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AN OVERVIEW OF THE NEWLY ADOPTED INTERNATIONAL CRIMINAL COURT DEFINITION OF THE CRIME OF AGGRESSION

Jennifer Trahan^{*}

INTRODUCTION

From May 31 to June 11, 2010, a significant event occurred in Kampala, Uganda: the first ever Review Conference to consider amendments to the International Criminal Court's Statute. At the conference, agreement was reached by States Parties to the International Criminal Court ("ICC") to adopt an amendment to the Rome Statute,¹ adding, *inter alia*, the definition of the crime of aggression as well as conditions for the ICC's exercise of jurisdiction over it.²

The fact that States Parties reached this agreement was a significant advancement for the rule of law. Over the years, many States Parties supported these negotiations, including some of the U.S.'s closest allies.³ States Parties also expressed broad support for the amendment during the

^{*}Assistant Clinical Professor of Global Affairs, N.Y.U.-S.C.P.S. Professor Trahan attended negotiations on the crime of aggression, including the International Criminal Court Review Conference in Kampala, Uganda, as an NGO observer for the Association of the Bar of the City of New York, a member of the American Bar Association 2010 International Criminal Court Task Force, and Chair of the American Branch of the International Law Association International Criminal Court Committee. These remarks were originally delivered as a speech on April 1, 2011, at St. John's School of Law, as part of a symposium entitled "Challenges to International Law, Challenges from International Law: New Realities and the Global Order."

¹"Rome Statute" refers to the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Rome Statute requests the U.N. Secretary-General to convene a Review Conference to consider amendments to the Statute seven years after its entry into force. *See id.*, art. 123(1).

²The text of the amendment can be found at Resolution RC/Res.6, advance version, 28 Jun 2010, available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf. [last visited Mar. 8, 2012].

³The U.K., Australia, France, Germany and Japan, for example, are all Rome Statute States Parties. *See* International Criminal Court, "*The States Parties to the Rome Statute*," <http://www.icc-cpi.int/Menus/ASP/states+parties/>. All of these countries to one degree or another have been supportive of the crime of aggression negotiations. France and the U.K. took a strong position on what should be the role of the Security Council (discussed below), and Japan, in particular, expressed concern about the process by which the amendment was accomplished (also discussed below). But, at a minimum, none of these states opposed adoption of the crime of aggression amendment, which was ultimately done by consensus vote, meaning that any one of them could have blocked the adoption.

2010 session of the Assembly of States Parties (“ASP”).⁴ This support for adoption of the crime of aggression is not shared by all states, and, even among States Parties, there is no doubt some diversity of views as to the merits of the final agreement.

While not the focus of this essay, it is worth noting the two other amendment proposals at issue during the Review Conference. One related to adding certain war crimes that had previously been covered if committed during international armed conflict; they now would become ICC war crimes if committed during non-international armed conflict.⁵ The other proposal was to delete existing article 124 from the Rome Statute. That article provides that when a State Party initially ratifies the Rome Statute it may exercise an opt out of war crimes jurisdiction for seven years.⁶ The proposal to add the additional war crimes was also adopted,⁷ while voting on article 124 was deferred.⁸

Also on the Review Conference agenda was a “stocktaking” of the field of international justice consisting of four panels on: (i) the impact of the Rome Statute system on victims and affected communities, (ii) peace and justice; (iii) complementarity, and (iv) cooperation.⁹

⁴ See Assembly of States Parties to the Rome Statute of the International Criminal Court, December 6-10, 2010, *Ninth Session*, ICC-ASP/9/20. Notes of statements by States Parties on file with the author.

⁵ See Rev. Conf. of the Rome Statute, 12th plenary meeting, June 10, 2010, I.C.C. Doc RC/Res.5, Annex 1, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf.

⁶ Article 124 states:

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Rome Statute, *supra* note 1, art. 124. Only Chile and France have utilized this provision.

⁷ See R.C. Res. 5, *supra* note 6.

⁸ For discussion of the decision not to delete article 124, see Roger S. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May - 11 June 2010*, 2 GOETTINGEN J. INT'L L. 689, 691–92 (2010).

⁹ See, e.g., Press Release, International Criminal Court, Stocktaking of International Criminal Justice: Peace and Justice (Mar. 6, 2010), available at http://www.icccpi.int/Menus/-ASP/Press+Releases/Press+Releases+2010/Stocktaking+of+international+criminal+justice_+Peace+and+Justice.htm. While it was significant to hold these panels, ultimately, their importance depends on the extent to which they motivate continued, sustained State Party involvement in these areas.

I. HISTORICAL PRECEDENT FOR THE CRIME OF AGGRESSION

The idea of prosecuting the crime of aggression is hardly new. The U.S. spearheaded such prosecutions before the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (Tokyo).¹⁰ The Nuremberg Tribunal deemed “crimes against peace” to be “*the supreme international crime, only differing from other war crimes in that it contains within itself the accumulated evil of the whole.*”¹¹

The prohibition of aggressive use of force is, of course, also enshrined in the U.N. Charter. Article 2(4) precludes use of force against the “territorial integrity” or “political independence” of any state.¹² Two key exceptions are authorized U.N. Security Council Chapter VII enforcement actions,¹³ and the use of individual or collective self-defense authorized under article 51.¹⁴

Thus, the notion that aggressive use of force is both: (1) *prohibited*, as it is under the U.N. Charter, and (2) *a crime*, as was recognized by the Nuremberg and Tokyo Tribunals, rests on sound historical foundation. After Nuremberg, however, the crime admittedly fell into disuse; we see neither similar prosecutions nor similar tribunals created.¹⁵ The most one

¹⁰ The Tokyo Tribunal was U.S.-dominated. The Nuremberg Tribunal was originally established by the U.S., U.K., France and U.S.S.R. in the London Charter of the International Military Tribunal, August 8, 1945. See International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1950; see also Zang Wanghong, *From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (On the Sixtieth Anniversary of the Trials)*, 27 CARDOZO L. REV. 1673, 1676 (2006) (comparing America’s unilateral domination of the Tokyo Tribunal, the statute of which was drafted entirely by America, to the Nuremberg Charter, backed by the four Allied powers).

¹¹ See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 186 (1946), available at http://www.loc.gov/frd/Military_Law/pdf/NT_Vol-1.pdf.

¹² Article 2(4) states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

¹³ See U.N. Charter, ch. VII (enumerating actions the U.N. may take with respect to threats to the peace, breaches of the peace, and acts of aggression).

¹⁴ See U.N. Charter, art. 51 (reserving the right of self-defense for U.N. members in the event of an armed attack). A third use of force that some would argue to be implicitly allowable under the U.N. Charter is humanitarian intervention, although admittedly there is no express provision in the Charter providing for it. Recent formulations of the “responsibility to protect” doctrine, however, suggest that forceful humanitarian intervention still should receive Security Council authorization. See, e.g., 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) (recognizing Security Council authority to decide on a case-by-case basis whether to intervene).

¹⁵ There were no international tribunals created after the Nuremberg and Tokyo

sees is the U.N. General Assembly, in 1974, defining aggression for purposes of giving guidance to the Security Council, in G.A. resolutions 3314.¹⁶

A. The Rome Statute's "Placeholder" & Ensuing Negotiations

In 1998, however, a very significant decision was made in finalizing the Rome Statute: there would be *four crimes* over which the ICC would have jurisdiction—genocide, war crimes, crimes against humanity, *and the crime of aggression*.¹⁷ But the Rome Statute created something of a “placeholder” as to the crime of aggression. Article 5(2) of the Statute provided that before the ICC may exercise jurisdiction over the crime, both the definition and conditions for the exercise of jurisdiction needed to be adopted.¹⁸

Following agreement on the Rome Statute, over 10 years of negotiations on these topics ensued,¹⁹ first before the Preparatory Commission of the

Tribunals until the creation by the U.N. Security Council in 1993 and 1994 respectively of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 5, 1993) (establishing the Yugoslav Tribunal); *see also* S.C. Res. 955, U.N. Doc. S/RES/995 (Nov. 8, 1994) (establishing the Rwanda Tribunal). Because collective Security Council action was generally blocked by Soviet-U.S. rivalry during the Cold War, it is only with the demise of the Cold War that the creation of such tribunals through the Security Council became possible.

¹⁶ *See* G.A. Res. 3314 (XXIX), Annex, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974). Numerous states also came to incorporate the crime of aggression, in one form or another, into their domestic criminal codes. *See* Astrid Reisinger Coracini, *National Legislation on Individual Responsibility for Conduct Amounting to Aggression*, in *INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW* 547–48, n. 29 (Roberto Bellelli ed., 2010).

¹⁷ *See* Rome Statute, *supra* note 1, art. 5(1) (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) [t]he crime of genocide; (b) [c]rimes against humanity; (c) [w]ar crimes; [and] (d) [t]he crime of aggression.”) (emphasis added).

¹⁸ Article 5(2) of the Rome Statute stated: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” *See* Rome Statute, *supra* note 1, art. 5(2). This provision was deleted at the Review Conference.

¹⁹ Indeed, negotiations on the crime of aggression even preceded agreement on the Rome Statute. Certain drafting work as to the crime occurred before and in Rome, with a number of state proposals and a working group just prior to the Rome Conference. Interview with Jutta Bertram-Nothnagel, Permanent Representative of the *Union Internationale des Avocats* to the International Criminal Court.

International Criminal Court in the years 1999 to 2002,²⁰ then before the Special Working Group on the Crime of Aggression (“SWGCA”) from 2003 to 2009,²¹ and finally at remaining Assembly of States Parties meetings prior to the Review Conference.²²

The U.S. chose not to attend the meetings of the Special Working Group on the Crime of Aggression. The U.S., of course, is a non-State Party to the ICC Statute, but was nonetheless able to attend and participate in these negotiations—Russia and China (also non-States Parties) did.²³ The decision not to attend the negotiations was made by the U.S. under the past administration. It did, however, put the U.S. at a distinct disadvantage when the Obama administration decided the U.S. should join the negotiations.²⁴ The U.S. negotiating team had missed a key period of time when essentially both the definition and elements of the crime²⁵ had been agreed upon.²⁶

²⁰ The Preparatory Commission was created by Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of An International Criminal Court. *See* U.N. Doc. A/CONF.183/10 (July 17, 1998), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/241/85/PDF/N/9824185.pdf?OpenElement>.

²¹ These negotiations were masterfully chaired by Leichtenstein Permanent Representative of the ICC Assembly of State Parties, H.E. Christian Wenaweser and H.R.H. Prince Zeid Ra-ad Al-Hussein, Ambassador of the Hashemite Kingdom of Jordan to the U.N., with the extremely able assistance of Leichtenstein Deputy Permanent Representative Stefan Barriga.

²² Once the Special Working Group’s mandate ended, discussions on the crime of aggression continued at the Eighth Session of the Assembly of State Parties of the International Criminal Court (in The Hague, in November 2009), and the Resumed Eighth Session of the Assembly of State Parties of the International Criminal Court (at The U.N., in March 2010). *See* International Criminal Court, Report of the Working Group on the Review Conference – Resumed Eighth Session (July 10, 2009), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/OR-ASPR8-Annex.II-ENG.pdf; *see also* International Criminal Court, Assembly of State Parties, Annotated List of Items Included in the Provisional Agenda, ICC-ASP/8/48/Add.1/Rev.1 (Mar. 18, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-48-Add.1-Rev.1-ENG.pdf.

²³ Observations of the author, meetings of the SWGCA in Princeton, N.J. The Russian delegation participated in the negotiations, although the Chinese delegation primarily did not. *See* International Criminal Court, Assembly of State Parties, Informal Inter-Session Meeting of the Crime of Aggression, Hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School at the Princeton Club, ICC-ASP/8/INF.2 (July 10, 2009), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-5-SWGCA-INF1_English.pdf.

²⁴ The U.S. delegation attended the Eighth Session of the ASP and attended and participated in the Resumed Eighth Session, both of which occurred after the completion of the work of the SWGCA.

²⁵ The elements of the crime of aggression were also adopted at the Kampala Review Conference. The elements of the crime of aggression are as follows:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to

II. THE AGREEMENT REACHED AT THE REVIEW CONFERENCE

A. *The Definition of the Crime of Aggression*

While there were many complex issues discussed over the years of negotiations as to both the definition and conditions for the exercise of jurisdiction,²⁷ this essay will highlight a few key provisions of the final agreement reached.

In terms of the definition, as befitting its historical roots, the language primarily consists of an amalgamation of text from the U.N. Charter, the London Charter establishing the Nuremberg Tribunal,²⁸ and U.N. General Assembly resolution 3314.²⁹ The definition consists of both a definition of

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.

Resolution RC/Res.6, *supra* note 2, at Annex II.

²⁶ What had been the definition of the crime by the time of the final SWGCA meeting became the definition adopted at the Review Conference. See Stefan Barriga & Leena Grover, *Current Developments: A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT'L L. 517, 521 (2011) (discussing the historical development of the definition of the crime of aggression).

²⁷ It is beyond the scope of this essay to discuss all of the details of the definition's text. For the most comprehensive compilation of the work of the Special Working Group, see THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003-2009 (Stefan Barriga et al. eds., 2009) [hereinafter THE PRINCETON PROCESS]. For discussion of the various competing proposals presented during the Review Conference, see Jennifer Trahan, *The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT'L CRIM. L. REV. 49 (2011) [hereinafter *Kampala Negotiations*]. For an article raising concerns about the definition, see Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71 (2010). This author believes that many of Glennon's concerns are overstated or based on a mistaken reading of the definition. See Jennifer Trahan, *A Meaningful Definition Of The Crime Of Aggression: A Response To Michael Glennon*, 33 U. PA. J. INT'L L. 101 (forthcoming 2012).

²⁸ The "London Charter" refers to the London Charter of the International Military Tribunal. See Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter "London Charter"].

²⁹ See G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

the “crime of aggression” (that is, the act that the individual would commit), in paragraph 1, as well as the “act of aggression” (that is, the act that the state would commit), in paragraph 2.

The crime of aggression covers:

8. *bis.* 1. . . . 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.³⁰

A few key features are of note.

1. *Planning, preparation, initiation or execution covered*

First, the relevant verbs in the definition of the crime are “planning, preparation, initiation or execution.” These words basically are taken from the definition used in the Nuremberg Charter.³¹

2. *The leadership nature of the crime*

Second, the crime would only cover “a person in a position effectively to exercise control over or to direct the political or military action of a State.”³² This means that the crime is a “leadership” crime, one that would not cover ordinary armed forces or even those fairly high up the chain of command.³³

³⁰ Resolution RC/Res.6, advance version, *supra* note 2, at Annex 1 [hereinafter “New Def.”], art. 8*bis*, para. 1.

³¹The London Charter defined “crimes 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.” London Charter, *supra* note 28, Art. 6(a) (emphasis added).

³² See New Def., *supra* note 30, art. 8*bis*, para. 1.

³³ Not all “leaders” would be covered, but only those “in a position effectively to exercise control over or to direct the political or military action of a State.” New Def., *supra* note 30, art. 8*bis*, para. 1. A corollary amendment to Rome Statute article 25 (individual criminal responsibility) was also agreed upon at the Review Conference. It would add a new 3*bis* to article 25(3): “In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.” New Def., *supra* note 30, Annex I, para. 5.

3. Requiring a “manifest” U.N. Charter violation

Third, the crime covers an “act of aggression, which, by its character, gravity and scale, constitutes a *manifest violation*” of the U.N. Charter.³⁴ Thus, there is a “threshold” that would need to be satisfied: there must be a “manifest” Charter violation. To evaluate what is a “manifest” violation, one would examine the “character, gravity and scale” of the state’s act.³⁵ Accordingly, state uses of force of insufficient “gravity” or “scale,” such as *de minimis* border incursions, would be excluded.³⁶ State uses of force without the “character” to constitute a manifest Charter violation also would be excluded, thereby excluding humanitarian intervention, admittedly, a legal “grey area.”³⁷

B. The Definition of the Act of State of Aggression

The next paragraph defines the state act of aggression. It states:

2. “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. . . .³⁸

³⁴ See New Def., *supra* note 30, art. 8*bis*, para 1 (emphasis added).

³⁵ The requirement of examining all three criteria (or at least two of the three criteria), and that no single criterion could suffice, is further emphasized by Understanding 7, also adopted at the Review Conference. Understanding 7 provides: “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.” Resolution RC/Res.6, advance version, Annex III, Understanding 7.

³⁶ Thus, for example, “the requirement that the character, gravity and scale of an act of aggression amount to a manifest violation of the Charter would ensure that a minor border skirmish would not be a matter for the Court to take up.” See THE PRINCETON PROCESS, *supra* note 27, at 8.

³⁷ See ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 322 (2010) (“There is controversy over whether there is also an exception for humanitarian intervention.”); see also Claus Kress, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 EUR. J. INT’L L. 1129, 1140 (“[T]he international legality of a genuine humanitarian intervention, such as the 1999 NATO air campaign in Kosovo, is also open to genuine debate, and is thus excluded from the scope of [then] draft Article 8*bis* of the ICC Statute.”). The U.S.’s proposed understanding that “humanitarian intervention” be excluded from the definition, however, was not adopted at the Review Conference. See Trahan, *Kampala Negotiations*, *supra* note 27, at 73–78 (2011) (discussing the U.S.’s proposed understandings and those that were adopted).

³⁸ See New Def., *supra* note 30, art. 8*bis*, para. 2.

This language basically tracks the text of article 2(4) of the U.N. Charter.³⁹ Then, there is a list of acts that would constitute an “act of aggression”:

- a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁴⁰

To the extent that any of these acts would be authorized by the Security Council or constitute individual or collective “self-defense,” they would not be covered, as they would not satisfy the requirements of paragraph 1 (“crime of aggression”). Similarly, the acts expressly listed would still be subject to the threshold in paragraph 1, that there must be a “manifest” violation of the Charter, which would exclude any *de minimis* or legally debatable acts, even if listed.⁴¹

³⁹ Article 2(4) does not, however, include the word “sovereignty.” See U.N. Charter art. 2, para. 4. U.N. General Assembly Resolution 3314, by contrast, does. See G.A. Res. 3314 (XXIX), *supra* note 29.

⁴⁰ See New Def., *supra* note 30, art. 8bis, para.2. The list is preceded by the following language: “[a]ny of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.” *Id.*

⁴¹ Additional provisions in the Rome Statute that protect against bringing legally borderline cases include: (i) Article 31(3)’s exclusion of criminal responsibility if conduct is permissible under applicable law; (ii) Article 21’s inclusion of principles and rules of

C. *The Conditions for the Exercise of Jurisdiction*

Turning to the issue of the conditions for the exercise of jurisdiction, this was a topic heatedly debated over the more than ten years of negotiations. Basically, two primary competing positions developed.⁴² One was basically advanced by the permanent members of the Security Council and their supporters. They took the position that article 39 of the U.N. Charter states that the Security Council determines what is a “threat to the peace, breach of the peace *or act of aggression*,”⁴³ and, therefore, the Security Council must be the *only* body capable of referring an ICC aggression prosecution. Other states generally responded to this argument that article 39 is in the context of Chapter VII of the Charter, and therefore for enforcement purposes, not criminal law adjudication. States also expressed concern over a political body (the Security Council) have exclusive say over the docket of a judicial institution (the ICC) vis-à-vis crime of aggression adjudications. Alternative positions were that either the International Court of Justice or the General Assembly could be involved in making the initial determination of whether a state act of aggression had occurred, before triggering an ICC case.⁴⁴ These alternatives, however, eventually fell to the wayside. The other key competing position became that the ICC could simply decide itself whether there had been a state act of aggression—that there need be no other body making this determination. Another key issue entering into the Review Conference negotiations was which amendment procedure would be used to accomplish the amendment.⁴⁵

international law; (iii) the requirement of proof beyond a reasonable doubt, and (iv) the principle in *dubio pro reo* (a defendant may not be convicted when doubts about guilt remain).

⁴² What follows is admittedly a gross simplification of the many positions articulated, but it distills some of the key issues and concerns.

⁴³ See U.N. Charter, art. 39 (emphasis added).

⁴⁴ See, e.g., International Criminal Court, Assembly of States Parties, Report of the Special Working Group on the Crime of Aggression, ICC Doc. ICC-ASP/7/20/Add.1, Annex II (Feb. 9-13, 2009) (draft proposal still listing the General Assembly and International Court of Justice as options for consideration).

⁴⁵ While it is beyond the scope of this essay to fully discuss this issue, the primary competing positions were whether the amendment should be accomplished using Rome Statute article 121(4) or 121(5). Article 121(4) would have provided that the amendment would enter into force after ratification by seven-eighths of States Parties, and then bind all State Parties. See Rome Statute, *supra* note 1, art. 121(4). Article 121(5) states:

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

This essay will highlight a few key features of the jurisdictional agreement reached at the Review Conference.

1. Security Council or ICC as “Trigger” Mechanisms

First, in terms of the question of the Security Council or another body (or no other body) making an initial determination that there had been a state “act of aggression,” two provisions were adopted at the Review Conference. Under new article 15*ter*, the Security Council may refer a situation of suspected aggression to the ICC.⁴⁶ But another mechanism was also agreed upon: under new article 15*bis*, the case may be triggered by State Party referral or the Prosecutor’s own *proprio motu* initiation, coupled by ICC Pre-Trial Division review.⁴⁷ This outcome is designed to at least partly satisfy supporters of both of the two primary competing positions—both the Security Council and the ICC (with Pre-Trial Division authorization) would be able to make the initial determination.⁴⁸

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

Rome Statute, *supra* note 1, art. 121(5). The ultimate resolution adopting the crime of aggression amendment states that the amendment is under article 121(5). See Resolution RC/Res.6, *supra* note 2, at para.1 (the amendment “shall enter into force in accordance with article 121, paragraph 5”). There is, however, still some lack of clarity as to how the amendment process is to occur. For a discussion of competing views, see Beth van Schaack, *Entry Into Force of Aggression Amendments*, INTLAWGRRLS (May 5, 2011, 5:04 AM), <http://intlwgrrls.blogspot.com/2011/05/entry-into-force-of-aggression.html> and responding post, Jennifer Trahan, *Construing Consent: ICC Amendments on the Crime of Aggression*, INTLAWGRRLS (August 2, 2011, 5:10 AM), <http://intlwgrrls.blogspot.com/2011/08/construing-consent-icc-amendments-on.html>.

⁴⁶ See New Def., *supra* note 30, art. 15*ter*, para. 1 (“The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article”). Importantly, if the Security Council makes the initial determination, it would in no way bind the ICC, which would conduct its own *de novo* review as to whether the act of states of aggression had occurred. See New Def., *supra* note 30, art. 15*ter*, para. 4 (“A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.”). This provision was seen as extremely important for preserving the ICC’s judicial independence, and protecting the rights of the accused by maintaining the presumption of innocence and the burden of proof upon the prosecution. See, e.g., June 2006 Princeton Meeting, in THE PRINCETON PROCESS, *supra* note 27, at 151 (“Many participants voiced a strong preference for a determination [made by an outside organ] that was open for review by the Court, in particular in order to safeguard the defendant’s right to due process. The Prosecutor would bear the burden of proof regarding all elements of the crime, including the existence of an act of aggression . . .”).

⁴⁷ New Def., *supra* note 30, art. 15*bis*, paras. 6-8.

⁴⁸ Under article 15*ter*, the Security Council would serve as both the referral mechanism and the “filter” mechanism, but under article 15*bis*, a State Party or the Prosecutor would

2. Exclusion of Non-States Parties from Jurisdiction

A second key feature of the jurisdictional regime agreed upon is that the nationals of, and the crimes committed in the territory of, non-States Parties are completely excluded from ICC crime of aggression jurisdiction for purposes of State Party referral or Prosecutor *proprio motu* action.⁴⁹ The exclusion would not impact Security Council referrals. This means that the U.S. (as a non-States Party to the Rome Statute) will be completely insulated from the ICC's crime of aggression jurisdiction (even when it commences) as to its national and crimes committed in its territory. While the exclusion only covers State Party referrals and Prosecutor initiated actions, because the U.S. sits as a permanent member on the U.N. Security Council, it will be effectively insulated from Security Council referrals as well, due to its ability to exercise veto power over substantive votes.

The exclusion of non-States Parties is even more comprehensive than the current exclusion of non-State Parties in the Rome Statute. The aggression exclusion would exclude from jurisdiction (a) the nationals of a non-State Party even if they commit a crime in the territory of a State Party; and (b) the nationals of a State Party even if they commit a crime in the territory of a non-State Party—neither of which is the case under the original Rome Statute.⁵⁰

While certain States Parties no doubt viewed this exclusion of non-States Parties from ICC crime of aggression jurisdiction as unfortunate (or even reprehensible) in placing them above the rule of law, other states supported it, and the exclusion likely was critical to reaching agreement on the Kampala negotiations.⁵¹

serve as the referral mechanism and the Pre-Trial Division would serve as the filter.

⁴⁹ New Def., art. 15*bis*, para. 5 provides: "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory."

⁵⁰ See Rome Statute, *supra* note 1, art. 12(2)(a)-(b) (for the crimes of genocide, war crimes, and crimes against humanity, jurisdiction is created: (1) over crimes committed in the territory of a State Party—even if committed by a national of a non-State Party, and (2) over crimes committed by nationals of a State Party—even if committed in the territory of a non-State Party).

⁵¹ The ultimate amendment, as noted above, was adopted by consensus. Thus, consensus could have been blocked by any one State Party (such as the U.K. or France) had the exclusion of non-States Parties from jurisdiction (apparently insisted on by several states) not been included. Observations and discussion of the author at the Review Conference.

3. “Opt Out” Declarations for States Parties

A third feature of the jurisdictional regime is that even States Parties will be able to avoid aggression jurisdiction by exercising an “opt out” declaration.⁵² Again, there are no doubt differing views on the merits of this provision. The bottom line is that states will have control over whether or not to agree to the ICC’s jurisdictional regime as to the crime of aggression—whether to (a) remain a non-State Party (and thus outside the Rome Statute system), or (b) exercise an “opt out” declaration (thereby staying within the Rome Statute system vis-à-vis the crimes of genocide, war crimes and crimes against humanity, but avoiding crime of aggression jurisdiction, at least temporarily).⁵³

4. Start Date Delayed

Fourth, a final significant aspect about the jurisdictional regime agreed upon is that none of this will start immediately. Before ICC crime of aggression jurisdiction may commence: (1) 30 States Parties must ratify the aggression amendment; (2) one year must pass after the 30th ratification; and (3) there must be one more vote before the ASP that passes either by two-thirds or consensus, to occur no sooner than January 2, 2017.⁵⁴

III. ASSESSING THE OUTCOME

Emerging from the Review Conference negotiations, there is now a concrete definition of the crime of aggression. Even if state actions are not technically covered by ICC aggression jurisdiction—certainly the case until 2017, and even the case beyond then vis-à-vis non-States Parties and States Parties that exercise “opt out” declarations⁵⁵—the definition may nonetheless prove significant. It may help create moral pressure against state uses of aggressive force that are neither authorized by the Security

⁵² Article 15*bis*, para. 4 provides: “The Court may, in accordance with article 12, 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. . . .” New Def., *supra* note 30, art. 15*bis*, para. 4.

⁵³ The text of the amendment suggests that a State Party exercising an opt out declaration would need to re-consider within three years of its initial filing whether to still retain the opt-out declaration. *See* New Def., *supra* note 30, art. 15*bis*, para. 4 (“The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.”). New Def., *supra* note 30, art. 15*bis*, para. 4.

⁵⁴ *See* New Def., *supra* note 30, art. 15*bis*, paras. 2-3; *id.*, art. 15*ter*, paras. 2-3.

⁵⁵ The exclusion of non-States Parties and the use of opt out declarations would only prevent State Party referrals and cases initiated by the Prosecutor, but not those referred by the Security Council. *See* New Def., *supra* note 30, art. 15*bis*.

Council, individual or collective self-defense, nor humanitarian in nature. The definition also creates a clear “benchmark” against which, in the future, to evaluate state uses of force. After January 1, 2017, there may be actual ICC jurisdiction, thus potentially providing a more concrete deterrent against aggressive uses of force for states subject to crime of aggression jurisdiction.

It remains to be seen which States Parties will ratify the amendment and/or exercise “opt out” declarations, so how much jurisdiction the ICC will eventually be able to exercise as to the crime of aggression (particularly regarding State Party referrals and Prosecutor initiations) is still unclear. Certainly, once Security Council referrals are able to commence, that has the potential to create broader deterrence, as it will not depend on which countries have ratified the amendment or exercised opt out declarations, but this deterrence would not be effective vis-à-vis permanent members of the Security Council (or their closest allies), due to the ability of permanent members to veto referrals.⁵⁶

The U.S. negotiating team in Kampala, and prior thereto, was clearly skeptical of the definition, and no doubt even more skeptical about the whole endeavor of activating the ICC crime of aggression.⁵⁷ States Parties that had participated in over ten years of negotiations on the definition and many of whom strongly supported reaching an outcome in Kampala that would include both a definition as well as conditions for the exercise of jurisdiction, were not, however, willing to reopen issues already resolved

⁵⁶ The existence of a concrete definition also means that states may incorporate this definition into their national criminal codes. (Indeed, as noted above, some states already have some form of crime of aggression in their national codes. *See supra* note 16.) Such incorporation has the potential to create criminal exposure before national courts through territorial exercises of jurisdiction as well as possibly universal jurisdiction. While the possibility of such national court prosecutions could provide positive deterrence and might prove beneficial in some instances, there is also a concern about the potential for unfair trials. Some of this concern might be alleviated if there were a relationship of “primacy” not “complementarity” between the ICC and national court aggression prosecutions. A “primacy” relationship would favor prosecutions before the ICC, which, with all its extensive fair trial protections, might come to be seen as the preferable forum. *See Jennifer Trahan, Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?*, CORNELL INT'L L.J. [forthcoming] 2012; Beth Van Schaak, *Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression*, INT'L CRIM. L. REV [forthcoming] (2012).

⁵⁷ *See, e.g.*, Statement of Harold H. Koh, Legal Advisor, U.S. Department of State, 8th Resumed Session of the Assembly of State Parties of the International Criminal Court, New York (Mar. 23, 2010), available at <http://usun.state.gov/briefing/statements/2010/139000.htm> (expressing concerns); *see also* Glennon, *supra* note 27 (expressing concerns with the definition). *But see* Trahan, *supra* note 27 (rebutting various of Glennon's concerns).

while the U.S. chose not to attend the negotiations. In the end, the best the U.S. negotiating team could do vis-à-vis the definition was what it did: propose a series of “understandings” to accompany the definition, various of which were adopted at the Review Conference.⁵⁸

Because the issue of the conditions for the exercise of jurisdiction was still far more unresolved going into the Kampala negotiations, the U.S. negotiating team had far more room to engage on this topic. They clearly did so by supporting the exclusion of non-States Parties from the jurisdictional regime, although the US does not appear to have been the only such supporter.⁵⁹ From the perspective of other states that wanted to create a level-playing field for the enforcement of international criminal law, the ultimate exclusion of non-States Parties and ability of even States Parties to use opt out declarations (at least vis-à-vis State Party referrals and Prosecutor *proprio motu* initiations) was no doubt a less than fully satisfactory outcome. The U.S. negotiating team, while unable to prevent the adoption of the amendment entirely (likely a goal), no doubt achieved a strong result from its perspective: the complete exclusion of non-States Parties. Regardless of ones views of the merits of this exclusion—whether U.S. leaders should be completely exempt from the jurisdictional regimes—one positive aspect of the outcome is that the U.S. certainly has no reason to withdraw from its current position of constructive engagement with the ICC.⁶⁰

The Review Conference adoption of the crime of aggression was an historic accomplishment. The outcome is not necessarily without flaws. Which flaws and merits exist from the perspective of states depends in large part on whether a state views itself more as a potential aggressor state or a potential victim state. Yet, the motivation behind the amendment—to limit aggressive use of force that is not sanctioned by the Security Council, legitimate individual or collective self-defense or humanitarian in nature—has the potential to play a significant role in changing state actions at the

⁵⁸ For discussion of the understandings proposed by the U.S. and those adopted, see Trahan, *Kampala Negotiations*, *supra* note 27, at 73–78. For an interesting discussion of the legal effect of the understandings, see Kevin Jon Heller, *The Uncertain Legal Status of the Aggression Understandings*, 10 J. INT’L CRIM. JUST. 229 (2012).

⁵⁹ A good deal of the negotiations in Kampala did not proceed through open meetings, but ones that were closed to NGO participants. Therefore, some of the details of which states insisted on which positions is known only to actual members of the negotiating teams, which did not include this author.

⁶⁰ See *U.S. Engagement With the International Criminal Court and the Outcome of the Recently Concluded Review Conference*, Washington, D.C. (June 15, 2010) (statement of Harold H. Koh, Legal Advisor, U.S. Department of State, and Stephen J. Rapp, Ambassador-at-Large for War Crime Issues), available at http://www.state.gov/j/gcj/us_releases/remarks/143178.htm (Ambassador Rapp expressing support for ICC prosecutions).

international level for years to come.