Kampala and the Crime of Aggression: Will the Selling of Heavy Artillery by one State to Illegal Armed Groups in another State Constitute a Prosecutable Crime of Aggression?

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Crime of Aggression and the Kampala Review Conference on the Rome Statute:
How Effective will this Amendment be for the ICC Prosecutor?

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**A BRIEF INTRODUCTION**

During his opening statement at the International Military Tribunal in 1945, Supreme Court Justice Robert H. Jackson, on leave to be the Chief U.S. Prosecutor in the Nuremberg Trials, urged that “It is high time we act on the juridical principle that aggressive war-making is illegal and criminal. . . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”

It might have been such mentality, longing for an end to aggressive acts yet hesitant lest the definition one day be used against themselves, that kept the leaders of the great powers in the international arena from being able to agree on a definition of aggression and take the leap of faith into a world where it is a truly prosecutable crime. For the next 65 years, the international community would debate over the crime of aggression, surging back and forth like the waves in the ocean over whether to allow the crime to take center stage and again be used to hold individuals responsible for the most devastating decisions and acts.

Finally in June of 2010, after many years of debate, at the Review Conference of the Rome Statute in Uganda, a country raging with civil war and seething with violence and some of the worst atrocities on the planet, the international community sat among the States Parties of the Rome Statute as they breathed new life into the legacy of Nuremberg. It was at that moment that United Nations Secretary-General Ban Ki-moon declared, “[l]et us now write Kampala in that illustrious history, as well. Let it be known as the place where the international community . . . coming together in concert . . . closed the door on the era of impunity and . . . acting in concert . . .

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. ushered in the new Age of Accountability." And so it was under the guidance of years of work, debate, compromise and strong coffee, that a definition for the Prosecutor at the International Criminal Court to use to prosecute individuals for the crime of aggression arose. Yet, it seems this crime is still far from truly coming to life in the ICC.

On the other side of the world, in a land equally plagued with hostility, brutality and bloodshed, the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia or FARC) has been raging across Colombia for almost half a century creating violence and mass atrocities through terrorist acts and military attacks. Meanwhile, heavy military weapons allegedly belonging to the neighboring, and hostile, Venezuela, have been making their way into the hands of the FARC over the past few years, making the Colombian government’s job of protecting its civilians and fighting the armed rebel group increasingly difficult. Through this scenario, the stage is set for an analysis of a future application of the new definition of the crime of aggression. Through a hypothetical based on such action occurring after the definition comes into force, an analysis of Kampala’s crime of aggression will be put forth.

This paper will narrowly focus on situations not where a State directly sent its own forces into another State, but rather where one State aided, or was substantially involved in assisting, an armed group in internal conflict with another State. However, before being able to fully understand what happened in Kampala, it is first important to have the history of aggression. This allows an analysis of what actions, attributable to a State by an individual through the Doctrine of State Responsibility, will trigger the ICC’s jurisdiction. As such, Part I will focus on the history of aggression. Part II will analyze what actually happened at Kampala, why it did,
and some of the potential complications which will surround the definition that was set forth. Part III will look at possible future prosecutions by the International Criminal Court using the new definition of the crime of aggression. In particular, a very realist hypothetical will be posited based on Venezuela giving heavy artillery to the FARC in Colombia and whether the ICC Prosecutor could prosecute responsible Venezuelan military officials for the crime of aggression.

I. HISTORY OF THE CRIME OF AGGRESSION

The crime of aggression, also known as the crime against peace, has been considered one of the worst international crimes for many decades. Yet despite its significance, a lack of consensus on what really makes up this crime was the primary reason that the possibility of a permanent international criminal court stalled out for over half a century. After World War II, the United Nations General Assembly, under the guidance of the International Law Commission, took on the task of drafting legislation to establish such a court. However, in 1953, the Draft Statute was “permanently shelved due to the absence of an internationally accepted definition of the crime of ‘aggression.’” When the International Criminal Court was finally established in 1998, the international community resolved to include the crime of aggression in the Court’s jurisdiction, but leave it undefined, thereby keeping it dormant and unusable until the States Parties could agree upon a formal definition. What happened in the interim between World War II and the adoption of the Rome Statute in 1998 will be the subject of this section.

5 Fact Sheet on the Review Conference of the Rome Statute, Article 2-2: Definition of the crime of aggression, elements, conditions of the exercise of the jurisdiction of the Court, ICC-PIDS-FS-11-001/10_Eng, available at
An analysis will follow explaining the relevant treaties, resolutions, and case law surrounding aggression in the past century, as well as a discussion of the status of aggression as customary international law. Understanding the relevant law surrounding any crime over which the ICC has jurisdiction is critical because Article 21 of the Rome Statute refers explicitly to the applicable law the Court may consider. Following the provisions provided by the Statute, the Court is next directed to apply “applicable treaties and the principles and rules of international law” and then “general principles of law derived by the Court from nationals laws and legal systems of the world.”

First of all, it should be noted that the crime of aggression may be found in the “customs and practice of states . . . and from the general principles of justices applied by the jurists and practiced by military courts.” This is not to say this statement means that the crime of aggression is unquestionably reflected in customary international law. Whether a crime is considered customary international law is often debatable and depends on two factors: actions of States and opinio juris. Although many states do not regularly engage in acts of aggression, there are certainly very significant exceptions. Therefore, State practice against committing aggressive acts is not conclusive. Until this point, it can be argued that there has not been an internationally agreed upon definition for the crime of aggression. Therefore there has been no opinio juris on what actually constitutes prohibited acts of aggression. Even the alleged ‘consensus definition’


6 Rome Statute, supra note 4, art. 21.
7 PAUST, supra note 3.
of the 1974 General Assembly Resolution 3314 (which will be explained infra), was “laced with ambiguous clauses to enable parties to interpret it to suit their own political advantage.”

On the other hand, however, there are well-respected scholars, such as Cherif Bassiouni, who maintain that “aggression is a customary international crime that requires no further definition or is subject to universal jurisdiction as a peremptory norm from which there can be no derogation.” Furthermore, in the United Kingdom, British Law Lord Bingham of Cornhill stated in a 2006 case, “the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime. It is unhistorical to suppose that the elements of the crime were clear in 1945 but have since become in any way obscure.” Considering this significant controversy over an agreed-upon definition of aggression, the following section will explore the legal development aggression has taken over the past century.

A. Origins of the Crime

After seeing the devastation that aggressive war can inflict on individuals, communities, and nations as a whole, the International Military Tribunal at Nuremberg established after World War II averred that to initiate an aggressive war “is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” As such, the Nuremberg and Tokyo Tribunals held that

9 Id.
10 Id.
individuals could be tried for the crime of aggression. Though debated and discussed, this would not become particularly important for over fifty years. Yet, when the International Criminal Court was established to bring individuals to justice, out of its four crimes the crime of aggression is considered to be the supreme crime.

The Nuremberg Tribunal was not working entirely *ad hoc*, but rather against the backdrop of the 1907 Hague Convention Relative to Opening of Hostilities. In that Convention, the Contracting powers made it clear that “hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war.” This basically laid a foundation in the negative for the future debate and eventual consensus on what constitutes the crime of aggression: it is not a war that is waged after adequate warning and for good reason.

In line with Nuremberg, the 1945 United Nations Charter contains a provision explicitly prohibiting Member States from engaging in acts of aggression. According to Article 2(4), all Member States “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.” For the next twenty-nine years, the members of the international community, under the guide of the International Law Commission, four special working groups and Special Rapporteurs, struggled over a definition for the crime. One Special Working Group

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13 *Id.*
14 PAUST, *supra* note 3.
15 U.N. Charter art. 2(4).

The General Assembly looked at the question again in 1952 and set up a special committee to draft “definitions of aggression or draft statements of the notion of aggression” (resolution 688
Rapporteur even declared that the crime of aggression, “by its very essence, is not susceptible of definition.”\(^{17}\) This long period of debate and extensive negotiations was due in large part to Cold War tensions, but also in part to the “proliferation of threats and conflicts such as the Suez crisis, the Cuban missile crisis, the conflict in the Congo, the Vietnam war and the occupations of Hungary and Czechoslovakia.”\(^{18}\) This backdrop created a cry for a definition but also heightened fears and concerns that any definition would end up being incomplete and misleading.\(^{19}\)

**B. General Assembly Resolution 3314**

However, on December 14, 1974, the General Assembly adopted Resolution 3314 on the Definition of Aggression.\(^{20}\) This Resolution is particularly important to the 2010 Kampala definition because it is expressly referenced therein. In large part, this consensus definition did little more than to preserve the status quo. Yet, as international law expert Benjamin Ferencz recalled, it also “reflected the undying determination and hope of many nations that illegal warfare could – at least to some extent – be curbed by law. It was a first baby step forward.”\(^{21}\) Article 3 of the Resolution established several acts that, “regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression.”\(^{22}\)

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\(^{17}\) A/CN.4/44, p. 69.

\(^{18}\) Wilmhurst, *supra* note 16.

\(^{19}\) *Id.*


\(^{22}\) Resolution 3314, *supra* note 20, art. 3; PAUST, *supra* note 3.
Article 2 spoke directly to the role of the United Nations Security Council. It envisaged in certain situations, “the Security Council may decide not to make a determination of aggression in the light of the circumstances, including the fact that the acts are not of sufficient gravity.” Article 4 clarifies that the Article 3 list, section (g) of which will be explored in detail, “is not exhaustive and that the Security Council may determine that other acts constitute aggression.”

Article 3(g) is found identically in Article 2 (2) (g) of the 2010 Kampala definition, and thus a bit of analysis on that provision is important. Article 3(g) involves “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.” The ‘acts listed above’ are relatively straightforward, basically involving the sending of troops or other forces into another state or misusing power for purposes of aggressive war or acts. Furthermore, Article 5(1) makes it clear that the motive is irrelevant: “No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”

Although Resolution 3314 was very important in light of defining the crime of aggression for the International Criminal Court, there has been some difficulty in using it because, as the International Law Commission explained, it “deals with aggression by States, not with the crimes of individuals, and is designed as a guide for the Security Council, not as a definition for

23 Wilmshurst, supra note 16.
24 Id.
25 Resolution 3314, supra note 20, art. 3; PAUST, supra note 3 (emphasis added).
26 Id. at art. 5(1); PAUST, supra note 3.
judicial use. But, given the provisions of Article 2, paragraph 4, of the Charter of the United Nations, that resolution offers some guidance.”

Interestingly, the International Court of Justice has found that Article 3 (g) reflects customary international law through various decisions, which will be explained subsequently, including *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 3; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 146). It is important to keep in mind that these decisions only involved acts of aggression by States, not by individuals. Individual prosecution, not State responsibility, for the crime of aggression is the object of the Kampala definition and for the ICC. Therefore, only certain aspects from the following cases are applicable.

**C. Nicaragua v. United States of America**

In arguably the most pertinent, and often very confusing and controverted, case on point, *Nicaragua v. United States of America*, the International Court of Justice (ICJ) provided a detailed analysis of the law building up to the crime of aggression by States. This case dealt with the situation where the United States allegedly funded, trained, and supported the Contras in Nicaragua with an aim at attacking the current Nicaraguan government – a state of affairs not dramatically different from this paper’s hypothetical proposed between Venezuela, the FARC and Colombia. According to the Court, the restriction on acts of aggression, found in the United Nations Charter’s prohibition on the use of force by States in Article 2(4), “constitutes a

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27 Wilmshurst, *supra* note 16.

28 *Id.*


30 U.N. Charter, art. 2(4).
conspicuous example of a rule in international law having the character of *jus cogens*." In other words, the illegal use of force itself is a *jus cogens* crime, meaning that there is no justification for committing the crime and no State may derogate from the rule.\(^{32}\)

The ICJ also cites several resolutions by the General Assemblies of the United Nations and the Organization of American States, both of which would be applicable to a potential conflict between Venezuela and Colombia. With particular relevance to my proposed hypothetical, United Nations General Assembly Resolution 2625, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations\(^{33}\) elaborates on obligations regarding the crime of aggression. It asserts that

> Every State has the duty to refrain from organizing, instigating, *assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts*, when the acts referred to in the present paragraph involve a threat or use of force.
> Also, no State shall organize, *assist*, foment, finance, incite or tolerate *subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State*, or *interfere in civil strife in another State*.\(^{34}\)

In line with this mandate, the Organization of American States (OAS), of which Colombia and Venezuela are parties\(^{35}\), also adopted a resolution aimed at reaffirming the “obligation of states from organizing, *supporting*, promoting, *financing*, instigating, or tolerating subversive, terrorist, or armed activities against another state and from *intervening* in a civil war

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\(^{34}\) *Id.* (emphasis added).

in another state or *in its internal struggles*.”

The Charter of the OAS, in Article 21, also touches directly on the crime of aggression and, in line with the United Nations Charter, declares that “American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.”

Despite some arguments that Venezuela may have made regarding a potential need for self-defense (which in and of itself is controversial), providing military weapons to an armed rebel group would not be proportional or even logically related to self-defense against the actions of the Colombian government. This will be explained in detail in Part III.

With this background as a roadmap, the ICJ denied that an “armed attack” should not include “assistance to rebels in the form of the provision of weapons or logistical or other support;” but found that “such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.” Ultimately, the Court held that “by training, arming, equipping, financing and supplying the Contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua,” the United States “acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another state.”

Furthermore, the Court clarified that the principle of non-intervention prohibits a State from intervening, “directly or indirectly, with or without armed force, in support of an internal opposition in another State.” Yet, the United States was not responsible under the theory of

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36 Organization of American States General Assembly Resolution 78 (April 21, 197) (emphasis added).
37 Organization of American States Charter, art. 21.
39 *Id.*
40 *Id.* at para. 292.
41 *Id.* at para. 206.
State Responsibility for the human rights abuses committed by the Contras because it did not exercise effective direction or control over the Contras.\footnote{Id. at para. 292.} This decision provides a helpful roadmap for what might be considered when determining future acts of aggression. Certainly, the ICC Prosecutor might use this analysis to find our hypothetical Venezuelan military official chargeable with the crime of aggression, which will be expounded upon momentarily.

**D. Armed Activities on the Territory of the Congo**

Similar to the *Nicaragua* case, *Armed Activities on the Territory of the Congo*\footnote{International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports* 2005, p. 168.} is a more recent example of the International Court of Justice holding that financing, training and supporting an opposition group in one country violates the prohibition against the use of force. The Court explained that “Uganda has acknowledged giving training and military support and there is evidence to that effect,” and although there was no evidence that Uganda controlled, or could control, the manner in which” Jeane-Pierre Bemba, the President and Commander-in-chief of the rebel group and political party, Mouvement de libération du Congo (Movement for the Liberation of Congo or MLC), “put such assistance to use” in the DRC, “the training and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law.”\footnote{Id. at para. 160-161.}

Consequently, the Court further explained that its reasoning was in line with the *Nicaragua* case because Uganda’s assistance to the MLC, which was directly or indirectly supporting “an internal armed opposition in another state,” constituted “a breach of the principle

\footnote{Id. at para. 292.}


\footnote{Id. at para. 160-161.}
of non-use of force in international relations”\textsuperscript{45} and equally an “interference in the internal affairs of the DRC and in the civil war there raging.”\textsuperscript{46} In arguably the most important provision for purposes of this paper and understanding the requirements of the new definition of the crime of aggression, the Court then found that “the unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.”\textsuperscript{47}

The importance of understanding this case in relation to the ICC’s definition of the crime of aggression, despite the fact that this case and the Nicaragua case were focused on State aggression and the ICC will be in charge of individual criminal responsibility, is great because it gives a baseline for determining what a grave or manifest violation of the United Nations Charter might be. It can be deduced that, at the very least, an individual with the same governmental control or influence, which would allow his actions to be imputed to the State, may be criminally liable for the crime of aggression in a situation where he provides military support for an armed group engaged in conflict of at least the nature of the one carried out in the DRC.

It is also interesting to note that Mr. Bemba is currently being prosecuted in the ICC for three counts of war crimes and two counts of crimes against humanity stemming from the situation in the Central African Republic.\textsuperscript{48} Assuming that he engaged in similar conduct in the DRC during the campaign he and the MLC executed through the support of Uganda, it could be inferred that such acts would constitute the level of use of force required to be considered a

\textsuperscript{45} Id. at para. 164 (see Nicaragua, I.C.J. Reports 1986, at paras. 206 and 209).
\textsuperscript{46} Id. at para. 160-161.
\textsuperscript{47} Id. at para. 160-161
‘manifest violation of the United Nations’ required in the Kampala Resolution (which will be explained below). Therefore, although the temporal jurisdiction of the ICC with regard to the crime of aggression could not reach the Ugandan military or governmental officials who assented to or actually assisted Mr. Bemba and the MLC in that conflict (as will also be explained infra), one could use that situation as a measuring stick for what would be needed for the ICC to have jurisdiction regarding the crime of aggression. Thus the Armed Activities case may become very important for understanding who the ICC Prosecutor can charge for the crime of aggression and in what situation and for what acts. Furthermore, both the Armed Activities and Nicaragua cases will likely be used by the Prosecutor to evaluate whether to bring a case for the crime of aggression since they are some of the most important cases in this field.

E. Eve of the a New Era

So it is in this milieu of history, law and debate, that civil societies, the international community and the Assembly of States Parties came together to amend the Rome Statute so to finally breathe life into the crime of aggression. On the eve of the Conference, the President of the Assembly, Ambassador Christian Wenaweser, reminded and encouraged all present that “the legal groundwork is in place” and that they had “prepared as diligently” as anyone could to find a solution, with “the largest possible political support,” to define the crime of aggression so to “allow the Court to exercise its jurisdiction over this crime.”49 His final remarks were an appeal to all “to approach these discussions with an open mind and with awareness of the historical task before you.”

II. KAMPALA REVIEW CONFERENCE OF THE ROME STATUTE

“The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new Age of Accountability. . . . Those who commit the worst of human crimes will be held responsible. Whether they are rank-and-file foot soldiers or military commanders, whether they are lowly civil servants following orders, or top political leaders, they will be held to account.”

– U.N. Secretary-General, Ban Ki-moon, May 31, 2010

A. Background

For decades the international community had been unable to come to a consensus on a definition for the individual criminal liability for aggression. However, the stalemate came to an end at the June 2010 Review Conference of the International Criminal Court in Kampala, Uganda, where a definition was officially agreed upon by the Assembly of States Parties to the International Criminal Court. At the start of the Conference, which was attended by 4600 representatives from States parties and interested intergovernmental and nongovernmental organizations, Chief Prosecutor of the ICC, Luis Moreno-Ocampo, emphasized that it is so important for the ICC to have jurisdiction over the crime of aggression because “[m]assive crimes require a careful plan. Certainty that these crimes will be investigated and prosecuted will modify the calculus of the criminals, will deter the crimes, will protect the victims.”

B. 2010 Amendment to the Rome Statute

At the start of the Conference, the crime of aggression was generally “considered to be the use of armed force by a State against another, without previous authorization of the United Nations Security Council and without self-defense justification.” In much more specific terms,

50 “An Age of Accountability,” supra note 2.


52 Id.


54 Review Conference Fact Sheet, supra note 4.
the Kampala Resolution officially defines the crime of aggression in Article 2(1), as the “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”\textsuperscript{55}

In Article 2(2), the amendment establishes that an ‘act of aggression’ is to mean “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.”\textsuperscript{56} Then Article 2(2) lists a series of acts that qualify as aggression. As explained above, for purposes of this paper only the act set out in paragraph 2 (g) will be explored, which “regardless of a declaration of war” and “in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974” is “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or \textit{its substantial involvement therein}.”\textsuperscript{57}

Furthermore, the proposed amendment establishes that “an individual in a leadership position is criminally responsible for the crime of aggression when planning, preparing, initiating or executing” an act that amounts to the substantial involvement with armed groups carrying out acts of armed force against another State.\textsuperscript{58} It is further clarified that such a person “must be in a position effectively to exercise control over or to direct the political or military action of a State.”\textsuperscript{59} This provision is to be added to the end of Article 25, paragraph 3, which includes in individual criminal

\textsuperscript{55} Amendments to Article 8 of the Rome Statute, Resolution RC/Res.6, The Crime of Aggression, 11 June 2010 [hereinafter Kampala Resolution], Annex I, art. 2(1).

\textsuperscript{56} \textit{Id.} at art. 2(2).

\textsuperscript{57} \textit{Id.} at art. 2(2), para. (g).

\textsuperscript{58} Review Conference Fact Sheet, \textit{supra} note 5.

\textsuperscript{59} Kampala Resolution, \textit{supra} note 55, art. 5.
responsibility not only the actual committing of the crime, but also acts that would fall under theories of aiding and abetting, joint criminal enterprise or command responsibility.\(^6^0\)

These provisions are important because they arguably generate the most controversy, as will be explained in the following section. More specifically, they are important for purposes of exploring whether the arming of illegal armed groups of one State by an individual in another State can qualify as a crime of aggression. First, however, it is useful to first understand the general controversial points that lie in the details of the Amendment.\(^6^1\)

**C. Controversy**

1. **MANIFEST VIOLATION**

Despite the preparation leading into to the Conference, several provisions contain great ambiguity that will likely take years of litigation and the evolution of State practice to resolve. First of all, Article 2(1) requires that an act must be a “manifest violation of the Charter of the United Nations.” There is uncertainty as to what actually constitutes a “manifest violation.” It has been proffered that this could mean one of three things: (1) “an obviously illegal violation, (2) a violation with serious consequences or (3) a violation which is both obviously illegal and serious.”\(^6^2\)

There are two understandings in the amendment that are meant to provide some clarity, but yet are still rife with ambiguity. Understanding 6 states that a “determination whether an act of aggression has been committed requires consideration of all the circumstances of each

\(^{6^0}\) Rome Statute, *supra* note 4, art. 25, para. 3.

\(^{6^1}\) Note that here are many controversies in the details and fine print of the Kampala Amendment. But that is not the purpose of this paper; rather this paper mainly seeks to analyze one provision and its future applicability.

particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.”\textsuperscript{63} This Understanding also reiterates that “aggression is the most serious and dangerous form of the illegal use of force.”\textsuperscript{64} In other words, to qualify as aggression, it seems that an act must be more than the illegal use of force alone. It must also be of very severe significance on the ground. Yet how much devastation and agony people must endure for an act to qualify as a crime of aggression is still uncertain. As mentioned above, one might find guidance by looking to the conflict in the facts underlying the ICJ’s \textit{Armed Activities on the Territory of the Congo} case.

Even more on point, Understanding 7 holds that “in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.”\textsuperscript{65} So the question should be raised of whether a “grave violation with serious consequence” will be enough to trigger the ICC’s jurisdiction over an act.\textsuperscript{66} Furthermore, in light of Understanding 7, one is still left uncertain as to whether character, gravity and scale must all be considered together, or whether two of the elements will suffice.\textsuperscript{67} The seemingly conflicting interpretations allowed by the first and second sentences of the Understanding can lead one to take it as meaning that “the seriousness of the consequences of the use of force must be considered” and therefore only “a breach of the prohibition of the use of force will only amount

\begin{itemize}
\item \textsuperscript{63} Kampala Resolution, \textit{supra} note 55, Annex III, para. 6.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id. at para. 7.
\item \textsuperscript{66} Akande, \textit{supra} note 62.
\item \textsuperscript{67} Id.
\end{itemize}
to aggression where it is a grave violation with serious consequences,” leaving little solid legal guidance and much room for interpretation.

Yet neither of these Understandings provides legal answers to what the necessary character, gravity or scale will be. Does the character have to involve loss of civilian lives or only the lives of combatants? Must there be destruction of property and, if so, whose: civilian property or government property? With regard to gravity, will ten lives lost suffice or must there be one hundred or five hundred lives taken? Must the infrastructure of the area affected be interrupted or destroyed? Does scale require a large area of land affected or will a few acres suffice? Must it last over a lengthy time period or will twenty-four hours be long enough? Finally, must the consequences be of all of these elements combined or will thousands of civilian lives lost in an hour’s worth of bombardments be enough? If a general of the armed forces of one State gives a small amount of military assistance to an armed group but that group is able to cause great destruction and extensively disrupt the infrastructure of another State without causing the loss of any life, will that qualify as a crime of aggression? These are all questions that still linger around the Kampala definition like a heavy fog. Again, looking to the Nicaragua and Armed Activities cases may provide some guidance as to what will satisfy these elements.

2. TIME FRAME FOR COMING INTO FORCE

There is also the question of when the new definition will come into effect and actually be an arrow in the Prosecutor’s sheath. This question is very important because Article 22 of the Rome Statute, asserts the principle of *nullum crimen sine lege*, which demands that a “person shall not be criminally responsible under this Statute unless the conduct in question constitutes,

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68 *Id.*
at the time it takes place, a crime within the jurisdiction of the Court.”

Yet with regard to the point when the crime of aggression will fall under the Court’s jurisdiction, the jury still seems to be out. Will it only be effective after January 1, 2017 if the requisite two-thirds of the States Parties have agreed to activate its jurisdiction? Or will it be applicable to crimes committed one year after 30 States Parties have ratified or accepted the Amendments? This vagueness stems from a debate at Kampala regarding whether the Amendment will be governed by Article 121(4) or Article 121(5) of the Rome Statute. Article 121(4) requires that 7/8th of the States Parties must ratify or accept the Amendment and then it will be binding on all States Parties. Article 121(5) on the other hand, holds that

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.

Ultimately, the States Parties at Kampala decided that it should come into effect in accordance with Article 121(5). However, “it is not clear that the ‘decision’ taken in Kampala that the amendments shall come into force in accordance with Article 121(5) is in any way binding.” Therefore, an unsatisfied State Party or a future person being prosecuted may be able to argue that the Amendment should come into force under 121(4) instead. In other words, “[a]rguably all that was done in Kampala was to adopt a text (to use the language of Art. 9 of the

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69 Rome Statute, supra note 4, art. 22.
70 Akande, supra note 62.
71 Id.
72 Id.
73 Rome Statute, supra note 4, art. 121(4); Akande, supra note 62.
74 Id. at art. 121(5); Akande, supra note 62.
75 Akande, supra note 62.
Vienna Convention on the Law of Treaties) and the adoption of a text does not usually create legal obligations on States or indeed on the Court that allows bypassing of the binding text of Art. 121 as it exists.” Ultimately, the situation as it stands today can be understood as follows:

Having decided that the amendments will come into effect under Art. 121(5) the parties decided to impose additional conditions before the Court can prosecute for aggression. The Court may only exercise jurisdiction over aggression committed one year after 30 states have ratified. Furthermore, the Court’s jurisdiction over aggression will only commence once a decision is made to that effect, after 1 January 2017 by the States parties. The decision is to be made by at least 2/3rds majority. So we will have to wait nearly seven years before the aggression amendments become operational (assuming we have 30 ratifications by then). These conditions apply to prosecutions commenced as a result of state party referral and proprio motu prosecutions (Art. 15bis) as well as to prosecutions resulting from a Security Council referral (Art. 15 ter).

3. TRIGGERING THE COURT’S JURISDICTION

There are two provisions of the aggression amendment, Articles 15 bis and 15 ter, that establish triggers for the ICC Prosecutor to be able to exercise jurisdiction over an act of aggression that meets the (elusive) requirements set out above. Article 15 bis gives the Court jurisdiction, subject to several provisions, in accordance with Rome Statute Article 13(a), State referral, and 13 (c), proprio motu investigations. Article 15 ter, on the other hand, refers specifically to the role of the Security Council and Article 13 (b) of the Rome Statute.

Interestingly, these provisions set the crime of aggression apart from the other crimes prosecutable in the ICC. In light of the controversial history of the crime of aggression and the substantial political unease surrounding it, these provisions establish a “unique jurisdictional regime outlining when the ICC Prosecutor can initiate an investigation into a crime of

76 Id.
77 Id.
78 Kampala Resolution, supra note 55, at Annex I, art. 3.
79 Id. at Annex I, art. 4.
aggression.” To begin with, in reverse order, Article 15 ter provides a framework similar to the other crimes: when the United Nations Security Council refers a situation to the Prosecutor, he may then proceed to investigate whether it constitutes the crime of aggression. On the other hand, Article 15 bis stands in contrast to Security Council referrals and the triggering mechanisms for the other crimes. It limits the Prosecutor’s breadth of powers in that he may only proceed to investigate a possible crime of aggression through a proprio motu investigation (an investigation on his own motion) or State referral investigation under three conditions:

1. After first ascertaining whether the Security Council has made a determination of the existence of an act of aggression (under Article 39 of the United Nations Charter) and waiting a period of 6 months;
2. Where a situation concerns an act of aggression committed between States Parties; and
3. After the Pre-Trial Division of the Court has authorized the commencement of the investigation.

In political terms, these three requirements were likely a concession to those States who opposed the Security Council’s involvement. Consequently, the Prosecutor can either (1) proceed if the Security Council has determined that the act constituted aggression or (2) if the Security Council fails to respond to the Prosecutor’s request for a ruling on aggression ‘within six months,’ the Prosecutor can proceed with an investigation; provided such a course of action is approved by the entire pre-trial panel of at least six judges. These requirements are very reflective of the serious political unease of States Parties, which is evident in how varied and uncertain state practice is regarding acts of aggression and the use of force against one and other.

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81 Id.
82 Id.
84 Id.
Even stronger proof of this atmosphere of hesitation surrounding the crime of aggression is that Article 15 bis also provides an “opt-out” opportunity for States Parties. States Parties have the option to “opt-out” of the ICC’s jurisdiction by simply filing a “declaration of non-acceptance of jurisdiction” with the Registrar of the Court.\textsuperscript{85} Even more astounding, it seem that such a declaration can be filed at any time and must only be reviewed by the State within three years of filing the declaration.\textsuperscript{86} There is some ambiguity however, surrounding when exactly a State Party must make such a declaration, be it before the amendment comes into force or anytime thereafter. Furthermore, any non-States Parties have been completely and explicitly excluded from the ICC’s jurisdiction over any acts committed by that State’s nationals or on its territory that might amount to crimes of aggression.\textsuperscript{87}

4. COMPLEMENTARITY

It is important to speak a bit on how the principle of complementarity in Article 17 of the Rome Statute will play out with regard to the crime of aggression. This principle removes the ICC’s jurisdiction if a State is willing and able to prosecute the crimes itself,\textsuperscript{88} which normally involves a State prosecuting its own nations or foreign nationals who acted in such a way to trigger that State’s jurisdiction. In the case of foreign nationals being prosecuted, unlike the crime of aggression, the other three crimes in the Rome Statute do not require that the acts of that national also be attributed to his home State. However, as it stands after the Review Conference, \textsuperscript{85} CICC, \textit{Delivering on the promise}, supra note 80; Kampala Resolution, \textit{supra} note 55, at art. 3(4).

\textsuperscript{86} \textit{Id.}; Kampala Resolution, \textit{supra} note 55, at art. 3(5).

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} Whether a State is unwilling or unable to prosecute each have specific meanings in Article 17 (2) and (3).
whether States will have an obligation to exercise jurisdiction over acts of aggression committed by nationals of the aggressor state is unresolved.89

The Special Working Group concluded early on that it would not be necessary to make any changes to Article 17 to incorporate the crime of aggression.90 This is particularly intriguing considering that the crime of aggression, by definition and unlike any of the crimes included in the Court’s jurisdiction, requires the involvement of two States. In order for there to be an act of aggression, there must be one State acting against another. In order for there to be a crime of aggression, such an act must have been done by someone in a position to bind his State under the theory of State Responsibility.91 While Article 17 refers only to “a State which has jurisdiction” over the ICC crimes, the question looms large as to whether including aggression will “require or encourage States to exercise domestic jurisdiction over the crime of aggression with respect to acts of aggression committed by other States, based on either the passive personality principle (as a victim State) or based on an assumption of universal jurisdiction.”92 In an attempt to resolve this, the following understanding was added at the very end of the Kampala Resolution:

It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.93

90 Id.
91 Kampala Resolution, supra note 55, at Annex I, art. 4.
92 Non-Paper by the Chair, supra note 89.
93 Kampala Resolution, supra note 55, at Annex III, arts. 4 and 5.
It is clear that the Amendment does not give States a green light to bring an action against another State when an act of aggression occurs. But does that mean that complementarity does not apply to the ICC’s jurisdiction over the crime of aggression since a State does not have the “right or obligation” to bring a prosecution with respect to an act of aggression? If this is the case, then the ICC may “end up assuming a position of primacy vis-à-vis the crime of aggression where national authorities are unable to prosecute the crime themselves because they lack the legal basis to do so.”

For example, there have been concerns that the United States (though not a party to the ICC, but providing a good example of municipal law possibly not allowing domestic prosecutions over crimes of aggression) would not have jurisdiction over acts of aggression because of the Act of State Doctrine. Perhaps this is not a bad thing, however, because it seems that “to the extent that the crime of aggression is prosecuted, it is best done in an international, rather than domestic, tribunal.” Furthermore, removing an obstacle to the ICC’s jurisdiction could remove the great deal of politics often involved in States prosecuting other States’ acts of aggression.

5. SECURITY COUNCIL’S ROLE

Speaking of politics, Resolution 3314 made it completely clear that the Security Council should make the determination of whether an act by a State was legally permissible or not. Article 39 of the UN Charter “charges the Council with responsibility to determine whether an act of aggression by a State has taken place.” However, this determination must be made in accordance with the Security Council’s Chapter VII authority: the act must threaten international

96 See Van Shaack, supra note 94.
97 Ferencz, Removing the Lock, supra note 8.
98 Id.
peace and security.\textsuperscript{99} Unfortunately, these decisions are far too often politically-based rather than legally-based.\textsuperscript{100} Consequently, there has been some concern that the involvement of the Security Council in the prosecutions of the crime of aggression in the ICC will also bring too much politics into the process.\textsuperscript{101} This fear can certainly be reinforced by seeing the political struggles of the ICJ in holding States responsible for aggressive acts. As such, it is feared that since “individual responsibility for the crime of aggression is inextricably linked to the commission of aggression by a state, and the determination of the commission of aggression by a state is one left to the Security Council, the ICC will necessarily be dependent on the Council.”\textsuperscript{102}

The very notion of criminal justice is degraded by the thought of a judicial body, such as the ICC, having to wait on the approval of a political body, the Security Council, to commence prosecutions because there is a “clear danger that aggression may occur, but for political reasons the Security Council would not make such a determination, thus barring the ICC from considering the matter.”\textsuperscript{103} Furthermore there could reasonably be circumstances in which the Security Council could conclude

that the maintenance of international peace would be better served by not apportioning blame for the unlawful use of force upon a specific state. . . . The possibility of a politically-motivated decision would clearly undermine the credibility of the ICC as an entity able to equally punish all those who commit what its preamble describes as ‘the most serious crimes of concern to the international community.’\textsuperscript{104}

\textsuperscript{99} U.N. Charter, Ch. 7.
\textsuperscript{100} Ferencz, Removing the Lock, supra note 8.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 583.
\textsuperscript{104} Id.
On the other hand, at the beginning of the Review Conference, Chief Prosecutor Moreno-Ocampo insisted his office would not be involved in politics but would follow in the footsteps of the drafters of the Rome Statute who, by taking “great care to exclude political considerations from the work of the Court,” consciously decided “to force political actors to adjust to new legal limits.” He adamantly maintained that the “Prosecutor and Judges cannot and will not take political considerations into account. We cannot both claim that we will ‘never again’ let atrocities happen and continue to appease the criminals, conducting ‘business as usual.’”

What the solution to such a dilemma will be is uncertain. Some claim that the ICC should not even have jurisdiction over the crime of aggression. However, such a conclusion seems a bit to rash considering the important nature of the crime of aggression. This conclusion also seems highly unlikely since the international community, particularly the States Parties to the Rome Statute, just expended a great deal of effort not only in Kampala, but over the past several years, drafting a new definition for the crime of aggression. More likely, it seems that perhaps the Security Council needs to take a less active role in the Prosecutor’s decisions and the other methods of initiating prosecutions should be the focus of the crime. This also could prove difficult because, coming full circle, of politics. Considering the great deal of political ties that the permanent members of the Security Council have to both Colombia and Venezuela, this dilemma could certainly be brought to life in our proposed hypothetical, which without further ado will now be explored.

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105 Statement by Luis Moreno-Ocampo, supra note 53.

106 See Boeving, supra note 101, at 582.
III. ANALYSIS OF AN ICC PROSECUTION OF THE CRIME OF AGGRESSION: THE PROPOSED HYPOTHETICAL BASED ON THE 2009 VENEZUELA-FARC INCIDENT

In 2009, Venezuela was accused of selling or providing heavy artillery, specifically anti-tank rocket launchers, to the Fuerzas Armadas Revolucionarias de Colombia (FARC).\textsuperscript{107} To fully understand why such action in the future might constitute a crime of aggression, it is critical to understand the historical tensions between Colombia and the FARC, as well as between Colombia and Venezuela. In light of the above analysis of the Kampala definition, the following information will demonstrate how a Venezuelan military official aiding the FARC could be considered a threat to Colombia’s “sovereignty, territorial integrity or political independence.”\textsuperscript{108}

A. Historical Conflict between Colombia and the FARC

In 1964, the Colombian Communist Party created out of its military wing what would grow to become one of the world’s most brutal and powerful illegal armed groups. Today, the FARC is “Colombia’s oldest, largest, most capable, and best-equipped Marxist insurgency.”\textsuperscript{109} Consisting of up to 12,000 armed combatants with a strong network of resources and supporters, the FARC has been responsible for decades of bombings, murders, kidnapping, extortions, hijacking and many instances of guerilla-type acts of warfare.\textsuperscript{110} The main objectives of the FARC have been carrying out illegal criminal enterprises, such as drug trafficking, terrorizing peasants and Colombian citizens throughout the countryside in an effort to control lands, and attacking government infrastructures throughout Colombia. The guerilla activities are primarily


\textsuperscript{108} Kampala Resolution, supra note 55, at Annex I, art. 2(2).


\textsuperscript{110} Id.
aimed at political, military and economic targets. Considering this background, the FARC can be considered an armed group for purposes of international humanitarian law, and therefore, any aid provided to the group could potentially fall under Article 2(g) of the Kampala Resolution.

In light of soaring levels of violence and mass atrocities, which by 2004 were becoming intolerable, then-President Álvaro Uribe Vélez “launched a large military operation called the ‘Patriot Plan’ involving 15,000 government soldiers” aimed at crushing the FARC strongholds and pushing them out of their controlled areas. The main result of this action was to drive many FARC leaders into deeper hiding and many FARC factions into neighboring Venezuela and Ecuador. It is in this context that the historical tensions between Colombia and Venezuela became important with regard to the activities of the FARC.

**B. Historical Conflict between Colombia and Venezuela**

Under heavy attack by the Uribe administration and consequently being forced to conduct many of its operations from neighboring countries, the FARC also found itself in the middle of a serious and escalating crisis between the governments of Álvaro Uribe in Colombia and Hugo Chávez in Venezuela. Tensions rose in early 2005 when Colombia’s Minister of Defense, now President Juan Manuel Santos Calderón, admitted that Colombia had paid bounty hunters to capture members of the FARC on Venezuelan territory, which actually happened in the capitol, Caracas. President Chávez immediately claimed a violation of Venezuela’s territorial sovereignty. However, tensions lulled a bit between the two countries until in 2008 when the

111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*
Colombian military raided a FARC encampment in Ecuador. Fearing a penetration of his own border, President Chávez began to amass troops and sent battalions of tanks to the Colombian border in preparation for potential conflict.\textsuperscript{116} However, President Uribe met with President Chávez and again the situation diffused, in large part due to the economic interconnectedness between Colombia and both Venezuela and Ecuador.\textsuperscript{117} It is in this atmosphere of rising and subsiding tensions between Colombia and Venezuela that an act such as the one that will follow could potentially trigger the ICC’s jurisdiction over the crime of aggression.

C. Transfer of Heavy Artillery and Why such an Act Constitutes Aggression

In 2009, Venezuela allegedly sold weapons to the FARC, in fact anti-tank (AT-4) rocket launchers which Venezuela bought from the Swedish company Saab Bofors Dynamics in the 1980s.\textsuperscript{118} Confirmation was given by Saab Bofors Dynamics to the Swedish Foreign Ministry that the serial numbers on the weapons matched those of weapons sold by the company to Venezuela decades ago. The critical question is how those weapons found their way into the hands of the FARC. The AT-4 rocket launchers could pose a serious threat to the Colombian government because they “are easily portable weapons that would permit guerilla groups to attack tanks and fortified installations.”\textsuperscript{119}

1. ELEMENTS THE PROSECUTOR MUST PROVE

This question is the center of the hypothetical situation in which the ICC Prosecutor might have jurisdiction to prosecute a senior-level Venezuelan military official for the crime of aggression under the new Kampala definition. According to Annex II of the Amendment, in

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Devereux, supra note 107.
\textsuperscript{119} Id.
order for a person, in this case the military official who sold or gave anti-tank rocket launchers to the FARC, to be found guilty of a crime of aggression, the ICC Prosecutor must prove the following elements:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person (more than one person may be in a position that meets these criteria) in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.\(^{120}\)

To begin with, elements 1 and 2 can be taken together. The Kampala Resolution delineates that “a person in a position effectively to exercise control over or to direct the political or military action of a State” can be prosecuted for the crime of aggression in the right situation.\(^{121}\) Consequently, if, in the future, Venezuelan-owned heavy artillery found its way into the hands of the FARC again, it is very likely that the ICC would be able to prosecute a senior-level military official for the crime of aggression because heavy artillery does not normally simply slip out of the military’s control. Rather, it generally takes the authority of a senior-level military official to sell or transfer such weapons. Obviously, a military official of such caliber would meet the criteria of the second element.

In satisfaction of the first element, this official would have to have been involved in the planning, preparation, initiation or execution of getting those weapons to the FARC because of

\(^{120}\) Kampala Resolution, supra note 55. Annex II, arts. 1 through 6.

\(^{121}\) Id. at Annex I, art. 2(2).
the nature of such weapons and the unlikelihood of military officials simply losing track of them. This was confirmed by a nongovernmental organization that monitors Venezuela’s armed forces, Control Cuidadano, when it asserted that “[t]his is the most serious incident to have occurred in Colombian-Venezuelan relations in the last 10 years, above all because for this type of weapon to arrive in the hands of the FARC suggests the compliance of senior military officers.” It would be somewhat understandable for small arms, such as “rifles or other types of weapons to disappear and end up in FARC hands” as that “could happen in various military scenarios; but for anti-tank rocket launchers to reach the FARC it is obvious that there is some kind of involvement at senior levels of the armed forces.”

The third element that the Prosecutor must prove is also satisfied in this situation because an act of supplying heavy artillery to a guerilla group, such as the FARC, can be deemed a “use of armed force by a State” since there was sufficient certainty, considering their ongoing actions, that the FARC would use the weapons against Colombia. Further, due to the longstanding tensions between Venezuela and Colombia, this “revelation strengthens claims by Bogotá that Venezuela and its allies have been actively supporting the left-wing terrorist group which has carried out a bloody insurrection in Colombia for more than 50 years.” Consequently, under Article 2(g), such acts could be considered the “substantial involvement” of Venezuela with the “armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against

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122 Devereux, supra note 107, quote by Rocio San Miguel, President of Control Ciudadano.

123 Id. In further support of this assertion,

The Swedish government, which could also find itself accused of being complicit in selling arms to a terrorist group according to European Union laws, has made a formal request to the Venezuelan government, asking it to clarify how the weapons ended up in Colombia. San Miguel said that other countries -- such as Spain, which has ignored a request by the U.S. to embargo arms sales to Venezuela -- might review their policies in light of the new evidence. Id.

124 Id.
another State of such gravity as to amount to” an act of aggression.125 This conclusion would be furthered if a compared to the conflict underlying the DRC v. Uganda was made and it was found that the FARC-Colombian conflict at least rises to the level of the conflict in the Congo.

In light of the deep-rooted nature of the tensions between Colombia and the FARC, it is likely that the military official who authorized the transfer of the weapons to the FARC would satisfy the requirements in elements 4 and 6 that “the perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations. . . . [and] a manifest violation of the Charter of the United Nations.”126 Any military official in the Venezuelan armed forces would surely be very aware of both the nature of the activities of the FARC within Colombia, as well as the ongoing tensions between Venezuela and Colombia. He would certainly understand that supplying the FARC with anti-tank rocket launchers would likely lead to serious destruction within Colombia, both to government infrastructure, military facilities and possibly to civilian property. He would also understand that due to his nature of military control, his actions could be attributable to Venezuela. A military official would understand that such actions are clearly in violation of the United Nations Charter. Yet whether these acts were legally understood by the military official to be violations of the Charter is irrelevant. Annex II to the Amendment, in paragraph 2 of the Introduction, states there is no requirement that the Prosecutor “prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter.”127

Element 5 is analyzed last because it is where the most controversy and uncertainty lies in that it requires an analysis of four words that could be open to interpretation: ‘character,’

125 Kampala Resolution, supra note 55, at Annex I, art. 2(2), para. (g).
126 Id. at Annex II, Elements, arts. 4 and 6.
127 Id. at Annex II, Introduction, art. 1 (emphasis added).
‘gravity,’ ‘scale,’ and ‘manifest.’ With regard to the phrase ‘manifest violation of the Charter of the United Nations,’ the Introduction in Annex II of the Kampala Resolution provides two clarifications. First, paragraph 3 states that “[t]he term ‘manifest’ is an objective qualification.” This essentially means that the ICC Prosecutor or the Security Council will be charged with determining whether the Charter has been manifestly violated. The mental state of the perpetrator will not be considered in determining a ‘manifest’ violation. Consequently, similar to paragraph 2 explained above, paragraph 4 provides that “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to the ‘manifest’ nature of the violation of the Charter of the United Nations.” In other words, the perpetrator must only know that “the factual circumstances that established such a manifest violation,” as was explained above with regard to paragraph 6. While these words each demand a factual determination that can only be made after an act has been committed, an argument can be made that selling heavy military weapons to the FARC could satisfy the character, gravity and scale requirement.

To begin with, the character of the act is that it will give the FARC the ability to cause great destruction to the military and infrastructure of Colombia, as well as possibly causing great civilian property damage and loss of civilian life. The gravity of the act can be analyzed by looking at the extent of the destruction and harm that can be caused by a rebel group using anti-tank rocket launchers, which was explained above and is likely going to be very intense. Finally, the scale of the act can possibly be widespread, depending on the extent of the use that the FARC would put the weapons to. The FARC could very likely use such weapons to attack many different military installations, government buildings, or civilian communities over a long period.

128 Id. at Annex II, Elements, art. 5.
129 Id. at Annex II, Introduction, art. 3.
130 Id. at art. 4 (emphasis added).
131 Id. at Annex II, Elements, art. 6.
of time. If this were the case, then the scale of the act could be great, despite the fact that it only involved one or a few transactions where the Venezuelan military official actually handed over the weapons to the FARC. Whether the FARC would put the weapons to use in such a way as to add up to an act of aggression that by its character, gravity and scale would be a manifest violation of the Charter requires a factual determination that is not possible in the scope of this paper. Looking back, however, if the situation is at least comparable to what occurred in Nicaragua in the 1980s or the DRC in the late 1990s and early 2000s, it might well suffice.

IV. CONCLUSION

In light of the long and controversial history of the crime of aggression, it is very likely that the Prosecutor will move with caution once the Kampala Resolution actually comes into force. Despite the desire to remove any political ties to the crime, it seems inevitable for two main reasons. The first is the role of the Security Council in determining when an act of aggression has occurred, in light of international peace and security, and thus enabling the Prosecutor to move forward. The second is the fact that any act of aggression is going to have real and serious political roots and consequences, domestically, regionally and internationally.

Furthermore, because so many elements of the crime will require a great deal of interpretation, a substantial balancing between various factors and considerations, particularly with regard to what constitutes a ‘manifest violation of the United Nations Charter,’ will have to be made in every case. In the end, although it was concluded in the hypothetical that the ICC Prosecutor would be able to bring aggression charges against a Venezuelan military official responsible for transferring military weapons to the FARC, such a determination in reality will be completely dependent on the particular facts at hand. Considering the complexity of the Kampala Resolution on aggression, set against the background of the contentious history of aggression, there is really no way to predict exactly what kind of situation will be its trigger.