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AMERICAN BRANCH OF THE  
INTERNATIONAL LAW ASSOCIATION  
INTERNATIONAL CRIMINAL COURT COMMITTEE

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THE CRIME OF AGGRESSION:  
THE NEW AMENDMENT EXPLAINED  
QUESTIONS & ANSWERS

**WHAT OCCURRED THIS PAST JUNE AT THE ICC REVIEW CONFERENCE  
AS TO THE CRIME OF AGGRESSION?**

In Kampala, Uganda, from May 31-June 11, 2010, at the first Review Conference on the International Criminal Court (the “ICC”), States Parties to the ICC (“States Parties”) forged an historic agreement, **adopting an amendment** to the Rome Statute **defining the crime of aggression** and agreeing on conditions for the ICC’s exercise of jurisdiction over it.<sup>1</sup>

**DID THE U.S. VOTE FOR THE AMENDMENT?**

**No, but the U.S. did not oppose it.** The U.S. delegation was present at the negotiations as a Non-State Party observer. While the U.S. delegation voiced initial concerns about the definition in particular,<sup>2</sup> it was able to add four “understandings” to the definition, and actively participated in the remainder of the negotiations particularly concerning the conditions for the exercise of jurisdiction. By the end of the conference, the U.S. (which, as a Non-State Party, was not eligible to vote) was, however, not opposed to the amendment (*i.e.*, the U.S. did not lobby other States Parties to oppose the amendment), which passed by “consensus”—that is, general agreement of all States Parties present.

**WILL THE AMENDMENT TAKE EFFECT NOW?**

**No.** It first requires a vote by States Parties to the Rome Statute (either 2/3<sup>rds</sup> of all States Parties or “consensus”) to occur after January 1, 2017, ratification of the amendment by 30 States Parties, and the passage of 1 year after the 30<sup>th</sup> ratification.<sup>3</sup> Thus, if 30 States Parties ratify the amendment by January 1, 2016, and a positive vote occurs on **January**

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<sup>1</sup> At the Review Conference, there were also sessions devoted to a “stocktaking” of the field of international justice, and two other Rome Statute amendment proposals, one of which was adopted (the so-called “Belgian” war crimes amendment), and the other of which was deferred for later consideration (whether to delete Rome Statute article 124).

<sup>2</sup> Statement by Harold Hongju Koh, Legal Adviser U.S. Department of State, Review Conference of the International Criminal Court, Kampala, Uganda, 4 June 2010, available at <[www.state.gov/s/l/releases/remarks/142665.htm](http://www.state.gov/s/l/releases/remarks/142665.htm)> [last visited 22 September 2010]; *see also* Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Review Conference of the International Criminal Court Kampala, Uganda, 1 June 2010, available at <[www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-gendeba-USA-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-USA-ENG.pdf)> [last visited 22 September 2010].

<sup>3</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, available at <[www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf)> [last visited 22 September 2010], Annex I, Art. 15*bis*, paras. 2-3, Art. 15*ter*, paras. 2-3.

**2, 2017, that is the earliest date ICC jurisdiction over the crime of aggression could commence.**

**WILL ICC JURISDICTION AS TO AGGRESSION COVER U.S. NATIONALS?**

**No.** Many could argue that the rule of law should apply to all states on an equal footing, and this principle should apply particularly where one is reinforcing a core foundational norm of the U.N. Charter, Article 2(4)'s prohibition on the aggressive use of force.

The Rome Statute, however, operates on a consent-based regime, where whether a state has ratified the Rome Statute is extremely significant in determining whether the ICC possesses jurisdiction.<sup>4</sup> The aggression amendment continues with a consent-based approach vis-à-vis the crime of aggression.

The jurisdictional regime ultimately agreed upon provides:

5. 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.**<sup>5</sup>

The U.S. is not a party to the Rome Statute. Thus—regardless of one's views as to whether the U.S. should need to exempt itself from such jurisdiction (an exemption which the U.S. hopefully will not need to utilize)—it is clear that even after jurisdiction commences, aggression committed by U.S. nationals or on U.S. territory would be excluded from the ICC's jurisdiction.<sup>6</sup>

This exemption for Non-States Parties vis-à-vis the crime of aggression is broader than the current exemption for Non-States Parties in the Rome Statute. It would exclude the crime of aggression committed by a Non-State Party national on the territory of a State Party, and the crime of aggression committed by a State Party national on the territory of a Non-State Party. Neither of these situations is true for ICC jurisdiction as to genocide, war crimes and crimes against humanity, where jurisdiction applies to crimes committed on the territory of States Parties (regardless of the perpetrator's nationality), and to the nationals of States Parties (even on the territory of a Non-State Party).

**WOULD THE CRIME COVER ACTS BY ORDINARY SOLDIERS?**

**No.** Under the definition agreed upon (set forth in Appendix A hereto), the crime of aggression is committed "by a person in a position effectively to exercise control over or

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<sup>4</sup> Ratification of the Rome Statute creates ICC jurisdiction vis-à-vis crimes committed in the territory of, or by a national of, a State Party. Rome Statute, art. 12. The only other way that jurisdiction can exist is following a Security Council referral. Rome Statute, art. 13.

<sup>5</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15bis, para 5.

<sup>6</sup> The theoretical possibility of a U.N. Security Council referral would exist—again, only after 1/1/17 at the earliest—but with the U.S. as a permanent member of the Security Council, it would be in a position to veto such a referral. If, one day, the U.S. were to become a party to the Rome Statute, the U.S. would still be in a position to veto the referral of an aggression case involving the U.S. If the U.S. were to ratify or accept the aggression amendment, it could also avoid ICC jurisdiction as to the crime of aggression by filing an "opt out" declaration (discussed below). Many States Parties view the ability to avoid aggression jurisdiction as too extensive.

to direct the political or military action of a State.”<sup>7</sup> Thus, the crime is solely a “leadership crime.” Ordinary soldiers would never be covered by the definition. This understanding is further confirmed by the amendment to Rome Statute Article 25, also agreed on at the Review Conference, which would insert into the article on individual criminal responsibility a new paragraph *3bis* stating: “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.”<sup>8</sup>

### **IS IT A NEW IDEA TO PROSECUTE THE CRIME OF AGGRESSION?**

**No. Both the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (Tokyo) prosecuted the crime of aggression,**<sup>9</sup> the U.S. having played a leading role in the work of both Tribunals. The Judgment of the International Military Tribunal at Nuremberg describes aggression as “the supreme international crime”:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is *the supreme international crime* differing only from other war crimes in that it contains within itself the accumulated evil of the whole.<sup>10</sup>

While aggressive use of force is prohibited under Article 2(4) of the U.N. Charter,<sup>11</sup> that prohibition has not fully prevented recourse to such force. Prosecuting the crime of aggression is intended to reinforce this prohibition.

### **WHAT DOES THE DEFINITION CONTAIN? THAT IS, WHAT INDIVIDUAL BEHAVIOR CONSTITUTES THE CRIME OF AGGRESSION?**

The definition of the crime of aggression ultimately adopted at the Review Conference, which will be located in a new Article *8bis* to the Rome Statute, provides:

1. For the purpose of this Statute, “crime of aggression” means **the planning, preparation, initiation or execution**, by a person in a position effectively to exercise control over or to direct the political or military action of a State, **of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter** of the United Nations.<sup>12</sup>

<sup>7</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, *8bis*, para. 1.

<sup>8</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, para 5.

<sup>9</sup> The Nuremberg (London) Charter defines “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.” Charter of the International Military Tribunal, Art. 6(a). *See also* Charter of the International Military Tribunal for the Far East (Tokyo), Art. 5(a) (similar, adding that the war could be declared or undeclared); *see also* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), art. II (1)(a).

<sup>10</sup> Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 October 1945 - 1 October 1946 (1947-1949), Vol. XXII International Military Tribunal 427 (1948), at [www.loc.gov/rr/frd/Military\\_Law/NT\\_major-war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html) (emphasis added).

<sup>11</sup> U.N. Charter, art. 2(4).

<sup>12</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, *8bis*, para. 1 (emphasis added).

### **WHY IS A “MANIFEST VIOLATION” OF THE U.N. CHARTER REQUIRED?**

The crime of aggression will only apply when a state act of aggression by “its character, gravity and scale, constitutes a *manifest violation* of the Charter of the United Nations.”<sup>13</sup> Thus, to determine what is a “manifest” violation, one must assess the state act’s “character, gravity and scale.”<sup>14</sup> This requirement is intended to exclude “borderline cases”<sup>15</sup> or those “falling within a grey area.”<sup>16</sup>

### **WOULD SMALL-SCALE INCURSIONS OR HUMANITARIAN INTERVENTION BE COVERED?**

**No.** As noted above, the definition excludes “borderline cases” or those “falling within a grey area.” By excluding factually “borderline cases,” it would exclude any minimal border incursions that do not meet the required “gravity” or “scale” to constitute a “manifest” Charter violation.<sup>17</sup> It would also exclude legal “borderline cases” (that is, debatable cases, where a state’s act due to its “character” does not constitute a “manifest” Charter violation). The latter means that humanitarian intervention is not covered.<sup>18</sup> Additionally, Security Council authorized humanitarian intervention would always be clearly excluded, as would humanitarian intervention that fits under Article 51’s authorization of collective self-defence. The exclusion of “grey area” cases is very much in line with the Rome Statute’s preamble, which makes clear that the ICC is intended to prosecute only the most serious crimes.<sup>19</sup>

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<sup>13</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8bis, para. 1 (emphasis added).

<sup>14</sup> An understanding, proposed by the U.S. at the Review Conference, and adopted, makes clear that all three factors would need to be considered. See Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex III, para. 7 (“It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.”).

<sup>15</sup> February 2009 SWGCA Meeting, in *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009*, edited by Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser (hereinafter, “*The Princeton Process*”), p. 51, para. 13.

<sup>16</sup> June 2008 SWGCA Meeting, in *The Princeton Process*, p. 87, para. 68.

<sup>17</sup> 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.” Stefan Barriga, in *The Princeton Process*, p. 8.

<sup>18</sup> Excluding legally debatable cases means that humanitarian intervention is not covered. See Claus Krefß (German delegation), ‘Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus,’ 20 *Eur. J. of Int’l L.* 1129, p. 1140. See also Elizabeth Wilmshurst (UK delegation), in R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst (eds.) *An Introduction to International Criminal Law and Procedure* (2<sup>nd</sup> ed., 2010), pp. 326, 327 (“humanitarian intervention” is a grey area). 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 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). See Jennifer Trahan, ‘The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference,’ *International Criminal Law Rev.* 11 (2011) 49–104, n. 43.

<sup>19</sup> See Rome Statute, preamble (“[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .”).

## **CAN THE CRIME OF AGGRESSION OCCUR ABSENT A STATE ACT OF AGGRESSION?**

**No.** The next paragraph of the definition (*see* Appendix A hereto) defines the state’s “act of aggression,” which is also a necessary requirement. Unlike other ICC crimes, it is impossible for an individual acting alone, absent state action, to commit the crime of aggression.<sup>20</sup>

## **IS ONLY A WAR OF AGGRESSION COVERED BY THE DEFINITION?**

**No.** Criminalizing only a full-scale “war” had been previously debated and rejected; states wanted to cover uses of force that fell short of full-scale war.<sup>21</sup> Thus, the definition defines a state “act of aggression” as follows:

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- 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

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<sup>20</sup> While it is possible to imagine an individual acting alone might engage in “planning,” “preparation” or “initiation” of an act of aggression, the Amendments to the Elements of Crimes suggest that an act of aggression—that is, the act by the state—must also occur. *See* Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex II, element 3 (“The act of aggression . . . was committed.”). Given that “attempt” is contained in Rome Statute Article 25, and will apply to the crime of aggression, one way to reconcile having “attempt” as a form of individual criminal responsibility, with the need for an act of aggression is as follows: “attempts” at “planning,” “preparation,” “initiation” or “execution” would be covered, but there would still need to be a state act of aggression for purposes of article 8*bis*. Indeed, if an individual engaged in planning, preparation, initiation or execution, but no state act of aggression resulted, that would seem unlikely to meet the gravity threshold necessary for Rome Statute crimes. *See* Rome Statute, preamble (“[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .”).

<sup>21</sup> *See* June 2006 SWGCA Meeting, paras. 21-24, in *The Princeton Process*, p. 144 (reflecting the issue being debated).

- 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.<sup>22</sup>

### **WOULD ALL LISTED ACTS CONSTITUTE THE “CRIME OF AGGRESSION?”**

**No.** The definition of the “act of aggression” (quoted above) includes a list of acts from General Assembly resolution 3314, each of which qualify as an “act of aggression.” To constitute the “crime of aggression,” the act must still by “its character, gravity and scale, [need to] constitute[] a manifest violation of the Charter of the United Nations.” So, as defined, not every blockade, bombardment or attack listed would necessarily constitute *the crime* of aggression, but only the most egregious situations. This concept is also consistent with the Rome Statute’s preamble, which makes clear that the ICC is intended to prosecute only the most serious crimes,<sup>23</sup> and with one of the “understandings”—proposed by the U.S.—also adopted at the Review Conference.<sup>24</sup>

### **WILL THE DEFINITION IMPACT SECURITY COUNCIL DETERMINATIONS AS TO AGGRESSION?**

**No.** Article 39 of the U.N. Charter states that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or *act of aggression* . . .”<sup>25</sup> for purposes of determining whether to authorize action under Chapter VII. States Parties to the Rome Statute do not have the competence to tell the Security Council how to apply these provisions. The Security Council’s power emanates from the U.N. Charter, and is unaffected by Rome Statute amendments.

### **IS THE LIST OF ACTS OF AGGRESSION A COMPLETE LIST?**

Pursuant to paragraph 2, “[a]ny of the following acts . . . shall, in accordance with United Nations General Assembly resolution 3314 . . . qualify as an act of aggression.”<sup>26</sup> That language arguably leaves open the possibility that other acts might be covered, thereby potentially allowing for new forms of aggressive state action (although they too would need to meet the qualifier of a “manifest” violation of the Charter to constitute the crime of aggression).<sup>27</sup> There was much debate in negotiations held prior to Kampala as to

<sup>22</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8*bis*, para. 2 (emphasis added).

<sup>23</sup> See Rome Statute, preamble (“[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .”).

<sup>24</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex III, para. 6 (“aggression is the most serious and dangerous form of the illegal use of force . . .”). For discussion of the U.S. proposal, and the understanding ultimately adopted at the Review Conference, see Trahan, *supra* note 18, Part 2.4.

<sup>25</sup> U.N. Charter, Art. 39 (emphasis added).

<sup>26</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8*bis*, para. 2.

<sup>27</sup> 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 *Göttingen J of Int’l L* 689,

whether the list of acts from resolution 3314 should be a “closed” or “open” list. Ultimately, it was resolved to consider it a “semi-open” or “semi-closed” list<sup>28</sup> in that the list is not closed, but any other act would need to meet the other qualifiers in the definition, which effectively “closes” the list.

**WILL THE SECURITY COUNCIL BE ABLE TO REFER AGGRESSION CASES TO THE ICC OR DEFER PENDING CASES? Yes.** The jurisdictional regime adopted in Kampala (reflected in new Articles 15*bis* and 15*ter*—set forth in Appendixes B-C hereto),<sup>29</sup> permits the Security Council, pursuant to Article 15*ter*, to refer situations, including cases of suspected aggression, to the ICC. That is also the case with respect to the other Rome Statute crimes (genocide, war crimes and crimes against humanity).<sup>30</sup> The Security Council will also be able to defer aggression cases if necessary, using its authority under Chapter VII of the U.N. Charter, as is also the case with the other Rome Statute crimes.<sup>31</sup>

#### **COULD AGGRESSION CASES START IN ANY WAY OTHER THAN SECURITY COUNCIL REFERRAL?**

**Yes.** Under the definition agreed upon, the other way that aggression cases could commence, pursuant to Article 15*bis*, would be as follows. If there is a State Party referral or the Prosecutor acts *proprio motu* (on his own motion) and the Prosecutor concludes there is a reasonable basis to proceed, he or she would first ascertain whether the Security Council has made a determination of an act of aggression.<sup>32</sup> If the Security Council has made such a determination, the Prosecutor could proceed (*see* above). But, if, six months after notification, the Security Council has made no such determination, then **the Pre-Trial Division could authorize the commencement of an investigation,** assuming there otherwise is appropriate jurisdiction (*see* below).<sup>33</sup> The ICC’s Pre-Trial Division would consist of an expanded Pre-Trial Chamber of not less than six judges.

#### **WHY ARE THERE TWO DIFFERENT “FILTER” MECHANISMS BY WHICH INVESTIGATIONS COULD COMMENCE—EITHER THE SECURITY COUNCIL OR THE ICC PRE-TRIAL DIVISION?**

At the Review Conference, and in negotiations long before, stark differences of opinion emerged as to how jurisdiction should be exercised as to the crime of aggression.

Some states argued that only the Security Council should be able to refer aggression cases, relying upon Article 39 of the U.N. Charter which states that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or

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696 (2010) (“The list of ‘acts’ in Article 8*bis* (2), taken verbatim from Resolution 3314, may be open-ended to the extent that it does not say that no *other* acts can amount to aggression [but additional acts would need to be interpreted narrowly and satisfy the threshold clause].”).

<sup>28</sup> Stefan Barriga, in *The Princeton Process*, p. 11.

<sup>29</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis* & 15*ter*.

<sup>30</sup> *See* Rome Statute, art. 13.

<sup>31</sup> *See* Rome Statute, art. 16.

<sup>32</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para. 6.

<sup>33</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para. 8.

*act of aggression . . .*,”<sup>34</sup> as well as Article 5(2) of Rome Statute, which states that any provision defining the crime of aggression and setting out conditions under which the Court shall exercise jurisdiction “shall be consistent with the relevant provisions of the Charter of the United Nations.”<sup>35</sup>

Other states that maintained that the Security Council should not have such a role, or not such an exclusive role, generally argued that Article 24 speaks of a primary but not exclusive role of the Security Council and/or that Article 39 is used for the Security Council to determine whether Chapter VII actions should be undertaken, not for purposes of applying international criminal law. These states argued that to give a political body such control over the Court would undermine its independence as a judicial institution and could make aggression prosecutions look politically, and not judicially, motivated. Moreover, there was a concern that the historical reluctance of the Security Council to determine when acts of aggression have occurred could paralyze the Court and undermine its effectiveness. States that supported not giving the Security Council a role, or not an exclusive role, saw another possibility to be the ICC authorizing cases itself (an “internal filter”).

The agreement reached at the Review Conference utilizes both methods. This represents a compromise designed to at least partially satisfy both sides in the debate. The role of the Security Council is preserved, as it will be given first option to act, for an initial six month period.<sup>36</sup> Yet, thereafter, the ICC will also be able to act, independently, if authorized by the Pre-Trial Division (acting as a “filter”) after State Party or *proprio motu* referral (which would be the “trigger”), assuming jurisdiction also exists.<sup>37</sup>

### **WILL DETERMINATIONS BY THE GENERAL ASSEMBLY OR INTERNATIONAL COURT OF JUSTICE OF ACTS OF AGGRESSION PLAY A ROLE?**

**Not directly.** During earlier negotiations, it had been proposed that alternatives to having the Security Council make a determination of an act of aggression, or the ICC act as its own judicial “filter,” would be to involve the General Assembly or International Court of Justice (“ICJ”). Neither such method was ultimately adopted; hence, the determination of an act of aggression by either body has not become an alternative jurisdictional condition. (The ICJ might, in the course of an advisory or contentious case, make a determination of an act of aggression, as might the General Assembly in a resolution, but neither such determination would authorize commencement of an ICC investigation.)<sup>38</sup>

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<sup>34</sup> U.N. Charter, Art. 39 (emphasis added).

<sup>35</sup> Rome Statute, Art. 5(2).

<sup>36</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para. 8.

<sup>37</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*.

<sup>38</sup> An ICC investigation could follow in either situation, but it would first require either Security Council referral, or State Party referral or *proprio motu* action followed by Pre-Trial Division authorization.



## **COULD A STATE PARTY THAT HAS RATIFIED THE AGGRESSION AMENDMENT OPT OUT OF ICC JURISDICTION AS TO THE CRIME OF AGGRESSION?**

**Yes.** Under the jurisdictional regime agreed upon, States Parties would be able to “opt out” of aggression jurisdiction by lodging a declaration with the ICC Registrar. The text of Article 15*bis* states:

4. **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.** The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.<sup>39</sup>

## **WHAT AMENDMENT PROCEDURE WAS AGREED ON TO ACCOMPLISH THE AMENDMENT?**

The amendment was “adopted” at the Review Conference. There were two possible methods that could have been utilized for the amendment to enter into force—Rome Statute Article 121(4) or Article 121(5). Under Article 121(4), once seven-eighths of States Parties ratify an amendment, the amendment enters into force one year thereafter for all States Parties to the Rome Statute<sup>40</sup>—including the one-eighths not ratifying. Under **Article 121(5)—which was utilized**<sup>41</sup>—the amendment only enters into force for those States Parties that accept or ratify it, one year after their acceptance or ratification.<sup>42</sup> However, in this case, exercise of jurisdiction for the aggression amendment will be delayed—requiring a further vote and 30 ratifications (*see above*); thus, as to the first 29 states that ratify or accept the aggression amendment, that will only cause the amendment to enter into force for those states, but jurisdiction will not yet be able to commence.

## **COULD THE ICC EXERCISE JURISDICTION OVER A STATE PARTY THAT HAS NOT RATIFIED THE AGGRESSION AMENDMENT?**

**Potentially.** Rome Statute Article 5(2) mandated States Parties to determine the conditions for the exercise of jurisdiction vis-à-vis the crime of aggression,<sup>43</sup> which occurred at the Review Conference. At the Review Conference, an “opt out” methodology was adopted, whereby States parties could “opt out” of aggression jurisdiction (*see above*). In the Review Conference Resolution, Rome Statute Article 12(1) was also invoked, which provides that States Parties have already accepted jurisdiction over the crime of aggression.<sup>44</sup> The implication of this is that after the first 30 ratification and the activation vote are achieved, all Rome Statute States Parties could be covered by jurisdiction (for cases triggered by State Party referral or *proprio motu*

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<sup>39</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para. 4 (emphasis added).

<sup>40</sup> Rome Statute, Art. 121(4).

<sup>41</sup> *See* Resolution RC/Res.6, advance version, 28 June 2010, 18:00, para. 1.

<sup>42</sup> Rome Statute, Art. 121(5).

<sup>43</sup> *See* Rome Statute, Art. 5(2).

<sup>44</sup> *See* Rome Statute, Art. 12.

initiation) unless the State Party exercises an opt out declaration. (Any state, of course, could be covered if there is a Security Council referral.) Alternative formulations have been suggested that at least the victim State Party must have ratified the amendment; others suggest that neither the aggressor nor victim State Party would have to have ratified the amendment.

Another construction, however, is also being offered, although it does not appear to have been what was agreed upon at the Review Conference. The second sentence of Rome Statute Article 121(5) states: “In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.”<sup>45</sup> Thus, under this argument, the plain meaning of this language is that the ICC may only exercise jurisdiction—once jurisdiction commences—over a State Party that has ratified or accepted the amendment (that is, at least if it is the “aggressor” state).<sup>46</sup>

This alternative construction, however, does not consider that Article 121(5)’s second sentence covers the exercise of jurisdiction. Pursuant to Article 5(2), States Parties at the Review Conference were authorized to establish conditions for the exercise of jurisdiction over the crime of aggression, which meant that they could adopt a construction that did not endorse a literal reading of 121(5)’s second sentence and instead took full account of article 12(1). This appears to have been what was done.

#### **DID THE U.S. TAKE PART IN THE YEARS OF NEGOTIATIONS ON THE CRIME OF AGGRESSION PRECEDING THE REVIEW CONFERENCE?**

**No.** Prior to the Review Conference, there were approximately 10 years of negotiations regarding the crime of aggression, almost none of which the U.S. attended. From 1999-2002, there were various “Preparatory Commission” meetings covering the crime of aggression.<sup>47</sup> Thereafter, the Assembly of States Parties (“ASP”) created a Special Working Group on the Crime of Aggression (“the Special Working Group”), which met from 2003-2009.<sup>48</sup> The United States did not attend the meetings of the Special Working Group, although they were open to Non-States Parties. With the change to the administration of President Obama, the U.S. began to attend the negotiations, commencing with the Eighth Assembly of States Parties meeting in November 2009.

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<sup>45</sup> Rome Statute, Art. 121(5).

<sup>46</sup> A strict reading would also suggest that the victim state should have ratified as well. States Parties, however, had focussed much more discussion on whether the aggressor state would need to consent. See Trahan, *supra* note 18, Part 1.3.1 (discussing voting at the Resumed Eighth Session of the Assembly of States Parties, where States Parties were asked to vote for certain options, with two alternatives being whether the aggressor state or victim state would have to have accepted the amendment; there was no vote taken whether *both* would have to do so).

<sup>47</sup> The Preparatory Commission was charged with various work, including “proposals for a provision on aggression.” See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998, U.N. Doc. A/CONF.183/10, Annex I, Resolution F.

<sup>48</sup> The work of the Special Working Group has been extensively chronicled in the recent book *The Princeton Process*, note 15 *supra*.

**WERE THERE ADVERSE CONSEQUENCES OF THE U.S. NOT ATTENDING THE EARLIER NEGOTIATIONS?**

**Yes.** One adverse consequence of entering the negotiations late, was that agreement on the definition and elements of the crime (also adopted at the Review Conference)<sup>49</sup> were basically already concluded when the U.S. joined the negotiations. Thus, the U.S. had limited ability to weigh in on those issues. By contrast, the issues of the conditions for the exercise of jurisdiction and the amendment procedure were much more undecided when the U.S. joined negotiations; consequently, the U.S. was much more able to participate in those negotiations.

**DOES THE CONCLUSION OF A CRIME OF AGGRESSION MEAN THE U.S. HAS REASON TO REVERSE ITS CONSTRUCTIVE ENGAGEMENT WITH THE ICC? No, not at all.** The U.S. delegation clearly went to the Review Conference not wanting any definition of aggression agreed upon. While they did not achieve that, the delegation did obtain something of tremendous value, as perceived by the U.S. negotiating team: a robust exemption for the nationals of Non-States Parties from aggression prosecution. (*See above.*) Regardless of one's views as to whether the U.S. should need such an exemption and the optics of having insisted upon it, the outcome of the Review Conference provides no reason for the U.S. to turn its back on the ICC. The U.S. stands well-poised to continue on its course of positive and constructive engagement with the Court.<sup>50</sup>

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<sup>49</sup> *See* Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex II. (The elements of the crime of aggression are set forth in Appendix D hereto.)

<sup>50</sup> *See, e.g.*, "U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference," Special Press Briefing by Harold H. Kohn and Stephen J. Rapp, Washington D.C., June 15, 2010, at [www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm) [last viewed 11/28/10] (characterizing the change in relationship of the US vis-à-vis the ICC from one of "hostility" under the past administration to a current one of "positive engagement").

## APPENDIX A

The definition of the crime of aggression agreed upon at the Review Conference is as follows:

### **Article 8 bis**

#### **Crime of aggression**

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

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- h) 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;
- i) 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;
- j) The blockade of the ports or coasts of a State by the armed forces of another State;
- k) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- l) 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;
- m) 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;
- n) 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.<sup>51</sup>

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<sup>51</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I.

## APPENDIX B

The following provision covering exercise of jurisdiction based on State Party referral or *proprio motu* action was also agreed upon:

**Article 15 bis**  
**Exercise of jurisdiction over the crime of aggression**  
**(State referral, *proprio motu*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
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 States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, 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;
4. 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. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. 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.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. 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.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.<sup>52</sup>

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<sup>52</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I.

## APPENDIX C

The following provision covering exercise of jurisdiction based on a Security Council referral was also agreed upon:

**Article 15 *ter***  
**Exercise of jurisdiction over the crime of aggression**  
**(Security Council referral)**

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.
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 States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, 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;
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.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.<sup>53</sup>

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<sup>53</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I.

## APPENDIX D

The following elements of the crime of aggression were also agreed upon:

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 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.<sup>54</sup>

\* “With respect to an act of aggression, more than one person may be in a position that meets these criteria.”

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<sup>54</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex II.