLT, which stated that: "The text provisionally adopted in 1964 spoke of a practice which "establishes the understanding of all the parties." By omitting the word "all" the Commission did not intend to change the rule. It considered that the phrase "the understanding of the parties" necessarily means "the parties as a whole." It omitted the word "all" merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.' *Yearbook of the International Law Commission* (1966), vol. 2, at 222; see also Sorel and Boré Eveno, 'Article 31: Convention of 1969', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 804, at 826.

<sup>31</sup> See Stürchler, *supra* note 21.

<sup>32</sup> *Ibid.*

<sup>33</sup> See further Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation', in H.-P. Aust and G. Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016) 72, at 92, with further references.



interpretations of the relevant instrument, even those not present ought to be *en garde* to voice their dissent, lest they be considered as having acquiesced to the interpretation offered, thereby establishing agreement.

Kevin Jon Heller has argued, along the lines discussed above, that the Kampala Understandings on the crime of aggression did not represent subsequent agreements or subsequent practice under Article 31(3) of the VCLT because not all states parties to the Rome Statute were present in Kampala.<sup>34</sup> This might still have been the case when he was writing in 2012. Today, however, the fact that no state party to the Rome Statute (whether present in Kampala or not) has expressed disagreement with the interpretations offered in the understandings in the eight years since their adoption probably does represent agreement in substance. On the contrary, the fact that some parties immediately expressed a divergent view to that contained in paragraph 2 of the New York resolution does suggest that there was no agreement in substance in the way described by the ILC.

There is one further reason why the New York resolution does not necessarily provide finality regarding the question of over who the ICC will have jurisdiction with regard to aggression. Even if the resolution constituted a subsequent agreement or subsequent practice establishing the agreement of the parties under Article 31(3)(a) or (b), it is unclear whether an interpreter is bound by such an interpretation. In this regard, it should be recalled that the VCLT requires that subsequent agreements or practice that qualify under Article 31(3) shall be 'taken into account' without indicating what weight should be given to them. Clearly, an interpreter must consider any subsequent agreement that qualifies under Article 31(2) as part of the context as well as any subsequent agreement or practice that 'shall be taken into account together with the context' under Article 31(3). (This is unlike the case of supplementary means of interpretation under Article 32, recourse to which can only occur if certain conditions are met or simply to confirm an interpretation arrived at through the application of the general rule of interpretation in Article 31.) However, while some are of the view that an interpretation agreed on by the parties is decisive and binding, given that the parties are after all the masters of the treaty, others have argued that such a subsequent agreement or practice is only one of several factors that the interpreter is to consider in applying Article 31 of the VCLT.<sup>35</sup>

The ILC does not seem to have taken a consistent position on this question. In elaborating the VCLT, it stated that subsequent agreements represent 'an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation'.<sup>36</sup> Similarly, Sir Humphrey Waldock as ILC Special Rapporteur on the Law of Treaties stated that '[s]ubsequent practice, when it is consistent and embraces all of the parties, would appear to be decisive of the meaning to be attached to the treaty, at any rate when it indicates that the parties consider the interpretation to be binding upon them'.<sup>37</sup> However, in its more recent work on 'Subsequent Agreements and Subsequent Practice in relation to the interpretation of treaties', the ILC has taken

<sup>34</sup> Heller, 'The Uncertain Legal Status of the Aggression Understandings', 10 *JICJ* (2012) 229.

<sup>35</sup> See Sorel and Boré Eveno, *supra* note 30, at 826; 828; cf. M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 429.

<sup>36</sup> *Yearbook of the International Law Commission*, *supra* note 30, at 221, para. 14.

<sup>37</sup> Waldock, 'Third Report on the Law of Treaties', 2 *ILC Yearbook* (1964) 60, para. 25.

the view that even when a subsequent agreement or subsequent practice falls within the meaning of Article 31(3), it is still only one of the different means of interpretation to be taken into account in the process of interpretation under Article 31.<sup>38</sup> According to this more recent view of the ILC, '[t]he interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3(a), but not necessarily treat it as legally binding'.<sup>39</sup>

It may be that this apparent divergence of views is not a real divergence at all. The fact that the masters of the treaty have, through subsequent agreement or practice, offered an 'authentic interpretation' of the treaty cannot be any more legally binding than any utterance included in the treaty. There being no '*acte claire*', all utterances, contemporary or 'subsequent', in the treaty being interpreted or in other instruments require interpretation. Against this background, subsequent practice or agreement, of course, is only one of the elements to be taken into consideration by the interpreter, if a particularly weighty one that the interpreter will ignore at their peril. Let us not forget that the states parties may still contest an interpretation by a court after the fact, and this has and will continue to happen, sometimes (though rarely) with the effect of relegating the interpretation of a court to the dustbin of history.

If the more recent view of the ILC were to be applied to the 2017 New York ASP resolution, or if we accept that there is no significant divergence between the views other than at first sight, the decision taken in paragraph 2 of that resolution (adopting the narrow view of ICC jurisdiction over aggression) would not be binding on the Court even if it were to be considered as subsequent agreement or subsequent practice (or, indeed, as part of the context). It would merely be one factor – though a particularly weighty one to be given its 'appropriate weight' – to be taken into account in determining whether the Court does have jurisdiction over a crime of aggression allegedly committed by nationals of, or on the territory of, states parties not ratifying.

To conclude on the question of the legal effect of the 2017 ASP resolution, while the parties that insisted on the insertion of paragraph 2 of that resolution pushed for it in an attempt to provide legal certainty that the Court would not exercise jurisdiction with respect to aggression allegedly committed by ICC states parties that had not ratified the Kampala Amendments, the resolution does not necessarily provide such certainty. However, this conclusion should not be taken to mean that the adoption of the resolution does not improve the position of the adherents of the narrow view. Even if the resolution does not qualify as a subsequent agreement or subsequent practice under Article 31(3)(a) or (b), it would nonetheless be a supplementary means of interpretation under Article 32 of the VCLT.<sup>40</sup> Thus, it can (and should) be used to

<sup>38</sup> ILC Report 70th Session, *supra* note 27, at 114, para. 37.

<sup>39</sup> *Ibid.*, para. 38.

<sup>40</sup> ILC Draft Conclusions, *supra* note 27, Conclusion 11(2): 'Depending on the circumstances, such a decision [adopted by a conference of state parties] may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32' (emphasis added). See also *ibid.*, Conclusion 2(4): 'Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.'

confirm the meaning of the Rome Statute that is reached by application of Article 31 of the VCLT. The resolution should also be taken into account by the Court were it to be determined that the relevant provisions of the Rome Statute are ambiguous. While the Court may not regard the resolution as binding, the resolution adds considerable weight to the view that the narrow position is the correct interpretation to be given to the Rome Statute.

### 3 A Return to Rome: Is Jurisdiction over the Crime of Aggression Subject to Ordinary ICC Jurisdictional Rules?

Ultimately, the answer to the question of ICC jurisdiction over nationals of ICC states parties that do not ratify the Kampala Amendments is to be found in the Statute adopted in Rome rather than in the amendment adopted in Kampala or in the ASP resolution adopted in New York. What was done in Kampala could not have the effect of changing the treaty rights of the parties under the Rome Statute that do not go on to ratify the Kampala Amendments.<sup>41</sup> The crucial step in sorting out the jurisdictional issues relating to the crime of aggression is an appreciation of the means by which the Kampala Amendments enter into force under the Rome Statute.

The central question of whether the ICC will have jurisdiction with respect to nationals of ICC states parties that do not ratify or accept the Kampala Amendments, and also do not opt out of the regime, depends on whether the ordinary jurisdictional regime of the ICC applies to the Kampala Amendments. Article 15bis(4) of the Kampala Amendments, dealing with state referrals and *proprio motu* investigations with respect to aggression, provides that '[t]he Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression'. This may be taken to suggest that the normal jurisdictional regime, provided for in Article 12 of the Rome Statute and based on either the state of nationality of the actor or the territorial state accepting the Court's jurisdiction, is applicable to the crime of aggression.<sup>42</sup> However, it is clear that Article 15bis of the Kampala Amendments makes one change to the normal jurisdictional rules of the ICC in that it excludes the jurisdiction of the Court with respect to aggression committed by nationals of non-parties or committed on the territory of non-parties. Article 15bis(5) clearly states that '[i]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory'.

Those who take the broad view of jurisdiction over aggression argue that, other than this change with regard to non-parties, the normal jurisdictional regime under Article 12 applies, unless a state party to the Rome Statute opts out of ICC jurisdiction

<sup>41</sup> See Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', 10 *JICJ* (2012) 209, at 210: '[A]s a matter of principle and subject, naturally, to the *lex specialis* rule, any amendment to a multilateral treaty cannot alter the position of the parties of the original treaty which decide *not* to join the later treaty providing for such an amendment' (emphasis in original).

<sup>42</sup> Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression: At Last ... In Reach ... Over Some', 2 *Göttingen Journal of International Law* (2010) 745.

over aggression as provided for under Article 15bis(4).<sup>43</sup> On this view, nationals of ICC states parties that have not ratified the Kampala Amendments are subject to ICC jurisdiction if they commit aggression on the territory of a state that has ratified the aggression amendments. This is on the basis of territoriality, in accordance with Article 12(2)(a) of the Rome Statute. Whether the normal jurisdictional rules of the Rome Statute apply to the crime of aggression depends ultimately on how the Kampala Amendments entered into force. In the lead up to the Kampala conference, the understanding was that there were four possibilities regarding entry into force of the amendments.<sup>44</sup>

The first possibility was that the amendments would enter into force and become effective simply on adoption at the Kampala Review Conference, without any need for ratification or acceptance by the states parties.<sup>45</sup> The argument that this was possible was based on Article 5(2) of the Rome Statute, which provided that '[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is *adopted* in accordance with Articles 121 and 123' (emphasis in original). The second possibility was that the amendments would come into force only when seven-eighths of the states parties had ratified or accepted them and then for all states parties. This is what is provided for in Article 121(4) of the Rome Statute.<sup>46</sup> The third possibility was that the amendments would come into force under Article 121(5) for each state party that accepted or ratified them one year after such ratification/acceptance. The second sentence of the provision of Article 121(5) goes on to state that '[i]n respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory'. A fourth possibility was that a special and previously not-provided-for amendment procedure would be designed for the crime of aggression based on the mandate given to states parties in Article 5(2) to negotiate a provision regarding the definition of the crime and the conditions for the exercise of jurisdiction by the Court over the crime.<sup>47</sup> In reality, this possibility was only a variant of the first, in that it relies on the option for the Kampala Amendments to enter into force other than in accordance with the provisions dealing with amendments set out in Article 121.<sup>48</sup>

However, though some of the negotiators of the Kampala Amendments seemed to think that this fourth possibility was open to them, and that this was the option that they actually adopted, such a possibility is neither in accordance with the text of the

<sup>43</sup> See Barriga and Blokker, *supra* note 20.

<sup>44</sup> See generally Report of the 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, 8–10 June 2009 (Report on Crime of Aggression), Doc. ICC-ASP/8/INE.2, 10 July 2009, paras 32–41.

<sup>45</sup> See Clark, 'Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute', 41 *Case Western Reserve Journal of International Law* (2009) 413, at 416–418.

<sup>46</sup> For consideration of this view, see Clark, 'Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Conditions for ICC Exercise of Jurisdiction over It', 10 *European Journal of International Law* (2010) 1103, at 1115.

<sup>47</sup> For an expression of this view, see Barriga and Blokker, *supra* note 20, at 667–668.

<sup>48</sup> For the link, see Report on Crime of Aggression, *supra* note 44, para. 37.

Rome Statute nor with basic principles of international law. The argument that Article 5(2) could have enabled the aggression amendments to enter into force, in principle, merely on adoption (first possibility) or without having to go through the amendment procedures stipulated in the Rome Statute (fourth possibility) is not a plausible reading of that provision. It stretches credulity to suggest that in Rome, where there were diverging views on the Court's jurisdiction over the crime of aggression and, indeed, an inability to agree on a definition of the crime of aggression at that point, states nevertheless accepted that mere adoption of a text providing for the definition and exercise of jurisdiction (or the design of other, specialized amendment procedures) by a two-thirds majority at a future conference would bring the aggression provisions into force, with binding effect for all states parties. This would effectively mean bypassing the need to obtain the consent of states that were to be bound. Further, the states would not be given any opportunity to submit the text of the amendments to national parliaments (should they have constitutional provisions to that effect).<sup>49</sup> Finally, although Article 5(2) speaks of 'adoption' of the text, there is nonetheless a general reference to Article 121. This reference is not just to the parts of that article that deal with adoption of texts but, rather, a reference to the whole of Article 121.<sup>50</sup> Article 121, in turn, assumes that any amendment adopted under Article 121(3) will then enter into force under Article 121(4) or (5) dealing with amendments. Any other reading of Article 5(2) would make the part of the provision that refers to Article 121 redundant and would thus not be permitted.

Article 5(2) of the Rome Statute ought to be interpreted in light of the ordinarily applicable rules relating to the entry into force of treaty provisions.<sup>51</sup> The law of treaties does not foresee that adoption alone will bring the substantive provisions of a treaty into force. Adoption of a treaty simply signifies agreement on a text of a treaty and marks the end of negotiations of the text.<sup>52</sup> The substantive provisions of the text remain non-binding until they are brought into force generally and for each state that is to be bound by it.<sup>53</sup> It would be possible for states to diverge from these default rules regarding entry into force, but they would have to do so clearly and explicitly.<sup>54</sup> However, there is nothing in Article 5(2) that speaks to a special procedure for the Kampala Amendments. Instead, the provision contains a *renvoi* to the normal amendment procedures of Article 121. It is hard to believe that states would so radically diverge from established treaty practice without some clear expression of their will to do so and despite the clear reference to Article 121, which reflects such established practice.

<sup>49</sup> See Zimmermann, *supra* note 41, at 212–213.

<sup>50</sup> *Ibid.*, at 213.

<sup>51</sup> VCLT, *supra* note 23, Art. 31(3)(c).

<sup>52</sup> See *ibid.*, Art. 9. See Korontzis 'Making the Treaty', in D. Hollis (ed.), *The Oxford Guide to Treaties* (2012) 188.

<sup>53</sup> See VCLT, *supra* note 23, Arts 11, 24(2); see further Kamto, 'Article 9: Convention of 1969', in Corten and Klein, *supra* note 30, 163, at 175. It may be noted that, as set out in Korontzis, *supra* note 52, at 188, though a treaty does not become binding on adoption, certain provisions become operative on adoption, 'namely those on authentication, consent to be bound, reservations, depositary functions, and "other matters arising necessarily before the entry into force of the treaty"'.<sup>54</sup>

<sup>54</sup> See VCLT, *supra* note 23, Art. 24(1).

It is important to recall that the provisions of the Rome Statute, including Article 5(2), which prevents the Court from exercising jurisdiction over the crime of aggression, and Article 121, setting out how amendments come into force, are legally binding on the parties, unless they are amended through the amendment procedures provided for in the Statute or through some other legally binding instrument or process. More importantly, the Rome Statute, including the amendment procedure, is binding on the Court, which, in considering whether a particular provision is or is not in force and binding under the Statute, has no authority to look beyond the Rome Statute and otherwise applicable rules of international law.

The best position under international law regarding the entry into force of the Kampala Amendments is that, despite the views of some states in Kampala, those amendments came into force in accordance with Article 121(5). First, this is the position that best accords with the text of Rome Statute since that provision deals with amendments to substantive crimes within the jurisdiction of the Court. The text of Article 121(5) is expressly stated to apply to amendments to Articles 5, 6, 7 and 8 of the Rome Statute. The aggression amendments explicitly amend Article 5(2) by deleting it from the Statute (for those states parties for whom the amendments are binding) and also introduce Article 8bis, which like Articles 6, 7 and 8 provides a definition of the crime listed in Article 5. It is true that the aggression amendments go beyond amendments to those particular provisions. However, a good case can be made that the Kampala Amendments are a package intended to bring into effect jurisdiction over the ‘new/amended’ crime and that the intention behind Article 121(5) is that it applies to amendments dealing with the imposition of new substantive obligations on individuals via the creation of ‘new’ or ‘amended’ crimes within Articles 5–8.<sup>55</sup> Thus, Article 121(5) applies only when there is the creation of a completely new crime over which the Court is to have jurisdiction – the changes to existing crimes in Articles 5–8 – as well as to the creation of new obligations by changes to a crime such as aggression, which is provided for in Article 5 but not defined or filled with substance in the original Statute. The negotiators in Kampala could have included all of the conditions for the exercise of jurisdiction over aggression within Article 8bis, and it ought to make no difference that they chose to put some of the package in a differently numbered paragraph.

Second, it was agreed by the states parties in Kampala that the amendments ‘shall enter into force in accordance with article 121, paragraph 5’ of the Rome Statute.<sup>56</sup> This decision is significant because it constitutes a subsequent agreement regarding the interpretation and application of Rome Statute. Not only was that decision reached by consensus, but it also remains the case that it has not been objected to several years later by any party to the Rome Statute, whether present in Kampala or not. By now, it is probably too late for any objection to have the effect of depriving that consensus decision of its quality as a subsequent agreement.

<sup>55</sup> Similar considerations would apply to any amendment to Art. 8(2)(b)(xx).

<sup>56</sup> See Kampala Amendments, *supra* note 5, para. 1.

The conclusion that the amendment enters into force in accordance with Article 121(5) of the Rome Statute is of great significance. It means that the effects provided for in the second sentence of that article are to follow for any amendments, including the Kampala Amendments. The attempt by some to distinguish between the entry into force of an amendment under the first sentence of Article 121(5) and the consequences of such entry into force under the second sentence is unpersuasive.<sup>57</sup> That attempted distinction relies on the argument that the parties to the Rome Statute could negotiate a new amendment procedure for the crime of aggression that would somehow become binding, and would supersede and replace the amendment procedures provided in the Rome Statute, without respecting the Statute's binding procedures as to how it is to be amended. It has already been shown how this view is erroneous. Importantly, the second sentence of Article 121(5) is a provision that is binding for all states parties and the Court, and the law of treaties provides (and, indeed, logic suggests) that what is set out in this binding provision cannot be changed by an amendment except for those states that ratify or accept the amendment.

## 4 Over Whom Will the ICC have Jurisdiction with Respect to Aggression?

### *A UN Security Council Referrals*

In the case of referrals of situations by the UN Security Council, the Court will have jurisdiction over persons within the situation referred to the Court. They may be nationals of ICC states parties that have ratified the Kampala Amendments; nationals of ICC states parties that have not ratified those amendments or, indeed, nationals of non-parties. These points are made clear in the understandings regarding the aggression amendments that are annexed to the resolution adopting the Kampala Amendments.<sup>58</sup> Paragraph 2 of the Kampala Understandings states that:

[i]t 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.

The jurisdictional regime provided for with respect to UN Security Council referrals is thus the same as that which already exists in the Rome Statute for the other crimes.

On its face, the second sentence of Article 121(5) of the Rome Statute would exclude the jurisdiction of the ICC over crimes provided for in an amendment if they were committed by nationals of ICC states parties that have not ratified that amendment, even in cases of Security Council referrals. However, there was a broad, perhaps universally shared, understanding among states parties to the Rome Statute that the second sentence of

<sup>57</sup> It must be admitted that this distinction had already been mooted during the negotiations leading up to the Kampala Review Conference. See Report on Crime of Aggression, *supra* note 44, para. 37.

<sup>58</sup> Understandings Regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression (Kampala Understandings), Annex III, Doc. RC/10/Add.1, 11 June 2010, para. 2.

Article 121(5) was not to be regarded as applying to Security Council referrals. This understanding of the meaning of Article 121(5) is confirmed in the second paragraph of the Kampala Understandings.<sup>59</sup> No state party seems to have objected to this understanding. Despite the points made above about how decisions adopted by consensus within the framework of a conference of state parties do not necessarily qualify as subsequent agreements or subsequent practice establishing the agreement of the parties regarding the interpretation of the treaty within the meaning of Article 31(3)(a) and (b) of the VCLT, the Kampala Understandings do appear to fall within those provisions of the VCLT.<sup>60</sup> For one thing, there appears to have been agreement in substance among all states parties present in Kampala and, on the point relating to Security Council referrals, among all states parties that took part in the Special Working Group on the Crime of Aggression. Even if not all states parties were present at the moment of the adoption of the Kampala aggression texts, those not present have now had ample time to express a contrary position, but none has been expressed. The view that the second sentence of Article 121(5) does not apply in cases of Security Council referrals can now be regarded as the interpretation reflecting the agreement of the parties as established through their subsequent practice, in accordance with Article 31(3)(b) of the VCLT.

## **B State Referrals and Prosecutions Proprio Motu**

In reviewing the jurisdiction of the ICC over aggression, it is useful to recall our earlier grouping of states into certain categories: non-parties; ICC states parties that have ratified the Kampala Amendments; and ICC states parties that have not ratified the Kampala Amendments. We deal with those in turn.

### *1 Non-Parties: States That Are Not Parties to the Rome Statute*

In the case of state referrals and prosecutions *proprio motu*, we have already seen one change with regard to the ICC jurisdictional regime over aggression from the jurisdictional regime over other crimes in relation to nationals of non-parties. The Rome Statute allows the ICC to exercise jurisdiction over other crimes committed by nationals of non-parties on the territory of states parties.<sup>61</sup> A crime of aggression allegedly committed by a national of a non-party on the territory of a state party, however, is excluded from the jurisdiction of the Court under Article 15bis(5).<sup>62</sup> It may be asked whether non-parties can accept the jurisdiction of the ICC with respect to aggression by simply making a declaration to that effect under Article 12(3) of the Rome Statute. Article 12(3) allows such a declaration to be made relating to the other ICC crimes. In our view, the

<sup>59</sup> See Blokker & Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', 646, at 649–650.

<sup>60</sup> See Heller, *supra* note 34, writing not long after the Kampala Review Conference and making the opposite argument. However, while the points made by Heller may have been compelling at the time, the passage of time and the lack of objections to the Kampala Understandings perhaps indicate a broader agreement than was originally the case.

<sup>61</sup> Rome Statute, *supra* note 1, Art. 12(2)(a).

<sup>62</sup> 'In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.'



language of Article 15bis(5) is categorical in precluding jurisdiction over aggression allegedly committed by nationals or on the territory of non-parties.<sup>63</sup> Also, accepting such declarations would put non-parties in a 'better' position than states parties. States parties cannot do anything that would allow the ICC to exercise jurisdiction over a crime of aggression allegedly committed by nationals of non-parties on the territory of states parties. It would be rather strange then if non-parties were allowed to enable the court to exercise jurisdiction not only over aggression committed by their nationals but also over aggression committed by nationals of states parties on the territory of non-parties.

## 2 States Parties to the Rome Statute That Also Ratify the Kampala Amendments

In the case of state referrals and prosecutions *proprio motu*, the ICC will have jurisdiction over nationals of state parties that have ratified the Kampala Amendments when the aggression is committed against another state party that has also ratified the amendments, unless the former state has also opted out of ICC jurisdiction over aggression.<sup>64</sup>

## 3 States Parties to the Rome Statute That Do Not Ratify the Kampala Amendments

As indicated, the difficult jurisdictional question relates to aggression committed by an ICC state party that has not ratified or accepted the Kampala Amendments. States parties to the Rome Statute may choose to opt out of ICC jurisdiction over aggression.<sup>65</sup> But what about a state party to the Rome Statute that has not ratified the Kampala Amendments but has also not opted out of the Court's jurisdiction over aggression? If one starts with the Kampala Amendments, Article 15bis(4) might seem to suggest that the ICC will have jurisdiction over aggression committed by states parties whether they have ratified the aggression amendments or not. Also, if the normal rules of ICC jurisdiction set out in Article 12 of the Rome Statute apply, then aggression committed by an ICC state party that has not ratified the Kampala Amendments on the territory of a state party that has ratified them will be subject to ICC jurisdiction.

However, there are a number of reasons why the narrow view – namely, that the ICC has no jurisdiction with respect to aggression committed by an ICC state party that has not ratified or accepted the Kampala Amendments and has also not opted out of jurisdiction over aggression – is to be preferred.

First, under Article 40(4) of the VCLT, and unless otherwise provided for by the treaty, an amendment to a treaty does not bind a non-accepting state and cannot remove the rights of states parties to the original treaty that have not accepted the amendment. Article 121(4) of the Rome Statute is an example of a treaty provision that does provide otherwise than the default rule of Article 40(4) of the VCLT.<sup>66</sup> However, Article 121(5) is not such a provision and, in fact, confirms the default rule of Article 40(4).

<sup>63</sup> See Barriga and Blokker, *supra* note 20, at 656.

<sup>64</sup> Rome Statute, *supra* note 1, Art. 15bis(4).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, Art. 121(4) provides that, '[e]xcept 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'.

Second, the ordinary meaning of the second sentence of Article 121(5) of the Rome Statute prevents the Court from exercising jurisdiction over crimes covered by amendments when these are committed by a national, or on the territory, of an ICC state party that has not ratified or accepted the amendments. In the negotiations of the Special Working Group on the Crime of Aggression, there was a dispute between the so-called ‘positive’ and ‘negative’ understandings of this provision. Under the positive understanding, the provision does not prevent the Court from exercising jurisdiction in regard to a crime of aggression allegedly committed by any ICC state party that has not accepted the Kampala Amendments. The negative understanding suggests that the provision does prevent such an exercise of jurisdiction.<sup>67</sup> The positive understanding seems to be based on the view that where the Court has jurisdiction over a crime on a basis that is not related to the fact that the crime was committed by a national, or on the territory, of an ICC state party that has not accepted the amendments, then Article 121(5) should not prevent the exercise of jurisdiction. Thus, on that view, Article 121(5) would not prevent the Court from exercising jurisdiction on the ground that the crime was committed on the territory of an ICC state party that has ratified the amendments, even though the alleged offender is a national of a state party that has not.

One key reason for interpreting the words of Article 121(5) as excluding jurisdiction over crimes committed by nationals, or on the territory, of an ICC state party that has not accepted the amendments, even where those facts are not the basis of jurisdiction, is that the exact same language used in that provision has been used in other provisions of the Rome Statute and of the Kampala Amendments to mean precisely what the negative understanding suggests. Article 124, which allows states parties to temporarily opt out of jurisdiction over war crimes, provides that the Court will not exercise jurisdiction ‘when a crime is alleged to have been committed by its nationals or on its territory’. Similarly, in Article 15bis(5), the Kampala Amendments provide that, with respect to non-parties, the Court ‘shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory’. In these other instances, it seems generally accepted that the Court will not have jurisdiction in cases in which the crime is alleged to have been committed by a national, even if the crime was committed on the territory of an ICC state party.

Another indication that the second sentence of Article 121(5) means that the Court will not have jurisdiction over crimes committed by nationals of ICC states parties that have not ratified the Kampala Amendments is to be seen in the resolutions adopted in Kampala and New York regarding amendments to Article 8 of the Rome Statute dealing with war crimes. The second preambular paragraphs of those resolutions indicate the understanding that Article 121(5) prevents the Court from exercising jurisdiction

<sup>67</sup> See Report of the Special Working Group on the Crime of Aggression, February 2009, paras 34–37, reprinted in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions)*, New York, 19–23 January and 9–13 February 2009, Doc. ICC-ASP/7/20/Add.1, ch. II, Annex II.

over crimes committed by the nationals of an ICC state party that has not ratified the war crimes amendment as well as on the territory of that state.<sup>68</sup>

The second sentence of Article 121(5) is an exception to the normal jurisdictional rules provided for in Article 12. One of the rules of treaty interpretation is that a treaty should be interpreted so as not to render a provision redundant;<sup>69</sup> all provisions of the treaty are to be interpreted as producing effects. If the second sentence of Article 121(5) does not mean that it is creating an exception to the normal rules of jurisdiction, it is unclear what else it could mean.

It has been argued that even if the second sentence of Article 121(5) ordinarily excludes the Court from applying amended crimes to nationals of ICC states parties that do not ratify the amendment, this interpretation does not apply to the Kampala Amendments because all states parties have already agreed to jurisdiction over aggressions in Article 5 of the Rome Statute.<sup>70</sup> However, there is nothing in Article 121(5) that supports such a position. Indeed, states parties have also accepted jurisdiction of the ICC over war crimes, but in adopting the war crimes amendment to the Rome Statute, states parties agreed that the second sentence of Article 121(5) applied to those amended crimes.<sup>71</sup>

Third, the Kampala Amendments do not establish the agreement of the states parties to interpret the second sentence of Article 121(5) in a manner that confers jurisdiction over nationals of ICC states parties that have not ratified the amendments. It is possible for subsequent practice to establish the agreement of states parties to the Rome Statute over an interpretation of Article 121(5) that departs from the interpretation of that provision that would otherwise be reached. As discussed above, while a good case can be made that there is agreement of the states parties that the second sentence of Article 121(5) should not be interpreted to mean what it appears to mean with regard to UN Security Council referrals, the same cannot be said in relation to the general meaning of that sentence.

Fourth, some question why there would be an opt-out provision in the Kampala Amendments if states parties need to opt in anyway (through ratifying) before the Court has jurisdiction over aggression committed by those states parties. Why would we have states opting in through ratification of the amendments, only to allow them to opt out subsequently? It may well be the case that such a system was not contemplated

<sup>68</sup> See Kampala Amendments to Article 8 of the Rome Statute, Resolution RC/Res.5, 10 June 2010, and Resolution ICC-ASP/16/Res.4 (2017): 'Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court.'

<sup>69</sup> This is the principle of effectiveness or *effet utile*. In its 'Commentary to Articles 27–28 on the Law of Treaties', 2 *ILC Yearbook* (1966) 219, para. 6, the ILC noted that the principle is embodied in (or required by) what is now Art. 31 of the VCLT. See further Tzanakopoulos and Ventouratou, 'Nicaragua in the International Court of Justice and the Law of Treaties', in E. Sobenes Obregon and B. Samson (eds), *Nicaragua before the International Court of Justice: Impacts on International Law* (2018) 215, at 228ff.

<sup>70</sup> See Barriga and Blokker, *supra* note 20.

<sup>71</sup> See second preambular para of Resolution RC/Res. 5, *supra* note 68; ICC-ASP/16/Res. 4 (2017), *supra* note 68.

by the negotiators of the Kampala Amendments.<sup>72</sup> However, as already pointed out, the fundamental point is that it is not the Kampala Amendments that determine the ICC's jurisdiction over the crime of aggression allegedly committed by ICC states parties that have not ratified the Kampala Amendments. That is a matter for the Rome Statute. Nonetheless, the text of the resolution adopting the aggression amendments in Kampala suggests that the opt-out may occur prior to the state party ratifying the amendments and seems to contemplate that a state party can both ratify the amendments and opt out of ICC jurisdiction.<sup>73</sup> Furthermore, there are at least two reasons why the opt-out provision in Article 15bis(4) still makes sense even if the ICC has no jurisdiction over aggression committed by ICC states parties that do not ratify or accept the Kampala Amendments:

- A state party that wished to activate the provisions of the Kampala Amendments with respect to UN Security Council referrals may have wished to ratify the aggression amendments to help get those amendments to the necessary 30 parties, while opting out of the state referrals and *proprio motu* prosecutions.
- An opt-out only excludes the jurisdiction of the Court over aggression committed by the state party that opts out. The opt-out does not exclude the Court's jurisdiction over aggression committed against that state party. A state party that wishes for the ICC to have jurisdiction over aggression committed against that state may ratify the amendments but then opt out from ICC jurisdiction over aggression committed by itself.

Fifth, it has been argued that to interpret Article 121(5) as excluding ICC jurisdiction over crimes committed by ICC states parties that do not ratify the amendments is to privilege them over non-parties and to create inequalities. However, the way the Kampala Amendments have been structured to exclude jurisdiction over aggression committed by or against non-parties avoids any such inequality. Furthermore, Article 121(5) does create a more privileged position for states parties, but that privilege is part of the incentive of states to ratify the Rome Statute. They get to decide on whether amended crimes apply to their nationals. The Rome Statute already contains other provisions that favour states parties over non-parties. Article 124 of the original Rome Statute allowed states parties to exclude the application of the war crimes provisions to their nationals or to acts committed on their territories, whereas non-parties did not get the opportunity to exclude the jurisdiction of the court over war crimes committed by their nationals (on the territory of states parties). In any event, it is not problematic or otherwise extraordinary for a treaty to privilege its parties over non-parties. That is

<sup>72</sup> See Barriga, *supra* note 14, who states that '[a]n opt-in-opt-out regime, however, was *not* the deal. That is not a compromise. It is not even within the spectrum of positions debated during and prior to Kampala! No delegation from Camp Consent ever asked for such an extreme version of consent; all they wanted was an opt-in. Why would Camp Protection have conceded an opt-in, and on top of that agreed to add an opt-out? An opt-in-opt-out regime would pull Camp Protection all the way over to the other side, and then beyond. Conversely, it would give Camp Consent more than it ever dared to ask for. There is no evidence in the formal and informal record that this was contemplated in Kampala, let alone that this was so agreed' (emphasis in original).

<sup>73</sup> See Kampala Amendments, *supra* note 5, para. 1.

pretty much the point of becoming a party to a treaty – enjoying at least some benefits within its framework that are not available to non-parties.

Sixth, more broadly and outside the confines of the specific provisions of the Rome Statute, general principles of international law also point to a requirement that a state consent to the court determining whether that state has committed aggression. Jurisdiction in international law is always consensual, and aggression is a special crime where consent plays a special role. Unlike other international crimes within the jurisdiction of the ICC, the crime of aggression requires the Court to determine a question of state responsibility – that is, that a state has committed an act of aggression. The fact that the court is required to determine the responsibility of a state implicates the aforementioned principle of consent to jurisdiction – namely, that an international tribunal cannot determine the rights or responsibilities of a state without the consent of that state. Even in cases where the decision of a tribunal will not be binding on a state, tribunals have still held that they cannot exercise jurisdiction where they are essentially called upon to determine the responsibility of a state that has not consented. In the ICJ, this is referred to as the *Monetary Gold* principle,<sup>74</sup> but it is a principle that exists beyond the ICJ and is sometimes called the ‘indispensable third party’ principle.<sup>75</sup> This general principle of international law and the special position of the crime of aggression suggest that one should seek to interpret the Rome Statute and the Kampala Amendments to require consent.<sup>76</sup>

## 5 Conclusion

The activation of the jurisdiction of the ICC over the crime of aggression is a momentous event in the long march towards the establishment of the rule of law in international affairs. However, in building the rule of law, one must be careful to respect the detailed provisions of the law as well as the general framework of the law. In the context of international law, a desire to promote accountability for grave international crimes must also take into account the framework regarding how international obligations are created and developed. That framework is that which has been established in the law of treaties, and this article has sought to embed developments regarding the crime of aggression within that framework.

<sup>74</sup> See the *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Judgment, 15 June 1954, ICJ Reports (1954) 19.

<sup>75</sup> See, e.g., the discussion in PCA, *South China Sea Arbitration (Philippines v. China)*, 22 January 2013, PCA Case no. 2013–19, part VI.

<sup>76</sup> See generally D. Akande, ‘Prosecuting Aggression: The Consent Problem and the Role of the Security Council’, Oxford Legal Research Paper Series no. 10/2011 (2011).