

2016

Current U.S. Policy on the Crime of Aggression: History in the Unmaking?

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Recommended Citation

Donald M. Ferencz, *Current U.S. Policy on the Crime of Aggression: History in the Unmaking?*, 48 Case W. Res. J. Int'l L. 189 (2016)
Available at: <http://scholarlycommons.law.case.edu/jil/vol48/iss1/12>

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CURRENT U.S. POLICY ON THE CRIME OF AGGRESSION: HISTORY IN THE UNMAKING?

*Donald M. Ferencz**

At the 2015 Annual Meeting of the American Society of International Law, a U.S. policy statement on the crime of aggression was presented as part of a panel entitled “The ICC Crime of Aggression and the Changing International Security Landscape.” This article examines current U.S. policy on the crime of aggression, highlighting the historic role that the U.S. played in establishing aggression as an international crime after World War II, and concludes that activation of ICC jurisdiction over the crime of aggression would be a significant step forward in the development of international law.

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I remind you that 23 members of the United Nations have bound themselves by the Charter of the Nuremberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as

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well as states shall be tried before the bar of international justice.¹

U.S. President Harry Truman, Addressing the U.N. General Assembly, 23 October 1946.

I. BRIEF BACKGROUND ON THE CRIME OF AGGRESSION

Sixty million dead² and the introduction of weapons of such mind-numbing destructive capacity as to threaten all life on earth could not help but leave those who had survived the carnage of World War II determined to curb war-making itself.³ The year 1945 thus witnessed not only the establishment of the United Nations, whose Charter expressly prohibits the unauthorized use of force,⁴ but also the historic opening of the ground-breaking Nuremberg Trials, whose judgment indelibly and conspicuously branded aggressive war as “the supreme international crime.”⁵

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1. President Harry Truman, Address in New York City at the Opening Session of the United Nations General Assembly (Oct. 23, 1946) (transcript available at <http://trumanlibrary.org/publicpapers/viewpapers.php?pid=914> [<https://perma.cc/9R39-B9SS>]) (President Truman delivered this speech the night before the first anniversary of entry into force of the United Nations Charter).
 2. The 60 million total deaths, of which 45 million were civilian deaths, does not include up to 20 million people who may have been killed in China. *WWII by the Numbers: World-Wide Deaths*, NAT'L WWII MUSEUM, available at <http://www.nationalww2museum.org/learn/education/for-students/ww2-history/ww2-by-the-numbers/world-wide-deaths.html> [<https://perma.cc/5NYE-FRDT>].
 3. “*We the Peoples of the United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . . And for these Ends to practice tolerance and live together in peace . . . and to unite our strength to maintain international peace and security, and to ensure . . . that armed force shall not be used, save in the common interest . . . Have Resolved to Combine our Efforts to Accomplish these Aims*”
See U.N. Charter pmbl. (emphasis added).
 4. *See* U.N. Charter arts. 2, 41-42, 51 (proscribing the use of force unless authorized by the Security Council or occurring in response to an armed attack).
 5. 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 427 (1948) (The Nuremberg Trials included not only the quadripartite IMT held pursuant to The London Agreement of August 8, 1945, but also the

Students of history will know that the United States played a critical role in seeing to it that those accused at Nuremberg would stand trial for their crimes, rather than simply be taken out and shot—as was the initial preference of both Stalin and Churchill.⁶ Moreover, American insistence was responsible for assuring that crimes against peace was among the indictable offenses at Nuremberg—the first time in history that aggressive war-making would be charged as a crime and that those responsible for it would be held personally accountable.⁷

The Nuremberg Charter, which set forth the provisions pursuant to which the International Military Tribunal (IMT) would be conducted, was annexed to the London Agreement signed on the morning of August 8, 1945.⁸ It enumerated three crimes for which individuals could be held accountable in their personal capacities, regardless of their positions of national leadership. These included war crimes, crimes against humanity, and crimes against peace—the core feature of which was the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances.”⁹

twelve American-led “Subsequent Proceedings” held at Nuremberg pursuant to Control Council Law No. 10 of 20 December 1945).

6. See Dave Johns, *Defining Justice*, FRONTLINE WORLD (Jan. 24, 2006), http://www.pbs.org/frontlineworld/stories/iraq501/defining_index.html [<http://perma.cc/SZ2H-XQE7>] (describing Saddam Hussein’s capture, confinement awaiting trial, and history of imprisoning, rather than killing, enemy leaders).
7. See Jonathan A. Bush, “*The Supreme . . . Crime*” and *Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2326 (2002) (discussing the role of the United States in developing the inclusion of Crimes Against Peace in the Nuremberg Charter).
8. Coincidentally, the London Agreement was signed on the same day that President Harry Truman put his signature to the United States ratification of the U.N. Charter, making the United States the first country to officially join the U.N. It is no small irony that before the sun had set on Washington or on London that evening, an American B-29 bomber had already taken off from the island of Tinian in the Pacific, *en route* to dropping the atomic bomb that was to obliterate the city of Nagasaki just a few hours later. See The London Agreement of August 8th 1945 art. 1, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280; John Q. Barrett, *London Agreement (1945)*, JACKSON LIST (Aug. 8, 2015), <http://thejacksonlist.com/wp-content/uploads/2015/08/20150808-Jackson-List-London-Agreement.pdf> [<https://perma.cc/9CCC-HQZ6>] (describing the signing of the agreement).
9. Nuremberg Charter art. 6; Nuremberg Trials Final Report Appendix D: Control Council Law No. 10 art. 2, ¶ 1(a) Dec. 20, 1945, *available at* <http://avalon.law.yale.edu/imt/imt10.asp> [<https://perma.cc/H7PQ-9CNZ>] (while the IMT’s definition of crimes against peace focused on

At Nuremberg, Sir Hartley Shawcross, the British prosecutor, articulated the proposition that those who conduct wars in violation of international law are ineligible to claim, in defense, that such wars were executed in accordance with the laws and customs of war:

The killing of combatants in war is justifiable, both in international and in municipal law, only where the war itself is legal. But where a war is illegal . . . there is *nothing* to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands.¹⁰

At the end of the ten-month trial, the IMT delivered its judgment on September 30, 1946.¹¹ Truman's October address to the United Nations, quoted above, came close on its heels, and was part of an American-led initiative pushing for worldwide recognition of the legal precedents established at Nuremberg. Before the year was out, the General Assembly, acting at the behest of the United States, unanimously approved Resolution 95(I), affirming the Nuremberg principles and directing that work begin on codifying them within an international criminal code.¹²

Immediately after the conclusion of the IMT, Justice Robert H. Jackson, the American Chief of Counsel at Nuremberg, reported on the import of the trial to President Truman. In his report he wrote that "[n]o one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute

acts constituting illegal *war*, Control Council Law No. 10 went beyond this definition, expressly specifying that the crime also applied to invasions. Thus, Nuremberg's subsequent proceedings—made up of a dozen more criminal trials during December of 1945 overseen by the United States, acting on its own authority—made an *invasion*, as distinct from a war, prosecutable as an act included within crimes against peace).

10. 19 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 458 (1948) (emphasis added) (with my continuing thanks to Matthew Gillet and Manuel Ventura for bringing this quotation to my attention).
11. INTERNATIONAL MILITARY TRIBUNAL, *supra* note 5, at 427.
12. *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal: General Assembly Resolution 95(I)*, U.N. AUDIOVISUAL LIBR. INT'L L. (2008), http://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf [<https://perma.cc/VSL2-BCH5>] (explaining that upon the United States' demand, the U.N. General Assembly, on December 11, 1946, unanimously affirmed the principles of the Nuremberg Charter and judgment, and called for work to be undertaken regarding the development of an International Criminal Code based on those principles).

law, *and law with a sanction.*"¹³ At the pace at which matters appeared to be proceeding, his conclusion seemed, at the time, to be an accurate assessment of where things were headed.

Notwithstanding such initial momentum toward universalizing Nuremberg's core crimes, further progress was stymied by the politics of the Cold War.¹⁴ As a consequence, half a century would pass before the seeds of such early efforts showed signs of the hoped-for harvest.¹⁵

The effort to bring to fruition a criminal code including Nuremberg's core crimes achieved a milestone of historic proportions in 2002, with the entry into force of the Rome Statute ("the Rome Statute" or "the Statute") of the International Criminal Court ("the Court" or "the ICC").¹⁶ But, as far as the crime of aggression was concerned, there was still plenty of work to do. Though the Statute technically vested the Court with aggression jurisdiction, it provided that such jurisdiction could not be *exercised* until later provisions were adopted, defining the crime and specifying the conditions under which the Court could prosecute it.¹⁷ Precisely when—and if—such additional provisions might eventually be adopted was anyone's guess, but it would certainly not occur prior to a review conference, expected to be held at least seven years after the coming into force of the Rome Statute.¹⁸ Thus, notwithstanding that there was finally a permanent international criminal court which had ostensibly been vested with jurisdiction over aggression, the "supreme international crime" found itself rather ignominiously relegated to a state of legal limbo.

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13. Letter from Justice Jackson to President Truman (Oct. 7, 1946) (emphasis added), (on file at <http://avalon.law.yale.edu/imt/jack63.asp> [<https://perma.cc/W9CP-95VN>]).
 14. Giulio M. Gallarotti, *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, DIVISION II FAC. PUBLICATIONS, Apr. 1999, at 3.
 15. *See Draft Code of Crimes Against the Peace and Security of Mankind*, 1996 Y.B. Int'l L. Comm'n Vol. 2, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (explaining that the efforts of the International Law Commission in this regard culminated in 1996 in the Draft Code of Crimes against the Peace and Security of Mankind).
 16. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF 183/9 (1998) [hereinafter Rome Statute].
 17. Article 5.2 of the Rome Statute, prior to the amendments adopted at the Kampala Review Conference, stated: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." *See id.* at art. 5, ¶ 2.
 18. *See* Rome Statute, *supra* note 16, at art. 123.

At present, despite such continuing relegation, proponents of the Court's aggression jurisdiction have reasons for optimism. During the ICC Review Conference, held in Kampala in 2010, amendments to the Rome Statute were adopted by consensus, which, if activated, will finally grant the Court active jurisdiction over the crime of aggression possibly as early as 2017.¹⁹ According to the terms of such amendments, they may be activated—subject to the collective re-approval of the Assembly of States Parties—once they have been ratified by at least thirty States Parties, twenty-eight of which have already done so.²⁰

Notwithstanding such progress, it is a sad fact that those who would commit the crime of aggression may still do so in the knowledge that the Court is currently powerless to prosecute them for it. But the days of such impunity may be numbered. As in the feature-length film with a similar-sounding title, the Court's aggression jurisdiction stands tantalizingly close to activation as “the fourth element” of the Rome Statute²¹—a weapon of mass instruction in the arsenal of international law—signalling that aggressors may soon be held accountable for their crimes, just as Justice Jackson had predicted.

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19. The adopted amendments define the crime and provide the conditions under which the Court may exercise its jurisdiction. However, as part of an overall compromise package, it was agreed in Kampala that the Court would not be able to exercise its aggression jurisdiction until and unless thirty States Parties to the Rome Statute ratified the Kampala amendments *and* the Assembly of States Parties reapproved them, which approval could not occur until after January 1, 2017. It should be noted, however, that the definition of the crime of aggression, covering a litany of aggressive acts, was adopted outright, and is, therefore, neither subject to the peculiar additional thirty-ratifications rule nor re-approval by the Assembly of States Parties. INT'L CRIM. CRT., *Review Conference of the Rome Statute Of The International Criminal Court, Kampala, 31 May – 11 June 2010 Official Records* (2010), http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf [<https://perma.cc/FX9B-29R7>].
 20. See *Ratification Status: Amendments on the crime of aggression to the Rome Statute of the International Criminal Court*, EQUIPO NIZKOR (Mar. 4, 2016), available at <http://www.derechos.org/nizkor/aggression/doc/status.html> [<https://perma.cc/LU3K-AXG6>] (showing that, as of March 7, 2016, the countries that had ratified the Kampala amendments on aggression included Andorra, Austria, Belgium, Botswana, Costa Rica, Croatia, Cyprus, Czech Republic, El Salvador, Estonia, Finland, Georgia, Germany, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Poland, Samoa, San Marino, Slovakia, Slovenia, Spain, Switzerland, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, and Uruguay).
 21. Anyone who has seen the “The Fifth Element” (a 1997 film starring Bruce Willis, Gary Oldman, and Milla Jovovich) will know what I'm talking about.

But not everyone agrees that activating the Court's independent aggression jurisdiction is a good idea.²² The permanent members of the U.N. Security Council believe the Court's aggression jurisdiction should not be exercisable without pre-clearance from the Council itself. Although only two of the permanent members of the Council ("P-5") are Parties to the Rome Statute,²³ their collective influence is significant.

Moreover, although the compromise reached in Kampala allows states, in certain circumstances, to opt out of the Court's aggression jurisdiction,²⁴ the optics of such an opt-out may be problematic. After all, is it likely that a state involved in a legally questionable military action would risk the potential opprobrium associated with electing to opt out of the Court's aggression jurisdiction if it did not seriously believe that there was reasonable doubt as to the legality of its actions? And are such doubts something that any national leader would like to publicly admit? Beyond this, if such an opt-out occurred, is it possible that the "opt-out" state's coalition partners might also feel tainted by such an opting out? Whether considerations such as these have had an influence or not, it is clear that not all who joined in negotiating the terms of Kampala's compromise package are comfortable with how its provisions may combine to play out in practice.²⁵

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22. For purposes of this essay, "independent" aggression jurisdiction refers to aggression jurisdiction which is either on a *proprio motu* or state referral basis, but *not* a situation referred by the Security Council.
 23. Thus far, only the United Kingdom and France have ratified the Rome Statute, thus becoming members of the ICC's Assembly of States Parties.
 24. See Rome Statute, *supra* note 16, at arts. 15 *bis*, 15 *ter* (showing how this rule applies to the Court's aggression jurisdiction based on state referrals or *proprio motu* investigations brought at the behest of the Prosecutor of the ICC, but *not* to referrals by the U.N. Security Council).
 25. For a discussion of some of the concerns regarding uncertainties related to how the Kampala amendments may be interpreted, and urging the resolution of such uncertainties prior to 2017, see Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AJIL 257, 257-85 (April 2015). In response to Koh and Buchwald see, e.g., Bing Bing Jia, *The Crime of Aggression as Custom and the Mechanisms for Determining Acts of Aggression*, 109 AJIL 569, 569-82 (July 2015); Alain Pellet, *Response to Koh and Buchwald's Article: Don Quixote and Sancho Panza Tilt at Windmills*, 109 AJIL 557, 557-69 (July 2015). For an online discussions of this topic, see also Dapo Akande, *AJIL Unbound Symposium on the Crime of Aggression*, EJIL: Talk! (Mar. 3, 2106), available at <http://www.ejiltalk.org/ajil-unbound-symposium-on-the-crime-of-aggression/> [<https://perma.cc/X58H-AV23>]; John Bellinger, *USG Concerns with the ICC Aggression Amendment*, LAWFARE BLOG (Jan. 5, 2016, 7:09 AM), available at <https://www.lawfareblog.com/usg-concerns-icc-aggression->

Finally, it should be recalled that at Nuremberg crimes against peace covered *wars* of aggression, or *wars* in violation of international treaties, agreements, or assurances. The definition of the crime of aggression set forth within the Kampala amendments goes well beyond this. In addition to criminalizing acts that would amount to crimes against peace at Nuremberg, it criminalizes a litany of acts which were characterized in a 1974 General Assembly resolution as *prima facie* acts of aggression,²⁶ but only *if* they rise to the level of *manifest violations* of the UN Charter as to their *combined character, gravity, and scale*.²⁷

II. CURRENT U.S. POLICY ON THE ICC CRIME OF AGGRESSION

It is against this backdrop that at the 2015 annual meeting of the American Society of International Law, Sarah Sewall, the U.S. State Department's Under Secretary for Civilian Security, Democracy, and Human Rights delivered what has been described as "a major policy speech on the crime of aggression."²⁸ The address presented three serious U.S. concerns with amendments to the Rome Statute of the International Criminal Court which, if made effective, will, at long last, operationalize Truman's vision of a bar of international justice before which aggressors may be tried for their crimes.²⁹

amendments [<https://perma.cc/L8B7-Q979>]; David Bosco, *Who's Afraid of Aggression Prosecutions?*, LAWFARE BLOG (Jan. 8, 2016, 1:15 PM), available at <https://www.lawfareblog.com/whos-afraid-aggression-prosecutions> [<https://perma.cc/AQ4W-7EE6>]. For a recent live debate regarding the crime of aggression, see Videotape: The International Criminal Court and the Crime of Aggression, on the website of the German Center for Research and Innovation, which hosted a discussion between Harold Koh and Professor Claus Kress (Feb. 22, 2016), available at <http://www.germaninnovation.org/news-and-events/videos?video=733f9287-f0df-e511-83dd-00155dcfd969&page=1> [<https://perma.cc/M56X-F456>].

26. G.A. Res. 3314 (XXIX), Definition of Aggression, arts. 2-4 (Dec. 14, 1974).
27. See Rome Statute, *supra* note 16, at art. 8 *bis* (defining "crimes of aggression," as adopted in Kampala).
28. See Beth Van Schaack, *U.S. Policy on the ICC Crime of Aggression Announced*, JUST SECURITY (Apr. 21, 2015, 8:03 AM), available at <http://justsecurity.org/22248/u-s-policy-icc-crime-aggression/> [<https://perma.cc/4K2Y-W8S8>].
29. See INT'L CRIM. CRT., *supra* note 19, at 17-22 (discussing the text of the compromise solution to activation of the Court's jurisdiction that was agreed to at Kampala); Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT'L LAW 517, 533 (2011) (explaining that "[u]ltimately, the political will in Kampala to end impunity for the crime of aggression united delegations and

As discussed below, the U.S. is concerned that activation of the Court's aggression jurisdiction pursuant to the terms of the amendments and the negotiated list of understandings adopted in Kampala will:

- 1) Have a chilling effect on potential coalition partners in U.S.-led military actions which, though lacking legal authorization by the U.N. Security Council, may nonetheless be undertaken with legitimate humanitarian interests or objectives in mind,
- 2) Make it more difficult to grant amnesty to leaders who are alleged to have committed the crime of aggression, thereby potentially impeding peace deals which would grant immunity for such offenses; and
- 3) Impede the Court's core mission of prosecuting for atrocity crimes by embroiling it in politically charged controversies, which it is unsuited to deal with.³⁰

Under-Secretary Sewall argued that such U.S. concerns "have been exacerbated by the efforts of some supporters of the amendments to promote an interpretation – which we believe flies clearly in the face of the plain language of the Rome Statute – contending that the Court's aggression jurisdiction would extend even to the nationals of states parties that do not ratify the amendments."³¹ This accusation, while not entirely clear, appears to refer to the fact that the terms

enabled them to overlook any imperfections in the final outcome"); *see generally* Claus Kreß & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179 (2010) (overviewing the compromises at the Kampala Conference); Jutta Bertram Nothnagel, *A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court*, AFR. LEGAL AID Q., available at <http://www.africalegalaid.com/news/the-provisions-on-the-crime-of-aggression-kampala-conference> [<https://perma.cc/85VA-3YCH>] (stating that "[e]xactly because the crime is committed by leaders who 'control or direct' the machinery of the State, requiring State acceptance for their prosecution would seem to be highly counterproductive, especially if such acceptance can be rather easily withheld or withdrawn"); *see* S.C. RC/Res.6 (June 11, 2010); Sarah Sewall, Under Sec'y Civilian Sec., Democracy, & Hum. Rts., U.S. Dep't State, Speech at the American Society of Law Annual Meeting: The ICC Crime of Aggression and the Changing International Security Landscape (Apr. 9, 2015) (transcript available at <http://www.state.gov/j/remarks/240579.htm> [<https://perma.cc/PX5U-WGLX>]) [hereinafter *Sewall Speech*] (her remarks may also be viewed online, including comments from the floor, at <https://www.asil.org/resources/2015-annual-meeting> [<https://perma.cc/8ZNZ-DK6D>]).

30. Van Shaack, *supra* note 28.

31. *Sewall Speech*, *supra* note 29.

agreed to in Kampala could allow the Court—in limited circumstances—to exercise its independent aggression jurisdiction over nationals of States Parties which have not yet ratified the Kampala amendments.³²

III. OBSERVATIONS REGARDING THE STATED U.S. CONCERNS

A. Possible Chilling Effect on Military Coalition Partners

First among the enumerated U.S. concerns is that activating the Court's jurisdiction over the crime of aggression, as it is currently defined within the Rome Statute, "could chill the willingness of states to cooperate in certain military action where the legal basis for that action might be contested."³³ Such a concern is certainly understandable in the context of any military action which has neither been authorized by the U.N. Security Council nor undertaken in self-defense after an armed attack—as would generally be permitted under the U.N. Charter.³⁴ It must be kept in mind that before any such action could be successfully prosecuted as an act of aggression under the Rome Statute, it would need to constitute a manifest violation of the U.N. Charter as to its combined character, gravity, and scale.³⁵ Although the precise manner in which the Court will interpret the contours of such a threshold clause cannot be predicted with absolute certainty, it may reasonably be inferred that in order

32. The compromise crafted and agreed to in Kampala allows for the assertion of jurisdiction over nationals of all states if the Security Council refers an aggression case. Short of a referral by the Security Council, the Court cannot assert jurisdiction over nationals of non-States Parties, nor may it do so over nationals of States Parties which have opted out of the Court's independent aggression jurisdiction. To avoid application of the Court's independent aggression jurisdiction, a State Party need do nothing more than file a declaration to the effect that it elects to opt out of such jurisdiction. Such a jurisdictional regime brings into play the meaning of Article 121(5) of the Statute, discussed in further detail below – that is, whether a State Party may be required to opt out of the application of an amendment that it has not previously ratified. *See infra* Part III.D. As discussed below, the whole debate over Article 121(5) may be seen essentially as a "red herring," since no State Party's leaders need be subjected to the Court's independent aggression jurisdiction should their State decide to opt out of such jurisdiction. *See infra* Part III.D

33. *See Sewall Speech*, *supra* note 29.

34. *See* U.N. Charter arts. 2, 42, 51 (proscribing the use of force unless authorized by the Security Council or occurring in response to an armed attack); *see generally* C.G. WEERAMANTRY, *ARMAGEDDON OR BRAVE NEW WORLD? REFLECTIONS ON THE HOSTILITIES IN IRAQ* (1st ed. 2003) (providing an interesting discussion on the parameters of legality covering the use of armed force).

35. *See* S.C. RC/Res. 6, *supra* note 29, at art. 8 *bis*(1).

for an act of aggression to warrant prosecution before the Court, it would need to constitute a fairly serious violation of the U.N. Charter as to some combination of its purpose, methods of execution, scope, and effects. This is a fairly clear indication that a *bona fide* humanitarian intervention is beyond the scope of what is covered by the Rome Statute's definition of the crime of aggression—as it should be, akin to the manner in which the “necessity defense” is recognized in certain domestic criminal proceedings.³⁶

But there is some very good news here as far as possible “chilling effects” on potential U.S. coalition partners are concerned. Pursuant to the terms of the Kampala amendments, short of a referral by the Security Council, the Court can neither exercise its aggression jurisdiction over nationals of non-States Parties nor over an act of aggression committed by any State Party that elects to opt out of the Court's aggression jurisdiction.³⁷ Thus, should a State Party wish to insulate its nationals from possible prosecution with respect to a States Party or *proprio motu* situation referral, it need do nothing more than file a piece of paper with the Court, declaring that it will not be bound by the Court's jurisdiction as to any acts of aggression which it may commit.³⁸ The general effect of such an opt-out is not in dispute.

Having said that, there are rather obvious reasons why no state would wish to be in a position of having to publicly opt out of the Court's aggression jurisdiction. After all, wouldn't such an opt-out run the risk of appearing to represent a concern—possibly even construed by some as an outright concession—that the state in question believes that its actions could potentially constitute the crime of aggression? And if such action was part of a broader military coalition, might such an opt-out have the undesirable consequence of bringing into question the legality of the entire military undertaking, thereby potentially giving rise to the spectre of culpability of each of the national leaders who bear responsibility for either initiating it or participating in it?

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36. See Jennifer Trahan, *Defining the ‘Grey Area’ Where Humanitarian Intervention May not be Fully Legal, but is not the Crime of Aggression*, 2 J. USE FORCE & INT'L LAW, 42 (2015) (discussing the relationship between the crime of aggression and humanitarian intervention when the interveners are also the aggressors); *R. v. Jones* [2006] UKHL 16 (appeal taken from the Court of Appeal (Criminal Division) (U.K.)), <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones.pdf> [<https://perma.cc/WWN9-5PS4>] (discussing the crime of aggression in international customary law and its defenses).
37. See Rome Statute, *supra* note 16, at art. 15 *bis*, ¶ 4 (describing the exercise of jurisdiction over the crime of aggression).
38. See Rome Statute, *supra* note 16, at art. 15 *bis*, ¶ 4.

B. Impairment of Ability to Resolve Ongoing Conflicts

The second of the U.S. concerns is that activating the Court's jurisdiction over the crime of aggression "may reduce the ability of the international community to manage and resolve conflicts"³⁹—meaning that it could be more difficult to broker peace deals if amnesty is sought by those who commit the crime of aggression. With respect to this issue, it must, once again, be kept in mind that, short of a referral by the U.N. Security Council, the Court lacks jurisdiction over acts of aggression committed by nationals of non-States Parties and, similarly, lacks jurisdiction over acts of aggression committed by States Parties which have opted-out of the Court's aggression jurisdiction. In essence, the option to opt-out, itself, offers an easy route to potential amnesty.

It may be surmised that those who would be most likely to find themselves the subject of prosecution for the crime of aggression in the case of a state party or *proprio motu* referral would be in such a position because their own country elected *not* to opt-out of the Court's jurisdiction. In such case, one might well conclude that their own societies view them as deserving of prosecution, rather than amnesties. At the same time, when the Security Council refers an aggression case, presumably there would be a rather strong international consensus that such a case should go forward.

In reflecting on whether those in positions of power should be granted immunity for serious acts of aggression, it is hard not to be reminded of the words of Justice Jackson at Nuremberg:

The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it *to set in motion* evils which leave no home in the world untouched.⁴⁰

As highlighted in Under-Secretary Sewall's address, the international community is opposed to amnesties for atrocity crimes.⁴¹ To suggest immunity for those who propagate the illegal uses of force, which invariably result in the very atrocity crimes that the international community condemns, seems a far cry from the historic precedents established at Nuremberg. To deter the Court from

39. *Sewall Speech*, *supra* note 29.

40. 2 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-155 (1947) (emphasis added).

41. *See Sewall Speech*, *supra* note 29 (stating, "[w]hile the international community has strived for consensus around the principle that atrocities cannot legitimately be the subject of an amnesty, it is not obvious that the same approach is appropriate for the crime of aggression, which is of a fundamentally different character").

enforcing the law, rather than deterring those who would break it, may be seen by some as expedient in the short term, but such an approach does nothing to advance respect for the predictable and uniform rule of law—a principle generally enshrined within U.S. legal traditions.⁴²

C. Interference with the ICC's Core Mission of Prosecuting and Helping to Deter Atrocity Crimes

The last of the three U.S. concerns is that activation of the Court's aggression jurisdiction “will impair the Court's ability to carry out its core mission—deterring and punishing genocide, crimes against humanity, and war crimes.”⁴³ The basis for this concern is that “assessments involved in prosecuting aggression will inevitably be deeply political,”⁴⁴ burdening the “already struggling”⁴⁵ Court with “a role better suited for political actors.”⁴⁶ Presumably, such remarks are in contemplation of a case which has not been referred by the Security Council, since any referral by the Council would likely already reflect a broad consensus—political or otherwise—regarding potential prosecution for the crime of aggression.

As to cases growing out of a state referral or the Prosecutor's *proprio motu* investigation power, the opt-out alternative clearly limits the prospect of prosecuting nationals without the assent of their own State of nationality. This, combined with the fact that jurisdiction over nationals of non-States Parties is altogether excluded, substantially limits the likelihood that any particular state's point of view will exert undue influence because the assent of the state of the accused is, essentially, a prerequisite to prosecution.

There is no question, however, that adjudication of cases relating to the crime of aggression will involve difficult and complex issues—not the least of which may be the deep reluctance of states to disclose their sources of information and the details of intelligence-gathering networks and technologies. Divulging such details could, naturally, have significant political consequences for the states involved. But,

42. The words “Equal justice under law” are etched in the portico of the United States Supreme Court. If they stand for anything, they certainly stand for predictable enforcement of law, rather than amnesty for those who break it. *See generally* Off. Curator, *The West Pediment: Information Sheet*, <http://www.supremecourt.gov/about/westpediment.pdf> [<https://perma.cc/9KB3-7RHT>] (providing an overview, photos, and the history of the West Pediment of the Supreme Court Building).

43. *Sewall Speech*, *supra* note 29.

44. *Sewall Speech*, *supra* note 29.

45. *Sewall Speech*, *supra* note 29.

46. *Sewall Speech*, *supra* note 29.

the *carte blanche* assertion that aggression cases would necessarily and “inevitably be so deeply political” as to undermine the Court itself may well be viewed by skeptics as tantamount to an application of all-purpose gravy intended to mask the perhaps not-so-palatable cafeteria-style meatloaf simmering beneath its surface.

The contention that the crime of aggression is, *ipso facto*, a “highly politicized crime” was voiced by State Department personnel *well before* the consent-based approach was developed and agreed in Kampala.⁴⁷ Given the features of the consent-based regime adopted at the Review Conference—applicable to all but Security Council referred cases—the politicized prosecutions argument seems to have significantly diminished currency compared to what may have been the case had the regime adopted in Kampala been less flexible.

Beyond this, the Court lacks its own enforcement mechanisms and is, therefore, highly reliant on the goodwill of cooperating states to offer the access and assistance necessary for successful investigations and prosecutions. Consequently, unless there is cooperation on the part of the state whose nationals may be the subject of prosecution for the crime of aggression, such prosecution could be so hampered as to be beyond successful prosecution by the Court. It may, therefore, be prudent of the Court to heed the concerns voiced by the U.S. in such circumstances, and avoid dissipating its resources and reputation on such cases.

D. Jurisdiction over Nationals of Non-ratifying States Parties: The Article 121(5) Issue

The concern that the jurisdictional regime agreed to in Kampala potentially allows the Court to exercise its aggression jurisdiction over nationals of States Parties, regardless of whether or not their State has ratified the Kampala amendments raises an apparent conflict with the language of Article 121(5) of the Statute.⁴⁸

47. Harold H. Koh, Legal Advisor, U.S. Dep’t of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm> [<https://perma.cc/R4JG-UCUN>]).

48. It should be kept in mind that the compromise crafted and agreed to in Kampala allows for the assertion of jurisdiction over nationals of all states if the Security Council refers an aggression case. Short of a referral by the Security Council, the Court cannot assert jurisdiction over any nationals of non-States Parties, and may only assert jurisdiction over nationals of States Parties which have failed to affirmatively opt out of the Court’s aggression jurisdiction – *but only where such nationals are accused of committing the crime of aggression against a State Party which, itself, has ratified the Kampala amendments*. To avoid having its nationals potentially subject to the Court’s jurisdiction in such a case, a State Party need simply file a piece

The key element of the argument for any State Party wishing not to have the Court's aggression jurisdiction applied to its nationals is that, on its face, Article 121(5) of the Statute would seem to allow a State Party to avoid the application of such jurisdiction by simply not ratifying the amendments. In such case, an argument raised with respect to the Kampala amendments is that States Parties cannot be required to affirmatively opt out of the Court's aggression jurisdiction unless they have already ratified the amendments, since if they fail to ratify, such jurisdiction wouldn't apply to their nationals in the first place.

Although the issue, as more fully discussed immediately below, may appear to be an arcane and even confusing topic, at the end of the day, the basic question is really fairly simple: Will the countries which adopted the Kampala amendments in a resolution which claimed that they were "[r]esolved to activate the Court's jurisdiction over the crime of aggression as early as possible" make good on that promise or not? Will powerful states agree to be bound by the law criminalizing acts of aggression - or is such law only for those who must rely on the force of law, rather than the law of force, to make their way through the landscape of global affairs?

At the outset of the discussion regarding Article 121(5) it should be kept in mind that the Article 121(5) issue is of greatest concern to non-ratifying States Parties who wish to limit the risk of scrutiny by the ICC with respect to their prospective commission of acts involving the use of force not authorized by the U.N. Charter. Once a State Party ratifies the Kampala amendments, the issue of how Article 121(5) ought best be interpreted becomes completely moot as to that State Party.

It should be noted that even if the State Party in question has ratified, they may still opt out of the Court's independent aggression jurisdiction if they wish to.⁴⁹ Thus, the apparent real crux of the concern is not really about being *forced* to accept the ICC's independent jurisdiction over the crime of aggression, but rather how a state will look in front of the eyes of the world if it opts out of such jurisdiction in an effort to insulate its leaders from possible judicial scrutiny for the crime of aggression. In this regard, any "group opt-outs" may be seen as little more than an attempt at camouflage.

of paper, declaring that it elects to opt out of the Court's aggression jurisdiction.

49. Rome Statute, *supra* note 16, at art. 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 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.").

Insofar as the opt-out provisions agreed to in Kampala are concerned, Article 121(5) has no application whatsoever to any case where the Security Council has referred a situation involving an aggression charge, since in such case, neither States Parties nor non-States Parties have any right to opt out of the Court's jurisdiction. Similarly, as to States Parties which have demonstrated their commitment to activating the Court's aggression jurisdiction through their own ratification of the Kampala amendments, any argument as to tension between the express language of the Kampala amendments and the express language of Article 121(5) is completely moot.

Non-ratifying States Parties wishing to avoid the application of the Kampala amendments to their own nationals may well point to the language of Article 121(5) for support. Yet whether Article 121(5) may be seen to shield them from potentially having to affirmatively opt out of aggression amendments which they have not yet ratified, is a question which does not exist in isolation: it must be considered within the context of the broader Rome Statute itself.

Let's begin by looking at Article 121(5). It provides:

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.⁵⁰

Although on its face, Article 121(5) would seem to expressly exempt nationals of non-ratifying States Parties from the application of any amendments to article 5, 6, 7, and 8 of the Statute, such language is either directly at odds with other provisions of the Statute or incongruous in their light. For example, pursuant to Article 12(2) of the Statute, the Court may assert jurisdiction even over nationals of states which have altogether failed to ratify the Rome Statute *if* their nationals commit genocide, war crimes, or crimes against humanity on the territory of a State Party. This means that notwithstanding the fact that the Rome Statute has not "entered into force" at all as far as the states of the perpetrators of such crimes are concerned, the perpetrators may still come within the jurisdiction of the Court. The issue of "coming into force" and ICC jurisdiction are thus, two quite distinct things.

In a moment the contrast between the exceptions to jurisdiction referenced in Article 124 versus Article 121(5) will be explored. However, before doing that, let's reflect for a moment on whether, when drafted, Article 121(5)'s second sentence could possibly ever

50. Rome Statute, *supra* note 16, at art. 121(5).

have meant, in isolation, what it seems to say. Here is the point: from inception, it has clearly been understood that, even as to non-ratifying states, the ICC may assert jurisdiction where a crime over which the ICC is able to exercise jurisdiction is committed on the territory of a State Party. (Let's put aside, for purposes of this discussion, the fact that in Kampala it was agreed, strictly as a matter of compromise, to completely exclude all nationals of non-States Parties from the ICC's state referral and *proprio motu* aggression jurisdiction).

If Article 121(5) is read to literally mean what it says, without considering (as Article 124 does) the territorial jurisdictional rule found within Article 12, what do we have? We have a provision which seems to say that States Parties which do not ratify subsequent amendments to the core crimes of the ICC would have an absolute *carte blanche* "get out of jail free" card to play with respect to crimes which, if they were committed by *non*-States Parties on the territory of accepting States Parties would be fully subject to the Court's jurisdiction. Could this possibly have been the intention of the drafters of Article 121(5)? Did they really mean to suggest that, although the Court's jurisdiction over amendments to the ICC's core crimes could clearly apply to nationals of non-States Parties, Article 121(5) would fully exempt nationals of States Parties in all cases—even including Security Council referrals, and regardless of where the crimes were committed? Was the message intended to be that there are fully two groups of countries in the world—those which have ratified no portion of the Rome Statute, yet whose nationals may still be subject to the Court's jurisdiction for crimes committed by them on the territory of Member States and those which, by ratifying the Rome Statute of the ICC, can potentially completely avoid any such ICC jurisdiction as applied to amended core crimes—even if the referral comes from the Security Council itself? Could this *really* be what was intended?

When we analyze Article 124, below, and then compare its carve-out of jurisdiction to the language of Article 121(5), the comparison makes a literal reading of Article 121(5) seem even more untenable. By contrast with Article 121(5), the abrogation of jurisdiction rule found in Article 124 (relating to opting out of war crimes provisions for a 7 year period)—expressly limits itself to the Court's state referral and *proprio motu* jurisdiction.⁵¹ It could not be clearer that Article

51. Rome Statute, *supra* note 16, at art 124 (providing, in pertinent part: "Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory."); Rome Statute, *supra* note 16, at art. 12 (stating, in pertinent part:

124 *expressly provides* that the rules of Article 12(1) and (2) do not trump the jurisdictional carve-out for war crimes. Because Article 12 does not cover the grant of ICC jurisdiction based on Security Council referrals (which is set forth in Article 13(c)), this means that the carve-out of the Court's jurisdiction allowed under Article 124 is limited to the type of jurisdiction which may be conferred under Article 12—and does *not* cover any carve-out of jurisdiction in cases where the Security Council refers a case. Hence, the exception to jurisdiction enunciated in Article 124 is qualitatively narrower and more explicit than that articulated in Article 121(5).

The distinct difference between the texts of Articles 121(5) and 124 raises the obvious question: If Article 121(5) meant to completely override the general jurisdictional rules imbedded within Article 12 (including its territorial jurisdiction implications) why did it not say so in the very same way that such exception was expressly and unambiguously articulated in Article 124? Why doesn't Article 121(5), like Article 124, begin with language that says "Notwithstanding Article 12 paragraphs 1 and 2"?

By contrast, Article 121(5) contains no limitation at all on its exception from the Court's jurisdiction. Upon a literal reading, *taken in isolation*, this would seem to imply that the carve-out of jurisdiction under the second sentence of Article 121(5) is *absolute*. Presumptively, therefore, if we look only to the literal language of Article 121(5) (as opposed, for example, to the jurisdictional carve-out

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.”);

Rome Statute, *supra* note 16, at art. 13 (“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) 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; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”).

language found within Art. 124) —not even a referral by the Council would be sufficient to vest the Court with jurisdiction over the national of a State Party which has failed to ratify an amendment to the core crimes provisions, regardless of where the crime is alleged to have been committed. Once again, the question arises: Can such an overly broad interpretation of Article 121(5) possibly be construed as reasonable in light of the entirety of the Rome Statute?

But any confusion caused by the seeming conflicts within the Rome Statute is neither the fault nor the work of the Kampala Review Conference. Beyond this, one might well argue that the provisions of the Kampala compromise are controlling as to the aggression amendments *if for no other reason* than the Rome Statute, *with quite specific and unique reference to the crime of aggression itself*, expressly authorized the Assembly of States Parties to adopt a provision “defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”⁵² And that is *precisely* what the Review Conference did in Kampala. It would appear more than a bit inconsistent to argue that Article 121(5) is a *lex specialis* rule that should be construed to expressly supersede the provisions of Article 12 without conceding that the language of Article 124 provides language that is *much more precise* in doing so.

As to arguments regarding the potential *lex specialis* implications of Article 121(5)⁵³, it should be noted that—as to the question of jurisdiction over the crime of aggression—you can hardly get more *lex specialis* than the very specific and explicit authorization contained in Article 5.2. It quite directly references the Assembly of States Parties’ authority with respect to the adoption of a provision “defining the crime [of aggression] and *setting out the conditions under which the Court shall exercise jurisdiction* with respect to *this* crime.”⁵⁴ The language of Article 5.2 specifying that the adoption of such a provision be in accordance with Articles 121 and 123 arguably goes much more to the question of amendment *procedure* and issues related to *entry into force*, rather than to issues pertaining to jurisdiction—especially in light of the fact that it is clear, according to the language of Article 5.2, that it will be the adopted provision, itself, which will specify “the conditions under which the Court shall exercise jurisdiction”⁵⁵ *with respect to the crime of aggression*.

52. Rome Statute, *supra* note 16, art. 5(2).

53. The *lex specialis* argument is that Article 121(5) is so specific that it effectively “trumps” the more general jurisdictional rules set forth elsewhere within the Statute. Rome Statute, *supra* note 16.

54. Rome Statute, *supra* note 16, art. 5(2) (emphasis added).

55. Rome Statute, *supra* note 16, art. 5(2).

Moreover, one cannot ignore the fact that a literal reading of Article 121(5) would seem to allow that section's carve-out of jurisdiction to exempt the nationals of States Parties even where the Security Council has referred an aggression case. This factor, alone, would seem sufficient to demonstrate that Article 121(5) cannot possibly be conclusively interpreted without considering other relevant provisions within the Statute.

Any suggestion that the Kampala amendments are being inappropriately *interpreted* with respect to the conclusion that their opt-out provisions apply to both ratifying as well as non-ratifying States Parties raises a number of questions. For example, if, in Kampala, the consensus was that the opt-out mechanism *only* applies to ratifying States Parties, why wasn't such a limitation spelled out within the language of the amendments themselves or agreed to and included in the understandings which accompanied them? Moreover, if mere non-ratification was seen in Kampala as sufficient to completely exempt nationals of States Parties even if they commit the crime of aggression on the territory of ratifying States Parties, why all the fuss in Kampala in crafting the compromise opt-out mechanism in the first place? Thus, rather than being criticized as flying in the face of the Rome Statute, the conclusion that the opt-out regime applies to *all* States Parties should perhaps more charitably be viewed as a matter of faithful adherence to the quite specific jurisdictional provisions adopted by consensus in Kampala.

Finally, notwithstanding the mental gymnastics that may accompany a discussion of how Article 121(5) should properly be construed, the question of whether a State Party wishing to avoid the Court's Article 15 *bis* aggression jurisdiction may need to opt out even if it has not ratified the aggression amendments is more about appearances than about substance. The real question is whether the promise made in Kampala "to activate the Court's jurisdiction over the crime of aggression as early as possible" will be kept by those who made it.

IV. U.S. SUGGESTIONS FOR MITIGATION OF ITS CONCERNS

In light of the expressed U.S. concerns with the Kampala amendments, Under-Secretary Sewall suggested a series of possible steps to mitigate the concerns:

- Governments and parliaments of states parties could formally state their views on the questions raised here. They can clarify the scope of which acts are covered and confirm that the amendments do not apply to states parties that do not ratify the amendments. They could do this, for example, in statements at upcoming sessions of the ICC's Assembly of States Parties, or in written instruments communicating their decision whether or not to ratify.

- Perhaps most critically, if there were eventually a decision by the Assembly of States Parties to activate the amendments, states could insist that that decision contain clear guidance on these issues.
- States parties could clarify how the “opt-out” provisions contained in the amendments might be used to help address the concerns raised here and serve as a guardrail or check on an overly broad application of the amendments.
- States parties could also consider other steps, including the possibility of adopting further understandings to ensure these amendments do not work at cross-purposes to the critical goal of preventing atrocity crimes.⁵⁶

V. FURTHER REFLECTIONS AND CONCLUDING THOUGHTS

The proposed mitigation steps set forth above are generally tailored to address concerns regarding clarity, both as to definition and jurisdictional reach. They are also arguably aimed at circumscribing the scope of the Court’s aggression jurisdiction. Regardless of the practicability of such proposed mitigation steps, the U.S.—though not a party to the Rome Statute—still has considerable influence, and it would, therefore, be surprising if the U.S. concerns were simply ignored. Yet the United States is conspicuous in leading the world in military spending as well as export of arms,⁵⁷ at least some of which may be suspected of having contributed to the commission of some of the very atrocity crimes to which the ICC and the U.S. stand in opposition.⁵⁸ The extent

56. *Sewall Speech*, *supra* note 29.

57. See Skye Gould & Jeremy Bender, *These Charts Show the Immensity of the US’ Defense Budget*, BUS. INSIDER UK (Aug. 31, 2015, 3:25 PM), <http://uk.businessinsider.com/the-us-defense-budget-is-massive-2015-8?r=US&IR=T> [https://perma.cc/JN54-7EHP] (“In 2015, the US’ estimated military budget is expected to be \$601 billion, down from \$610 billion spent in 2014. However, even with the budgetary drawdown, the US still far outspends the next six highest spending nations.”); Thom Shanker, *U.S. Arms Sales Make Up Most of Global Market*, N.Y. TIMES (Aug. 26, 2012), http://www.nytimes.com/2012/08/27/world/middleeast/us-foreign-arms-sales-reach-66-3-billion-in-2011.html?_r=1 [https://perma.cc/37LF-24RT] (“Overseas weapons sales by the United States totalled \$66.3 billion last year, or more than three-quarters of the global arms market, valued at \$85.3 billion in 2011. Russia was a distant second, with \$4.8 billion in deals”).

58. That the current U.S. administration is indeed committed to helping prevent atrocity crimes is beyond question, and such commitment is clearly evidenced by the ongoing work of the Atrocity Prevention Board, established by the Obama Administration in 2012. Yet, in what may be viewed by some as an anomalous contrast, in the recent federal court

to which global perceptions with respect to such factors may have a bearing on reactions to U.S. overtures regarding clarifying or limiting the Court's aggression jurisdiction is an open question.

The suggestion that confirmation should be forthcoming from the ICC community to the effect that nationals of State Parties which have neither ratified nor opted out of the Kampala amendments should be immune from the Court's independent aggression jurisdiction may very well meet significant resistance. This is so because the bundle of provisions that was adopted by consensus in Kampala represented what could perhaps best be characterized as a fully integrated compromise package. In describing the nature of the deal struck there, Harold Koh, at the time Legal Advisor to the U.S. Department of State—and a key negotiator of the package agreed to at the Kampala Review Conference—put it this way: “Every single piece of it was a critical part of what was decided.”⁵⁹ He was, of course, correct and there can be no getting away from his conclusions in this regard.

It is impossible not to acknowledge that support for every aspect of what was agreed to in Kampala may be a bit difficult to trace back to specific language contained in the Rome Statute.⁶⁰ For example, the requirements that, before the Court may assert its aggression jurisdiction over anyone, the Kampala amendments must not only be ratified by thirty States Parties, but re-approved by the Assembly of States Parties after January 1, 2017, are certainly not expressly found

case of *Sundus Shaker Saleh, et al. v. George W. Bush, et al.* (involving an Iraqi citizen displaced by the U.S.-led invasion of Iraq in 2003), counsel for the United States have argued, among other things that:

The plain language of the Westfall Act clearly immunizes any government official who acts within the scope of employment. It is irrelevant whether plaintiff has successfully alleged a violation of such international law norms. The Westfall Act grants absolute immunity to federal employees for “wrongful” acts taken within the scope of employment, whether or not they are illegal.

See Brief for Appellee at 20, *Saleh, et al., v. Bush, et al.*, 2015 WL 4937588 (9th Cir. 2015) (No. 15-15098). The government brief in question goes on to point out that, for purposes of immunizing government officials under the Westfall Act, it is irrelevant whether they have committed “scope of employment” acts such as torture, rape, or “egregious torts that violate *jus cogens* norms.” *Id.* at 27-28.

59. American Soc’y Int’l Law., *The U.S. and the International Criminal Court: Report from the Kampala Review Conference*, YOUTUBE (June 18, 2010), available at <https://www.youtube.com/watch?v=hJcUqEwrNS4> [<https://perma.cc/KK4Z-AN3Z>] (statement of Harold H. Koh at 1:04:17).
60. *See* INT’L CRIM. CRT., *supra* note 19; *see also* S.C. RC/Res. 6, *supra* note 29.

within the language of the Rome Statute. These two constraining hurdles were developed during the Kampala review conference, where they were agreed upon as a matter of reaching a compromise solution capable of being approved by consensus—within the limits, of course, of what might reasonably be sustained as positions consistent with the Statute. As the consensus achieved in Kampala demonstrates, the establishment of such hurdles was accepted as being sufficiently within the competence of the Review Conference so as not to disturb the process of reaching an effective compromise agreement.

It is true, of course, that Article 121(5)—a mixed provision, touching on entry into force as well as jurisdiction—does little to advance the cause of clarity. There can be little argument that, read literally and isolation, at first blush it would appear to entirely exempt nationals of non-ratifying States Parties from the Court's exercise of aggression jurisdiction. Yet, as discussed above, there is simply no way that such a construction can be squared with the broader language of the Statute, nor with the delicate balance of compromises that were arduously negotiated and ultimately agreed to in Kampala.⁶¹

Given the substance of Under-Secretary Sewall's speech, its title "The ICC Crime of Aggression and the Changing International Security Landscape," offers food for thought. In concluding her remarks, she candidly emphasized, "[t]o be sure, the activation of the Court's jurisdiction over aggression is not a step that the United States has sought."⁶² This would certainly seem to imply a preference for a Court whose hands continue to be tied as to the crime of aggression. Because of this, some may suspect that the U.S. is more interested in maintaining the current international landscape than in changing it.

It may well be said that the current state of global relations more nearly represents an *insecurity* landscape, than one of security, whose horizon happens to be dwarfed by U.S. prominence in many respects, including as the world leader in global arms exports and military spending.⁶³ Because of this, some may question whether U.S. non-support of the Kampala amendments, like its non-membership in the Court itself, may perhaps be based on perceived geopolitical, rather than merely humanitarian, interest and objectives.

61. See *supra* Part III.D.

62. *Sewall Speech*, *supra* note 29.

63. *The United States Leads Upward Trend in Arms Exports, Asia and Gulf States Arms Imports Up, Says*, STOCKHOLM INT'L PEACE RES. INST. (Mar. 16, 2015), available at <http://www.sipri.org/media/pressreleases/2015/at-march-2015> [<https://perma.cc/LS8R-4DDW>].

The remark that activation of the Court's jurisdiction over aggression is not a step that the United States has sought makes rather short shrift of the broader track record of the United States and its historic role in working to establish aggression as a prosecutable international crime. Without the insistent leadership of the United States, the waging of aggressive war—or, as it was characterized by the IMT, war “in violation of international treaties, agreements or assurances”—would never have been made the cornerstone of the criminal indictments at Nuremberg, nor unanimously affirmed as an international crime in December of 1946 by the U.N. General Assembly.⁶⁴

There is no question that the American architects of the Nuremberg Trials led the way in the last century in criminalizing aggressive war-making. In doing so, they certainly took a historic step forward. Perhaps with this in mind, Justice Jackson, in his opening statement before the IMT, unapologetically observed, “[u]nless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law.”⁶⁵

So, too, today, in proscribing not only *wars* of aggression, but also serious *acts* of aggression, the Kampala amendments may similarly represent a historic step forward. Whether current U.S. policy will ultimately have the effect of contributing to the making of such history, or, instead, to its unmaking, yet remains to be seen.

64. See G.A. Res. 95, U.N. Doc. A/64/Add.1 (1947).

65. INTERNATIONAL MILITARY TRIBUNAL, *supra* note 40, at 147.