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A Study on the Efficacy of the Kampala Amendments for Suppression of Aggression: Examined by the Case of Armed Conflicts in the Korean Peninsula

Nu Ri Jung

Assist. Prof. of Law, University of Seoul, South Korea

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A STUDY ON THE EFFICACY OF THE KAMPALA AMENDMENTS FOR SUPPRESSION OF AGGRESSION: EXAMINED BY THE CASE OF ARMED CONFLICTS IN THE KOREAN PENINSULA

Nu Ri Jung[†]

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I. Introduction

On March 25, 2010, a warship of the Republic of Korea (South Korea), ROKS Cheonan, was severed in two and sunk near the sea border with the Democratic People's Republic of Korea (North Korea), after an explosion at the rear of the ship.¹ Of among 104 people on board at the time of sinking, 58 sailors were rescued while another 46 sailors went unaccounted for.² The cause of the sinking was not identified at that time. An international investigation by the Joint Civilian-Military Investigation Group (JIG)³ officially concluded on May 20, 2010

[†] Nu Ri Jung is an Assistant Professor of Law, Division of International Studies at Ewha Womans University in Seoul, South Korea.

¹ Yonhap, *Report: South Korean Navy Ship Sinks*, CNN WORLD (Mar. 26, 2010), http://articles.cnn.com/2010-03-26/world/south.korea.ship.sinking_1_korean-broadcasting-system-kbs-north-korea?_s=PM:WORLD.

² Tae-hoon Lee, *Chronology of the Cheonan Sinking*, KOREA TIMES (Apr. 29, 2010), http://www.koreatimes.co.kr/www/news/nation/2011/04/116_65091.html.

³ See Press Release, The Joint Civilian-Military Investigation Group, Investigation Result on the Sinking of ROKS "Cheonan" (May 20, 2010), available at http://news.bbc.co.uk/1/hi/shared/bsp/hi/pdfs/20_05_10jigreport.pdf (explaining that the JIG was an international commission which investigated the sinking of the Cheonan with 25 domestic South Korean experts from 10 domestic professional institutes, 22 military experts, 3 experts recommended by the National Assembly and 24 foreign experts from the United States, Australia, the United Kingdom and Sweden, and that the JIG was composed of four teams

that the Cheonan was sunk by a torpedo attack launched by a North Korean submarine.⁴

Six months later, on November 23, 2010, following a South Korean regular military exercise at waters in the south,⁵ North Korea fired approximately 170 artillery rounds at Yeonpyeong Island.⁶ Among those 170 shells, 80 hit the island.⁷ Some 20 of them hit an artillery company.⁸ According to one news report, "The attack damaged military facilities, destroyed 29 homes, and set hillsides and fields blaze."⁹ Moreover, the attack killed two soldiers and two civilians,¹⁰ and injured sixteen soldiers and three civilians.¹¹

These two armed attacks allegedly carried out by North Korea are clear violations of international law, including the Charter of the United Nations (UN Charter) and the United Nations (UN) General Assembly Resolution 3314, entitled "Definition of Aggression," adopted by the UN General Assembly on December 14, 1974.¹² As a result, South Korea is authorized to act in self-defense against those aggressive acts.

Nevertheless, South Korea has endeavored to settle the disputes by international law rather than by force as follows. On June 4, 2010, South Korea referred the matter of the sinking of the Cheonan to the UN Security Council.¹³ In November and December 2010, South Korean citizens and students¹⁴ sent several communications conveying information regarding the shelling of Yeonpyeong

– Scientific Investigation Team, Explosive Analysis Team, Ship Structure Management Team and Intelligence Analysis Team).

⁴ *Id.*

⁵ *Korea Crisis: Yeonpyeong War Games Increase Tension*, BBC NEWS ASIA-PACIFIC (Dec. 20, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-12033330>. According to South Korean military official, shells fired as part of the exercise were directed at waters in the south-west, away from North Korea. *Id.*

⁶ Walter T. Harn IV, *Eighth Army Marks First Anniversary of Yeonpyeong Island Attack*, OFFICIAL HOMEPAGE U.S. ARMY (Nov. 23, 2011), http://www.army.mil/article/69799/Eighth_Army_marks_first_anniversary_of_Yeonpyeong_Island_attack/.

⁷ *Satellite Images Show S. Korean Shelling Ineffective*, STATESMAN (Calcutta), Dec. 2, 2010, available at 2010 WLNR 23966825.

⁸ *South Seeks Revenge for Yeonpyeong Shelling*, KOREA TIMES (Nov. 21, 2011), http://www.korea-times.co.kr/www/news/nation/2011/12/205_99230.html.

⁹ *Satellite Images Suggest Casualties in N. Korea: Lawmaker*, BANGLA NEWS (Dec. 2, 2010), <http://www.banglanews24.com/English/detailsnews.php?nssl=ab49b208848abe14418090d95df0d590&nttl=201204199656>.

¹⁰ *South Korea Remembers Yeonpyeong Island Attack*, BBC NEWS ASIA (Nov. 23, 2011), <http://www.bbc.co.uk/news/world-asia-15849625>.

¹¹ *Seoul Warns of 'Severe Punishment' over N. Korean Attack*, CHOSUNILBO (Nov. 24, 2010), http://english.chosun.com/site/data/html_dir/2010/11/24/2010112400306.html.

¹² G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

¹³ Permanent Rep. of ROK, *Letter dated 4 June 2010 from the Permanent Representative of the Republic of Korea to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2010/281 (June 4, 2010), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DPRK%20S%202010%20281%20SKorea%20Letter%20and%20Cheonan%20Report.pdf>.

¹⁴ See Associated Press, *International Court Investigating North Korea*, FOX NEWS (Dec. 7, 2010), <http://www.foxnews.com/world/2010/12/07/international-court-investigating-north-korea/> (reporting that Luis Moreno-Ocampo, the Chief Prosecutor of the International Criminal Court told reporters that "[n]o

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Island to the Office of the Prosecutor (OTP or the "Office") of the ICC.¹⁵ Some, however, see international law as largely a matter of international politics and policy.¹⁶

Following the referral by South Korea on July 9, 2010, the Security Council adopted a presidential statement that merely condemned the attack that led to the sinking of the Cheonan, without assigning any specific blame.¹⁷ That is to say, the Security Council did not take any substantial action after the Cheonan incident. Even some traditional allies of North Korea, such as China and Russia, have voiced reservations about the outcome of the international investigation into the sinking of the Cheonan.¹⁸

The communications and subsequent allegations on December 6, 2012 regarding the Cheonan triggered the OTP to announce the opening of a preliminary examination to evaluate the situation in South Korea, including the sinking of the Cheonan and the shelling of Yeonpyeong Island, pursuant to the Rome Statute of the International Criminal Court (Rome Statute or the "Statute").¹⁹ The preliminary examination has not been closed as of the time of writing, and thus the OTP's decision as to whether there is a reasonable basis to proceed with an investigation or not is still pending.

Because the ICC cannot exercise its jurisdiction over the crime of aggression yet, the Court's actual preliminary examination of the situation in South Korea would be limited to war crimes. However, the ICC would not be likely to exercise its war crimes jurisdiction over the two incidents. This is firstly because unlike the incident of Yeonpyeong, the attacker of the Cheonan was not identified at the time of the attack. Thus, it would be difficult to establish criminal liability of North Korea beyond a reasonable doubt based on the evidence so far discovered.²⁰ Secondly, it is not quite certain whether the incident of Yeonpyeong Island would meet threshold some of the admissibility requirements, including, but not limited to, military necessity, proportionality and grav-

state requested our intervention. . . We received no official communication," and stressed to reporters that "(South) Korean citizens sent us communications. Students sent us communications.")

¹⁵ Office of the Prosecutor, ICC, *Report on Preliminary Examination Activities*, ¶ 44 (Dec. 13, 2011), available at <http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>.

¹⁶ Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 *YALE L.J.* 1762, 1804 (2009).

¹⁷ See Press Release, Security Council, in Presidential Statement, Security Council Condemns Attack on Republic of Korea Naval Ship 'Cheonan', Stresses Need to Prevent Further Attacks, Other Hostilities in Region, U.N. Press Release SC/9975 (July 9, 2010), available at <http://www.un.org/News/Press/docs/2010/sc9975.doc.htm> (calling for adherence to the Korean Armistice Agreement and encouraging the peaceful settlement of outstanding issues on the Korean peninsula).

¹⁸ *UN Security Council Understands Probe into Ship Sinking*, KOREA TIMES (June 15, 2010), http://www.koreatimes.co.kr/www/news/nation/2010/06/113_67651.html.

¹⁹ Press Release, Office of the Prosecutor, ICC, ICC Prosecutor: Alleged War Crimes in the Territory of the Republic of Korea under Preliminary Examination (Dec. 6, 2010), available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/Pages/pr608.aspx.

²⁰ See Nu Ri Jung, *Is the Shelling of Yeonpyeong Island a War Crime? A Review under Article 8 of the Rome Statute of the International Criminal Court*, 124 *KOREAN J. INT'L L.* 157, 158 n.9 (2011).

ity. Accordingly, it is possible that the Court would deny admissibility of both incidents.

The problem here is that although there were indeed illegal uses of force, unlawful armed attacks or acts of aggression, neither the UN nor the ICC would be able to properly deal with such incidents. In order to overcome this kind of problem, after years of negotiation and discussion, the Review Conference of the Rome Statute of the International Criminal Court (the "Review Conference"), which took place in Kampala, Uganda, from May 31 to June 11 in 2010,²¹ finally adopted a resolution to amend the Rome Statute to include a definition of the crime of aggression and the conditions necessary for jurisdiction.²²

The purpose of this paper is to examine the efficacy of the amendments to the Rome Statute on the Crime of Aggression (the "Kampala amendments") for suppression of aggression, by analyzing the aforementioned situation in South Korea currently under the preliminary examination by the OTP. As previously mentioned, the ICC cannot exercise its jurisdiction over the crime of aggression yet, but incidents like the sinking of the *Chonan* and the shelling of Yeonpyeong Island may occur again in the future after the Kampala amendments become effective. Accordingly, for purposes of discussion, this paper hypothesizes that the Court's jurisdiction *ratione temporis* over the crime of aggression is already established.

The paper first introduces the overview of the Kampala amendments. Then the paper discusses the applicability of the definition of the crime of aggression under the Rome Statute and the exercisability of the ICC's crime of aggression jurisdiction over North Korea's aggression against South Korea. Lastly, the paper analyzes the legal implications of the Kampala amendments on the Korean Peninsula and on the greater international community in regard to suppression of aggression and makes policy recommendations on the Kampala amendments for future reform.

II. The Rise of the Kampala Amendments

As Michelle Caianiello notes, "The Review Conference in Kampala represented the first opportunity to consider amendments to the Rome Statute from its entry into force in 2002, and to take stock of its implementation and impact."²³ At the conference, the attending States Parties discussed amendments including: (1) expanding the definition of war crimes under Article 8 to include certain weapons that are used in non-conflict situations at the global stage; (2) Article 124; and (3) the definition of the crime of aggression.²⁴ Among these three, the

²¹ *Delivering on the Promise of a Fair, Effective and Independent Court, Review Conference of the Rome Statute*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=review> (last visited Apr. 10, 2013).

²² Ryan McClure, *International Adjudication Options in Response to State-Sponsored Cyber-Attacks against Outer-Space Satellites*, 18 *NEW ENG. J. INT'L & COMP. L.* 431, 440 (2012).

²³ Michele Caianiello, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, 36 *N.C. J. INT'L L. & COM. REG.* 287, 311 n.84 (2011).

²⁴ David H. Lim, *Beyond Kampala: The U.S.' Role in Supporting the International Criminal Court's Mission*, 39 *SYRACUSE J. INT'L L. & COM.* 441, 456-57 (2012).

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Conference facilitated consensus on the first and the third, but could not reach a consensus on the second.²⁵ Among those amendments, the most important result achieved is considered to be the inclusion of the definition of the crime of aggression,²⁶ which is the focus of this paper.

The crime of aggression, descended from the crime against peace in Article 6(a) of the Charter of the International Military Tribunal at Nuremberg,²⁷ has long been thought of as the ultimate evil or supreme international crime.²⁸ Defining and prosecuting aggressive war, although not uncontroversial, proved relatively easy following the complete defeat of the States responsible for acts of aggression in the Second World War.²⁹ However, when the international community turned its attention to building what would eventually be known as the ICC, controversies emerged to stymie efforts to codify the crime of aggression for more general application in the future.³⁰

The International Law Commission, the first body to undertake the effort, was unable to agree on the definition of the crime of aggression.³¹ Starting in 1967, the UN General Assembly tasked several committees to define the crime of aggression, which ultimately led to a consensus definition in General Assembly Resolution 3314 of 14 December 1974.³² While influential, the definition of aggression in Resolution 3314 did not easily lend itself to a penal context.³³ When the Rome Statute was negotiated and drafted in 1998, among the four crimes falling within the jurisdiction of the ICC—genocide, crimes against humanity, war crimes, and the crime of aggression³⁴—only the crime of aggression was left undefined. As a result, unlike the other three crimes, the ICC's exercise of

²⁵ *Id.* at 457-60.

²⁶ Caianiello, *supra* note 23, at 311 n.84. See Jennifer Trahan, *A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon*, 33 U. PA. J. INT'L L. 907, 912-13 (2012) ("State Parties in Kampala created a historic achievement, advancing the rule of law, when they reached agreement on the definition of the crime of aggression and conditions by which the ICC may in the future, subject to certain procedural prerequisites, exercise jurisdiction over the crime.").

²⁷ Noah Weisbord, *Evolutions of the Jus Ad Bellum: The Crime of Aggression*, 103 AM. SOC'Y INT'L L. PROC. 438, 439 (2009). See Charter of the International Military Tribunal, Annexed to London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (defining the term "crime against peace" as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing").

²⁸ Chance Cammack, *The Stuxnet and Potential Prosecution by the International Criminal Court under the Newly Defined Crime of Aggression*, 20 TUL. J. INT'L. & COMP. L. 303, 304 (2011).

²⁹ Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 510 (2011).

³⁰ *Id.* at 510-11.

³¹ *Id.* at 511.

³² *Id.*

³³ *Id.*

³⁴ Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

jurisdiction over the crime of aggression did not commence when the Court was formally established in 2002.³⁵

Shortly after the ICC came into force in 2002, the Assembly of State Parties to the Rome Statute established the Special Working Group on the Crime of Aggression (the "Special Working Group") to propose a definition of aggression and establish the conditions for the exercise of jurisdiction.³⁶ The Special Working Group made slow progress toward an acceptable definition and trigger mechanism for aggression from 2003 to 2009,³⁷ laying the foundations for the Kampala amendments adopted by the Review Conference in June 2010. The Special Working Group's draft definition was adopted without changes at the Review Conference, and the Assembly of State Parties reached a consensus compromise over the laden issues of jurisdiction and the entry into force of the amendments.³⁸

As a result of the Kampala amendments, Articles 8 *bis*, 15 *bis*, and 15 *ter* were inserted into the Rome Statute with regard to the inclusion of the crime of aggression within the jurisdiction of the ICC. Article 8 *bis* consists of two paragraphs. The first paragraph provides a general definition of crime of aggression and the second paragraph stipulates a definition and a list of acts of aggression, incorporated from Resolution 3314. Articles 15 *bis* and 15 *ter* regulate the ICC's exercise of jurisdiction over the crime of aggression.

According to Articles 15 *bis* (2) and (3) and 15 *ter* (2) and (3) of the Rome Statute, the ICC may exercise jurisdiction over the crime of aggression, subject to a decision to be taken after January 1, 2017 by a two-thirds majority of States Parties and further subject to the ratification of the amendments by thirty State Parties.³⁹ Because the procedural hurdles for activating the ICC's crime of aggression jurisdiction have not yet been met⁴⁰ as of the time of writing, the Court cannot exercise its jurisdiction over the crime of aggression. Even though the ICC has yet to consider a charge of aggression,⁴¹ the inclusion of restrictive juris-

³⁵ Article 5(2) of the Rome Statute was deleted by the ICC's Resolution RC/Res.6 on June 11, 2010. *See id.* art. 5 n.1. (stating "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. . . .").

³⁶ Kari M. Fletcher, *Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma?*, 65 A.F. L. REV. 229, 230 (2010).

³⁷ Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357, 361-62 (2012).

³⁸ Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 86 (2011).

³⁹ *See* Rome Statute of the International Criminal Court, *supra* note 34, art. 15 *bis* (2) & 15 *ter* (2) ("The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty State Parties."); *see also id.* art. 15 *bis* (3) & 15 *ter* (3) ("The Court may exercise jurisdiction over the crime of aggression . . . subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.").

⁴⁰ Jennifer Trahan, *Potential Future Rome Statute Amendments*, 18 NEW ENG. J. INT'L & COMP. L. 331, 335 (2012).

⁴¹ Aaron M. Riggio, *The International Criminal Court and Domestic Military Justice*, 5 PHX. L. REV. 99, 105 (2011).

dictional paths through which the ICC can actually obtain jurisdiction over allegations of criminal aggression⁴² has already been the subject of much criticism.⁴³

The following discussion studies relevant issues by hypothetically applying the ICC's crime of aggression jurisdiction to North Korea's aggression against South Korea, substantiated by the sinking of the Choenan and the shelling of Yeonpyeong Island.

III. Applicability of the Definition of the Crime of Aggression Under Article 8 *bis* of the Rome Statute to North Korea's Aggression Against South Korea

A. Overview

Article 8 *bis* of the Rome Statute defines "crime of aggression" 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 [UN Charter]",⁴⁴ and "act of aggression" as "the use of armed force by a *State* against the sovereignty, territorial integrity or political independence of another *State*, or in any other manner inconsistent with the [UN Charter]."⁴⁵

In other words, according to the Rome Statute, only a State's act of aggression against another State can constitute a crime of aggression, and only a State's official can be held criminally liable for a crime of aggression. In this regard, two primary legal issues should be clarified in order for North Korea's aggression against South Korea to fall within the definition of the crime of aggression under Article 8 *bis*. One is an issue of statehood for North and South Korea, which is related to North Korea's capacity to commit aggression against South Korea under the Rome Statute. The other is an issue of the status quo of armistice in the Korean Peninsula, which is related to characteristics of North Korea's aggression against South Korea. Each is discussed separately below.

B. North Korea's Capacity to Commit Aggression Against South Korea Under the Rome Statute

Under Article 8 *bis* of the Rome Statute, the establishment of the crime of aggression requires both aggressor and victim to be States. Accordingly, the relationship between an aggressor and a victim within the purview of the Rome Statute should be international. As a result, in order for military provocations by North Korea against South Korea to constitute acts of aggression, both North and South Korea should be separate, individual States.

⁴² Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1019 (2012).

⁴³ Andrew Trotter, *Of Aggression and Diplomacy: The Security Council, the International Criminal Court, and Jus Ad Bellum*, 18 NEW ENG. J. INT'L & COMP. L. 351, 351 (2012) ("The formulation of the crime of aggression reached in Kampala . . . has been the subject of much criticism.").

⁴⁴ Rome Statute of the International Criminal Court, *supra* note 34, art. 8 *bis* (1) (emphasis added).

⁴⁵ *Id.* art. 8 *bis* (2) (emphasis added).

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Ever since the division of Korea into North Korea and South Korea, each has claimed to be the only legitimate representative of the Korean nation.⁴⁶ For example, Article 1 of the Socialist Constitution of the Democratic People's Republic of Korea claims that: "The Democratic People's Republic of Korea is an independent socialist State representing the interests of *all the Korean people*."⁴⁷ On the other hand, Article 3 of the Constitution of the Republic of Korea (the "Constitution") declares that: "The territory of the Republic of Korea shall consist of *the Korean peninsula and its adjacent islands*."⁴⁸ Theoretically, as a result, North Korea is not a recognized State to South Korea, and vice versa.

South Korea's argument of being the only lawful government in Korea relies on the UN General Assembly Resolution 195 (III),⁴⁹ entitled, "The Problem of the Independence of Korea," and adopted by the General Assembly on December 12, 1948. It declares that "there has been established a lawful government (the Government of [the] Republic of Korea) having effective control and jurisdiction over that part in Korea where the Temporary Commission was able to observe and consult."⁵⁰ The South Korean Supreme Court has held that North Korea is not a State⁵¹ and:

The North region is a part of the Korean Peninsula which belongs to the Republic of Korea [as affirmed in Article 3 of the Constitution], so only the sovereignty of the Republic of Korea is valid in that region, and any other politics of sovereignty against the sovereignty of the Republic of Korea cannot be admitted in legal theory.⁵²

For these reasons, to South Korea, North Korea is technically not a State but only a *de facto* local government vis-à-vis South Korea, and thus the relationship between North and South Korea cannot be a State-to-State relationship.⁵³

Meanwhile, South Korea and North Korea were admitted to the membership of the UN on September 17, 1992 and have entered into several agreements together. However, on each occasion, both made it clear through their respective government statements and press conferences that they were not explicitly or implicitly recognizing each other as a State at all.⁵⁴ For example, the Preamble to the Agreement on Reconciliation, Non-aggression and Exchanges and Coopera-

⁴⁶ Derek J. Vanderwood, *The Korean Reconciliation Treaty and the German Basic Treaty: Comparable Foundations for Unification?*, 2 PAC. RIM. L. & POL'Y J. 411, 413 (1993).

⁴⁷ SOCIALIST CONSTITUTION OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA Sept. 5, 1998, art. 1.

⁴⁸ CONSTITUTION OF THE REPUBLIC OF KOREA Jul. 17, 1948, art. 3.

⁴⁹ Kuk Cho, *Tension between the National Security Law and Constitutionalism in South Korea: Security for What?*, 15 B.U. INT'L L.J. 125, 158 (1997).

⁵⁰ G.A. Res. 195 (III) art. 2, U.N. Doc. A/RES/195 (III) (Dec. 8, 1948).

⁵¹ Cho, *supra* note 49, at 158. See also Supreme Court [S. Ct.], 92Do1244, Oct. 18, 1992 (S. Kor.); Supreme Court [S. Ct.], 91Do2341, Nov. 22, 1991 (S. Kor.); Supreme Court [S. Ct.], 91Do212, Apr. 23, 1991 (S. Kor.).

⁵² Cho, *supra* note 49, at 158 n.199. See also Supreme Court [S. Ct.], 4249 Haeng Sang 48, Sept. 28, 1961 (S. Kor.).

⁵³ Jin Lee, *A Millennium Hope for Korea: Lessons from German Unification*, 9 MSU-DCL J. INT'L L. 453, 508 (2000).

⁵⁴ *Id.* at 507.

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tion between the South and the North (the "Basic Agreement"), signed on December 13, 1991, states that "[t]he South and the North [recognize] that their relations, not being a relationship between States, constitute a special interim relationship stemming from the process towards unification."⁵⁵

Under these circumstances, any agreement between North and South Korea cannot, in theory, be a treaty between two States. Accordingly, the South Korean government considers such agreements an agreement between two governments—the *de jure* central government and a *de facto* local government—and thus does not obtain consent from the National Assembly for the agreement as required for a treaty under the Constitution.⁵⁶ The Constitutional Court of the Republic of Korea also considers the Basic Agreement a type of a joint declaration or a "gentlemen's agreement" that does not have legal validity because the South Korean government did not obtain consent from the National Assembly after signing it.⁵⁷ In addition, North and South Korea further agreed not to register the agreement with the Secretariat of the United Nations as required for every treaty and international agreement under Article 102 of the UN Charter.⁵⁸

Although both Koreas deny each other's statehood, the statehood of South Korea is recognized by the ICC, as can be inferred from the fact that South Korea has been admitted to the Rome Statute as a State Party.⁵⁹ South Korea signed the Rome Statute on March 8, 2000, and deposited its instrument of ratification of the Rome Statute on November 13, 2002.⁶⁰ Subsequently, the Rome Statute entered into force in South Korea on February 1, 2003 in accordance with Article 126(2).⁶¹

In the meantime, whether the ICC would recognize the statehood of North Korea is not certain as of the time of writing, because North Korea is not yet a party to the Rome Statute and the ICC has not yet made any comment on this issue. As discussed earlier, the ICC's jurisdiction over the crime of aggression is confined to conflicts between States. The requirement that an act of aggression be by a State subsequently excludes non-State aggressors such as terrorists.⁶²

⁵⁵ Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between South and North, N. Kor.-S. Kor., Dec. 13, 1991.

⁵⁶ Jin Lee, *supra* note 53, at 509-12.

⁵⁷ Seong-Ho Jhe, *Four Major Agreements on Inter-Korean Economic Cooperation: Legal Measures for Implementation*, 16 E. ASIAN REV. 19, 22-23 (2004). According to Article 60(1) of the Constitution of the Republic of Korea,

The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction to sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

THE CONSTITUTION OF THE REPUBLIC OF KOREA, July 12, 1948, art. 60(1).

⁵⁸ Lee, *supra* note 53, at 509-10.

⁵⁹ Jung, *supra* note 20, at 163.

⁶⁰ *Republic of Korea*, INT'L. CRIMINAL COURT, <http://www.icc-cpi.int/Menu/ASP/states+parties/Asian+States/Republic+of+Korea.htm> (last visited Apr. 10, 2013).

⁶¹ Rome Statute of the International Criminal Court, *supra* note 34, art. 126(2).

⁶² Trotter, *supra* note 43, at 357-58.

Accordingly, the issue of North Korea's statehood is directly related to the issue of North Korea's capacity to commit acts of aggression. If the ICC considers North Korea a State, North Korea is capable of committing acts of aggression, but if not, it is incapable.

The ICC is an independent organization that acts under its own authority and applies its own law,⁶³ and thus would make its own decision on the statehood of North Korea,⁶⁴ despite the aforementioned discussions revolving around the relationship between North and South Korea. This is confirmed in the Draft Policy Paper on Preliminary Examinations by the OTP on October 4, 2010, which states that: "The preliminary examination process is conducted by the Office on the basis of the facts and information available and in the context of the overarching principles of *independence, impartiality and objectivity*."⁶⁵

According to Article 1 of the Montevideo Convention on Rights and Duties of States, which is the most widely accepted formulation of the criteria of a statehood in international law,⁶⁶ and Article 201 of the Restatement (Third) of Foreign Relations Law of the United States, a State is an entity that has a defined territory, a permanent population, a government and the capacity to enter into relations with other States.⁶⁷ Recognition, however, is not a required element of statehood.⁶⁸ North Korea possesses a defined territory as set under the Armistice Agreement, a permanent population, a government currently under the regime of Kim Jong-Un, and the capacity to enter into relations with other States (such as China) and international organizations (such as the UN).⁶⁹

Therefore, it is highly possible the ICC would consider North Korea a separate State from South Korea,⁷⁰ and then North Korea would become capable of committing acts of aggression against South Korea as defined by the Rome Statute.

⁶³ Joshua B. Bevitz, *Flawed Foreign Policy: Hypocritical U.S. Attitudes toward International Criminal Forums*, 53 HASTINGS L.J. 931, 946 (2002).

⁶⁴ Jung, *supra* note 20, at 165.

⁶⁵ Office of the Prosecutor, International Criminal Court, Draft Policy Paper on Preliminary Examinations, ¶ 33, (2010), available at http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf (emphasis added).

⁶⁶ MALCOLM N. SHAW, INTERNATIONAL LAW 178 (5th ed. 2003).

⁶⁷ Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

⁶⁸ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 67, § 202, cmt. b ("An entity that meets the definition of a state is a state, whether or not its statehood is formally recognized by other states."). See also Charter of the Organization of American States, art. 13, Apr. 30, 1948, 119 U.N.T.S. 3 (entered into force Dec. 3, 1951) ("The political existence of the State is independent of recognition of other States.").

⁶⁹ Jung, *supra* note 20, at 166.

⁷⁰ *Id.* In the updated Situation in Palestine issued on April 3, 2012, the Office of Prosecutor of the ICC rejected a request by the Palestinian National Authority calling for investigations into Israeli crimes during the war in Gaza in 2008 on the grounds that Palestine is not a Member State of the UN and thus could not sign the Rome Statute. See Press Release, Office of the Prosecutor, ICC, Situation in Palestine (Apr. 3, 2012), available at http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/28438_7/SituationinPalestine030412ENG.pdf; *Programme Summary of Al-Jazeera TV News 0500 GMT 4 Apr 12*, BBC INTERNATIONAL REPORTS (MIDDLE EAST) (Apr. 4, 2012), available at 4/4/12 BBC Monitoring Middle E. 00:35:16; *Rights Groups Denounce ICC Ruling against Palestine Request*,

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C. Characteristics of North Korea's Aggression Against South Korea Under the Status Quo of Armistice in the Korean Peninsula

The Korean War, which lasted for three years from 1950 to 1953, ended with the Military Armistice in Korea and Temporary Supplementary Agreement (the "Korean Armistice Agreement" or "Armistice Agreement") between the Commander-in-Chief of the United Nations Command, representing UN Forces, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, representing North Korean and Chinese forces on July 27, 1953.⁷¹ In addition to the ceasefire agreement itself, the Korean Armistice Agreement established a military demarcation line and demilitarized zone and created the Military Armistice Commission to supervise the Agreement.⁷²

However, there have been a series of military clashes between North and South Korea—although not as severe as the Korean War—particularly in the Yellow Sea off the west coast of the Korean Peninsula ever since then. A recent report by South Korea's Ministry of National Defense disclosed that North Korea has violated the Armistice Agreement 221 times and conducted an actual military attack up to 26 times since 1953.⁷³ Such circumstances lead to questioning the status quo of armistice in the Korean Peninsula today—namely, whether the Korean Peninsula is now in wartime or peacetime. If the former is the case, new aggression by North Korea against South Korea is an issue of resuming the suspended hostilities. If the latter, it is an issue of commencing new hostilities.

Black's Law Dictionary defines armistice, ceasefire or truce as "a suspension or temporary cessation of hostilities by agreement between belligerent powers."⁷⁴ According to such traditional notion of armistice, the Korean Peninsula under the state of armistice is technically still at war. This traditional perspective is reflected in pertinent articles of the Hague Convention of 1907. The Hague Convention was recognized by the Nuremberg Tribunal as articulating customary international law,⁷⁵ and thus is considered to have achieved almost universal acceptance⁷⁶—binding even non-contracting parties such as North and South Korea to the Hague Convention.

PALESTINE NEWS & INFO. AGENCY (Apr. 7, 2012), available at 4/9/12 Palestine News & Info. Agency (Wafa) 06:01:36. It can be inferred from this decision that the ICC's legal determination of statehood hinges on an entity's UN membership. Because North Korea is a UN Member State, it is highly likely that the ICC would recognize North Korea as a State.

⁷¹ Military Armistice in Korea and Temporary Supplementary Agreement, July 27, 1953, 4 U.S.T. 234, 1953 U.N.Y.B. 136, U.N. Sales No. 1954.I.15, available at <http://news.findlaw.com/hdocs/docs/korea/kwarmagr072753.html> [hereinafter Korean Armistice Agreement].

⁷² Charles J. Moxley, Jr., *The Sword in the Mirror – The Lawfulness of North Korea's Use and Threat of Use of Nuclear Weapons Based on the United States' Legitimation of Nuclear Weapons*, 27 *FORDHAM INT'L L.J.* 1379, 1401-02 (2004).

⁷³ Hae-in Shin, *N.K. Commits 221 Provocations since 1953*, *KOREA HERALD* (Jan. 5, 2011), <http://www.koreaheerald.com/national/Detail.jsp?newsMLId=20110105000563>.

⁷⁴ BLACK'S LAW DICTIONARY 1546 (8th ed. 2004).

⁷⁵ David M. Morris, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 *V.A. J. INT'L L.* 801, 810 (1996).

⁷⁶ M.J. Peterson, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 *AM. J. INT'L L.* 589, 590 (1983).

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According to Article 36 of the Hague Convention, an armistice merely suspends military operations between the belligerent parties.⁷⁷ Article 36 further states that “[i]f its duration is not defined, *the belligerent parties may resume operations at any time*, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.”⁷⁸ In addition, Article 40 provides that “[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, or recommencing hostilities immediately.”⁷⁹

The Preamble to the Korean Armistice Agreement provides that: “an armistice [would] insure a complete cessation of hostilities and of all acts of armed force in Korea *until a final peaceful settlement is achieved*.”⁸⁰ This, along with the Hague Convention, indicates that the Korean Armistice Agreement is not a final peace settlement to the Korean War. A peace treaty, although not defined by the Hague Convention, is by ancient custom the final comprehensive ending of hostilities which extinguishes the state of war and all corresponding belligerent rights between the parties.⁸¹

Thus, under this traditional perspective of an armistice, the relationship between South Korea and North Korea is still technically in a state of war today⁸² because the Korean War ended in an armistice rather than a final peace treaty. The UN General Assembly Resolution 3390B (XXX), dealing “Questions of Korea,” in 1975, also acknowledged that “a durable peace cannot be expected so long as the present state of armistice is kept as it is in Korea.”⁸³ In this paradigm, a breach of an armistice agreement effectively does not have any relevant legal consequences, because an armistice agreement only suspends hostilities without ending the state of war.⁸⁴

Subsequently, a military provocation by North Korea is not an act of aggression, but rather a breach of the Korean Armistice Agreement—particularly Article II, Paragraph 12 (requesting the Commanders of both South and North Korea to order and enforce “a complete cessation of all hostilities in Korea by all armed forces under their control”)⁸⁵ as well as Article II, Paragraph 17 (requesting these

⁷⁷ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 36, 36 Stat. 2277, 2305, 205 Consol. T.S. 277, 295 (“An armistice suspends military operations by mutual agreement between the belligerent parties.”).

⁷⁸ *Id.* art. 36 (emphasis added).

⁷⁹ *Id.* art. 40.

⁸⁰ Korean Armistice Agreement, *supra* note 71, pmbl (emphasis added).

⁸¹ Morriss, *supra* note 75, at 810.

⁸² Cecilia Y. Oh, *The Effect of Reunification of North and South Korea on Treaty Status*, 16 EMORY INT'L L. REV. 311, 311-12 (2002).

⁸³ G.A. Res. 3390B (XXX), pmbl., U.N. Doc. A/RES/3390(XXX) (Nov. 18, 1975).

⁸⁴ Andrej Lang, “*Modus Operandi*” and the ICJ’s Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: *The Role of Peace Agreements in International Conflict Resolution*, 40 N.Y.U. INT’L L. & POL. 107, 145 (2008).

⁸⁵ Korean Armistice Agreement, *supra* note 71, art. II, ¶ 12 (“The Commanders of the opposing sides shall order and enforce a complete cessation of all hostilities in Korea by all armed forces under their control, including all units and personnel of the ground, naval and air forces, effective twelve hours after this armistice agreement is signed.”)

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Commanders to establish “all measures and procedures necessary to insure complete compliance with all of the provisions.”)⁸⁶ Pursuant to Article 40 of the Hague Convention, the breach of the Armistice Agreement would provide grounds for denunciation of the Armistice Agreement and even, in cases of urgency, immediate recommencement of hostilities by South Korea. This inherently temporary and limited nature of the Armistice Agreement illustrates the traditional perspective that views an armistice agreement as a suspension, not a termination, of war.

Even after sixty years, however, a peace treaty has not yet been signed to formally end the hostilities.⁸⁷ As a result, the Korean Armistice Agreement, which was originally intended as only a temporary measure by its own terms, has continued in force and will continue so long as it is observed. In the meantime, *de facto* “peace” has been maintained over the past half century⁸⁸ in the Korean Peninsula, despite some occasional conflicts between North and South Korea.

Accordingly, in contrast to the aforementioned traditional perspective, the new perspective views that the role of an armistice agreement has substantially changed in the past decades⁸⁹ and the rules laid down in the Hague Convention are no longer reflected by state practice.⁹⁰ In the current practice of states, an “armistice” chiefly denotes a termination of hostilities, completely divesting the parties of the right to renew military operations under any circumstances whatsoever, and thus puts an end to war and does not merely suspend the combat.⁹¹

As stated earlier, the Preamble to the Korean Armistice Agreement invites “a complete cessation of hostilities and of all acts of armed force in Korea,”⁹² and Article II, Paragraph 12 of the Korean Armistice Agreement requests “a complete cessation of all hostilities in Korea by all armed forces.”⁹³ This may suggest that the effect of the Armistice Agreement’s entry into force was not restricted to a mere suspension of military operations,⁹⁴ but was rather extended to a termination of military operations.

In addition, Article V, Paragraph 62 of the Korean Armistice Agreement stipulates that: “The Articles and Paragraphs of this Armistice Agreement shall re-

⁸⁶ *Id.* art. II, ¶ 17 (stating, Responsibility for compliance with and enforcement of the terms and provision of this Armistice Agreement is that of the signatories hereto and their successors in command. The Commanders of the opposing sides shall establish within their respective commands all measures and procedures necessary to insure complete compliance with all of the provisions hereof by all elements of their commands.).

⁸⁷ John M. Leitner, *To Post or Not to Post: Korean Criminal Sanctions for Online Expression*, 25 *TEMP. INT'L & COMP. L.J.* 43, 52 (2011).

⁸⁸ Sung-Yoon Lee, *The Mythical Nuclear Kingdom of North Korea*, 29 *FLETCHER F. WORLD AFF.* 125, 134 (2005).

⁸⁹ Lang, *supra* note 84, at 146 n.147.

⁹⁰ Wolff Heintschel von Heinegg, *Factors in War to Peace Transitions*, 27 *HARV. J.L. & PUB. POL'Y* 843, 849 (2004).

⁹¹ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 42 (4th ed. 2005).

⁹² Korean Armistice Agreement, *supra* note 71, pmb1 (emphasis added).

⁹³ *Id.* art. II, ¶ 12 (emphasis added).

⁹⁴ Heinegg, *supra* note 90, at 849-50.

main in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides.”⁹⁵ This provision can be construed to preclude the right of either party to resume hostilities.⁹⁶ Such a construction can be interpreted as to give a permanency rather than a temporality.⁹⁷ The fact that the Korean Armistice Agreement includes the term of a “final peaceful settlement” in the Preamble would not justify a conclusion to the contrary.⁹⁸

The new perspective of armistice demonstrates that armistices and peace agreements are today nearly identical concepts.⁹⁹ In fact, contemporary state practice belies the traditional assumption of a sharp distinction between peace and war.¹⁰⁰ Consequently, should any of the former belligerents plunge again into hostilities, this would be considered the unleashing of a new war and not the resumption of fighting in an ongoing armed conflict.¹⁰¹

Hence, under this new perspective, the relationship between South Korea and North Korea is no longer a state of war today. In this paradigm, a military provocation by North Korea would be subject to not only the Korean Armistice Agreement, but also the rules of *jus ad bellum*, or the principles of just war, because an armistice agreement technically terminates the state of war and thus subsequent hostilities would be considered to be the beginning of new hostilities.

To summarize, if the customary rules governing armistice under the Hague Convention that view an armistice as a mere suspension of hostilities are resorted to, the Korean Peninsula is still in a state of war. On the other hand, if the position that the status of armistice has ripened into a termination of hostilities tantamount to a peace treaty is taken, the state of war has already ended in the Korean Peninsula without a formal peace treaty.

What should be noted here, however, is that two Koreas, as UN members, are subject to obligations under the provisions of the UN Charter regardless of whether the Korean Peninsula is in wartime or peacetime. The UN Charter is the primary source for the modern rules of *jus ad bellum*,¹⁰² which establishes when the use of armed force is authorized under international law.¹⁰³ A violation of *jus ad bellum* constitutes the crime of aggression under the Rome Statute when the use of armed force by a State against the sovereignty, territorial integrity or polit-

⁹⁵ Korean Armistice Agreement, *supra* note 71, art. V, ¶ 62.

⁹⁶ Ernest A. Simon, *The Operation of the Korean Armistice Agreement*, 47 MIL. L. REV. 105, 113 (1970).

⁹⁷ *Id.*

⁹⁸ Heinegg, *supra* note 90, at 850.

⁹⁹ Lang, *supra* note 84, at 144.

¹⁰⁰ Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus In Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 67 (2009).

¹⁰¹ DINSTEIN, *supra* note 91, at 46.

¹⁰² Sean Kanuck, *Sovereign Discourse on Cyber Conflict under International Law*, 88 TEX. L. REV. 1571, 1585 (2010).

¹⁰³ Stephenie Gosnell Handler, *The New Cyber Face of Battle: Developing a Legal Approach to Accommodate Emerging Trends in Warfare*, 48 STAN. J. INT'L L. 209, 220 (2012).

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ical independence of another State, or in any other manner inconsistent with the UN Charter amounts to a manifest violation of the UN Charter.¹⁰⁴

The Preamble to the UN Charter proclaims that “armed force shall not be used, save in common interest.”¹⁰⁵ Article 1(1) of the UN Charter provides that one of purposes of the UN is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”¹⁰⁶ In pursuit of the Charter’s purposes, Article 2(3) requires that “[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”¹⁰⁷ More importantly Article 2(4) asserts, “[a]ll 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.”¹⁰⁸ The UN Charter provides two exceptions to the strict prohibition against the use of force set forth in Article 2(4). One is Article 51, which permits a state to act in self-defense against an armed attack.¹⁰⁹ The other is Article 42, which provides the UN Security Council the so-called “Chapter VII powers”¹¹⁰ to authorize a state to use force.¹¹¹

Accordingly, if the Korean Peninsula is in the state of peace (where the state of war is terminated as under the new perspective concept of armistice) a military provocation by North Korea constitutes not only a breach of the Korean Armistice Agreement but also a violation of the UN Charter—most gravely Article 2(4)—unless such force is authorized by the Security Council. This, in return, triggers South Korea’s right of self-defense under Article 51 of the UN Charter.

¹⁰⁴ See Rome Statute of the International Criminal Court, *supra* note 34, art. 8 *bis* (1) (defining the crime of aggression 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.

(emphasis added). Article 8 *bis* (2) of the Rome Statute stipulates a list of acts of aggression. See generally *id.* art. 8 *bis* (2).

¹⁰⁵ U.N. Charter pmb. l.

¹⁰⁶ *Id.* art. 1, ¶ 1.

¹⁰⁷ *Id.* art. 2, ¶ 3.

¹⁰⁸ *Id.* art. 2, ¶ 4. Controversy has revolved around the meaning of “force” in Article 2(4) of the UN Charter – whether the term refers to armed force only or includes other types of force as well. This paper discusses the topic within the scope of the law of armed conflict. Thus, as clarified in the body, the term at issue here refers to only “armed force” for the purpose of this paper.

¹⁰⁹ *Id.* art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense [*sic*] if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

¹¹⁰ See generally ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL. (2004) (providing an overview of the limits to the Security Council’s discretion under Article 42 of the UN Charter).

¹¹¹ U.N. Charter, *supra* note 105, art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”).

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The significant part is that this analysis is also valid under the traditional perspective where the Korean Peninsula is still in the state of war, because both Koreas are subject to obligations under the UN Charter. According to the traditional perspective, a military provocation by North Korea would be a simple resumption of military operations allowed under the aforementioned Article 36 of the Hague Convention. However, as clearly affirmed in Article 103 of the UN Charter, the UN Charter is hierarchically superior to all other international treaties so that its provisions prevail in the event of a conflict with another treaty provision.¹¹²

Accordingly, although the Korean Armistice Agreement has constituted the state of armistice in the Korean Peninsula, the Armistice Agreement is not the primary or sole legal source of the status quo of armistice in the Korean Peninsula. In other words, the situation in the Korean Peninsula is sustained primarily by the UN Charter, a legal source superior to the Armistice Agreement. Even in a situation where the Korean Armistice Agreement is abolished or hostilities are recommenced properly pursuant to relevant rules of the Hague Convention, the use of force against each other is still prohibited fundamentally by the UN Charter.

Therefore, the use of armed force by North Korea against South Korea, unless justified by the right of self-defense or authorized by the Security Council, is a problematic matter related to violations of the UN Charter, and is beyond the scope of the Korean Armistice Agreement or the Hague Convention. This is further confirmed from the fact that North Korea argues the right of self-defense as an excuse for the shelling of Yeonpyeong Island.¹¹³ Subsequently, it would be more appropriate to interpret the status quo of the Korean Peninsula as practically in peacetime rather than in the continuous phase of wartime. In this regard, it may be further considered that the state of war, in the technical sense, has ended in the Korean Peninsula. It is not only due to the changes in state practice regarding an armistice under the new perspective but also, more importantly, due to the UN system.

If an act of aggression by North Korea constitutes a manifest violation of the UN Charter, then such conduct may further constitute a crime of aggression under Article 8 *bis* of the Rome Statute. For example, among seven acts of aggression stipulated in Article 8 *bis* (2) of the Rome Statute, the sinking of ROKS Cheonan may be qualify as “[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State” under Article 8

¹¹² Gregory Shaffer, *A Transnational Take on Krisch's Pluralist Postnational Law*, 23 EUR. J. INT'L L. 565, 568 (2012). Article 103 of the UN Charter provides that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” U.N. Charter, *supra* note 105, art. 103.

¹¹³ In regard to these two incidents, North Korea denies that it was responsible for the sinking of the Cheonan, and claims that its artillery strike on Yeonpyeong Island was in self-defense provoked by the South Korean maneuvers in disputed waters. See U.N. Dep't of Public Info., Press Conference on Situation in Korean Peninsula (June 15, 2010), available at http://www.un.org/News/briefings/docs/2010/100615_Cheonan.doc.htm; *US Supercarrier to Join Drills with S. Korea in Feb.*, KOREA TIMES (Feb. 15, 2011), http://www.koreatimes.co.kr/www/news/nation/2011/02/113_81400.html.

bis (2)(d).¹¹⁴ Alternatively, the shelling of Yeonpyeong Island would be the “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State” under Article 8 *bis* (2)(b).¹¹⁵

IV. Exercisability of the ICC’s Crime of Aggression Jurisdiction Under Article 15 *bis* of the Rome Statute over North Korea’s Aggression Against South Korea

As mentioned earlier, the ICC cannot exercise jurisdiction over the crime of aggression at least until after January 1, 2017. However, even if the Kampala amendments enter into force, the Court may exercise its crime of aggression jurisdiction only when certain conditions—more restricted than cases involving the crime of genocide, crimes against humanity and war crimes¹¹⁶—are satisfied, with the exception of cases of Security Council referrals.

According to Article 15 *bis* (5) of the Rome Statute, “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”¹¹⁷ This exemption of the ICC’s crime of aggression jurisdiction for Non-Party States applies to situations triggered either by State referrals or by *proprio motu* investigations of the Prosecutor. The Court may exercise jurisdiction over a crime of aggression arising from an act of aggression committed by a State Party, but only when the State Party has not previously declared to opt out of the amendments in accordance with Article 15 *bis* (4).¹¹⁸ In the meantime, the Prosecutor may initiate an investigation *proprio motu* in respect of a crime of aggression committed by a State Party only when either the Security Council has made a determination that an act of aggression committed by the State concerned or, where no such determination is made within six month of an incident, the Court’s Pre-Trial Division authorizes the Prosecutor to proceed with the investigation.¹¹⁹ However, “[a] determination of an act of aggression by an organ outside the

¹¹⁴ See Rome Statute of the International Criminal Court, *supra* note 34, art. 8 *bis* (2)(d).

¹¹⁵ *Id.* art. 8 *bis* (2)(b).

¹¹⁶ The ICC can exercise jurisdiction over the crime of genocide, crimes against humanity and war crimes in the following situations: (1) a situation in which one or more of such crimes appears to have been committed by a State Party’s national(s) or on a State Party’s territory, when either the situation is referred to the Prosecutor by a State Party, or the Prosecutor initiates an investigation *proprio motu*; or (2) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter. See Rome Statute of the International Criminal Court, *supra* note 34, arts. 12-15.

¹¹⁷ *Id.* art. 15 *bis* (5).

¹¹⁸ *Id.* art. 15 *bis* (4) stating,

The Court may . . . exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

Id.

¹¹⁹ *Id.* art. 15 *bis* (6)-(8).

Court shall be without prejudice to the Court's own findings under [the] Statute."¹²⁰

Accordingly, North Korea's acts of aggression cannot be subject to the ICC's crime of aggression jurisdiction with respect to State referrals or the Prosecutor's *proprio motu* investigations, because North Korea is not a State Party to the Rome Statute and Non-Party States are exempt from such jurisdiction. In other words, North Korea's alleged sinking of the Cheonan and the shelling of Yeonpyeong Island do not satisfy the preconditions to the ICC's exercise of jurisdiction over the crime of aggression even though these incidents occurred within the territory of South Korea.

Although the Court's exercise of jurisdiction is not subject to such constraints in cases of Security Council referrals, considering the fact that China and Russia are traditional allies of North Korea among the five permanent members of the UN Security Council and possesses the power to veto substantive votes, a situation involving North Korea would not be easily referred by the Security Council to the ICC. In fact, as mentioned earlier, when South Korea referred the incident of the Cheonan to the Security Council, China and Russia did not accept the outcome of the JIG's investigation of the sinking of the Cheonan. Rather, China and Russia succeeded in diluting the Security Council's presidential statement by avoiding directly linking the incident to North Korea¹²¹ and including North Korea's denial of involvement in the incident.¹²² In addition, there have been only two Security Council referrals in the history of the ICC since 2002.¹²³

Therefore, under the Kampala amendments, the ICC will not be able to exercise jurisdiction over the crime of aggression against North Korea absent a Security Council Referral, which will not be an easy case to make.

V. Legal Implications of the Kampala Amendments and Policy Recommendations

As previously discussed, under Article 15 *bis* of the Rome Statute, the ICC's crime of aggression jurisdiction would be limited to an instance where a crime of aggression stems from an act of aggression committed by a State Party and the State Party has not opted out of such jurisdiction against another State Party. In other words, even after the activation of the ICC's crime of aggression jurisdiction, absent a Security Council referral under Article 15 *ter*, the Court cannot exercise such jurisdiction where a crime of aggression is committed by a Non-Party State's nationals or on a Non-Party State's territory.

¹²⁰ *Id.* art. 15 *bis* (9).

¹²¹ Doo-hyong Hwang, *Key Security Council Members Agree to Draft on Cheonan's Sinking*, YONHAP (July 9, 2010), <http://english.yonhapnews.co.kr/national/2010/07/09/81/0301000000AEN20100709003700315F.HTML>.

¹²² *U.N. Condemns Attack of S. Korean Warship without Naming N. Korea*, YONHAP (July 9, 2010), <http://english.yonhapnews.co.kr/national/2010/07/09/81/0301000000AEN20100709003700315F.HTML>.

¹²³ The Security Council referred the ICC the situation in Darfur, Sudan in 2005 and the situation in Libya in 2011. See Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005); Press Release, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC /10187/Rev.1 (Feb. 26, 2011).

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Among several concerns that may be raised by such limitations, this paper focuses on prospective implications of such limitations upon the relationship between North and South Korea. In regard to aggression between North and South Korea, two scenarios can be envisaged. Scenario 1 is a situation similar to the sinking of the Cheonan or the shelling of Yeonpyeong Island in which North Korea commits a crime of aggression against South Korea. Scenario 2 is an opposite situation from Scenario 1, in which South Korea commits a crime of aggression against North Korea.

Under the current circumstances where North Korea is not a State Party and only South Korea is a State Party, the ICC cannot exercise its crime of aggression jurisdiction in either scenario, with respect to State referrals or *proprio motu* investigations of the Prosecutor, irrespective of whether South Korea has opted out of such jurisdiction or not. In Scenario 1, the Court's crime of aggression jurisdiction is not established because the crime of aggression at issue is committed by a Non-Party State, or by the nationals of a Non-Party State. In Scenario 2, the Court's such jurisdiction is not established because the crime of aggression at issue is committed against a Non-Party State, or on the territory of a Non-Party State. In sum, according to Article 15 *bis*, the Court cannot exercise its crime of aggression jurisdiction over a situation involving a Non-Party State, regardless of whether a Non-Party State attacks a State Party or a State Party attacks a Non-Party State.

Considering the frequency of military provocations by North Korea against South Korea, Scenario 1, in which North Korea is an aggressor, is much more likely to happen than Scenario 2, in which North Korea is a victim. In other words, North Korea would tend to be a potential perpetrator rather than a potential victim, whereas South Korea would tend to be a potential victim than a potential perpetrator. In this regard, the most problematic part of the Kampala amendments in relation to aggression between North and South Korea is that the ICC has no jurisdiction over a situation where a Non-Party State attacks a State Party. While Security Council referrals as to aggression committed by North Korea against South Korea would be still possible, China and Russia would likely stand by North Korea and may veto any such attempted referral.

It is highly unlikely that North Korea would join the Rome Statute. However, even if North Korea were to join the Rome Statute, North Korea could still—and would—exercise an opt-out declaration to avoid the ICC's jurisdiction over the crime of aggression triggered by a State Party referral or a *proprio motu* action of the Prosecutor. In this kind of situation, it would be strategically better for South Korea to exercise an opt-out declaration, even though South Korea might see itself as a potential victim State rather than a potential aggressor State. Otherwise only a crime of aggression committed by South Korea as in Scenario 2 would be subject to the Court's jurisdiction, while such jurisdiction would be excluded for a crime of aggression committed by North Korea as in Scenario 1.

As can be seen from the above analysis of Scenarios 1 and 2, the limitations upon the ICC's ability to exercise jurisdiction over the crime of aggression provide no incentive for either North or South Korea to accept the Court's crime of aggression jurisdiction. In addition, because of such limitations, the Court's

crime of aggression jurisdiction would be established mostly through a Security Council referral, which is seldom the case. As a result, the Kampala amendments do not have any significant legal implications on the relationship between North and South Korea except to the extent that the door for a Security Council referral is opened for the crime of aggression.

In sum, the Kampala amendments are inadequate to suppress aggression between North and South Korea and thus do not leverage peace and security on the Korean Peninsula under armistice. The scope of the ICC's jurisdiction over the crime of aggression should be the same as the Court's jurisdiction over the other three crimes under Article 12(2) of the Rome Statute in order to suppress future crimes of aggression—at least in regard to State referrals—considering that the crime of aggression inherently involves acts of aggression committed by perpetrators in foreign territories.¹²⁴

In accordance with Article 12(2), absent Security Council referrals, the ICC may exercise jurisdiction over genocide, crimes against humanity and war crimes where one or more of such crimes appears to have been committed either by a State Party's nationals or on a State Party's territory.¹²⁵ Accordingly, the sinking of the Cheonan and the shelling of Yeonpyeong Island, which occurred within the territory of South Korea,¹²⁶ satisfy the preconditions to the ICC's exercise of jurisdiction over war crimes, irrespective of nationality of the perpetrator.

¹²⁴ See Steven Nicholas Haskos, *An Argument for the Deletion of the Crime of Aggression from the Rome Statute of the International Criminal Court*, 23 *PACE INT'L L. REV.* 249, 258 (2011) ("The crime of aggression inherently involves action[s] taken by individuals in foreign territories.").

¹²⁵ Rome Statute of the International Criminal Court, *supra* note 34, art. 12(2).

¹²⁶ Both the sinking of ROKS Cheonan and the shelling of Yeonpyeong Island occurred in the South Korean side of the Northern Limit Line (hereinafter NLL). Yeonpyeong Island is just two miles from the NLL and only eight miles from the North Korean mainland. In the meantime, the location where the Cheonan was allegedly sunk by a North Korean torpedo is about one nautical mile off the southwest coast of Baengnyeong Island, ten miles from the North Korean shore, in the Yellow Sea. See Sung-ki Jung, *US to Join in Search for Missing S. Korean Sailors*, *KOREA TIMES* (Mar. 28, 2010), http://www.koreatimes.co.kr/www/news/nation/2010/03/205_63162.html; Robert Mackey, *A Line in the Sea Divides the Two Koreas*, *THE LEDE* (Nov. 23, 2010, 9:56 AM), <http://thelede.blogs.nytimes.com/2010/11/23/a-line-in-the-sea-divides-the-two-koreas/>; Leigh Montgomery, *East Asia's Top 5 Island Disputes*, *CHRISTIAN SCI. MONITOR* (Aug. 3, 2011), <http://www.csmonitor.com/World/Asia-Pacific/2011/0803/East-Asia-s-top-5-island-disputes/Takeshima-Dokdo-islands-claimed-by-Japan-and-South-Korea>; Sang-Hun Choe, *Korea Exchange Fire at Sea, Adding to Tension*, *N.Y. TIMES* (Jan. 27, 2010), http://www.nytimes.com/2010/01/27/world/asia/27korea.html?_r=0; *Report: South Korean Navy Ship Sinks*, *CNN WORLD* (Mar. 26, 2010), http://articles.cnn.com/2010-03-26/world/south.korea.ship.sinking_1_korean-broadcasting-system-kbs-north-korea?_s=PM:WORLD. North Korea refuses to recognize the NLL, insisting that the line was drawn unilaterally by the UN Command at the conclusion of the Korean War. See Andrew Salmon, *Why Border Hot-spot Is Korean War Relic*, *BBC NEWS ASIA-PACIFIC* (Nov. 25, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-11839284>. For example, North Korea has claimed a "North Korean Military Demarcation Line in the West Sea (Yellow Sea)" since 1999, demanding the border line be drawn further to the south. See Zou Keyuan, *Disputing or Maintaining the Marine Legal Order in East Asia?*, 2 *CHINESE J. INT'L L.* 449, 486-87 (2002); *N. Korea Warns of Military Action over Naval Clash*, *KOREA TIMES* (Nov. 13, 2009), http://www.koreatimes.co.kr/www/news/nation/2009/11/113_55432.html. However, the NLL is still considered to be the *de facto* maritime demarcation line in the Yellow Sea between North and South Korea, and the current demarcation of the NLL would most likely remain for some time. See Terence Roehrig, *Korean Dispute over the Northern Limit Line: Security, Economics, or International Law?*, 2008 *MD. SERIES IN CONTEMP. ASIAN STUD.* 1, 58 (2008), available at <http://digitalcommons.law.umaryland.edu/mscas/vol2008/iss3/1>.

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Likewise, if those preconditions to the ICC's exercise of jurisdiction under Article 12 become applicable to the Court's jurisdiction over the crime of aggression, Scenario 1 may fall within the jurisdiction of the Court. This change might subsequently lead to the deletion of Article 15 *bis* (5) as well, and then Scenario 2 may also fall within the jurisdiction of the Court. Even if the opt-out clause of Article 15 *bis* (4) survives, there will be less chance that South Korea, or State Parties that sees themselves as potential victims, would exercise such right under the proposed circumstances than under the current Kampala amendments. In these circumstances, moreover, the opt-out clause might be able to work to entice North Korea or Non-Party States that sees themselves as potential aggressors to join the ICC.

VI. Conclusion

The inclusion of the crime of aggression under the jurisdiction of the ICC is indispensable to fulfill the Court's *raison d'être*, including putting an end of impunity, preventing the commission of future crimes, fostering respect for international justice,¹²⁷ and reaffirming the purposes and principles of the UN Charter, in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independent of any State.¹²⁸ The ICC's long awaited jurisdiction *ratione materiae* over the substantive crime of aggression,¹²⁹ however, does not seem to be enough to fulfill those goals.

This paper has so far examined the issue of whether the Kampala amendments, upon activation, would be adequate to put an end of impunity for the crime of aggression, prevent the commission of future crimes of aggression and eventually guarantee peace and security in the international community—particularly in the Korean Peninsula under armistice. The paper has approached the issue by examining the applicability of the definition of the crime of aggression under the Rome Statute and the exercisability of the ICC's crime of aggression jurisdiction over North Korea's aggression against South Korea. In discussing the legal implications of the Kampala amendments, the paper has further considered the opposite situation as well—South Korea's aggression against North Korea (although far less likely to occur).

In short, the Kampala amendments would not sufficiently function effectively enough to suppress aggression between North and South Korea—or, furthermore, between a Non-Party State and a State Party—and thus cannot leverage peace and security in the Korean Peninsula or otherwise benefit the international community. It is mainly because the ICC cannot exercise its crime of aggression

¹²⁷ Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 *VAND. J. TRANSNAT'L L.* 405, 472 n.339 (2012) (“... the Rome Statute's preamble mentions various goals for the International Criminal Court, including: putting an end to impunity, preventing the commission of future crimes, and fostering respect for international justice.”); see also Regina E. Rauxloh, *Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining*, 10 *INT'L CRIM. L. REV.* 739, 739 (2010) (“The most important function of international criminal justice is the restoration of peace.”).

¹²⁸ Rome Statute of the International Criminal Court, *supra* note 34, pmbl.

¹²⁹ Charles Chernor Jalloh, *Africa and the International Criminal Court: Collision Course or Cooperation?*, 34 *N.C. CENT. L. REV.* 203, 221 (2012).

jurisdiction over a situation involving a Non-Party State, regardless of whether a Non-Party State attacks a State Party or vice versa.

Article 15 *bis* of the Rome Statute would inherently restrict the ICC's crime of aggression jurisdiction to where a crime of aggression stems from an act of aggression committed by a State Party that has not opted out of such jurisdiction against another State Party. In other words, even after the activation of the ICC's crime of aggression jurisdiction, the Court cannot exercise such jurisdiction where a crime of aggression is committed by a Non-Party State's nationals or on a Non-Party State's territory absent a Security Council referral under Article 15 *ter*.

Therefore, for the suppression of future crimes of aggression, at least in regard to State referrals, the scope of the ICC's jurisdiction over the crime of aggression should be made the same as the Court's jurisdiction over other three crimes under Article 12(2) of the Rome Statute. If that were so, the Court would be able to exercise its jurisdiction where a crime of aggression is committed either by a State Party's nationals or in a State Party's territory. Under this suggested modification, the Court's jurisdiction may include a crime of aggression committed either by a Non-Party State against a State Party or by a State Party against a Non-Party State. Future crimes of aggression would thereupon become more effectively suppressed and subsequently peace and security in the international community, as well as the Korean Peninsula, would be more secured. North Korea's recent missile test in December 2012¹³⁰ and nuclear test in February 2013¹³¹ as well as its ongoing series of escalating war threats as of the time of writing¹³² may additionally indicate the necessity of such modification on the ICC's crime of aggression jurisdiction.

¹³⁰ North Korea launched a long-range rocket on December 12, 2012. North Korea has frequently dismissed accusations that it uses rocket launches as a cover to test its ballistic missile technology, which, if perfected, could give the regime a projectile capable of reaching the U.S. mainland. North Korea insists that the rocket launch was intended to send an Earth observation satellite into orbit. Justin McCurry & Tania Branigan, *North Korea Launches Successful Rocket in Face of Criticism*, GUARDIAN (Dec. 12, 2012), <http://www.guardian.co.uk/world/2012/dec/12/north-korea-launches-rocket>.

¹³¹ On February 12, 2013, North Korea announced that it had conducted its third underground nuclear test in seven years and further claimed that the test detonated a miniaturized and lighter nuclear device. *North Korea's Nuclear Tests*, BBC NEWS ASIA (Feb. 12, 2013), <http://www.bbc.co.uk/news/world-asia-17823706>.

¹³² North Korea has raised political tensions on the Korean Peninsula with a barrage of bombastic comments directed at its enemies South Korea and the United States. Chelsea J. Carter & Kevin Voigt, *North Korea's War of Words Escalates - Timeline of a Crisis*, CNN (Apr. 11, 2013), <http://edition.cnn.com/2013/04/10/world/asia/north-korea-threats-timeline>. For example, on March 8, 2013, North Korea announced that it was withdrawing from all non-aggression pacts with South Korea, closing its Red Cross hotline between Pyongyang and Seoul and shutting its shared border point. *North Korea Ends Peace Pacts with South*, BBC WORLD ASIA (Mar. 8, 2013), <http://www.bbc.co.uk/news/world-asia-21709917>. On March 13, 2013, North Korea confirmed that it has shredded the 1953 Armistice Agreement and warned that the next step was an act of merciless military retaliation against its enemies. Agence France-Presse, *North Korea Confirms End of War Armistice*, JAKARTA GLOBE (Mar. 13, 2013), <http://www.thejakartaglobe.com/international/north-korea-confirms-end-of-war-armistice/579452/>. On April 9, 2013, North Korea warned foreigners that they might want to leave South Korea because the peninsula was on the brink of nuclear war. Sang-hun Choe & David E. Sanger, *North Korea Warns It Is on Brink of Nuclear War with South*, N.Y. TIMES (Apr. 9, 2013), http://www.nytimes.com/2013/04/10/world/asia/south-korean-leader-seeks-to-end-vicious-cycle-with-north.html?pagewanted=all&_r=0.