Smoothing out the rough edges of the Kampala Compromise

by Robbie Manson.[1]

Introduction.

Last week the first Review Conference of the Rome Statute for the Establishment of an International Criminal Court 1998 (hereafter "*the Rome Statute*"), was concluded at the Speke Resort & Conference Centre, in Munyonyo, Kampala. The principal order of business for this, the first Review Conference of the Rome Statute, was the fulfilment of the implicit commitment, as set out in article 5(2)[2], to amend the Statute so as to adopt amending provisions incorporating both the definition of the crime of aggression ("CoA"), and, much more controversially, the conditions for the exercise of jurisdiction ("EoJ") by the International Criminal Court ("Court") with respect to that crime.

In the event, despite much scepticism that such an amendment dealing with both aspects was not currently politically possible, and following much diplomatic horse-trading, a resolution setting out an amendment to the Statute incorporating both aspects was adopted, by consensus, at around 00:40 am on the morning of Saturday 12 of June 2010.For ease of reference the text of that Resolution is set out in Appendix 1 below.

The first aspect, which proved to be the least controversial, was the setting out of the definition of the crime in a new article 8(*bis*) in the Statute. This language comprised the culmination of quite literally a decade's work since the Rome Conference by the SWGCA and its predecessor body. It comprises in essentially two paragraphs, the first setting out the definition of the individual criminal act, whilst the second then sets out the definition of the state act of aggression, essentially by means of the direct incorporation of the main elements of the definition as was in turn set out previously in UN General Assembly Resolution 3314 (XXIX) of 14 December 1974. With the singular exception of the placement of this new article within the statute, this element of the resolution, having been through so much examination and analysis, is now largely a fully accepted working compromise on the issue, and accordingly does not need to attract much further attention by this article.

The second aspect, however, on the conditions for the exercise of jurisdiction by the Court, as was well appreciated long before we all came to Kampala, proved to be the far more politically controversial and diplomatically vexed issue to resolve. In the event, two new articles have been incorporated into the Statute to deal with this aspect.

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[1] I attended the Kampala Review Conference and was present for all the debates on the Aggression question as a representative of the UK Coalition for the ICC ("UKCICC") and on behalf of my own civil society NGO the Institute for Law, Accountability and Peace ("INLAP")

[2] *"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.* " Also and more to the point the terms of paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (at Rome), called upon the Preparatory Commission for the Establishment of the Court, to continue the work towards an agreement among participant states on these provisions, which was subsequently work carried on by the Special Working Group on the Crime of Aggression ("SWGCA"), established in 2002 under the auspices of the then established Assembly of States Party to the Rome Statute ("ASP"), and which concluded with a final draft resolution in that Group's final Report, as adopted by the resumed 7th session of the ASP.

New article 15(*bis*) : must you first 'opt-out' before 'opting-in' ?

The first new provision is added after the existing art 15 in the Statute, on the powers of the Prosecutor to proceed with an investigation of his own motion (*proprio motu*), and is titled article 15(*bis*) exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*). As this title indicates it sets out the further conditions or modalities for the EoJ by the Court with respect to the CoA in the case where the Prosecutor becomes seized of a matter either through a referral by a state party ("SP"), per the art.13(*a*) procedure, or instead where he becomes seized of a matter on his own motion (so-called '*proprio motu'*), as per the art.13(*c*) procedure.

From the point of view of those who have always contended for the largest possible politically acceptable jurisdiction for the Court the most notable aspect of this new provision is the absence of the limitations on the EoJ by the Court with respect to its relationship with the United Nations Security Council ("the Council") on the issue of the pre-determination of a state act, as previously proposed in earlier drafts.

Whilst, the Prosecutor is required to ascertain whether the Council has made any prior determination on a state act committed by a state concerned, and in the instance where it has is then empowered to proceed forthwith[3] ; in the instance instead where it has made no such determination then, after the lapse of a further 6 months, the Prosecutor is instead now empowered to initiate an investigation upon his only having to obtain an authorisation from the full pre-trial division of the Court itself, an example of an internal filter against so-called 'politicized' allegations. In particular, there is no requirement for any prior authorisation or determination by the Council, let alone an exclusive such role for that political body. Most notably the earlier proposal for some form of so-called 'green-light', whereby the Council resolves to give the Prosecutor permission to proceed with an investigation, including as to a possible aggression crime, without its having to also actually determine in advance the commission of a state act by any state involved, has not in the end been incorporated. Consequently, neither of the 'Alternative 1' elements, as set out in the draft resolution presented at the outset of the Conference[4], have in the end made it into the Statute, either exclusively, or even as part and parcel of a wider package of filter measures. This constitutes a remarkable apparent concession by those SPs who are also permanent veto wielding members of the Council.

On the other hand, certain provisions are now included which clearly very seriously limit or reduce the scope of the Court's future jurisdiction over the crime. In particular, a so-called 'opt-out' provision has now been added, permitting SPs to literally 'opt-out' of the EoJ by the Court, with respect to any CoA allegation arising out of any state act allegedly committed by that SP[5]. This 'opt-out' is not time limited, although the provision enables a withdrawal of the opt-out declaration to be made at any time and requires a 'good-faith' review of such a withdrawal within 3 years of the declaration in any event. Given that this entire amendment is declared in the pre-amble to be subject to acceptance or ratification and entry into force ("EiF") on a state-by-state basis, as per the provisions set out in article 121(5) of the Statute[6], there is a clearly a very tricky issue as to just how the terms of this 'opt-out' provision is intended to interact, with the existing terms of the so-called 'opt-in' provision, as per the notorious second sentence of that article[7].

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[3] See para 6 & 7 in the new art.15(*bis)*

[4] See in particular proposed Alternative 1 options for article 15(*bis*) paragraph 4 in the draft resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration, which included both Council exclusive predetermination and a 'green light' as options.

[5] See para.4 in the new art.15(*bis)*

[6] See operative paragraph 1 of the preamble.

[7] *" 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."*

In particular, where a SP is yet to lodge a declaration, per art.121(5) accepting or ratifying this amendment, but equally it is also yet to lodge a declaration, per the new 15(*bis*) para.4 opting out of the EoJ, which are clearly two different declarations[8], then in a case coming before the Court, especially before the Office of the Prosecutor ("OtP"), say where the state act involved occurred (at least in part) on the territory of another SP which had at the relevant time already accepted (and not then opted out of) the amendment[9], does the OtP possess jurisdiction absent the 15(*bis*)(4) 'opt-out' declaration by the accused so-called 'aggressor state' ; or does it not possess jurisdiction, absent the art 121(5) 'opt-in' declaration of acceptance by that same SP ? Alas the indications and constructional aids to guide the Court on this point work both ways with respect to the answer to that rather obvious question.

Firstly, at operative para.1 in the preamble specific reference is made to the ability of a SP to exercise the power to declare an opt-out (under the new art 15(*bis*) provision), notwithstanding that is has yet to declare its acceptance or ratification of the amendment itself under the existing para.121(5) provision[10]. A reasonable inference from this reference is that, absent such an 'opt-out' declaration, the SP concerned will be subject to the Court's EoJ, notwithstanding its also not yet having declared its acceptance/ratification of the amendment itself. Why else would such a clarification be included ?

However, against this must be considered that included in the proposed Annex III 'understandings' when we came to Kampala, there was proposed for possible inclusion in the amendment resolution, a so-called "*positive*" 'understanding' option[11] on the effect of the notorious art.121(5) second sentence, which in effect would have also made it plain that the Court possessed just such a jurisdiction in the case of a state act committed on the territory of an accepting SP, even where the accused so-called 'aggressor SP' had not, at the relevant time, declared its acceptance/ratification of the amendment, per art.121(5) first sentence. But that proposed 'understanding' never made it into the final text of the amendment resolution, and accordingly the very absence of that so-called positive understanding, from the Annex III understandings in the final resolution, is itself some clear evidence from the preparatory paperwork, the *travaux preparatoires* ("TP"), that this 'positive understanding' did not find sufficient support within the ASP to secure its inclusion in the Resolution.

Accordingly, it might reasonably be said to follow that, if this 'positive understanding' was not supported then it logically follows that the alternative 'strict reading', is the preferred interpretation of the second sentence. Such a strict reading is after all arguably wholly consistent with the provisions of article 40(4) of the Vienna Convention on the Law of Treaties (1969), which provides in short that a SP to a multilateral treaty shall not become bound by any subsequent amendment of the provisions of that treaty, unless and until it also subsequently unilaterally agrees to become a party to that amendment. Alas, by way of a further twist, this strict or plain reading construction is essentially indistinguishable from to so-called 'negative understanding', also proposed in the draft resolution on coming to Kampala as an alternative 'understanding'[12] to the so-called positive

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[8] Although there is no reason why they could not be contained within the very same declaratory communication, and in practice probably would be.

[9] Giving rise to simple territorial jurisdiction (as per art 12(2)(*a*) of the Statute)

[10] *"... 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."*

[11] RC/WGCA/1 page 7 Annex III understanding 6. Alternative 1 : *"It is understood that article 121, paragraph5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment."*

[12] RC/WGCA/1 page 7 Annex III understanding 6. Alternative 2 : *"It is understood that article 121, paragraph5, second sentence, of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment."*

understanding, but which again also did not make an appearance in the final Annex III understandings, as in the adopted Review Conference resolution.

It is especially notable, in this regard, that the reference to "any State"[13] in this strict reading or negative proposed understanding, applies equally to non states party ("NSP"), as it does with respect to non accepting SPs ("NASP"), and that this equality of position or treatment, as between NSPs and NASPs, is the very view that has won expression in the other principal limitation expressed in this new article (15(*bis*) provision), and which expressly grants a similar exemption from the Court's EoJ with respect to NSPs, in identical language to the way in which such exemption is expressed in article 121(5) second sentence with respect to NASPs, as to which see paragraph 5 in the new article[14].

Accordingly, this history of the TP points strongly and conversely to the construction whereby any SP which is yet to accept/ratify the amendment, as with the position of any NSP, is exempt from the EoJ by the Court unless and until it does so, irrespective as to whether or not it has also lodged an article 15(*bis*)(4) opt-out declaration. Rather that it is only at the point where it is prepared to declare its acceptance/ratification of the amendment that it then needs to also consider declaring an opt-out, under the new art.15(*bis*) para. 4 provision, if it wishes to continue to benefit from its exemption from the EoJ by the Court. Of course, one may well ask why would a SP ever wish to declare its acceptance/ratification of the amendment with respect to the CoA, only to then move immediately to declare its opt-out from the EoJ by the Court with respect to that very crime.

However, there are several reasons, grounded in political expediency whereby a SP may well wish to be seen to support the general principle of the Court's jurisdiction with respect to the crime, whilst preserving '*for the time being',* perhaps even only on a temporary basis, its own continuing exemption from the EoJ by the Court, with respect to that crime and its own nationals and territory.

This is clearly, I would submit, a most unfortunate and potentially highly contentious state of affairs which could be rectified by the simple inclusion of a further understanding in Annex III to the Conference Resolution, setting out once and for all the true and actual consensus on the position, always assuming that is that any such consensus actually exists *!*

My proposal would be a further understanding making it clear beyond question that any SP wanting to be sure of its exemption from the EoJ by the Court, with respect to the CoA, especially with respect to the case where the state act concerned occurs (at least in part) on the territory of an accepting SP, should lodge an article 15(*bis*)para(4) opt-out declaration, at the earliest opportunity, which I suspect and assume always was the basic intended consensus[15].

Delay in the Exercise of Jurisdiction is in truth a deferral of the Activation of the Jurisdiction.

The next serious limitation on the scope of the Court's future jurisdiction over the crime derives from the two new provisions added to the amendment, both as respects the new article 15(*bis*)

[13] Rather than the term "State Party" as used in the first or so-called positive understanding as @ ft.nt. 9 above

[14] *"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."*

[15] Such an understanding might read as follows : *"It is understood that, notwithstanding the provisions of the second sentence of article 121, paragraph 5, of the Statute, in the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction, as per article 12 of the Statute, in respect of an act of aggression committed against a State Party that has accepted the amendment, except in so far as the act of aggression concerned was committed by a State that had at the relevant time lodged a declaration under paragraph 4 of article 15(bis) of the Statute."*

and the new article 15(*ter*)[16] in equal measure, and which were negotiated under the premise of their amounting to a delay in the EoJ of the Court. The first of the new provisions[17] is a reasonably straight forward provision, simply delaying the EoJ by the Court, until the fulfilment of a further modality, namely until one year after the acceptance or ratification of the amendment by 30 SPs.

Two short points are worth making with respect to this provision.

Firstly, this is not I perceive generally regarded as a seriously onerous new limitation, given that the EiF of the Rome Statute itself, was made subject to the acceptance or ratification by 60 SPs[18] and in the event this proved to be capable of fulfilment within only 4 years after the Rome Conference adopting the Statute itself (1998 to 2002). Secondly, whilst this condition or modality is clearly additional to the provisions, as set out in article 121(5) of the Statute, on the EiF of the amendment itself[19], this is in no sense inconsistent or incompatible with that provision, since this further modality deals with the EoJ by the Court, rather than the EiF of the amendment, which, with respect, is a distinction with a difference. It is the uncontroverted and understood position that, whilst an amendment to the statute establishing the jurisdiction of a court, must naturally first enter into force, before that court may then exercise its jurisdiction with respect to that amendment, such that any suggestion of EoJ prior to EiF would be incompetent ; there is nothing in that which prohibits or questions the ability of the statute making body, providing for a delay in the EoJ by the Court, with respect to the said amended provisions on its jurisdiction, until some point in time or fulfilment of a further condition, and which occurs after the satisfaction of the conditions laid down for the EiF of that said amendment itself.

The second such new provision on the “delayed EiF”, however, was a very last minute compromise, indeed the last comprise, and which clearly proved necessary for the acquiesce to consensus on adoption, by those SPs[20] for whom their position on the, as they see it, so-called ‘principle’ of the, exclusive right to pre-determination of a state act by the Council was, and remains, a red line concern. This further provision[21] in truth provides for a complete deferral on the activation of the new jurisdiction, unless and until a further decision to activate is taken by the ASP, at some opportunity after 1st January 2017.

The only factors which to some degree ameliorate the effect of that compulsory deferral, as opposed to mere delay, is that (*a*) the future decision can be made at any meeting of the ASP, it need not wait for a further full Review Conference called by the UN Secretary General, and (*b*) the vote, necessary to activate the Court’s jurisdiction with respect to this amendment, is to be achieved by only the concurrence of 2/3rds of the ASP, as per the article 121(3) proportion necessary, failing any consensus, for adoption of an amendment itself ; rather than the requisite ratification by 7/8ths of the ASP of an amendment, as required for the EiF of an amendment, under the article 121(4) provisions of the Statute.

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[16] This new provision deals with exercise of jurisdiction over the crime of aggression in the case of a Security Council referral under the provisions of article 13(*b*) of the Statute. There is no other limitation or modality on the EoJ by the Court in this instance, in particular no opt-out for SPs and no exemption for NSPs.

[17] As to which see para 2. In the new 15(*bis*) , repeated again at para 2 in the new 15(*ter*).

[18] See Article 126 of the Statute

[19] Which in essence provides that this amendment 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

[20] Namely France & the United Kingdom

[21] As to which see now common paragraph 3 in the new article 15(*bis*) repeated in article 15(*ter*), as follows : *“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…”*

A friend has analogized this outcome as equivalent to that of a desperately fragile patient, who is placed in a chemically induced coma, in order to preserve his vital organs until conditions become more conducive to exposing his anatomy to the rigors of the 'real world'. But, if this is so, then what are the essential surgical procedures, needing to be performed on the comatose patient, in order to patch him up in preparation for his eventual revival ?

The need to re-write the substantive amendments as amending article 5 only.

The moment of highest drama in the conference, was that of the intervention by the Head of the Japanese delegation taken immediately prior to the ASP President's motion on the consensus being put. He gave every indication, until the last possible moment, that, far from the UK or France being the one or other of the SPs to oppose consensus, as had been variously feared or anticipated all week by those present, it was going to be Japan which was prepared to standout amongst the Assembly and to oppose such a consensus. To be clear it was by that time very painfully obvious to all present, that there were simply insufficient accredited SPs present at the conference, with instructions permitting them to be free to vote on the adoption of the resolution, absent any such consensus, and as per the provisions of article 121(3) of the statute, so as to prevail in a vote on adoption, and which would have required a concurrent vote of 75 SPs, being 2/3^{rds} of the current composition of the ASP, being 111 states following the most recent ratification by Bangladesh.

However, as I say at the last possible moment, the Japanese Head of Delegation merely asked for the formal abstention of Japan on the consensus to be noted. Astonishingly, his main cause of dispute with the adoption of the final compromise conference resolution, was in essence a technical and constructional matter, rather than any policy disagreement in principle with its provisions. He had previously presaged his technical problems with the language in the proposed amendment, earlier in the week, when he first responded, setting out his legal and technical difficulties with respect to the first detailed compromise proposal, which had come forward during the earlier part of the negotiations. This was a non-paper in the name of a tri-partite group of SPs, namely Argentina, Brazil & Switzerland, which came to be known simply as the "ABS proposal". The precise text of that proposal is set out for historical reference in the second appendix below.

However, in short the ABS proposal amounted to a suggestion that the resolution on adoption of conditions be divided according to the differing trigger mechanisms[22], in a similar fashion as was finally adopted by the President's conference paper, but that whilst the Security Council referral condition, per an art.13(*b*) referral, be available for ratification and EiF at an early opportunity under the art 121(5) procedure ; further conditions and modalities relevant to the other two referral trigger mechanisms, state party referral (per art 13(*a*)) and prosecutor referral *proprio motu* (per art.13(*c*)), should instead be ratified and EiF under the art 121(4) procedure instead, requiring the subsequent acceptance/ratification by 7/8^{ths} of the ASP prior to EiF.

The Japanese problem with this approach, again in short, amounted to the suggestion that ratification and EiF of amending provisions, by both of the different and <u>mutually exclusive</u> procedures, set out under paras.(4) & (5) of article 121 respectively, applied differently solely on the premise that they addressed themselves to different trigger mechanisms, under the extant provisions of article 13, was not a consistent or legally sound basis upon which to draw such an important and consequential distinction, on the appropriate procedure for the acceptance/ratification and EiF of the politically contentious amendment(s) on the conditions for EoJ with respect to the CoA.

[22] As per article 13(*b*) Security Council referral, for the one part ; and, article 13 para (*a*), per SP referral, and (*c*) per prosecutor referral *proprio motu*, on the other.

Instead, in a later intervention the Japanese proposed that, since it was apparently the inadequacy of the current language in article 121 on an acceptance/ratification and EiF procedure, suitable for the adoption of an amendment on the CoA which was the problem, that instead an amendment to that amending procedure itself should be adopted[23]. Effectively, allowing for a bespoke procedure to be created, especially for the differential EiF of a subsequent amendment of the statute, on the definition and conditions for EoJ with respect to the CoA. The Japanese expressed the view that with goodwill and a positive and consensual appreciation of the need to overcome this technical difficulty, pursuit of this 'boot-straps' solution need not necessarily involve any over long delay on the eventual adoption of a tailored amendment to the statute on the CoA. It is fair to observe, however, that the optimism inherent in this analysis, was not universally shared.

The response on behalf of the ABS process, given by Switzerland, was in essence to attempt to re-iterate its previous justification for the different treatment, as between the different EiF procedures applied to the different trigger mechanism modalities, on the basis of the contention that different amending articles, dealt with different characters of amending provision. Specifically, that the proposed replacement article 5(2) of the statute, setting out the Security Council pre-determination of a state act or in the alternative at least a 'green-light' proposed modality, in relation to an article 13(*b*) Council referral trigger situation, together with the proposed new article 8(*bis*) on the definition of both the individual crime and the state act, were said to be amendments to the statute incorporating new substantive criminal law aspects of the crime, and therefore requiring treatment under the *lex specialis* provisions of the article 121(5) regime on ratification and subsequent EiF. Whereas, the proposed new article 15(*bis*), dealing with the EoJ with respect to a SP referral & prosecutor *proprio motu* referral trigger mechanism modalities, under article 13(*a*)&(*c*) respectively, were said to represent merely amendments going to essentially procedural matters or aspects of the new crime, and therefore fell to be dealt with under the default ratification and EiF regime, as set out in article 121(4) instead.

For my part, I never found any of this reasoning in the least part persuasive. I would agree with the Japanese assessment that the mere distinction as between the different trigger mechanisms dealt with by the different amending provisions was never any rational justification for applying a different ratification and EiF mechanism *per se.* Equally, the later amending articles within the new provisions, as set out in the ABS proposal, tidying up the loose ends, on the incorporation of a new article 25(3)(*bis*), and amending the existing language of articles 9(1) and 20(3) of the Statute, merely in order to incorporate references to the new article 8(*bis*), were also manifestly largely only of a procedural character, and yet their proposal called for the ratification and EiF of these new provisions under the article 121(5) mechanism also. Consequently, I found the ABS rationale lacked persuasive logic.

However, and quite ironically, I also found the Japanese position to be without strict logic either. As I read the Rome Statute, one can speculate and hypothesize as much as one wishes, as to the underlying rationale and purposes fulfilled by there being two very different and differing provisions, on the ratification and subsequent EiF of an amendment to the provisions of the statute, as set out in paragraphs (4) & (5) of article 121 respectively. For my part I suspect that compatibility with the thrust of article 40(4) of the VCT remained an important consideration for many participants at the time of the Rome Conference. Yet, in the final analysis, the only true basis for applying one provision rather than the other is, for me, quite simply and clearly set out in the language at the start of each paragraph respectively. Namely, that the article 121(4) procedure shall apply "*except as provided in paragraph 5*", and equally the paragraph (5) procedure shall apply with respect to "*any amendment to articles 5, 6, 7 and 8 of this Statute*"[24], and no deeper rationale than that need actually be sought.

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[23] Which, of necessity, would in its turn first have had to have been be ratified & EiF under the art.121(4) provisions, requiring ratification by 7/8^{ths} of the ASP before EiF a year later, and all before, in turn, it could then be used to ratify a later amendment on the CoA.

[24] I am willing to except that the use of the conjunctive participle "and", in this expression, was an oversight, and that it must be construed in the context as if it said "or" instead.

Consequently, the ABS proposal, as originally set out, was I found quite consistent with this rationale, in so far that the proposed replacement for article 5(2), intended for ratification and EiF under the 121(5) mechanism, clearly was an amendment to article 5 of the statute ; whilst, the proposed new article 15(*bis*), intended for ratification and EiF under the 121(4) mechanism instead, was clearly not by way of any amendment to articles 5, 6, 7 or 8 of the statute.

All of that said, and now applying that reasoning to the Conference Resolution on amendment to the statute as finally adopted instead, I do find myself entirely in sympathy with the Japanese technical concerns. To be clear that Resolution[25] calls for the introduction of four new provisions in the Statute, namely a new article 8(*bis*) on definition, a new article 15(*bis*) on the exercise of jurisdiction over the crime of aggression per state referral, or *proprio motu,* a new article 15*(ter)* on exercise of jurisdiction over the crime of aggression per a Security Council referral, and finally a new article 25 paragraph 3, on limiting ancillary liability per the CoA to only a perpetrator in a 'leadership' position. There are also two tidying up proposals to amend the language in the existing articles 9(1) and 20(3) respectively, as I said merely in order to incorporate references to the new article 8(*bis*). It is, therefore, only the first amendment as set out in paragraph 1 of the Annex to the Resolution, calling for the deletion of the existing article 5(2), and that alone, which, to my thinking, falls clearly within the operative language of the opening expression of the article 121(5) provision. Whereas, the conference resolution nevertheless claims that this ratification and EiF procedure is to be applied equally to all of the following amendments as therein set out as well. As much as that has doubtless proved to be a convenient compromise, I concur with the Japanese assessment that it is simply an outright abuse of the current language of art 121(5) of the Statute.

In its further and subsequent intervention, following the adoption of the resolution, the Japanese delegation went on to make it plain beyond misunderstanding, that it regarded this matter as being of such gravity, that, in the event these amendments were to be activated post Jan 2017 as currently drafted, it would regard that as such a serious breach of international legal protocol and logic that it would feel free to withdraw from the Statute. A matter of grave concern indeed, especially so given the scale of that delegation's financial contribution to the functioning of the institution of the Court.

Consequently, I do see the important need, necessary to be satisfied by the 2017 activation at the latest, if not before, to again amend the language of the Statute, as now amended, so as to bring the present amendment proposals in substance, back into strict compliance with the logic and letter of the existing and mutually exclusive article 121 ratification and EiF mechanisms. If we take it that the consensus view is now that all amending provisions, relative to both the definition, and conditions for EoJ, should all be ratified and EiF under the article 121(5) procedure, then again to my mind the only practical and logical way of achieving that aim, whilst remaining consistent with the existing language as already set out, is to alter the placement of those amendments so as to bring them all entirely within a new set of further paragraphs added to article 5 of the statute, and thereby bringing them strictly within the letter of the opening expression of article 121 paragraph 5 of the existing statute.

In Appendix III below, I have set out the way in which such a further resolution, on amendment to the statute as now amended, might be set out so as to achieve that outcome, all be it that amendment is now also necessary so as to delete the new and inconsistent provisions, as now adopted at Kampala, and furthermore that this can only be achieved by an urgent amendment, which alas can only be ratified and EiF under the article 121(4) procedure instead, A possible version of which is for convenience also set in appendix III below, in a second Annex II to the proposed resolution. This should obviously be a matter for urgent consideration by the ASP at the very earliest practical opportunity.

[25] See Appendix I below

Deletion of the art 12(3) reference.

This then leaves me with just one further and relatively minor observation on the tidying up of the Kampala Resolution, which I feel is nonetheless worthy of separate consideration. The issue is with respect to the application of the voluntary and so-called *ad hoc* declaration by a NSP, under the existing provisions of article 12(3), accepting the EoJ by the Court with respect to a particular "crime in question", as that applies in future with respect to the Court's jurisdiction over the CoA.

Until the very last stage during the course of negotiations on the final Friday (11 June) at Kampala, an understanding on the position of NSPs, who later ratify the Statute, and concerning as to when their liability to the EoJ by the Court over the CoA would start, had been included in the Annex III to the President's Conference non-Paper[26].This understanding had expressly made reference to the preservation of this existing provision. However, when the language of the last minute amendment, to provide for a 7 year deferral on the activation of the EoJ, came to be incorporated into these understanding, the decision was taken, seemingly *sub silentio*, to instead simply delete this understanding in its entirety. It had read as follows :

> " 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 that State has made a declaration under article 12, paragraph 3."

Now there are certain manifest issues with this understanding, not the least of which is that a NSP's voluntary declaration, made under art 12(3), is made *ad hoc,* that is made solely for the purpose of the Court's EoJ "*with respect to the crime in question*". Accordingly, it is difficult to see how the effect of that *ad hoc* declaration can be seen to, as it were, linger on so as to continue to have some effect for any other purpose, even before that NSP later ratifies the Statute and becomes a SP. Alas, this language is lifted directly from the wording of article 11 paragraph 2 of the Statute, and therefore this observation applies equally with respect to that provision of the Statute, as it does with respect to this understanding. Of course, in so far as the language is intended to merely convey the meaning that, the subsequent compulsory subjection to the full article 12 jurisdiction of the Court, as entered into prospectively by any new SP, is without prejudice to any *ad hoc* subjection, to which it may have previously voluntarily accepted, by means of an art.12(3) declaration when a NSP, then naturally that is a consistent and logical provision.

However, it is not really this aspect of the understanding to which I wish to make reference, but rather, and more essentially, the fact that it made a specific reference to the effect of an article 12(3) declaration in relation to an understanding of the Court's EoJ with respect to the CoA. The importance of this reference comes into force when one now turns to consider the effect of the provisions of the new article 15(*bis*) paragraph 5, which states as follows :

> "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."

The issue then becomes clearer. If a NSP were to lodge an article 12(3) *ad hoc* declaration, with respect to a situation including as to a CoA investigation, would the Court possess jurisdiction to proceed per that paragraph, or not possess such jurisdiction per this one ? In short, does article 12(3) apply to a CoA or not? When the 'understanding' was incorporated in Annex III to the Resolution, it would have served as powerful evidence of the intention that the answer to that question was intended to be this it does apply. However, now that the entire understanding has been dropped what are we left with ?

[26] See for instance understanding 4 in Annex III in the President's non-paper dated 11 June @ 15:00 hrs

In the world of *real politic* this consideration is no mere theoretical issue. If a NSP is accused, say before the Council, of being guilty of aggression, then it makes a very important political difference as to whether or not that State can say to the world with justification "*well of course although not a party to the ICC, we would be quite happy to refer this particular case to that Court for its judgement vindicating our actions ; but, alas, the Statute bars it from exercising its jurisdiction with respect to a non-state party accused of aggression, even if that state is willing to accede to its jurisdiction in the case*."

As I discovered this is a political nuance not lost on many NSP who were present at Kampala, most especially from the middle-east region, and for whom such a distinction could make a very important difference, in due course, as to whether or not they would be willing in future to ratify the Statute. Accordingly I would advocate that a clarification of any consensus on this matter be sought, by the proposal to add to the end of the current article 15(*bis*) para (5) the following text :

"... , unless that State had lodged a declaration in accordance with article 12 paragraph 3."

Conclusions

The interaction of geo-politics & diplomacy, on the one hand, with legislative clarity and certainty on the other, was always going to be an uncomfortable partnership, which makes for very poor bed-fellows. If two diplomats can walk away from a negotiation with an identical piece of paper, about which each can 'legitimately' claim an interpretation, diametrically opposed to the other, that is regarded as a triumph of diplomacy. However, it is also a formula for future catastrophe when it comes to drafting legislation. The atmosphere at Kampala was I accept fraught with apprehension that a consensus on nothing more than the definition of the CoA was all that was realistically achievable at best. Accordingly, those most directly responsible for hammering out a viable compromise, and which achieved also a full text on conditions for the EoJ, which truly reflected the best consensus position available, are to be warmly congratulated on the success of their efforts.

However, we are also here talking about a legislative statute, setting out the precise constitutional parameters for the exercise of jurisdiction by a permanent international law tribunal. We simply cannot be content to be satisfied with leaving in perpetuity some of the very rough edges, produced by all of that hammering, for the judges of the Court to grapple with bloodied hands at some future date. The deferral on the activation of the provisions, now gives the ASP seven years within which to smooth out the roughest of those rough edges, and I for one think that at least some of that time, could hardly be put to better use than its choosing to do so.

Accordingly, I offer the following three measures as a suitable place for the ASP to start that process :

1. Adopt a further understanding, as per footnote 15 above, setting out a clear position with respect to the Court's jurisdiction over a state party which has neither accepted or ratified the amendment, nor yet declared an opt-out pursuant to the new art.15(*bis*)para(4) provision ,

2. Adopt a new resolution, deleting the three new substantive criminal law provisions, and replace them with three new provisions amending article 5 of the statute instead, thereby making those amendments fully consistent with the opening language of the article 121(5) EiF procedure ,

3. Finally, further amend the new art 15(*bis*)para(5) provision, to reintroduce a reference to the availability of an art 12(3) non state party *ad hoc* declaration, also with respect to the Court's future exercise of jurisdiction over the crime of aggression.

Robbie Manson
For and on behalf of INLAP

St.Dogmaels, Pembrokeshire
18 June 2010.