The handle http://hdl.handle.net/1887/38952 holds various files of this Leiden University dissertation.

**Author**: Wong, Meagan Shanzhen  
**Title**: The crime of aggression and public international law  
**Issue Date**: 2016-04-14
Part III. Enforcement
Chapter VI. Prosecution of the crime of aggression at the International Criminal Court

6.1. Introduction

Chapter III had examined the definition of the crime of aggression in the Kampala Amendments (Article 8 bis). This Chapter will focus on the entry-into-force of the Kampala Amendments and the conditions for the exercise of jurisdiction of the ICC over the crime of aggression (Articles 15 bis and 15 ter). The contours of this jurisdictional regime depict the scope of situations of aggression that may be prosecuted as the ICC as the crime of aggression.

Thus far, it has been established that prosecution of the crime of aggression at the ICC is in the interests of the international community, and also in the direct legal interests of the aggressed state. Yet, the effectiveness of the Court as an enforcement mechanism is predicated upon the contours of its jurisdictional regime (Article 15 bis and Article 15 ter) as it is unable to carry out proceedings in situations that fall outside of this regime. This means that the ICC is able to protect the legal interests of the aggressed state only to the extent that the situation of aggression falls within the jurisdictional regime of the Court over the crime of aggression.

The aim of this Chapter is to ascertain the jurisdictional regime of the ICC over the crime of aggression, which determines when a situation of aggression can be prosecuted at the Court as a crime of aggression. As will be shown, the jurisdictional regime over the crime of aggression is not entirely consistent with the existing jurisdictional regime that the Court has with respect to the other core crimes under Article 5(1) Rome Statute. It is sui generis in nature. To understand how and why this sui generis regime was adopted, it is necessary to examine the negotiation history behind the Kampala Amendments in relation to the conditions for the exercise of jurisdiction.

The Chapter begins by examining the activation of the Court’s jurisdiction over the crime of aggression (section 6.2), followed by revisiting the negotiation history starting from Article 5(2) Rome Statute (sections 6.3 and 6.4) to the Review Conference at Kampala (section 6.5). As a result of the Kampala Compromise (section 6.6), the jurisdictional regime over the crime of aggression (section 6.6.2) is divided into state referrals and proprio motu investigations (Article 15 bis) and Security Council referrals (Article 15 ter). In relation to the former, there is the
concomitant question of state consent (aggressor state). This issue pertains to whether the consent of the aggressor state is necessary for a situation of aggression to be prosecuted at the ICC. This Chapter submits that the jurisdictional regime at the ICC requires the consent of the aggressor state in situations of state referrals and *proprio motu* investigations (Article 15 *bis*), and will examine how this consent should be expressed and the ramifications of this with respect to the jurisdictional regime over the crime of aggression. The Chapter continues to examine the jurisdiction regime pursuant to Security Council referrals (Article 15 *ter*), followed by contemplating the effects of the Kampala Amendments on future States Parties (section 6.6.3).

The final section in this Chapter (section 6.7) considers the ICC as an enforcement mechanism, with particular reference to the legal interests of the aggressed state.

6.2. The beginning of all prosecutions: activating the crime of aggression at the International Criminal Court

The crime of aggression currently lies dormant at the Court. Although the Rome Statute has encompassed the crime of aggression as one of the most serious crimes of concern to the international community as a whole (Article 5(1)), its jurisdiction was delayed until a provision would be adopted stipulating the definition and conditions for the exercise of jurisdiction over the crime. At Kampala, it was decided by consensus that the activation of the Court’s jurisdiction was to be even further delayed. This political strategy played a significant role in helping to achieve consensus.\(^{715}\) Therefore, the delayed activation of the Court’s jurisdiction was a substantial part of the compromise and should be appreciated as a component of the conditions for the exercise of jurisdiction.\(^{716}\)

---

\(^{715}\) The President of the Review Conference, Ambassador Christian Wenaweser reflects Post-Kampala, ‘I considered in Kampala, and still do today, that the issue of the formula for delayed activation – while important – was of significantly less relevance than some of the compromises that had been forged beforehand, in particular the opt-out framework for states parties, the wholesale exemption for non-states parties and the competence given to the Pre-Trial Division to authorize an investigation in the absence of a determination by the Security Council’, Christian Wenaweser, ‘Reaching the Kampala Compromise on Aggression: The Chair’s Perspective’ (2010) 23 Leiden Journal of International Law 883, 887; Niels Blokker and Claus Kress, ‘A Consensus Agreement on the Crime of Aggression: Impressions from Kampala’ (2010) 23 Leiden Journal of International Law 889, 891.

\(^{716}\) Wenaweser (n 715) 886; Kress and von Holtendorff (n 133) 1207.
The Kampala Amendments provide two requirements for the activation of the Court’s jurisdiction over the crime of aggression. One requirement is that there must be at least 30 ratifications of the Kampala Amendments as seen in Articles 15 bis (2) and 15 ter (2):

The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

The second requirement involves a majority of two thirds of States Parties to make a decision to activate the Court’s jurisdiction after 1 January 2017. This can be seen in Article 15 bis (3) and Article 15 ter (3):

The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

Understandings One and Three state that the Court may exercise its jurisdiction ‘only with respect to crimes of aggression committed after a decision in accordance with article 15 bis, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later’ (italics added). The phrase “whichever is later” implies that the minimum requirement of 30 ratifications and the activation decision are cumulative conditions.\(^\text{717}\)

6.3. The conditions for the exercise of jurisdiction: revisiting the negotiation history

6.3.1. Article 5(2) Rome Statute: a “codified impasse”

As Article 120 of the Rome Statute does not allow for reservations, an argument can be made that every State Party has accepted the jurisdiction of the ICC over the

core crimes pursuant to Article 5(1) Rome Statute, including the crime of aggression. Thus, the crime of aggression appears to be a rather curious crime that is present and already operational since the adoption and entry-into-force of the Rome Statute, but yet remains to be defined and intended to be subject to its own jurisdictional regime: a crime which has been described as “half in and half out.”\footnote{Barriga, ‘Negotiating the Amendments on the Crime of Aggression’ (n 446) 8.} The starting point to understanding this curious crime, is to return to Article 5(2) of the Rome Statute, which can be broken down into the following components:

- the Amendments are to be adopted in accordance with Articles 121 (Amendments to the Rome Statute) and 123 (Review of the Statute)
- the definition of the crime and the conditions under which the Court can exercise jurisdiction are to be adopted by the ASP/Review Conference
- the definition of the crime and the conditions under which the Court can exercise jurisdiction are to be consistent with the UN Charter

The negotiations from Rome to Kampala thus had to encompass: i) deciding upon the correct entry into force mechanism under Article 121; ii) defining the crime in a manner that was consistent with the UN Charter; iii) ascertaining the conditions under which the Court can exercise jurisdiction in a manner consistent with the UN Charter.

### 6.3.2. Trigger mechanisms

From early stages of the negotiation process, it appears to have been accepted that the existing trigger mechanisms under Article 13 (state referrals; Security Council referrals; \textit{proprio motu} investigations)\footnote{Kirsch and Robinson inform that ‘the term ‘trigger mechanism’ emerged during the development of the ICC Statute to refer to the procedural mechanisms by which the ICC jurisdiction over a particular situation might be activated. As the concept developed, it became clear that it referred not simply to the commencement of specific investigations of a particular case or individual, but rather to the ability to direct the Court’s attention to events in a particular time and place, possibly involving numerous criminal acts, with a view to initiating an exercise of jurisdiction over those events,’ Phillippe Kirsch and Darryl Robinson, ‘Referral by States Parties in the Rome Statute of the International Criminal Court’, \textit{The Rome Statute of the International Criminal Court: A Commentary} (Oxford University Press 2002) 619.} should also be applicable to the crime of aggression. This could already be seen in the 1999 Coordinator’s Paper,\footnote{‘Discussion Paper Proposed by the Coordinator: Consolidated Text of Proposals on the Crime of Aggression’, 9 December 1999, UN Doc. PCNICC/1999/WGCA/RT.1 (as corrected} whereby Option 1 for the conditions for the exercise of jurisdiction read:
The Court shall exercise its jurisdiction with regard to the crime of aggression in accordance with the provisions of article 13 of the Statute.

This was later affirmed in the 2007 Chairman’s Non-Paper on the Exercise of Jurisdiction. The significance is that the Security Council was not considered to be the exclusive trigger mechanism because proceedings may also be initiated by States and the Prosecutor.

6.3.3. The role of the Security Council

Article 5(2) of the Rome Statute had specified that the provision relating to the crime of aggression ‘shall be consistent with the relevant provisions of the Charter of the United Nations.’ As examined in Chapter I, pursuant to Article 24 of the UN Charter, the Security Council has the primary responsibility for the maintenance of international peace and security, which includes determining an act of aggression under Article 39 of the UN Charter. Thus, Article 5(2) of the Rome Statute encompasses the question of the role of the Security Council with respect to the definition of the crime of aggression and the conditions under which the Court can exercise jurisdiction.

This envisaged role was arguably the most significant and contentious question in the negotiations. Already in the much earlier 1994 Draft Statute for an International Criminal Court produced by the ILC (“Draft Statute for an International Criminal Court”), Article 23(2) provided that:

A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.
In the Commentaries on the Draft Statute for an International Criminal Court, it was written:

the difficulties of definition and application, combined with the Council’s special responsibilities under Chapter VII of the Charter, mean that special provision should be made to ensure that prosecutions are brought for aggression only if the Council first determines that the State in question has committed aggression in circumstances involving the crime of aggression which is the subject of the charge.\textsuperscript{725}

This clearly implies a type of exclusivity in competence for the Security Council to determine an act of aggression. Some delegations, such as the Russian Federation were in support of such an exclusive role of the Security Council:

\[\ldots\] subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a war of aggression.\textsuperscript{726}

\textsuperscript{725}Commentary to Art.20 of the Draft Statute for an International Criminal Court, Yearbook of the International Law Commission, 1994, vol. II, Part II, 39; The Commentary had also additionally included that ‘any criminal responsibility for an act or crime of aggression necessarily presupposes that a State has been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter of the United Nations to make. The consequential issues of whether an individual could be indicted, for example, because that individual acted on behalf of the State in such a capacity as to have played a part in the planning and waging of the aggression, would be for the court to decide’, 44.

However, this was not necessarily the general opinion. Fernandez de Gurmendi who was the Co-ordinator of the Working Group on Aggression of the PrepCom in the period 2000-2002 reports that most of the proposals made in the Working Group appeared to accept that ‘a determination of an act of aggression is a precondition for the Court to exercise its functions over the crime of aggression’ and that ‘the Security Council has the right to be the organ that acts in the first place.’

This suggests that the Security Council has the ‘primary’ role and not the exclusive role to determine an act of aggression.

Despite the apparent general consensus that a pre-determination of aggression by the Security Council is ideal as a requirement for the ICC to exercise jurisdiction, there has always been a divide in opinion with regards to whether the power and competence to determine aggression should be exclusive to the Security Council. Wilmshurst argues with respect to the pre-determination of aggression that:

the Court will not be able to act in relation to the crime of aggression unless and until the Council has first determined that aggression has been committed by the State concerned (this was indeed the tenor of the statement made by the United Kingdom and the United States on the adoption of the Statute at the Conference).

However, there appeared to be rather limited support outside of the permanent members. At the SWGCA, the vast majority of the contentions which arose within the negotiations were significantly predicated upon the need for a prior external determination of the state act of aggression which had to be consistent with the UN Charter.

As it was decided that all three mechanisms under Article 13 were applicable to the crime of aggression, the role of the Security Council was especially significant.

---

727 Fernandez de Gurmendi (n 447) 603.
730 Wenaweser (n 715) 884; see also Kress and von Holtzendorff (n 133) 1195.
with respect to state referrals and *proprio motu* investigations. Such external determination was understood as the pre-condition for jurisdiction over the crime of aggression (“jurisdictional filter”) and furthered the on-going debate encompassing whether the Security Council had primary or exclusive responsibility to determine an act of aggression. The inability to reach a consensus on the jurisdictional filter can be seen in Article 15 *bis* of the SWGCA Proposal 2009 which had marked the conclusion of the work of the Group. It is worth reproducing the relevant section in full:

**Article 15 bis Exercise of jurisdiction over the crime of aggression**

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect to the crime of aggression.

4. (Alternative 1) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.

*Option 1 – end the paragraph here.*

*Option 2 – add:* unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

4. (Alternative 2) Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

*Option 1 – end the paragraph here.*

*Option 2 – add:* provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

*Option 3 – add:* provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 *bis*;

*Option 4 – add:* provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 *bis.*
As can be observed, Article 15 *bis* (4) (Alternative 1) promotes the exclusivity hypothesis. Article 15 *bis* (4) (Alternative 2) accords the Security Council with the primary responsibility/competence to determine aggression; but provides options for other bodies to act as the external determining filter: Pre-Trial Chamber, General Assembly, International Court of Justice. This Proposal was subsequently circulated at the Review Conference at Kampala to reach an agreement upon the relevant external determining filter.

Attention should also be drawn to Article 15 *bis* (5) of the 2009 SWGCA Proposal, which states:

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.

This is highly significant as it represents a consensus that any role of the Security Council (and/or General Assembly and International Court of Justice) with respect to aggression is only procedural in nature.\(^{732}\) The underlying basis for the argument against the ICC being bound by a pre-determination of the Security Council in relation to the exercise of jurisdiction over aggression is that the court will be subject to the political will of the Security Council, which could be detrimental to its integrity and the due process rights of the defendants.

As this may place strain upon the presumption of innocence (Article 66 ICC Statute) which would be unfair towards the accused as the onus will fall upon the Prosecutor to prove the guilt of the accused. The burden of proof should not be shifted to the accused. An argument can be made that a determination that is not based on pre-determined rules of law should not bind the court, and more significantly, must not bind a defendant charged with the crime of aggression as it may be inconsistent with *nullum crimen sine lege*.

\(^{732}\) Kress and von Holtzendorff (n 133) 1195.
6.4. Interpreting Article 5(2) in conjunction with Article 121 of the Rome Statute: the issue of state consent

As the debate with respect to the exclusivity hypothesis advanced, a concomitant question of state consent began to emerge.\(^{733}\) This referred to whether the aggressor state had to consent to the jurisdiction of the ICC over its nationals for the crime of aggression. This was directly relevant to the question of the entry into force of the Amendments and played a significant role in the debate pertaining to how Article 5(2) was to be read in conjunction with Article 121; more specifically, which provision under Article 121 should serve as the entry into force mechanism.\(^{734}\) The SWGCA debated upon three possible interpretations of how the Amendments should enter into force under Article 121 in conjunction with Article 5(2): Article 121(3); Article 121(4) and Article 121(5).\(^{735}\)

6.4.1. Article 121(3)

Also known as the “Adoption model” pursuant to Article 5(2), no ratification process was required as the Court could exercise jurisdiction over this crime once the resolution was adopted at the Review Conference.\(^{736}\) As Article 5(2) does not mention “amendment” but “adopted,” it can be suggested that this is consistent with Article 121(3):

The 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.

---


\(^{735}\) Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 765.

However, this argument was not sustainable.\footnote{McDougall (n 7) 239. see also Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 763–765.; Zimmermann (n 734) 212–213.} Pellet for example, argues that ‘it is scarcely possible to claim that adoption of a provision in accordance with Article 5(2) should not be analysed as an amendment, given that this provision refers explicitly to Articles 121 and 123, and that Resolution F itself states that ‘the provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.’\footnote{Alain Pellet, ‘Entry into Force and Amendment of the Statute’, The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press 2002) 183.} There is also the issue of domestic process of ratification of treaties. Clark writes:

some participants in the Special Working Group have argued that there are practical problems of how a State faced with a significant decision like this can cope with the necessary changes in domestic law without going through the ratification process. Some have been adamant that their Governments could not possibly contemplate an amendment of this magnitude that did not go through the ratification process and, since crimes are involved, legislative action would be necessary.\footnote{Clark, ‘Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute’ (n 736) 417–418; see also Kress and von Holtzendorff (n 133) 1196.}

As Article 121(3) did not prove to be acceptable, the SWGCA focused their attention on Article 121(4) or (5) as potential entry-into-force mechanisms.\footnote{McDougall (n 7) 239.}

6.4.2. Article 121(4)

Article 121(4):

[...] 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.
This provision is considered to be the general rule, according to which, entry into force is applicable for all States Parties, giving rise to a coherent jurisdictional regime.\footnote{Article 121(6) offers States Parties that have not accepted the Amendment the possibility of opting out of the Rome Statute.}

The legal implication of entry-into-force under Article 121(4) is that the concomitant jurisdictional regime would also encompass jurisdiction over non-states parties provided there is a nationality or territoriality link to the State Party as contained in Article 12(2). Thus, the jurisdictional regime would be identical to the other core crimes. This was of particular importance to all of the African states, members of the Non-aligned Movement (NAM) and most Latin American and Caribbean countries,\footnote{Barriga and Grover (n 733) 524.} as they viewed that ‘requiring aggressor state consent would depart from the territorality principle enshrined in Article 12(2) of the Statute and lead to impunity rather than preventing aggression and protecting potential victims of this crime.’\footnote{ibid.} The underlying rationale therefore is to encompass the broadest scope of jurisdiction over the crime to ensure that perpetrators could be punished accordingly.\footnote{Barriga labels this as “Camp Protection” as these delegations wanted a jurisdictional regime that was mainly protective in nature, and with effect beyond just States Parties”; Stefan Barriga, ‘Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression’ in Gerard Dive, Benjamin Goes and Damien Vandermeersch (eds), \textit{From Rome to Kampala: The first 2 amendments to the Rome Statute} (Bruylant 2012) 45.}

An argument can be made that this provision is allegedly the correct entry into force mechanism as almost all the proposed amendments do not technically involve any amendments to Articles 5, 6, 7 and 8 of the Rome Statute.\footnote{Reisinger Coracini, ‘“Amended Most Serious Crimes”: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court’ (n 734) 704.; See also Hans-Peter Kaul, ‘Preconditions to the Exercise of Jurisdiction’, \textit{The Rome Statute of the International Criminal Court: A Commentary} (2002) 605.} For example, Clark argues ‘adding new crimes like drugs or terrorism to Article 5(1) is subject to Article 121(5); completing the negotiation on Article 5(2) is subject to Article 121(4).’\footnote{Clark, ‘Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute’ (n 736) 416.} He adds that he personally thinks ‘the argument in favour of the seven-eighths solution is stronger on the basis of the plain language and it is consistent with the complex preparatory history.’\footnote{ibid 426.}
6.4.3. Article 121(5)

Article 121(5):

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 a crime covered by the amendment when committed by that State Party's nationals or on its territory.

This provision stipulates that the amendment enters into force only with respect to the accepting State Party.\textsuperscript{748} As such, this reflects the premise that States do not have legal obligations under treaties they have not consented to. The ramification of this is that there is a rather fragmented jurisdictional regime pertaining to the crime of aggression, as the amendments only enter into force for States Parties that have ratified.\textsuperscript{749}

There were two interpretations of the second sentence of Article 121(5) that were advanced in the SWGCA: i) a negative interpretation; ii) a positive interpretation. Both interpretations are central to the question of whether aggressor state consent is necessary for the exercise of jurisdiction.

i. Article 121(5) with a positive interpretation

This interpretation takes into consideration that Article 121(4) is the general rule relating to amendments; Article 121(5) therefore is the exception to this general rule.\textsuperscript{750} Thus, it should not be considered as a specific rule which creates a separate jurisdictional regime pertaining to consent, but should be read in the light and purpose of the other provisions of the Rome Statute, and ‘so far as it may have a limiting

\textsuperscript{748} Reisinger Coracini, “Amended Most Serious Crimes”: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court’ (n 734) 706.

\textsuperscript{749} ibid 706.

\textsuperscript{750} See Article 121(4).
effect on other provisions’ should be ‘construed narrowly in order to respect the integrity of the Statute.’\textsuperscript{751}

A narrow interpretation, i.e. a positive interpretation accepts that the Court shall not actively exercise jurisdiction with respect to a crime committed by the national of the State Party or on its territory. However, this does not rule that jurisdiction may still be established over the crime pursuant to the existing framework under Article 12(2). In other words, jurisdiction may still nevertheless be exercised if the crime was committed against the territory of a State Party that has ratified.

With respect to the crime of aggression, the State Party that has not ratified is placed on the same \textit{locus standi} as a non-State Party with respect to the crime covered by the relevant amendments, as the Court is nevertheless able to exercise jurisdiction in accordance with its existing framework under Article 12(2).\textsuperscript{752} The consent of the aggressor state is not strictly necessary as jurisdiction is nevertheless delegated to the ICC on the basis of territorial criminal jurisdiction upon the ratification and acceptance of the aggressed state of the Amendments. This is consistent with the ordinary jurisdictional regime contained within Article 12 of the Rome Statute, the purposes of the ICC, and the principles of international law that regulate the competence ICC as an international tribunal under international law. Pellet submits:

\begin{verbatim}
Entry into force of an amendment to Article 5 to 8 leaves both third States and those who, though parties to the Statute, have not ratified the amendment in an exactly identical position: each are unaffected by the amendment. The fact that the amendment may apply not to them as States, but, should the case arise, to their nationals (and without any discrimination between nationals of States Parties to the Statute and those of third States) has absolutely nothing to do with the amending procedures; it is the normal consequence of territoriality of penal competence.\textsuperscript{753}
\end{verbatim}

\textsuperscript{751} Reisinger Coracini, “‘Amended Most Serious Crimes’: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court’ (n 734) 707, 718.; For a contrary view, see Zimmermann (n 734) 217.
\textsuperscript{752} See McDougall (n 7) 243; Kress and von Holtzendorff (n 133) 1197; Reisinger Coracini, “‘Amended Most Serious Crimes’: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court’ (n 734) 707, 718.
\textsuperscript{753} Pellet, ‘Entry into Force and Amendment of the Statute’ (n 736) 182; Reisinger Coracini, “‘Amended Most Serious Crimes’: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court’ (n 734) 707–708, 718; Dapo
ii. Article 121(5) with a negative interpretation

This interpretation derogates from the existing framework under Article 12(2). It excludes nationals from States Parties that have not ratified regardless of whether the other State Party has the competence to transfer its criminal jurisdiction to the ICC under the territoriality principle. Instead, there is the need for both jurisdictional links between both States to be cumulative in the sense that the crime of aggression must be committed by a national of a ratifying State Party against the territory of a ratifying State Party.\textsuperscript{754} Reisinger Coracini observes that:

Unlike Article 12(2), Article 121(5) does not distinguish between different ‘trigger mechanisms’ Therefore the same preconditions arguably need to be established, even upon a referral by the UN Security Council. As a consequence states parties would to a large extent be able to shield their nationals from the Court’s jurisdiction over crimes covered by an amendment.\textsuperscript{755}

She suggests that this interpretation implies that States Parties that have not ratified the Kampala Amendments, i.e. non-ratifying States Parties would also be excluded from jurisdiction under Security Council referrals.\textsuperscript{756} This was discussed in the SWGCA, where some delegations agreed that ‘while this reading may be undesirable from a political perspective, it was nevertheless the only option under the current language of the article.’\textsuperscript{757}

However, the view that ultimately prevailed was that this provision did not apply to Security Council referrals.\textsuperscript{758} These delegations argued:

\begin{footnotesize}

\begin{itemize}
  \item Reisinger Coracini, ‘“Amended Most Serious Crimes”: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court’ (n 734) 707.
  \item ibid.
  \item SWGCA Report 2008 (November), para.9.
  \item SWGCA Report 2008 (November), para.10.
\end{itemize}
\end{footnotesize}
The Security Council could have the competence to refer cases involving the crimes of aggression to the Court with respect to non-States Parties, and it would therefore be illogical to preclude that possibility with respect to certain States Parties. Given the role of the Security Council under the Charter with respect to aggression, it would furthermore be particularly unconvincing to argue that the Council had less influence in triggering investigations into the crime of aggression than with respect to other crimes. [...] Furthermore, article 121, paragraph 5, dealt with the issue of consent to be bound, which was irrelevant in the context of a Security Council referral.759

The other main problem with this interpretation is that non-ratifying States Parties are on a different locus standi than non-States Parties. Article 121(5) refers specifically to a State Party that has not ratified the amendments, which suggests that a crime of aggression committed by a non-ratifying State Party’s national or on its territory is inherently excluded from the jurisdiction of the ICC.

However there is nothing in the provision that precludes jurisdiction over non-states parties.760 This suggests that the jurisdictional links under Article 12(2) may apply to non-states parties but not to a non-ratifying State Party. The underlying rationale is that States Parties consented to the unamended Statute and should thus be protected from obligations from the amended Statute that they did not ratify or accept.761

Reisinger Coracini on the other hand, questions whether such a self-privilege is acceptable under the object and purpose of the Statute?762 It was generally agreed within the SWGCA that the provisions on aggression ‘should avoid unequal treatment of non-States Parties and States Parties in this respect.’763 It is worth mentioning that at the SWGCA, there were suggestions that an amendment could be made to Article

760 Reisinger Coracini, ‘“Amended Most Serious Crimes”: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court’ (n 734) 700.
761 Zimmermann (n 32) 211, 218.
762 Reisinger Coracini questions ‘is such a self-privilege acceptable under the object and purpose of the Statute?,’ Reisinger Coracini, ‘“Amended Most Serious Crimes”: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court’ (n 734) 711.
121(5) or possibly by other means, to clarify the issue above and to prevent future confusion. However, this was countered by discussion that complications might arise from the need to choose the correct amendment procedure to amend Article 121(5).

My view is that the positive interpretation allows for a more consistent reading of Article 121(5) with the provisions within the Rome Statute in the light of their object and purpose. This way, the provision does not appear to create an arrangement requiring state consent, which departs from the existing jurisdictional regime of the ICC and/or discrimination between States Parties that have not ratified and non-States Parties. Ultimately, the conundrum pertaining to the two differing interpretations of Article 121(5) is the result of ambiguous drafting.

iii. Article 121: An open question

The problem with Article 5(2) is that it appears to be incompatible with Article 121, which gives rise to a “fundamental ambiguity” with respect to the entry into force and the question of state consent. To reiterate, the first interpretation of “adoption” under Article 121(3) was dropped relatively quickly. On the other hand, Article 5(2) does not mention “entry into force” which places it at odds with both Article 121(4) and Article 121(5). Clark has insightfully clarified that ‘the preparatory work on Articles 5 and 121 is not conclusive on this crucial point of the applicable procedure. It is, however, worth rehearsing for what light it does shine on the matter’. He explains that Articles 5(2) and 121 of the Rome Statute were drafted and formulated by two different working groups independently, which makes it rather difficult to reconcile. This conundrum was left and passed on to the Review Conference.

---

764 SWGCA Report 2008 (November) para.10.
765 SWGCA Report 2008 (November) para.10; See also McDougall (n 7) 242.
767 See Kress and von Holtzendorff (n 133) 1215.
768 Clark, ‘Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute’ (n 736) 413.
769 ibid.
770 ibid 413, 421–425; see also Zimmermann (n 734) 216.
6.5. Pushing forward at Kampala

Pursuant to Article 5(2), the Review Conference needed to adopt the definition of the crime of aggression and the conditions for the exercise of jurisdiction over the crime of aggression. The objective was to achieve this by consensus.\(^{771}\) As the definition of the crime was already accepted by consensus at the ASP in February 2009,\(^ {772}\) the entire negotiations at Kampala relating to the crime of aggression focused upon the conditions for the exercise of jurisdiction. There was also the issue of the correct entry into force mechanism, which as examined above, represented more than just a drafting technicality. It had direct implications on the question of state consent in the absence of a Security Council referral.

As the SWGCA had already proposed a consensus definition of the crime of aggression in February 2009,\(^ {773}\) the remainder issues at the Review Conference, were:

i) Whether the consent of the alleged aggressor state is a pre-requisite for a \textit{proprio motu} investigation and state referral with respect to a crime of aggression.\(^ {774}\)

ii) the role of the UN Security Council, i.e. whether the ICC may only proceed on the basis that the Council had actively determined an act of aggression had taken place, or if there are alternative options with respect to the determination of an act of aggression.\(^ {775}\)

Prince Zeid, acting as the Chairman of the SWGCA during the Review Conference announced in his Introductory Remarks (1 June):

it is clear that two issues – the question of acceptance by the aggressor State, and the jurisdictional filter – are the main hurdles that we have to clear in order to arrive at an acceptable solution. We have a mandate from the Rome Conference to arrive at an acceptable provision on the crime of aggression,

\(^{771}\) See Blokker and Kress (n 715).

\(^{772}\) Barriga and Grover (n 733) 521–522.

\(^{773}\) Barriga, ‘Negotiating the Amendments on the Crime of Aggression’ (n 446) 24.

\(^{774}\) Prince Zeid had conducted an informal “roll call” which provided an insight to the position of States Parties; reprinted in a footnote in Barriga and Grover (n 733) 524.

\(^{775}\) See Wenaweser (n 715) 884.
and we are called upon by the rules of procedure to make every effort to find a consensus.\textsuperscript{776}

Ambassador Wenaweser, who acted as the President of the Review Conference, reflected post-Kampala that ‘on both topics delegations held strong and seemingly irreconcilable positions usually presented as positions of principle. The two issues were also to some extent interlinked, which further complicated the matter.’\textsuperscript{777}

It was also revealed by others who were present at Kampala that ‘the best negotiation strategy was to focus the debate to the greatest extent possible on the conditions for the exercise of jurisdiction, and to first seek an agreement on the role of state consent. Only once such an agreement was reached could it be hoped that France and the UK would move away from their adamant insistence on SC monopoly. Fortunately, the strategy ultimately prevailed.’\textsuperscript{778}

6.5.1. Preface: eliminating two jurisdictional filters

The Chairman’s first Revised Conference Room Paper\textsuperscript{779} dealt immediately with the issue of the jurisdictional filter. It suggested deleting the two options of the General Assembly and the International Court of Justice as a jurisdictional filter in the case of a lack of determination by the Security Council in the first instance. It is interesting to note the footnote to proposed Article 15 \textit{bis}(1):

The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. “The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression.” Such a paragraph would only be relevant in case of article 121, paragraph 5, of the Statute were to be applied.

\textsuperscript{776} 2010 Introductory Remarks by the Chairman (1 June) \textendash{} Kampala; reprinted in Barriga and Kress (n 6) 736.
\textsuperscript{777} Wenaweser (n 715) 884.
\textsuperscript{778} Kress and von Holtzendorff (n 133) 1201.
\textsuperscript{779} ‘Conference Room Paper on the Crime of Aggression’, RC/WGCA/1/REV.1, 6 June 2010; reprinted in Barriga and Kress (n 6) 743; see Barriga, ‘Negotiating the Amendments on the Crime of Aggression’ (n 446) 47.
6.5.2. Phase One: The Argentina, Brazil and Switzerland proposal

Argentina, Brazil and Switzerland put forward a joint initiative and submitted a non-paper ("ABS Proposal") on the 6th June 2010. This non-paper represents the first phase towards achieving the final compromise as it enacted considerable interest amongst delegations. It addressed the issue of state consent by considering the Security Council referral trigger mechanism separately from the other two trigger mechanisms under Article 13, i.e. state referrals and proprio motu. This provided the innovative platform for advancement, as it focused the substantive question of state consent directly to the relevant trigger mechanisms.

With respect to the former, in accordance with Article 13(b), the entry into force mechanism was to be Article 121(5), whilst Article 121(4) would govern the entry-into-force for State referrals and proprio motu once the seven-eighths majority of ratifications were obtained. In the light of the high threshold of ratifications, the jurisdictional regime envisaged to apply to the latter was identical to the other core crimes under Article 5(1) which would thus encompass both non-ratifying States Parties and non-States Parties.

The ABS Proposal received a mixture of both praise and disapproval the next day. Nevertheless, the Proposal was considered to be “extremely useful” in advancing the negotiations. This was subsequently incorporated into the Chairman’s Second Revised Conference Room Paper on the Crime of Aggression. In this Paper, Article 15 bis was split into: i) Article 15 bis (state referral, proprio motu...
motu) and Article 15 ter (Security Council referral). However, Prince Zeid emphasized in his Introductory Remarks that ‘splitting 15 bis into two provisions does, however, and I would like to underline this, not mean that the conference room paper now endorses the idea of also splitting the entry into force procedures, by using both 121(4) and 121(5). The conference room paper continues to be neutral on this issue of the entry into force procedure (…).’

The ABS Proposal was so politically useful because it would have been difficult otherwise for Ambassador Wenaweser and Prince Zeid to construct the demarcation between the trigger mechanisms because ‘such a move would have been appeared biased toward the permanent members of the Security Council, as it would have been implied that the other two trigger mechanisms should be dropped in the light of the difficulty in reaching an agreement.

6.5.3. Phase Two: The Canadian proposal

The Canadian delegation put forward their own proposal on the 8th June (“Canadian Proposal”), which refocused on the issue of state consent of the aggressor state with respect to state referrals and proprio motu investigations. This Proposal can be seen to reflect elements from the negative interpretation of Article 121(5). Attention should be drawn to proposed Article 15 bis (2):

Where the Security Council has not made such a determination within six (6) months after the date of notification and where a State Party has declared its acceptance of this Paragraph, at the time of its deposit of its instrument of ratification or acceptance or at any time thereafter, the Prosecutor may proceed with an investigation of a crime of aggression provided that:

---

786 In the Introductory Remarks by the Chairman (8 June), he said ‘my expectations that splitting the old 15 bis into two provisions, along exactly those lines, will help us sharpen our discussions on the question of consent, and on the question of the filter’; reprinted in Barriga and Kress ibid 761.
787 Ibid 762.
788 Barriga and Grover (n 733) 525.
789 Ibid.
(a) the Pre-trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15; and

(b) [all state(s) concerned with the alleged crime of aggression] the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused.

6.5.4. Phase Three: The Argentina, Brazil, Switzerland and Canada proposal

The delegations from Argentina, Brazil, Switzerland and Canada engaged in closed multilateral consultations and surprised the remaining delegations by producing a combined non-paper (“ABCS non-Paper”) two days before the end of the Conference.\(^790\) The starting premise for this non-paper was that in the case of a Security Council referral, there would be no further conditions for the exercise of jurisdiction by the Court. Thus, the focus was on conditions for the exercise of jurisdiction for the other two trigger mechanisms: state referrals and \textit{proprio motu}.

The following provisions played a significant role in the final compromise:

\textbf{Article 15 bis}

Exercise of jurisdiction over the crime of aggression (State referral, \textit{proprio motu})

4. (Alternative 2)

\textellipsis

4 bis. The Court may exercise its jurisdiction over the crime of aggression committed by a State Party’s nationals or on its territory in accordance with article 12, unless that State Party has filed a declaration of its non-acceptance of jurisdiction of the Court under paragraph 4 of this Article.

4 ter. Such a declaration may be submitted to the Secretary General of the United Nations at any time before December 31, 2015 or, in the case that ratify or accede to the Rome Statute after that date, upon ratification or accession. This declaration may withdraw at any time, in which case the Court, subject to the provision of paragraph 1, may exercise its jurisdiction in respect of the State concerned.

4 cor. In respect of a State which is not party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression as provided for in this article when committed by that State’s nationals or on its territory.

\(^{790}\) Barriga, ‘Negotiating the Amendments on the Crime of Aggression’ (n 446) 50–51; Wenaweser (n 715) 885; Kress and von Holtzendorff (n 133) 1203–1204.
The ABCS non-Paper was considered seriously by Ambassador Wenawesser and Prince Zeid because it represented a significant political development in the negotiations. There appeared to be compromise between conflicting positions with respect to the issue of state consent.\(^{791}\) The proposed provision was predicated upon Article 12 Rome Statute albeit two qualifications: i) allowing any State Party to file a declaration of non-acceptance of jurisdiction; and ii) excluding non-States Parties.\(^{792}\) For the delegations who were in favour of the jurisdictional regime under Article 12, to agree to the exclusion of non-States Parties entirely was a large concession. Likewise, for the delegations who were in favour of state consent, the inclusion of Article 12 was a large compromise.\(^{793}\) The ABCS Proposal gave rise to many informal bilateral and group consultations for the next day and a half.\(^{794}\)

6.5.5. *Phase Four: the final stages, the role of the President of the Review Conference*

At the conclusion of the work of the Working Group, the negotiations were then presided over by the President of the Review Conference, who put forward the first non-Paper (“President’s First Paper”) at the plenary of the Review Conference in the morning of Thursday, 10 June 2010.\(^{795}\) This non-Paper appeared to closely mirror the ABSC non-Paper:

1. Decides to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter “The Statute”) contained in annex I of the present resolution, which are subject to the ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5 (bold in original text).

Two additional provisions have been put forward under Article 15 *bis* (1):

1 *bis* The Court may, in accordance with article 12, exercise jurisdiction with respect to an act of aggression committed by a State Party, unless that State has lodged a declaration of non-acceptance with the Registrar.

1 *iter* The Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State Party (bold included in original text).

\(^{791}\) see Barriga and Grover (n 733) 526; Barriga, ‘Negotiating the Amendments on the Crime of Aggression’ (n 446) 51.

\(^{792}\) Kress and von Holtzendorff (n 133) 1204.

\(^{793}\) Barriga, ‘Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression’ (n 744) 45–46.

\(^{794}\) Barriga, ‘Negotiating the Amendments on the Crime of Aggression’ (n 446) 51.

\(^{795}\) ‘Draft Resolution: The Crime of Aggression’, informal non-paper submitted by the President of the Review Conference, originally dated 10 June 2010, 10.00am; reprinted in Barriga and Kress (n 6) 774.
With respect to Security Council referrals, a footnote pertaining to Articles 15 ter reads:

The suggestion has been made to delete paragraphs, 2, 3 and 4. This would dispense the need for a determination of an act of aggression by the Security Council in order to proceed, bearing in mind that this article should not negatively affect the ability of the Security Council to exercise its competence under Art. 13 (b).

The President’s legal advisor, Barriga reveals that this suggestion was made in bilateral consultations and was then being openly tested.\(^{796}\)

When speaking to the Plenary, Ambassador Wenawesser addressed the opt-out mechanism:

You know that a number of states have circulated suggestions to this effect and have in their suggestions outlined something that would usually be referred to as an “opt out” under article 121(5) of the Rome Statute. This has met with quite some legal criticism as I understand it and this is why we have redrafted this approach in a new paragraph 1 bis of article 15 bis. Under this approach, this would not constitute an “opt out” of the amendment, much rather it would be a declaration that would affect a State Party’s acceptance already given under article 12(1). So this approach is very strongly based on article 12 of the Rome Statute and the very specific manner in which the crime of aggression is already reflected in the Rome Statute.\(^{797}\)

Half a day later, he circulated the second non-paper (“President’s Second Paper”).\(^{798}\)

The following provisions are worth reproducing:

1. *Decides* to adopt, *in accordance with article 5, paragraph 2*, of the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) the amendments to the Statute contained in annex 1 of the present resolution, which are subject to ratification

\(^{796}\) Barriga, ‘Negotiating the Amendments on the Crime of Aggression’ (n 446) 52.

\(^{797}\) 2010 Introductory Remarks by the President (10 June, 11.00am); reprinted in Barriga and Kress (n 6) 780; In a reflection written post-Kampala, Ambassador Wenaweser states, ‘I presented it to the plenary as a sui generis solution on the basis of the acceptance already given by states parties under Article 12 of the Rome Statute, which as possible due only to the specific placement of the crime of aggression in the Statute, Wenaweser (n 715) 886–887.

\(^{798}\) ‘Draft Resolution: The Crime of Aggression’, informal non-paper submitted by the President of the Review Conference, 10 June 2010, 11.00pm; reprinted in Barriga and Kress (n 6) 147.
or acceptance and shall enter into force in accordance with article 121, paragraph 5; and
notes that any State Party may lodge a declaration referred to in article 15 bis prior to ratification or acceptance.

[...]

4. Also decides to review the amendments on the crime of aggression seven years after the beginning of the Court’s exercise of jurisdiction.

Article 15 bis:

1 bis. The Court may exercise jurisdiction only with respect to crimes of aggression committed at least five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty States Parties.

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

1 quarter. 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. (bold included in the original text)

Another important modification can be seen in Article 15 bis (4) (Alternative 2) that the Pre-Trial Division instead of the Pre-Trial Chamber has to authorize the commencement of the investigation in respect of a crime of aggression where no such determination of the State act of aggression is made by Security Council.799 With respect to Security Council referrals, under Article 15 ter, the provisions from the previous paper which require a determination by the Security Council have been deleted.

799 Introductory Remarks by the President 10 June, 11.30 pm; reprinted in Barriga and Kress ibid 787.
On the last day of the Review Conference, the President put forward a Preliminary Compromise Proposal.\textsuperscript{800}

15 bis

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

5. The Court may not exercise jurisdiction over the crime of aggression in accordance with article 15\textsuperscript{bis} until States Parties so decide no earlier than 2017.

In a reflection written post-Kampala, Ambassador Weneweser writes:

At this point, less than 24 hours before the end of the Conference, my assessment of the political dynamic at the Conference was such that the submission of a text that provided for an alternative in case of a Security Council inaction was the logical next step – although I was aware that this might raise serious objections. I therefore informally consulted the most important stakeholders in the late morning of Friday 11 June, on the basis of a short non-paper. The paper suggested the Pre-Trial Division as an additional filter to the Security Council, and sought to balance this choice in two ways: first, it made a specific reference to Article 16 of the Statute and the competence of the Security Council to suspend ICC Proceedings. Second, it delayed the activation of the ICC’s jurisdiction by at least seven years, and in doing so gave precedence to the Security Council filter: the ICC’s jurisdiction under 15 ter would automatically be activated after seven years, unless states parties decided otherwise. The more controversial jurisdiction under 15\textsuperscript{bis}, on the other hand, would require an active decision by states parties (...) [Italics added]\textsuperscript{801}

\textsuperscript{800} 2010 President’s Preliminary Compromise; reprinted in Barriga and Kress, ibid 789.

\textsuperscript{801} Wenaweser (n 715) 886–887.
The final non-Paper (‘President’s Third Paper) marked the final compromise proposal and was presented to the plenary at 4.30pm. It contained *inter alia* the additional condition of ‘a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.’ Under both Article 15 *bis* and 15 *ter*, paragraph 3, a provision is to be inserted for the delayed entry into force. Article 15 *bis*(8) had added “in accordance with article 16.” Ambassador Weneweser further reflects:

Direct talks between the most interested parties continued well into the evening with an extended and at times irrational argument over this aspect of the final package. In the end, they were unsuccessful. Given the high stakes and the late hour, I put a final proposal on the table, which today is the text of paragraph 3 of Articles 15 *bis* and 15 *ter* of the Rome Statute: the activation of both triggers is thus subject to a future decision of states parties, to be taken after 1 January 2017 by at least an absolute majority of two-thirds of states parties.\(^{802}\)

This “final proposal” was made verbally, and the final revised draft resolution was put to the Review Conference, where the resolution was adopted by consensus at 12.20am.\(^{803}\)

6.5.6. The importance of consensus

The Rome Statute provided no clear instructions how to amend the Statute to give effect Article 5(2), which is why it is presumed that the Review Conference has the competence under international law to adopt the *sui generis* regime pertaining to the crime of aggression.\(^{804}\) The fact that the Kampala Amendments were adopted by

\(^{802}\) ibid 887; the 2010 President’s Final Compromise Proposal reads: 15 *bis* (3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute; 15 *ter* (3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute, reprinted in Barriga and Kress (n 6) 804.

\(^{803}\) Barriga, ‘Negotiating the Amendments on the Crime of Aggression’ (n 446) 57.

\(^{804}\) For presumed legality see *Certain Expenses of the United Nations* (n 29) 168.
consensus is significant as it is symbolic that every State Party present at the Review Conference had adopted the *sui generis* regime.

From a political perspective, the consensus is indicative that the crime of aggression was an important issue, requiring engagement from all present States Parties to create a sense of unity. Blokker and Kress reveal that ‘almost every State Party from the outset indicated that it had strong preference for consensus decision-making or even that it did not want to vote as this would be divisive for the ICC.’

The unspoken compliance pull of aiming for consensus can be seen in the following example: before the adoption of resolution RC/Res.6, the representative of Japan had announced that ‘it is with a heavy heart that I declare that, if all the other delegations are prepared to support the proposed draft resolution as it stands, Japan will not stand in the way of a consensus.’

6.6. The Kampala Compromise

In the light of the above, the term Kampala Compromise is apt to describe the amendments on the crime of aggression, which were the result of the highly complex and conflicting interests within the States Parties, which inevitably led to significant concessions on all sides as the ‘logical consequence of aiming for consensus.’

Under Article 1 of the Kampala Amendments, the Review Conference:

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

---

805 Blokker and Kress (n 715) 891.
806 Statement by Japan, Statements by States Parties in explanation of position before the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 810.
807 Blokker and Kress (n 715) 891; Ambassador Wenaweser had affirmed ‘few had expected – or even thought feasible – a consensus in Kampala on a comprehensive package on the crime of aggression. That this proved possible in the end was due to the very positive negotiating dynamic in Kampala, which found its most important expression in the willingness of all sides to make massive concessions’, Wenaweser (n 715) 887.
There are three important points to note. First, the Amendments are adopted in accordance with Article 5(2). Second, the Amendments shall enter into force under Article 121(5). Third, the declaration pursuant to Article 15 bis allows a State Party to lodge a declaration with the Registrar that it does not accept the Court’s jurisdiction over the crime of aggression, an “opt-out” clause (Article 15 bis 4).

The jurisdictional regime of the crime of aggression in the Kampala Amendments was the result of concessions and compromise in the light of two concomitant issues that encompassed seemingly irreconcilable positions: i) the role of the Security Council; ii) and the need for consent by the alleged aggressor state. This led to the separation of the trigger mechanisms, whereby state referrals and proprio motu investigations are governed by Article 15 bis, whilst Security Council referrals fall under Article 15 ter.

6.6.1. The entry into force and the conditions of jurisdiction: A tale of frustration

The entry-into-force mechanism is Article 121(5), while the jurisdictional regime is predicated upon Article 15 bis and Article 15 ter. As already produced above, Article 121(5) states:

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 a crime covered by the amendment when committed by that State Party's nationals or on its territory.

The first sentence specifies the entry into force, whilst the second sentence pertains to jurisdiction of the Court over the crime covered by the amendment. Thus, the entry-into-force mechanism is directly relevant to the jurisdictional regime of the Court over the crime covered by the amendment. However, the second sentence does not appear to fit entirely with the jurisdictional regime contained within the Kampala Amendments, as pointed out by Zimmerman, ‘both Article 15 bis and Article 15 ter contain significant deviations from the amendment provisions contained in the ICC

808 Zimmermann (n 734) 212–215.
Statute itself, and, in particular, Article 121(5) thereof.\textsuperscript{809} \textit{Per contra}, Article 15 \textit{ter} does not necessarily deviate from the second sentence of Article 121(5) because the Court may ordinarily exercise jurisdiction over nationals of non-State Parties in situations of Security Council referrals.\textsuperscript{810} Any contention thus stems from how Article 121(5) should be read in relation to Article 15 \textit{bis}.

In my view, the most logical approach is to create a demarcation between the entry into force of the amendments (first sentence), and the jurisdiction (second sentence). The first sentence of Article 121(5) is to be read only in the context of the entry-into-force of the Kampala Amendments.\textsuperscript{811} The text of OP1 can be read to support this, as it only mentions “entry into force” in accordance with Article 121(5) and does not make any explicit reference to jurisdiction.

This way, the mechanism for the entry-into-force of the amendments for each individual ratifying State Party is a separate matter from the jurisdictional regime of the Court with regard to the crime of aggression. Thus, upon entry into force of the amendments on the crime of aggression, the jurisdictional regime is not necessarily the one as contained within the second sentence of Article 121(5) as it is predicated upon the conditions pursuant to Article 15 \textit{bis} and Article 15 \textit{ter}.

As can be expected, this interpretation is not so readily accepted. Manson for example, argues that ‘the Art. 121(5) reference in OP1 comes together with ‘the baggage’ of the second sentence, to which it is tied in the Statute, whether welcome or not.’\textsuperscript{812} This suggests that the jurisdictional regime of the crime of aggression should be read in accordance with Article 121(5). His argument that Article 121(5) should be read in its entirety is not unreasonable. Yet, the interpretation that calls for a demarcation between the first sentence and the second sentence of Article 121(5) is tenable because the nature of the conditions of jurisdiction pertaining to the crime of aggression, which was ultimately adopted by the Review Conference is \textit{sui generis} in nature. Article 5(2) Rome Statute is the \textit{lex specialis} which provided the ASP/Review

\textsuperscript{809} ibid 220; See McDougall (n 7) 250.
\textsuperscript{810} Article 13 Rome Statute; Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (n 698) 618.
\textsuperscript{811} Barriga, ‘Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression’ (n 744) 31,34,46; For a contrary position see Robert Manson, ‘Identifying the Rough Edges of the Kampala Compromise’ (2010) 21 Criminal Law Forum 417, 426; Kress and von Holtzendorff (n 133) 1214.
\textsuperscript{812} Manson (n 811) 426; For a different view, McDougall writes that 'if Article 121(5) is not understood as applying to the crime of aggression as a matter of law, there is no legal impediment to the severing of the second sentence’, McDougall (n 7) 252.
Conference with the legal basis to adopt this *sui generis* regime pertaining to the entry-into-force and conditions for the exercise of jurisdiction for the crime of aggression. This way, the amendments 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, whilst the jurisdictional regime is a separate matter of interpretation.

As this section now continues to examine the *sui generis* jurisdictional regime over the crime of aggression, Article 15 *bis* will be focused upon, especially in the light of how the provision should be read together with Article 121(5). The findings are directly relevant to the jurisdictional regime over the crime of aggression in situations of state referrals and *proprio motu* investigations, as at present, the jurisdictional regime over the crime of aggression in relation to state referrals and *proprio motu* is not entirely clear and there are differing positions in relation to the correct regime. Therefore, the answer stems from the correct interpretation of Article 121(5) and Article 15 *bis*(4).

6.6.2. The jurisdictional regime over the crime of aggression

i. State Referrals and *proprio motu*: Article 15 *bis*

There are two aspects to the jurisdictional regime under Article 15 *bis*: substantive conditions and procedural conditions. The former relates directly to the exercise of jurisdiction over the individual for the crime of aggression, whilst the latter refers to pre-determination that the state act element of the crime is present.

A. The substantive conditions

The crux of the substantive conditions is encapsulated in Article 15 *bis*(4):

> The Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept

---

813 See Zimmermann (n 734) 224; Milanovic, ‘Aggression and Legality: Custom in Kampala’ (n 579) 182; Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 771–781; see also Statement by Japan, Statement of States Parties in explanation of position before the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 810.
such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

The specific reference to Article 12 makes it worthwhile to reproduce the provision in its entirety. Article 12:

(1) A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

(2) In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.

(3) If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Pursuant to Article 12(1), it can be deduced that all States Parties to the Rome Statute have accepted jurisdiction with respect to the crime of aggression, which was already present under Article 5(1) at the adoption of the Statute. Article 12(2) stipulates that the Court may exercise its jurisdiction under the territorial or nationality principle provided that one of the parties to the proceeding is a State Party. As such, jurisdiction is not limited only to States Parties and may extend towards nationals of

---

non-States Parties under one of the aforementioned jurisdictional links above.

Thus, a reference to Article 12 implies that the Court may exercise jurisdiction over the crime of aggression provided that one of the parties to the proceedings has ratified the Kampala Amendments. Provided the State Party wishing to initiate proceedings has ratified the Kampala Amendments, jurisdiction can be established under the territorial or nationality principle. It is not necessary for both aggressed and aggressor state to ratify the Amendments.

It should be noted that Article 15 *bis*(4) stipulates that jurisdiction will be exercised over an act of aggression committed by a “State Party”, which infers that non-States Parties are excluded from jurisdiction. Article 15 *bis*(5) affirms this, by stating ‘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.’ Read together, these provisions suggest that the jurisdictional regime of the crime of aggression departs from an ordinary reading of Article 12. Also departing from the Rome Statute is the “opt-out” mechanism whereby a State Party declares that it does not accept such jurisdiction by lodging a declaration with a Registrar.\(^8\) Presumably, it is intended that this declaration should be made prior to the commission of the crime of aggression.\(^9\) This appears to be contrary to the mechanism of “opt-in” where a State Party actively ratifies an Amendment.

*(i) Understanding the scope of jurisdiction that the ICC can exercise over the crime of aggression*

It is the reference to Article 12 which renders Article 15 *bis*(4) incompatible with the second sentence of Article 121(5). There are two conflicting views on how Article 15 *bis*(4) is to be read in conjunction with Article 121(5):

- The second sentence of Article 121(5) should prevail
- Article 15 *bis*(4) should prevail

\(^8\) It is interesting to note that some have questioned the decision to lodge the Declaration with the Registrar of the Court, as it is the Secretary-General of the United Nations who is the depository of instruments of accession under Article 125(3). As such, this raises the concern of untransparency, see Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 775; McDougall (n 7) 265–266.

\(^9\) See McDougall (n 7) 266.
The scope of jurisdiction that the ICC may exercise over the crime of aggression is predicated upon the correct interpretation of how these two provisions should be read together. The following tables best illustrate the differences between both approaches.

Table 2: Prevalence of the negative interpretation of the second sentence of Article 121(5)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>[V] SP</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>[V] SP RA</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>[V] SP OO</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>[V] SP RA OO</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>[V] NSP</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

Table 3: The prevalence of Article 15 bis(4)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>[V] SP</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>[V] SP RA</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>[V] SP OO</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>[V] SP RA OO</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>[V] NSP</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

[A] – aggressor state; [V] – aggressed state; SP – State Party that has not ratified the Amendments; SP RA – State Party that has ratified the Amendments; SP OO – State Party that has not ratified the Amendments but has opted-out; SP RA OO – State Party that has ratified the Amendments and opted-out; NSP – non State Party.

As can be seen, the prevalence of Article 15 bis(4) gives rise to a broader jurisdictional scope than the interpretation which adheres to the prevalence of the negative interpretation of Article 121(5). Thus, both readings have significant differences with respect to the jurisdictional regime of the crime of aggression. This has practical ramifications relating to Court proceedings.

i. The second sentence of Article 121(5) should prevail

The first assumption is that those who hold this view, would argue that Article 121(5) is to apply in its entirety.\textsuperscript{817} In other words, the first sentence and the second sentence must both apply. The next assumption is that those who subscribe to this

\textsuperscript{817} Manson (n 811) 426.
view uphold the negative interpretation of the Article 121(5). This is arguably because Article 15 bis(4) appears to broadly reflect the positive interpretation of the second sentence of Art 121(5) Rome Statute, albeit the exclusion of non-States Parties entirely from the jurisdiction. Although Article 15 bis(4) is not entirely consistent with the positive interpretation, the crux of the matter is that it upholds that jurisdiction can be satisfied on either the nationality or territorial basis. This provides reason to believe that those who uphold the positive interpretation of the second sentence of Article 121(5) would be in favor of Article 15 bis(4) having prevalence.

The negative approach on the other hand, holds that jurisdiction is available only when both the aggressed state (party) and the aggressor state (party) have ratified the amendments on the crime of aggression. It is the latter that is important because the underlying issue is that the aggressor state must specifically consent to the jurisdiction of the Court. Thus, both the territorial and nationality jurisdictional links must be cumulative for the Court to have jurisdiction over this crime.

An argument in support of the negative interpretation of the second sentence of Article 121(5) can be made that RC/Res.5, which was also adopted at the Review Conference, amends Article 8 of the Rome Statute pursuant to Article 121(5). Hence the application of Article 121(5) should consistently apply to to the amendment to Article 8 and to the crime of aggression.818 The criticism of this approach however is that it appears to discard Article 15 bis(4), which is arguably contrary to the intention and efforts of the drafters of the Amendments to create the sui generis framework.

**ii. Article 15 bis(4) should prevail**

This approach adopts the proposed demarcation between entry into force and conditions for the exercise of jurisdiction as submitted above. The first sentence of Article 121(5) should be concentrated upon with regards to the entry-into-force of the Kampala Amendments:

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.

---

818 Zimmermann (n 734) 220.
This means that the amendments on the crime of aggression will enter into force for the relevant State Party individually, one year after the deposit of the treaty instrument. It has no bearing on the question of jurisdiction, which falls under the second sentence. Therefore, this interpretation involves an apparent severance of the first and second sentence of Article 121(5), holding only the former to be applicable with respect to the overall Amendments. This can be reaffirmed by arguing that OP1 only mentions “entry into force” in accordance with Article 121(5).

In other words, only the first sentence of Article 121(5) applies specifically in the context of entry-into-force, whilst the second sentence becomes effectively discarded. The conditions for the exercise of jurisdiction are to be governed by Article 15 bis and ter. With respect to the former, in the conflict between the second sentence and Article 15 bis(4), it is the latter that prevails as the jurisdictional regime. Thus, the application of the first sentence of Article 121(5) as the entry-into-force mechanism, followed by Art 15 bis(4) as the conditions for the exercise of jurisdiction give rise to a “sui generis” adoption regime.819

The next stage of analysis is to find the legal reasoning that allows Article 15 bis(4) to prevail over the second sentence of Article 121(5). Three arguments can be put forward. The first argument is that Article 15 bis(4) is the lex specialis which is why it can prevail over the second sentence of Article 121(5). It can be argued that Article 15 bis(4) is more specific as it relates directly to the jurisdiction for the crime of aggression, whilst the second sentence of Article 121(5) refers more generally to amendments to Articles 5, 6, 7 and 8. As such, it should prevail in the light of the jurisdictional regime over the crime of aggression. Alternatively, it can also be argued that Article 15 bis(4) is the lex posterior and should thus prevail.

The second argument is predicated upon Article 12(1) as the lex specialis. This means that all State Parties have accepted the Court’s jurisdiction over the crime of aggression under Article 5(1). The second sentence of Article 121(5) is not relevant because the States Parties have already accepted jurisdiction over the crime of aggression. As such, it is inapplicable in the present context: Article 15 bis(4) will apply.

819 Kress and von Holtzendorff argue that ‘it is thus perfectly possible and hence preferable to construe the enabling resolution and draft Article 15 bis (4) of the ICC Statute harmoniously as both the wording of the latter provision and the genesis of the negotiations suggest it’, Kress and von Holtzendorff (n 133) 1214.
The final argument is that the *lex specialis* is Article 5(2), which allowed the ASP to adopt a *sui generis* approach under the legal basis of creating the “conditions for the exercise of jurisdiction.” This *sui generis* approach appears to be predicated upon Article 5(1) and Article 12(1): that the crime of aggression is already present in the jurisdiction of the Court and that States Parties have already agreed to such.  

Therefore, the second sentence of Article 121(5) does not necessarily apply, allowing the newly drafted Article 15 *bis* and Article 15 *ter* to apply as the “conditions for the exercise of jurisdiction.” In my view, this is the most convincing argument as the Review Conference has the legal competence under Article 5(2) to adopt a *sui generis* jurisdictional regime, which is not entirely consistent with the typical adoption process under the Rome Statute but nevertheless falls under the “conditions for the exercise of jurisdiction.”

It is worth examining again the Statement of the Japanese delegation after the adoption of the Kampala Amendments:

> Article 5, paragraph 2, is invoked as the basis with respect to “amendment”, whereas article 121, paragraph 5, is invoked as the basis with respect to “entry into force”. This is a typical “cherry picking” from the relevant provisions related to the amendment, that is, in Japan’s view, very difficult to justify. We have serious doubt as to the validity of article 5, paragraph 2, as a basis of amendment to the Statute, if we adhere to a sound interpretation of the Rome Statute as agreed upon in Rome. The upshot is a highly accentuated complication in the legal relation after the amendment between States Parties, as well as the relation between States Parties and non-States Parties, which is extremely unclear and hard to understand.  

That said, the Rome Statute did not provide clear instructions how to make the relevant amendments with respect to Article 5(2). Although “cherry picking” is difficult to justify, it is to be presumed that the States Parties have the competence

---

820 Wenaweser (n 715) 885; see also Kress and von Holtzendorff (n 133) 1215.
821 Kress and von Holtzendorff (n 133) 1215; For a contrary position, see Zimmermann (n 734) 226–227.
822 Statement by Japan, Statements by States Parties in explanation of positions after the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 811–812.
under international law to implement Article 5(2) as they decide fit.\textsuperscript{823} Furthermore, the \textit{sui generis} adoption regime which encompassed the “cherry picking” was adopted by consensus.\textsuperscript{824} This justifies Article 15 \textit{bis}(4) taking prevalence over the second sentence of Article 121(5). The Japanese Delegation continued to express:

What happens to article 5, paragraph 2?  
How can we possibly delete article 5, paragraph 2, of the Statute in accordance with article 5, paragraph 2, itself? This is nothing but a “legal suicide” or “suicide of legal integrity.”

Yet, the deletion of Article 5(2) appears to be logical in the context of the addition of Article 8 \textit{bis}, Article 15 \textit{bis} and Article 15 \textit{ter} to the Rome Statute. This is because the definition of the crime of aggression and the conditions for the exercise of jurisdiction have been incorporated into the amended Statute.

In the light of the present analysis, my view is that the intended jurisdictional scope that the Court can exercise over the crime of aggression is the one demonstrated in Table 3. It is still necessary for one of the State Parties to the proceedings to ratify the Amendments as the entry into force for this relevant State is required to activate the jurisdictional regime under Article 12(2). Thus, if the aggressor State Party has ratified the amendments, jurisdiction may be exercised under the nationality principle (Article 12(2)(b)) and it is not necessary for the aggressed state Party to ratify. Alternatively, if the aggressed state Party has ratified, the jurisdictional link may be established under the territorial principle (Article 12(2)(a)) even if the aggressor State Party has not ratified.\textsuperscript{825}

Some may argue that the interpretation above is contrary to the VCLT, as Article 40(4) VCLT stipulates that the amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.\textsuperscript{826}

\textsuperscript{823} Certain Expenses of the United Nations (n 29) 168; See Kress and von Holtzendorff (n 133) 1215.
\textsuperscript{824} Article 31(3)(a) VCLT 1969; see McDougall (n 7) 257.
\textsuperscript{825} For an unfounded criticism of this interpretation, see Beth Van Schaack, ‘Negotiating at the Interface of Power and Law: The Crime of Aggression’ (2011) 49 Columbia Journal of Transnational Law 507, 598.
However, the chapeau of Article 40(1) states that paragraph (4) applies ‘unless the treaty otherwise provides.’ As the Rome Statute has provided under Article 5(2) for a *sui generis* regime pertaining to the crime of aggression, then Article 40(4) VCLT is not necessarily applicable.

(ii) Opting-out

Although the opt-out mechanism has led to much confusion, it is part of the conditions for the exercise of jurisdiction pursuant to Article 5(2). In a similar manner to the exclusion of non-States Parties entirely from the jurisdiction of the Court, such mechanism is unprecedented within the Rome Statute. There are three questions that need to be addressed:

i. What is the purpose of the opt-out mechanism?

ii. Can States Parties that do not intend to ratify or accept the Amendments opt-out?

iii. How should the opt-out mechanism be interpreted as part of the condition for the exercise of jurisdiction?

i. What is the purpose of the opt-out mechanism?

The opt-out mechanism effectively excludes a State Party from jurisdiction over the crime of aggression, by allowing it to derogate from Article 12(1) Rome Statute by a declaration that it does not accept the Court’s jurisdiction over the crime of aggression. The opt-out also serves as derogation from Article 12(2) Rome Statute because it prohibits the exercise of jurisdiction even if the other State Party has ratified. Thus, the underlying rationale of the opt-out mechanism is to preserve the issue of state consent. As the declaration of non-acceptance of jurisdiction demonstrates an unequivocal dissent, the relevant State Party is excluded entirely from the jurisdiction of the Court.

As the Rome Statute does not provide any basis to opt-out of Article 12, the competence and power to create such derogation must fall within the mandate conferred to the Review Conference by Article 5(2). When reflecting upon the

---

827 See Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 777.
negotiation history, it can be recalled that Article 15 *bis*(4) was the result of a compromise between the Argentinian, Brazilian, Swiss Proposal and the Canadian Proposal.\(^{828}\) The former represented those who envisaged the broadest jurisdictional regime possible, whilst the latter stood for state consent. The exclusion of non-States Parties from the jurisdiction represented a compromise on the part of those who wanted a broader jurisdictional regime as this meant that the Court would have a more limited jurisdictional regime for the crime of aggression compared to the other crimes.\(^{829}\)

On the other hand, those in favor of a consent based regime accepted a concession that States Parties did not have to specifically “opt-in” to the Court’s jurisdiction, but instead could “opt-out.”\(^{830}\) The “opt-out” mechanism therefore represents a compromise between the objective of creating the broadest jurisdictional regime possible and the need for absolute state consent.\(^{831}\)

**ii. Can States Parties that do not intend to ratify or accept the Amendments opt-out?**

The question is whether States Parties can “opt-out” in the absence of ratification or acceptance. This has interesting legal implications. The starting point is that the opt-out mechanism itself is contained within Article 15 *bis*(4), thus formulating part of the Amendments. The assumption therefore is that for such mechanism to apply, the Amendments would need to enter into force for the relevant State. However, it is interesting that OP1 *notes*:

> any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance.

It does not appear to be necessary for the State Party to ratify or accept the Kampala Amendments in order to opt-out from the Court’s jurisdiction. However, the mention

\(^{828}\) Barriga, ‘Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression’ (n 744) 45.

\(^{829}\) ibid.

\(^{830}\) ibid 46.

\(^{831}\) Kress and von Holtzendorff write that ‘the idea of an "opt-out" declaration was born precisely to bridge the gap between those in favor of applying the jurisdictional scheme under Article 12(2) of the ICC Statute without modification (ABS Proposal) and those in preference of a strictly consent-based regime (Canadian Proposal), Kress and von Holtzendorff (n 133) 1213.
of “prior to” bears the assumption that the relevant State Party has an intention to ratify or accept the Kampala Amendments at a subsequent stage. As there is no specific temporal condition, it can be assumed that there is no consecutive time frame between the declaration of non-acceptance and ratification or acceptance. In other words, there is no assigned time limit between the declaration of non-acceptance and the subsequent act of ratification or acceptance – only the assumption that relevant State Party intends to perform the latter.\(^{832}\)

Nevertheless, as the opt-out mechanism is contained in Article 15 \(bis(4)\) which is part of the Amendments, it appears that ratification (at some point) is necessary. This may appear to some to be rather absurd. Why would a State Party ratify the Amendments in the light of its intent to opt-out from the jurisdiction of the Court? A simple explanation could be that the entry-into-force of the Amendments for that particular State Party contributes towards the requirement of 30 ratifications. By ratifying then opting out or vice versa, the State Party assists with the activation of the Court’s jurisdiction over the crime without the concern of its own nationals being prosecuted. Such State Party is also in an advantageous position, as it can initiate proceedings against the aggressor state (party) but shields its nationals from jurisdiction if the situation is reversed (reference to Table 2).\(^{833}\) Indeed, some may say that this asymmetry introduces ‘a privilege that may also serve as an incentive to ratify the Statute.’\(^{834}\)

This, nevertheless, remains only an assumption because it is not clear as to whether the declaration of non-acceptance is linked or conditional upon the subsequent process of ratification or acceptance. The reality is that a State Party may very well opt-out without subsequent ratification or acceptance. Thus, the possibility should be acknowledged that States Parties that do not intend to ratify or accept the Amendments may choose to opt-out from the Court’s jurisdiction over the crime of aggression. Reisinger-Coracini writes that:

\(^{832}\) Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 777.

\(^{833}\) See ibid 776; McDougall submits that ‘this benefit itself represents an abrogation of the negative interpretation of Article 121(5), which would have exempted the nationals and the territory of non accepting States Parties whether those States Parties were the victim or aggressor.’ McDougall (n 7) 255.

\(^{834}\) Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 776.
It is my understanding that only states parties that ratify the amendments may lodge a declaration of non-acceptance. The legal basis for the opt-out declaration is set forth in the amendments, which only enter into force for those states that have ratified them. A declaration of non-acceptance by a state party that does not ratify the amendments and remains party to the unamended treaty would be difficult to justify in light of the prohibition of reservation according to Art.120.835

In an earlier publication, she submitted that:

It will ultimately be up to the Court to decide whether a declaration of non-acceptance would be covered by the undeniably wide discretion provided in Article 5(2) or whether such a declaration would amount to a prohibited reservation according to Article 120.836

This draws attention to the possibility that in a situation where the aggressor state (party) has opted out from the jurisdiction of the Court, the aggressed state (party) may challenge such declaration. It is of course for the Court’s discretion as to whether to accept such declaration. In such a situation, the aggressor state (party) may choose to justify the legality of the declaration of non-acceptance under pacta tertiis nec nocent nec prosunt. As such, the relevant State Party does not necessarily have to ratify the amendments but may regard itself as a “third State” with respect to the amended Rome Statute.837 An example where a “third State” is awarded such privilege can be seen in Article 12(3), which allows a non-State Party to accept the exercise of jurisdiction of the Court with respect to the crime in question by lodging a declaration with the Registrar.

836 Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 778.
837 Ibid; McDougall (n 7) 252.
iii. How should the opt-out mechanism be interpreted as part of the condition for the exercise of jurisdiction?

If it is held that the ratification and acceptance or intended ratification and acceptance of the Amendments is a necessary requisite for the declaration of non-acceptance to be legitimate, then the opt-out mechanism can be said to support the argument that the second sentence of Article 121(5) shall prevail. This is because the opt-out mechanism can only apply to a State Party that has ratified or accepted the amendments.

On the other hand, if it is accepted that a State Party may opt-out without ratifying or accepting the amendments under *pacta tertii nec nocent nec prosunt*, then this reinforces the interpretation that Article 15 *bis*(4) should prevail.838 Without having to ratify or accept the amendments, acceptance of and consent to jurisdiction is already present by virtue of Article 12(1) of the Rome Statute. Therefore, unless a State Party makes use of the opt-out mechanism, it is implied that the acceptance of and consent to the Court’s jurisdiction over the crime as aggression pursuant to Article 5(1) is still applicable.

Although these arguments may appear to be logical, my view is that it is nevertheless necessary for the relevant State Party to ratify the Amendments for the Opt-out mechanism to have legal effect. This is consistent with the text of OP1 and Article 15 *bis*(4). Ultimately, it remains the discretion of the Court under Article 119(1) to decide whether the State Party wishing to opt-out of jurisdiction has the legal basis to do so.

B. The procedural conditions

The procedural conditions for the exercise of jurisdiction over the crime of aggression for state referrals and *proprio motu* can be found in Articles 15 *bis* (6) – (8). It is worth producing these provisions in full.

Article 15 *bis*(6):

---

838 McDougall (n 7) 255.
Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

Article 15 bis(7):

Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

Article 15 bis(8):

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

As can be seen, the hypothesis that the Security Council has exclusive privilege to determine an act of aggression with respect to state referrals and *proprio motu* investigations was ultimately rejected. The Council nevertheless is given the priority of making a determination of aggression, which is consistent with Article 24 of the UN Charter. However, the question is how ‘determination’ is to be considered. As Article 15 bis(6) does not specify that a determination should be made under

---

France had expressed, ‘France has decided not to oppose the consensus, despite the fact that it cannot associate with this draft text as it disregards the relevant provisions of the Charter of the United Nations enshrined in article 5 of the Rome Statute. In article 15 bis, paragraph 8, the text restricts the role of the United Nation Security Council and contravenes the Charter of the United Nations under the terms of which the Security Council alone shall determine the existence of an act of aggression. Under these conditions, France cannot depart from its position of principle’, Statement by France, Statements by States Parties in explanation of position after the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 811; see Blokker and Kress (n 715) 894.
Article 39, UN Charter or that the Council should be acting under Chapter VII, it is assumed that this is not necessary. In the present context, a determination of an act of aggression is not for the purposes of recommending enforcement collective measures in relation to a situation. Furthermore, it is unlikely that the Security Council would make a determination for the purposes of prosecution at the ICC in an ongoing situation of aggression. Thus, any determination of aggression for the purposes of Article 15 bis(4) is likely to be retrospective.

It is not clear whether the Council needs to be specific that an act amounts to “aggression” or if words broadly along the basis of a “threat to the breach of international peace and security” may suffice. Presumably, there should be a specific determination of an act of aggression. In the case of a ‘negative determination,’ it is likely that this should be viewed in the same light as a non-determination and the Prosecutor may seek the Pre-Trial Division’s authorization after six months. This suggests that the ICC may reach a different conclusion than the Security Council in determining the existence of an act of aggression.

Here, an interesting observation can be made. Leaving aside the underlying fact that the IMT and the Security Council are different types of international institutions, and that the NMT and ICC are also different in nature, the common underlying factor is that the IMT and the Security Council are considered to be of a higher authority on a hierarchical level than the NMT or the ICC. Nonetheless, the determination by the IMT was re-evaluated and a broader scope was adopted in the subsequent NMT. Likewise, the determination by the Security Council can be re-evaluated by the ICC, and it is within the discretion of the Pre-Trial Division to determine aggression.

In any event, it should be remembered that in accordance with Article 15 bis (9), any determination by the Security Council shall be without prejudice to the Court’s own findings. Thus, the Court may come to its own findings with regard to the determination of an act of aggression. Also, Article 15 bis(8) specifically refers to powers of the Security Council, which allows the Council to defer an investigation or prosecution for a period of 12 months pursuant to a resolution adopted under Chapter VII of the UN Charter. Not only does the reference to Article 16 respect the primacy of international peace and security under Chapter VII, allowing prevalence over the interests of justice, but serves to reassure the P5 that despite the rejection of

the exclusivity hypothesis, the Council still has the power to defer an investigation pertaining to the crime of aggression.

The Pre-Trial Division of the Court was adopted as the jurisdictional filter when the Security Council fails to determine an act of aggression, which means that no less than six judges with predominantly criminal trial experience will convene in full session to decide upon authorizing the commencement of the investigation.841 By comparison, three judges typically carry out the functions of Pre-Trial Chamber.842 Therefore, choosing the Pre-Trial Division in lieu of the Pre-Trial Chamber as the jurisdictional filter provides an additional number of judges.843 Questions may arise with respect to the operation of how this Division will authorize the investigation for the crime of aggression844 – the contemplation of which exceeds the compass of this dissertation. Rather, it falls on to the Court to clarify Guidelines and/or the Rules of Procedure for how the judges should address this issue.845 It is also worth noting that Article 15 bis(5) / 15 ter(5) state:

This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5.

This implies that during the delay period of six months, the need for pre-determination of the state act element of the crime of aggression will not affect the exercise of jurisdiction over the other crimes if they are included in the same indictment against the defendant.

C. Non-States Parties

As mentioned above, non-States Parties are precluded from the jurisdiction of the ICC with respect to the crime of aggression (Article 15 bis(4) and bis(5)). Article 15

---

841 Article 39, Rome Statute.
842 Article 39(2)(b), Rome Statute.
843 See Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 784.
844 ibid.
bis(5) \textsuperscript{846} specifically excludes jurisdiction over the nationals and territory of non-
States Parties.\textsuperscript{847} This amounts to an ‘element of reciprocity so far unknown to the
Rome Statute.’\textsuperscript{848} The opt-out mechanism, which is also so far unknown to the Rome
Statute, allows a State Party to be excluded entirely from the jurisdiction of the Court
over the crime of aggression, which would place the relevant state on the same locus
standi as non-States Parties.\textsuperscript{849} The exclusion of non-States Parties entirely from the
jurisdiction of the Court has been criticized as being incompatible with the Rome
Statute.\textsuperscript{850} Before the adoption of RC/Res.6, the Japanese delegate expressed a serious
concern that the amendments ‘unjustifiably solidifies blanket and automatic impunity
of nationals of non-States Parties: a clear departure from the basic tenent of Article
12 of the Statute.’\textsuperscript{851}

The next question is whether Article 12(3) is applicable to the crime of
aggression. This provision allows a non-State Party to declare that it accepts
jurisdiction of the Court over the particular crime which must be read against Article
15 bis (5). Can the latter be said to be lex posterior?

Article 15 bis is not clear in this respect. An argument may be made that as there
is no explicit provision otherwise, it can be assumed that non-States Parties can make
a declaration under Article 12(3).\textsuperscript{852} Barriga however, submits that ‘this is not possible’\textsuperscript{853} and supports his claim by explaining that ‘the exclusion of the ad-hoc
declarations under 12(3) is also confirmed by the drafting history of the
understandings.’\textsuperscript{854} Indeed, at the early stages of the Review Conference, a
provisional draft understanding read:

\begin{footnotesize}
\footnote{\textsuperscript{846} It is interesting to note that the language used in Article 15 bis (5) is very similar to the text of
the second sentence of Article 121(5). McDougall writes that this may suggest that a
negative interpretation of the second sentence prevailed, McDougall (n 7) 256.}
\footnote{\textsuperscript{847} Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the
Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 780.}
\footnote{\textsuperscript{848} ibid.}
\footnote{\textsuperscript{849} See McDougall (n 7) 257.}
\footnote{\textsuperscript{850} See Zimmermann (n 32) 221-223.}
\footnote{\textsuperscript{851} Statement by Japan, Statements by States Parties in the explanation of position before the
 adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n
6) 810.}
\footnote{\textsuperscript{852} See Rule 44 of the Rules of Procedure and Evidence, International Criminal Court}
\footnote{\textsuperscript{853} Barriga, ‘Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of
Aggression’ (n 744) 41.}
\footnote{\textsuperscript{854} Ibid.}
\end{footnotesize}
It is understood, in accordance with article 11, paragraph 2, of the Statute, that in a case of article 13, paragraph (a) or (c), the Court may exercise jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless the State has made a declaration under article 12, paragraph 3.\(^\text{855}\)

This provision was eventually deleted as a result of explicit requests by certain States Parties as there was concern that this would lead to an unfair advantage against States Parties.\(^\text{856}\) This is because non-States Parties would then be in a position to decide whether or not to participate in proceedings against States Parties. As such, McDougall believes that Article 15 \textit{bis} (5) must be viewed as the \textit{lex specialis} and apply as a blanket exception.\(^\text{857}\)

Assuming that both States Parties that have not ratified and non-States Parties are on the same locus standi, a related question is whether the aggressed state (party) that has not ratified against can invoke a declaration under Article 12(3) to invoke ad hoc acceptance of jurisdiction. Kress and Von Holtzendorff suggest that this may be possible.\(^\text{858}\) The implications of this are that a State Party may wish to use Article 12(3) instead of going through the domestic and international ratification process.\(^\text{859}\)

McDougall on the other hand disagrees, arguing that ‘the requirement that the aggression amendments must have been ratified by a State Party to enter into force under the first sentence of Article 121(5) is not remedied by an Article 12(3) declaration. […] the carefully balanced \textit{lex specialis} regime established under Article 15 \textit{bis} militates against the application of Article 12(3).’\(^\text{860}\) My view is similar. Upon a straightforward reading of the text of Article 12(3), the provision appears to apply specifically to a “State which is not a party to this Statute.” To allow States Parties to use this provision as an ad hoc acceptance defeats the purpose of having a specific framework relating to the crime of aggression. Should States Parties wish to accept

\(^{855}\) See McDougall (n 7) 263; Barriga, ‘Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression’ (n 744) 41.

\(^{856}\) McDougall, ibid; Barriga, ibid.

\(^{857}\) McDougall (n 7) 263.

\(^{858}\) See Kress and von Holtzendorff (n 133) footnote 117.

\(^{859}\) Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some’ (n 717) 775–776.

\(^{860}\) McDougall (n 7) 264.
the jurisdiction of the Court, they should ratify the Amendments pursuant to their
domestic ratification process.

D. The question of state consent

In general, consent means that the State has agreed to the competence and
jurisdiction of the international court or tribunal. The Monetary Gold principle was
raised during the course of negotiations with respect to the Kampala Amendments. In
this case, the ICJ held that the consent of a State is necessary for adjudication upon
its international responsibilities, even when the relevant State is not a party to the
proceedings so long as the legal interests of that State would form the subject matter
of the decision. Akande argues:

Even if one assumes that the Monetary Gold doctrine applies to all
international law tribunals, it will not, in most cases, be violated by the
exercise of jurisdiction by the ICC over non-parties nationals in respect of
official acts done pursuant to the policy of that non-party.

However, he departs from this position with respect to the crime of aggression. Here,
he argues strongly in favor of the applicability of the Monetary Gold Principle:

861 See Akande, ‘Prosecuting Aggression: The Consent Problem and the Role of the Security
Council’ (n 753).
862 McDougall (n 7) 245; see also Akande, ‘Prosecuting Aggression: The Consent Problem
and the Role of the Security Council’ (n 753) 18.
863 The ICJ held “to adjudicate upon the international responsibility of Albania without her
consent would run counter to a well-established principle of international law embodied in the
Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its
consent. [...] In the present case, Albania's legal interests would not only be affected by a
decision, but would form the very subject-matter of the decision. In such a case, the Statute
cannot be regarded, by implication, as authorizing proceedings to be continued in the absence
of Albania.” Monetary Gold Removed from Rome (Italy v France, United Kingdom and
United States) I.C.J. Rep [1954] (hereinafter “Monetary Gold”) 33 -34; This principle was
subsequently applied by the Court in the Case concerning East Timor, where the Court held
‘whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of
the conduct of a State when its judgment would imply an evaluation of the lawfulness of the
conduct of another State which is not a party to the case. Where this is so, the Court cannot
act, even if the right in question is a right erga omnes’, Case concerning East Timor (Portugal
864 Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-
Parties: Legal Basis and Limits’ (n 698) 635.
the ICC, in cases of aggression, is not only called upon to determine individual criminal responsibility but is also being asked to make determinations of State responsibility under the law relating to the use of force. For the Court to make these determinations, it would need to consider the conduct of the relevant States […] The fact that the determination of state responsibility by the ICC is a prerequisite to determination of individual liability immediately implicates the principle of consent in cases where the State that is alleged to have committed the act of aggression is not a party to the ICC, or has accepted the jurisdiction of the ICC with respect to aggression.865

The underlying rationale is that ‘the ICC will not be engaged in making determinations about a State’s legal responsibility, nor will it need to do so, in order to convict an individual for war crimes, crimes against humanity or genocide. However, the position is different with respect to aggression.’866 That said, it is not entirely accurate that the crime of aggression differs from the other Rome Statute crimes in this respect. The perpetration of war crimes, crimes against humanity or genocide may also directly or indirectly involve considerations of the conduct of a State.867 McDougall rightly points out that ‘there may be political, as opposed to legal, consequences for States as a result of aggression rulings, but this falls outside the Monetary Gold principle.’868

Furthermore, with respect to the question of state responsibility, Article 25(4) Rome Statute stipulates:

\[
\text{no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.}
\]

It can be inferred that individual criminal responsibility for the crime of aggression is without prejudice to state responsibility for an act of aggression. To be more specific,

865 Akande, ‘Prosecuting Aggression: The Consent Problem and the Role of the Security Council’ (n 753) 17, He adds ‘in the case of ICC jurisdiction over aggression by a non-consenting State, the only way in which the ICC may convict for aggression is first to decide on State responsibility and then on individual responsibility. In such cases involving non-consenting States, the ICC would be acting contrary to the consent principle’, id.
866 ibid 16.
867 See also McDougall (n 7) 245–246.
868 ibid 245.
there are different legal consequences pertaining to each set of responsibility. Thus, the determination of an act of aggression is for the purposes of executing legal consequences against the perpetrator of the crime of aggression and not for enforcing legal consequences against the aggressor state for state responsibility.

Be that as it may, one more factor should be taken into consideration. This is the question of whether the determination of an act of aggression or successful conviction of a perpetrator for the crime of aggression may amount to satisfaction for the aggressed state as a legal remedy against the aggressor state. If so, a strong argument can be made that consent of the aggressor state is indeed necessary as satisfaction amounts to a legal consequence under state responsibility. Nevertheless, even if the determination of an act of aggression does not amount to satisfaction, the question of consent is still important and is directly linked to the jurisdictional regime.

E. How should consent be expressed?

Consent of a State Party to the jurisdiction of the Court over the core crimes under Article 5(1) is represented by ratifying the Rome Statute. In the context of the crime of aggression, explicit consent to the Court’s jurisdictional regime is evidenced by ratifying the Kampala Amendments. By contrast, a non-ratifying State Party does not appear to consent to the jurisdictional regime of the crime of aggression. However, this is not necessarily true. An argument can be made that non-ratifying States Parties have nevertheless consented to the jurisdiction regime of the ICC over the crime of aggression by virtue of Article 5(1) and Article 12(1) of the Rome Statute. This suggests that consent can be either specific or implied. The former is evident by the ratification of the Kampala Amendments, whilst the latter appears to be predicated upon an interpretation of Article 5(1) and Article 12(1).

Akande argues that ‘consent given by those States to the Statute in general cannot be regarded as consent to the exercise of jurisdiction over the crime of aggression.’ He continues ‘a party that does not accept an amendment to which the provision relates does not consent to the exercise of jurisdiction by the Court over that crime.’ Be that as it may, pursuant to Article 15 bis (4), States Parties may make a declaration of non-acceptance of jurisdiction – the ramifications of which precludes the State

870 ibid 28.
Party from the jurisdiction of the court over the crime of aggression entirely. Thus, the concept of specific consent becomes reversed because the State Party is allowed to specify its non-consent to jurisdiction. For the opt-out mechanism to make sense, it is presumed that the consent of all States Parties is implied pursuant to Article 5(1) and Article 12(1) until or unless it makes a declaration of non-acceptance of jurisdiction under Article 15 bis(4). In a way, the opt-out mechanism is symbolic of a safeguard for States Parties to ensure that consent is represented. As submitted by Kress and von Holtzendorff:

To not require the ratification of the alleged aggressor State Party, but to grant that state the right to opt out, amounts to a ‘softened consent-based regime’ that is situated somewhere between the two poles and is, therefore, a suitable basis from which to create a compromise.

In my view, it is negligent to assume that state consent is entirely irrelevant with respect to Article 15 bis. This is evident by two factors: i) the opt-out mechanism and ii) the exclusion of jurisdiction over non-States Parties. Thus, it is clear that consent is implied. It is not strict in the sense of the negative interpretation of the second sentence of Article 121(5) which implies an “opt-in” as opposed to “opt-out” mechanism where the State Party has to ratify the relevant amendments. Instead it is assumed that when acceding to the Rome Statute, States Parties have already indicated their consent to the jurisdiction over the crime of aggression in accordance with Article 12(1), as recalled in the preamble to Resolution RC-Res.6. Thus, the onus is placed on States Parties to opt-out if they do not intend to consent to the jurisdiction of the crime of aggression. This has been labelled as the ‘softly consent-based pillar’ of the Kampala compromise.

Therefore, it is submitted that state consent is a condition for the exercise of jurisdiction pursuant to the Kampala Amendments. The nature of such consent need not be specific or explicit, but is implied so long as the State Party has not opted-out of the jurisdictional regime over the crime of aggression.

---

871 See Kress and von Holtzendorff (n 133) 1213.
872 ibid.
873 ibid 1215.
ii. Security Council referrals: Article 15 ter

Unlike state referrals and *proprio motu* investigations, the jurisdictional regime pertaining to Security Council referrals is relatively straightforward. Article 15 ter (1) stipulates:

The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this article.

The jurisdiction over Security Council referrals is subject to the activation of the Court’s jurisdiction pursuant to 15 ter (2) and 15 ter (3). Article 13(b) Rome Statute refers to a ‘situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.’ By encapsulating the existing jurisdictional regime of Security Council referrals, this means that the Court can investigate and exercise jurisdiction over all of the four core crimes without having to make any differential treatment with respect to the crime of aggression.

There is no legal prerequisite of a determination that an act of aggression has occurred under Chapter VII of the UN Charter. This means that the Council does not necessarily need to make a specific determination of an act of aggression under Article 39; it shall suffice to refer the “situation” to the Court. The Security Council therefore has the discretion to decide how it refers the situation to the court, the “green light” is implied in its referral of a respective situation to the ICC. In any event, if such determination is made, Article 15 ter(4) reaffirms that this shall be without prejudice to the Court’s own findings under this Statute, which inherently serves to uphold due process for the accused. Such determination nevertheless will have a persuasive effect on the Court’s consideration of the state act element of the crime. For example, it is likely that the Court will find that such use of force was unauthorized by the Council.

---

874 Cf. Understanding One, Kampala Amendments, Resolution RC/Res.6.
875 See Kress and von Holtzendorff (n 133) 1211–1212.
876 Blokker and Kress (n 715) 893.
The procedural implications of Security Council referrals are that proceedings may take place faster, as the Prosecutor is able to proceed with the investigation without submitting it to the control of the Pre-Trial Chamber. Also, under Article 53 Rome Statute, the Prosecutor has the discretion to decide whether there is a sufficient basis for prosecution and is thus under no duty or obligation to initiate investigations upon the referral by the Security Council.

The issue of state consent is not relevant in situations of a Security Council referral. This is reflected in Understanding Two:

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

6.6.3. Future states parties

The Japanese delegate raised the question:

What happens to a non-State Party that desires to accede to the Rome Statute after the adoption of the amendments? How can we be certain that such a newly acceding country will be bound by the amended Rome Statute, while we see no provisions stipulating about the entry into force of the amendments per se?\footnote{Statement by Japan, Statements by States Parties in explanation of position after the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 811.}

It can be assumed that future State Parties will be bound by the aggression amendments. This is consistent with Article 40(5) of the VCLT:

Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be
considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.\footnote{SWGCA Report 2008 (November), para.17.}

In any event, Article 15\textit{bis}(4) encompasses the opt-out mechanism, which allows the newly acceded State Party to declare its non acceptance of the Court’s jurisdiction over the crime of aggression should it chose to do so. This neatly avoids the question of whether ratification of the amendments are necessary for the opt-out mechanism to take legal effect as it is assumed that the newly acceded State Party has consented to the amended Rome Statute.

6.7. The International Criminal Court as an enforcement mechanism

The analysis above has delineated the jurisdictional regime of the ICC over the crime of aggression in situations of state referrals and\textit{proprio motu}, and Security Council referrals. This makes it possible to understand to what extent the ICC is representative of the legal interests of the aggressed state (and the international community) with respect to the prosecution of the crime of aggression.

There is a preliminary consideration which first needs to be addressed: this is the procedural issue of complementarity. The admissibility of cases to the ICC is predicated upon the mechanism of complementarity (Article 17 Rome Statute). Complementarity means that in situations where both States Parties and the ICC have concurrent jurisdiction, the former should have the primary competence to facilitate investigations/prosecutions. Thus, the case is inadmissible if the State Party is conducting an investigation or prosecution unless there is reason to believe that the State is unwilling or unable to genuinely carry out such proceedings (Article 17(1) Rome Statute). Therefore, complementarity serves as a procedural bar to the ICC where it must first be satisfied that there is judicial inactivity on the relevant domestic level or that the relevant State is unwilling/unable to genuinely carry out an investigation or prosecution in the interests of justice subsequent to the commencement of the proceedings.\footnote{For a general understanding of complementarity, see Darryl Robinson, ‘The Mysterious Mysteriousness of Complementarity’ (2010) 21 Criminal Law Forum 67.}

As discussed in Chapter III, the ratification of the Rome Statute is representative of a delegation of competence by the State Party to the ICC to prosecute individuals
under the national or territorial principle. This signifies that prosecution at the ICC is in the interests of the international community. Complementarity ensures that it is only in a situation where domestic courts do not have jurisdiction under the nationality or territorial principle that the ICC assumes its jurisdictional competence over the crime (or are unwilling or unable to genuinely prosecute or investigate). Thus, the legal interests of State Parties are preserved as domestic courts have the priority of prosecution in situations of concurrent jurisdiction.

As discussed above, pursuant to Article 15 bis, the conditions for the exercise of jurisdiction can be summarized as follows. First, both the aggressed state and aggressor state must be a State Party to the Rome Statute. Second, one of the parties to the intended proceedings must have ratified the Kampala amendments. This represents the delegation of domestic competence of the ratifying State Party to the ICC to prosecute the crime of aggression under either the nationality or territorial principle of jurisdiction. Third, the aggressor state (party) must not have opted-out. As demonstrated in the Tables above in section 6.6.2, if the aggressor state (party) has opted out, it is excluded entirely from the jurisdictional regime over the crime of aggression. The aggressed state may of course choose to challenge the legality of the adoption procedure and/or opt-out declaration, and it is for the Court under Article 119 Rome Statute to settle such dispute.

As can be seen, the jurisdictional regime under Article 15 bis excludes non-States Parties. Thus, in a situation where the aggressor state is a non-State Party, its nationals are precluded entirely from the jurisdiction of the Court. This may be so even if the aggressed state party has ratified the amendments. In this case, the ICC is unable to carry out the legal interest of the aggressed state (party). Similarly, if the aggressed state is a non-State Party, its legal interest is excluded from the ratione personae jurisdiction of the Court even if the aggressor state is a ratifying State Party. Therefore, in situations where the aggressor state is a non-State Party, or a State Party that has opted-out, the legal interests of the aggressed state, regardless of whether it is a State Party, or has ratified the Kampala Amendments, can be represented at the ICC only if the Security Council makes a referral pursuant to Article 15 ter.

880 Akande writes that proprio motu investigations may be considered as an expression of the ‘joint authority of those states to prosecute’, Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (n 698) 626.
Overall, it appears that the jurisdictional regime of the ICC is rather limited, which means that the scope whereby the ICC may act in the interests of the aggressed state to prosecute the crime of aggression is also rather limited. In particular, the exclusion of non-States Parties entirely from the jurisdictional regime significantly limits the effectiveness of the Court as an enforcement mechanism. Such asymmetry between State Parties and non-State Parties is indeed regrettable, but ironically gave rise to a step forward in international law, as it was one of the substantial concessions that allowed the Kampala Amendments to be adopted by consensus.

It is worth recalling that the underlying rationale behind excluding non-States Parties and States Parties that have opted-out is the need for consent to the jurisdictional regime of the ICC over the crime of aggression. The question of consent in the negotiations was directly relevant to the legal interests of the aggressor state, which appear to have prevailed over the interests of the aggressed state for the ICC to serve as an enforcement mechanism over the crime of aggression. Upon examining the balance between the legal interests of the aggressor state and the aggressed state with respect to enforcement against the crime of aggression at the ICC, an observation can be made that the jurisdictional regime over the crime of aggression at the ICC is indicative of the former prevailing over the latter.

On the domestic level, assuming that the aggressed state has prescribed the crime of aggression in its domestic legislation, its courts may exercise territorial criminal jurisdiction against a national from the aggressor state. By ratifying the Kampala Amendments, the aggressed state (party) may then delegate this competence to the ICC. Under international law, such delegation can be made without the consent of the aggressor state. However, the need for the consent of the aggressor state, regardless of how ‘softly based’, appears to prioritise the interest of the aggressor State over the aggressed state, as the latter has a legal interest for the prosecution for a crime committed against its territory.

Indeed States Parties who were involved in the negotiation process leading to the Kampala Amendments had legal interests both ways – it was in their interests to protect their nationals from prosecution at the Court without their consent to the jurisdictional regime over the crime of aggression; yet it was also in their interests as

---

881 ibid 649–650.
a potential victim of the crime of aggression to ensure that the jurisdictional regime at
the ICC may represent their interests.

That said, it should not be forgotten that the question of aggressor state consent
was directly predicated on the exclusivity hypothesis of the Security Council. The
political reality is that France and the UK were more likely to agree to the non-
exclusivity of the Security Council as a jurisdictional filter if aggressor state consent
was an underlying requirement. Aggressor state consent in the absence of
determination by the Security Council therefore played a large role as leverage, which
allowed the two members of the P5 to concede on their monopoly point. This may
account for a large part of the reason why the legal interests of the aggressor state
appear to prevail over the legal interests of the aggressed state with respect to the ICC
as an enforcement mechanism over the crime of aggression.

6.8. Conclusion

At present, it remains to be seen whether the jurisdiction of the ICC over the
crime of aggression will be activated in 2017. Be that as it may, the role of the ICC as
an enforcement mechanism against the crime of aggression can nevertheless be
contemplated. It appears that the Kampala Compromise encapsulates a rather limited
jurisdictional regime over the crime of aggression. There is still uncertainty over the
scope of the jurisdictional regime in situations of state referrals and propreitmotu as
there are different interpretations that come into play with respect to Article 121(5)
and Article 15 bis (4). As submitted in this chapter, my view is that the first sentence
of Article 121(5) relates to the entry-into-force mechanism of the Kampala
Amendments, while Article 15 bis (4) applies as the conditions for the exercise of
jurisdiction. Thus, in the conflict between the second sentence of Article 121(5) and
Article 15 bis (4), the latter prevails.

This means that at least one of the States Parties to the proceedings must ratify
the Kampala Amendments, as jurisdiction will be applicable pursuant to Article 12(2)
of the Rome Statute under the nationality principle (Article 12(2)(b)) or the territorial
principle (Article 12(2)(a)). The aggressor state does not necessarily have to be a
ratifying State Party, as ratification by the aggressed state is sufficient to establish a
jurisdictional link under the territorial principle. That said, the aggressor state must
not have opted-out from the jurisdiction of the Court over the crime of aggression. If
it has done so, then it is excluded entirely from proceedings even if the aggressed state (party) has ratified the Kampala Amendments.

The opt-out mechanism and the exclusion of non States Parties from the jurisdiction of the Court over the crime of aggression in situations of state referrals or *proprio motu* is indicative that state consent (of the aggressor state) is necessary for the jurisdictional regime of the Court to apply. Such consent need not be explicit in the form of a ratification of the Kampala Amendments, but is implied so long as the State Party has not opted out of jurisdiction pursuant to Article 15 bis (4). By contrast, in situations of Security Council referrals, the consent of the aggressor state is not necessary for the ICC to exercise jurisdiction over the crime of aggression.

This Chapter has shown that the jurisdictional regime of the ICC over the crime of aggression is rather limited, especially with regard to state referrals and *proprio motu*. Thus, the legal interests of the aggressed state and the international community may often be excluded from the competence of the Court to prosecute nationals from the aggressor state. The protection of the interests of the aggressed state can go only as far as Court has jurisdiction over the crime of aggression.

Nevertheless, the ICC is not the only enforcement mechanism. As will be discussed in the next chapter, domestic courts are also competent to serve as an enforcement mechanism against the relevant perpetrators. Thus, the aggressed state may also consider domestic courts as an enforcement mechanism. This is consistent with the mechanism of complementarity enshrined within the Rome Statute (Article 17), which gives priority to domestic prosecution in situations of concurrent jurisdiction.

It should be appreciated that although the jurisdictional regime pertaining to the crime of aggression is not perfect, it is nevertheless a phenomenal achievement. Prior to the Review Conference, many were skeptical as the question of the role of the Security Council and the concomitant question of state consent gave rise to seemingly irreconcilable positions. Under the legal mandate provided by Article 5(2) and a spirit of positive cooperation, the Review Conference adopted a *sui generis* regime by consensus. Thus, subsequent and inevitable legal ambiguities with respect to the interpretation of the Kampala Amendments should not undermine the historical significance of this consensus agreement.