Compromised Aggression? A Process Tracing Approach to the Kampala Amendments to *The Rome Statute of the International Criminal Court* (1998).

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Abstract

The legal community's efforts to establish the crime of aggression (COA) under codified international law began in the aftermath of the Nuremberg and Tokyo tribunals, and has continued to-date. In 2010, the Assembly of States Parties (ASP) to the International Criminal Court (ICC) voted by consensus on amendments to the Rome Statute, bringing the COA into a state of partial-activation. The purpose of this study was to use a process tracing method to develop a systematic understanding of the mechanisms leading to agreement on the COA at the Kampala Review Conference, to assess the possibility of a final ASP activation vote (due to take place after 1st January 2017) and to analyse the impact the COA might have on the ICC's role in the international community. Findings suggest that despite efforts to dilute the COA by some of the world's most powerful states, a number of causal mechanisms facilitated consensus. These included: support from particularly influential delegates (individual personalities), momentum and norm-setting by the Chairman's team, signalling by norm-compliant states (in particular 'middle powers'), and encouragement from domestic (and/or academic) actors (lobbying). The piece closes with an assessment of the implications arising from the Kampala compromise, for the ICC, global governance, and the strength of international criminal law as a whole.

List of Acronyms

ASP	Assembly of States Parties to the International Criminal Court
AU	African Union
COA	Crime of Aggression
ICC	International Criminal Court
ICL	International Criminal Law
II	International Institution
IO	International Organisation
IMTFE	International Military Tribunal for the Far East
IMTN	International Military Tribunal at Nuremberg
OTP	Office of the Prosecutor, International Criminal Court
PT	Process Tracing
P4	The 'Permanent Four' (P5 Security Council Members, minus the United States)
P5	The 'Permanent Five' Members of the United Nations Security Council
SWGCA	Special Working Group on the Crime of Aggression
TRS	The Rome Statute of the International Criminal Court (1998)
U.K.	United Kingdom
UN	United Nations
UNSC	United Nations Security Council
U.S.	United States

1. Introduction

In the aftermath of the Second World War, there was an overwhelming, globally-declared need to counteract military incursions into the territory of foreign states. With the atrocities of the Holocaust and Pearl Harbour fresh in the world's consciousness, 'crimes against peace' was included in the statutes establishing the International Military Tribunal at Nuremberg (IMTN) and the International Military Tribunal for the Far East (IMTFE). Such crimes were defined as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances" (Charter of the International Military Tribunal at Nuremberg, 1946, Article 6[a]). In the course of his arguments, Chief Prosecutor Robert H. Jackson (a U.S. jurist) stated at Nuremberg, "to initiate a war of aggression…is not only an international crime; it is the *supreme* international crime" (Nuremberg Trial Proceedings Vol. 22, 1946, para 426, emphasis added). It was this oft-cited moment that began the legal community's efforts to establish the crime of aggression (COA) under codified international law – a saga that has continued to-date (McDougall, 2013; Weisbord, 2014; Kress & Barriga, 2011; Ferencz, 2009).

In spite of the evidence of strong global will to establish such a crime, a concrete understanding of what actually *constitutes* a COA, has been painfully slow to develop. A number of elements of the crime have required significant negotiation and compromise at the international level; namely, defining the 'act' element (what constitutes an 'act' of aggression?), 'conduct' elements (what indicates 'planning' or 'execution' of aggression?), jurisdictional issues (who will have the power to charge such a crime?), and a determination of the point at which an act of aggression would reach the threshold of an international crime.

Defining and establishing the jurisdiction for a COA has been historically contentious by nature of the crime's subjectivity; different states may interpret different behaviours as 'aggressive.' For example, actions seen in one state as separatism, may be construed as a struggle for human rights by another (Zhou, 2012). There may also be different perceptions of appropriate interference in another country's territory, depending on the aggressor state's perceived obligation to protect weaker nations during times of mass violence or war. As a result, despite ongoing discussions as to the criminalisation of aggression, international institutions (in particular international courts) have consistently shied away from codifying or enforcing the crime, even though numerous states have engaged in the illegal use of armed force against other states, in manifest violation of the *Charter of the United Nations* (1945). A new mechanism with the means of enforcing the COA as an international crime, was therefore needed.

The International Criminal Court (ICC) was established in 2002 after the enactment of the *Rome Statute of the International Criminal Court* (1998); this might have proven the perfect opportunity to define a crime that had thus-far been the product of diplomatic impasse (McDougall, 2013; Grzebyk, 2013). However, the degree of contention around the COA was such that the Rome Conference (the diplomatic conference that facilitated the creation of the ICC) failed to produce a definition or jurisdictional mandate for the crime. Instead, the COA was listed under Article 5(d) of the Rome Statute (1998) as falling under the ICC's remit, with a concrete definition and jurisdictional rules only to be adopted once states could agree on them.

Following a number of years and a series of protracted negotiations, member states of the ICC voted by consensus on a definition and set of jurisdictional rules for the COA, at the first Review Conference for the International Criminal Court in Kampala, Uganda (the "Kampala Review Conference"). On the final day of the conference, 11th June 2010, Resolution RC/6 was

adopted, officially bringing the COA into existence under Articles *8bis,* 15bis and 15ter of the Rome Statute. This was described at the time as an 'historic breakthrough' and "no small achievement" (Wenaweser, 2010, p. 883; see also Barriga & Grover, 2011). However, in almost equal measure, the negotiations have been characterised as "controversial," and a compromise rife with "flaws and complexities" (Kress & von Holtzendorff, 2010, p. 1217).

The state negotiations on aggression leading from the aftermath of Rome up to and including the Kampala Review Conference, form the major focus of this paper. The time required to debate the various elements of the COA, coupled with overarching problems of legal and political ambiguity by states, meant that despite being named as the supreme crime of concern to the international community, for decades the COA has had little legal or normative force (VanLandingham, 2016). Though the COA exemplifies the foundational principles of international criminal law (ICL) – deterrence of atrocity crimes, the end of impunity for illegal acts of war by Heads of State, and the critical importance of state sovereignty - issues of power politics and hegemonic influence have hindered the COA's full implementation and (some suggest) rendered it inert.

Three requirements have limited the full entry into force ('activation') of the Kampala Amendments. Firstly, it was determined in Kampala that the ICC's jurisdiction could only be activated after 1st January, 2017 (Resolution RC/Res 6, 2010). Secondly, it was determined that 30 state ratifications would be required for the crime to enter into force; this was fulfilled in June 2016, when Palestine became the 30th state to recognise and ratify the amendments.[1] Thirdly, a final vote by the States Parties to the ICC is required as a final threshold of activation. Whether

[1] A brief description of the difference between signing and ratifying a treaty, may be found in a footnote under the section, "Understanding State Relations with the International Criminal Court."

or when this vote will take place, has yet to be determined, as the Assembly of States Parties (ASP) to the ICC is not bound by any time restriction.

Project Aim and Justification

The purpose of this study is to develop a systematic understanding of the international dynamics and negotiation tactics that led to a consensus agreement on the jurisdiction and definition of the COA. Analyses of the COA to-date have focused on the legal flaws inherent in the crime, rather than contextualising each compromise in *governmental* decision-making, *global* power dynamics, or *individual* influence (Kress & Barriga, 2017; McDougall, 2013; Kestenbaum, 2016; Sayapin, 2014). The overwhelming focus of historically-oriented research on the COA, has been the (very few) pieces of case law in which the crime has been included. Furthermore, there has been little rigorous assessment of the future utility of the crime in the international legal system. This project represents an attempt to fill those analytic gaps, framing the evolution of the COA in terms of ongoing compromises – each small-scale agreement on the definition and implementation of the crime, has served as a link in the causal chain leading to the final product – the crime itself.

The COA is unique in myriad ways and a virtually unprecedented amount of negotiation was required to reach points of consensus between states parties (McDougall, 2013; Drumbl, 2009). Nevertheless, this year (2017) is a particularly notable one for the development of the COA. As previously stated, the ICC will be unable to exercise jurisdiction over the COA until the occurrence of a two-thirds majority vote by the ASP, which may take place any time this year. The COA has thus reached a stage of 'almost-activation.' It remains to be seen whether the existence of the crime on the books of an international institution already beset by normative and legal obstacles, will have any deterrence value for would-be aggressors. What is needed,

therefore, is a compelling explanation of the negotiation process that led to the creation of the crime, the compromises on the ICC's jurisdiction over the COA, and the parties who have supported different facets of the activation process. Only by understanding these factors is it possible to predict with any degree of accuracy, the crime's future utility.

The second chapter of this piece elucidates a theoretical and historical framework, grounding analysis in constructivist understandings of international relations, and providing the context for various state relationships (and degrees of compliance) with the ICC. This facilitates a broader understanding of why certain states (or state blocs) may have taken specific approaches to the COA debates. The third chapter will elucidate the process tracing (PT) methodology and method, rationalising a qualitative analysis of causal processes. The fourth chapter contains the results of the PT analysis, tracing the COA from the creation of the Special Working Group on the Crime of Aggression (SWGCA), through to the contemporary period. Finally, the fifth chapter looks to the future, assessing the utility of the COA as an international crime, and suggesting political and legal implications that may result from the COA's current status.

2. Background and Theoretical Framework

Constructivist Theory and International Criminal Law

The COA, even in comparison to other ICC jurisdiction crimes – war crimes, genocide, and crimes against humanity – has been unique in terms of the volume of negotiations required to secure a workable definition. Although power dynamics between nations have had an unquestionable influence on the COA negotiations throughout history, state relations and normative beliefs may also prove critical to the creation of (and adherence to) international law as a whole, and international criminal law (ICL) in particular (Cohen, 2009). The analysis in this

piece is thus informed by a constructivist framework, which emphasises cooperation, signalling, and negotiation as influential elements in the construction of law and policy (Brunee & Toope, 2011). Unlike neo-realists, who see global politics and international law as a function of state power and institutional dominance, constructivist theorists frame international relations as a product of ongoing social practices (Wendt, 1999). Rather than focusing solely on the material elements of international relations, constructivists look at the social contexts that give those materials *meaning* – Checkel (2011) cites the example of a state's possession of nuclear weapons. It is not the mere ownership of a nuclear weapon that is problematic, but rather the question of whether the state possessing them is a friend or a foe. So, whilst the United States (U.S.) may see the United Kingdom's (U.K.) nuclear program as non-threatening, the same cannot be said for North Korea's or Iran's respective programs (Checkel, 2011). Equally, though ICL may be seen as a reflection of the ideals and priorities of powerful members of the international community, it is also a product of multilateral interactions, is characterised by longstanding practices, and carries (socio-) legal repercussions for violations.

In order to contextualise their focus on social practices and behaviours, constructivists frame interests in terms of 'norms' of behaviour. Norms are generally defined as "a standard of appropriate behaviour for actors with a given identity" (Finnemore & Sikkink, 1999, p. 891). Norms are not merely externally imposed rules of behaviour; they generate a sense of 'oughtness' in that they are seen as "the appropriate thing to do" (Sikkink, 2011, p. 11). By observing commonly understood norms, actors take meaning from events, which then impacts their understandings of what constitutes compliant and non-compliant behaviour. This may occur at the individual, group, or even state levels; world leaders often recognise that the conformity of their state with international rules of behaviour will positively impact economic,

political, and social relations with other compliant nations (Ruggie, 1998). Once a number of states have been convinced of the need to support a norm, the international community as a whole, reaches a 'tipping point' (Finnemore & Sikkink, 1999). At this juncture, constructivists are not only interested in the *quantity* of states who show support for a norm, but also the relative *power* of those nations within the world system. This represents more than realpolitik – it is also a product of moral influence; as an example, Finnemore and Sikkink (1999) contrast the raw power of the United Nations Security Council with the moral influence of the newly-transitioned South Africa.

Early constructivism emphasised the role of intersubjective understandings of behaviour, which shapes the perceptions and decisions of social actors. March and Olsen (2009) contextualise these understandings in an ability "to proceed according to the institutionalized practices of a collectivity, based on mutual, and often tacit, understandings of what is true, reasonable, natural, right, and good" (p. 4). In the context of a multilateral negotiation on the COA, this might have the impact of centralising state interests on the prevention of atrocity crimes and the violation of sovereign territory. Coleman (2011) describes the importance of diplomatic venues and the dynamic impacts these can have on norms; membership in an institution over time enhances any debates that expand the mandate of that institution. By this logic, the COA negotiations would be bolstered by the preceding discussions in Rome – actors would be motivated to build upon the work that has already been achieved. Finally, Coleman suggests that norm emergence in an institutional setting is founded on the premise of bargaining and compromise – states may be motivated to promote a norm, but they are unlikely to blindly adopt a norm on the basis of moral appropriateness alone.

The ways in which norms diffuse and have been used by both state and individual actors in the international community, have shaped the prioritization of international legal principles over time. In order to begin tracing the process of defining and classifying the COA, it is helpful to understand the context set by overall state responses to the court, and highlight particular points of contention around the ICC's work that may have been influential on state behaviour during the COA negotiations.

Understanding State Relations with the International Criminal Court

Contemporary narratives on global relationships with the ICC tend to concentrate on two points of contention: the tension between the United Nations Security Council (UNSC) 'Permanent Five' nations and the ICC's role as an impartial institution with huge power potential, and the increasingly strained relationship between the ICC's Office of the Prosecutor (OTP) and several member states of the African Union (AU) (Kestenbaum, 2016; Trahan, 2013; Bosco, 2014; Struett, 2008; Waddell & Clark, 2008). This section will undertake a brief discussion of the court's creation and elaborate on some of the responses to the court as a whole. Although the COA is *sui generis*, even in relation to the other crimes in the ICC's purview, it is critical to contextualise some of the state and regional bloc perspectives on the court, both at its inception and in the contemporary period. Doing so allows for a distinction to be made between the COA as a critical component of ICL, and the COA as a tool of an at-times controversial international institution.

Though 'crimes against peace' represented a controversial facet of the Nuremberg and Tokyo tribunals, the push to criminalise aggression waned in the aftermath of the courts' judgments (McDougall, 2013). The UN General Assembly created three Special Committees on

the Question of Defining Aggression throughout the 1970s; none were able to agree on a workable definition of the crime (Kestenbaum, 2016).

Two tactics by the UN General Assembly ultimately precipitated the inclusion of a crime of aggression (albeit as a 'shell crime') under the Rome Statute. Firstly, General Assembly Resolution 3314 (1974) provided an initial list of acts constituting aggression, upon which all States Parties agreed at the time. Such acts include but are not limited to: invasion, the attack, or annexation of one state by another, bombardments by the armed forces of one state against the sovereign territory of another, blockades of coasts or ports by one state against another, or the sending of mercenaries to carry out acts involving armed force of a similar gravity.[2] Secondly, General Assembly Resolutions *following* Resolution 3314 invoked several critical references to acts of aggression and *jus ad bellum* (the laws governing the right to engage in war), which scholars have suggested indicated a continued willingness by States Parties to engage with the possibility of its criminalization (McDougall, 2013; Kestenbaum, 2016).

Throughout the 1990s, as the atrocities in Rwanda and the Former Yugoslavia intensified and necessitated the creation of two ad-hoc UN tribunals, the movement to replace Heads of States' impunity with accountability, intensified. This culminated in a five-week United Nations General Assembly diplomatic conference in Rome, in June 1998 "to finalize and adopt a convention on the establishment of an international criminal court" (United Nations, 1999). The result was the *Rome Statute for the International Criminal Court* (1998) (hereafter the Rome Statute).

The Rome Statute was adopted by a majority of 120 to 7; by the end of the Rome Conference, those who had participated in the negotiations were euphoric, describing the process

[2] For a complete list of acts defined as aggression, see UN General Assembly Resolution 3314 (XXIX) *Definition of Aggression* (2319th Plenary Meeting, 14 December, 1974).

as “a triumph for the peoples of the world” (Bassiouni, 1999, p. 468). Nevertheless, it was uncertain in the immediate aftermath of the conference, what state responses to the treaty would be. The Rome Statute required 60 signatures to enter into force, after which time the court could begin its operations. Per international legal principles, some states began the two-step process of placing themselves within the jurisdiction of the court: signing the Rome Statute, then undertaking the domestic processes required for ratification.[3] Nevertheless, support for the ICC was far from universal, with Russian, Chinese, United States (U.S.), and Indian delegates all asserting doubts as to the validity and power of an international legal body.

The United Nations Security Council: Power Politics

The relationship between the so-called ‘great’ powers and the ICC has ranged from measured support to outright contention.[4] Such ideological differences were particularly important at the court’s inception. Almost any international legal body would be capable of establishing its own credibility and legitimacy over time, but initial negotiations nevertheless relied upon the support of major world powers, even as the court’s basic mandate curtailed the authority of state officials – and thus, the state itself (Tolbert, 2015). The greatest tension exists

[3] Unlike domestic, contract-based law, the signing of an international treaty or convention does not automatically bind a state to its contents. Instead, States Parties who have signed a piece of international law are declaring an agreement ‘in principle’; only upon ratification is that state duty bound to follow the law. Ratification processes vary from state to state, according to domestic legal rules. For example, in the United States, a two-thirds majority vote in the Senate or the signing of an executive agreement between the President and Congress, are required for the U.S. to successfully ratify any piece of international law. The President of the United States is unable to unilaterally ratify. This is often cited as a major reason why the U.S. has failed to ratify so many bastions of international human rights law, including the *Convention on the Rights of the* Child (1990), the *Convention on the Elimination of Discrimination Against Women* (1981), and indeed, *The Rome Statute* (1998). For more information, see Bassiouni, 1999 and Henkin, 1995.

[4] Scholars have disagreed over the definition of what constitutes a ‘great’ power. Here, major powers, superpowers, or great powers are generally defined as those states possessing, “(1) power capabilities; (2) special aspect (geographic scope of interests or projected power) and (3) status (an acknowledgement of major power status)” (Danilovic, 2002). The United Nations Security Council Permanent Five Members (P5): Russia, France, the U.K., the US, and China, are all considered Great Powers for the purposes of this piece.

between the court and some of the world's strongest and most powerful states – namely, several of the five permanent members of the United Nations Security Council (the 'P5').[5]

Despite a pioneering engagement with ICL at the IMTN, after the Rome Conference the U.S. quickly became one of the biggest detractors to the establishment of the court. Having signed the Rome Statute in December 2002, the U.S. declared almost immediately afterwards that they did not intend to ratify (Mayerfield, 2003). By doing so, they freed themselves from an obligation to act in accordance with the object and principles of the Rome Statute, per Article 18 of the *Vienna Convention on the Law of Treaties* (1969). Such 'unsignings' have been viewed as damaging to the ICC's legal power and legitimacy (Mayerfield, 2003; Bosco, 2014).[6] It is of note that the U.S., as a former signatory, attends ASP meetings as an 'observer' state –its delegates may attend meetings but may not vote during Assembly deliberations ("Rules of Procedure of the Assembly of States Parties," 2002).

Under Chapter VII, Article 39 of the United Nations Charter (1945), the UN Security Council has held a long-standing and unique ability to make determinations about whether or not there has been a "threat to the peace, breach of the peace, or act of aggression." The UNSC also possesses the legal authority to act on behalf of all 193 Member States of the United Nations (UN), despite the fact that the vast majority of states have never served a term on the Council (Article 25, United Nations Charter, 1945). This combination exemplifies the UNSC's unprecedented and highly centralised military and political power on the world stage (Hurd, 2014). This also illustrates the fine line between law and politics in the international arena; the

[5] For reference purposes, the five permanent members of the United Nations Security Council are: China, France, Russian Federation, the United Kingdom, and the United States.

[6] Other states have declared similar intentions not to ratify TRS: Russia signed TRS in September 2000, but declared its non-ratification in November 2016 ("Statement by the Russian Foreign Ministry", 2016). Israel also notably signed, but entered an intention of non-ratification in 2002 (Driscoll et. al., 2004). Finally, China has neither signed nor ratified TRS: scholars predict that it is highly unlikely that they will do so (Gao, 2007).

P5 member states have not only been able to make determinations about whether an act constitutes aggression, but have also held the exclusive authority to veto those same determinations. In other words, the Council has been afforded the power to make decisions pertaining to the rule of law in the international community, and that affect the international community, without any outside interference or compulsion. It is therefore unsurprising that its members would be reluctant to relinquish this authority to an independent international court.

Though the U.S. has distinguished itself as one of the loudest detractors, one of the issues that *all* of the Permanent Five ('P5') powers had with the ICC from the very beginning, was its ability to operate almost entirely independently of the United Nations Security Council (UNSC). Of all the P5 members, only France and the U.K. are also members of the ICC, meaning the other three states are not bound by the provisions of the Rome Statute. Nevertheless, the rules of the ICC allow it to exercise independent jurisdiction over parties that have not ratified the statute (if officials from the non-member state commit crimes on the territory of states who *have* ratified); this raises the possibility of implicating the most powerful Heads of State in the world, for atrocity crimes in other nations.[7] For obvious reasons, the P5 members of the UNSC have a vested interest in preventing this from occurring. The OTP has been imbued with the power to

[7] The jurisdictional rules for the ICC are as follows: per Article 23 of the Rome Statute (TRS) the ICC must abide by *subject matter* jurisdiction: it may open an investigation into actions amounting to its core crimes – genocide, war crimes, and crimes against humanity. However, per Article 12 of TRS, the ICC is also bound by *territorial* jurisdiction, meaning that it may only exercise jurisdiction if such crimes have occurred within the territory of a state who has ratified TRS, or against nationals of a ratifying country. This means that if members of a non-State Party (i.e. the USA) engage in activities amounting to atrocity crimes in the territory or against nationals of a State Party to the ICC (i.e. Afghanistan), the Court is still entitled to open an investigation, issue indictments, and prosecute those individuals. Finally, the Court is bound by three 'trigger' mechanisms: a nation may self-refer a situation occurring in its own territory and request the Court investigate as an impartial actor (Article 14[1], TRS), the United Nations Security Council may refer situations to the ICC under Chapter VII of the UN Charter (1945), (Article 13[b], TRS) or the Prosecutor may begin an investigation *proprio motu* – if he or she has reason to believe a situation falls under its subject matter jurisdiction but is not being managed by the state in question (Article 15[1], TRS).

begin prosecutions independently of international approval, through a *'proprio motu'* power.[8] Though the UNSC has the power under the Rome Statute to require the ICC to *investigate* possible atrocity crimes, its powers to stop the ICC from investigating a case, are more limited.[9] Arguments over legitimacy and jurisdiction have thus pervaded the dialogue between the UNSC and the ICC since the latter's very beginnings.

The ICC and the Wider World: Deterrence and Compliance

The ICC's role as an international deterrent against atrocity crimes is a particularly problematic one. Broadly speaking, research points to the critical role of international institutions (IIs) as deterrents to amoral or illegal behaviour by states (Bosco, 2011). As international norms are often promoted through socialization processes that involve punishment for detractors (which may involve legal sanctions, political opprobrium, etc.) and legitimation of compliance, IIs often become the ideal mechanisms through which such processes occur. Association with an international court is a particularly apt example of such compliance-through-membership. The possibility of an investigation by an external, ostensibly independent organization, and the possible political repercussions resulting from violations of international law, theoretically serves as a disincentive to the commission of human rights violations. For this reason, scholars point to deterrence as a means by which international courts provide a serious threat of investigation, enforcement, and punishment for would-be norm violators (Meernik, 2015; Hyeran & Simmons, 2016).

A major problem with deterrence in this context is that – because the unit of analysis is states rather than individuals – the theory relies on the unblemished reputation of an II, in order

[8] The Prosecutor must seek permission from the Pre-Trial Chamber of the ICC to launch an investigation; he or she may also request information from the United Nations. However, no UN body may *compel* the Prosecutor to cease a preliminary investigation of a situation or case.

[9] The UNSC can, by a resolution adopted under Chapter VII, suspend an ICC investigation or prosecution for a period 12 months, renewable under the same conditions, pursuant to article 16 of the Rome Statute.

for it to be able to serve as an effective deterrent (Ainley, 2015). Despite the ICC's ostensible autonomy to select its own investigations and establish independent indictments, the court has nevertheless been dogged by narratives that weaken its position on the world stage and render states disinclined to support its mandate. Easily the most prominent myth about the ICC is that as an institution, it is inherently prejudiced against African states. Since the court's beginnings, a number of African states have appeared on the ICC's list of situation countries, which some have used to suggest there is an inherent, irreversible tension between African nations and the ICC (Freeland, 2015; Mukum Mbaku, 2014). Those arguing that the ICC has always been biased against African countries, negate a spate of initial self-referrals from African states to the ICC's jurisdiction (most notably the Central African Republic and Uganda), as well as the fact that 34 of the 60 states that initially signed the Rome Statute (1998) were African (Keppler, 2012).

The relationship between the ICC and the African bloc is far more nuanced than the news media portrays, but the damage to the court's reputation and perceptions of its work, have been significant (Emmanuel, 2014). The conflation of prosecutorial personality with the early work of the ICC (mainly Luis Moreno-Ocampo – the court's Founding Chief Prosecutor) has meant that current Prosecutor Fatou Bensouda has spent significant time in her role, attempting to correct the 'Africa-bias' narrative (Du Plessis et. al., 2013). The OTP has, over the last several years, begun to expand its investigatory remit to include situations that would implicate states in different regions, which has had the side-effect of incriminating states with significant international power and influence. The OTP is currently conducting ongoing preliminary examinations in Ukraine (possibly implicating Russia), Iraq (implicating the U.K.), and Afghanistan (possibly implicating U.S. personnel, depending upon jurisdictional rules) ("Report on Preliminary Examination Activities," 2016). This has been met with strong resistance from

the states involved, and has arguably had an equally strong impact on the court's ability to fulfil its primary role: combatting the impunity of state leaders who commit atrocity crimes (Foster, 2016).

Compounding the ICC's ability to perform effectively are other allegations – that the court is inefficient and overly costly, is almost entirely disconnected from the states where it carries out investigations, and is too political to operate effectively in the states most likely to experience atrocity crimes ("Is the World's Highest Court Fit for Purpose?" 2017). These narratives have proved difficult for the ICC to counteract; though it is only as costly as the ad-hoc tribunals that preceded it, it is entirely dependent on the political and (more importantly) the *financial* backing of its States Parties (Bosco, 2014). Allegations of weakness and bias have hindered the ICC's ability to secure state buy-in, both figuratively and literally. This has been said to negatively impact logistical support during investigations, the court's access to intelligence, and provision of other diplomatic assistance (Bosco, 2014).

One positive note in relation to compliance with (and support for) the ICC's rulings and mandate, comes from a broad group of nations that might be loosely categorised as 'middle powers.' Though a significant swathe of literature on international law concentrates on the world's most powerful nations, often neglected are the comparative roles played by 'middle power' states that may not be classified as 'great' in terms of Security Council membership or hegemonic status, but who nevertheless serve key economic and social roles within the international hierarchy, and indicate a strong desire for international stability (Jordaan, 2003). Though almost no research has examined the role of middle power states in relation to the ICC specifically, other research suggests that middle powers have proved prominent in conflict reduction and negotiations. They are unlikely to directly challenge the status quo of hegemonic

influence but may act with other like-minded states (usually through multilateral institutions) to maintain order in the world system (Cooper, Higgott, & Nossal, 1993). This becomes a cyclical process, as membership and strong presence within an international institution, provides a middle power state with more possibilities for global influence. For this reason, the authority of middle power states was of particular interest to this project.

Research suggests that since the court's very beginnings, middle power states have exercised effective leadership through the prism of the ICC, as well as strong compliance with its provisions. Canada, for instance, was a key player in demonstrating the necessity and efficacy of an international criminal court in the first place, during the mid-1990s (Behringer, 2003). At the discussions leading up to (and including) the Rome Conference, the 'Like-Minded Group' – an association of thirty-two small and middle power nations – threw their collective weight behind the ICC and expressed unconditional support for the Court's mandate (Wilson, 2009). Payton (2012) in turn describes the ICC's inception as resulting from the actions of a "coalition without the powerful" (p. 16). This raises the possibility that middle powers may have played a role in facilitating the negotiations in Kampala – middle powers and weaker states are not only more likely to be victims of acts of aggression, they are also less likely to be able successfully strike back against incursions into their territory, on their own (Wilson, 2009). This, combined with higher levels of compliance with international rules of behaviour, seem to suggest that middle powers would have sought to influence the COA talks to the best of their abilities (Simmons, 2009). Coalition-building would allow for states who would otherwise have a softer voice in multilateral negotiations, to express their perspective and translate discursive power into concrete solutions – it is therefore open to investigation, whether this same principle would have applied in relation to the COA.

3. Research Methodology & Method

Case Studies and Process Tracing

This piece consists of a single case study and applies a process tracing method (PT) in order to analyse the recent developments of the COA. Gerring (2009) describes case studies as the primarily qualitative exploration of "a spatially delimited phenomenon…observed at a single point in time or over some period of time" (p. 19). Research of this nature provides a means of knowing more about a complex phenomenon through in-depth description and contextual analysis (Yin, 2014). Case studies may be of particular use in instances where statistical or formal models are weak; they permit a researcher to systematically identify the indicators that best represent the theoretical concepts they are attempting to capture (George & Bennett, 2005). Furthermore, case study approaches may be less prone to some types of measurement error, as analyses "intensively assess a few variables across several qualitative dimensions, rather than having to quantify variables across many cases" (George & Bennett, 2005, p. 220). It is possible for the researcher to incorporate a large number of intervening events and decisions, and from there to identify which conditions are necessary to activate or perpetuate causal mechanisms (Mahoney, 2012; Kay & Baker, 2015). This form of research design can be particularly valuable when examining political events that have not been adequately theorised, or when exploring a new or novel phenomenon (Collier, Seawright & Munck, 2010).

Within the case study research canon, process tracing (PT) analyses provide the *means* for a researcher to locate sufficient qualitative evidence, then document the complex interactions they are seeking to explain (George & Bennett, 2005; Bennett & Checkel, 2015; Goertz & Mahoney, 2012). PT is far from a new method; the first use of the term dates back to the late 1960s, when psychologists sought a technique that would allow them to more rigorously understand cognitive decision-making processes at the individual level (George, 1979). Since

that time, analysts seeking a qualitative means of understanding why an outcome came to pass in a specific case, have begun to use PT as a means of doing so (Mahoney, 2012). In particular, PT has gained traction for scholars of international relations and political science, who seek to 'diagnose' elements of social and political life (Collier, 2011). Such diagnoses may be micro-level (i.e. at the individual human level) or macro-level (i.e. at the structural - political, legal, or policy levels) (Bennett & Checkel, 2015). PT has been associated with myriad theoretical backgrounds and frameworks, to the point of acquiring "near buzz-word status" (Checkel, 2005, p.2). Ostensibly, PT has its strongest roots in positivist traditions, as a significant element of the method relies on tests of causality and causal mechanisms (Bennett & Checkel, 2015). Nevertheless, PT is also compatible with constructivist epistemological approaches, due to its focus on evolving and intersubjective relations.

The emphasis in a PT analysis is the dynamic influence of *causes* on *outcomes* (Cairney, 2013; Collier, 2011). Though in statistics, determinative causality implies a theoretical model with no error term (i.e. a model that explains one hundred percent of the variance in a dependent variable), in qualitative analysis and PT in particular, causality is better understood as "a theory of a system of interlocking parts that transmits causal forces from X to Y" (Beach & Pedersen, 2013, p.29). Activities occur as a part of a larger mechanism, and researchers seek to understand the relationship between the parts, and the 'whole' mechanistic entity (Gerring, 2005). Although researchers may be conducting an assessment of a single mechanism within a single case study, inferences may nevertheless be made about the presence or absence of various parts of a mechanism in analogous case studies, which lends value to both the method and the analytic outcome (Checkel & Bennett, 2014; Dowding, 2016).

At its most basic level, PT thus focuses on sequential developments within a single case, requiring the researcher to identify specific causal mechanisms (X) and assess their impact upon a dependent variable of interest (outcome Y). The researcher assesses preferences based on an actor's rhetoric and actions, and then explain behaviour over time "while also investigating the possibility that preferences may change over time through learning, changing life cycle stages/aging, or other processes" (Bennett & Checkel, 2015, p. 42). A PT analysis is not merely a historical storytelling exercise, but rather a means of showing connections *between* events that explains the correlation of variables in a specific case.

Case and outcome-centric PT analysis has had particular value in explaining the outcome of political decision-making; examples include the Soviet Union's withdrawal of hegemonic influence and power in Eastern Europe after the end of the Cold War, and the rise of intra-state conflicts through the 1990s (Checkel & Bennett, 2014; Beach & Pedersen, 2013; Mahoney, 2016; Mahoney, 2012). In these cases, PT may also illustrate 'path dependency' – a phenomenon whereby states, individuals, or institutions, once they have decided upon a particular path, become locked into that path and at critical junctures, are likely to choose the outcome that will entrench the institutional trajectory (Pierson, 2000; Weller & Barnes, 2014).

Before beginning a qualitative assessment of casual processes, researchers must distinguish between two types of research: 'causes-of-effects' and 'effects-of-causes' (Mahoney & Goertz, 2006; Weller & Barnes, 2014). The latter concentrates on assessing the effect of a variable on an outcome across settings (i.e. in multiple cases); as this piece concentrates on a singular case, research of this nature has diminished utility in this instance. The 'causes-of effects' typology, which will be used in this piece and which has also been termed 'explaining-

outcome process tracing,' establishes a minimally sufficient explanation for why a particularly interesting outcome has occurred in a specific case (Beach & Pedersen, 2013).

There is some contention amongst scholars as to whether PT, and in particular 'explaining-outcome' PT, ought to proceed in an inductive or deductive fashion. Is it preferable for PT research to generate theories, or to test them? As with other research methods, deciding whether to proceed inductively or deductively depends on the nature of the selected case, the extent of prior knowledge, and the similarity of that case to a defined population of other cases (Bennett & Checkel, 2015; Beach & Pedersen, 2013). A decision was made to focus on two specific areas of interest (which will be discussed in the 'Guiding Questions' section, below); these were informed by prior, broad research on the role of the ICC in the international arena. Despite these contextual areas of interest and the existence of a legal canon of research on the COA, there has also been a limited use of PT to assess the historical evolution of international law (Klamberg, 2015). Although this pilot study is guided by research questions (discussed in more detail below), it nevertheless aims to *elucidate* conclusions and theories, rather than explicitly *test* them.

One of the major limitations of a PT analysis that must be noted at this stage, is the issue of generalisability.[10] Scholars of PT have disagreed as to the number of generalizable conclusions that may be generated from a single case analysis (Bennett & Checkel, 2015; George & Bennett, 2005; Hay, 2016) As Checkel himself (2008) notes, "process tracing is not conducive to the development of parsimonious or generalizable social theories" (p. 123). Some scholars argue that the generalizability of research results depends on the case selected, rather than on the PT analysis itself (Moumoutzis & Zartaloudis, 2016). Others suggest that PT is more concerned with *internal* validity and thus the aim of generalizability should not be inferred at all; instead,

[10] A full description of the limitations of this study, may be found in Chapter 5.

researchers should aim to meet a threshold of descriptive inference, whereby a similar result may be anticipated, if not guaranteed, in equivalent cases (Kreuzer, 2016; Dowding, 2016).

Guiding Questions for PT Analysis

As this piece follows an outcome-explaining mode of PT, the major focus lies in explaining how the COA amendments came into existence in Kampala, despite the myriad political and power-based issues that seemed destined to defy success. Specifically, this identifies two areas of interest in relation to the ICC as the multilateral vehicle through which the COA has come into being. It is these areas that inform the following guiding questions for the PT analysis:

Q1. Given that three members of the UNSC are not States Parties to the ICC, were they able to influence the construction of the COA, and what impact did this have on the additions to The Rome Statute?

Q2. Would the COA amendments have been subject to a successful vote in Kampala, if middle power states had not engaged with (and facilitated the momentum of) the debate?

As previously noted, the overarching outcome of interest in this piece is the COA itself - what factors precipitated the crime's rapid development in the Princeton and Kampala negotiations, when its evolution to that point had been intermittent at best? Several possible mechanisms will be explored in explaining the pathway from a non-existent to an operationalized COA definition, including signalling, individual (as against state) personality, momentum-driving injects (primarily in the form of non-papers), and decisions by consensus.

Data Collection and Elite Interviews

The overarching aim of a PT analysis is to gain insights into phenomena or processes that are as specific and well-defined as possible. Any researcher engaging in PT should therefore be

prepared to conduct in-depth archival and historical analyses of review documents, meeting minutes, and literature, but should also (if possible) complement insights gained from those materials with interviews with key personnel (Tansey, 2007; Bakke, 2013). Interviews facilitate the researcher's ability to do so by triangulating the information that has been preserved in an official narrative (George & Bennett, 2005). Interviews may also contextualize information that is incomplete and elucidate inconsistencies found in the 'paper trail' leading to a policy decision (Vennesson, 2008).

It is not necessary for the researcher to apply a random sampling technique in order to recruit interviewees for a PT study. Participants are chosen through non-probability sampling, on the basis of their specific knowledge of the event or process under consideration (Thalhammer, 2013). The aim is not to draw a representative sample of a wider population, but rather to understand the perspectives of those actors who may have held the most influence and power at the time (Tansey, 2007). Furthermore, those contacted for an 'elite interview' may not necessarily have been *the* most prominent figures attending a meeting or event, but may nevertheless possess significant insider knowledge about the process under consideration, which renders their contributions particularly valuable to the project. By providing the narrative of an insider, an elite interviewee may "shed light on the hidden components of political action that are not clear from an analysis of political outcomes or other primary sources" (Tansey, 2007, p. 767). To contextualise the negotiations on the COA and to analyse information of a depth and nature that may not be preserved in official documents, elite interviews were conducted as a component of this project. All participants had significant roles in the pre-Kampala period and in Kampala itself, acting as delegates[11] and/or academic experts.[12] Authorisation to undertake

[11] H.E. Stefan Barriga, Deputy Permanent Representative of the Principality of Lichtenstein to the United Nations, and Claus Kress, former Member of the German Delegation and Focal Point for the COA.

the project was obtained from the Simon Fraser University Office of Research Ethics (also known as the Research Ethics Board or REB) before beginning interviews.

Interviewee Sample and Interview Process

Interviewees were sought for this project through two key processes: purposive sampling and snowball sampling. The selection method was largely driven by the need for rich, first-person data on specific events. As a result, interviewees were subject to the following inclusion criteria: they had attended the Kampala Review Conference, hold or have held significant roles in the field of international criminal law, and/or are a part of the Special Working Group on the Crime of Aggression (Tansey, 2008). Whilst the participant group was well defined, it was also difficult to access, meaning that it was necessary for the researcher to apply a snowball, or chain-referral sampling technique (Palys & Atchison, 2014). Snowball sampling often involves identifying an initial set of respondents, and then requesting that they suggest possible contacts who share similar characteristics or have relevance to the object of the research (Thalhammer, 2013).

Interviews took place between January and April 2017; all lasted approximately 60- 90 minutes. Interview were either taped, the researcher took detailed notes throughout the process, or both.[13] Although a series of questions were prepared for the REB that focused on a variety of issues and time periods, the focus of each interview varied depending on the participant. For instance, each interviewee was asked about the meetings at which they had the most access, but

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[12] Donald Ferencz: Convenor of the Global Institute on the Crime of Aggression (and son of Benjamin Ferencz, a surviving Prosecutor at the Nuremberg Military Tribunal); Noah Weisbord, Professor of Law and Assistant to the Assembly of States Parties; and Jennifer Trahan, Associate Professor of Global Affairs and former Chair of the American Bar Association's International Criminal Court Committee.

[13] Three of the interviews were not taped: the interviews with Claus Kress and Stefan Barriga took place over long-distance lines between Vancouver and Europe, on a landline with no speakerphone. The interview with Jennifer Trahan was also not taped; detailed notes and follow-up emails to clarify discussion points, were used in lieu of transcription.

not all interviewees had attended the same side-meetings or participated in the same negotiations in Rome, Princeton, or Kampala. Questions were therefore selected from the overall list given to the REB, depending on the participant's own knowledge base; this fits with the approach often taken by PT researchers (Tansey, 2008). Where applicable, recorded interviews were transcribed immediately following completion, to preserve contextual information as clearly as possible.

All interviewees were given the option of retaining anonymity, to protect their name, profession, and their direct role in the negotiations.[14] However, all participants chose to use their real names and titles, to lend credibility to the research and in an effort to promulgate transparent research on the COA.[15] Due to time constraints and the exploratory nature of this research, the researcher made the decision to stop the snowballing process after five interviews. Despite the relatively small number of participants, the information gathered nevertheless assisted in understanding the evolution of the crime of aggression over the last two decades, the dynamics between the various States Parties who have defined it, its nuances, normative power, and future impact on state behaviour.

4. Process Tracing: From Princeton to Kampala

The Special Working Group on the Crime of Aggression

In 2002, the Rome Statute entered into force and the International Criminal Court (ICC) was formally created under ICL. The ICC's Preparatory Commission, which had been in charge of "practical arrangements for the establishment and coming into operation of the Court," began the process of handing over responsibilities for the running and mandate of the ICC, to the court itself ("Preparatory Commission for the International Criminal Court," n.d.). As the COA had

[14] See Appendix A for an oral consent agreement, including confidentiality provisions, that was read to participants before beginning the interview.
[15] This desire for openness and transparency in research was particularly highlighted by Kress and Trahan.

only nominal status in the Rome Statute (1998) and no jurisdictional or definitional rules for the crime existed, the Assembly of States Parties (ASP) established in its first session a Special Working Group on the Crime of Aggression (SWGCA, or "Special Working Group"), which would be "open on an equal footing to all Member States of the United Nations or members of specialized agencies or of the International Atomic Energy Agency" (Resolution ICC-ASP/1/Res.1, 2002).[16] For the majority of the SWGCA's work, Ambassador Christian Wenaweser of Lichtenstein, served as Chairman. He stepped down in 2009 to serve as the President of the ASP and H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein of Jordan was elected in his place. Wenaweser, as the President of the ASP, chaired the Kampala Review Conference with assistance from Prince Zeid and Lichtenstein's Deputy Permanent Representative to the UN, Stefan Barriga (McDougall, 2013).

The overarching purpose of the SWGCA was to debate proposals relating to the COA – more specifically, the definition of the crime and the jurisdictional rules that would facilitate its later use (Barriga & Grover, 2011). Participation and attendance at SWGCA meetings was open to all Member States of the UN – delegates were free to attend as they pleased. Initially, the intention was for the SWGCA to meet for 10 days of 'exclusive meeting time' between 2006 and 2008 ("Report of the Special Working Group on the Crime of Aggression," November 2006). However, due to the ever-increasing complexity of the issues at stake, the group met several times between 2004 and 2009, formally (and primarily) in New York and The Hague. These meetings were augmented by additional meetings at the Lichtenstein Institute on Self-

[16] The Assembly of States Parties is the legislative and oversight body of the International Criminal Court. It consists of a representative from every State Party that has *signed* The Rome Statute. It holds meetings once a year in New York or The Hague; these meetings are open to nongovernmental organisations and observer states, though these parties may not speak during open debate. Amongst other things, the ASP elects judges and prosecutors and approves the budget for the Court. Its votes are by consensus – a general agreement predicated on silence as acquiescence. If consensus cannot be met, a 2/3 majority vote is required to pass a decision.

Determination at Princeton University between 2004 and 2007; the supplementary sessions became known as the 'Princeton Process' (Barriga & Kress, 2011; Barriga, 2009). The SWGCA reported annually to the ASP, meaning the international community was kept constantly informed of the group's work.

Setting the Tone and the Agenda: The 'Princeton Process'

At the time the SWGCA began its work, the negotiations in Rome were fresh in the minds of delegates and the Kampala Review Conference seemed a "thing of a rather distant future" (Wenaweser, 2009, p. ix). It was therefore seen as critically important to break some of the lingering tension in the early Princeton years - the period from 1998-2010 has been described as one of "great transformation and diplomatic dexterity."[17] The group deviated from the protocol of 'standard' legal negotiations in several key ways. Firstly, sessions became characterised by "an intensive but informal setting" (McDougall, 2013, p. 13). This had the benefit of breaking the inertia of formal international negotiation processes: "[if] you keep in a formal mode, everyone will repeat themselves without moving ever again…Princeton was designed to break that type of sterility and it did."[18] Participants were strongly discouraged from exchanging *ideological* views on the COA – they were recommended to instead concentrate on the *legal* substance of the crime ("Informal Intersessional Meeting," 8-10 June, 2009). This may have been a deliberate strategy on the part of the Chairman and his team, but it was also the approach favoured by delegates. An oral SWGCA Report to the ASP, presented by Wenaweser, noted "several delegations emphasised the need to keep at this stage of our deliberations the legal and political aspects of the issue separate, and to focus on the former with a view to making progress" (2003 SWGCA Oral Report, para 5). The nature and setting of the negotiations meant

[17] Weisbord, N. (30th January, 2017). Personal Interview.
[18] Kress, C. (3rd March 2017). Personal Interview.

that participants frequently discussed sensitive and/or potentially divisive issues in small groups, or even one-on-one with other delegates. This camaraderie and sense of collective interest has been almost universally acknowledged as an unusual and uncommonly focused approach to the negotiations.

The overarching goals of the SWGCA may be broken down into five categories: defining the *individual* conduct requirement of aggression, defining *state* conduct requirements, establishing a threshold for acts of aggression, forming jurisdictional rules for the three trigger mechanisms (*proprio motu* cases, UNSC referrals, and state referrals), and designing entry into force requirements (state consent). To generate momentum, the format of the early SWGCA meetings was driven by a focus on technical-legal issues, rather than attempting agreement on politically contentious issues (in particular, state consent and jurisdiction). The premise of the discussions was that "nothing is agreed until everything is agreed" ("Report on the First Review Conference of the Rome Statute," 2010, p. 8). The intention was to generate momentum on sufficient technical issues that possible areas of divergence at a later date, would carry a risk of wasted work and energy.[19] This had the side-effect of focusing deference onto to legal experts, regardless of their nationality or institutional backgrounds.[20] This interpersonal connection was allegedly influential even in instances where state relationships would otherwise have been strained: "the Israeli guy got along with the Iranian guy, and it was personalities more than state dynamics."[21] Whilst government mandates were undoubtedly still integral to agreement, this acceptance of individual expertise would come to be critical later on in the negotiations in Kampala, when state interests threatened to drive the sessions into stalemate.

[19] Barriga, S. (3rd April, 2017). Personal Interview.
[20] Kress, as above.
[21] Weisbord, as above.

Princeton meetings were also unique in that they were open to both states parties and non-states parties to the Rome Statute, with both groups afforded equal opportunities to speak (Barriga & Kress, 2011; Barriga, Danspeckgruber &Wenaweser, 2009). Such a measure was highly unusual, contributing to the sense of collaboration and global engagement (McDougall, 2013; Barriga & Kress, 2011). There were also opportunities for non-governmental groups to take the floor and engage during sub-meetings, which would not have been permitted at Assembly of States Party meetings (and indeed, was not permitted in Kampala).[22] Trahan described this as a particularly useful way of conveying the perspective of victim populations and those who were most likely to be affected by acts of aggression – the focus of the discussions may have been technical-legal, but the approach allowed for greater transparency and inclusiveness.[23]

U.S. Absence: 2002-2008

Despite this rare opportunity for transparency, it is of note that the United States declined to attend the early meetings of the SWGCA and as a result, was said to have missed key developments in the negotiation process.[24] There are several plausible explanations for the absence of the U.S. delegation during this period. The logistical explanation given was that under the Bush administration, a U.S. piece of domestic legislation had been enacted - the *American Service-Members Protection Act* (2002) – that directly prohibited personnel affiliated with the U.S., from engaging in any activity that would aid the ICC, including the provision of funds or personnel-based assistance.[25] This was not the first legal manoeuvre made by the U.S. to reduce its involvement with the court; the government was also, during this time, in the

[22] Trahan, as above.
[23] Trahan, as above.
[24] Kress, as above.
[25] Ferencz, D. (27th March, 2017). Personal Interview.

process of signing a series of bilateral agreements (known as Article 98 agreements, per The Rome Statute) with economic and trading partners who were also ICC member states, binding those states to never turn American personnel over to the court (even if they were the subjects of indictments) (Paust, 2013). The acrimonious relationship between the U.S. and the ICC was also reflected in the total U.S. absence from ASP meetings during the Bush years.

Defining the COA: Individual and State Components

In 2005, decisions by the Special Working Group were losing momentum, rather than gaining the traction that had been expected. The 2004 ASP session had allocated little time for the SWGCA to conduct its work – as noted in a report of an informal meeting, "the return to the core issues was curtailed due to the meagre time allocation at the 2004 Assembly session. Thus, Princeton 2005 stood for the opportunity to 'get back to business'" ("Report from the CICC Team on the Crime of Aggression," June 2005). These developments were evidently noted by the Chairman, the November 2005 meeting reflected his request for quicker and more focused debates, "we cannot afford continuing our work at the current pace. We need to approach the issue before us with longer term thinking…We should not continue working at an ad hoc basis" (per Christian Wenaweser, "International Criminal Court Fourth Session of the ASP: SWGCA Notes," 2005). The agenda thus shifted to open discussions focusing on the definition of the crime, with the issue of jurisdiction moving from the central focus (McDougall, 2013).

The goal of the initial Princeton meetings was on establishing consensus, even on the smallest of topics: "once they are agreed upon in any number – once you've agreed upon four, five, six issues, you have created a basis on which to build and to move on."[26] The group thus began with the least contentious element of the COA – the relevance of an individual component

[26] Kress, as above.

to the crime – concluding that the COA could only be committed by Heads of State and those individuals at the highest echelons of the military (Barriga & Kress, 2011). It was inconceivable that the ICC would have the power to question *only* state (as opposed to individual) behaviour; not only would this deviate from the other core crimes under the Rome Statute (1998), but the political contention around the court was such that states would likely never have agreed to be bound in such a manner. To the contrary, the precedent from the Nuremberg and Tokyo Tribunals pointed to the establishment of individual criminal responsibility, whilst still preserving a 'state act' that would serve as an element of the crime (Weisbord, 2008; Kress, 2007). These became known as the two 'conduct' components of the crime. A majority of states were in favour of the crime having an individual component: it was agreed with relative speed that the COA could only be committed by state leaders or those able to exercise effective control over the military activities of the state (McDougall, 2013; Heller, 2007).[27]

The predominant question in setting the state conduct elements of the COA, then became whether the definition of the state act should be specific or generic; in other words, should the elements of the crime contain a predetermined list of actions that would constitute aggression ("SWGCA Discussion Paper 3," 2005)? Generally speaking, the group was divided by three possibilities: some delegates preferred a definition of specific acts under General Assembly Resolution 3314[28], others wanted 'wars of aggression' to be the only criminalised activities, and a third group sought to criminalise aggression on the basis of Article 2(4) of the UN Charter (1945):

[27] Article 8*bis* (1) of The Rome Statute (1998), classifies individual responsibility as follows: "For the purpose of this Statute, 'crime of aggression' means 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."
[28] See the section entitled, "Understanding State Relations with the International Criminal Court" for a brief overview of the acts contained in Resolution 3314.

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

According to Barriga (2011), the definition of aggression under Resolution 3314 proved most appealing to hegemonic states and members of the Security Council. This was largely due to the emphasis in the Resolution on the power of the Council to make determinations as to the "existence of any threat to the peace, breach of the peace or act of aggression" (UN General Assembly Resolution 3314, Annex). Those states more focused on pinpointing legality for acts deviating from a specific list, pushed for broad terminology such as "an armed attack or a 'use of armed force'" (Barriga, 2011, p. 25). This marked the first point of real contention in the negotiations.

To break the stalemate, Greek delegate, Phani Daskalopoulou-Livida disseminated a survey to all 2005 attendees, asking participants to specify whether they preferred a generic or more detailed definition of the COA. In particular, the questionnaire asked whether the term 'act of aggression,' 'armed attack,' 'armed force,' or 'use of armed force' would be preferable in the chapeau elements of the crime (McDougall, 2013). This allowed states the clarity of distinguishing between the options, and afforded all states an equal power in determining their preferences.

By mid-2006, there was a strong sense felt by the group that to continue to dispute the definition beyond that year would create too much contention and potentially derail the ongoing Princeton meetings (Weisbord, 2014). The Chairman's 'non-paper' of January 2007 provided delegates with finalised options for the individual conduct threshold under the Rome Statute,

which broke the stalemate between the two groups.[29] The definition of the state act, preserved in Article *8bis* of the Rome Statute *to*-date, became as follows:

> "'Act of aggression' means 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. 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 (The Rome Statute, Article 8*bis* [2])

Finally, the creation of a threshold clause to limit the application of the COA definition, was also discussed during the early Princeton years. Before handing over to the SWGCA, the Chairman of the Preparatory Commission authored a paper in which he advocated that acts contained in resolution 3314 could be further limited by referring to a use of armed force "which, by its character, gravity, and scale, constitutes a flagrant violation of the Charter of the United Nations" ("Discussion Paper Proposed by the Coordinator," 2002, I.1) Barriga (2011) notes that the 2002 paper received general support during early meetings of the Working Group. The majority of delegates espoused an increased familiarity and preference for the word 'manifest' instead of 'flagrant' (Barriga, 2011). By December 2007, the agreement on the threshold clause appeared to be absolute, with even minority delegations indicating flexibility regarding its retention ("2007 SWGCA Report" [December]).

[29] In international negotiations, non-papers are briefing memos or aide memoires that are circulated informally at meetings and generally contain proposals or requests that separate the author from their state practices. They are a critical tool in that they can focus discussions without attributing authorship to a *state policy* or binding the representative (or their state) to the contents.

Jurisdiction, Consent, and the 'P4 Cha-Cha'

Discussions as to the referral process and jurisdiction over the COA more broadly, began in earnest in 2007. Though delegates raised the issue as early as 2004, SWGCA Reports seem to reflect that the Chairman and his team re-focused common attention on the definition, arguing that "no criminalization could take place in the absence of a specific provision on the definition of aggression" (2004 Princeton Report, para 2. [7]). The group's earliest discussions on jurisdiction were founded on the premise of necessary compromise, with a particular emphasis on finding a middle ground between those who preferred a wholly independent OTP and those who believed that a UN Security Council determination of aggression was necessary to allow the ICC to exercise jurisdiction (McDougall, 2013). Though initial proposals introduced an independent third party referral system (specifically, a referral from the International Court of Justice), it became clear that UNSC members were unwilling to compromise on this point (Barriga, 2011).

As previously noted, regardless of the incremental agreement secured over the years, jurisdiction over the COA remained the "one big political issue that dominated the discussions on the crime of aggression all along" (Barriga, 2011, p. 30).[30] Chairman Christian Wenaweser noted in a 2009 press conference, "I don't want to say that they [UN Security Council Members] will pose problems, but there is, at this point, a divergence of views." ("Press Conference on Special Working Group"; see also McDougall, 2013; Barriga, Danspeckgruber &Wenaweser, 2009). Ferencz recalls that four of the permanent Security Council members sent delegates to attend the Princeton meetings (Ferencz christened this group "the P4" in an acknowledgement of the U.S. absence from the negotiations), who would dine as a group the night before negotiations

[30] This was also referred to in the interview with Kress, as above.

began.[31] Once the general debates commenced, each of the P4 delegates would hold the floor and relate the same point regarding jurisdiction, namely that under Article 39 of the Charter of the United Nations (1945), only the Security Council could make a determination of the existence of a threat to the peace, breach of the peace, or an act of aggression.[32] This constant reiteration of the jurisdictional limits of the ICC, did not engender other participants in the negotiations to the P4 – in fact, the absurdity of these moments became so profound over time that these vignettes were christened by Ferencz as "the P4 'cha-cha.'"[33]

It also became apparent at this point that the Russians, unlike the U.S., were willing to accommodate other delegates, but refused to cede any of their interests– "they cooperated, in the sense that '*we control what is the* COA.'"[34] Several of the interviewees also noted that the focus of most of the participants was on the opinions proffered by the British and the French delegations, due to their joint ICC/P5 status – this was to be the case throughout the negotiations. It became apparent fairly quickly that the P5's ability to classify acts as aggressive, and the ways in which this ability would interact with the Court's role, would be one of the most difficult issues for the group to manage.

As the SWGCA progressed into 2009 and the prospect of the Review Conference drew closer, the group turned to the two most complex issues at hand: issues of state consent upon the entry into force of the amendments, and more specific options for jurisdiction under draft Article 15*bis* (Barriga, 2011). The former had been raised several years earlier, with the SWGCA Report for that year noting that if consensus were achieved relating to jurisdiction, "the answer to the question… [of entry into force] would probably become self-evident" ("June 2005 SWGCA

[31] Ferencz, as above.
[32] Ferencz, as above.
[33] Ferencz, as above.
[34] Trahan, as above, emphasis added.

Report," para 17). There had been other indicators of the build-up to these point of discussion; the Chairman and his team produced several non-papers and diagrams throughout 2007-9, to outline the options available to states in terms of jurisdiction and ratification.

According to 121(5) of the Rome Statute (1998), amendments enter into force for parties who have ratified them, one year after the point of ratification. Critically, the amendments do not apply to those states which have not ratified. The problem for the SWGCA with 121(5) was that it was seen as clashing with 121(4), which provided that an amendment could enter into force for *all* states parties if there was seven-eighths state approval from the UN General Assembly (Clark, 2010). Due to the legal ambiguity of the wording in the Rome Statute, it was not initially clear which rule would take priority. Nevertheless, the latter was (for fairly obvious reasons) not favoured by a number of states, and the Security Council members in particular.

Raising the issue as early as 2007 may have proved contentious, but it allowed the SWGCA's discussion to be focused on *specific* scenarios for referrals (i.e. Security Council referrals or *proprio motu* investigations) and addressed specific ramifications for each series of options. Crucially, there seemed to be little expectation from the Chairman and his team, that a decision would be made in Princeton. The 2009 SWGCA Report reflects:

> "The Chairman noted that a solution for the difficult issue of the conditions for the exercise of jurisdiction was not expected during this session…and he therefore encouraged delegations to limit their comments to the question whether draft article 15*bis* reflected the status of the discussion" (para 18).

This demonstrates a degree of realism about attainable goals, and echoed the (lack of) progress for negotiations in the era preceding the Rome Conference. Kress (2007) expressed similar doubts about the group's ability to create a workable and well-supported set of rules on

jurisdiction, so far ahead of the Review Conference: "It would be a little naïve to expect the emergence of consensus on this issue at any time *before the very end of the negotiations*" (p. 859, emphasis added). The major concern for a number of states was that reliance on 121(5) would mean that the amendments would only come into effect for the select few that chose to ratify, a move which would render the crime too narrow to be useful.

The late discussions on jurisdiction were said to lead to "new confusion" (McDougall, 2013, p.23). A final Chairman's non-paper, introduced in June 2009, asked states to consider the extent to which consent to be bound by the COA amendments, would influence the process of entry into force ("2009 Chairman's Non-Paper," para IV [8]). As McDougall notes, "the implicit understanding was that the introduction of consent might also assist to resolve the jurisdictional question" (p. 24). It was at this point that an opt-out clause, which would allow states to declare their intention to *not* be bound by Article 8*bis*, was first mooted (Barriga, 2011). This suggestion would come to have significant ramifications for the forthcoming negotiations in Kampala.

Meanwhile…the U.S. Returns to the Table

As the Kampala Conference drew nearer, the U.S. evidenced a politically sensitive need to join the COA negotiations. The Bush Administration had softened its stance towards the ICC over time, and by the time of the Obama Administration, U.S. government officials began to speak out in favour of the ICC. Most famously, Secretary of State Hillary Clinton expressed regret that the U.S. had not become a full member of the Rome Statute ("Clinton: 'It is a Great Regret…," 2009). The US also appeared to be indicate that the COA negotiations had gained such momentum that they could no longer be ignored.[35]

[35] Kress, as above.

Upon its return to Assembly of States Parties meetings in November 2009 (and in a later meeting in March, 2010), the U.S. delegation raised several queries over the jurisdiction of the ICC in regards to the COA, expressing apprehension that the Security Council might lose its monopoly over determinations of aggression (Kress, 2007). Other noted concerns were the use of Resolution 3314 to inform the definition of aggression, and the possible impact of the COA on domestic prosecutions. At least initially, the U.S. appeared "keen to show a broadly conciliatory spirit; to 'listen and learn.'"[36] There were, however, concerns espoused by international lawyers that the Kampala Conference had the potential to derail the budding harmony between the U.S. and the ICC. As predicted by this group, U.S. interests were to become increasingly overt and were to serve as an impediment to the pace (and, some would argue, the overall success) of the negotiations (Barriga, 2011).

By early-2010, there remained a number of issues that required further consideration: the threshold definition of aggression required final clarification (was a "manifest" violation of the UN Charter sufficient for the ICC to intervene?), all means of jurisdiction over the crime remained controversial (but in particular the Security Council determinations for aggression), as did consent to the amendments (could states opt out of the aggression provisions if they did not agree to them?). By 2010, academic scholars were in disagreement as to whether the time was right to move to an adoption of the amendments. Even Wenaweser (2009) admitted in the run-up to Kampala, "the underlying issues are both complex and polarising, and a consensual solution at the Review Conference is still a far shot." (p. 20). There were vocal arguments for caution, with some questioning whether disagreement amongst the international community could preclude a workable definition (Paulus, 2010). Others, however, strongly advocated for

[36] Kress, as above. Kress is quoting Stephen Rapp, U.S. Ambassador At-Large for War Crimes, who said, "having been absent from previous rounds of these meetings, much of what we will do here is listen and learn" (Koh & Buchwald, 2015).

the recognition of Kampala as a necessary window of opportunity and a chance to enhance the legitimacy of the international criminal justice system (Kress, 2010).

Reading the Signals: Causal Mechanisms under the SWGCA

To what extent did the actions and decisions of the SWGCA affect the final outcome in Kampala? The constructivist framework used in this piece suggests that in general, states were motivated to work towards norm-compliant solutions, as long as they were not forced to sacrifice significant political power. In this case of these negotiations, 'norm compliance' appeared to amount to securing as much consensus on the legal and technical elements of the COA as possible, and rendering the COA a core piece of contemporary ICL.[37] The presence of delegates who were also experts in the law, facilitated this ethos from the very beginning of SWGCA meetings. Although the close of the previous section has hinted that much more work was needed to secure the consensus in Kampala, it must nevertheless be emphasised that at this point the SWGCA had moved further in their deliberations than some participants thought might be possible.[38] The critical mechanisms at play in Princeton and during the period preceding Kampala are as follows: the deliberately informal atmosphere set by the Chairman and his team, the inclusion of non-state parties as observers (and, in some cases, participants) to the negotiations, ongoing signals from the Chairman as to the need for momentum, the enthusiasm and sincerity displayed by specific delegates, and domestic lobbying.

'Structured' Informality

This piece has already noted the relaxed atmosphere of the Princeton negotiations, suggesting that this had a direct impact on the ability of participants to bond on an interpersonal level, and thus to negotiate more closely when controversial issues arose. Although it would not

[37] Kress, as above.
[38] This was noted in interviews with Barriga (as above) and Kress (as above). It is also alluded to in Barriga, (2011).

have been the case that a personal friendship could shift a state mandate, this approach nevertheless contributed to the process in other key ways. Interviewees stated that the reasoning behind the informality was to diminish the perception that the decisions being made would bind the states concerned.[39] This trickled down to the most minute elements; in Princeton, for instance, delegates would not wear ties while negotiating; though this may appear a small thing, it nevertheless gave delegates the message that talks would not be immediately binding, which allowed for more flexibility and openness in discussions.[40]

The 'Princeton Spirit' (as characterised by Barriga, 2011) was not a product of happenstance, but rather a deliberate attempt to diminish the contentious atmosphere of the Rome Conference and bring about a 'group spirit' over time. Per Kress, "if you sit for four hours over a can of beer, this may also build trust before an undue amount of scepticism reigns."[41] Several attendants noted that without the creation of diplomatic and interpersonal foundations over almost a decade of negotiations in Princeton, Kampala might not have resulted in consensus.[42] Informality also served to reduce misunderstandings between participants; there was time available for precision and private discussions, which meant all parties had clarity on the proposals under discussion. Kress also emphasised, "in informality there is more time for issues, even those which are technical or not easy."[43] The building of trust on an individual level was crucial – though state mandates were still the foundation for negotiation, sincere trust-building allowed for individuals to "interact with others in their personal capacity rather than

[39] Trahan, as above; Ferencz, as above. See also Wenaweser (2009).
[40] Weisbord, as above.
[41] Kress, as above.
[42] Kress, as above. Trahan, J. (21st February, 2017). Personal Interview, Barriga, S. (3rd April, 2017). Personal Interview. See also Barriga, 2011; Kress & von Holtzendorff, 2010; Barriga & Grover, 2011; Weisbord, 2013.
[43] Kress, as above.

playing the role of diplomat" (Weisbord, 2014, p. 99). This sense of trust only increased for those participants that continued to attend Princeton meetings year-on-year.

The sense that negotiations were not binding during the Princeton Process, was also heightened by the decision to allow all Member States of the UN to attend and to hold the floor (including NGOs and other non-state actors), regardless of their status within the ICC. This was highly unusual for international negotiations, in that it allowed states who might arguably not even be affected by the ICC's jurisdiction, to express their position on the COA and, in a broader sense, on the state of ICL. By allowing non-state members to not only attend but also to debate the purposes and principles underlying the COA, the SWGCA enhanced global transparency for their mission and ethos.[44] This sentiment was echoed by Weisbord, "I think they wanted to make the statute as appealing as possible to these other states so they involved them in negotiations, in the hope that they would be comforted by the outcome and sign on."[45] This would likely also have engendered an atmosphere of trust, and arguably facilitated agreement later on in the process.

It was observed in several of the interviews that some states would send different delegates to the meetings each year, whilst others attended consistently (notably the delegations from Germany, Greece, Lichtenstein and the UK – though there were undoubtedly others, these were specifically mentioned in interviews); these were known to Kress as a "circle of key players."[46] Ferencz and Barriga both stated that the number of overall attendants increased year-on-year – but Ferencz in particular emphasised that "the term 'Working Group' only applied to a few of us."[47] Although it cannot be assumed that protracted diplomatic contact with the same

[44] Trahan, as above.
[45] Weisbord, as above.
[46] Kress, as above.
[47] Ferencz, as above; Barriga, as above.

people would directly lead to consensus, the consistency with which some delegates interacted with one another and with the Chairman's team, arguably facilitated agreement on certain issues and, at the very least, encouraged delegations to vocalise their concerns. Active participation by all parties smoothed the feedback process between the convening team and delegate teams: Barriga emphasised, "the worse thing is when people are *not* expressing views."[48] The combination of consistency in attendance and what has here been termed 'structured informality,' pushed some delegates to the forefront of the negotiations as experts and/or particularly engaging participants.

Momentum-Enhancing Tools

Wenaweser and his team (including Deputy Stefan Barriga) applied a number of tactics to maintain momentum within the SWGCA negotiations. Delegates were regularly reminded of the need to use the negotiation time wisely (as demonstrated in the aforementioned example from 2005). Non-papers written by the Chairman and distributed with tight timelines before the negotiations began, also served to force delegates into decision-making.[49] Kress (2007) cites Wenaweser's 2007 non-paper in particular as a key tool bringing awareness to states of the different trigger mechanisms under the Rome Statute (1998). Ferencz also indicated that these measures made a significant difference: "the way he [Wenaweser] herded cats…he heard everyone and then shaped discussions through a paper. That really moved things along."[50] Trahan, in turn, reflected on an illustrative chart created by Prince Zeid and Christian Wenaweser in 2008, outlining the nine separate options for jurisdiction and focusing attention specifically on

[48] Barriga, as above, emphasis added.
[49] Barriga, as above.
[50] Ferencz, as above.

instances in which the aggressor or victim state had not ratified the amendments to the Rome Statute (1998) under Article 121(5).[51]

Equally, to facilitate the technical-legal (and less political) approach to early discussions, the Chairman's team delegated authority to a series of rapporteurs to manage different sub-issues (i.e. review of the Rome Statute, complementarity, etc.). This maintained the free flow of information between groups and the Chairman's team, but also moved the locus of authority to particularly motivated individuals, who were then able to assist the negotiations by offering specific expertise.[52] Focal points are a relatively common tool for negotiations - particularly ones this complicated – but their utility in this instance was not just managing points of contention, but also ensuring that the debates had progressed enough to see a plausible consensus vote in Kampala.

The focal points also highlighted the impact of individual expertise in maintaining the pace of the negotiations: the Greek delegation is a particularly good example of this. Livida's survey, as described earlier in this section, was cited as useful in moving the decision-making process along and forcing delegates to choose between a series of concrete options. [53] As with the Chairman's non-papers, this focused the discussions away from ideology and power, and onto legal principles. Kress also gave this example during his interview, but noted that the Greek delegation was much less visible during the last 4-5 years of negotiations in Princeton, because the composition of the delegation changed – "sometimes, it is that easy."[54]

Absence as Signalling?

[51] Trahan, as above.
[52] Kress, as above.
[53] Wesibord, as above.
[54] Kress, as above.

The SWGCA years reflected the use of signalling by some parties, through their *ongoing presence* at the negotiations, but also in terms of *absence*. Literature and archival documents on this period contain relatively few references to African perspectives during early COA discussions. However, despite growing objections to the power of the ICC throughout the late-2000s, for some states absence from the COA discussions simply meant their leaders were simply not interested in the topic. Barriga, when asked why certain states (or state blocs) may not have attended the early Princeton years, contextualised presence or absence in these terms.[55] Weisbord (2014) does indicate that "an anti-imperialist tirade by the Head of an African delegation in Princeton in 2006, was met with eye rolls" (p. 102). This suggests that any acrimonious relations between the AU and the ICC were not strong enough at this point, to be a cause for concern or influence over the COA itself. For his part, Kress emphasised, "consistently, either through the AU or in whatever form, there was support for the idea [of a COA]."[56] It is also notable at this point that the Ugandan government had *volunteered* to host the conference in Kampala. President Museveni gave all indications in the run-up to the conference, of being engaged and focused on securing a positive outcome for the court, particularly in terms of jurisdiction (Schabas, 2010, "Kampala Diary 31/05/10"). Although absence in the case of AU nations might have signalled a lack of state interest, this assertion cannot be decisively proven. The far bigger problem at the time was that the U.S., absence was signalled in a way that was both deliberate and stylised.

Given the strong U.S. opposition to an independent international court in the aftermath of its creation, the state had a vested ideological interest in removing itself from any and all meetings pertaining to that body (Koh & Buchwald, 2015). However, according to interviewees,

[55] Barriga, as above.
[56] Kress, as above.

there may have also other, more individualistic reasons at stake, including the possible perception delegates that the negotiations in Princeton might not result in meaningful progress: "[they] thought they didn't have to engage in Princeton - 'this will never happen.'"[57] The impression from this behaviour is that the U.S. thought - if not that the COA would not come to fruition – that their own foreign policy solutions would be more viable. This absence was to have strong ramifications in Kampala, which will be discussed in the next section of this piece.

Domestic Lobbying

Constructivist literature emphasises the role of domestic or transnational activism in facilitating state engagement with human rights and international norms of behaviour (Risse-Kappen, Ropp & Sikkink, 2013). A mechanism that appears to have facilitated U.S. engagement with the COA discussions in particular, was the importance of lobbying at the domestic level. The U.S. legal community remained wary of missing out on opportunities to influence the definition of the COA, should that form a part of the Special Working Group's discussions.[58] Exemplifying this concern, Professor Jennifer Trahan wrote a series memos during this period, personally addressing War Crimes Ambassador Stephen Rapp and Legal Adviser to the State Department Harold Koh.[59] These memos were written on behalf of the American Bar Association's ICC Committee; they urged both men to, amongst other things, "continue to attend ICC-related meetings, as an *active*, *constructive*, and *positively engaged* participant" ("Recommendations for Future U.S. Policy Towards the ICC," 2010c, emphasis added; "Recommendations to the Administration Regarding its Approach to Aggression Negotiations," 2010b). This seems to indicate a schism in the U.S. perspective: on the one hand, their delegates would not (and could not) attend meetings of the SWGCA, but on the other hand, legal experts

[57] Kress, as above.
[58] Weisbord, as above.
[59] Trahan, as above.

and private organisations understood the risks inherent in failing to participate in defining a crime that might feasibly end up as codified law.

The Kampala Review Conference

In the months preceding the Kampala Review Conference, states began to clarify and signal their positions on the COA negotiations. The messages from those at Princeton was that the definition of the crime was now largely settled; the biggest goal emphasised by Ambassador Wenaweser (now the President of the ASP) and Prince Zeid (now the Chairman of the SWGCA) was to lead the conference to an outcome that could be characterized as "definition plus"—though it was not entirely clear what the 'plus' might include (Barriga & Grover p. 520). At this point, the U.S. was engaged in building support for its own agenda in Kampala (Barriga & Grover, 2011). The African Union (AU), in turn, was suffering from a divided set of narratives, with some (most notably South Africa, at the time) calling for withdrawals from the ICC altogether, and others responding to the huge NGO lobbying effort to throw support behind the court (Barriga, 2011).

As Kampala was intended to be an ICC Review Conference and not an entirely aggression-focused event, the first week-and-a-half of the allotted time was devoted to stocktaking exercises ("Introducing this Blog," Schabas, 2010). Nevertheless, participants were clear that bringing the COA into being was high on the week's agenda, despite the strong possibility of failure; "the hurdles on the way seemed almost insurmountable" (Blokker & Kress, 2010, p. 890). Though a number of states pledged to uphold the values enshrined in the Rome Statute, this was no guarantee of a positive outcome.

The three major requirements for success in Kampala were neatly outlined by Kress & von Holtzendorff (2010):

"…that States Parties would stand by their provisional agreement on the definition of the crime embodied in draft Article 8*bis* of the 2009 Proposals in the draft Elements, that those states would find a solution for the Court's exercise of jurisdiction over aggression…and that the overall package would not cause a major confrontation between States Parties and non-States Parties." (p. 1201)

The last of the three requirements would undoubtedly have the most dramatic consequences, were it to fail; the ASP was deeply conscious of the risks involved in alienating Russia, China, or (most importantly) the U.S, during the bid to secure the ICC's international authority. Some suggested that the stocktaking exercise was included as a 'safety blanket' should the negotiations on the COA prove unsuccessful.[60] States were already divided on the entry into force requirements, with UNSC members, Australia, Canada, New Zealand, and others pushing for a consent-based regime (i.e. both aggressor and victim states must consent to the ICC's jurisdiction by ratifying the amendments, for them to have any binding effect) and the vast remainder of the world (including, notably, the entire African bloc) arguing for the COA to be treated equally to the other core crimes in terms of jurisdiction and state consent (Barriga & Grover, 2011).

In anticipation of the work that needed to be completed, Prince Zeid prepared two papers to focus the ASP's discussions: one served as a summary of existing proposals and the other concentrated on the aforementioned issues, which were sometimes referred to as the 'three baskets' of issues, by the delegates (Schabas, "New Documents on the Crime of Aggression").[61] The papers resolved some details, introducing the possibility of a review period specifically for the aggression amendments. However, the papers failed to establish agreeable rules on UNSC

[60] Ferencz, as above.
[61] Kress, as above; Weisbord, as above.

authorisation, and there was reliance on the possibility of adding review clauses at a later date (McDougall, 2013). Nevertheless, the overwhelming sense communicated both before and since, was that the COA amendments in Kampala were a case of 'now or never' (McDougall, 2013).[62]

On the Sunday evening before talks began, Benjamin Ferencz – the last surviving Nuremberg prosecutor, was called upon to give an address to the delegates in attendance. Ferencz urged those attending to honour the history of the COA in particular, dating back to Nuremberg (Ferencz, 2017). The purpose of this keynote was said to focus delegates on the moral and legal ramifications of failed talks.[63] The Conference formally began on 31st May, though formal debates on the COA did not begin until 4th June. Unlike the Princeton Process, establishing a presence at the Review Conference was critical – every ICC member state (and several non-member states) sent a delegation to Kampala; approximately 4,600 state, nongovernmental, and intergovernmental attendants were present (Lees, 2010).

During the opening speeches in Kampala, states seemed reluctant to speak out against any element of the aggression amendments – even (or perhaps especially) those considered to be 'great power' nations. At least initially, there appeared to be a great deal of posturing, with states signalling agreement with criminalising the COA *in principle*, but not in specific legal or binding terms (Schabas, 2010, "Kampala Diary, 31/5/10"). This interplay appeared to echo many of the negotiations on ICL over the years, and particularly those in Rome. With so little time to spare, it was not long before this changed; on the second day of the general debate, the French declared their preference for the Security Council to retain primary responsibility for

[62] Kress, as above.
[63] Weisbord, as above.

aggression determinations. Prince Zeid in turn, warned delegates to "brace yourself" for intense debates and drafting (Schabas, 2010, "Kampala Diary, 1/6/10").

The African Bloc in Kampala

A theme that was alluded to in almost every interview, but has been generally under-discussed in the literature, is the impact the African bloc had in Kampala in terms of voting power. The significance of holding the Review Conference on African soil, cannot be underestimated – this was seen as "a turning point for Africa" ("Kampala Meeting to Empower ICC," May 2010). Sadat (2010) describes the decision by Uganda to host the conference as a gesture holding both symbolic and pragmatic significance; it brought non-African states onto African soil, forcing states to examine the political realities faced by states on the continent. For his part, Barriga describes the choice to hold the Review Conference in an African state as "crucial" – in that it allowed the African states to push for an outcome that they wanted.[64] This perspective was strongly supported by local media in Uganda: "while the ICC is catalysing healthy debate across the continent, it will only truly work in bringing about accountability if Africans support its work." ("International Criminal Court Belongs to Us Africans," 24 May 2010). The sense was that African states had a strong interest in supporting the crime because the vast majority had, at various points in history, been susceptible to acts of aggression in the form of colonialism.[65]

There was very little evidence in Kampala of the protests by African Heads of State against the power and jurisdiction of the ICC. However, on one point, African states as a bloc were extremely strong - they wanted no Security Council monopoly with respect to the COA – ideally, the bloc wanted no special jurisdiction over the COA to exist *at all*, but the compromise

[64] Barriga, as above.
[65] Kress, as above.

position they were willing to take was that they wanted absolutely no jurisdiction decisions to be able to be made by *just* the UNSC.[66]

The African bloc nations held several 'informals' during the talks as a whole, but especially once the talks were coming to a close. Informals occurred in the main conference room, but with no record of the discussions - for the majority of delegates, it also meant being able to talk exclusively in English, even when the interpreters signed off (Schabas, 2010, "Kampala Diary 8/6/10). Informals allowed several groups to assess one another's agenda and work together, if appropriate (Schabas, 2010, "Kampala Diary 8/6/10"). The African States Parties may have felt strongly about the monopoly being sought by the UNSC nations, but their overarching goal was to secure a workable crime; they were "willing to accept a consent-based regime for the sake of a consensual outcome."[67] This position became increasingly important as the negotiations came to a climax.

Harold "and the Boys" – the U.S. Approach in Kampala

As previously stated, at the commencement of the Kampala negotiations, there were concerns that the U.S. might not be amenable to any measures that would remove power from the Security Council. The U.S. arrived in Kampala with a 30-strong team of lawyers and government officials – more than any other state delegation - led by Ambassador-at-large for War Crimes Stephen Rapp and Department of State Legal Advisor Harold Koh. Ferencz referred to this group, tongue-in-cheek, as "Harold [Koh] and the boys."[68] The U.S. delegation was to take an incredibly active approach, despite their status as a non-State Party to the Rome

[66] Kress, as above.
[67] Kress, as above.
[68] Ferencz, as above. For more on the U.S. delegation, see (Barriga & Grover, 2011)

Statute.[69] This did not always work to their advantage – they were described by one of the interviewees in this manner: "the U.S. was very busy with itself."[70] Nevertheless, the importance of the U.S. presence and influence could not be ignored.

The first major issue that the U.S. delegation raised with the COA, was the definition of the crime as established in Princeton. The U.S. absence from Princeton was cited at this point as a "terrible decision" - it placed the U.S. outside of the sphere of influence relating to the definition of the crime, meaning that by the time the U.S. wished to engage in negotiations on this issue, other states were not receptive to their arguments.[71] To resolve this perceived problem, Koh approached the Conference with a long list of draft understandings intended to alter the substantive definition of the crime, even though political agreement on the definition had already been established by the SWGCA.[72] States recognised that the US delegation was not formally entitled to vote and therefore could not *now* try to amend the definition as such. According to Kress, the overwhelming response was "I'm sorry, but you are too late."[73] Kress also noted that some of the understandings may have been fair, but they only served to outline clarifications that had already been raised and reconciled. Recognising the possible significance of an unhappy delegation from a powerful nation, Prince Zeid and Ambassador Wenaweser appointed the German delegation –Claus Kress more specifically – to act as a focal point for bilateral consultations on the understandings (Kress & von Holtzendorff, 2010).[74] The Germans agreed to this proposal, not just out of a desire to achieve consensus, but also in the interests of "not alienating a close friend."[75]

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[69] Weisbord, as above.
[70] Anonymized by request.
[71] Trahan, as above. This will be discussed in more detail under the section 'Getting to Kampala.'
[72] Kress, as above.
[73] Kress, as above.
[74] Kress, as above.
[75] Kress, as above.

The German and U.S. delegations met and spoke extensively for a two-day period, with the assistance of the Canadian and (somewhat surprisingly) the Iranian delegations. The U.S. wanted to be able to classify specific acts and contexts as falling outside of the COA remit (including instances of forcible humanitarian intervention[76]), which Kress acknowledged would be next to impossible to achieve in the remaining time (Kress & von Holtzendorff, 2010). The U.S. originally devised 11 Understandings to clarify various aspects of the definition, which were cut down and became Understandings 4 to 7, relating to domestic jurisdiction over the COA (i.e. maintaining primacy over domestic law) and qualifying the requirement for "character, gravity, and scale," as outlined in the SWGCA definition (to ensure that all three requirements could be met before a determination of aggression could be made).

In the aftermath of the conference, Koh and Rapp both spoke extensively about the Understandings, implying that they had the same weight of law and authority as the amendments themselves.[77] The two were also quick to credit the U.S. for clarification and ensuring "that it [the COA under the Rome Statute] deters to the appropriate extent but doesn't over or under-deter" ("U.S. Engagement with the ICC…" 2010, per Koh, p. 7). Despite the positive step to ensure U.S. agreement with the COA provisions, there remained concerns that the U.S might try to throw the negotiations at the final hour, or convince another state that *was* a member of the ICC, to do so on their behalf. Nevertheless, at this point, the agreement on the understandings combined with a manoeuvre by an unlikely state coalition, changed the momentum of the conference.

[76] Trahan, as above.
[77] Ferencz, as above.

ABS & ABCS: Maintaining Momentum at all Costs

There came a point at the Review Conference when the negotiations were reaching a point of exhaustion. Two issues remained that had no consensus whatsoever: whether state consent was required for the ICC to exercise jurisdiction (i.e. did the *aggressor* state have to have ratified the amendments?) and whether a UNSC determination was the only means of opening a COA investigation (or whether the Office of the Prosecutor could act either on their own, or on the basis of a self-referral). As previously noted, it was not entirely clear what steps would be needed to move the parties beyond their relatively entrenched positions.[78] However, during the final part of the negotiations, a proposal for state consent came from a non-paper jointly authored by the Argentinian, Brazilian, and Swiss delegations. The 'ABS Proposal' as it came to be known, drew a distinction between a UNSC referral to the ICC, and the two other mechanisms by which the ICC could assume jurisdiction (state referral and *proprio motu*) ("2010 Non-Paper by Argentina, Brazil and Switzerland").

According to the ABS non-paper, Security Council referrals would be possible once a State Party had ratified and deposited the amendment, and one year had expired, per Article 121(5) of the Rome Statute. In contrast, the other two mechanisms would require a seven-eighths ratification, in order for jurisdiction to be exercised – per Article 121(4). And yet, despite its positive traits, there was a major drawback: the UN Security Council P5 favoured an understanding of jurisdiction that took a 'negative approach' to 121(5) – in other words, that assumed that any state that had *not* accepted or ratified the amendments, would not be bound, even if they committed acts of aggression in the territory of a State Party that had done so (Barriga & Grover, 2011). This would have given UNSC members an advantage over other states in three distinct ways: they would be allowed to retain the right to make aggression

[78] Barriga, as above.

determinations, would continue to have the power to delay ICC cases relating to aggression (as with the other ICC crimes), *and* (along with other states who chose to do so) would gain the power to opt-out of the aggression amendments altogether. The introduction of the separation of jurisdictional approaches allowed the Chairman to break the overall jurisdictional issue into two clean subcomponents: draft Article 15*ter* was thus designed to concentrate on Security Council referrals and Article 15*bis* focused on state referrals and *proprio motu* investigations.

The ABS option was soon to evolve into an 'ABCS' proposal, as the Canadian delegation had already proposed a similar compromise on jurisdiction and sought to explore common ground with ABS (Barriga, 2011). The main feature of the ABCS proposal was a consent-based regime for Article 15*bis* (meaning that non-States Parties would not be affected) and a "non-exclusive Security Council filter" (Barriga, 2011, p. 51). States Parties were also given the choice to opt out of the Court's jurisdiction by applying to do so before 31 December 2015 and the Court's ability to exercise jurisdiction over the COA was delayed by an additional five years. The opt-outs were especially controversial – allowing states to not only fail to ratify the amendments, but to opt out of ever being bound to them, was a compromise position that has since been strongly condemned by a number of academics (Kress & von Holtzendorff, 2010; Trahan, 2016b; Trahan, 2015; Ferencz, 2016).[79] Although the jurisdictional rules at this point "resembled Swiss cheese,"[80] the extension of the original ABS proposal demonstrated that a series of leading voices in the negotiations who had not been able to find agreement before that point, were willing to find and endorse a compromise. Even those parties that had appeared unwilling to compromise to this point, had to acknowledge that this was the best option for a positive conclusion to the talks; delegations (including the African bloc) therefore began to

[79] This was also strongly emphasised by Weisbord and Trahan in their interviews.
[80] Trahan, as above.

throw their support behind the ABCS jurisdictional rules, as the end of the Review Conference drew closer.[81]

The Final ('Heavy-Hearted') Consensus

The ABS and the subsequent ABCS proposals, gave the Chairman an opportunity to produce a series of last-minute non-papers, to clarify the issues still at stake. The first paper, cited in Barriga (2011) as the specific result of numerous bilateral and informal talks, was to remove the idea of 'positive' and 'negative' jurisdiction, and instead give states the ability to 'opt out' of Article 15*bis* by submitting a declaration to the ICC Registrar; this also reflected some of the work established in the ABCS Paper. The second non-paper added some 'breathing room' to Articles 15*bis* and 15*ter* by delaying any ICC jurisdiction over the COA by at least five years, and establishing the 30-ratifications rule. The second non-paper also provided two different options for the UNSC jurisdictional filter: the ICC must proceed with UNSC approval, but the UNSC would not be required to make a prior determination of aggression; or the full Pre-Trial Chamber of the ICC could launch an investigation in the absence of a UNSC decision (as long as it did so within six months) (Barriga, 2011). This non-paper was produced with the express intent to "capture…those ideas that I hope can help us move forward and get us close to the final stage of our deliberations" ("2010 Introductory Remarks by the President," para 2). By the last day of the conference, all delegates sensed that time was running out to come to an agreement; there was tremendous anxiety at the potential of calling for a vote that had such a strong likelihood of failure (Schabas, 2010, "Put it to a Vote!").

On the final day of the conference, several of the delegations had already left for the airport – there were concerns that there would not be sufficient states outstanding, to secure a

[81] Kress, as above.

binding consensus.[82] The remaining delegations appeared divided into two camps: on the one hand, the UNSC members were still unwilling to relinquish their monopoly, but it was increasingly apparent that the majority of delegations would not allow a consensus retaining the exclusivity of UNSC power (Kress & von Holtzendorff, 2010). The Chairman's final non-paper reiterated the two-pronged solution of 15*bis* and 15*ter*, delayed the jurisdiction of the court still further – to January 2017 – and reinforced the ratification threshold (per Article 121 of the Rome Statute). Schabas (2010) summarised the dilemma felt by delegates: "by insisting upon the consent of the 'aggressor' state…the Europeans (and Canada) have actually conceded very little. By endorsing the ABS proposal, the States of the global South have made a huge concession, in that they acknowledge the primary role of the Security Council" ("Kampala Diary 8/6/10"). There was at this point a sense of great urgency – had any states objected to the provisions under discussion, the COA would likely have been a failed attempt (Barriga & Grover, 2011).

At midnight, the clocks were stopped for final deliberations. In private consultations with Ambassador Wenaweser, the U.K. was the last delegation to confirm that it would not call for a formal vote (Barriga, 2011). The amendments were thus put to consensus, and the Japanese requested the floor. Schabas (20100 reflects on how tense the moment was, as the Japanese delegate expressed his significant concerns with the text, "It is with a heavy heart…' he began, and we all thought that we were headed for a train wreck" ("Success!!!").[83] Mercifully, the Japanese concerns did not preclude their agreement – and at 12:20am, the COA amendments were adopted by consensus.[84]

[82] Weisbord, as above.
[83] Kress and Ferencz also described this moment in-depth, during their interviews.
[84] The COA amendments may be found in full, at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf

Causal Mechanisms in Kampala

Shuttle Diplomacy, Strategic Non-Papers, and Moral Interjections

The Kampala Review Conference, much like the SWGCA meetings that preceded it, involved several critical components that arguably facilitated the establishment of the jurisdictional rules of the COA, and a successful consensus vote on all aspects of the crime. There were a number of ways in which these components may be directly attributed to the Chairman's team. Firstly, despite the daily routine of public debates, the majority of the discussion momentum continued to take place through the use of informal or one-on-one discussions between delegates. This was a tool deliberately favoured by Ambassador Wenaweser and Prince Zeid, who were said to use 'shuttle diplomacy' with individual delegates – "including the P5, the African 'Group' and others" (Barriga & Grover, 2011, p. 520). This mirrored some of the structured informality seen in Princeton. The formal ASP negotiations were so 'formulaic in their approach' that it was necessary to change the means of communication between the convening team and other participants, to better understand the diverse perspectives in the room (and not get caught up in rhetoric) and to conduct informal 'roll calls' before putting issues to a large-scale vote (or consensus).[85]

Secondly, the Chairman continued to approach the issues in divided 'baskets' – which proved to be a critical tool in securing steady agreement over time. As Kress noted, "if you start with more technical issues and agree step-by-step, then move to the bigger issues, you can get over the general feeling that 'this is too complex.'"[86] Although the Chairman was careful to retain a certain degree of realism about the likelihood of overall success, by splitting the big issue into smaller sub-issues, the group was able to *incrementally* move towards consensus. As

[85] Barriga, as above; Trahan, as above, used the term "formulaic in their approach."
[86] Kress, as above.

with the work of the SWGCA, as each agreement was made the next one carried an exponentially greater risk of collapsing the whole negotiation process, were it to fail.[87] To put this into PT terms, the Chairman's team made strategic use of states' path dependency – the desire to bring the talks to a workable conclusion and to continue to adhere to the promise begun in Rome. By encouraging incremental decision-making, the team altered the dynamics of perception, and thus the prospects for success.[88]

Finally, the convening team also made use of moral tools to remind delegates of the reason for the debates. As previously noted, whenever legal debates became too technical or opinions became entrenched, Wenaweser would call upon Benjamin Ferencz (the surviving Nuremberg Prosecutor) and ask him to speak to the issues at hand (Weisbord, 2014). Ferencz's speeches generally served to remind delegates of the principles and the morality underpinning the law – it refocused international efforts onto the need to end impunity, rather than preserve legal technicalities. The signalling from the Lichtenstein delegation throughout Kampala, consistently reminded delegates of the importance of maintaining momentum and reaching a consensus that would bear out the crime's long history.[89]

State vs. Individual Personalities

Another arguably critical factor in the COA coming into being in Kampala, was the approach taken by the various P5 members - both productive and not – and those who interacted with them. It may be assumed that if the issues had come down to questions of raw power, the P5 would never have compromised on jurisdiction at all. All interviewees cited the *individuals* involved as a key part of the negotiation process; said Trahan, "the whole success of

[87] Kress, as above.
[88] Kress, as above.
[89] Kress, as above.

the thing was the result of individual behaviour."[90] The interaction between structured informality and deeply knowledgeable and motivated individuals, meant that the Chairman could entrust certain delegates to engage on the practical level, with states who had a totally opposite ideological perspective on the COA. Weisbord (2014) contextualises this in relation to Kress and the design of the U.S. Understandings: "Through his body language, facial expressions, voice intonation, and personal and professional efforts to operationalize the crime of aggression, he deliberately communicated his single-minded commitment to achieving a successful outcome" (Weisbord, 2014, p. 109). Kress himself describes negotiations with the U.S. as necessary to secure the agreement of an undoubtedly powerful ally, not just on behalf of Germany but for all of the delegates present, "Germany's role as a focal point meant it was not *unfairly* helping the U.S., but [rather] *helping the process* through signalling the U.S. that there is room to negotiate for a fair process, even though you have come so late in the day."[91] What may also have assisted the development of the Understandings, was the personality of the U.S. delegates, "Harold and the other key US spokesman, Steve Rapp, are very effective. They are well-liked and articulate, and they speak *with greater subtlety* than the French and the Russians" (Schabas, 2010, "Kampala Diary 4/6/10, emphasis added). Personality certainly did not serve as the *only* determining factor in these circumstances, or even the *main* one – Schabas (2010) pointed to Barriga and Wenaweser as the architects of the negotiations, noting that "personalities alone do not account for the result" ("An Assessment of Kampala: The Final Blog"). Nevertheless, it is likely that individual characteristics were at least *partially* relevant to the willingness to debate already-settled points on the agenda.

[90] Trahan, as above.
[91] Kress, as above, emphasis added.

There are myriad examples in the literature and in the oral retellings of the Kampala negotiations (and the preceding period) of signalling at both the interpersonal and the structural level, of the primacy of 'great power' states' domestic laws. Examples were also given of constructive behaviour by individuals that gave momentum to the debates, *in spite of* the mandate issued by their government; Chris Whomersley of the U.K. was noted in several interviews as a particularly productive negotiator.[92] In contrast, several examples were also given in interviews (usually under the promise of anonymity) of delegates who were "epitomised by smugness," "a villain," or "naysayers."[93] In those instances, one of two things would happen: the delegate would be ignored altogether, trust in their abilities would be diminished, or their sincerity would be placed into question, even implicitly (Weisbord, 2014). Personality traits therefore proved to have both benefits and drawbacks that were independent from the state's mandate and/or place in the global power structure.

Middle Power Momentum?

Having argued in favour of individuals as catalysts to the negotiations in Kampala, there were also interesting moments during Kampala, when middle power states came together and played a key role in propelling the negotiations. The ABS and ABCS papers came at a time when negotiations were losing productivity and momentum.[94] The draft by three arguably middle power states clearly signalled that "the time had come to strike some deals" (Barriga, 2011, p. 50). Their proposals have been cited by many who were in Kampala as a key catalyst in producing the final consensus agreement (Kress & von Holtzendorff, 2010; Barriga & Grover, 2011; Wenaweser, 2011; Trahan, 2011b; Kostic, 2011).[95]

[92] Kress, as above; Barriga, as above.
[93] All anonymised by request.
[94] Weisbord, as above.
[95] This was also cited in interviews with Barriga, Kress, and Trahan.

It is difficult in this instance to separate the state mandates from the individual motivations – there are no accounts from delegates or conveners that distinguish between the two with a sufficient degree of accuracy. Nevertheless, as with the Greek example during the SWGCA negotiations, this demonstrates that there were distinct efforts by states to maintain the path to a workable crime. It is worth hypothesising that in this instance, middle power states (or perhaps the delegates from middle power states, if individual personality is considered to be the predominant influence) proved more susceptible to path dependency and norm compliance, than their UNSC counterparts.

The Role of Consensus

Finally, there is the need to devote a small note to the importance of consensus. Several interviewees mentioned that if any of the decisions on the COA had been put to a full vote, they would almost certainly have failed. The role that consensus played was therefore critical. Consensus reverses the onus of disagreement – passive abstention is not possible and any dissention requires action to implement. It also serves to "put the collective strength of the members behind the decision, offering the best possible guarantee for full implementation" (Blokker & Kress, 2010, p. 890). Thematically, silence as a tool of consensus also fits with the incremental decision-making and even (in the case of the opt-outs) with substantive issues relating to the COA. In all three instances, to dissent or to otherwise go against the purposes and principles of the law, requires *action* and risks social and political opprobrium. To acquiesce requires less effort, but also comes with fewer poltical costs. Weisbord captured this issue during interview, "it [opting-out] is a little harder to do because you need to mobilize your machinery of state and there could be an outcry – 'why are you trying to opt out of the crime of aggression?'" This may also explain why some delegations (those in the African bloc, for

instance) who had appeared totally unwilling to compromise on the issue of Security Council jurisdiction, relinquished their position at the last-minute. Silence in these instances does not imply complete satisfaction – it merely implies an absence of desire to disrupt the work that had already been done. This, too, indicates that path dependency may have been a factor for some states, particularly those who were not especially powerful players on the world stage. Even an imperfect outcome would have been preferable to a non-existent one.

5. Research Results: Looking Beyond Kampala

Guiding Questions: Some Preliminary Answers

This project used PT analysis to assess some of the causal mechanisms that allowed for the completion of a Rome Statute (1998) definition (under Article 8*bis*) and set of jurisdictional rules (Article 15*bis* for *proprio motu* and state referrals; Article 15*ter* for UNSC referrals to the ICC) for the COA. What this piece has demonstrated is that the COA has emerged as a product of ongoing compromises – to the point where the crime as it exists under the Rome Statute (1998) may have little legal use in the face of contemporary conflicts. This reflects other technical-legal research on the topic, which suggests that there are few circumstances in which a COA case could mooted by the ICC, without being vetoed or otherwise delayed by the UNSC P5 states (McDougall, 2013; De Bock, 2014; Drumbl, 2009). Interviewees admitted that the first use of the COA in the future (were it to occur), would likely be predicated upon an act of aggression by one middle-to-small power state against another, in a region where the UNSC have little interest.[96] It is almost impossible to predict what this might look like, given the diverse global interests of the P5 powers. This reality also does very little to assist the narrative that the ICC will only prosecute cases in areas where powerful states cannot challenge its work.

[96] Barriga, as above; Kress, as above.

This suggests that despite a willingness to engage with a different understanding of the COA beyond realpolitik, the fact remains that the ICC cannot divorce itself from the international political climate, and its powers of deterrence for would-be aggressors, are likely to remain limited.

Tracing the process of enacting the COA from Rome to Kampala, allowed for some preliminary answers to the guiding questions posed at the beginning of this piece.

Q1. Given that three members of the UNSC are not States Parties to the ICC, were they able to influence the construction of the COA, and what impact did this have on the additions to The Rome Statute?

The fact that three non-States Parties to the Rome Statute, also happen to be UNSC members, did not prohibit those states' ability to influence the outcome of the COA. The PT analysis demonstrated ongoing ways in which American exceptionalism in particular, proved useful for the UNSC's interests during the debates. The U.S., for various reasons, did not attend the early discussions on the definition of aggression, but was nevertheless able to influence the definition of the COA in Kampala, by adding qualifying Understandings. Its absence did not impact the substance of the definition of aggression, but its return meant that definition required qualification, time, and effort to fit the delegation's demands. Despite widespread exasperation for the U.S. desire to backtrack to a topic deemed largely settled, other delegates (and the Chairman's team) were nevertheless willing to permit the exercising of U.S. influence. As Kress noted, "we [Germany] had a vested interest in a positive outcome…the U.S. is of a singular status with regard to the COA…there was therefore the question of what to do to pacify them."[97] Shuttle diplomacy as a method of enhancing speed and momentum over the negotiations, was a helpful tactic, here. It allowed for the U.S. to remain 'busy with itself' while the other delegates

[97] Kress, as above.

continued their discussions. That said, this does not diminish the level of influence the U.S. was able to exercise over a matter that had been deemed already settled.

This piece indicates that the unwillingness displayed by UNSC members, to compromise the power of UNSC referrals and vetoes over aggression cases, meant that other delegations were forced to give ground that they were not initially willing to give. This was particularly true of the African bloc, who arrived in Kampala unwilling to compromise the ability of the ICC to make independent referrals, but by the end of the conference had been forced to reverse their position. Those at the conference appeared to recognise that the immediate damage to the COA would be greater were the negotiations to fail altogether, than to permit a system that once again afforded disproportionate power to already-powerful nations. Interestingly, though a number of interviewees described this behaviour as 'spoiler' activity, Barriga was quick to qualify this point "there were no spoilers – there were delegations with competing interests."[98] From Barriga's perspective as an organiser of the COA discussions, the fact that any UNSC powers agreed to the rules at all and complied with the consensus, was a victory in itself. Nevertheless, the impact UNSC activities in Kampala in particular, have had on the Rome Statute (1998) is stark – it means the legal barriers to accountability for powerful aggressor states are likely too high for a case to succeed. The possible future implications for the crime itself, and the ways in which this applies to UNSC Member States, particularly the U.K. and France, will be discussed in more detail, below.

Q.2. Would the COA amendments have been subject to a successful vote in Kampala, if middle power states had not engaged with (and facilitated the momentum of) the debate?

This piece has also demonstrated that throughout the negotiations, there were instances when particularly influential delegates – usually from middle power nations, used tools to

[98] Barriga, as above.

enhance the momentum of the discussions. Whether it was applying the same technique as the convening team, in using non-papers, diagrams, and other legal tools to focus the debates, or negotiating directly with UNSC Member States, middle powers played a crucial role in facilitation and mediation. Kress described this phenomenon: "middle powers had a driving role in a [more strict] stricter sense – appreciably moving the negotiations to a fruitful conclusion in Kampala."[99] In a very meaningful way, middle power states indicated not only compliance with international order and law, but also a willingness to challenge (in coalitions) the unfettered power of the UNSC nations. This signalled - as has been noted in the previous section – path dependency and a steadfast commitment to the creation of an international crime.

As a convener of the negotiations, Barriga contextualised momentum in the need for feedback – "we encouraged delegations to be active and move things forward."[100] What seems apparent from the analysis was that smaller or middle power states were willing to give extensive and ongoing feedback, rather than delaying or diluting the process with rhetoric. Whilst the P4 were willing to hold the floor repeatedly in Princeton to make the same argument, smaller and middle power states were more focused on the iterative process of feedback, surveying, and collaborating with other states. All of these were found to be relevant mechanisms to the establishment of the final set of rules on the COA, and to the consensus vote in Kampala.

Unlocking the Final Courtroom Door: A 2017 ASP Activation Vote?

As noted at the beginning of this piece, the COA is one step away from activation: a majority consensus vote is required by the ASP, to bring the COA into formal existence; Weisbord referred to these steps as the "three locks on the courtroom door."[101] The time

[99] Kress, as above.
[100] Barriga, as above.
[101] Weisbord, as above.

restriction on the COA may have elapsed, but it must be re-emphasised that does not indicate an *obligation* on the ASP to hold a vote at any specific time, and given the international political climate at the time of writing (April 2017), states may have a vested interest in continuing to wait before a vote takes place.[102]

Of the five participants included in this (preliminary) study, four espoused the strong belief that yes, a final vote by the ASP would occur at some point within the next twelve months and yes, the vote would achieve the necessary 2/3 majority of the ASP.[103] This assertion belied the fact that a number of states have had indicated significant issues with the COA amendments in the years since Kampala. Two of the interviewees tempered their stances somewhat, noting that a vote by consensus (as in Rome and at the end of Kampala) would be more likely to succeed than a formal vote. Barriga added that some states "were not too happy" and emphasised that success would depend heavily on the states involved and prominent on the world stage at the time.[104] Indeed, certain states have made allusions to the need for the crime to 'mature' or to otherwise settle to a natural compromise – the U.K. in particular has been a proponent of this view (Whomersley, 2017). Ferencz described such a view as "obstructionist" – arguing that to do so would be to go against the decades of work that has preceded the crime's final point of activation.[105]

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[102] At the time of writing, former U.K. Prime Minister Tony Blair faces the possibility of a private domestic charge of COA, as a result of the U.K.'s military engagement in Iraq in 2003. Though it is extremely unlikely that Blair would face criminal liability, there is a possibility that these events may further catalyse U.K. efforts to halt the progress of the COA ("UK Attorney General in Bid to Block Case against Tony Blair…" April 2017). In a concurrent but unrelated issue, tensions are continuing to rise on the Korean Peninsula, with North Korea and South Korea (backed by the U.S.) engaged in military posturing. The U.S. is also scaling up its military operations in Syria. Both have been subject to discussions as to whether actions could be classified as a COA ("Donald Trump's air attack on Syria may have been unlawful" April, 2017).

[103] Per Weisbord, Trahan, Kress, and Ferencz. Kress noted, "I have a sense that the vote will be this year, but no certain knowledge that it will be this year."

[104] Barriga, as above.

[105] Ferencz, as above.

Agreement in negotiations does not necessarily equate to success, though it is certainly a necessary ingredient (Zartman, 2005). Even a consensus agreement by the ASP, does not guarantee the effective use of the ICC as a mechanism for preventing and prosecuting acts of aggression. The next sections of the piece discuss the possible implications for the COA itself, as well as for the wider political and international legal system.

The Future of the COA

The possible implications arising from a fully activated COA under the Rome Statute, involve far greater ramifications than the occurrence of an ASP vote; there is a vast difference between an *existing* crime and a *workable* crime. Thus far, only Kenya has issued formal opt-out for the jurisdiction of the ICC over the COA; it remains to be seen whether the three most reticent states – France, the U.K., and Japan – will opt out, too ("Declaration of Non-Acceptance…" 2015). It was particularly interesting to note that despite evidence of weaknesses with the COA in its current form, nearly every participant interviewed espoused a strong belief in the power of the COA under international law, as well as in the authority of the ICC as an overarching tool for deterrence and enforcement. This trust has endured despite evidence that throughout the COA negotiations, the world's most powerful nations took significant steps to ensure continued impunity for their own nationals – this was even (or perhaps especially) true of those that are not ICC member states. At very few points in the negotiations, beyond remaining silent during consensus vote, did the two 'crossover' P5/ICC members (the U.K. and France) indicate an intention to comply with *internationally*-imposed provisions relating to the COA. Whilst domestic law should rightfully be afforded primacy over international provisions, and the ICC has always been intended as a tool of last resort, it is nevertheless disheartening to see

evidence of tempered compliance with international legal principles, particularly when equivalent domestic laws are weak or non-existent.

As an example, the U.K. has no codified legislation to establish the COA as a crime, nor does aggression constitute a common-law principle under English law (O'Keefe, 2017). Were an aggressor to act in its sovereign territory, the U.K. has no laws of its own to criminalise those actions. And yet, from the U.K.'s perspective, it remains the UNSC and not that ICC that has (and, some argue, has always had) the primacy to make determinations on the existence of acts, wars, or crimes of aggression. It is therefore seen as fundamental to U.K. interests that the UNSC maintain a leading role in the maintenance of international peace and security (Whomersley, 2017).

Although it is rarely mentioned explicitly in written documents, interviewees were candid that U.K. and French interests were drawn from their inability to veto an ICC investigation (as they could a UNSC determination), and their fear of being implicated for aggression as a result of their ongoing engagement in complex international conflicts.[106] Great power governments are not only the biggest historical perpetrators of acts of aggression, but even in the contemporary period, they are the most likely to engage in wars in other states - directly and indirectly, as well as unilaterally and multilaterally. Whilst international human rights norms dictate that these governments should support laws against aggression, it is difficult for them to do so without jeopardising their own impunity, or the impunity of successor governments.

From both the U.K. and French perspectives, the result from Kampala failed to provide the jurisdictional clarity that was desired, and though neither delegation actively blocked the amendments from being adopted in Kampala, this has not prevented their expressions of dissatisfaction in the post-Kampala period (Belliard, 2017). As of the time of writing, the U.K.

[106] Ferencz, as above; Trahan, as above.

and France have requested that a second 'Working Group' be created, focusing on "clarification and consensus" of the agreements made by the original SWGCA ("Baroness Anelay Speech at International Criminal Court Assembly of States Parties;" "Declaration de la France", both November 2016). This has been deemed by insiders as a further attempt to weaken the power of the law and protect themselves from liability, a move to which other states have indicated resistance.

Broader Implications: The Role of International Criminal Law

Critics of the international legal system are quick to point out that in times of 'hot' conflict, the threat of indictments by an international court – often a long physical distance from the site of the violence - may carry little weight for those directly involved in perpetrating atrocity crimes (Simmons & Danner, 2010). In some cases, the threat of international criminal accountability may cause certain states to simply not ratify any legal conventions that would bind them to the international standard (Simmons & Danner, 2010). As demonstrated throughout this piece, particularly *powerful* states may experience a degree of exceptionalism that would diminish the likelihood of any repercussions above that of light opprobrium (Chomsky, 2016). This exceptionalism is not countered by international organisations or systems; institutions may instead function as an additional mechanism through which already powerful governments gain legitimacy and control, whilst concomitantly securing their state's interests and reducing their liability under ICL (Lavers, 2013; De Bock, 2014).

This reality is no more evident than in relation to the ongoing crises in Syria and the Ukraine. In Syria, Russia, the U.S. and various international groups have engaged in different levels of direct and indirect military intervention, blockades, and bombardments. In the case of Ukraine, there have already been preliminary assessments as to whether the 2014 invasion and

annexation of Crimea amount to a crime of aggression (Kestenbaum, 2016; Green, Henderson & Ruys, 2015). Regardless of whether any of these acts meet the legal threshold for aggression, the likelihood of prosecution of *any* great power Heads of State for atrocity crimes, is extremely low. The opt-out provisions make the international double-standard all the more painful – as Heller (2010) notes, "[a]n opting-out State Party is…protected against aggression by other States Parties but is permitted to commit acts of aggression itself, even against States Parties that have not opted out" ("The Sadly Neutered Crime of Aggression"). As a non-ratifying party to the Rome Statute, military and state leaders in the U.S. and Russia will be completely exempt from prosecution for any activities carried out in foreign territory, as long as both states opt out of the laws on aggression that would otherwise bind them. It becomes very difficult to argue the force of international law, when it is remarkably easy for some of the (arguably) bigger violators of ICL to remove themselves entirely from liability (Nichols, 2015).

In many ways, the COA encapsulates a fundamental problem with ICL: enforcement mechanisms are likely to be social or political - rather than strictly legal - and it is possible for states to choose to simply *not adhere* to international rules and norms when it does not suit their interests (Brown, 2014). There is a tremendous gap between agreement in principle with legal provisions and behaviour that reflects those principles; this is known by constructivist theorists as the 'compliance gap' (Luck & Doyle, 2004; Risse-Kappen, Ropp & Sikkink, 2013). And yet, the argument in favour of the crime's existence is this: the COA as it currently exists in the Rome Statute (1998), may not have the strongest foundation for future prosecutions, but even a weak law that demonstrates multilateral agreement, is a victory for the international community. For so many nations with unique histories, power differentials, and needs, it is almost unfathomable that the diplomatic process in Kampala led to a definitive conclusion.

International Criminal Law as Codified Norms?

Although it was not explicitly stated in any of the interviews, the overwhelming impression was that the consensus on the COA amendments were a reflection of the idealism of members of the legal community, who believe that the existence of a COA under ICL is the best way of setting a global norm of behaviour. Legal scholars have argued for a significant period of time that aggression has formed a part of customary international law (CIL) and is, in fact, a *jus* cogens acts from which there could be no derogation (Sayapin, 2014; Weatherall, 2015). From a constructivist perspective, a norm of compliant, non-aggressive state behaviour that respects equal sovereignty for all nation states, has finally been codified. Despite listing the opt-out as the COA's greatest weakness, Weisbord admitted that by fighting for an opt-out and not an opt-in, the international community had heightened the opportunity costs of withdrawing from the amendments: "you [i.e. Heads of State] would need to mobilize your machinery of state and there would be an outcry."[107] This seems to suggest that at the very least, a leader who commits an act of aggression would be subject to opprobrium by the international community.

As the field of ICL has developed and as precedents have been established for the management of the other atrocity crimes under the Rome Statute, even formerly non-compliant states have appeared motivated to recognise a basic international standard of human rights protection (Hillebrecht & Straus, 2017). There is evidence to suggest that as States Parties continue to ratify the COA amendments, other states are implementing equivalent laws into their domestic systems – even those who have not ratified TRS or (in the particularly notable case of the Russian Federation) are strongly against the jurisdiction of the ICC (Reisinger-Coracini, 2017).[108] Regional bodies have also begun to discuss the establishment of a COA – this

[107] Weisbord, as above.
[108] Confirmed by Trahan, as above.

includes, most interestingly, a proposal by the African Union that the (as yet dormant) African Court of Justice and Human Rights should exercise jurisdiction over the COA (Du Plessis, 2012). As there is no requirement for even signatory states to the COA amendments to implement domestic provisions 'in mirror image,' these nations' laws have, in some instances, deviated from the definition of the crime under TRS.[109] However, in the majority of cases, domestic provisions have actually served to *widen* the COA's scope of application (Reisinger-Coracini, 2017).

All of these steps indicate that whilst the international community may have doubts about the legal utility of the COA, as a norm of behaviour and a moral standard for the international community, the amendments to the Rome Statute may well be effective. Ferencz gave the analogy of individuals under domestic law, noting that criminalising an act can render it socially amoral; in those instances, collective judgment has as much bearing on individual behaviour as the threat of criminal prosecution.[110] For several of the interviewees, this in and of itself serves as a necessary quality, regardless of logistical or pragmatic limitations. Not only does the COA provide a baseline for domestic implementation, but the achievement of historic consensus in Kampala renders states reluctant to jeopardise what has already been achieved. Kress summarised this premise perfectly, "everyone involved knows that it is this compromise or no compromises for a very long time, which means swallowing the compromise despite its imperfections."[111] Rather than the end justifying the means, for the COA, the opposite may to be true.

[109] Trahan, as above.
[110] Ferencz, as above.
[111] Kress, as above.

The 'Politics of Time'

This piece developed in order to better understand how consensus was achieved in Kampala, despite the decades of negotiations on the COA (without resolution) that preceded the Review Conference. Though time is an abstract and challenging concept to analyse, political scientists and international lawyers are coming to recognise its importance in facilitating the development of international law, global relations, and understandings of international power dynamics. Democracy, democratic processes, and even laws themselves have been termed 'myopic' in the sense that they benefit the present without being sufficiently oriented towards the future (Thompson, 2010). International lawyers must reconcile the continuous tension between adapting to ever-changing global circumstances, whilst also preserving international security for the future. Any changes to ICL must therefore be evaluated, over time, according to the circumstances in which they were developed. By its very nature, ICL requires the agreement of a majority of the international community, for a norm to become codified law – these processes require significant commitment, but they also take *time*. It is particularly notable that in both Rome and Kampala, the final consensus agreement was only secured after the 'clocks' for the negotiations had been stopped: Chairman Wenaweser and his team sent a strong signal that the time for debate was over and a decision was required.[112]

It seems intuitive that the process required to create and implement new laws, should run at the same pace as the evolution of the crimes, violence, and wars the international community seeks to prevent. However, in the years that the international community has taken to establish the COA under the Rome Statute, the modes and character of warfare have shifted significantly. Though conflicts and conflict actors are becoming increasingly complex, fluid, and unpredictable, assessments of ICL tend to be heavily theoretical and primarily oriented (despite

[112] Per Kress, as above.

provisions relating to non-state actors) towards state-centric brutality. There is an argument to be made that the agreement achieved in Kampala could not have happened at any other time.[113] There is an equally strong contention that the politics of time have slowed the progress of the COA to the point where it may not apply easily to the actors and situations befalling modern conflicts. As Ferencz (2016) notes, "setting a minimum but not maximum or firm date [for the final ASP vote] is hortatory but not mandatory" ("What Really Happened at Kampala?" para 4). The time between the Review Conference and the final ASP vote, may have a positive impact in allowing some of the controversy around the amendments, to dissipate. As the results of the analysis has shown, time was used as a strategic tool in the negotiation process, both to encourage decision-making in short periods of time, but also to allow for the ramifications of decisions to percolate in the long gap between meetings.

Implications for Negotiation 'Readiness'

Scholars have long debated the role of 'ripeness' in negotiations, primarily in the context of peace processes (Zartman, 2008; Kersten, 2016). Ripeness is said to occur at a point when parties reach a 'mutually hurting stalemate' – when all sides acknowledge their options are reduced to continuing an unwinnable war (most likely at huge costs and with little to gain) and the best alternative thus becomes negotiating a settlement (Zartman, 2008). Though it has been acknowledged that the mutually hurting stalemate dissipates outside of the conflict setting, there is nevertheless room to apply theories relating to 'ripeness' or 'readiness', beyond peace processes and within the realm of substantive discussions (Kersten, 2016). Pruitt (2005) notes that strong individual aims to secure a workable conclusion, combined with focused information-

[113] Both Kress and Barriga heavily emphasised this during interviews.

gathering about other party motivations, may inject negotiations with a fervour that can then lead to a successful conclusion.

The link between individual motivations and state-level mandates has been under-discussed in negotiation processes, but the discussions relating to the COA provide a unique opportunity to do so. The COA debates exemplified the interplay between the views of highly motivated members of the international community, and government-mandated views on the form the COA should take. It may therefore be argued that ripeness in Kampala was not only present (and necessary), but also a product of those people involved in the discussions. Had the discussions not taken place over so many meetings and such a significant swathe of time – had the focused but ultimately friendly atmosphere in Princeton not developed through the years running up to Kampala – it is plausible that the negotiations might not have been so prone to consensus. Both Kress and Barriga espoused similar statements during interviews, adding that research by the international legal community further may facilitate an open discussion on the amendments and allow complaints to be addressed in an apolitical forum, in the run-up to the final activation vote.

Limitations of Study

In a number of scholarly works, Checkel has identified the good, bad, and ugly elements of conducting PT analysis, in order to indicate how PT might best be operationalised, assessed and reviewed (Checkel & Bennett, 2013; Checkel, 2008). Some of the biggest limitations that Checkel points to are: the issues of proxies (analysis of meeting minutes instead of being present at a meeting, for instance), the time-intensive nature of the method, generalisability of results (as discussed above), the risk of missing causal complexities, and the dangers of being unable to

categorically prove how a mechanism will function in a broader context than the phenomenon under assessment (Checkel, 2008).

The most pertinent issues for the purposes of this project, were the issues of proxies and the risk of missing additional mechanisms. Because the Princeton Process was famously informal, meeting minutes did not always adequately capture the intricate nature of the negotiations, or note every decision that moved the discussions forward. Summaries and reports were written quickly as a *deliberate* tool, to give delegates little time to backtrack on previous decisions, and maintain momentum during the negotiation processes (Barriga, 2011). Although interviewees gave a broad context of some of the discussions that took place in Princeton, both the small number of interviews conducted and the time that has passed since Kampala and the Princeton years, render it difficult to capture the exact nature of the negotiations. It is thus even more difficult to determine with certainty that the causal mechanisms identified, had the impact that they did.

Two possible factors that were unquestionably influential on the questions posed in this piece, are that of global power dynamics and the means by which agreement was achieved. Unspoken discussions on world power underpinned all of the interviews conducted, particularly in relation to the discussions on the U.S. If the U.S. had declined to come to the talks, it is likely that the delegations might still have struggled to find consensus on some issues – even if a vote had taken place, the other UNSC members would most likely have voted against the amendments. The logic of appropriateness suggests that states were highly susceptible to the means by which assent was given – if a vote had taken place, the influence of middle power states and the Chairman's team, would not have been sufficient to lead to a successful conclusion. Without additional facts and deeper, more extensive interviews, it is incredibly

difficult to assess unknown outcomes with any degree of rigour. More in-depth analysis is therefore required, to assess the impacts of global power and the interplay between power and the logic of appropriateness.

6. Conclusions and Future Research

This piece used a PT analysis to illustrate several relatively unique aspects of a complex and highly contentious negotiation process, with significant ramifications for ICL and global politics. It found that individual personalities, signalling from both the Chairman's team and states themselves, lobbying from domestic actors, and consensus, were all mechanisms that facilitated the outcome of interest: the COA under the Rome Statute (1998).

The extent of the compromises secured in Kampala were such that the COA, once fully implemented, will not be subject to the absolute satisfaction of any world power; all delegations expressed some degree of reservation with the amendments.[114] That said, the debates over the COA are far from over, nor has the diplomatic process finished bringing the laws relating to aggression, into existence. Checkel & Bennett (2014) strongly advocate approaching interviews in PT by continuing to interview anyone who was 'in the room' and who remains accessible – including those taking the minutes at meetings, aides and assistants – in order to reach a point of saturation (see also Checkel, 2008). As has already been noted, both time and logistical constraints meant that the snowballing process for this project was halted after five interviews had been conducted, and this point was not reached. Towards the end of the project, the researcher was offered access to six possible participants. Additional options for pursuing other avenues and contacts that were not used in this initial phase, could be considered, were the project to be extended. The immediate priority for further research would be conducting more

[114] Barriga, as above.

interviews, engaging in follow-ups with those participants already interviewed, and observing meetings of the ASP in New York and The Hague.

A secondary but nevertheless relevant extension of this project, would be to approach communities outside of legal experts, and solicit their views on the COA amendments. To ensure that perspectives are as rich and rounded as possible, participants should include international actors (NGO representatives, for instance) based in developed, high-income countries, but should also include professionals, politicians, and lawyers who are nationals of countries currently under investigation by the ICC, and which have experienced aggression in some form, even under the form of pre-ICC colonialism. One of the more interesting elements of this project was the relative lack of information solicited (or available) in relation to the African bloc perspective, even when evidence suggested there should have been evident tension between the narrative of the ICC as an inherently biased court, and the strong desire of African nations to counteract neo-colonial acts of aggression. This perspective is underemphasised in COA analyses, and therefore merits further attention.

In a broader sense, this project has illustrated a particularly interesting facet of ICL that requires further attention. Even as the news is saturated with images of large-scale human rights violations happening across the world, proponents and challengers of ICL are entrenched in the same arguments that have been made for years – even decades. These include questions of peace vs. justice, the issue of bias towards (or against) certain states or regional groupings under international law, the ICC's prosecutorial strategies, and broader issues of efficiency in the international justice system. Although this piece has also chosen to focus on some of these questions – it must nevertheless be acknowledged that the interchange between proponents of the ICC and those opposed to it, is mired in a stalemate. More analysis is therefore required to

understand the dialogic back-and-forth between those arguing that the ICC is not doing its job effectively, and those who remain idealistic about the court's utility and future. Why is it that supporters of the ICC are unable to reconcile the arguments of detractors who argue that the court lacks effective modes of deterrence? What will it take in the long-term, to secure more global buy-in for the court? Without addressing these questions, there is a risk that ICL may never adapt sufficiently to the needs of the international community, nor will it effectively answer legitimate concerns about its efficacy. Even as the international legal community celebrates the hard-won victories in Princeton and Kampala, those same actors must also remain oriented to the broader goals of the future.

7. References

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Appendix A: Oral Consent Agreement for Interviewees

Good morning/afternoon – as you know, I'm Melissa and I'm conducting interviews about the crime of aggression as part of my PhD research at Simon Fraser University's School of Criminology in Burnaby, BC. I'm working under the direction of Dr. Martin Andresen, also of SFU's School of Criminology.

The information form, which I have already sent you via email, should have made clear the purpose of the study, benefits and drawbacks to participating, and the procedure we will follow during our interview. If you have any questions or concerns about your rights as a participant, please feel free to contact either myself at mgregg@sfu.ca (tel: 778-782-3213) or my PhD Supervisor, Dr. Martin Andresen, at andresen@sfu.ca (tel: 778-782-7628). Concerns and complaints should be addressed to Dr. Jeff Toward, Director, Office of Research Ethics, jtoward@sfu.ca, 778-782-6593.

Do you have any questions or would you like any additional details about the study?

Do you wish to use your name and title for the purposes of this study, or would you prefer to remain anonymous? If you would prefer to be anonymous, do you have a preferred pseudonym that you would like me to use in this study? If you choose to retain anonymity, your name, place of employment, and all personal identifiers will be removed from transcripts and all study documentation.

Do you agree to participate in this study, knowing that you can withdraw at any point with no consequences to you? Your participation in this study is voluntary, and as such you have the right to withdraw from this study at any time. Refusal to participate or withdrawal/dropout after agreeing to participate will not have an adverse effect or consequences on the participants.

Do you consent for this interview to be recorded on a digital recorder? Once this interview has concluded, transcripts will be completed as soon as possible and original recordings will be destroyed as soon as transcripts have been completed. Only I will have access to audio recordings until their destruction. My Senior Supervisor will have access to transcription documents only once they have been anonymised.

[*If yes, interview will begin. Switch on the recorder and ask the participant to say:* "I have been informed as to the oral consent agreement and I agree to participate in this study."*]*
[If no, the participant will be thanked for his/her time and the interview will end.]