

## THE CRIME OF AGGRESSION: THE UNITED STATES PERSPECTIVE

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At the 2010 Review Conference in Kampala, the states parties to the Rome Statute of the International Criminal Court (ICC) decided to adopt seven amendments to the Rome Statute that contemplate the possibility of the Court exercising jurisdiction over the crime of aggression subject to certain conditions. One condition was that the exercise of jurisdiction would be “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,” and another was that such jurisdiction could be exercised “only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.”<sup>1</sup> As these dates approach, we—two lawyers who represented the United States at the Kampala conference and who worked many hours on the United States’ reengagement with the ICC during the Obama administration—thought it an appropriate moment to take stock of where we are, how we got here, and where we might or should be headed with respect to the crime of aggression.

### I. THE ROAD TO KAMPALA

The relationship between the United States and the ICC has been rocky,<sup>2</sup> an awkwardness in which the crime of aggression issue has prominently figured. From the outset, the United States expressed deep misgivings about jurisdiction over that crime. Speaking in 1995 before the UN General Assembly’s Sixth Committee, the U.S. representative underscored the problematic nature of the issue:

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<sup>1</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 [hereinafter Rome Statute]; International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Res. RC/Res.6, Arts. 15 *bis*(2–3), 15 *ter*(2–3) (June 11, 2010). The resolution on the crime of aggression, as well as the other resolutions from the Kampala conference, is contained in the Review Conference’s Official Records, ICC Doc. RC/11 (2010). Part I includes the proceedings, and Part II the resolutions, declarations, and various annexes. The Web page for the Assembly of States Parties, [http://www.icc-cpi.int/en\\_menus/asp/Pages/asp\\_home.aspx](http://www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx), provides access to all official records, general debates, and other records and documentation. The Rome Statute itself and other legal texts are available at [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/Pages/legal%20tools.aspx](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/Pages/legal%20tools.aspx).

<sup>2</sup> For a recent comprehensive review, see Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT’L L. 525 (2013).

This is fundamentally a crime of States, as to which the Security Council would have to play a central role. It thus presents all the risks of politicization in a serious form. It is, moreover, a crime which is still very ill-defined. The Nuremberg Tribunal did not have to confront this problem, as it was dealing, after the fact, with a clear and specific case. In the abstract, however, it is not at all universally established what fits even within the limited concept of “waging a war of aggression.” What are the possible defenses or mitigating factors in connection with such a charge? What if it concerns disputed territory?<sup>3</sup>

The U.S. representative went on to question how “controversial concepts such as humanitarian intervention or a war of liberation” would be handled, saying that “[i]ncluding the crime of aggression would require clear, universally-accepted answers to these questions.” She urged that it would be far better for the negotiators to focus, instead, “on the core crimes of international humanitarian law for which there is universal support.”<sup>4</sup>

The treatment of aggression contributed significantly to the sense of disappointment with which the United States reacted to the ICC treaty adopted at Rome (the Rome Statute). In testifying before Congress and in speaking before the Sixth Committee shortly after the Rome Conference ended, Ambassador-at-Large for War Crimes Issues David Scheffer was candid about U.S. concerns. Although the Rome Conference had essentially punted the issue—by delaying until a future Review Conference the adoption of a definition of the crime of aggression and the conditions under which the Court would be able to exercise jurisdiction<sup>5</sup>—he pointed to the elusiveness of a widely acceptable definition of the crime. He noted that there was no guarantee that the definition would include the vital linkage with a prior UN Security Council decision that a state had committed aggression, and he made clear the U.S. concern that how the provisions on aggression “will be resolved is too unclear for so important an issue.”<sup>6</sup>

Aggression continued to figure prominently thereafter. Even when the United States finally signed the Rome Statute in December 2000, President Clinton took pains to warn that “we are not abandoning our concerns about significant flaws in the treaty” and that he would not recommend that his successor submit the treaty to the Senate for advice and consent “until our fundamental concerns are satisfied.”<sup>7</sup> Within the United States, domestic opponents criticized the signing of the Rome Statute as being “as outrageous as it is inexplicable.”<sup>8</sup> After the George

<sup>3</sup> See Press Release, United States Mission to the United Nations, Statement by Jamison S. Borek, Deputy Legal Adviser, United States Department of State, at the 50th Session of the United Nations General Assembly, Sixth Committee (Nov. 1, 1995) (regarding the establishment of an international criminal court), at <http://www.state.gov/documents/organization/65827.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> See Rome Statute, *supra* note 1, Art. 5(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.”); *id.*, Art. 123 (Review Conference to be convened seven years after entry into force of the treaty).

<sup>6</sup> *Is a U.N. International Criminal Court in the U.S. National Interest?*, Hearing Before the Subcomm. on Int’l Operations of the S. Comm. on Foreign Relations, 105th Cong. 10–47 (July 23, 1998) (statement of David J. Scheffer, ambassador-at-large for war crimes issues); UN GAOR, 53d Sess., 9th mtg., para. 58, UN Doc A/C.6/53/SR.9 (Nov. 4, 1998) (remarks of David J. Scheffer before the 6th Committee of the General Assembly on Oct. 21, 1998).

<sup>7</sup> William J. Clinton, Statement on the Rome Treaty on the International Criminal Court, 3 PUB. PAPERS 2816 (Dec. 31, 2000).

<sup>8</sup> Press Release, Senate Foreign Relations Committee Chairman Jesse Helms, Helms on Clinton ICC Signature: “This Decision Will Not Stand” (Dec. 31, 2000), at [http://www.amicc.org/docs/Helms\\_Sign.pdf](http://www.amicc.org/docs/Helms_Sign.pdf).

W. Bush administration took office, Under Secretary of State for Arms Control and International Security Affairs John Bolton famously wrote to the UN secretary-general to “un-sign” the Rome Statute.<sup>9</sup> The United States thereafter boycotted the Court, declining to participate in the meetings of the Assembly of States Parties, the Special Working Group on the Crime of Aggression (Special Working Group) established by the Assembly of States Parties, or the “Princeton Process,” the informal intersessional meetings established to help develop a package of draft aggression amendments for the anticipated ICC Review Conference.

Under President Bush, the United States thus entered a period that many characterized as overt hostility to the Court.<sup>10</sup> Even before the end of the Bush administration, however, a thaw, of sorts, began to emerge.<sup>11</sup> And in 2009, as the Barack Obama administration assumed office, Secretary of State–designate Hillary Clinton showed new openness to the Court, saying, “Whether we work toward joining or not, we will end hostility toward the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.”<sup>12</sup>

But it was also no secret that there remained differences of view about the ICC within the U.S. government, both inside the executive branch and among members of the U.S. Congress.<sup>13</sup> As Secretary-designate Clinton noted, we would need “to consult thoroughly within the government, including the military, as well as non-governmental experts, and examine the

<sup>9</sup> International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), at <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

<sup>10</sup> Many of the Court’s supporters particularly criticized the effort by the United States to conclude bilateral “Article 98 agreements,” including the enactment into U.S. law of the American Servicemembers’ Protection Act. See, e.g., Human Rights Watch, *United States Efforts to Undermine the International Criminal Court* (Oct. 3, 2002), at <http://www.hrw.org/legacy/campaigns/icc/docs/art98analysis.htm> (stating that “[s]uch impunity agreements violate the Rome Statute and should be opposed”). Many also criticized the U.S. insistence on including language in Security Council resolutions to provide protections that it considered necessary for personnel from non-Rome Statute parties against the Court’s jurisdiction, see SC Res. 1422 (July 12, 2002), 1492 (July 28, 2003), U.S. efforts to prevent references to the ICC in the resolutions adopted by United Nations and other bodies, and the U.S. decisions not to join consensus on the annual UN General Assembly resolutions regarding the Court or to participate in the meetings of the Assembly of States Parties. See, e.g., UN GAOR, 57th Sess., 52d plen. mtg. at 10, UN Doc. A/57/PV.52 (Nov. 19, 2002) (Rafael Martinez for the United States).

<sup>11</sup> Most notably, the Bush administration instructed the U.S. Mission in New York to abstain on Security Council Resolution 1593 (Mar. 31, 2005), so as to allow the Council to refer the situation in Darfur to the Court’s prosecutor in March 2005. Soon thereafter, senior U.S. officials made statements that “not only do we not oppose the ICC’s investigation and prosecutions in Sudan but we support its investigation and prosecution of those atrocities.” George Gedda, *U.S. Sees ICC in More Benevolent Light*, WASH. POST, Dec. 29, 2006 (statement of John B. Bellinger III), at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/29/AR2006122900119.html>. There were numerous other statements to the same effect. See, e.g., U.S. Department of State, Remarks at the Brookings Institution on the Situation in Darfur (Apr. 13, 2006) (statement of Deputy Secretary of State Robert Zoellick), at <http://2001-2009.state.gov/s/d/former/zoellick/rem/2006/64622.htm>; *Meet the Press’ transcript for Dec. 21, 2008*, NBC (Dec. 21, 2008) (interview with U.S. Secretary of State Condoleezza Rice), at [http://www.nbcnews.com/id/28337897/ns/meet\\_the\\_press/t/meet-press-transcript-dec/#.VS6i-fIA4k0](http://www.nbcnews.com/id/28337897/ns/meet_the_press/t/meet-press-transcript-dec/#.VS6i-fIA4k0); see also Wasil Ali, *ICC: ‘No Sudanese Official Immune from Prosecution’*, SUDAN TRIB. (Dec. 18, 2006) (remarks of the chief ICC prosecutor, Luis Moreno Ocampo, noting shift in U.S. policy and “mounting signs of the U.S. warming up to the ICC”), at <http://www.sudantribune.com/spip.php?article19321>. Toward the end of the Bush administration, Legal Adviser John Bellinger gave a speech acknowledging the valuable role that the Court can play and making clear that the United States does not seek to prevent other countries from deciding to become parties to the Rome Statute. John B. Bellinger III, Speech Before the Council on Foreign Relations (Apr. 25, 2008), at <http://www.cfr.org/courts-and-tribunals/bellingers-speech-united-states-international-criminal-court/p16110>.

<sup>12</sup> *Nomination of Hillary R. Clinton to Be Secretary of State, Hearing Before the Senate Comm. on Foreign Relations*, 111th Cong. 135 (2009), at <http://www.nytimes.com/2009/01/13/us/politics/13text-clinton.html>.

<sup>13</sup> See Koh, *supra* note 2, at 534 (“many in our country still have fundamental concerns about the Rome Statute that have prevented us from becoming a party”).

full track record of the ICC before reaching decisions on how to move forward.”<sup>14</sup> As the Obama administration settled into office, the Review Conference that would take place in Kampala in the first half of 2010 presented an opportunity to reengage with the Court and the Rome Statute parties. Kampala emerged as a decision-forcing event that would help the administration marshal its efforts and energies, and also as a ready-made chance for the United States to publicly reconfirm its commitment to international criminal justice. Yet that sense of opportunity was tempered by a note of challenge: much of the world saw the *raison d’être* of the Kampala conference to be the adoption of amendments on the crime of aggression, and to bring to closure the seven-year process that had led to a package of amendments with which the United States had fundamental concerns. With those expectations, how could the United States work toward an outcome in Kampala on the crime of aggression that would allow it to maintain its trajectory toward a more mutually beneficial relationship with the Court?

An additional complication was that, absent U.S. participation, the Special Working Group had produced a completed package of proposals,<sup>15</sup> with compromises worked out on all but those issues relating to the provisions on entry into force and on the Security Council (or other) “filter” for the exercise of ICC jurisdiction. But the United States’ concerns extended well beyond those two issues. A special report written by a bipartisan panel sponsored by the influential Council on Foreign Relations on the eve of the Review Conference concluded that a decision by the Rome Statute parties to enable the Court to exercise jurisdiction over the crime of aggression “would jeopardize U.S. cooperation with the Court.”<sup>16</sup>

The U.S. delegation thus went to Kampala understanding that it would have to view the impending negotiations through two different lenses. On the one hand, many partners in the international community would be critical of the United States for having absented itself from the Princeton Process and for then “parachuting in” with new ideas and proposed changes. On the other hand, the U.S. delegation feared that the Kampala conference might produce an outcome with which the United States fundamentally disagreed and that could provoke a serious crisis in the warming United States relationship with the Court. The delegation thus needed to gauge how the U.S. Congress and domestic audience would react to anything that might be agreed in Kampala. ICC jurisdiction over the crime of aggression was a politically charged issue, in which key U.S. views and interests seemed to be shared by only a small number of other states, creating significant potential for charges that the Obama administration’s decision to engage with the Court had been futile and naive.

<sup>14</sup> See *Nomination of Hillary R. Clinton to Be Secretary of State*, *supra* note 12, at 131.

<sup>15</sup> On an official level, the negotiations took place on a “general understanding that ‘nothing is agreed until everything is agreed.’” Report of the Special Working Group on the Crime of Aggression, para. 4, ICC Doc. ICC-ASP/7/SWGCA/2 (Feb. 20, 2009). At an informal level, however, many participants proceeded on the basis that the crime-of-aggression package had consensus support subject only to resolution of the elements that had been included in brackets. See Stefan Barriga, *Against the Odds: Results of the Special Working Group on the Crime of Aggression*, in *INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW* 621, 623 (Roberto Bellelli ed., 2010) (“On the face of it, only two issues remain to be resolved. The first is whether the provisions on aggression should only be binding upon those States Parties that have accepted the amendment (Article 121(5) [of the Rome Statute]), or whether the amendment would enter into force for all States Parties once ratified by seven-eighths of them (Article 121(4) [of the Rome Statute]). The second is the question of the role of the Security Council, and implicitly the role of the Permanent Members of the Council.”).

<sup>16</sup> VIJAY PADMANABHAN, COUNCIL ON FOREIGN RELATIONS, SPECIAL REPORT NO. 55: FROM ROME TO KAMPALA: THE U.S. APPROACH TO THE 2010 INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE 4 (2010).

The Obama administration thus initiated a review of the overall posture of the United States toward the ICC, including review of the draft provisions that already had been developed on the crime of aggression. The administration's most important symbolic decision may have been its decision to attend in November 2009 the first meeting of the Assembly of States Parties that was held after the administration took office. In his introductory speech to the assembly, the new ambassador-at-large for war crimes issues, Stephen Rapp, struck a conciliatory note in an intervention that was widely welcomed for its positive tone and sense of renewed U.S. engagement.<sup>17</sup>

But even at that moment of reconciliation, the United States felt it necessary to sound a cautionary note about the aggression issue. Said Rapp:

I would be remiss not to share with you my country's concerns about an issue pending before this body to which we attach particular importance: the definition of the crime of aggression, which is to be addressed at the Review Conference in Kampala next year. The United States has well-known views on the crime of aggression, which reflect the specific role and responsibilities entrusted to the Security Council by the UN Charter in responding to aggression or its threat, as well as concerns about the way the draft definition itself has been framed.<sup>18</sup>

As indicated above, there was concern within the U.S. government about the general feeling—held by many of those who had participated in the Special Working Group and the Princeton Process—that only two issues remained open, despite the formally stated agreement that those discussions had been conducted on the principle that “nothing is agreed until everything is agreed.”<sup>19</sup> In our view, five issues beyond those considered “open” needed more work. First, the definition of aggression itself—as set out in the amendment for Article 8 *bis*—seemed exceedingly problematic. Nor did we agree that the terms of that definition should logically be evaluated independently of the questions related to the conditions for exercising jurisdiction. Second, the United States was concerned about the decision to address the role of the Security Council through what the participants called “filter”—as opposed to “trigger”—mechanisms.<sup>20</sup> Third, there were questions about the extent to which states parties could or should use any aggression amendments to the Rome Statute as a point of departure for enacting legislation providing for jurisdiction over the crime of aggression in domestic courts. Fourth, we became increasingly concerned about the extent to which enabling the Court to exercise jurisdiction over the crime of aggression could do harm to the Court itself. Those in the administration who were most supportive of a strengthened relationship with the Court feared that

<sup>17</sup> Rapp said:

Having been absent from previous rounds of these meetings, much of what we will do here is listen and learn. Our presence at this meeting, and the contacts that our delegates will seek with as many of you as possible, reflects our interest in gaining a better understanding of the issues being considered here and the workings of the Court.

Stephen J. Rapp, U.S. Ambassador at Large for War Crimes Issues, Speech to Assembly of States Parties (Nov. 19, 2009), at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> See *supra* note 15.

<sup>20</sup> Under the package that had been produced by the Special Working Group, “trigger” mechanisms included those that exist under Article 13 of the Rome Statute for state referral and *proprio motu* situations, whereas the question of “filters” would arise at a later stage, after the prosecutor had concluded that there was a reasonable basis to proceed with an investigation. See Barriga, *supra* note 15, at 632.

aggression jurisdiction would divert and distract the Court from its core mission of combatting the “atrocious crimes”—war crimes, crimes against humanity, and genocide—over which the Court was already able to exercise jurisdiction. They questioned whether adding aggression into the mix would inevitably politicize the Court and the prosecutor, who would have to decide—one way or the other—whether to pursue the inevitable allegations that both sides would make in the event of armed conflict, charging that the other side had committed aggression? Finally, we asked, how would the aggression project affect overall relations between the Court and the United States? Would the outcome of the Kampala conference deflect the trajectory of our warming relationship with the Court, and undermine broader prospects for promoting interests and values that the United States and the Court clearly shared?

Over many months, the United States team undertook extensive diplomatic efforts to better understand the “crime of aggression package” developed through the Princeton Process and the Special Working Group and the issues that it presented. The team engaged in detailed discussions with those who had been immersed in the process, including through participation in informal, exceedingly useful meetings sponsored by the MacArthur Foundation in Glen Cove, New York, and hosted by the Mexican Foreign Ministry in Mexico City, as well as discussions at the meeting of the Assembly of States Parties itself and at the resumed session held in New York in March 2010. Those discussions identified a range of questions that concerned the United States, some of which we discuss below.

## II. THE ROLE OF THE SECURITY COUNCIL AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

The United States’ views about the role of the Security Council were well known from the outset: the Court should not exercise jurisdiction over the crime of aggression unless the Security Council had first determined that a state act of aggression has occurred. We recognized that few beyond the other permanent members of the Security Council shared this view, which some in the international community saw as designed simply to protect the permanent members from the possibility of prosecution. In fact, however, our views were anchored in the UN Charter, its negotiating history, and the special importance attached to the role of the Security Council in making determinations about whether a *state* has committed aggression.<sup>21</sup> There are obvious differences in kind between the crime of aggression and the atrocity crimes. Unlike a prosecution for those other crimes, a prosecution of an individual for the crime of aggression must necessarily turn on a prior determination that a *state* act of aggression has been committed. For that reason, the notion that the Security Council would first need to determine that a state had committed an act of aggression appeared central to the approach of the International Law Commission in its draft statute for an international criminal court.<sup>22</sup> Indeed, the very premise of UN General Assembly Resolution 3314 (discussed further below)—upon which

<sup>21</sup> See Remarks by D. Stephen Mathias, in *The Definition of Aggression and the ICC*, 96 ASIL PROC. 181, 182 (2002).

<sup>22</sup> See *id.* at 182 (noting that Article 23, paragraph 2, of the draft statute adopted by the International Law Commission provided that no complaint related to an act of aggression could be brought before the Court “unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint”) (emphasis added); International Law Commission, Report on the Work of Its Forty-Sixth Session, UN GAOR, 49th Sess., Supp. No. 10, at 84, 86, UN Doc. A/49/10 (1994) (“Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed

the entire package of amendments adopted at Kampala purportedly rests—was the mainstream view that core responsibility for determining whether aggression has occurred lies with the Security Council.

At a more conceptual level, the crime of aggression demands deeper consideration of how international institutions should balance the interests of peace versus justice. ICC supporters firmly believe in the notion of “No peace without justice.”<sup>23</sup> With respect to atrocity crimes, there is a widespread view that agreements ending conflicts must not absolve those responsible for such crimes, and the Rome Statute speaks of crimes that “must not go unpunished.” Justice interests in ensuring accountability must not be sacrificed to the interests of peace, even if real-life issues of sequencing and timing complicate the application of that principle in particular cases. When political solutions immunize those responsible for such atrocities, more damage than good may be caused to peace itself.<sup>24</sup>

But there appears to be no such consensus with respect to the crime of aggression. The crime of aggression seems fundamentally different insofar as members of the international community must consider political factors in deciding whether to investigate and prosecute, or even to forgo assigning blame in the interests of bringing a conflict to a close. Suppose two countries fight a war, each accusing the other of having committed aggression in starting the war; after protracted conflict, they are finally ready to sign a peace treaty, each insisting on assurances that their leaders will not be prosecuted for having started the war. Should claims of justice obstruct peace? Peace agreements commonly avoid assessing blame regarding who started a conflict in the first place. How prepared will the international community be to intervene to prevent the parties from agreeing that each others’ leaders should not be prosecuted? And what damage will be done to the fabric of international criminal law, as well as efforts to promote peace, if such protections from prosecution are declared inadmissible?

Inevitably, the international community will want to strike a different balance between peace and justice when asking “who started this war?” than when asking “did the combatants commit atrocities?” Aggression determinations are different in kind: they fundamentally require a political assessment and political management. In our view, such assessment is of the type that the Charter has traditionally assigned to the Security Council. But whether or not one agrees with that, assigning that role to an ostensibly apolitical Court would inject the ICC into treacherous political waters that would threaten to undermine both the Court’s credibility and that of the greater international criminal justice project.

### III. THE DEFINITIONS IN ARTICLE 8 *BIS*

As discussed above, Princeton Process participants widely considered that they had finalized a definition of aggression and that all that remained for the Kampala conference to address were the conditions for exercising jurisdiction and the process by which the amendments would enter into force. The United States did not agree with that definition, nor did it share the view

aggression, and such a finding would be for the *Security Council* acting in accordance with Chapter VII of the Charter . . . to make.”) (emphasis added).

<sup>23</sup> See, for example, the nongovernmental organization of the same name, at <http://www.npwj.org/>.

<sup>24</sup> See, e.g., *Peace and Justice in Post-conflict Societies—the UN Position*, 3 INT’L ORG. L. REV. 395, 395 (2006) (legal opinions of the Office of Legal Affairs of the United Nations) (“The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”).

that the issue of the definition should be viewed as independent of the other two issues. As indicated above, the crime of aggression differs from the other ICC crimes in that an individual cannot be found guilty of having committed the crime of aggression without a prior determination that the state itself had committed aggression. The Princeton Process and the Special Working Group had developed highly debatable definitions of both the state “act of aggression” and the individual “crime of aggression.”

#### *A. The Definition of the State “Act of Aggression”*

Paragraph 2 of Article 8 *bis* of the draft amendments produced by the Special Working Group defined the state act of aggression.<sup>25</sup> The first sentence provided a generic definition of “act of aggression” as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” The second sentence then contained an enumerative definition, listing specific acts that qualify as an act of aggression. Both these sentences draw heavily from language in the annex to General Assembly Resolution 3314 (XXIX) of December 1974 (“Resolution 3314”),<sup>26</sup> but they stripped out clear limitations found in the text of that resolution. The manner in which that language was embedded without limitation in draft Article 8 *bis* risked fundamentally changing the way that it would operate.

1. *The first sentence of the definition of the state “act of aggression.”* Specifically, the first sentence of draft Article 8 *bis*(2)—nominally drawn from Resolution 3314—made it appear that *any* illegal use of armed force would constitute an act of aggression, even though Resolution 3314 clearly contemplated that only certain illegal uses of force would do so.<sup>27</sup> By calling upon states “to refrain from all acts of aggression *and other uses of force contrary to the Charter*,”<sup>28</sup> paragraph 3 of Resolution 3314 made clear that not all illegal uses of force constitute aggression. But the amendments produced by the Special Working Group eliminated the phrase that made clear that aggression occurs only “as set out in this Definition.”<sup>29</sup> The Special Working Group’s draft Article 8 *bis*(2) thus seemed to eliminate the other elements that had been incorporated into Resolution 3314 to make clear that—to constitute an act of aggression—a use of force not only must violate Article 2(4) of the UN Charter but must also satisfy other criteria.

First, gravity: to constitute an act of aggression, an illegal use of force must be of sufficient gravity, a notion reflected throughout Resolution 3314. For example, in the annex that includes the definition of aggression, preambular paragraph 5 states that “aggression is the most serious . . . form of the illegal use of force.” Article 2 of the definition itself adds that a determination that an act of aggression has been committed is not justified if “the acts concerned or their consequences are not of sufficient gravity.”

<sup>25</sup> ICC Doc. ICC-ASP/7/SWGCA/2, *supra* note 15.

<sup>26</sup> Definition of Aggression, GA Res. 3314 (XXIX), annex (Dec. 14, 1974).

<sup>27</sup> Article 1 of the Resolution 3314 definition states: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, *as set out in this Definition.*” *Id.*, Art. 1 (emphasis added).

<sup>28</sup> Definition of Aggression, *supra* note 26, para. 3 (emphasis added).

<sup>29</sup> Specifically, the first sentence of Article 8 *bis* (2) omits the key phrase from Article 1—“as set out in this Definition”—a phrase that, by incorporating the seven other articles that contained additional elements modifying what the meaning of the sentence would otherwise be, was clearly intended to establish that not all violations of Article 2(4) constitute acts of aggression.

Second, other relevant circumstances: under Resolution 3314, a determination whether an illegal use of force constitutes an act of aggression requires a consideration of “other relevant circumstances.” Thus, preambular paragraph 10 of the annex containing the definition of aggression made clear that “whether an act of aggression has been committed must be considered *in the light of all the circumstances* of each particular case” (emphasis added) and that the Resolution 3314 definition constitutes only “guidance” regarding the ultimate determination. Similarly, Article 2 of the Resolution 3314 definition makes clear that, apart from whether the acts concerned or their consequences are of sufficient gravity, “other relevant circumstances” can justify a conclusion that an act of aggression has not been committed.

Third, purpose: the negotiating record of Resolution 3314 contains specific statements by the United States that the phrase “other relevant circumstances” includes the particular *purposes* for which the state concerned had acted, such as whether the purpose was to acquire territory. An earlier draft of what became Resolution 3314 specifically stated that “the purposes of the States involved” were among the “other relevant circumstances” to be taken into account in determining whether an act of aggression had occurred.<sup>30</sup> The United States agreed that “it was unnecessary to make special reference to the intent or purpose (including the proof of *animus*) of the States involved, that notion being covered by the phrase ‘other relevant circumstances.’”<sup>31</sup> Similarly, the Soviets—hardly at that point a partner of the United States—“attached great importance to the intentions of the States parties to a conflict” and stated that the Security Council “must analyse the intentions of the States involved . . . to identify the true aggressor.”<sup>32</sup>

At bottom, Resolution 3314 was a political declaration that did not contain an actual definition at all, at least in a legal sense. The “other relevant circumstances” that Resolution 3314 recognized as needing assessment extended beyond purpose. Inclusion of the phrase “other relevant circumstances” thus reflected a recognition that determining an act to be aggression required a political assessment of the situation as a whole, whatever conclusion might otherwise be suggested by the other provisions of Resolution 3314. If the drafters of the Kampala amendments are taken to have expressly provided that it was for the Court to “conclude that a determination that . . . aggression has been committed would not be justified in the light of other

<sup>30</sup> Consolidated Text of the Reports of the Contact Groups and of the Drafting Group, *in* Report of the Special Committee on the Question of Defining Aggression, Annex II, App. A, UN Doc. A/9019, A, at 16 (1973). The draft of the so-called Six Powers (Australia, Canada, Italy, Japan, United Kingdom, and United States) that was considered in the run-up to the adoption of Resolution 3314 included an illustrative list of purposes that were of the type that might be consistent with a conclusion that a particular use of force constituted aggression. In particular, uses of force might constitute acts of aggression if they were undertaken “[i]n order to: (1) Diminish the territory or alter the boundaries of another State; (2) Alter internationally agreed lines of demarcation; (3) Disrupt or interfere with the conduct of affairs of another State; (4) Secure changes in the government of another State; or (5) Inflict harm or obtain concessions of any sort.” The precise list of purposes in the Six Powers draft is less important than the fact that it was clearly contemplated that *purpose* should be an element to be considered in determining whether an act of aggression had occurred. Draft Proposals Before the Special Committee, *in* Report of the Special Committee on the Question of Defining Aggression, *supra*, Annex I, at 11–12.

<sup>31</sup> See Report of the Special Committee on the Question of Defining Aggression, UN GAOR, 29th Sess., Supp. No. 19, UN Doc. A/9619, at 23 (1974).

<sup>32</sup> *Id.* at 36; see also Andreas L. Paulus, *Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE L. REV. 1, 27 (2004) (discussing litigation under German domestic law distinguishing aggression from “a mere violation of the prohibition on the use of force” and noting that the absence of a specific intent “to disturb the peaceful coexistence of peoples” and the “benign motives of NATO action” rendered the German government non-prosecutable).

relevant circumstances,” there would be no guidance as to what those circumstances are or how they would affect a determination about whether aggression had occurred. Inclusion of the “other relevant circumstances” language would have risked revealing that application of the definition required essentially political judgments. But because Resolution 3314 clearly *did* assume that the making of such political judgments would be required, stripping out the element of political judgment that had made the Resolution 3314 “definition” workable turned the logic of the resolution on its head. Our view was, of course, that under the Charter system it was the Security Council that was responsible for making the necessary political judgments. But even those who feel that these decisions should not be left to the Security Council must concede that *someone* must make these political judgments in order to make it workable to use Resolution 3314 as a starting point to evaluate what constitutes aggression. It seems inconsistent with the essential judicial nature of the ICC to place such fundamentally political determinations in the hands of a criminal prosecutor and a group of judges.

2. *The second sentence of the definition of the state “act of aggression.”* We also found confusing the second sentence of Article 8 *bis*(2), which provides:

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

This sentence drew from Article 3 of the Resolution 3314 definition but, like the first sentence, did so in a manner that omitted key elements that had been essential for making the language of the Resolution 3314 definition workable. This enumerative list had been workable in Resolution 3314 only because it had been designed as “guidance” for the Security Council, effectively allowing the Council to modify or supplement the list as it considered necessary to fit a given situation. To decide whether a particular act indeed constituted an act of aggression,

the Council would take into consideration such issues as gravity, intent, and “other relevant circumstances.” Thus, a determination as to whether aggression has occurred would necessarily require an assessment of broader “relevant circumstances” and the making of political judgments in applying the definition—assessments that Resolution 3314 had presumed the Security Council would need to make. The need for this approach becomes clear when one takes a closer look at the nature of the acts listed in the second sentence. For example, absent such an assessment:

- Subparagraph (a) would appear to define as aggression “any military occupation, however temporary, resulting from [an invasion or attack by the armed forces of a state of the territory of another state],” and thus on its face would appear to characterize as aggression such things as the Allied occupations following World War II.
- Subparagraph (b) would appear to cover the “use of any weapons by a State against the territory of another State [or part thereof]” and thus on its face would appear to cover brief skirmishes of relatively little real consequence.
- Subparagraph (e) would appear to cover the “use of armed forces of one State which are within the territory of another State with the agreement of the receiving state, in contravention of the conditions provided for in the agreement,” and thus on its face would appear to cover such non-aggressive matters as relatively minor violations of bilateral agreements.

Strangely, the enumerative list appeared not only overinclusive but also underinclusive. For example, the list seemed woefully out-of-date with respect to the modern threat posed by international terrorism. Paragraph (f) applies to a state’s action in putting its territory at the disposal of another “state” for perpetrating an act of aggression against a third state, but never addresses the possibility of a state putting its territory at the disposal of nonstate actors. Similarly, having drawn from a list that had been finalized in 1974, there was understandably no mention or even hint of how Resolution 3314’s definition might apply in the cases of cyberwarfare that have recently emerged as one of the greatest potential security threats facing the international community.

Because the second sentence of Article 8 *bis*(2) does include the phrase “in accordance with . . . General Assembly Resolution 3314,” it could be argued that any of the seven enumerated acts would qualify as acts of aggression only insofar as they would do so under Resolution 3314. But for several reasons, we lacked sufficient confidence that that reading would, in fact, be attached to the sentence. First, the parallel to the phrase “in accordance with United Nations General Assembly resolution 3314” used in Article 8 *bis*(2) was the phrase “*subject to and in accordance with the provisions of article 2*” that the General Assembly included in Article 3 of the annex to Resolution 3314. This wording left no doubt that the extent to which the enumerated acts constituted acts of aggression was “subject to” the provisions of Resolution 3314.<sup>33</sup> But “in accordance with”—by itself—does not necessarily mean the same thing as

<sup>33</sup> The precise language of Article 2 of the Resolution 3314 definition, to which the provisions of Article 3 are subject, is as follows:

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified *in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.*

“*subject to and* in accordance with”; the argument that the two phrases might be intended to mean the same thing is undermined by the fact that the drafters had excluded the “subject to” portion of the phrase used in Resolution 3314.

Furthermore, it seemed dubious that the drafters intended to make application of the entire list “subject to” the conditions of the Resolution 3314 definition, because doing so, on the face of the language, would have made the entire question subject to a determination by the Security Council, as it is in Resolution 3314. Yet a great number of states participating in the Princeton Process negotiations had clearly resisted accepting such a role for the Security Council. If the Court itself, rather than the Security Council, was supposed to decide whether the acts at issue were of “sufficient gravity” or whether “other relevant circumstances” warranted a conclusion that a state had not committed aggression, the language of Article 8 *bis*(2)—and, indeed, the language of the entire package of amendments, as well as the reports of the Special Working Group and the Princeton Process—did not offer the guidance that the Court would need on exactly how to exercise that discretion. Thus, Article 8 *bis*(2)’s language created ambiguity about whether gravity or other circumstances must be considered in determining whether a particular use of force constitutes an act of aggression. This issue seemed far too important to leave ambiguous, especially when defining an international crime.

3. *The relationship between the two sentences in the definition of the state “act of aggression.”* Finally, we were concerned about the lack of clarity in the relationship between the two sentences of Article 8 *bis*(2). As we have seen, the first (generic) sentence suggested that *any* illegal use of force constituted an act of aggression, while the second (enumerative) sentence listed seven categories of acts that would qualify as an act of aggression. This structure left unclear whether

- an act must fall within both the generic *and* enumerative definitions in order to constitute an act of aggression;
- an act qualifies as aggression if it falls within *either* of the two sentences in the definition; or
- the second sentence is intended as a non-exhaustive list of acts that are considered automatically to fall within the generic definition; in other words, any of the enumerated acts are considered *automatically* to constitute the use of armed force “against the sovereignty, territorial integrity or political independence of a state, or in any other manner inconsistent with the Charter of the United Nations.”<sup>34</sup>

The italicized language at the end of the sentence (our emphasis) made clear that it would not be justified to conclude that any of the enumerated acts would be an act of aggression absent the requisite gravity or “other relevant circumstances.”

<sup>34</sup> This last approach—that the two sentences are considered coterminous—was perhaps suggested by the draft Elements of Crimes, the third element of which was as follows: “The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed.” This last approach also appears consistent with the views expressed by delegations during the negotiations that were summarized as follows in the Special Working Group’s report of its June 2008 meeting:

Those delegations that supported the drafting of paragraph 2 expressed their understanding that the list of crimes was, at least to a certain extent, open. Acts other than those listed could thus be considered acts of aggression, provided that they were of a similar nature and gravity to those listed and would satisfy the general criteria contained in the chapeau of paragraph 2. In this connection, it was stressed that the right balance had been

Apparently, the lack of clarity about the relationship between the two sentences was raised in the course of the work of the Special Working Group and the Princeton Process. The two sentences had previously been set forth as separate paragraphs within what had become Article 8 *bis*(2). The February 2009 Special Working Group report states that the two paragraphs were combined in order to address that lack of clarity.<sup>35</sup> But simply moving the two sentences physically closer to one another only highlighted the lack of clarity about the relationship between the two sentences.

In sum, Article 8 *bis* was, in our view, woefully lacking in providing a workable definition of “act of aggression.” The text failed to grapple in an appropriate manner with the ideas of gravity or “other relevant circumstances,” failed to ensure against being interpreted in a way that was inconsistent with customary international law, and failed to accurately reflect the elements of Resolution 3314 upon which it was purportedly based. We were troubled by the extent to which others were willing to gloss over what seemed to us to be obvious shortcomings in the legal definition of a term that carries such central importance.

### *B. The Definition of the Individual “Crime of Aggression”*

Paragraph 1 of proposed Article 8 *bis* provided that a “crime of aggression,” for which an individual could be criminally liable, would mean the following:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

This definition raised at least two important issues: (1) whether the predicate for individual responsibility should be that the state has committed “an *act* of aggression” as opposed to a “*war* of aggression”; and (2) what the threshold for seriousness should be before individual criminal liability would properly lie.

1. An “*act of aggression*” versus a “*war of aggression*.” Most of General Assembly Resolution 3314 was focused on whether a state act of aggression had occurred. The only provision of the Resolution 3314 definition that spoke to criminal responsibility of individuals was Article 5, which spoke of criminal responsibility only in the context of a “war of aggression.”<sup>36</sup> The phrase “war of aggression” was drawn directly from Article 6 of the Charter of the International Military Tribunal, which defined the crimes that were subject to prosecution at Nuremberg. Thus, it was the “planning, preparation, initiation or waging of a *war of aggression*”—as opposed to

struck in the Chairman’s paper by including a generic definition in the chapeau of paragraph 2, along with the non-exhaustive listing of acts of aggression.

Report of the Special Working Group on the Crime of Aggression, para. 34, in ICC Doc. ICC-ASP/6/20/Add.1, Annex II (2008).

<sup>35</sup> See Report of the Special Working Group on the Crime of Aggression, ICC Doc. ICC-ASP/7/SWGCA/2, *supra* note 15, para. 14 (stating that the space between the two sentences was deleted to “enhance clarity”).

<sup>36</sup> See GA Res. 3314 (XXIX), *supra* note 26, annex, Art. 5(2) (“A war of aggression is a crime against international peace.”).

an individual act or acts of aggression—that was the necessary predicate for criminal liability.<sup>37</sup> It had been the United States' view that only wars of the type launched by Nazi Germany would appropriately form a model for the crime of aggression. The distinction between “act of aggression” and “war of aggression” was clearly noted in the comments of delegates leading to the adoption of Resolution 3314.<sup>38</sup> Later, that distinction was widely recognized, including famously by Germany's statements in 2000 that “use of the term ‘war’—instead of ‘act’—of ‘aggression’ is of great significance” and that “[t]here is no evidence whatsoever to suggest that . . . the crime of aggression under customary international law could have undergone a broadening beyond its narrow content as expressed by the term ‘war of aggression.’”<sup>39</sup>

The Special Working Group amendments nevertheless took a different approach, contemplating that liability for the crime of aggression could be triggered by an individual's involvement in a mere “act of aggression.” Of course, many of the acts listed in the enumerative portion of Article 8 *bis* that were explicitly referred to as “acts” of aggression might be elements of a war of aggression if undertaken as part of a broader campaign. But it is hardly self-evident that they should be considered by themselves to qualify as the necessary predicate for the crime of aggression. The absence of an explicit requirement that a state have waged a “war of aggression” appeared to depart from customary international law and was another point that significantly concerned the United States.

2. *The “threshold” issue.* The Special Working Group amendments further stated that the “crime of aggression”—the offense for which an individual may be criminally prosecuted “means the planning, initiation or execution . . . of an act of aggression which, by its character, gravity and scale, constitutes a *manifest violation of the Charter of the United Nations*” (emphasis added). Under this language, the threshold test was thus whether the act committed by the state constituted a “manifest” violation of the Charter. The “character, gravity and scale” of the state's action appeared relevant only insofar as they bore on the question whether the violation of the Charter is “manifest.” Yet, standard definitions of the word “manifest” suggest something that is evident, obvious, apparent, or plain,<sup>40</sup> without necessarily connoting the egregiousness or flagrancy that would ordinarily be considered essential to distinguish aggression for which individual criminal liability might lie from other illegal uses of force. Thus, a use of force, such as the firing of a single bullet that flies across a border, might constitute a plain—or

<sup>37</sup> Charter of the International Military Tribunal, Art. 6, Aug. 8, 1945, 59 Stat. 1544, 8 UNTS 279 (Nuremberg Charter) (defining “crimes against peace” as “namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy”); see also Charter of the International Military Tribunal for the Far East, Art. 5, Jan. 19, 1946, TIAS No. 1589 (Tokyo Tribunal); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625, pmbl. (Oct. 24, 1970) (specifying that it is a “*war of aggression* [that] constitutes a crime against the peace” (emphasis added)).

<sup>38</sup> See, e.g., Report of the Special Committee on the Question of Defining Aggression, *supra* note 31, at 16 (Japan affirming “that an act of aggression which was not part of a war of aggression gave rise only to State responsibility”).

<sup>39</sup> See Proposal Submitted by Germany: The Crime of Aggression, paras. 20–21, PCNICC/2000/WGCA/DP.4 (Nov. 13, 2000).

<sup>40</sup> See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, COLLEGE EDITION 813 (New York, 1980). The entry goes on to give “clear,” “distinct,” and “unmistakable” as synonyms. In a similar vein that appears to focus on considerations related to clarity, Article 46(2) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, provides that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding competence to conclude treaties unless that violation was, *inter alia*, manifest; and then proceeds to provide that “[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.”

“manifest”—violation of the Charter but nevertheless be relatively trivial in real terms. The blurring of the distinction between the two situations thus became another point of significant concern for the United States.

### C. *Would Overbroad Definitions Chill Lawful Uses of Force?*

In the course of our discussions, some argued that the absence of appropriate thresholds in Article 8 *bis* should not concern us because separate provisions of the Rome Statute—for example, Articles 1 and 5—would erect a sufficient threshold for prosecution. They argued that the Court, in any event, is empowered to prosecute only “the most serious crimes of concern to the international community as a whole”<sup>41</sup> and consequently both that the Court would find a case inadmissible if it is “not of sufficient gravity to justify further action by the Court”<sup>42</sup> and that a case would not proceed if it would “not serve the interests of justice.”<sup>43</sup>

For at least four reasons, however, these arguments offered us insufficient comfort. First, a decision not to investigate or prosecute would not obviate the fact that such acts would have been deemed to constitute either an “act of aggression” by a state or the “crime of aggression” by an individual, under what would be taken as widely accepted definitions that would be treated as having the imprimatur of the ICC. Others in the international community could be readily expected to label them as such for their own political advantage, using the definition to “demonstrate” that another country had committed aggression, perhaps even using that fact to justify supposedly defensive military action of their own. Even assuming that the Court ultimately agreed not to investigate or prosecute, action by the Office of the Prosecutor could cast a long shadow and, during the typically long period during which it conducts its preliminary examinations, provide opportunities for critics to rally opposition to legitimate actions. Second, the International Military Tribunal at Nuremberg itself called the initiation of a war of aggression “not only an international crime [but] *the supreme international crime*.”<sup>44</sup> Thus, the nature of aggression is such that it would be difficult for the Court, in the case of acts that literally met the definition of aggression, either to dismiss those acts as falling outside the most serious crimes of concern to the international community or to leave them unprosecuted in response to an appeal to the interests of justice. Third, the adoption of the definition in a treaty as significant as the Rome Statute might well affect the way that states and others in the international community view customary international law, as is often said to have happened with respect to the definitions of “war crimes” and “crimes against humanity” in the Rome Statute. Fourth, even if it was true that the Court might decide not to investigate or prosecute any particular act that fell within the definition of the “crime of aggression,” the act would not necessarily escape attempts to investigate or prosecute elsewhere, such as in domestic courts. This concern seemed all the more important in view of the ICC’s foundational principle of complementarity, which calls for states to adopt national laws to investigate or prosecute crimes defined in the Rome Statute. Indeed, the basic notion underlying Article 5 of the Rome Statute is not that lesser cases—that is, cases that are not among the most serious crimes of

<sup>41</sup> Rome Statute, *supra* note 1, Art. 5(1).

<sup>42</sup> *Id.*, Art. 17(1)(d).

<sup>43</sup> *Id.*, Art. 53(1)(c).

<sup>44</sup> *Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AJIL 172, 186 (1947) (emphasis added).

concern to the “international community as a whole”—will remain uninvestigated or unprosecuted, but rather that such investigations and prosecutions will be left to be pursued in national legal systems.

As a policy matter, the ambiguities embedded in the Article 8 *bis* definitions risk a profound chilling effect. Supporters of ICC jurisdiction over the crime of aggression claim that fear of individual responsibility will make those responsible for the use of military force think twice before resorting to force. But there is a concomitant risk that a broad or vague definition will over-chill by *discouraging* states from using force in cases where they should. Thus, states may become unduly reluctant to risk involvement even in military actions that are lawful and appropriate, if such involvement creates an inherent and unpredictable risk of ICC investigation or prosecution. Ironically, one such result could be that the ICC ends up prolonging violence and abuses of human rights by deterring future military actions—for example, ones parallel to the intervention frequently urged in Rwanda in 1994—aimed at stopping the commission of genocide, war crimes, and crimes against humanity, which the Rome Statute sought to eliminate. It would be hugely tragic if this chilling effect discouraged states from stopping preventable genocide, war crimes, and crimes against humanity, and thus limited states’ responses to *post hoc* efforts at accountability. These amendments could also chill non-Rome Statute parties by offering a new political weapon to those who would criticize legitimate action as aggression, thereby greatly complicating the task of building the multi-lateral coalitions that are necessary for such actions.<sup>45</sup>

#### D. The Understandings

The Understandings attached as Annex III to the resolution on aggression adopted at Kampala were intended to address these concerns, but they ended up addressing only some of the weaknesses of the definition of “act of aggression” identified above. For these purposes, the most important Understanding was contained in paragraph 6, which provided:

It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

Happily, this language clarified at least two points: (1) only “the most serious and dangerous” forms of illegal use of force constitute aggression, and (2) the determination whether an illegal use of force constitutes aggression “requires consideration of all the circumstances of each particular case,” including “the gravity of the acts concerned and their consequences.”<sup>46</sup> Still, as

<sup>45</sup> We have heard anecdotal evidence that such a chilling effect has already hindered international efforts to stop the ongoing slaughter in Syria. Such a chilling effect could well encourage international actors to engage in behavior against which force would otherwise appropriately be used, and thereby have the perverse effect of undermining rather than strengthening international peace and security. Cf. William H. Taft, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 291, 299–300 (2004).

<sup>46</sup> Another Understanding related to the definition of “crime of aggression” as opposed to “act of aggression.” Specifically, paragraph 7 provided:

It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify

discussed above, the assessment of these issues inevitably requires judgments that are almost wholly political in nature, with little direct guidance for the prosecutor and Court to apply.

Regrettably, the Kampala Review Conference failed to include a further Understanding proposed by the United States to address questions related to humanitarian intervention more explicitly. Whatever one's legal views on whether humanitarian intervention is a permissible basis under international law for resorting to force, a true humanitarian intervention should not be considered "aggression" and should not entail the risk of international criminal prosecution. The language that the United States put forward would clearly have excluded the use of force to prevent the very atrocity crimes that the Rome Statute itself aims to prevent: genocide, crimes against humanity, and war crimes.<sup>47</sup> One can argue that this principle is implicit in the other elements of paragraph 6 of the Understandings, but the Kampala conference's reluctance to address explicitly such an important concern leaves the issue with an unfortunate ambiguity that may make it harder to prevent atrocity crimes in the future.

The United States also remained concerned about arguments that the Understandings are legally irrelevant and not part of what the Court should take into account in considering any cases involving the crime of aggression.<sup>48</sup> In our view, the Understandings are both legally correct and legally relevant as they reflect the meaning that the states parties attributed to the terms of the amendments at the time that the parties adopted them.

We believe it important for the states parties and others to continue to affirm all of these principles in the months and years ahead, thereby eliminating doubt and guarding against backsliding on these vital points.

#### IV. JURISDICTION IN NATIONAL COURTS OVER THE CRIME OF AGGRESSION, AND THE ROLE OF STATE CONSENT

In the diplomatic discussions leading to the Kampala Review Conference, there were considerable discussions about "state consent"—that is, whether the Court should be able to proceed with investigations and prosecutions of the crime of aggression where only the "victim

a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

This Understanding was designed to underscore that the three factors in determining whether an act of aggression is a manifest violation of the UN Charter—character, gravity, *and* scale—must be read conjunctively; that is, the use of the word "and" in Article 8 *bis*(1) is based on an understanding that any one element could not be sufficient for this purpose and that all must be present. This does not directly address, of course, the more fundamental concerns, as described above, about the way that the Court may ultimately interpret the word "manifest." The Kampala participants declined to adopt proposed language that more straightforwardly stated that "it is only a war of aggression that is a crime against international peace." Still, it remained our view that it is on that basis that the Court would need to proceed if a crime of aggression case was ever prosecuted—a point made by Resolution 3314 itself.

<sup>47</sup> Non-paper by the United States, reproduced in THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 751–52 (Stefan Barriga & Claus Kress eds., 2012); see also Statement at the Review Conference of the International Criminal Court (June 4, 2010), at <http://www.state.gov/s/l/releases/remarks/142665.htm> (statement by Legal Adviser Harold Hongju Koh, U.S. Department of State, arguing for Understandings that would "make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes that the Rome Statute is designed to deter—do not commit 'manifest' violations of the UN Charter within the meaning of Article 8 *bis*. Regardless of how states may view the legality of such efforts, those who plan them are not committing the 'crime of aggression' and should not run the risk of prosecution.").

<sup>48</sup> See, e.g., Kevin Jon Heller, *The Uncertain Legal Status of the Aggression Understandings*, 10 J. INT'L CRIM. JUST. 229 (2012) (arguing that the Court would have the right to ignore the Understandings unless they are adopted by all of the states parties to the Rome Statute).

state” has consented, or whether, instead, the consent of the alleged “aggressor state” should also be required.<sup>49</sup> As described above, the United States’ view had been that the ICC should be able to exercise jurisdiction only if the Security Council has made a prior determination that aggression had, in fact, occurred. The United States was therefore less focused upon whether the consent of the “aggressor state” should be required for the Court to proceed than were many of the other states that attended the meetings in Kampala. Nevertheless, the question had important implications for how the adoption of the amendments could “spill over” to parties outside the Court itself—in particular, how the crime of aggression might be investigated and prosecuted in national courts.

Describing the risk of unjustified domestic prosecutions at the start of the Review Conference, one of us (speaking as Legal Adviser) said:

Too little attention has yet been paid to the question of how, if at all, the principle of complementarity would apply to the crime of aggression. The definition does little to limit the risk that State Parties will incorporate a definition—particularly one we believe is flawed—into their domestic law, encouraging the possibility that under expansive principles of jurisdiction, government officials will be prosecuted for alleged aggression in the courts of another state. Even if states incorporate an acceptable definition into their domestic law, it is not clear whether or when it is appropriate for one state to bring its neighbor’s leaders before its domestic courts for the crime of aggression. Such domestic prosecutions would not be subject to any of the filters under consideration here, and would ask the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security.<sup>50</sup>

Under Article 12 of the Rome Statute, for the Court to have jurisdiction over genocide, crimes against humanity, and war crimes, the alleged crime must have been committed either on the territory of a Rome Statute party or by the national of a Rome Statute party. The theory upon which the Court’s jurisdiction rests thus derived from the jurisdiction of one or both of those states, either one of which would normally have jurisdiction to prosecute the case in its national courts.<sup>51</sup> As is well-known, the United States has objected to the Court’s assertion of jurisdiction with respect to nationals of nonparties to the Rome Statute for genocide, crimes against humanity, and war crimes. But the United States’ objections to analogous treatment for the crime of aggression extend deeper: is it appropriate for a territorial state to prosecute the leader of a state that it accuses of aggression, without that state’s consent?

The International Law Commission addressed this point in 1996, when it provided—in Article 8 of the draft *Code of Crimes Against the Peace and Security of Mankind*—that states should establish jurisdiction over war crimes, crimes against humanity, and genocide, but should not establish jurisdiction over the crime of aggression *except possibly with respect to its own nationals*.<sup>52</sup> The Commission’s commentary provided:

<sup>49</sup> See, e.g., Report of the Working Group on the Review Conference, ICC Doc. ICC-ASP/8/20/Add.1, Annex II (2010).

<sup>50</sup> Statement at the Review Conference of the International Criminal Court, *supra* note 47.

<sup>51</sup> See, e.g., Sharon A. Williams, *Article 12*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 329, 340 (Otto Triffterer ed., 1999) (“When an alien commits a crime . . . on the territory of another State, a prosecution in the latter State is not dependent on the State of nationality being a Party to the pertinent treaty or otherwise consenting. . . . There is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute.” (footnotes omitted)).

<sup>52</sup> Article 8 of the draft code provided:

This principle of exclusive jurisdiction is the result of the unique character of the crime of aggression in the sense that the responsibility of an individual for participation in this crime is established by his participation in a sufficiently serious violation of the prohibition of certain conduct by States contained in Article 2, paragraph 4, of the Charter of the United Nations. The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. *Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State.* The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet* [one sovereign power cannot exercise jurisdiction over another sovereign power]. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.<sup>53</sup>

The Commission went on to say:

The only State that could try an individual for the crime of aggression in its national courts under this provision is the State referred to in article 16, namely *the State whose leaders participated in the act of aggression*. This is the only State which could determine the responsibility of such a leader for the crime of aggression without being required to also consider the question of aggression by another State.<sup>54</sup>

There are, of course, examples of states that have enacted some form of aggression legislation and that have, in a few cases, conducted prosecutions of foreign nationals.<sup>55</sup> Even these examples, however, mainly dating to the unsettled era immediately following World War II, are of questionable reliability.<sup>56</sup> The prosecutions at Nuremberg were conducted, of course, during a period of military occupation. In the case of occupied Germany, the right to provide the relevant consent had passed to the Allied powers following the unconditional surrender of Germany.<sup>57</sup>

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over [genocide, crimes against humanity, crimes against UN personnel, and war crimes], irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 [aggression] shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Code of Crimes Against the Peace and Security of Mankind, in Report of the International Law Commission on the Work of Its Forty-Eighth Session, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10, at 27.

<sup>53</sup> *Id.*, Art. 8, cmt. 14 (emphasis (of full sentence) added).

<sup>54</sup> *Id.*, cmt. 15 (emphasis added).

<sup>55</sup> See Astrid R. Coracini, *Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute's Complementarity Regime*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 733 (Carsten Stahn & Goran Sluiter eds., 2009).

<sup>56</sup> It is also noteworthy that the definitions in the relevant national legislation do not necessarily match the definitions adopted by the Special Working Group. See Beth Van Schaack, *Par in Parem Imperium Non Habet*, 10 J. INT'L CRIM. JUST. 133, 138–141, 152 (2012) (“Legislators incorporating the crime into national penal codes may drop or change definitional elements of the crime, enabling more expansive prosecutions than have been deemed acceptable by the [Assembly of States Parties].”).

<sup>57</sup> See Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, 31–32 (Oxford Inst. for Ethics, Law & Armed Conflict, Working Paper, 2010), at <http://www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf> (footnotes omitted). Akande states:

At the end of the day, the supporters of the Kampala amendments appear to have accepted the principle that, absent action by the Security Council, the consent of the aggressor state *should*, in fact, be required in order for jurisdiction to exist over the crime of aggression. With respect to non-Rome Statute parties, that acceptance is made clear by Article 15 *bis*(5), which precludes the Court from exercising its jurisdiction over the crime of aggression when committed by the national of a non-state party. With respect to Rome Statute parties, there is a range of views regarding what constitutes a sufficient manifestation of consent of the state involved, but—even among those with the most expansive views of the circumstances of what qualifies as sufficient consent to enable the Court to exercise jurisdiction—the Kampala amendments clearly proceed on the basis that the Court cannot exercise its jurisdiction with respect to an act of aggression committed by a state that has not consented to the Court’s aggression jurisdiction.<sup>58</sup>

Absent such consent, the Kampala amendments do not treat the territorial nexus with the victim state, standing alone, as a sufficient basis to confer jurisdiction on the Court. It would be incongruous for states, having agreed that such a territorial nexus was an insufficient basis to confer jurisdiction on the Court, nevertheless to treat it as an appropriate basis for conferring jurisdiction on their domestic courts.<sup>59</sup>

Even if one were to take the view that the Nuremberg Tribunal was not a national or quasi-national tribunal but instead was a tribunal operating exclusively on the plane of international law, there would still be the question whether it operated in the absence of the consent of the State whose acts it judged when it considered the waging of aggressive war. At the relevant time Germany had surrendered to the Allied powers and had been occupied by those countries. Strictly speaking, Germany had lost its sovereignty, in the sense of its independence, as a matter of international law, and the Allied powers had assumed governmental control over it. In fact, and in law, they had joint supreme authority or sovereignty over Germany. This means that Allied powers possessed the right and power to exercise for Germany all acts and all competences which the German government could have exercised and possessed. From this perspective, the establishment of the Nuremberg Tribunal cannot be regarded as departing from the principle of consent or indeed of establishing a new principle whereby an international tribunal can be established which pronounces, as an essential aspect of its jurisdiction, on the obligations and responsibilities of a State, without the consent of that State. Clearly, the Allied powers, which were the governing authorities of Germany, consented to the exercise of jurisdiction over German acts by the Nuremberg Tribunal, for they established it.

See also the Berlin Declaration of June 5, 1945, 60 Stat. 1649, 1650 (“The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic hereby assume supreme authority with respect to Germany, including all powers possessed by the German Government, the High Command and any state, municipal, or local government authority.”). The situation was different with respect to Japan, the government of which continued to exist after World War II and consented to the establishment of the Tokyo Tribunal. See Neil Boister, *The Tokyo Trial*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 18 (William A. Schabas & Nadia Bernaz eds., 2011).

<sup>58</sup> See Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AJIL 517, 532 n.38 (2011) (noting agreement that Kampala adopted a consent-based regime and that differences of view involve only how that consent needs to be expressed).

<sup>59</sup> It was with this possibility in mind that paragraph 5 was included in the Understandings attached as Annex III to the resolution that the states parties adopted in Kampala. Paragraph 5 provided: “It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.” While on its face this Understanding does not preclude arguments that a state might otherwise have authority to prosecute the crime of aggression (and surely nothing in international law would prevent it from doing so with respect to its own leaders), it does separate the crime of aggression from the atrocity crimes in the Rome Statute—genocide, crimes against humanity, and war crimes—with respect to which many in the international community look to the Rome Statute as verifying that it is appropriate and desirable for states to prosecute such cases.

Ultimately, these seemingly technical legal issues connect to political considerations of great importance. It might be useful for states to prosecute their own leaders for the crime of aggression, particularly when a new government has taken over from one that is responsible for aggression. But how much would the international community actually benefit by encouraging states to use their national courts to sit in judgment on whether another state's action constituted aggression? Imagine two states at war, each making accusations of aggression against the other: it is all too predictable how an aggression case would come out. The leader of one state would likely be held criminally liable in the domestic courts of the other. But would the interests of the international community in either peace or justice be promoted by establishing a norm that promotes such cases or domestic prosecutions in third states?<sup>60</sup>

V. ISSUES RELATED TO THE ENTRY-INTO-FORCE PROVISIONS—ARTICLES 121(4)  
AND 121(5)

Perhaps the most befuddling discussions surrounding the Kampala amendments surrounded the “entry into force provisions”: Articles 121(4) and (5). These seemingly technical issues took on profound importance in the discussions leading up to Kampala because they were so tightly tied to critical questions of when the Court would be able to exercise jurisdiction over the crime of aggression, and whether the Court would be able to exercise jurisdiction when the accused state had not ratified the amendments.

As events evolved, the discussion involved two key subsections of Article 121 of the Rome Statute, which provide:

- (4) Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
- (5) Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Under these provisions, a different “entry-into-force regime” would apply, depending on whether or not a provision was an amendment to four provisions—Articles 5 through 8—that establish the crimes over which the Court has jurisdiction and define those crimes. Specifically, Article 5 provides that the Court has jurisdiction in accordance with the Rome Statute with respect to the crime of genocide, crimes against humanity, war crimes, and *the crime of aggression*, and Articles 6 through 8 provide the definitions of “genocide,” “crimes against humanity,” and “war crimes” for purposes of the Court's jurisdiction. At Rome, of course, no definition was agreed for the crime of aggression; instead, a provision was included in Article 5 under which the Court would not be able to exercise jurisdiction over the crime of aggression until a provision defining the crime and setting out the conditions under which the Court

<sup>60</sup> For a thorough discussion of the many still-unaddressed issues involved in reconciling the principle of complementarity and the crime of aggression, see generally Julie Veroff, Note, *Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward*, 125 Yale L.J. (forthcoming).

would be able to exercise jurisdiction with respect to it was adopted in accordance with Articles 121 and 123 of the Rome Statute.<sup>61</sup> In this context, it is helpful to look back at the negotiating history of those articles.

### *A. Negotiating History of Article 121 of the Rome Statute*

Until shortly before the text of the Rome Statute was finalized, the contents of what are now Articles 5, 6, 7, and 8 were all contained in a single provision, the original Article 5. Under that draft article, the first subsection listed the crimes over which the Court would have jurisdiction—war crimes, crimes against humanity, genocide, and the crime of aggression—and subsequent subsections defined each of the crimes.<sup>62</sup> The text of Article 121(5) at that time said that it would apply to “any amendment to article 5 of this Statute.”

Article 5 was broken into separate articles only in the final stages of the Rome Conference. However, no corresponding change was made to Article 121(5). Thus, when the states actually voted on adoption of the text for the Rome Statute in July 1998, the text of Article 121(5) still said that it would apply to “[a]ny amendment to article 5 of this Statute,”<sup>63</sup> without adding that it would also apply to amendments that were now contained in Articles 5 through 8.

After the Rome Conference, on September 3, 1998, Ambassador Philippe Kirsch, who had presided over the conference at Rome, wrote to Ambassador Hans Corell, the UN under-secretary general for legal affairs, to make what he characterized as a “technical correction” to the text adopted at Rome. Under Article 125, the UN secretary-general serves as depositary of the Rome Statute. As described in more detail in the Vienna Convention on the Law of Treaties, in the case of error in the text of treaties, the responsibilities for a depositary include notifying the signatory and contracting states of errors and of the proposals to correct them—and in the absence of objection, to make and initial corrections in the text and to inform those entitled to become parties.<sup>64</sup> These procedures apply only in “cases where there is no dispute as to the existence of the error or inconsistency” and do not apply if “there is a dispute as to whether or not the alleged error or inconsistency is in fact such.”<sup>65</sup>

Ambassador Kirsch’s letter was thus written to make clear that the fact that Article 121(5) referred only to Article 5 was merely a technical error, and to have the secretary-general make the necessary corrections so that Article 121(5) would be revised to refer not just to Article 5 but to the new Articles 5 through 8.<sup>66</sup> Ambassador Kirsch’s letter noted specifically that the Bureau of the Committee of the Whole of the Conference had confirmed that this error was simply a technical one and that it had not been “the intent of the Bureau in Rome to make a substantive change to Article 121, paragraph 5” when it had broken what had been a single

<sup>61</sup> Article 5(2) went on to provide that “[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

<sup>62</sup> See, e.g., Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

<sup>63</sup> See Rome Statute of the International Criminal Court, Art. 121(5), July 17, 1998, UN Doc. A/CONF.183/9\*, 37 ILM 999 (1998). An online copy is available at <http://legal.un.org/icc/docs.htm>.

<sup>64</sup> See Vienna Convention on the Law of Treaties, *supra* note 40.

<sup>65</sup> Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. INT’L L. COMM’N 187, 272.

<sup>66</sup> The UN secretary-general, for whom the head of the Office of Legal Affairs serves as legal counsel, had been designated as the depositary for the treaty. Rome Statute, *supra* note 1, Art. 121(5). See also Vienna Convention on the Law of Treaties, *supra* note 40, Art. 79 (describing role of depositary in the correction of errors in the texts of treaties).

Article 5 into four separate articles.<sup>67</sup> This history obviously suggests that Article 121(5) applies in the same way as it would have applied had the content of these four articles been retained as a single Article 5.

So, how would Article 121(5) apply with respect to such an undivided Article 5? Looking at war crimes as an example, the amendment of the definition of war crimes would clearly be an amendment to the portion of Article 5 dealing with war crimes. Accordingly, in the event of an amendment of the definition of war crimes, that amendment would fall within the purview of Article 121(5), and the Court would not be able to exercise its jurisdiction regarding a war crime covered by the amendment when committed by the nationals of a state party that had not accepted the amendment, or when committed on the territory of such a state party. In essence, that state party would have to “opt in” to a crime—that is, specifically consent to its exercise by ratifying or accepting the amendment—for any exercise of jurisdiction to occur with respect to it.

Exactly the same reasoning should apply to the crime of aggression. The crime of aggression would be set out in Article 5, alongside the other crimes over which Article 5 specified that the Court would have jurisdiction. As with the other crimes, the amendment would fall within the purview of Article 121(5), and the Court would not be able to exercise its jurisdiction regarding the crime of aggression when committed by the nationals of a state party that had not ratified or accepted the amendment, or when committed on the territory of such a state party. Under the plain meaning of the article, a state party would have to “opt in” to the crime of aggression for an exercise of jurisdiction to occur.

In short, Article 121(5) embodied two simple ideas: that the states parties were signing onto a Court with jurisdiction over crimes the definitions of which the parties had accepted, and that legislatures of those states had had an opportunity to review those definitions in the process of ratifying the treaty. In ratifying the Rome Statute, states were thus committing to a set of crimes under Article 5 over which the Court would have jurisdiction. Article 121(5) guarded against the risk that two-thirds of the states parties might amend those definitions to extend the Court’s jurisdiction to acts that other parties did not agree should be subject to the Court’s jurisdiction or should even be treated as criminal offenses.<sup>68</sup> This provision gave states parties confidence that their nationals could not be hauled before the Court to face criminal charges for such acts without that state’s consent, and that the Court in which they had invested their resources and support could not be “turned against them” in ways to which they had not specifically consented.

<sup>67</sup> Letter from Philippe Kirsch to Hans Corell, UN Under-Secretary-General and Legal Counsel (Sept. 3, 1998), *partially reprinted in* Allain Pellet, *Entry into Force and Amendment of the Statute*, 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paolo Gaeta & John R. W. D. Jones eds., 2002), at 145, 181.

<sup>68</sup> See Andreas Zimmerman, *Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties*, 10 J. INT’L CRIM. JUST. 209, 218 (2012) (“[W]hile contracting parties were generally willing to automatically submit to the Court’s jurisdiction by way of their ratification of the Statute (which, in itself, constituted a major step forward as compared to, for instance, the jurisdiction of other international courts and tribunals, such as the International Court of Justice), they were only willing to do so to the extent they had accepted the substantive law governing the exercise by the Court of its jurisdiction. Otherwise, they wanted to shield themselves, as well as their nationals, from the exercise of jurisdiction by the Court on the basis of any amendments they could not foresee and, ultimately, could not prevent from entering into force.”).

*B. Consideration of Articles 121(4) and 121(5) by the Special Working Group*

The records of the Special Working Group reflect considerable discussion about what to make of Articles 121(4) and 121(5) with respect to the crime of aggression, and the Special Working Group's final package contained six separate amendments:

- (1) an amendment to delete Article 5(2) of the Rome Statute
- (2) an amendment to insert a new Article 8 *bis*, containing the definitions of "act of aggression" and "crime of aggression" described in part III above
- (3) An amendment to insert a new Article 15 *bis*, regarding the conditions for the exercise of jurisdiction
- (4) An amendment to Article 25(3), limiting to whom the provisions on the crime of aggression would apply ("only to persons in a position to effectively exercise control over or to direct the political or military action of a state")
- (5) An amendment to Article 9(1), providing that the Elements of Crime shall assist the Court in interpreting and applying the crime of aggression (as the Elements of Crime had previously provided assistance with respect to genocide, crimes against humanity, and war crimes)
- (6) An amendment to Article 20(3), protecting persons who have been tried by another court for the crime of aggression from trial by the ICC (as had previously been the case with respect to genocide, crimes against humanity, and war crimes)<sup>69</sup>

The final package ultimately contained a seventh amendment, as Article 15 *bis* gave way to separate articles 15 *bis* and 15 *ter*, with Article 15 *bis* dealing with conditions for exercising jurisdiction in cases of state referrals or *proprio motu* jurisdiction, and Article 15 *ter* dealing with the conditions in cases of Security Council referrals.

At least on their face, each of these six proposals would appear to present different issues in terms of the 121(4)/121(5) regime. The amendment of Article 5 would seem on its face to fall under Article 121(5). The amendments of Articles 9, 20, and 25, along with the insertion of Article 15 *bis*, would seem on their face *not* to fall under Article 121(5), from which it would follow that they would not enter into force unless and until ratified or accepted by *seven-eighths of the states parties*. Not only were these provisions not physically placed within Articles 5 through 8, they did not fit there conceptually, in the sense that they were not providing a definition of a crime, the nonacceptance of which by a state would trigger a rule under which its nationals could not be prosecuted for that crime.

Article 8 *bis* was at least facially different: it could be said to fall physically outside Article 121(5) in that it was not, literally, an amendment to Article 5, 6, 7, or 8. But it served the same function as the provisions contained in those articles in that it defined acts that had not been—but would become—subject to investigation and prosecution by the Court. Moreover, the negotiating history reviewed above supported the conclusion that amendments regarding the

<sup>69</sup> See Draft Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, para. 1 (Feb. 2009), reprinted in *THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2009*, at 60–62 (Stefan Barriga, Wolfgang Danspeckgruber & Christian Wenaweser eds., 2009).

definition of the crime of aggression should be treated in the same manner as amendments to Articles 5 through 8. Specifically, taken together, these facts—that Articles 5 through 8 had originally been contained in a single article to which Article 121(5) referred, that the substance of Article 8 *bis* would clearly have been appropriate to include within that original Article 5, and that the breaking of Article 5 into separate articles was treated as a technical change that was not intended to alter the way the provisions would operate—strongly suggested the propriety of treating Article 8 *bis* as subject to Article 121(5).

In any event, by the time the United States began engaging in the process, the participants had already concluded that all the amendments should be treated as a single package falling under either Article 121(4) or Article 121(5).<sup>70</sup> The apparent theory was that the parties could have framed the amendments as a single amendment that fell physically either inside or outside Articles 5 through 8. For example, it was posited that, if the desire had been to frame all the amendments to come within Articles 5 through 8, the substance of Article 25—modifying the rules for attributing criminal responsibility so that, for the crime of aggression, only those in a position of leadership could be prosecuted—could have been squeezed into Article 5, rather than included in a separate Article 25.

Yet the reality was far more complicated. It was *not* clear that some of the provisions could have been framed to come within Article 5, at least without torturous drafting. This problem was especially apparent in the case of the provisions on the conditions for exercising jurisdiction that eventually emerged as Articles 15 *bis* and 15 *ter*. These amendments were of a very different character, modifying the application of portions of the Rome Statute that were separate from the definitions of the crimes. For example, Article 15 *bis* was specifically framed as a modification of the jurisdictional rules that would otherwise apply under Article 13 of the Rome Statute (“Exercise of Jurisdiction”).<sup>71</sup>

What would it mean, under the first sentence of Article 121(5), that such a provision was in force for parties that ratified, and not in force for parties that had not? The jurisdiction of an international court such as the ICC can easily cover particular acts committed by the nationals of one state, but not those of another, when all states agree that that is the way that the Court’s jurisdiction should operate. Indeed, this is the way in which the jurisdiction of the International Court of Justice operates.<sup>72</sup> But it is quite another thing to say that provisions that endow the Court with jurisdiction over particular acts are in force for some Rome Statute parties but not others. Such an approach would create myriad paradoxes. Would states for which

<sup>70</sup> At the same time, there was a general view that Articles 121(4) and 121(5) were alternatives; that is, one or the other, but not both, could apply at the same time. Barriga, *supra* note 15, at 635 (footnotes omitted) (“So far, any attempts to consider the two provisions as complementary rather than mutually exclusive have been rejected, and it is thus likely that in the final decision on the matter, the Review Conference will simply have to choose one or the other option.”). Yet this conclusion, too, was not completely obvious.

<sup>71</sup> See, e.g., Article 15 *bis*(1) (“The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.”). Both Articles 15 *bis* and 15 *ter* modify the Court’s ability to exercise jurisdiction over the crime of aggression under Article 13, with the consequence that the otherwise applicable rules under Article 13 are made subject to the provisions of these two new articles. Thus, the rules would limit the Court’s jurisdiction in state referral and *proprio motu* cases, meaning that the Court may exercise jurisdiction only after thirty states ratified and only after a decision, referred to in the amendments, taken by the states parties after January 1, 2017.

<sup>72</sup> Specifically, the pattern here is the same as with the Statute of the International Court of Justice, under which all parties to the ICJ Statute have agreed that the Court will have compulsory jurisdiction only over those states that make a declaration under Article 36.

the amendments are not in force be under a legal obligation to recognize judgments that, insofar as they are concerned, the Court is not competent to make? Would such states be under an obligation to cooperate with investigations or prosecutions being pursued by the Court under provisions that, for those states, are not in force? Indeed, would such states be required to *fund* the operations of the Court to pursue cases under provisions that, insofar as they are concerned, are not in effect? None of these issues would be problematic if the amendments establishing conditions for exercising jurisdiction were adopted under Article 121(4). The obligations under such amendments—including the requirements to recognize judgments, to cooperate with investigations and prosecutions, and to provide funding—would apply equally to all states parties.

The decision to treat all the amendments as if each were an amendment to Articles 5 through 8 thus opened an intellectual and legal quagmire. It seemed one thing to treat provisions as if they fell under Articles 5 through 8 if, logically, their content fit comfortably within those provisions. But it is quite another thing to do so for provisions that, in reality, were of a very different character. Nevertheless, the states parties appear to have proceeded on the basis that all the amendments would be treated as a single package that fit either wholly within Articles 5 through 8 or wholly outside those articles. For its part, having absented itself from the process since 2003, the United States made a tactical decision not to press the view that the different elements of the package should be treated differently under the 121(4)/121(5) regime. At least at the time, the tactical costs of pressing to revisit this issue appeared to outweigh the benefits of bringing what might be seen as greater legal clarity and intellectual order to the issue.

*C. The Decision That the Aggression Amendments Would Enter into Force Under Article 121(5) and Questions About “Positive” Versus “Negative” Understandings*

In the end, the text of the resolution adopted at Kampala was clear on at least one point: none of the Kampala amendments would require ratification or acceptance by seven-eighths of the parties in order to enter into force, and paragraph 1 of the resolution adopted on the last night of the Kampala conference stated explicitly that all the amendments “are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5.”<sup>73</sup> But if that is so, what did the second sentence of Article 121(5) mean when it said that, in respect of a state that has not ratified or accepted the amendment, “the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory”? The reports of the Special Working Group reflect extensive discussion of two schools of thought on this question: the so-called negative versus positive understandings of Article 121(5).

The first of these schools of thought involved the so-called negative understanding: the second sentence of Article 121(5) meant exactly what it said. Thus, if there were amendments to expand the definitions of genocide, crimes against humanity, or war crimes to apply to new acts, the Court would not be able to exercise jurisdiction under those amendments to prosecute those new crimes against the nationals of a state party that had not ratified or accepted the amendment, even if that national’s action occurred on the territory of a state that had accepted or ratified the amendment. Similarly, the Court would not be able to exercise jurisdiction with

<sup>73</sup> ICC Res. RC/Res.6, *supra* note 1.

respect to acts committed on the territory of a state party that had not ratified the amendment, even if the allegedly offensive action had been taken by a national of a state that had ratified the amendment.

A second, opposing school of thought supported the so-called positive understanding that the second sentence of Article 121(5) meant the *opposite* of what it actually said. Thus, while Article 121(5) said on its face that the Court could not exercise jurisdiction over acts when committed by the nationals of a state that had not ratified an amendment, the positive understanding was that the Court could nonetheless exercise jurisdiction over such nationals if the crimes were committed on the territory of a state that had ratified. And while Article 121(5) said on its face that the Court could not exercise jurisdiction over acts committed on the territory of a state that had not ratified, under the positive understanding the Court could nonetheless exercise jurisdiction over crimes committed on the territory of such a state if they were committed by the national of a state that did ratify.

The purported logic of the positive understanding was that the result better matched the jurisdictional regime in other parts of the Rome Statute, under which the Court would have jurisdiction if either the state of nationality *or* the territorial state was a Rome Statute party. But in the United States' view, this interpretation had many problems. Most obviously, the positive understanding was inconsistent with what Article 121(5) actually said, and the interpretation thus would not be—in the words of the Vienna Convention on the Law of Treaties—“in accordance with the ordinary meaning to be given to the terms of the treaty.”<sup>74</sup> While normal principles of treaty law, reflected in the Vienna Convention, allow recourse to supplementary means of interpretation when the interpretation based on the ordinary meaning either “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable,”<sup>75</sup> the plain meaning of the words here was neither “ambiguous” nor “obscure,” nor did it yield a result that was “manifestly absurd or unreasonable.” Indeed, as described above, the ordinary meaning of that sentence is fully consistent with the manifestly reasonable desire of states parties to protect themselves from the possibility that the Court that they had committed to support could not be turned against them, so as to expose their nationals to investigations or prosecutions for acts that they did not agree were crimes or that they did not agree should be subject to the Court's jurisdiction.

The U.S. delegation was concerned with the very fact that the Special Working Group had had such an extended debate on the issue of the positive versus negative understandings. Some proponents of the positive understanding appeared too willing to disregard explicitly limiting language in favor of interpretations that sought, as a matter of policy, to maximize the scope of the Court's jurisdiction. This phenomenon raised troubling questions about whether countries could depend upon the institutions created by the Rome Statute to abide by those legal protections to state interests that had been painstakingly included in the text.

In any event, whatever credibility the arguments in favor of the “positive understanding” might have had, it dissolved in Kampala itself. Specifically, paragraph 5 of Article 15 *bis* of the Kampala Outcome Document, which addressed the Court's jurisdiction over the crime of aggression in cases involving states that are not parties to the Rome Statute, provides: “In respect of a State that is not a party to this Statute, the Court shall *not* exercise its jurisdiction

<sup>74</sup> Vienna Convention on the Law of Treaties, *supra* note 40, Art. 31(1).

<sup>75</sup> *Id.*, Art. 32.

over the crime of aggression when committed by that State's nationals or on its territory" (emphasis added). This Article 15 *bis* language thus directly mirrors the second sentence of Article 121(5): both this language and Article 121(5) say that the Court shall not exercise its jurisdiction over the crimes to which they apply "when committed by that State's nationals or on its territory." In Kampala, nothing could have been clearer than that, under this provision, the Court *would not* be able to exercise jurisdiction over acts committed by nationals of non-state parties, even if the alleged crime occurred on the territory of a state party that had ratified the aggression amendments.<sup>76</sup> It is thus hard to see how the same language in the parent provision, Article 121(5), could be read in exactly the opposite way: to mean that, somehow, the Court *would* be able to exercise jurisdiction if the alleged crime occurred on the territory of a ratifying state.

Thus, one would have expected from the above that the crime of aggression would not be prosecutable before the Court in cases that involved a state party that did not ratify or accept the amendments, either as the state of nationality of the accused or as the state in which the crime was alleged to have taken place. But suddenly, an entirely different, and deeply implausible, "theory" of the aggression amendments arose among some of the Kampala participants, based on the unlikely notion that the aggression amendments were governed by neither Article 121(4) nor Article 121(5), but by two completely different Rome Statute articles that had heretofore barely been mentioned seriously in the discussion of this matter.

## VI. ENTRY INTO FORCE UNDER THE ARTICLE 5(2)/ARTICLE 12 THEORY

What we call here "the Article 5(2) theory" appears to contain several steps. As we have heard it articulated,<sup>77</sup> the theory starts with the language in Article 12 of the Rome Statute: "A state

<sup>76</sup> See, e.g., Christian Wenaweser, *Reaching the Kampala Compromise on Aggression: The Chair's Perspective*, 23 LEIDEN J. INT'L L. 883, 887 (2010) (highlighting importance in the amendments of "the wholesale exemption for non-states parties"); Stefan Barriga, *Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression*, in FROM ROME TO KAMPALA: THE FIRST 2 AMENDMENTS TO THE ROME STATUTE 31, 41 (Gérard Dive, Benjamin Goes & Damien Vandermeersch eds., 2012) ("article 15 *bis*(5) is very unambiguous" as to whether the Court lacks jurisdiction if a non-state party is the alleged aggressor); Niels Blokker & Claus Kress, *A Consensus Agreement on the Crime of Aggression: Impressions from Kampala*, 23 LEIDEN J. INT'L L. 889, 893 (2010) ("the ICC will be precluded from exercising jurisdiction over the crime of aggression with respect to acts of aggression by and against non-state parties"); Claus Kress & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1212–13 (2010) ("the Court will not be able to exercise its jurisdiction over an alleged crime of aggression arising from an act of aggression of a non-State Party"); HANDBOOK: RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS TO THE ROME STATUTE OF THE ICC: CRIME OF AGGRESSION, WAR CRIMES 10 (Liechtenstein Institute on Self-Determination, Woodrow Wilson School of Public and International Affairs, Princeton University, n.d.) (According to Article 15 *bis*(5), "Non-States Parties are thus excluded both as potential aggressor and victim States.").

<sup>77</sup> See Barriga, *supra* note 76, at 38–39 ("Notably, article 5(2) does not state that the conditions for the exercise of jurisdiction over the crime of aggression shall include the limits of article 121(5), second sentence. Instead, it leaves it up to the provision to be adopted by States Parties to set out the conditions for the exercise of jurisdiction, and in doing so confers broad powers upon States Parties to find an aggression-specific solution for this issue."); Wenaweser, *supra* note 76, at 885–86 (jurisdictional regime under the amendments is "on the basis of the acceptance already given by states parties"); Kress & von Holtzendorff, *supra* note 76, at 1215 ("Article 5(2) of the ICC Statute must be taken to entitle States Parties to devise the *sui generis*-regime which has made its way into draft Article 15 *bis* (4) of the ICC Statute" even if the legal foundation "is perhaps not rock solid.").

The proponents of the Article 5(2)/Article 12 theory argue that the language of Article 15 *bis*(4)—providing that the Court may exercise jurisdiction over the crime of aggression "in accordance with article 12"—requires that either the alleged aggressor or the alleged victim has ratified the amendments. See, e.g., Barriga & Grover, *supra* note 58, at 532 ("Since [the amendment] enters into force for each ratifying state party individually under 121(5), the

which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.” Article 5(1), in turn, includes the crime of aggression—along with genocide, crimes against humanity, and war crimes—in the list of crimes over which the Court has jurisdiction.<sup>78</sup> Article 5(2) then states: “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*” (emphasis added).

The proponents of the Article 5(2) theory thus argue that the Rome Statute allowed the Court to exercise jurisdiction as soon as an amendment was “adopted” at a Review Conference. In the view of these proponents, Rome Statute parties had previously accepted the Court’s jurisdiction over the crime of aggression pursuant to Article 12. The underlying theory is that states consented, in the Rome Statute itself, to be bound by whatever provisions on aggression the Review Conference might later adopt many years later. *Yet if this theory were true, there would not, insofar as the Rome Statute is concerned, be any need for the aggression amendments to be ratified at all.*

The proponents of this theory appear to agree that other theories may also have merit, but claim that their theory is “available.” The United States’ view has been not simply that the position is weak but that the position simply is not legally plausible. Continued efforts to rely on the Article 5(2) theory will bring discredit to the post-Kampala process and, ultimately, to the Court itself. To elaborate: on its face, such a position would seem to imply that the Court could—upon ratification by thirty states and the making of the necessary decision after January 1, 2017—exercise jurisdiction over any case of aggression involving a Rome Statute party *even if none of the alleged “aggressor states” and none of the alleged “victim states” had ratified the amendments*, on the theory that the Rome Statute party had already accepted the Court’s jurisdiction by becoming party to the Rome Statute.

In our view, it is inconceivable that this conception of how the Rome Statute parties would deal with aggression is anything remotely like what states had agreed at Rome. Given the deep division of views that impeded the finalization of the crime of aggression at Rome, how could one conclude that all states there nevertheless agreed to submit themselves to whatever a two-thirds majority might adopt years later—at a future Review Conference (which turned out to

Court would have no jurisdiction whenever the amendment has not entered into force for any of the states parties involved.”). However, if the Article 5(2)/Article 12 theory is based on the proposition that states parties already accepted the Court’s jurisdiction over the crime of aggression when they became parties to the Rome Statute, it is not self-evident why ratification of the aggression amendments by either the alleged aggressor or the alleged victim would be necessary in order for the Court to be able to exercise jurisdiction. The fact that the proponents do not appear to accept this seemingly natural extension of their theory as a plausible result would seem further to undercut the logic of the Article 5(2)/Article 12 theory.

<sup>78</sup> The complete text of Article 5(1) is as follows:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

be Kampala 2010)—as either the definition of the crime of aggression or the conditions under which jurisdiction would be exercised? It is even less conceivable that that is what states parties agreed at Rome when one considers that everyone agrees that this rule would not apply to any expansion of the Court's jurisdiction in relation to any amendment to expand the definition of war crimes, crimes against humanity, or genocide. The thoroughly implausible implication of the Article 5(2) theory is that states took great pains to protect themselves against any incremental expansion, however minor, of the Court's ability to exercise jurisdiction over existing crimes in future Rome Statute amendments. Nevertheless, these same states took no similar steps to protect themselves against the Court's ability to exercise jurisdiction over an entirely new, controversial, and at-the-time wholly undefined crime of aggression!

The Article 5(2) theory rests on the implausible notion that all states agreed to be bound by whatever a two-thirds majority of states parties might later eventually agree. Yet surely, such an idea would have caused widespread consternation within any serious legislature considering ratification. Can one imagine a foreign ministry telling its country's legislators that, if the country ratified the Rome Statute, it would thereafter be subject to the possibility of aggression jurisdiction under *whatever* definition two-thirds of the states parties might subsequently agree, and under *whatever* conditions for exercising jurisdiction those parties might proclaim should apply?

To us, this notion seems utterly fantastic. And we have seen absolutely no evidence that that is what ratifying governments actually told their legislatures. To the contrary, those that addressed the issue appear—correctly—to have told their legislators exactly the opposite. In Australia, for example, the attorney-general and foreign minister provided assurances for the Parliament that the aggression amendments could not be adopted for at least seven years after entry into force of the treaty and that—in light of the principles that apply under Article 121(5)—the Court, even then, would lack jurisdiction over the crime if committed by nationals of states that did not accept the definition.<sup>79</sup>

The government of Switzerland seems to have made similar representations in a report submitted to the Swiss Parliament:

Sept ans au plus tôt après l'entrée en vigueur du Statut, la conférence de révision décidera de l'adoption d'une définition détaillée du crime d'agression. La procédure d'adoption sera conforme aux art. 121 et 123 du Statut. *Ceci veut dire qu'un État pourra faire objection à l'adoption et ainsi garder la faculté d'exclure l'application de l'agression pour ses ressortissants ou son territoire.*

[Seven years after the entry into force of the Statute, the Review Conference will decide on the adoption of a detailed definition of the crime of aggression. The adoption procedure

<sup>79</sup> See PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, JOINT STANDING COMMITTEE ON TREATIES, REPORT 45: THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT 46 (May 2002), at <http://www.iccnw.org/documents/AustraliaCCReport45.pdf>.

In relation to the crime of aggression, advice from the Attorney-General and the Minister for Foreign Affairs was that the crime has not yet been defined and that it cannot be added to the Court's jurisdiction until a definition is adopted by the State Parties. The earliest that the crime could be added to the Court's jurisdiction is 7 years after the establishment of the Court. At this time, a State Party may decline to accept the definition, in which case the Court may not exercise jurisdiction over that crime when committed by the nationals of that State Party or on its territory.

is consistent with art. 121 and 123 of the Statute. *This means that a State may object to the adoption and thus keep the right to exclude the application of aggression to its nationals or territory.*<sup>80</sup>

Indeed, the basic argument that parties had already, in Rome, accepted the Court's jurisdiction over aggression pursuant to Article 12 rings no truer for the crime of aggression than it does for any additions to the definitions of genocide, war crimes, or crimes against humanity. Article 12 simply says that the parties accept the jurisdiction of the Court over the crimes referred to in Article 5. It is, of course, self-evident that Article 5 refers to the crime of aggression, but it is no less self-evident that Article 5 refers to war crimes, crimes against humanity, and genocide. How could anything in Article 12 render the protections of Article 121(5) less applicable to provisions that define the crime of aggression from scratch than they would be to far less significant modifications to the existing definitions of war crimes, crimes against humanity, or genocide?

Even assuming *arguendo* that the states parties at Kampala *could have* proceeded under a theory that it was permissible for their decision to become operational upon adoption in Kampala without ever amending the Rome Statute, that is not what they, in fact, did. On its own terms, the Article 5(2) theory posits that the mere adoption of a provision could be sufficient, and that the parties in Kampala were free to circumvent the normal rule of amendment by action at a Review Conference, without provisions for subsequent acceptance or ratification in a legislative process in which parliaments would have an opportunity to participate. But even were that theory correct, the vehicle by which the parties expressly chose to proceed was, in fact, via "amendments" to the Rome Statute. Indeed, the word "amendment" was used repeatedly and consistently. The Kampala resolution was quite clear, in numerous places, in saying that it was "amendments" that the Rome Statute parties were adopting.<sup>81</sup> The resolution refers to the provisions as "amendments" every time it refers to them, saying, for example, that the provisions

<sup>80</sup> *Message relatif au Statut de Rome de la Cour pénale internationale, à la loi fédérale sur la coopération avec la Cour pénale internationale ainsi qu'à une révision du droit pénal* [Message on the Rome Statute of the International Criminal Court, the Federal Law on Cooperation with the International Criminal Court, as Well as a Revision of the Criminal Law], LA FEUILLE FÉDÉRALE 359, 393 (2000 VII) (dated Nov. 15, 2000) (emphasis added) (authors' translation), at <http://www.admin.ch/ch/f/ff/2001/359.pdf>.

Interestingly, the issue also came up much earlier in the context of commentators who argued that the fact that the definition of the crime of aggression remained to be decided should not deter the United States from becoming a party to the Rome Statute. Such commentators argued that, if amendments defining aggression were later adopted, the Court's jurisdiction would not apply against the nationals of a state that did not ratify the amendments. See, e.g., Philippe J. Sands, *The Future of International Adjudication*, 14 CONN. J. INT'L L. 1, 9 (1999) (emphasis added):

The specter was raised that in the event that the United States decided to launch a military attack against another state, the prosecutor of the International Criminal Court might be able to commence proceedings directly against a United States President for aggression. In my view the fear is misplaced: it is clear from the Statute that the definition of aggression has not been settled and jurisdiction on this head will not apply until there is a definition of aggression established by amendment of the Statute. Since such amendment cannot take effect without ratification by seven-eighths of the parties to the Statute and will not cover nationals of states not ratifying, *there is no prospect of a charge of aggression being laid against a United States national in the absence of United States ratification of the amendment.*

<sup>81</sup> One argument that has been raised is that paragraph 1 of Resolution RC/Res.6 says that the amendments "shall enter into force in accordance with article 121, paragraph 5" but does not say that jurisdiction created pursuant to it will operate in the same way as would be the case under (other) amendments that enter into force under that provision. Under this argument, the language in paragraph 1 of Resolution RC/Res.6 means that the first sentence of Article 121(5) applies but that, somehow, the second sentence does not apply. See Astrid R. Coracini, *More Thoughts on "What Exactly Was Agreed in Kampala on the Crime of Aggression,"* EJIL: TALK! (July 2, 2010), at <http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>. But it is hard to

being adopted were “*amendments* to the Statute,”<sup>82</sup> that the Review Conference was adopting understandings “regarding the interpretation of the above-mentioned *amendments*,”<sup>83</sup> that it would at a future time “review the *amendments*,”<sup>84</sup> and that it called upon states “to ratify or accept the *amendments*.”<sup>85</sup> The package as a whole was specifically entitled “*Amendments* to the Rome Statute of the International Criminal Court on the crime of aggression,”<sup>86</sup> consistently referred to itself as constituting “amendments,”<sup>87</sup> has been consistently referred to (both before and after Kampala) as the *amendments* on aggression, and was clearly structured in the form of “amendments” (as opposed to some other kind of provision that might theoretically have recorded the decision of the states parties to allow the Court to begin exercising jurisdiction absent amendments).<sup>88</sup>

Thus, even if it might have been legally possible in Kampala to proceed without adopting any amendments to the Rome Statute, the states parties decided to proceed through “amendments” to the Rome Statute. Lawful amendments require that either Article 121(4) or Article 121(5) would apply to the amendments. And if these amendments are amendments under Article 121(5), as the resolution specifically says, then that provision of the Rome Statute could not be more specific than, in respect of a state party that does not accept them, “the Court shall

understand why the second sentence—which is a sentence specifically about the effect on jurisdiction of amendments that enter into force in accordance with the first sentence—would be inapplicable. The amendment adopted by the Kampala conference earlier during the night of adopting the aggression amendments—ICC Resolution RC/res/5 (June 10, 2010), often referred to as the Belgian Amendment—used the same phrase in specifying that the amendment “is subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5,” and there has been no serious argument that the second sentence of Article 121(5) should not apply to it. Perhaps more importantly, the drafts of the aggression amendments developed by the Special Working Group in the run-up to Kampala all contained a version of the same sentence, with the language bracketed to show that the only thing unclear was whether it was Article 121(4) or Article 121(5) in accordance with which the amendments would enter into force. *See, e.g.*, Report of the Special Working Group on the Crime of Aggression, App. I, in ICC Doc. ICC-ASP/7/20/Add.1, ch. II, Annex II (language by which Review Conference would adopt the amendments, “which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4/5] of the Statute”). *See* Conference Room Paper on the Crime of Aggression, in UN Doc. RC/WGCA/1, Annex III (May 25, 2010). The debate about whether to refer to Article 121(4) or Article 121(5) was consistently cast in terms of (1) the effect it would have on the conditions for exercising jurisdiction and (2) the implications that a decision to refer to Article 121(5) would have because the second sentence would then apply. All this preparatory work makes it even less plausible that the reference to “Article 121(5)” should be interpreted to mean that the first sentence of that article applies but that the second sentence is irrelevant.

<sup>82</sup> ICC Res. RC/Res.6, *supra* note 1, para. 1.

<sup>83</sup> *Id.*, para. 3 (emphasis added).

<sup>84</sup> *Id.*, para. 4 (emphasis added).

<sup>85</sup> *Id.*, para. 5 (emphasis added).

<sup>86</sup> *Id.*, Annex I (emphasis added).

<sup>87</sup> *See, e.g.*, Article 15 *bis*(2) (jurisdiction can only be exercised one year after ratification or acceptance of the *amendments* by thirty states); Article 15 *ter*(2) (same); ICC Res. RC/Res.6, *supra* note 1, Annex III (referring to the Understandings as “Understandings regarding the *amendments* to the Rome Statute”) (emphasis added). Similarly, the depositary notifications by the secretary-general upon notification of ratification similarly refer to the provisions as “amendments,” *see, e.g.*, Depositary Notification, UN Doc. C.N.249.2012.TREATIES-XVIII.10.b (June 11, 2010), at <http://treaties.un.org/doc/Publication/CN/2012/CN.249.2012-Eng.pdf> (Liechtenstein); Depositary Notification, UN Doc. C.N.636.2012.TREATIES-XVIII.10.b (June 11, 2010), at <http://treaties.un.org/doc/Publication/CN/2012/CN.636.2012-Eng.pdf> (Trinidad and Tobago), and, in fact, the secretary-general’s authority to circulate documents under Article 121(7) of the Rome Statute, *supra* note 1, is specified as an authority to circulate *amendments*.

<sup>88</sup> It is also worth noting that Article 123(3) of the Rome Statute, *supra* note 1, provides that “[t]he provisions of article 121, paragraphs 3 to 7, shall apply to the adoption . . . of any amendment to the Statute considered at a Review Conference.” It was, of course, specifically understood that the *amendments* to be considered at the Review Conference would include those on the crime of aggression.

not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."

Finally, it is worth recalling that, under the Rome Statute, one type of amendment could, in fact, have entered into force simply upon adoption by a two-thirds majority at the Review Conference, without need for any subsequent ratifications or acceptances: Article 122 of the Rome Statute governs amendments "which are of an exclusively institutional nature." Such amendments are subject to a streamlined procedure under which they can enter into force for all parties upon adoption by two-thirds vote of the states parties.<sup>89</sup> But to our knowledge, no one has argued—and, indeed, no one could credibly argue—that the Article 122 procedure was meant to apply to the aggression amendments. Yet the result supported by proponents of the Article 5(2) theory exactly mirrors the process that would apply under Article 122. The idea that the framers would have structured the Rome Statute so that the highly controversial aggression amendments could enter into force on the same basis as the streamlined entry-into-force provisions for amendments "which are of an exclusively institutional nature" under Article 122 appears to us, with all due respect, preposterous.

In the end, critically important amendments to a treaty must be accomplished by an amendment process agreed upon at the time the organic treaty is adopted. Amendments cannot become binding through a clever shortcut developed after the fact. To be direct, the Article 5(2) theory risks bringing fundamental discredit to the ICC and Assembly of States Parties processes. Even before Kampala, there was much about which to be concerned in the insufficiently rigorous discussion in the Princeton Process of how Articles 121(4) and 121(5) should actually work as a legal matter. From our perspective, a faction at Kampala saw maximizing the situations covered by the amendments as its central policy objective—even without the consent of the affected states—whether that be in the form of expanding the definitions of aggression to encompass all illegal uses of force, or of having the Court's jurisdiction apply even with respect to those states that did not ratify or accept the amendments. As lawyers, our concern grew when, in the early days of the Kampala Review Conference, proposals were put forward that seemed to pick and choose between Articles 121(4) and 121(5) in internally inconsistent ways. But our concern reached its crescendo when some participants abandoned the notion of "amendment" altogether. Instead, they seized upon a novel theory based on a "nonamendment amendment" interpretation of Article 5(2) that, in our view, lacked any semblance of legal credibility.

To be clear: the Rome Statute is not an ordinary treaty. It makes rules that govern an international judicial body empowered to impose severe criminal penalties. It is thus especially important that that statute operate forthrightly and fairly. There is a heightened need for states inside and outside the Court to have complete confidence that important decisions will be made in a serious manner that reinforces the Court's reputation as a credible institution. Clarity about the process for amending such an important treaty is crucial, and the international community will do itself no favor if it puts in place "amendments relating to a crime under conditions that ensure that every aggression prosecution will begin with a challenge to the

<sup>89</sup> Rome Statute, *supra* note 1, Art. 122(2). Unlike the situation under Article 5(2), Article 122 does not say that the adoption of the amendments must take place "in accordance with articles 121 and 123."

legitimacy of the process by which the crime was adopted.”<sup>90</sup> States are entitled to a clear understanding about the extent to which becoming parties to a treaty, particularly to one involving judicial institutions, can subject them to the effects of possible future amendments.

In this setting, a far-fetched theory of “nonamendment amendments” can only sow confusion and distrust. Twisting beyond plausibility the words of the Rome Statute or claiming that the Statute has somehow been amended outside any recognizable amendment process will do little to build a climate that is internationally favorable for encouraging states to abide by either the letter or the spirit of their legal obligations to the ICC. As Japanese ambassador Ichiro Komatsu presciently said on the final night of the Kampala Review Conference:

In light of the absolute necessity of the legal integrity for a treaty dealing with criminal responsibility of individuals, the upshot of adopting such a resolution, I am afraid, is the undermining of the credibility of the Rome Statute and the whole system it represents. We have also a serious concern that this amendment may entail non-negligible difficulties in our relationship with the ICC system.<sup>91</sup>

## VII. THE “OPT OUT” PROVISION

One of the most interesting elements of the Kampala Amendments is the “opt out” provision contained in Article 15 *bis*(4): the Court may exercise its jurisdiction “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 provision thus says that in order for the declaration to block the Court from exercising its aggression jurisdiction, it must have been submitted “previously”; significantly, however, it does not explicitly say what the submission must have been “previous” to. Based on the syntax of Article 15 *bis*(4), one might possibly conclude that (1) the submission must be “previous” to the exercise of jurisdiction by the Court, (2) the declaration must be submitted “previous” to the commission of the crime or “previous” to the state act of aggression that would be the predicate for a particular prosecution, (3) the declaration must be submitted “previous” to the point at which the state ratifies or accepts the amendments, or (4) the declaration must be submitted “previous” to the time that thirty states ratify the amendments (or within one year thereafter) or “previous” to the post–January 1, 2017, decision contemplated in Article 15 *bis*(3). The main drafter of the provision, Stefan Barriga, has written that *previously* means “prior to the act of aggression,”<sup>92</sup> but any confusion about a provision of such importance is, at best, profoundly unfortunate and, at worst, intolerable.

<sup>90</sup> Statement at the Review Conference of the International Criminal Court, *supra* note 47.

<sup>91</sup> Statement of Japan, *in* Statements by States Parties in Explanation of Position Before the Adoption of Resolution RC/Res.6, *in* ICC Doc. RC/11, *supra* note 1, Annex VII, at 121.

<sup>92</sup> See Barriga, *supra* note 76, at 32, 42. The records from Kampala reflect that provisions that would have suggested that such declarations had to be submitted before a date certain, or before ratification, were considered but that the parties declined to include such provisions in the amendments that were ultimately included in Resolution RC/Res.6. See, e.g., Declaration (Draft of 9 June 2010 16h00), *in* J. Trahan, *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT’L CRIM. L. REV. 49, App. D (2011). In this compromise proposal between the proposal submitted by Argentina, Brazil, and Switzerland (Appendix A) and that submitted by Canada (Appendix B), Article 15 *bis*(4*ter*) would state that a declaration of nonacceptance “may be submitted to the Secretary General of the United Nations at any time before December 31, 2015 or, in the case of States that ratify or accede to the Rome Statute after that date, upon ratification or accession.” See Trahan, *supra*, at 73 n.97, Apps. A, B.

Assuming that states parties take a decision to “activate” the amendments, there would also be unfortunate confusion from the perspective of a state seeking to protect itself against the risk of retroactive operation of the Court’s jurisdiction, to cover acts committed before it accepted or ratified the amendments. For example, if one assumes a situation in which thirty states ratify and the states parties take a decision to activate the Court’s jurisdiction in 2017, a state that thereafter ratifies the amendments, say in 2025, could be subject to the risk of arguments that its leaders could be prosecuted with respect to acts or crimes of aggression alleged to have been committed any time between 2017 and 2025. Under such a reading, the Court’s aggression jurisdiction would “reach back” to events that occurred before the state in question had ever ratified the amendments. Paragraph 1 of the Kampala resolution offers some basis for states to guard against such an eventuality when it “notes” that a state party may lodge a declaration prior to ratification or acceptance.<sup>93</sup> But that would not appear to offer sufficient protection against such a reading to a state party that only subsequently decided to ratify the amendments and did not exercise this option before doing so.

All of the above points to the need for much greater clarity on the meaning and application of the opt-out provision. Whether and when a state may opt out goes to the core of whether a particular state consents to the aggression regime. This issue is not one on which it would be appropriate for the Court to impose a conclusion on states that they never understood at the time that they ratified the Rome Statute or its subsequent amendments. Yet in Kampala, the states failed to speak with even a modicum of clarity on such issues, leaving it to the Court to resolve differences of view on such basic political issues at a much later date. This ambiguity risks saddling a fledgling Court with a role that can hardly be expected to enhance the prospects for respect for its authority.

Another reason to focus on the opt-out provision is to address other problems that, in our view, were insufficiently addressed at Kampala, including the ambiguities discussed above about the definitions of “act of aggression” and “crime of aggression” in Article 8 *bis*. One possibility going forward is that states concerned about the risk that the definitions might, even wrongly, be construed to cover certain types of cases—for example, humanitarian interventions—might fashion a declaration, a “partial opt-out,” to limit the extent to which the Court’s jurisdiction would apply to them in such cases.<sup>94</sup> Or, given the differences in the nature between, on the one hand, the crime of aggression and, on the other hand, the atrocity crimes of genocide, crimes against humanity, and war crimes, one could imagine the fashioning of partial opt-outs for *proprio motu* situations—those in which no state had stepped forward to

<sup>93</sup> ICC Res. RC/Res.6, *supra* note 1, para. 1. Some have pointed to the language in paragraph 1 as suggesting that the parties at Kampala must have intended the Court to have jurisdiction with respect to alleged acts of aggression committed by states parties that did not ratify or accept the amendments unless they lodged such a declaration. Besides not being logically true—for example, the very discussion above demonstrates how states parties might want to use an advance opt-out to protect themselves from the Court exercising jurisdiction with respect to acts of aggression alleged to have been committed before they accept or ratify the amendments—such a result would, as we have seen above, be inconsistent with Article 121(5) of the Rome Statute. It thus would have been possible to achieve this result only if the parties had amended Article 121(5)—something that, to our knowledge, none of the proponents have claimed to have been agreed at Kampala, and something that could not have been done with respect to those states that decline to ratify or accept the amendments.

<sup>94</sup> A number of states could potentially agree upon the wording of such an opt-out and enter it at the same time. For a description of how such a collective opt-out might be fashioned, see Leslie Esbrook, *Exempting Humanitarian Intervention from the Definition of the Crime of Aggression: Ten Procedural Options for 2017*, 55 VA. J. INT’L L. (forthcoming 2015).

refer a situation to the ICC, or those in which (as part of a peace settlement) both sides to a conflict agreed that the leaders of the other side should not be prosecuted for aggression. A further possibility is that states might fashion partial opt-outs to cover situations in which they had acted within the framework of a regional body, such as the African Union, that has expressly endorsed some forms of humanitarian intervention or other action—thereby avoiding situations in which the prosecutor or the Court might be compelled to review or sit in judgment on whether decisions duly authorized by such a body fell within the ambit of the Article 8 *bis* definitions.<sup>95</sup> Similarly, an opt-out for coalition operations involving states that had not accepted the amendments would reduce the risk that the Court would be drawn into “proxy” prosecutions of state officials for supporting actions of another state that was not subject to the amendments. Yet another possibility is that a state might want to consider a partial opt-out under which the Court would not exercise jurisdiction in a nonreciprocal situation—that is, one in which the state with which it was involved in a conflict had itself opted out—because it considered it unfair for the Court to be able to exercise aggression jurisdiction only over one, and not both, parties to a conflict. In short, at least some of the lingering confusion over the breadth of the Kampala provisions can be addressed by affirmative steps by concerned states between now and 2017. The express availability of opt-out declarations identified by the Kampala Outcome Document raises numerous possibilities for discussion among interested states between now and 2017.

#### VIII. THE POST–JANUARY 1, 2017, DECISIONS

Both Article 15 *bis*(3) and Article 15 *ter*(3) contemplate further decisions after January 1, 2017. Under these articles, the Court’s ability to exercise jurisdiction is subject to decisions by the same majority of states parties as is required for adopting an amendment to the Statute. To be sure, nothing precludes states from ratifying the amendments before the taking of such a decision, and, indeed, some states have already ratified.<sup>96</sup> That said, there are many logical reasons not to do so. For example, states choosing to ratify the entire package of amendments—and their parliaments, as they consider the matter domestically—must do so without knowing the elements of the post–January 1, 2017, decision that the parties might take. At the most basic level, states choosing to ratify in advance cannot even be assured that states parties would decide to activate the Court’s jurisdiction under only one of Articles 15 *bis* and 15 *ter* but not the other. Perhaps even more important, they cannot be assured that the decision of the states parties would not affect the way in which the amendments would operate—for example, by a decision to allow the Court to begin exercising jurisdiction over the crime of aggression but only, in the words of both Article 15 *bis*(3) and Article 15 *ter*(3), “subject to” additional Understandings or further elements.

In its statement on the final night in Kampala, the United States specifically referred to the possibility that post–January 1, 2017, decisions would be used to address such concerns:

<sup>95</sup> Article 4 of the Constitutive Act of the African Union (2000), at [http://www.au.int/en/sites/default/files/ConstitutiveAct\\_EN.pdf](http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf), provides for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity,” and “the right of Member States to request intervention from the Union in order to restore peace and security.” For a fuller discussion of this “regional framework” possibility, see generally Esbrook, *supra* note 94.

<sup>96</sup> At this writing, twenty-three states parties have ratified the aggression amendments.

We also believe that at such a [post–January 2017] Review Conference, the States Parties should be allowed to consider any related amendments proposed for the Statute with the aim of strengthening the Court. We read the wording of paragraphs 3 of new articles 15 *bis* and 15 *ter* to allow for this sensible approach.<sup>97</sup>

On the same night, the delegation of Brazil asserted that “States Parties will have to make a decision to ‘activate’ the current provisions.”<sup>98</sup> This statement may be seen as suggesting that states would need to decide on a yes-no basis on each of the Article 15 *bis* and Article 15 *ter* decisions without additional action to adjust or clarify their terms. However, since the terms of Articles 15 *bis* and 15 *ter* simply say that exercising jurisdiction under those provisions is subject to a later decision, it is hard to see why only yes-no decisions would be permissible.

A crucially important political question that must be made by the states parties is whether the Kampala presumption that decisions should be taken only by consensus should apply to new decisions taken after January 1, 2017. If the foregoing discussion proves anything, it is that genuine consensus about the substance in Kampala was elusive and that statements by certain states make clear that there was, in fact, no consensus on many critical issues.<sup>99</sup> There does not appear to be a strictly legal requirement under which post–January 1, 2017, decisions would need to be made at a Review Conference rather than at a meeting of the Assembly of States Parties. Nevertheless, the profound questions surrounding the nature of any such decisions argue in favor of treating them as involving constitutional moments for the Court, to be considered with the solemnity of, and the preparation that would accompany, the holding of a Review Conference. As the United States said in its remarks on the last evening at Kampala,

there is an important difference between the procedures that should be used for constitutional decisions of the International Criminal Court and for routine decisions of this body. Decisions regarding organic amendments to the Rome Statute should take place in periodic, constitutional gatherings such as the Review Conference—where the precedents set by this Review Conference strongly indicate that the rule of decision is consensus—and not as part of contested votes held amid the shifting representation and ordinary decision-making that occurs at regular meetings of the Assembly of States Parties . . . .<sup>100</sup>

## IX. CONCLUSION

As we have noted, none of the foregoing analysis should be taken to suggest that the overall U.S. reaction to the Kampala Review Conference was negative. Apart from the difficult work on the amendments, we were impressed by the thoughtfulness of the stocktaking exercise and by the thoughtful consideration of issues of peace and justice, cooperation, complementarity, and impact on victims and affected communities. The delegation representing the United States ranked among the largest present in Kampala, comprising representatives from the

<sup>97</sup> ICC Doc. RC/11, *supra* note 1, at 127 (statement of U.S. Legal Adviser Harold Hongju Koh).

<sup>98</sup> *Id.* at 122.

<sup>99</sup> *See, e.g., id.* at 123 (Norway: emphasizing the need for “an assessment as to whether any further clarification would be called for as a precondition for the entry into force”). Indeed, there was not even consensus on whether it would be appropriate to allow aggression cases to proceed on the basis of state referral or *proprio motu*. *See id.* at 122 (France: Article 15 *bis* “restricts the role of the United Nations Security Council and contravenes the Charter of the United Nations”); *id.* at 124 (“The United Kingdom has fundamental issues of principles at stake with regard to aggression” and, in that respect, “draw[s] attention to Article 39 of the United Nations Charter.”).

<sup>100</sup> *Id.* at 126–27.

Departments of State, Justice, and Defense, the Joint Chiefs of Staff, and the National Security Council. We welcomed the opportunity to meet with other delegates, discuss important issues, and get a better and fuller sense of the priorities of those involved with the Court's work and with efforts to promote global criminal justice more generally.

On the specific issue of the crime of aggression, we do think that the discussions leading to, and taking place in, Kampala were important and positive, bringing greater appreciation to the concerns of not only the United States but the many countries on all sides of the many issues associated with the aggression project. From the perspective of our domestic audience, there seems no doubt that the provision included as Article 15 *bis*(5)—which provides that the Court shall not exercise its jurisdiction over the crime of aggression when committed by the national of a state that is not a party to the Rome Statute, or on its territory—was essential to temper what would have been an outcry in U.S. political circles that could have made it impossible to continue building a constructive relationship between the United States and the Court. And the delay provision—which ensured that there would be no investigations or prosecutions for the crime of aggression at least until 2017—provided essential breathing space for the Court to consolidate what we see as its core functions: the investigation and prosecution of genocide, crimes against humanity, and war crimes. That delay effectively deferred an issue that could otherwise have deflected the trajectory of the United States in its relationship with the Court, and consequently away from a result that would better serve the interests of both and of the international community generally.<sup>101</sup>

But to say that the Kampala Review Conference produced important results is not to say that there are no problems going forward. As this article has detailed, it has become increasingly

<sup>101</sup> An important, bipartisan report submitted by then Senators Kerry and Lugar of the U.S. Senate Committee on Foreign Relations underscored the importance of these provisions from the perspective of the U.S. domestic audience. Among other things, the report noted:

The proposed aggression regime is flawed in several respects, but nonetheless contains important protections for U.S. interests. Most significantly, U.S. persons, including U.S. officials and military members, could not be investigated or prosecuted for aggression by the ICC without the consent of the United States. The proposed regime will not enter into force for at least seven years, and will do so only after a further decision by the ICC's parties to bring it into force. U.S. participation at the Kampala Conference played an important role in securing these protections.

INTERNATIONAL CRIMINAL COURT, REVIEW CONFERENCE, KAMPALA, UGANDA, MAY 31–JUNE 11, 2010: A JOINT COMMITTEE STAFF TRIP REPORT PREPARED FOR THE USE OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 111th Cong., 2d Sess., at v (Sept. 2, 2010). With respect to the delay provision, the report stated:

Because the aggression regime will not go into effect for at least seven years, the United States will have opportunities to further address concerns not resolved by the outcome. It could seek greater clarity in the definition of aggression, either through changes to the definition or the elements of crimes accompanying it, or through further understandings. It will also have the opportunity to consult with allies and to develop plans to mitigate risks an ICC aggression regime might pose to the ability to plan and carry out coalition military operations.

*Id.* at 10.

With respect to the definitions, the report stated:

Interpretive understandings adopted in connection with the definition serve to mitigate some of its deficiencies, but the definition remains an unsound basis for addressing these issues. Were the definition to influence the future development of international law outside the context of the ICC, future U.S. leaders could face increased criticism in connection with some decisions regarding the use of force, including claims that their decisions amount to criminal conduct.

*Id.*

clear that key elements of the consensus achieved in Kampala masked what turned out to be very different understandings among participants about how, for example, the entry into force provisions apply to the aggression amendments, and how they would affect the Court's jurisdiction. Perhaps the most important point of this article is to make clear that there are numerous issues to which serious intellectual and political energies must now be turned. The resolution in Kampala wisely deferred the decision to allow the Court to exercise jurisdiction at least until 2017. It would be prudent for those who care about the Court's future to use the time we have left wisely, to address the very real issues that need to be faced. The importance of doing so has only been accentuated by some of the divisions that have come into focus much more clearly since Kampala.

So how to clarify contested issues? As we have noted above, there are any number of ways that points could be clarified or that issues such as those described above could otherwise be addressed, including through the terms of any post-January 1, 2017, decisions, resolutions, or understandings, through other statements of the Assembly of States Parties, or through subsequent Review Conferences. Individual states may also address particular points at the time of ratification, in the process of lodging individual or collective opt-outs, or through other statements or actions. It is not our purpose in this article to identify all the different means through which points could be addressed, or to choose among them. Instead, we simply underscore that important disagreements and confusion have emerged that will need to be addressed forthrightly and be resolved before 2017.

At the end of the day, the International Criminal Court does not exist in isolation. Its future success depends vitally on its ability to reinforce, and be reinforced by, other institutions within the international community. There are many difficult issues left. But there is still time for countries of good will, including the United States, to tackle them together. The year 2017 is close, but it is not yet here. The main message of this article is that the international community should take advantage of the time it has left, before 2017, to address these crucial issues in a cooperative and constructive way that contributes to the long-term success of the Court.

## EDITORIAL COMMENT

### ECONOMIC “NECESSITY” IN INTERNATIONAL LAW

*By Alan O. Sykes\**

Exigent circumstances can extinguish or suspend a wide range of legal obligations. They may empower governments to seize property or quarantine individuals. They may excuse the non-performance of private or public contractual obligations. And, of especial interest here, they may permit governments to deviate from their obligations under treaties or customary international law (CIL).

The focus of this Comment is on exigent economic circumstances that may afford a defense of “necessity” to the nonperformance of CIL obligations or that become a basis for deviation from commitments pursuant to express treaty language delineating necessity-like contingencies. An example of such language—prominently at issue in a number of investment disputes between U.S. investors and Argentina—is Article XI of the U.S.-Argentina bilateral investment treaty (BIT):<sup>1</sup> “This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its essential security interests.”

As described at greater length below, Argentina invoked both this language and the CIL defense of necessity as a basis for certain measures that it had taken during a period of domestic economic crisis and that would otherwise violate investment treaty obligations. A series of controversial arbitral decisions followed, along with subsequent annulment decisions, raising a variety of questions about the scope of the necessity defense and the appropriate construction of Article XI. Some of the underlying disputes remain ongoing.<sup>2</sup>

The issues raised by the Argentine investment cases have received much attention from legal scholars. With particular reference to necessity and Article XI, the issues that have been addressed include the contours of the necessity defense in CIL, the question whether Article XI implicitly incorporates the limits of the CIL defense or is instead a broader and less restrictive defense, the question whether Article XI should be viewed as a “defense” or as a “primary rule” that averts any violation altogether, the question whether Article XI can be construed as self-judging, and the question of what happens when the exigent circumstances abate

\* Professor of Law, Stanford University. I have benefited immensely from the comments of workshop and conference participants at Pepperdine, Northwestern, and Toronto, and at the annual meeting of the American Law and Economics Association, New York, May 2015.

<sup>1</sup> Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, 31 ILM 124 (1991).

<sup>2</sup> The status of cases against Argentina under World Bank arbitration (International Centre for Settlement of Investment Disputes) may be found at the ICSID website, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rntly=ST4>.

(including the possibility that compensation may be owed to investors for their losses). Other commentators have done an extensive job of analyzing these doctrinal issues and their historical origins.<sup>3</sup>

Considerably less attention has been paid to the necessity defense and related legal principles (such as those contained in Article XI of the U.S.-Argentina BIT) from an optimal contracting perspective.<sup>4</sup> What inferences can be drawn from the history of the CIL necessity defense about its economic logic and function? How can an understanding of its function enlighten its application to situations of exigent economic circumstances? Why would rational treaty drafters include a provision such as Article XI, and how might conditions of economic distress relate to its objectives? Are matters of “necessity,” “public order,” and “essential security interests” verifiable by adjudicators? What is the economic function of the word necessary? How do the answers to these questions bear on the degree of moral hazard created by the opportunity to deviate from international obligations? When is a deviation from commitments an appropriate policy instrument in response to necessity when other instruments may be available?

The goal of this Comment is to suggest possible answers to these questions and to offer some thoughts on how they might be used in the future to guide adjudicators in their thinking about when and to what extent economic exigency should excuse or postpone legal obligations under the CIL rubric of necessity or some similar treaty principle. Part I reviews necessity and related ideas in other fields of law, with an emphasis on the apparent economic rationale for these pockets of doctrine. It will suggest several hypotheses about the possible function of necessity and related concepts in CIL and treaty law. Part II reviews the CIL defense of necessity as it pertains to economic exigency. Part III turns to the particular subject of economic distress in the investment law area and assesses Argentina’s defenses from an economic perspective. It further considers the verifiability of circumstances that give rise to necessity and related exigencies, and the attendant implications for accommodating the tension between the need to address economic emergencies, on the one hand, and the need to limit opportunism and moral hazard, on the other, as well as the need to encourage an appropriate choice of policy instruments. The role of compensation requirements is a particular focus.

<sup>3</sup> The literature addressing the Argentina cases in whole or in part includes José Alvarez, *The Public International Law Regime Governing International Investment*, 344 RECUEIL DES COURS 193, 369–443 (2009); José Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, [2009] 1 Y.B. INT’L INVESTMENT L. & POL’Y 379; José Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 W. ARB. & MEDIATION REV. 491 (2012); Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 459 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); William W. Burke-White, *The Argentine Financial Crisis: States Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 199 (2008); Jurgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT’L & COMP. L. Q. 325 (2010); August Reinisch, *Necessity in Investment Arbitration*, 2010 NETH. Y.B. INT’L L. 137; JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 342–48 (2012); Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 L. & ETHICS HUM. RTS. 47 (2010); Anne van Akken, *Smart Flexibility Clauses in International Investment Treaties and Sustainable Development: A Functional View*, 15 J. WORLD INVESTMENT & TRADE 827 (2014); and MICHAEL WAIBEL, *SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS* (2011).

<sup>4</sup> A general discussion of “commitment” versus “flexibility” in investment treaties, touching briefly on the necessity cases, can be found in Anne van Akken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT’L ECON. L. 507 (2009).

## I. NECESSITY AND RELATED CONCEPTS IN OTHER AREAS OF LAW: POSSIBLE LESSONS

Exigent circumstances, including exigent economic circumstances at times, allow actors to circumvent obligations that would otherwise be unavoidable in a variety of fields of law. Examining the apparent rationale for these principles helps to understand how necessity and similar ideas might contribute usefully to CIL and international investment law. This part offers a non-exhaustive survey of how exigent circumstances may excuse obligations in other contexts. It begins with the most familiar territory in tort and contract law, and then addresses the area of international trade.

Before beginning this survey, however, it is helpful to delineate precisely what is meant by an “act of necessity.” For purposes of the present discussion, such an act is a voluntary act by the defendant that intrudes on some ordinarily recognized right of the plaintiff. The act is done to avert some harm that threatens the defendant’s or a third party’s interests and that emanates from a source other than the plaintiff. By “voluntary,” I mean that the defendant has the capacity to choose some other course of conduct. Thus, situations of necessity are to be distinguished from cases of *force majeure*, for example, where the defendant is unable to protect the plaintiff’s rights because of some superior force. They are also to be distinguished from situations in which the defendant’s act is compelled by coercion or duress. Finally, because the exigent circumstances are not attributable to the plaintiff, acts of necessity must be distinguished from cases in which the defendant’s act constitutes a form of self-defense or countermeasure.

### *Tort and Contract*

Most first-year law students in the United States are familiar with the classic tort tandem of *Ploof v. Putnam*<sup>5</sup> and *Vincent v. Lake Erie Transportation*,<sup>6</sup> both involving situations in which a boat owner secured a boat to a dock owned by another party during a severe storm rather than take the boat out in the storm at great risk to the boat and its crew. In *Ploof*, the dock owner’s servant responded by casting the boat adrift, and the owner was held liable for damages. In *Vincent*, the dock owner sustained significant damages to its property from the boat that was secured during the storm, and recovered damages.

A conventional summary of the necessity defense in this area suggests that it includes the following components: “(1) the defendant acted to avoid a significant risk of harm; (2) no adequate lawful means could have been used to escape the harm; and (3) the harm avoided was greater than that caused by breaking the law.”<sup>7</sup> This description of necessity contains its own economic rationale; necessity’s purpose is to enable an actor to avoid a greater harm either by causing a lesser harm at the expense of the plaintiff or by violating an otherwise applicable legislative enactment. In this sense, acts of necessity are efficient acts.

Buried in this simple description of necessity, however, are several additional considerations. Although necessity cases, by definition, involve some threat to the defendant’s interests emanating from a source other than the plaintiff, the classic cases typically do not address whether the condition of necessity might have been occasioned, in part, by the defendant’s imprudence

<sup>5</sup> 71 A. 188 (Vt. 1908).

<sup>6</sup> 124 N.W. 221 (Minn. 1910).

<sup>7</sup> *Necessity*, in THE FREE DICTIONARY BY FARLEX, at <http://legal-dictionary.thefreedictionary.com/Necessity+defense>.

and, if so, whether the privilege to act out of necessity should be lost. In *Ploof*, for example, there is no discussion of whether the boat owner should have put into port sooner due to prospects of an impending storm or perhaps should not have taken the boat out at all given the weather, rather than risk encountering the peril that necessitated a trespass to save the boat and crew. One suspects, however, that even if the boat was imperiled by an imprudent decision to be on the water, the court would still take a dim view of the dock owner casting off the boat to founder, perhaps causing the people on board to drown.

If this suspicion is right, a moral hazard problem is immediately apparent; actors will take risks that imperil them to an excessive degree if they can save themselves by imposing costs on others. A similar issue arises when the defendant sacrifices the plaintiff's property interest to save his own, as in *Vincent*. Even if such behavior is considered acceptable when what is saved is more valuable than what is lost, what incentivizes the actor to make that choice properly?

Both problems are addressed by a requirement that the defendant who acts out of necessity must pay for the actual harm caused to the plaintiff—the principle that emerges from *Vincent*. The boat owner who saves his boat from the storm by tying up to the plaintiff's dock must pay for the damage to the dock.<sup>8</sup> This mechanism eliminates the inefficiencies that would arise if the defendant could damage the dock with impunity. The compensation requirement forces the defendant to internalize the costs and benefits of each decision in sequence—the decision to take the boat out in questionable weather conditions and the decision to save the boat after the storm arises at the expense of damaging the plaintiff's dock.

To be sure, a compensation requirement is not the only way to address these concerns. An alternative legal rule might provide that one loses the privilege to act out of necessity if one's own negligence contributed to the condition of necessity. Likewise, the privilege to act out of necessity might be denied if a court determines *ex post* that the defendant acted in a manner that sacrificed a greater interest to save a lesser interest. The rule of *Vincent* is a type of strict liability rule (the actor must pay for harm caused), whereas the alternatives are a form of negligence rule (the actor must pay if, and only if, the act was inefficient). Either mechanism can, in principle, induce efficient acts.<sup>9</sup> The negligence mechanism, however, requires the adjudicator *ex post* to gather and evaluate the information bearing on the efficiency of the defendant's behavior, which may be costly or even impossible to obtain—a consideration that favors the strict liability approach.

Finally, the scope of the necessity defense may depend, in part, on whether the actor is serving his own interests or the interests of third parties. Suppose that a wildfire threatens a town, and the fire department makes a reasonable decision to destroy property belonging to one citizen to create a firebreak that will stop the fire from reaching the town. Should the property owner have a cause of action for damages against the official who makes this decision? A simple answer might be that damages are zero because the plaintiff's property would have been destroyed anyway. But suppose the wind later shifted, and the property would have avoided fire damage—although at the time of the fire department's decision, all experts would agree that the firebreak was the appropriate precaution to take. The defense of public necessity shields

<sup>8</sup> This principle may be limited to cases where physical damage is done; it is doubtful that a boat owner trespassing under circumstances such as those in *Ploof* could be held liable for the fair rental value of a dock that suffered no actual damage. This result has economic justification, however, if the dock owner suffers no opportunity cost due to the temporary use of the property by another.

<sup>9</sup> *E.g.*, Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

public officials who make such decisions from liability.<sup>10</sup> The evident rationale is to insulate the actor from personal liability when the act of necessity spares other parties' interests. If the actor were required to compensate, and thus bore the costs of the act but did not reap the benefits, efficient acts would be discouraged. The broader lesson is that liability may chill socially beneficial decisions and that the liability rule must be attentive to that possibility. The concern is especially acute when the relevant actor must make a decision that implicates the interests of third parties.

Turning from tort to contract, threats of physical harm that create necessity are much less common, but exigent economic circumstances often arise. These situations beget doctrines that are related to necessity, even if they do not employ that label.

The treatment of exigent circumstances in contract proceeds from the observation that contracting parties are free to provide for such contingencies explicitly, and often do. Specific provisions regarding the contracting parties' rights in exigent circumstances will be respected. Contracts routinely address transactions that are complex, however, and the transaction costs of contracting prevent parties from addressing every conceivable contingency. The "complete contingent contract" in economic parlance is simply too expensive to write. Instead, most contracts are "incomplete." Contract law supplements incomplete contracts with background default rules, some of which address rights and responsibilities in the event of various unspecified, often unanticipated, and sometimes exigent contingencies.

One default principle facilitating efficient deviation from commitments in response to economic exigency is the standard U.S. remedy for most contract breaches: expectation damages.<sup>11</sup> A virtue of expectation damages is that it facilitates what has become known in the literature as "efficient breach." If the costs of performance to a promisor exceed the value of performance to the promisee, performance is socially inefficient. With a rule of expectation damages in place, and neglecting complications associated with litigation and error costs, a rational promisor will breach and pay damages if breach is efficient.<sup>12</sup> To be sure, parties to an incomplete contract can also achieve efficient deviation from obligations through renegotiation (the only option where the default remedy is specific performance). Defenders of the expectation-damages rule argue, however, that such renegotiation is costly and may be afflicted by holdup and strategic bargaining behavior, which renders it inferior to the expectation damages liability rule. Proponents of the specific performance remedy observe, among other things, that the computation of lost expectation is costly and often fraught with error.<sup>13</sup> The general lesson is that the best options for facilitating efficient deviation from commitments are unlikely to be the same in all cases. A liability rule approach affording compensation is more likely to be useful, other things being equal, the less costly and error prone the computation of compensation.<sup>14</sup>

<sup>10</sup> *E.g.*, *Mayor of New York v. Lord*, 18 Wend. 126 (N.Y. 1837).

<sup>11</sup> To be sure, this rule applies not only to cases of economic exigency but to much more mundane settings, as when the seller of a good receives a better offer from another buyer.

<sup>12</sup> The classic article is by Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980).

<sup>13</sup> The arguments on both sides are found in Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

<sup>14</sup> Expectation damages may be seen as a liability rule since the breaching party need not secure permission to avoid performance. Specific performance is a "property rule" that forces a party who wishes to breach, to perform the required action anyway. The distinction originates in Guido Calabresi & A. Douglas Melamed, *Property, Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Other aspects of contract law are tailored more directly to situations in which exigent economic circumstances warrant deviation from commitments in incomplete contracts. Two principles that excuse performance altogether are the impossibility doctrine under the common law and its analogue under the Uniform Commercial Code (UCC)—commercial impracticability. Both the common law impossibility doctrine and especially the commercial impracticability doctrine of the UCC encompass some instances<sup>15</sup> in which performance has become extraordinarily costly because of some unanticipated contingency. The First Restatement of Contracts extended the concept of impossibility to “not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.”<sup>16</sup> UCC section 2-615 addresses performance that has “been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.”

A prominent example is *Mineral Park Land Co. v. Howard*, in which the defendants agreed to take their requirements of gravel from the plaintiff’s land, bearing the cost of excavation themselves and also paying five cents per ton to the plaintiff.<sup>17</sup> They later discovered that much of the gravel was below the water table, increasing the cost of excavation ten- to twelvefold, and the court excused performance. Another group of cases involve crop failures,<sup>18</sup> in which it has been held that if a contract calls for the delivery of crops grown on a particular parcel of land and is followed by a complete or partial crop failure, the promisor is discharged to the extent that the crop volume falls below the contractual commitment. The crop failure cases are also best viewed as cases of impracticability rather than true impossibility because the promisor could be required to perform by procuring cover for the buyer from another source.

Careful economic analysis of such cases raises many doubts concerning the efficiency of the impossibility and impracticability doctrines as applied in practice.<sup>19</sup> Nevertheless, one can detect two general themes in the cases and the commentary in support of the doctrines. In a situation such as *Mineral Park*, it is a safe bet that performance had become inefficient due to an unanticipated contingency and that it was best for the defendant to source its gravel elsewhere. A discharge of contractual obligations facilitates that result. In addition, contingent discharge of obligations may in some cases improve the efficiency of risk sharing between the contracting parties. The crop failure cases, in particular, insulate potentially risk-averse farmers who have already suffered heavy losses due to crop failure from the further burden of compensating buyers for the costs of cover.<sup>20</sup> The broader point—potentially applicable in the international setting as well—is that when a commitment becomes exceptionally burdensome due to events that were not anticipated at the time of contracting, the optimal contractual response depends not only on the efficiency of performance but also on the parties’ attitudes toward risk.

<sup>15</sup> To be sure, the cases in which nonperformance results from true impossibility—such as the death of the promisor to a personal services contract—do not involve acts of necessity as defined herein and are not pertinent.

<sup>16</sup> AMERICAN LAW INSTITUTE, RESTATEMENT (FIRST) OF CONTRACTS §454 (1932); see also AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF CONTRACTS §261 (1981).

<sup>17</sup> *Mineral Park Land Co. v. Howard*, 156 P. 458 (Cal. 1916).

<sup>18</sup> E.g., *Pearce Young Angel Co. v. Charles R. Allen, Inc.*, 213 S.C. 578, 50 S.E. 2d 698 (1948).

<sup>19</sup> Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second-Best World*, 19 J. LEGAL STUD. 43 (1990).

<sup>20</sup> E.g., Richard Posner & Andrew Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

Finally, the literature on impossibility and impracticability cautions against certain collateral consequences of discharging obligations because performance has become impracticable. In particular, if a promisor can take measures to avert impracticability—perhaps the farmer can store water against the danger of drought or use pesticides to guard against pest-related crop failures—a discharge of the promisor's obligations can uneconomically diminish the incentive to take such precautions. Likewise, the incentive to gather information about possible adverse events, so as to guard against them or hedge against them in insurance markets, may be diminished.<sup>21</sup> Where such matters are important, rules that force actors to internalize the consequences of their actions to others may be superior, such as rules requiring expectation damages to be paid regardless of exigent circumstances.

### *International Trade*

International trade agreements address exigent circumstances in a variety of provisions. In the interest of brevity, this section will focus on the law of the World Trade Organization (WTO), although related provisions may be found in various preferential trade agreements.

The most direct analogy to necessity under CIL and to Article XI of the U.S.-Argentina BIT is to be found in the General Agreement on Tariffs and Trade (GATT) Article XXI on security exceptions (and its parallel provision in the General Agreement on Trade in Services Article XIV *bis*):<sup>22</sup>

Nothing in this Agreement shall be construed . . .

- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations[.]

This provision has not been a subject of any formal dispute since the founding of the WTO, although it was at issue several times during the GATT years, most prominently in relation to British Commonwealth measures against Argentina because of the Falklands dispute,<sup>23</sup> a U.S. embargo against Nicaragua during the Reagan administration,<sup>24</sup> and European measures against Yugoslavia during the Balkans crisis of the early 1990s.<sup>25</sup>

A brief attempt to invoke GATT Article XXI to deal with difficult economic circumstances in a domestic industry was made by Sweden in 1975, when it imposed restrictions on certain footwear imports. It argued that footwear was an essential domestic industry that had to be

<sup>21</sup> Sykes, *supra* note 19.

<sup>22</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994 [hereinafter GATT], Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, 1867 UNTS 187; General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, *supra*, Annex 1B, 1869 UNTS 183.

<sup>23</sup> See 1 WORLD TRADE ORGANIZATION, GATT ANALYTICAL INDEX 601–03 (1995).

<sup>24</sup> *Id.* at 603.

<sup>25</sup> *Id.* at 604–05.

preserved at some minimum production capacity to protect Sweden's national security interests. The restrictions were the subject of intense criticism in the GATT Council, and Sweden ultimately withdrew them after less than two years.<sup>26</sup>

Why has Article XXI proven relatively uncontroversial over the seventy-year history of the GATT/WTO system? The key provisions quoted above are explicitly self-judging; a party may take action "which it considers necessary for the protection of its essential security interests." This attribute suggests that adjudicators will afford great deference to national government decisions to invoke Article XXI or else conclude that they lack a basis for adjudication (as occurred with a GATT panel composed to address the U.S. embargo of Nicaragua).<sup>27</sup>

But Article XXI is limited to concerns about fissionable materials, arms trafficking, and measures taken during war or during other *international* emergencies. Despite its self-judging character, opportunistic use of Article XXI to address domestic political or economic concerns seems squarely out of bounds. The only serious disputes have related to measures undertaken in relation to bona fide military conflicts.

The general lesson is that narrowly tailored security exceptions, limited on their face to circumstances that are well defined and observable, can function reasonably well, even when made self-judging. It is noteworthy that Article XXI does *not* encompass exigencies such as a member government's financial distress or domestic economic crises that are unrelated to war and international emergencies.<sup>28</sup> Opportunism is policed by the same self-enforcement mechanism that holds trade agreements together under ordinary circumstances; cheating is observable and is likely to carry a cost in the form of formal and informal retaliatory measures, and perhaps reputational sanctions.

GATT Article XX, on "General Exceptions," contains additional provisions permitting deviation from commitments under enumerated circumstances. Permitted deviations include those "necessary to protect public morals," "necessary to protect human, animal or plant life or health," and "relating to the conservation of exhaustible natural resources," among others. A complete discussion of Article XX's history and interpretation is far beyond the scope of this comment, and none of the provisions involve circumstances that one can easily characterize as economic necessity. Nevertheless, a few features warrant brief mention. Article XX is plainly not self-judging, and WTO/GATT panels have often been asked to ascertain whether a challenged measure falls within its purview. Nevertheless, the general tendency of WTO adjudicators has been to defer to members' claims that their policy aims come within the enumerated exceptions.<sup>29</sup> Adjudicators have been much less deferential to the choice of means to achieve these objectives, however, and regularly inquire whether a measure is "necessary" to achieve the

<sup>26</sup> *Id.* at 603.

<sup>27</sup> *Id.* at 601.

<sup>28</sup> Interestingly, some more recent investment treaties provide exceptions for adopting reasonable measures for prudential reasons, such as those to maintain the integrity of the financial system. See Article 10 of the 2004 Canadian model BIT, available at <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>. Such exceptions are not self-judging, however, and leave open the question whether the cancellation of a debt would ever be a "reasonable measure."

<sup>29</sup> To give two examples, the WTO has ruled that measures to protect extraterritorial seal populations against animal cruelty fall within the "public morals" exception and that measures to protect clean air come within the "exhaustible natural resources" exception. See Appellate Body Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R & WT/DS401/AB/R (adopted June 18, 2014); Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (adopted May 20, 1996).

stated objective or whether it violates the prohibition on “arbitrary or unjustifiable discrimination” in the Article XX chapeau.<sup>30</sup>

In broad brush, Article XX’s jurisprudence may thus be characterized as deferential to members’ policy objectives but considerably less deferential to their choice of policy instruments. Measures that intrude importantly on other members’ trading interests and that require justification under Article XX often receive a searching “least restrictive means” analysis grounded in textual hooks such as “necessary” and “discrimination.”<sup>31</sup> This approach has the virtue of preserving a broad degree of policy sovereignty for members to pursue nontrade objectives, while ensuring that they do not deliberately or inadvertently impose excessive costs on trading partners. Its efficacy depends, however, on the capacity of adjudicators to make reasonably accurate judgments about the existence of less trade-restrictive alternatives. This task is a plausible one for WTO adjudicators because of their trade expertise and attendant ability to weigh the trade impact of alternative approaches to the same policy goal. When adjudicators possess both the information and expertise to evaluate policy alternatives, least-restrictive-means analysis or its equivalent under another rubric can play a useful role in policing unnecessary deviation from international commitments.

We now turn to two other aspects of WTO/GATT law that address circumstances of economic exigency. The first, GATT Article XIX,<sup>32</sup> as elaborated by the WTO Agreement on Safeguards,<sup>33</sup> concerns “Emergency Action on Imports.” The standard for such action, known as a safeguard measure, is found in GATT Article XIX:1(a):

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

The evident objective is to permit WTO members to escape the economic consequences of negotiated import concessions that result in unexpected import surges that seriously imperil an import-competing industry.

Much has been written about the economic rationale for safeguard measures. Although the stated goal of safeguards under national law (such as section 201 of the 1974 U.S. Trade Act)<sup>34</sup> is to allow measures that restore the competitiveness of domestic firms or permit a more “orderly” contraction of a declining industry, it is difficult to offer a convincing account of how safeguard measures are desirable for such purposes on grounds of efficiency as conventionally

<sup>30</sup> See, e.g., Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161 & WT/DS169/AB/R (adopted Jan. 10, 2001) (necessity test violated); Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (adopted Nov. 6, 1998) (chapeau violated).

<sup>31</sup> The proposition that such analysis can be understood as a form of cost-benefit analysis that is attentive to error costs is developed in Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003).

<sup>32</sup> *Supra* note 22.

<sup>33</sup> Apr. 15, 1994, WTO Agreement, *supra* note 22, Annex 1A, 1869 UNTS 154.

<sup>34</sup> 19 U.S.C. §2251 (2012).

defined. Worthwhile efforts to restore competitiveness should be financed by the capital markets, and “orderly contraction” typically delays the inevitable while exacerbating the economic costs due to a period of protectionism. If any intervention is useful in times of labor market rigidities, direct intervention in the labor market through adjustment assistance makes more sense.<sup>35</sup>

Nevertheless, safeguard measures can be “efficient” in a political sense, and political accounts of the safeguard mechanism have come to predominate. One account posits that safeguard measures address situations of political exigency in which government officials will be compelled to deviate from their international trade commitments. If such deviation is defined as “cheating,” trade agreements may unravel; it is in the parties’ interest to permit temporary “cheating” to preserve long-term cooperation.<sup>36</sup> An alternative perspective emphasizes that the politicians who agree to treaties are concerned about their own political futures and face uncertainty about the consequences of treaties. It makes sense for them to provide options to deviate from commitments that prove unexpectedly burdensome from a political standpoint, particularly if the actors who are allowed to deviate enjoy significant political gains by so doing, while their counterparties’ political losses remain modest. Protection for troubled industries besieged by unexpected import competition arguably fits the bill.<sup>37</sup> The safeguard mechanism has the further virtue that it makes politicians less skittish about negotiating trade concessions and leads to more concessions *ex ante*, even if some are temporarily revoked *ex post*.<sup>38</sup>

One difficulty with the safeguard mechanism, however, is that the conditions under which deviation from trade commitments is politically efficient are difficult to observe and verify; indeed, the legal preconditions for the proper use of safeguards under GATT Article XIX are defined in exceedingly imprecise terms. What is an “unforeseen development”—unforeseen by whom and at what point in time? What is “serious injury?” How does one determine whether “increased quantities” of imports, rather than something else, are the “cause” of serious injury? Article XIX (as well as the more recent WTO Agreement on Safeguards) leaves these questions largely open, raising the danger of the opportunistic use of safeguard measures.

The original solution in Article XIX was to require compensation. Members invoking Article XIX were obligated to negotiate compensatory trade concessions with affected parties or else suffer limited “retaliation” in the form of those parties’ withdrawal of “substantially equivalent concessions.”<sup>39</sup>

<sup>35</sup> See Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991); ALAN O. SYKES, *THE WTO AGREEMENT ON SAFEGUARDS* (2006).

<sup>36</sup> Kyle Bagwell & Robert W. Staiger, *A Theory of Managed Trade*, 80 AM. ECON. REV. 779 (1990).

<sup>37</sup> Declining industries are commonly observed to invest heavy resources in the pursuit of trade protection. This phenomenon has two possible explanations: (1) they are more likely to succeed in securing protection because they are politically sympathetic suitors due to high unemployment among their workers, and (2) the returns to protection will not be competed away by the entry of new firms as long as investment returns do not rise above the competitive level. Likewise, if competing foreign exporters that would be affected by safeguards measures are growing and profitable, restrictions on their exports may not engender as much political outcry if the exporting firms expect their returns to be diminished anyway by competitive entry. These observations afford a plausible account of why protection for troubled industries against efficient foreign competitors may yield joint political gains to treaty partners on average, even if it reduces economic efficiency in the conventional sense. Sykes (1991), *supra* note 35.

<sup>38</sup> See sources cited *supra* note 35.

<sup>39</sup> GATT, *supra* note 22, Art. XIX:2–3.

The compensation requirement was itself problematic, however, in part because the “substantial equivalence” standard is also vague. Demands for compensation were often high. To avoid the requirement, GATT members began to negotiate extralegal arrangements—often termed “voluntary restraint agreements”—which were discriminatory and potentially permanent, and which sometimes ignored the prerequisites for the use of safeguards. The proliferation of extralegal measures resulted in the WTO Agreement on Safeguards, which elaborated some of the prerequisites for safeguards, with an eye toward adjudication (not very successfully as it turned out),<sup>40</sup> while softening the compensation requirement to allow safeguard measures for a period of three years without compensation in many cases.<sup>41</sup> The agreement was accompanied by an arbitral process that can assess “substantial equivalence” pursuant to the WTO Dispute Settlement Understanding. Finally, the agreement introduced further provisions to limit and discourage opportunism; if a nation imposes safeguards in a particular industry, it must phase them down over a few years, remove them altogether after at most eight years, and cannot reapply them for a period equal to the length of time that they were in force.<sup>42</sup> With regard to the latter principle, a nation that invokes the safeguards mechanism opportunistically may find itself confronted with a legitimate need to use safeguards later yet be unable to act. Opportunism becomes riskier and less likely.<sup>43</sup>

In summary, the WTO/GATT escape clause is an example of a treaty provision aimed at facilitating deviation from the bargain under exigent economic circumstances—albeit circumstances that create political exigency more than any conventional efficiency justification for deviation. The political actors who negotiate treaties under conditions of uncertainty may find such provisions optimal. We return in part III to the question whether a provision such as Article XI of the U.S.-Argentina BIT can be understood through the same lens.

Such provisions tend to create additional challenges in administration because economic exigency can be much more difficult to define with precision than emergency conditions associated with wars, arms trafficking, hazards to human health, and the like. The result tends to be vague standards regarding conditions that other parties find difficult to observe and that adjudicators find difficult to verify. In turn, serious problems of opportunism may arise. A compensation requirement is one possible solution, although not the only option.

The other GATT provisions that address economic exigency concern balance-of-payments crises. These provisions (GATT Articles XII–XV) are complex, but the central intuition is simple. Assume that a government wishes to maintain a fixed exchange rate or at least a rate within some narrow band. Assume further that it runs a substantial balance-of-trade deficit at this exchange rate, so that it imports considerably more than it exports. The demand for foreign currency to buy imports then exceeds foreigners’ demand for domestic currency to buy exports. Unless foreigners are content to accumulate the domestic currency for investment purposes, the excess demand for foreign currency will cause foreign currency to appreciate relative to the domestic currency. But this situation may push the exchange rate away from the target value.

<sup>40</sup> The jurisprudential confusion engendered by these issues is address in Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 *WORLD TRADE REV.* 261 (2003), reprinted in *THE WTO, SAFEGUARDS, AND TEMPORARY PROTECTION FROM IMPORTS* (Chad P. Bown ed., 2006).

<sup>41</sup> WTO Safeguards Agreement, *supra* note 33, Art. 8.3.

<sup>42</sup> *Id.*, Art. 7.

<sup>43</sup> Kyle Bagwell & Robert W. Staiger, *Enforcement, Private Political Pressure and the GATT/WTO Escape Clause*, 34 *J. LEGAL STUD.* 471 (2005).

To avoid that result, the domestic government must use its reserves of foreign currency to intervene in exchange markets, buying domestic currency to support its price and selling its holdings of foreign currency. But what happens if its reserves start to run out? It may be unable to support its currency, and devaluation may become imminent. Private actors holding assets denominated in domestic currency will then want to dump them, foreign capital will pull out of the country, and difficult macroeconomic circumstances may follow.

This problem was a common concern in the days of fixed exchange rates, as contemplated at the formation of the International Monetary Fund (IMF). Nations obliged to maintain their currency's par value could easily find themselves running short of foreign exchange reserves. They could borrow reserves from the fund, but it was also contemplated that import restrictions might be necessary to curb the excess of imports over exports. GATT permits such restrictions for the purpose of addressing balance-of-payments crises, but limits them. Article XII: 2(a) provides:

Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

- (i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or
- (ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.<sup>44</sup>

Additional obligations require that the measures be limited to the period of balance-of-payments distress and that they be administered in a nondiscriminatory fashion among the foreign exporters of competitive products (Article XIII).

The demise of fixed exchange rates for most developed countries reduced the need for currency market intervention by major countries such as the United States, but developing countries often seek to maintain fixed exchange rates today, in part to "tie their hands" against irresponsible monetary policies. Macroeconomic crises attributable to loss of confidence in local currencies still occur (recall the Asian financial crisis of the 1990s, which began when Thailand was forced to abandon its peg for the baht).

In short, economic exigency may at times arise because of balance-of-payments crises that threaten capital flight. Such exigencies afford a justification for deviation from trade commitments in the WTO when they are properly linked to bona fide crises and properly time limited. So, too, might they justify deviation from other international commitments if reasonably necessary to conserve important and scarce foreign exchange reserves. We will return below to the question whether investment treaty commitments might fall into this category.

Like the security provisions and general exceptions of GATT Articles XXI and XX, the balance-of-payments provisions have proven to be reasonably enforceable in adjudication. Although they have been invoked opportunistically in the past to afford a pretense for selective protectionism in politically sensitive industries, adjudicators have proven able to rule that they are illegal when a close linkage to a serious monetary reserve crisis is absent.<sup>45</sup>

<sup>44</sup> *Supra* note 22.

<sup>45</sup> See Appellate Body Report, India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/AB/R (adopted Sept. 22, 1999).

## II. THE NECESSITY DEFENSE IN CIL

The preceding review of necessity and related concepts in other fields of law offers important insights into what might be meant by necessity, how economic exigency might create circumstances relating to necessity, and how necessity might bear on collateral issues, such as the obligation to compensate for acts of necessity. We now turn to the evolution of necessity as a defense in CIL. Many of the same ideas emerge.

The CIL necessity defense dates back to Grotius.<sup>46</sup> It has been acknowledged in a number of CIL decisions through the years and is now enshrined in the International Law Commission (ILC) Articles on State Responsibility.<sup>47</sup> Article 25 provides:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
  - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
  - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
  - (a) The international obligation in question excludes the possibility of invoking necessity; or
  - (b) The State has contributed to the situation of necessity.

A review of the cases suggests that necessity here, as in other fields of law, arises only if the interest to be saved by an act of necessity exceeds in value the harm done by the violation of an international obligation. Necessity has been invoked to justify a wide range of actions under circumstances that seemingly satisfy this criterion, including a brief incursion into the territory of another state to interdict support for rebels (the *Caroline* case),<sup>48</sup> measures to protect animal populations from serious overfishing or hunting to extinction (the *Fisheries Jurisdiction*<sup>49</sup> and *Russian Fur Seals*<sup>50</sup> cases), the destruction of a foundering ship to prevent a massive oil spill (the

<sup>46</sup> "In cases of necessity men have a right of using that which has already become the property of others. To sanction this indulgence, the necessity must be such that it cannot otherwise be avoided." HUGO GROTIUS, ON THE LAW OF WAR AND PEACE [DE JURE BELLI AC PACIS], bk. II, ch. 2 (A. C. Campbell trans., 1814), available at <http://www.bartleby.com/172/202.html>.

<sup>47</sup> Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 26, UN Doc. A/56/10 (2001). The ILC commentaries on what were then the draft articles, UN Doc. A/56/10, at 59, include a thorough history of the ILC discussions. For the commentary relevant to our current discussion, see *id.* at 80–84 [hereinafter ILC Commentary].

<sup>48</sup> See *id.* at 81 (discussion).

<sup>49</sup> Fisheries Jurisdiction (Spain v. Can.), 1998 ICJ REP. 432 (Dec. 4).

<sup>50</sup> ILC Commentary, *supra* note 47, at 81.

*Torrey Canyon* case),<sup>51</sup> and the appropriation of foreign property that was necessary to provide subsistence to troops engaged in resisting a rebellion (the Anglo-Portuguese dispute of 1832).<sup>52</sup>

Considerable support exists for the proposition that economic exigency may create necessity, as in the series of cases regarding obligations to repay external debt in times of economic crisis.<sup>53</sup> At an international law conference in 1930, the South African government expressed the following view:

Foreigners lending money to a particular State can hardly expect not to be prejudicially affected under any circumstances by the vicissitudes of the State in question. If, through adverse circumstances beyond its control, a State is actually placed in such a position that it cannot meet all its liabilities and obligations, it is virtually in a position of distress. It will then have to rank its obligations and make provisions for those which are of a more vital interest first. A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign or national. There are limits to what may be reasonably expected of a State in the same manner as with an individual. If, in such a contingency, the hardships of misfortune are equitably divided over nationals as well as foreigners and the latter are not specially discriminated against, there should be no reason for complaint.<sup>54</sup>

This view, more or less, has received broad acceptance. In *Société Commerciale de Belgique*,<sup>55</sup> Belgium had won arbitral awards against Greece that had not been paid. In an action against Greece seeking a declaration that Greece had violated its international obligations, Greece pleaded necessity on the grounds that its budgetary and monetary situation was dire, and Greece could not afford to pay the award at the time. Counsel for Greece argued that “the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts.”<sup>56</sup> Both parties accepted that proposition in principle, with Belgium insisting only that such circumstances merely suspended the debt obligation and did not discharge it.<sup>57</sup> A similar argument was advanced by the Ottoman Empire to avoid repayment of a debt to Russia in the *Russian Indemnity* case. Once again, the tribunal accepted that such a defense might be available but disputed that it applied at the time to the situation facing the Ottoman Empire.<sup>58</sup> The argument and outcome were similar in the *Serbian Loans* case, where Serbia resisted payment in gold to its foreign bondholders, claiming that necessity allowed it to pay in paper francs instead.<sup>59</sup> The tribunal quarreled with the factual basis for the claim but not the underlying principle.

<sup>51</sup> The “Torrey Canyon,” Cmnd. 3246 (1967) (UK).

<sup>52</sup> ILC Commentary, *supra* note 47, at 81.

<sup>53</sup> A nice review of “financial necessity” arguments in cases involving sovereign debt defaults may be found in chapter 5 of MICHAEL WAIBEL, *SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS* (2011).

<sup>54</sup> See Roberto Ago (Special Rapporteur), Addendum to the Eighth Report on State Responsibility, [1980] 2 Y.B. INT’L L. COMM’N, pt. 1, at 13, 24, UN Doc. A/CN.4/318/ADD.5-7 (emphasis deleted) (“The internationally wrongful act of the State, source of international responsibility”).

<sup>55</sup> *Société Commerciale de Belgique* (Belg. v. Greece), 1939 PCIJ (Ser. A/B) No. 78, at 160 (June 15).

<sup>56</sup> As quoted in Report of the International Law Commission on the Work of Its Thirty-Second Session, UN GAOR, 35th Sess., Supp. No. 10, at 37, UN Doc. A/35/10 (1980).

<sup>57</sup> See Addendum to the Eighth Report on State Responsibility, *supra* note 54, at 25.

<sup>58</sup> *Id.* at 22–23.

<sup>59</sup> *Id.* at 24.

The debt cases thus add another form of economic exigency to the scenarios contemplated in, for example, the balance-of-payments provisions of GATT. Where compliance with an international obligation would impose such an economic burden that vital public services would be jeopardized, there is no violation of international law in *postponing* payment. None of the cases suggests, however, that payment should be discharged altogether. The Articles on State Responsibility also preserve that issue in Article 27, which provides: “The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to . . . [t]he question of compensation for any material loss caused by the act in question.”

Finally, the Articles on State Responsibility take a hard-line approach to policing the moral hazard problem that may accompany a necessity defense. Under Article 25, the necessity defense is not available if the “State has contributed to the situation of necessity.” As noted earlier, however, an alternative approach to policing moral hazard is a compensation requirement that encourages states to internalize the costs to others from its acts, even if they may be said to “contribute” to the necessity. The effect of “cost internalization” by states is subject to some uncertainty, however, which will be addressed further below.

### III. “NECESSITY” AND RELATED ISSUES IN THE INVESTMENT CONTEXT

We now turn to the investment treaty setting and to the question of when economic exigency might justify a departure from ordinary investor-protection rules. The discussion will be much informed by the role of economic exigency in the other settings discussed above, but the investment context assuredly injects some additional wrinkles.

Economic theorizing regarding the rationale for investment treaties is limited and generally informal. The conventional account in the literature emphasizes the time-inconsistency problem that can arise in countries that have difficulty making credible commitments to investors through their domestic legal systems. After investors incur the costs of sunk investments,<sup>60</sup> host countries may adopt policies that impair the returns to investment in a variety of ways—expropriation, onerous tax policies, breach of contract, and so on. These prospects create risk for investors (and “uncertainty” as well, in the sense of Knight).<sup>61</sup> Risk will increase the net price of imported capital (the required rate of return) by an amount that exceeds its expected cost to investors if investors are risk averse. The net price of imported capital will also increase to the degree that the expected costs to investors exceed the expected benefits of these policies to the home country, even if investors are risk neutral.<sup>62</sup> In addition, uncertainty in the sense of Knight makes it difficult even for risk-neutral investors to price the risk that they are facing, potentially scaring them away. Asymmetric information further complicates the problem since host countries may know their own propensities to engage in policies that impair investment

<sup>60</sup> A sunk investment is an investment that cannot be sold to recover its cost. If an investor drills an oil well, for example, it is impossible to “undrill” the well to recover the initial cost. Many capital investments have a significant sunk component.

<sup>61</sup> Knight distinguishes risk, which is quantifiable, from uncertainty, which is not. Uncertainty is more difficult for markets to handle because by definition it is difficult to price. FRANK KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* (1921).

<sup>62</sup> Because investments are sunk, host countries have no reason to limit their policies to measures that generate joint efficiency gains.

returns yet be unable credibly to disclose their “type” in that respect, leading investors to overestimate the risk of dealing with relatively “safe” host countries.<sup>63</sup>

Accordingly, to reduce the price of imported capital (an unambiguous benefit to a capital-importing nation), many host countries would like to make credible commitments not to act opportunistically toward the owners of sunk investments.<sup>64</sup> Some countries may be able to do so through commitments under domestic law that are difficult to modify (for example, the takings clause of the U.S. Constitution) and that are enforceable in domestic courts that investors consider unbiased and reliable. But commitments under domestic law may not be credible, especially in developing countries afflicted by problems such as weak legal systems, corruption, and political instability. Investment treaties afford a partial solution. They typically give investors the right to pursue claims before neutral international arbitrators and often provide a right of action for money damages. Although the collection of judgments may still prove problematic, these investor rights under international law may considerably improve on the credibility of host country commitments to investors.<sup>65</sup>

To be sure, capital-importing countries have important policy goals in addition to their desire to enjoy cheaper imported capital, and optimal investment treaties do not eliminate all risk for investors. Instead, they ideally eliminate all *inefficient* risks—risks that increase the price of imported capital by more than the value of retaining the policy flexibility that creates risk.<sup>66</sup> Various strategies may be employed to this end. Primary obligations may be construed to insulate desirable domestic policy measures from challenge.<sup>67</sup> Express exceptions to primary obligations may be included for the same purpose; Article XI of the U.S.-Argentina BIT is an obvious example.<sup>68</sup>

<sup>63</sup> This situation is a variant of the classic “lemons” problem. The seminal article is George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

<sup>64</sup> See, e.g., Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1997); van Akken, *supra* note 3. This conventional account of the rationale for investment treaties is subject to some dispute, however, based on various pieces of empirical evidence. They include some studies that find little impact of BITs on inbound foreign direct investment and survey evidence suggesting that the signing of a BIT does not affect investor decisions or political risk insurance premiums. See generally Lauge Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, 2010 Y.B. INT’L L. & POL’Y, and the articles collected in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND FOREIGN INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009). A more recent survey of the empirical evidence, however, observes that “the majority of studies conclude that [international investment agreements] have a positive impact on [foreign direct investment].” UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE IMPACT OF INTERNATIONAL INVESTMENT AGREEMENTS ON FOREIGN DIRECT INVESTMENT: AN OVERVIEW OF EMPIRICAL STUDIES 1998–2014 (2014), at <http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf>.

<sup>65</sup> See Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005).

<sup>66</sup> See generally van Akken, *supra* note 3. It is also important to note that investment treaties are not the only way for investors to avoid risk; political risk insurance can serve as a partial substitute. Insurance does not eliminate risk, however, but simply transfers it to a less risk averse entity. An appropriate investment treaty may actually eliminate inefficient risk by discouraging opportunistic behavior toward sunk investments.

<sup>67</sup> For example, sensible domestic regulatory measures that reduce the value of foreign investments might be deemed not to constitute measures “tantamount to expropriation.” See, e.g., Vicki Been & Joel Beauvais, *The Global Fifth Amendment: NAFTA’s Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine*, 78 N.Y.U. L. REV. 30 (2003).

<sup>68</sup> See also the exceptions for health and conservation measures contained in Article (8)(3)(c) of the 2012 U.S. Model Bilateral Investment Treaty, at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

But investment treaties cannot address all possible contingencies clearly and expressly, any more than trade treaties or private contracts. They are inevitably incomplete, requiring ex post interpretation of vague obligations (e.g., “essential security interests”) and possible gap fillers derived from sources such as CIL. This concluding part offers some thoughts on the relevance of economic exigency to this incomplete contracting problem.

The first of the three sections below considers possible circumstances in which economic exigency plausibly supports deviation from investment treaty obligations. The second section discusses the recent spate of litigation against Argentina, its claims of CIL necessity, and its invocation of Article XI of the U.S.-Argentina BIT. Finally, the third section considers the question whether economic exigency should ever discharge treaty obligations or merely suspend them, including the possible role of compensation for harm done to investors during the period of economic exigency.

*When Might Economic Exigency Justify a Departure from Investor Protection Rules?*

The earlier discussion of economic exigency as a basis for deviation from commitments in other settings immediately suggests some macroeconomic scenarios of potential importance in the investment context. It also suggests the importance of some attention to risk-distribution and political-efficiency issues.

*Fiscal and currency crises.* Drawing on the CIL cases involving repayment of external public debt, the host country may experience a severe imbalance of revenues and obligations to the point that a prospect of curtailing vital public services may result. If departure from an investor protection rule allows the host government to conserve its funds and maintain essential public services such as education, public health, and the like, then it may well be efficient ex ante for the operation of the rule to be delayed until the period of crisis abates. Examples might include an obligation to make payments to investors under a contractual agreement that comes within the “umbrella clause”<sup>69</sup> of a BIT, or the obligation to pay compensation for a taking of investor property.

This rationale for a suspension of obligations rests on the assumption that the host government cannot borrow in the capital markets at reasonable rates to cover its obligations—a plausible assumption, for example, in the case of a country that has defaulted on its external public debt or is threatening default, or when default has been avoided only through some mechanism such as an IMF bailout. One can then view a suspension of obligations as an opportunity to engage in borrowing more cheaply from creditors in the short term.<sup>70</sup> A mere suspension of obligations, rather than a substantial restructuring, makes sense (more below) if the fiscal crisis is likely to be transitory (in other words, if the problem is more one of liquidity than insolvency). The implications of this observation are elaborated in “Accommodating the Tensions” (see below).

The GATT balance-of-payments provisions suggest another possibility. If an obligation to investors is denominated in outside currency and can be met only with scarce currency reserves

<sup>69</sup> Many investment treaties contain “umbrella clauses” that allow investors to pursue treaty-based claims for violations of host state obligations that arise in another context, such as by contract or domestic statute. *See* SALACUSE, *supra* note 3, ch. 11.

<sup>70</sup> IMF bailouts, of course, have the same property; they are of little value unless they are implicitly undertaken at below market rates.

that are needed to support the price of the home currency, thereby to avoid capital flight and serious macroeconomic consequences, then it may be efficient to delay the obligation until the reserve crisis abates.

At first blush, fiscal and currency crises offer a rationale for suspending the rules only in cases where the obligation in question requires an expenditure of funds or currency reserves by the host country government. This view, however, is too narrow. Suspending payments owed to investors by private actors might facilitate taxation to address a fiscal crisis or might enable the government to control the expenditure of scarce foreign exchange in private hands so that it can be redirected to assist the government in rebuilding its reserves (for example, by enabling the government to purchase it from private actors at the target exchange rate). A direct savings to the government is not necessary as long as a clear linkage can be made to a source of funds for the government to address the fiscal or currency crisis.

Four additional observations apply to this class of cases. First, fiscal and currency crises are generally observable and verifiable. Outsiders can determine whether a country faces a severe imbalance of revenues and expenditures (consider the recent Eurozone crises in Greece and elsewhere), and whether downward pressure on the currency stresses currency reserves and may lead to sudden capital flight (for example, the Asian financial crisis). To an extent, therefore, the authority to suspend the rules under such conditions will not be subject to false claims of crisis.

Second, a suspension of obligations is not justified if alternative policies can address the crisis adequately. As noted, countries facing fiscal and currency crises will typically have a great deal of difficulty borrowing in international capital markets at reasonable rates. Nevertheless, other changes in tax policy, monetary policy, and the like may be possible to address the crisis, along with options such as IMF assistance. An issue arises as to the optimal mix of policy instruments in this regard and whether a suspension of obligations to creditors is a part of that mix.

Third, and related, a discriminatory suspension of investor protection rules will rarely be justified. Just as GATT requires a degree of nondiscrimination in balance-of-payment measures,<sup>71</sup> it will be difficult to justify the targeting of particular foreign investors over others in fashioning policies to address fiscal and currency crises, or the targeting of foreign investors and not domestic investors. Only if suspending the rules for a subset of investors can be shown to advance legitimate public policy goals (such as ensuring a supply of essential goods) would discrimination seem justifiable.

Finally, fiscal and currency crises are not always exogenous events. Host country fiscal and monetary policies often contribute to such conditions, and if economic exigency relieves the host government of substantial costs attributable to the government's own policy choices, a significant moral hazard arises. This observation has important implications for the scope of flexibility that can be justified by economic exigency.

*Risk distribution?* Recall the pocket of contract doctrine that applies to crop failure cases. The common justification for discharging the farmer's obligation rests on the proposition that

<sup>71</sup> It is something of a puzzle as to why GATT allows any discrimination in balance-of-payments measures. Article XIII requires that the producer of competing products be treated equally, but why allow a nation facing a currency crisis to restrict imports of footwear, say, but not imports of electronics? Perhaps the answer is that certain categories of products are more essential and that the burden of a currency crisis should fall on the imports of less essential products. But the WTO/GATT system has done little historically to implement such a principle, leaving it to importing nations to decide which categories of products to target.

farmers are typically risk averse, the farmer has already suffered a large casualty loss, and an obligation to pay damages to the promisee for cover would impose a sizable additional risk on the farmer. Contractual discharge splits the loss in a manner that is more likely to accord with optimal risk sharing. In effect, the argument is that the promisee serves as an efficient partial insurer for the farmer's potential losses.

Is the relationship between a host country obligor and an investor ever analogous to the relationship between an insured and an insurer, so as to provide a further justification for relaxing investment obligations under times of financial stress? With regard to the investors, those holding a diversified portfolio of investments may indeed be approximately risk neutral. Investors with large sunk costs in a particular investment, however, may be poorly diversified and thus risk averse, as may the managers of such operations. Indeed, as noted, part of the gains from an investment treaty may lie in the reduction of risk borne by risk-averse investors.

Might a host country nevertheless be *more* risk averse than investors? Not exactly, but a host country government may exhibit characteristics akin to risk aversion. In individuals, risk aversion is a product of the diminishing marginal utility of money.<sup>72</sup> Governments may also experience shocks that affect the marginal utility of money. Indeed, we have already discussed some of them. For a government facing a fiscal or balance-of-payments crisis, when the funds to provide essential public services or to support the local currency may be lacking, the implicit marginal utility of money may increase much as it does to individuals who experience an adverse shock to wealth. A justification might then arise for shifting the risk of fiscal distress from the government to investors. This argument for relaxing investor obligations during fiscal and currency crises, however, is just another way of phrasing the points made earlier.

But host governments may experience other shocks to the implicit marginal utility of money. Imagine a developing country facing a deadly tropical disease, and suppose that a costly cure has just been discovered. The government may then have an extremely valuable use for funds that it did not have before. Accordingly, to the list of economic exigencies plausibly justifying measures to conserve government funds, we might add certain scenarios in which the government experiences a new and pressing need for funds to address some unanticipated domestic emergency—a public health crisis, a natural disaster, and the like. To be sure, one must again ask whether a suspension of investor obligations is a sound option in relation to possible alternative sources of funds.

*Political crises?* Recall the prevailing economic understanding of the GATT escape clause. Few commentators believe that temporary protection for troubled industries is economically efficient in the conventional sense. Rather, troubled industries create intense political pressure for renewed protection, and politicians wish to retain the option to respond to it. If they could not, trade agreements might unravel, and politicians might be reluctant to make trade concessions in the first place. The temporary protection allowed by the escape clause may be the lesser of evils. In any event, the political officials who enter trade treaties will inevitably seek to promote their own political welfare and so will reserve the right to deviate whenever it is jointly optimal from a political standpoint.

Can a similar logic support deviation from investment treaty obligations to address situations of great political exigency? The answer may well be yes. The issue involves a considerable degree of speculation, however, as I am not aware of any theorizing as to which investment

<sup>72</sup> See, e.g., Kenneth Arrow, *ESSAYS IN THE THEORY OF RISK BEARING* (1970).

treaty commitments might prove especially problematic *ex post* from a political rather than conventional welfare standpoint. One conjecture is that scenarios might arise in which an investor reaps a windfall return at the expense of ordinary citizens. Perhaps the investor was promised an opportunity to price its output in foreign currency even though its production costs are largely paid in local currency, and an unanticipated depreciation of the local country results in an output price far above costs and hence a windfall profit. If the output is an essential good or service that is not subject to much competition (for example, if the investment is the local waterworks), one can imagine that the government would be under great political pressure to relieve the citizens of exorbitant prices for that necessary good or service, and that such a policy would contravene some treaty obligation (such as an umbrella clause).

No doubt other scenarios can be imagined. The range of low-probability, politically exigent circumstances that might warrant some departure from the bargain may be vast—yet, because of transaction costs, be unlikely to be addressed specifically in a treaty. A justification may then exist for a broad catchall provision that allows departure from treaty obligations under somewhat vague standards that are elastic enough to capture conditions involving intense political pressure to deviate.

The difficulty, of course, is that vague standards—particularly those encompassing political exigency rather than readily observable phenomena such as fiscal or monetary crises—raise a greater possibility of opportunism (much like the GATT escape clause). If outsiders cannot observe and verify the conditions that justify a departure from commitments, adjudicators have little hope of policing such opportunism. One must then wonder whether the cure is worse than the disease. In some cases, mechanisms might be devised to police opportunism in other ways, such as a requirement that investors be compensated for losses in appropriate cases.

*“Public” necessity?* As discussed earlier, necessity doctrine in tort includes a special rule immunizing public servants against *personal* liability for acts of necessity (recall the example of a fire department that destroys private property to create a fire break). The evident rationale is to relieve individual actors of liability for socially constructive acts when others enjoy the benefits, lest the actors be discouraged from acting. To what degree might analogous considerations be operative in the investment context?

At first blush, the answer seems to be “not at all.” Investment treaty liabilities attach to host governments, not to individual public officials. But the issue is more complex.

Public policy decisions are taken by government officials. What incentivizes those decisions is unclear. Agency costs and the familiar insights of public choice theory regarding interest group politics raise a variety of doubts about public officials’ incentives to act systematically in the public interest. It is easy to hypothesize scenarios in which officials may be led to make poor choices out of political self-interest. Imagine a policy choice that results in a substantial welfare gain to a minority of the population, yet the costs are spread throughout the population via the tax system. The majority of voters might then oppose the policy choice even if the net benefits to society as a whole are clear and substantial. A self-interested political official might well respond to the majority preference despite the net social costs.

Transplanting the concern to the investment context, one can imagine scenarios in which the obligation to compensate investors for the effects of policy changes might discourage socially desirable policy adaptations. This observation is hardly novel and lies at the heart of a literature discussing “regulatory chill”—questioning the wisdom of requiring compensation

for “regulatory takings.”<sup>73</sup> The harder question is whether it should factor into the definition of “necessity” and related justifications for departing from investment law commitments.

Ideally, these issues will be addressed through proper delineation of basic obligations (such as the definition of “expropriation” and “fair and equitable treatment”) rather than through exceptions such as necessity. One is thus tempted to suggest that this rationale for limiting investor obligations does not add to the list of conditions that create necessity. One cannot rule out the possibility, however, that exigent circumstances might distort public officials’ incentives in a manner that warrants a relaxation of the usual rules regarding exigent circumstances.

### *The Argentina Litigation*

The last century of economic history in Argentina has been turbulent indeed. Political instability, cycles of boom and bust, sovereign debt defaults, and bouts of hyperinflation have plagued the country since the 1930s. Argentina went from being one of the ten richest nations in 1930 (in per capita terms) to having, in recent years, a per capita income about 30 percent that of the United States.<sup>74</sup>

One of the most dismal periods in the last century occurred in the late 1970s and 1980s. Following a military coup in 1976, economic growth slowed, external public debt began to rise sharply, and inflation accelerated. Argentina sought IMF assistance on multiple occasions and borrowed from friendly nations such as the United States. A first period of hyperinflation led to the substitution of the austral for the peso but was followed by yet another hyperinflation and another IMF bailout package. In 1992, the austral was replaced by a new peso that was to be pegged to the U.S. dollar at a one-to-one ratio.<sup>75</sup>

During this period a number of government-owned enterprises were privatized. Foreign investors were important participants in the process of privatization, including the privatization of various utility services. But the monetary reform of 1992 was not enough to persuade investors that monetary stability would persist; the experience with the austral was clear evidence that monetary reforms did not always succeed. Accordingly, various investors in enterprises that were regulated by the government or that sold output under long-term contracts sought and received arrangements that allowed them to price their output in U.S. dollars and to index their prices to inflation using an external price index such as the U.S. Producer Price Index.

Initially, this sort of arrangement was quite favorable to investors since their prices rose with U.S. inflation at a time when the relative prices of other things in Argentina were falling. But difficulties soon returned. A series of events led to a crisis of confidence in the peso, including a steep expansion of public debt. Investors began to convert pesos to dollars, straining the country’s exchange reserves. Banks were forced to take on government debt, leading to bank runs and an eventual freeze on withdrawals. The one-to-one peg between the peso and the dollar became unsustainable and was abandoned. A partial debt default occurred in December 2001.

<sup>73</sup> *E.g.*, Been & Beauvais, *supra* note 67.

<sup>74</sup> Eugenio Diaz-Bonilla, *Argentina: The Myth of a Century of Decline*, *ECONOMONITOR* (Feb. 27, 2014), at <http://www.economonitor.com/blog/2014/02/argentina-the-myth-of-a-century-of-decline/>.

<sup>75</sup> See Graciela Kaminsky, Amine Mati & Nada Choueiri, *Thirty Years of Currency Crises in Argentina: External Shocks or Domestic Fragility?* (2009), at <http://home.gwu.edu/graciela/HOME-PAGE/RESEARCH-WORK/WORKING-PAPERS/argentina.pdf>.

By 2002, the peso had depreciated to roughly four pesos to the dollar.<sup>76</sup> In the background, unemployment and poverty rates increased dramatically.

The details of the ensuing investor claims against Argentina vary somewhat, but I will focus here on a set of measures that were common to a number of cases. As noted, a number of investors had secured the right to price in U.S. dollars and to index their prices to U.S. inflation. As part of its response to the economic crisis of the late 1990s and early 2000s, however, Argentina decreed that obligations denominated in dollars would be repaid in pesos at a one-to-one rate. Indexing was suspended.<sup>77</sup> Thus, in effect, investors would receive going forward about 25 percent of the amount per unit of output that their original arrangements provided, with no further indexation. The measures were nondiscriminatory in the sense that they applied to all obligations, regardless of the nationality of the obligee. But they were said to breach other investment treaty obligations, such as the obligation of fair and equitable treatment, and “umbrella clauses” that ostensibly enabled investors to bring breach of contract claims and similar matters under the treaty.

I assume *arguendo* that these claims were meritorious, save for the possible applicability of two “defenses” offered by Argentina—the CIL defense of necessity and, in the case of claims by U.S. investors, a defense based on Article XI of the U.S.-Argentina BIT. Detailed surveys of how these two issues were resolved by various arbitral panels and subsequent annulment panels may be found elsewhere.<sup>78</sup> Painting with a broad brush, a frequent response to the CIL necessity defense was to suggest that it was inapplicable because of the condition in ILC Article 25 denying the defense when the “State has contributed to the situation of necessity.” A defense based on Article XI of the U.S.-Argentina BIT was considered more plausible, particularly by some annulment panels. The dire economic conditions in Argentina, including high unemployment, poverty, and social unrest, were within the broad sweep of conditions that posed a threat to “public order” or to Argentina’s “essential security interests.”<sup>79</sup> Some panels were inclined to import into Article XI the additional condition of the CIL necessity defense that no state could invoke Article XI if it had “contributed” to the state of necessity,<sup>80</sup> whereas others rejected that proposition.<sup>81</sup> Still other panels saw no textual basis for importing that requirement<sup>82</sup> or were not persuaded that Argentina’s contribution to the situation was sufficient to justify rejecting the defense.<sup>83</sup>

<sup>76</sup> See J. F. Hornbeck, *Congressional Research Service Report for Congress: The Argentine Financial Crisis: A Chronology of Events* (2003), at <http://fpc.state.gov/documents/organization/8040.pdf>.

<sup>77</sup> See Alvarez, *supra* note 3, at 368–70.

<sup>78</sup> See especially José Alvarez & Gustavo Topalian, *supra* note 3. As noted earlier, some of the Argentina cases are still pending.

<sup>79</sup> *E.g.*, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, paras. 226–61 (Oct. 3, 2006); *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, para. 178 (Sept. 5, 2008).

<sup>80</sup> *National Grid P.L.C. v. Argentine Republic*, Award, paras. 260–62 (UNCITRAL Arb. Trib. Nov. 3, 2008).

<sup>81</sup> *E.g.*, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, paras. 128–35 (Sept. 25, 2007).

<sup>82</sup> Contrast the original decision on liability in *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, with the decision on annulment in the same case (paragraphs 198–219).

<sup>83</sup> *E.g.*, *LG&E Energy Corp.*, *supra* note 79, para. 256; *Enron Creditors Recovery Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, paras. 355–405 (July 30, 2010).

My objective is not to critique any particular panel decision or to opine on which panel, if any, “got it right.” The analysis above suggests a number of considerations that may help to clarify certain issues, however, and suggests others that deserve more extensive attention.

Two important considerations cut in favor of Argentina’s “defenses.” First, the conditions facing Argentina in the early 2000s unquestionably involved fiscal and currency crises within the potential scope of the CIL necessity defense historically as well as within the balance-of-payments exceptions to other international obligations, such as those of GATT. Argentina faced a heavy external debt, much of it denominated in foreign currency. It lacked the resources to service the debt and, in fact, defaulted partially in 2001. Domestic fiscal expenditures were deeply curtailed at a time of severe macroeconomic distress. Currency reserves were low and being depleted. Ordinary citizens suffered from extraordinary levels of unemployment and poverty.

Second, the measures taken by Argentina in the face of this crisis were, in important particulars, nondiscriminatory. Foreign investors were not targeted, nor were particular sectors targeted. Nothing in the course of events suggests that the measures taken were other than measures of general applicability applied in a reasonably evenhanded fashion.

But there are weighty concerns on the other side that cut against Argentina. In particular, why did investors seek arrangements that allowed them to price in dollars and use a dollar price index in the first place? The answer, of course, is that Argentina’s history of excessive borrowing and inflationary monetary policies created grave doubts about the ability of the country to avoid a repetition of the same mistakes in the future. Dollar-peso convertibility at parity was a comforting first step at “hand-tying” in the monetary realm, but it was not credible and could always be abandoned (as indeed it was). Pricing in dollars gave investors much more confidence that their investment returns would not be wiped out by a free-falling peso. Thus, the economic rationale for the investor protection arrangements that Argentina abrogated in the early 2000s was a fear of precisely what happened—excessive government borrowing, burdensome public debt, and a policy of printing more pesos when money ran short for the government. It is jarring to assert that investors forfeit their treaty remedy when a government acts in exactly the way that the investment protections were meant to counteract.

The broader issue, noted at several points in the analysis above, is the moral hazard problem that attends the opportunity for a host country to invoke necessity or a related defense when it has contributed to the condition of necessity. The incentive to avoid the mistakes of the past is seriously undermined. Indeed, it borders on deceit if a country can agree to arrangements to protect investors from unsound macroeconomic policies and then abrogate those arrangements within a decade, using the excuse that unsound macroeconomic policies have wrecked the economy.

Yet it remains uncomfortable to suggest that a country is disabled from taking steps essential to avoid macroeconomic disaster and massive social unrest because of its political officials’ past mistakes. A crude analogy is to the boat owner in *Ploof v. Putnam*, who may have been negligent to take the boat out on the water in the face of an impending storm. Despite such negligence, most of us would resist the notion that the defendant should be permitted to cut the boat adrift and send the boat to founder and its passengers to drown in the name of policing moral hazard.

A hard-line approach to the moral hazard problem—such as that embodied in ILC Article 25—seems compelling only if it can be expected systematically to deter imprudent behavior

that contributes to exigent circumstances. That hope may be unrealistic with respect to imprudent macroeconomic policy, whether in Argentina or elsewhere. The political officials who are responsible for imprudent policies do not bear the costs directly, with the bulk of the costs falling on ordinary citizens. Argentina's history is replete with political revolt against a sequence of administrations with failed economic policies, and the notion that a strict application of investor protection rules will eliminate the problem of unsound macroeconomic policy seems fanciful. For this reason, a more nuanced approach to the moral hazard problem may be preferable. The next section offers some thoughts in this regard.

Yet a further issue plagues Argentina's position. Under ILC Article 25 an act of necessity is acceptable only if the act is "the only way for the State to safeguard an essential interest." Article XI of the U.S.-Argentina BIT is slightly softer but nevertheless applies only to measures that are "necessary" to the maintenance of public order or an essential security interest. Even if some drastic measures were necessary to address the fiscal and currency crises facing Argentina in the early 2000s, could Argentina have gotten by without the particular measures that impaired investor protection in the cases that resulted in claims? Argentina might have discriminated *in favor* of foreign investors, for example, suspending dollar-peso convertibility only for obligations not protected by its investment treaties. Of course, discriminatory policies might produce their own economic distortions, but are they enough to establish that the actual policies were "necessary?"

Putting discriminatory actions to the side, a host of macroeconomic policy options exist for a nation facing macroeconomic distress, encompassing tax policy, monetary policy reform, IMF assistance, and the like. How can one plausibly know if abrogating investor protection rules is "necessary" in such a context? Even more to the point, how can an arbitral panel composed of experts on international economic law begin to assess the optimal policy instrument package for responding to a macroeconomic crisis? One suspects that the arbitral process is ill equipped to pursue that task and that an adjudication as to whether the policies at issue were "necessary" or "the only way" will be fraught with speculation and error.<sup>84</sup> Here, especially, the information that is essential to adjudicate the issue is unlikely to be observable by outsiders or is at least unlikely to be verifiable in the adjudicative process. This problem, too, should inform how "necessity" and related defenses are construed and implemented.

#### *Accommodating the Tensions: Moral Hazard and Policy Instrument Uncertainty*

The preceding section identifies two core problems with implementing a necessity or similar defense under the conditions that confronted Argentina. Adjudicators can plausibly observe and verify the existence of fiscal and currency crises, but they are not in a position to assess whether abrogation of international obligations is "necessary" or "the only way" to address them. Likewise, where a state has contributed to the underlying crisis through imprudent policy choices, excusing obligations can encourage the behavior that leads to these crises.

One can imagine three sorts of options for dealing with these issues. The first option is simply to ask adjudicators to do the best they can in assessing the necessity of abrogating international obligations and in deciding whether the moral hazard issue is sufficiently acute that

<sup>84</sup> See the discussion in *Continental Casualty Co.*, *supra* note 79, paras. 196–236 (importing WTO law into the interpretation of "necessary").

allowing a necessity defense under the circumstances would do more harm than good. ILC Article 25 incorporates this basic approach, with the further proviso that any evidence of imprudent behavior by a state seeking to invoke necessity results in denial of the defense. Article XI of the U.S.-Argentina BIT, by contrast, entrusts the necessity issue to adjudicators but is silent on the moral hazard issue.

A second approach is suggested by the WTO Safeguards Agreement,<sup>85</sup> which employs an imprecise standard for allowing deviation from commitments that turns on issues that are hard to verify. As noted earlier, one mechanism found in the agreement is a rule that any member that employs a safeguard measure must phase it out and is disabled from instituting a new measure in the same industry for a period of years. The limitation on duration encourages members to use the measures only during times of genuine and pressing need, as does the prohibition on using them again in the near future. Likewise, such limitations on the use of safeguard measures can penalize moral hazard to a degree by increasing the costs to governments of policies that may create conditions of distress. They also, to a degree, encourage governments to use efficient policy instruments to respond to distress, lest they lose the opportunity to deviate from international obligations in situations where that course of action is actually the best option.

No formal structure along these lines is to be found in CIL or the U.S.-Argentina BIT, but both can plausibly be interpreted with these considerations in mind. The “only way” principle in ILC Article 25 could be interpreted permissively for measures that are tightly circumscribed in time, in effect affording a deferential standard of review for short-term emergency measures; but the inquiry might be considerably more searching when a government seeks to invoke necessity for longer periods. The “necessary” standard of Article XI of the U.S.-Argentina BIT can be similarly implemented, on the premise that the longer a measure remains in place, the more reasonable it is to expect a government to identify other effective policy instruments.

A third approach is suggested by the necessity doctrine in tort law, the original safeguards system under GATT Article XIX, and the expectation-damages approach to facilitating “efficient breach” in contract. An adjudicator can defer to a nation claiming necessity or a similar defense (such as that under Article XI of the U.S.-Argentina BIT) but require that a measure of compensation be paid for the harm done due to breach of international obligations. The compensation can be deferred until such time as the state claiming necessity has recovered from the emergency situation sufficiently to be in a position to compensate without impairing its essential interests. Likewise, measured against the rates that the host country would have to pay to borrow during the depths of crisis, the interest rate (if any) on the deferred obligation may need to be “below market” to provide meaningful relief; in this sense, compensation will be partial.

This approach is readily available under the ILC Articles on State Responsibility. Article 27 provides in pertinent part: “The invocation of a circumstance precluding wrongfulness [such as necessity] in accordance with this chapter is without prejudice to . . . (b) The question of compensation for any material loss caused by the act in question.” Thus, an arbitral panel applying the necessity defense under CIL has the discretion to rule that compensation is required, at least after the period of necessity abates.

In my view, Article XI of the U.S.-Argentina BIT can be construed in this manner as well. Consider the phrase “this treaty shall not preclude the application by either party of measures

<sup>85</sup> *Supra* note 33.

necessary” to maintain public order or protect an essential security interest. If a measure such as the suspension of dollar pricing and indexing in Argentina is “necessary,” the treaty shall not preclude it. But once the measure is taken, the treaty is arguably silent on the question of compensation. Only if a compensation requirement would itself “preclude” a “necessary” measure does the text seem to rule out compensation. It is difficult to imagine why a requirement of compensation, deferred until such time as the exigent circumstances abate and the nation has the resources to compensate, and appropriately limited in magnitude, would be preclusive.

Among the three options discussed above, only the compensation option can induce a state that deviates from its international obligations to “internalize” a substantial portion of the cost. As noted earlier, cost internalization can do much to eliminate the moral hazard problem, at least for private actors who also internalize the benefits of their choices. It further encourages actors to select the least expensive way to protect their interests (the optimal policy instrument).

One must acknowledge some limitations and concerns about compensation, however, especially when required from governments. First, recalling the debate in the contract literature over the utility of expectation damages versus specific performance, compensation induces efficient choices only if it can be computed and administered with reasonable accuracy. In some investment disputes, valuation issues can be challenging (such as determining the fair value of expropriated property when market valuation is absent). This objection does not seem terribly compelling, however, since the same techniques of valuation can be used here as in domestic takings and related cases. Further, many investment claims are not difficult to value using market benchmarks (such as the claims for lost revenue from abandoning dollar pricing and indexing in the Argentina cases).

Another concern is the possibility that compensation requirements will induce excessive “reliance” investments by those who are to be compensated. The contract damages literature makes the point nicely. A promisee who makes investments in reliance on a contract, and who is guaranteed the return of its expectancy in the event of breach, will make excessive investments. The reason is that from a private perspective, the returns to investment are a certainty, whereas from a social perspective, the reliance investment is valuable only in those states of the world where breach is inefficient.<sup>86</sup> Similar points have been made about compensation in the takings literature.<sup>87</sup> An investor guaranteed compensation for a taking, for example, may invest in enhancing the value of the investment on the assumption that its resulting stream of returns is a certainty, even if significant probability exists that future developments will justify shutting down the investment for some public purpose. When other mechanisms to police excessive investments of this sort are lacking, a degree of undercompensation may be desirable,<sup>88</sup> which perhaps affords a further argument for below-market interest rates in computing the award. It seems unlikely that *zero* compensation will be the best response to the problem, however, as it provides no incentive for a promisor to respect commitments that have become privately unattractive but are jointly efficient.

Another type of objection to compensation emphasizes that policy decisions are made by public officials who do not internalize the social benefits of those choices. When a government

<sup>86</sup> See Shavell, *supra* note 12 (discussion of excessive reliance expenditure under expectation damages).

<sup>87</sup> See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984).

<sup>88</sup> See Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110 (2002).

is required to pay full compensation, it “internalizes” costs, but by no means can one assume that officials will henceforth respond by making efficient choices (as would a private actor who internalizes the benefits of choices in its own self-interest).<sup>89</sup>

Undoubtedly, government officials do not always make decisions that are first-best efficient from a cost-benefit standpoint. Moreover, there is no widely accepted model of what bureaucrats “maximize” and, consequently, no conventional wisdom as to how they will be affected by a prospect of governmental liability. They may well have incentives to pursue their personal or political objectives reasonably efficiently, however, because resources that are wasted cannot be used to reward politically influential interest groups. If so, governments may be motivated to minimize or at least reduce the costs of providing services and also may, to some degree, respond to liability in ways similar to that of a profit-maximizing (cost-minimizing) private firm.<sup>90</sup> A compensation requirement in the investment setting thus has the potential to encourage both the curtailment of moral hazard and the best choice of policy instruments to address crises, even if it does not induce ideal behavior in this regard.

Moreover, the cost internalization that is brought about by a compensation requirement may be expected to incentivize *politically efficient* policy choices. An analogy may be found in the modern theory of trade agreements, in which internalizing the harm that tariffs and other trade barriers cause to foreign nations leads to politically efficient trade agreements.<sup>91</sup> Politically efficient choices can have normative appeal. If government officials are the citizenry’s faithful agents, choices that deviate from the economic “first best” nevertheless have democratic legitimacy and may be understood as responsive to other citizen concerns, such as income distribution.

More generally, it is a commonplace in the literature on policy making with international externalities to suppose that governments tend to ignore the welfare of actors who are not among their constituents,<sup>92</sup> such as foreign investors. A compensation requirement forces governments to consider the welfare of those who might otherwise be ignored, plausibly leading to policy choices that better serve the global interest rather than simply the national parochial interest.

Nonetheless, compensation requirements imposed on political systems that reflect various types of agency problems can create a variety of distortions. One must be attentive to arguments in particular cases that the potential distortions are serious and may swamp the benefits of compensation requirements—a familiar type of problem in the economic theory of the “second best.” As with most second-best concerns about public policy, however, it may be prudent to proceed pragmatically on the assumption that second-best problems are also second-order problems, at least in the absence of compelling evidence to the contrary.

<sup>89</sup> The potential lack of efficiency is the core of the concern about compensation requirements in Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). See also Been & Beauvais, *supra* note 67.

<sup>90</sup> See the discussion of municipal liability for constitutional torts in Larry Kramer & Alan O. Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249.

<sup>91</sup> See KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* (2002).

<sup>92</sup> See ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW*, ch. 1 (2013).

#### IV. CONCLUSION

Conditions of economic exigency that are sufficient to justify a suspension of international obligations can surely arise—a proposition that has been accepted by the international community for many years in various settings. The full range of such conditions is difficult to specify *ex ante*, although certain scenarios such as fiscal and currency crises can be identified fairly accurately. The much harder problem relates to the question whether the opportunity to deviate from international obligations will create an unacceptable moral hazard in policy making and whether deviation from international obligations is the best policy instrument for addressing exigent circumstances. Such issues are not easily adjudicated because the necessary information can be difficult to observe or verify.

A possible response to the problem that preserves policy flexibility for states facing exigent economic circumstances, while policing both the moral hazard problem and the incentive to choose efficient policy instruments (albeit no doubt imperfectly), is to marry deference to a state's claim for a need to apply emergency measures with a compensation requirement, appropriately limited in magnitude and timed to allow states facing economic emergencies to recover from them before compensation is payable. Arguably, this approach is permissible under existing principles of customary international law and under more specialized treaty provisions, such as Article XI of the U.S.-Argentina BIT.