

## ARTICLE

# Prosecuting the Crime of Aggression in the International Criminal Court

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### ABSTRACT

The crime of aggression was included in the subject-matter jurisdiction of the International Criminal Court (ICC) (Article 5(1)(d) of the ICC Statute), but the competence of the ICC to prosecute aggression was made subject to the adoption of a definition of the crime and of the circumstances under which the ICC could exercise jurisdiction (Article 5(2)). Following years of intensive deliberations, the matter was finally settled by a Review Conference of the International Criminal Court that was held in Kampala, Uganda on May 31 through June 11, 2010.

The crime of aggression committed by an individual is based on an act of aggression committed by a State. The definition of an act of aggression approved by general agreement in Kampala simply repeats the provisions of General Assembly Resolution 3314 (XXIX) of December 14, 1974, that was initially designed as a guide for the Security Council when exercising its Chapter VII powers to counteract a threat to the peace, a breach of the peace, or an act of aggression. The crime of aggression was defined in Kampala, again by general agreement, as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The crime of aggression thus came to be defined as (a) a leadership crime; (b) flowing forth from an act of aggression; and (c) subject to U.N. Charter constraints. The definition furthermore followed the “differentiated approach” whereby the means of perpetration and the element of *mens rea* are not included in the definition but are dealt with separately in other sections of the ICC Statute (Articles 25(3) and 30, respectively). In virtue of the fact that aggression is a leadership crime, perpetration as an accessory (Article 25(3)(c)), attempt to commit the crime (Article 25(3)(d)), and vicarious liability for a crime committed by others (Article 28), will not be feasible in cases of aggression.

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More difficult, though, was reaching general agreement on the circumstances under which the ICC can prosecute the crime of aggression; in particular the role to be afforded to the Security Council. It was decided in Kampala to deal separately with instances where investigations were triggered by State Party referrals or by the Prosecutor acting *proprio motu* on the one hand (Article 15*bis*), and by a Security Council referral on the other (Article 15*ter*). In the case of State Party referrals and investigations *proprio motu*, the Prosecutor must first establish whether the Security Council has made a determination of an act of aggression. If it has, the Prosecutor may proceed with the investigation; if it has not done so within a period of six months after having been notified by the Prosecutor, a Pre-Trial Chamber of the ICC may authorize the investigation to proceed. In the case of Security Council referrals, the Prosecutor may proceed with an investigation into the commission of the crime of aggression without further ado. In both instances, a determination of an act of aggression by the Security Council is not binding to the ICC's own finding in this regard.

In the case of State Party referrals and investigations *proprio motu*, the crime of aggression cannot be prosecuted in the ICC (a) if the State guilty of the act of aggression is not a State Party to the ICC Statute, in which event the ICC cannot exercise its jurisdiction over the crime of aggression committed by a national or on the territory of the non-party State; or (b) if the State concerned, being a State Party, has submitted a prior declaration to the Registrar of the ICC that it does not accept the jurisdiction of the ICC over the crime of aggression. These constraints do not apply in the case of Security Council referrals.

The amendments to the ICC Statute approved by the Review Conference will enter into force following ratification of the amendments by no less than thirty States Parties. Furthermore, implementation of the decisions taken in Kampala in respect of the crime of aggression will be kept on ice until at least January 1, 2017, after which a decision to implement the same must again be approved by the same majority of States Parties required for amendments of the ICC Statute. Although this outcome is in a sense disappointing, the fact that nations of the world have now agreed on a definition of aggression will most likely serve as a deterrent against unbecoming military action by trigger-happy regimes.

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## I. INTRODUCTION

Including aggression in the subject-matter jurisdiction of the International Criminal Court (ICC) has been highly controversial since day one of the negotiations that culminated in adoption of the Statute of the International Criminal Court (ICC Statute) by the Rome Diplomatic Conference of Plenipotentiaries in 1998.<sup>1</sup> Two contentious issues precluded the Rome Conference from reaching agreement on the crime of aggression: (a) how to translate what was essentially an act of state into individual liability; and (b) the role to be afforded to the Security Council of the United Nations as a filter for prosecutions of the crime of aggression in the ICC.<sup>2</sup>

In attempting to come to terms with the first of these two issues, a distinction was made in the course of the debate between *acts of aggression* committed by States and *the crime of aggression* committed by individuals responsible for authorizing or instigating an act of aggression.<sup>3</sup> The ICC can only prosecute individuals suspected of committing the crime of aggression.<sup>4</sup> The major difficulty remained, though, in finding a proper criterion for designating the person or persons who should be held criminally responsible for an act of aggression of the culprit State.

There were in essence two definitions of aggression to go by: (a) General Assembly Resolution 3314 (XXIX) of 14 December 1974, dealing with acts of aggression,<sup>5</sup> and (b) the one contained in the (Nuremberg) Charter of the International Military Tribunal, which dealt with the crime against peace (as it was then called) committed by natural persons (individuals in Anglo-American legal usage).<sup>6</sup>

Resolution 3314 was intended to serve as a guide for the Security Council for purposes of executing its Chapter VII powers with regard to acts of

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<sup>1</sup> See Noah Weisbord, Comment, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 170–71 (2008) (discussing the issues faced at the Rome Conference in defining a “crime of aggression”).

<sup>2</sup> See Silvia A. Fernández de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT'L L.J. 589, 590 (2002) (identifying the two main issues regarding the crime of aggression as “the definition of the crime and the conditions of exercise of jurisdiction by the Court”).

<sup>3</sup> *Id.* at 597.

<sup>4</sup> *Rome Statute of the International Criminal Court*, art. 25(1), U.N. Doc. A/CONF.183/9 (July 17, 1998), reprinted in 37 I.L.M. 1002, at 1016 (1998) [hereinafter ICC Statute].

<sup>5</sup> G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142 (Dec. 14, 1974) [hereinafter G.A. Res. 3314].

<sup>6</sup> Charter of the International Military Tribunal, art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in 39 AM. J. INT'L L. 257 (1945) [hereinafter Nuremberg Charter].

aggression.<sup>7</sup> It defines aggression as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition, and then goes on to list a number of acts that constitute acts of aggression.<sup>8</sup> The Charter of the International Military Tribunal defined crimes against peace as a 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.<sup>9</sup> Attempts at the Rome Conference to reach agreement on the definition of aggression based on these two precedents were not successful. Many delegations did not want to leave it at that. Because the Nuremberg Tribunal prosecuted crimes against peace, it was generally felt that excluding aggression from the jurisdiction of the ICC would be a step backwards.<sup>10</sup>

As to the second major problem mentioned above, several delegations, mainly those representing the Permanent Members of the Security Council (P5), argued that dealing with acts of aggression was a prerogative of the Security Council of the United Nations and for that reason ought not to lead to prosecutions in an international criminal court.<sup>11</sup> They relied on Article 39 of the U.N. Charter, which provides in part: “The Security Council shall determine the existence of any . . . act of aggression.”<sup>12</sup> Other delegations, referring to Article 24 of the U.N. Charter, maintained that the Security Council has been entrusted with a primary responsibility, and not an exclusive responsibility, to take action against States engaged in acts of aggression.<sup>13</sup> The fact that decisions of the

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<sup>7</sup> See G.A. Res. 3314, *supra* note 5, at 143, art. 1 (stating that the definition should be used “as guidance in determining, in accordance with the Charter, the existence of an act of aggression”).

<sup>8</sup> *Id.* at 143, art. 3.

<sup>9</sup> Nuremberg Charter, *supra* note 6.

<sup>10</sup> Herman von Hebel & Daryl Robinson, *Crimes within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 79, 82 (Roy S. Lee ed., 1999); Elise Leclerc-Cagné & Michael Byers, *A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention*, 41 *CASE W. RES. J. INT’L L.* 379, 381 (2009); Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 *CRIM. L. F.* 1, 9 (2003).

<sup>11</sup> See von Hebel & Robinson, *supra* note 10, at 82 (noting that the P5 supported a provision that called for the Security Council to make a determination of whether an act of aggression has been committed before the Court would be able to step in).

<sup>12</sup> U.N. Charter art. 39, June 26, 1945, 59 Stat. 1031, 1043, T.S./U.N. No. 993; 1976 U.N.Y.B. 1043, 1046, U.N. Sales No. DPI511 [hereinafter U.N. Charter]; Fernández de Gurmendi, *supra* note 2, at 601–602.

<sup>13</sup> U.N. Charter art. 24, para. 1 (“Members confer on the Security Council primary responsibility for the maintenance of international peace and security . . .”); see also

Security Council are almost exclusively based on political rather than juridical considerations prompted many delegations—indeed a vast majority—to oppose the granting of a decisive role to the Security Council in prosecutions in the ICC for the crime of aggression.<sup>14</sup>

The crime of aggression was eventually included in the subject-matter jurisdiction of the ICC,<sup>15</sup> but the exercise of jurisdiction by the ICC to prosecute the crime of aggression was made conditional upon the adoption of a provision defining the crime and stipulating the conditions under which the ICC would be competent to exercise jurisdiction over that crime.<sup>16</sup> In its closing plenary session of July 17, 1998, the Rome Conference adopted *Resolution F*, establishing a Preparatory Commission and instructing the Commission to prepare proposals in regard to the crime of aggression, including its definition and elements, and the conditions under which the ICC could exercise jurisdiction in regard to that crime.<sup>17</sup> *Resolution F* went on to provide: “The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute.”<sup>18</sup> Article 121 of the ICC Statute placed an embargo on the amendment of the ICC Statute for a period of seven years from the date upon which the ICC Statute entered into force,<sup>19</sup> which happened on July 1, 2002. Following the seven years period, a Review Conference had to be convened to deal with proposed amendments to the ICC Statute “if the issue involved so warrants.”<sup>20</sup> The judgment of the Rome Conference as reflected in *Resolution F* was clearly that inclusion of a definition of the crime of aggression in the ICC Statute and specifying the circumstances under which the ICC can exercise jurisdiction over that crime “so warrants.” The ICC Statute furthermore stipulated that “a provision . . . defining the crime [of aggression] and setting out the conditions under which the Court shall exercise jurisdiction with respect to

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Carrie McDougal, *When Law and Reality Clash—The Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court’s Jurisdiction over the Crime of Aggression*, 7 INT’L CRIM. L. REV. 277, 287 (2005) (noting that the ICJ has stated that the responsibility granted by Article 24 is primary rather than exclusive).

<sup>14</sup> See *infra* notes 155, 156.

<sup>15</sup> ICC Statute, *supra* note 4, art. 5(1)(d).

<sup>16</sup> *Id.* art. 5(2); cf. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT’L L. 93, 105 (1999) (noting, with skepticism, that aggression was included in the ICC Statute “as an empty category”).

<sup>17</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., July 15–17, 1998, *Resolution F*, ¶ 7, U.N. Doc. A/CONF.183/C.1/L.76/Add.14 (July 16, 1998).

<sup>18</sup> *Id.*

<sup>19</sup> ICC Statute, *supra* note 4, art. 121(1).

<sup>20</sup> *Id.* art. 121(2).

the crime” must be “adopted in accordance with articles 121 and 123.”<sup>21</sup> Article 121 lays down procedural requirements for amending the ICC Statute, and Article 123 makes provision for the initial and subsequent review conferences.<sup>22</sup>

At its Eighth Session, the Assembly of States Parties of the International Criminal Court decided that the Review Conference would be held in Kampala, Uganda from May 31 to June 11, 2010 for a period of ten working days.<sup>23</sup> The Review Conference accomplished its mission—more or less—in its final session that commenced on June 11 and continued after midnight into the early hours of the following day.<sup>24</sup> The decisions were adopted by general agreement.<sup>25</sup> It is important to note that “general agreement” was not confined to States Parties to the ICC Statute. Non-party States (and member organizations of the NGO Coalition for the International Criminal Court) participated in the formal discussions and informal deliberations.<sup>26</sup> “General agreement” was based on compromises between all the participating States.<sup>27</sup> Those compromises reflected, at times, the preferences of a small minority, of which non-party States in some instances constituted a decisive component.<sup>28</sup>

The final outcome of the Review Conference was neatly encapsulated by Ambassador Stephen Rapp and Prof. Harold Koh, the leading figures in the (18 members strong) American delegation, in their report back to the Department of State on U.S. re-engagement with the ICC and the outcome of the Review Conference:

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<sup>21</sup> *Id.* art. 5(2).

<sup>22</sup> *Id.* arts. 121, 123.

<sup>23</sup> Rep. of the Assembly of States Parties to the Rome Statute of the Int’l Criminal Court, 8th Sess., Nov. 18–26, 2009, ¶ 44, U.N. Doc. ICC-ASP/8/20 (2009).

<sup>24</sup> See Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1180 (Nov. 2010) (explaining that the clocks were stopped at midnight to allow conference deliberations to continue).

<sup>25</sup> See ICC, *Resolutions and Declarations Adopted by the Review Conference*, Review Conf. Res. RC/Res.1–6, ICC Doc. ICC-ASP-RC/11, at pt. II (June 8–11, 2010) (listing the resolutions adopted by “consensus”).

<sup>26</sup> *Id.* at pt. IA, ¶¶ 4–6.

<sup>27</sup> See Amal Alamuddin & Philippa Webb, *Expanding Jurisdiction Over War Crimes Under Article Eight Of The ICC Statute*, 8 J. INT’L CRIM. JUST. 1219, 1225 (Nov. 2010) (discussing a compromise that took place in order to reach a consensus); see also Michael P. Scharf, *A Tribute to Henry King*, 60 CASE W. RES. L. REV. 621, 624 (Spring 2010) (calling the agreement reached an “elaborate compromise”).

<sup>28</sup> See *Comment on the Review Conference of the Rome Statute*, INTERNATIONAL LAW OBSERVER (July 6, 2010), <http://internationallawobserver.eu/2010/07/06/comment-on-the-review-conference-of-the-rome-statute/> (last visited Feb. 27, 2011) (noting the influence of the non-party States and the influence of China, Russia, and the United States).

The court cannot exercise jurisdiction over the crime of aggression without a further decision to take place sometime after January 1<sup>st</sup>, 2017. The prosecutor cannot charge nationals of non-state parties, including the U.S. nationals, with the crime of aggression. No U.S. national can be prosecuted for aggression as long as the U.S. remains a non-state party. And if we were to become a state party, we'd still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.<sup>29</sup>

This article explores, by way of introduction in Section A, the proceedings that preceded the Review Conference. The main focus of the essay, though, will be on the Review Conference itself, with emphasis on the primary controversies that had to be resolved in Kampala.

Least of those, perhaps, were reaching agreement on a definition of the crime of aggression, dealt with in Section B of this article. The significance of (a) aggression as a leadership crime, (b) based on an act of aggression, and (c) subject to U.N. Charter constraints, will be explained in some detail, and special attention is also given to (d) the structuring of the definition according to the so-called "differentiated approach" that excludes from the definition references to elements of the crime relating to the means of perpetration and *mens rea*. Of special interest in the latter context is the question whether the means of perpetration that applies to accomplices in the commission of a crime (Article 25(3)), or vicarious liability of persons in authority (Article 28), or the defense of superior orders (Article 33), are also applicable to the crime of aggression.

The conditions under which the ICC can exercise jurisdiction over the crime of aggression, which is the topic discussed in Section C, remained a stumbling block in the pursuit of consensus right to the end. The debate remained centered on (a) designating an appropriate filter for an investigation into the crime of aggression to proceed (who will decide that an act of aggression has been committed?); (b) differentiating between the rules that will apply in the case of State Party referrals and investigations by the Prosecutor *proprio motu* on the one hand, and Security Council referrals on the other; (c) conditions that must be satisfied for the entering into force of the decisions of the Review Conference, and in particular those applying to the power of the ICC to prosecute crimes of aggression; and (d) the competence of States to preclude the exercise of jurisdiction over crimes of aggression deriving from acts of aggression committed by the State concerned or by any of its nationals.

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<sup>29</sup> U.S. DEP'T OF STATE, U.S. ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT AND THE OUTCOME OF THE RECENTLY CONCLUDED REVIEW CONFERENCE (June 15, 2010) (statement by Mr. Koh).



The articles pertinent to the crime of aggression that was added to the ICC Statute by the Review Conference are cited and briefly analyzed in Section D of the article, followed by some concluding observations.

## II. FROM ROME TO KAMPALA

Post-Rome proceedings relating to the crime of aggression occurred in two stages.<sup>30</sup> In the period 1998–2002 (prior to the entry into force of the ICC Statute) a Working Group of the post-Rome Preparatory Commission considered the matters relevant to the crime of aggression.<sup>31</sup> The Working Group was initially coordinated by Tuvako Monongi of Tanzania, and subsequently by Silvia Fernández de Gurmendi of Argentina.<sup>32</sup> Since the definition of aggression and the conditions under which it can be prosecuted in the ICC could not be incorporated into the ICC Statute before, at the earliest, 1 July 2009,<sup>33</sup> deliberations in the Preparatory Commission were stifled by the absence of a sense of urgency.<sup>34</sup> Delegations seemed reluctant to commit themselves to a definition and requirements that would only become effective after the lapse of several years.

In January 2002, the Secretariat of the Preparatory Commission published a useful and informative review of historical developments relating to aggression in which it recorded elaborate details of the Nuremberg and Tokyo trials, Security Council and General Assembly resolutions, and judgments of the International Court of Justice (ICJ), pertaining to aggression.<sup>35</sup> Progress made, and controversies that persisted, while the matter was considered by the

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<sup>30</sup> Rep. of the Preparatory Comm'n for the Int'l Criminal Court, 2d Sess., July 26–Aug. 13, 1999, Summary ¶ 8(a), U.N. Doc. PCNICC/1999/L.4/Rev.1 (Aug. 18, 1999); see Fernández de Gurmendi, *supra* note 2, at 589–90 (explaining why the Preparatory Commission established the Working Group).

<sup>31</sup> Fernández de Gurmendi, *supra* note 2, at 589–90.

<sup>32</sup> See Fernández de Gurmendi, *supra* note 2, for a general overview of the work of the Working Group.

<sup>33</sup> See Alain Pellet, *Entry into Force and Amendment of the Statute*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 145, 183 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., Iain L. Fraser trans., 2002) (finding this arrangement “surprising,” because the life-span of the Preparatory Commission would terminate when the Assembly of States Parties holds its first meeting and a definition was therefore expected to be found many years before it could actually be enacted into the ICC Statute).

<sup>34</sup> Schuster, *supra* note 10, at 17.

<sup>35</sup> Historical Review of Developments Relating to Aggression, Preparatory Comm'n for the Int'l Criminal Court, 9th Sess., Apr. 8–9, 2002, U.N. Doc. PCNICC/2002/WGCA/L.1 (Sep. 9, 2003).

Preparatory Commission are reflected in a proposal of the Commission “for a provision on the crime of aggression” contained in the report of its final meeting that was held in New York in July 2002.<sup>36</sup> That report merely incorporated the final *Discussion Paper Proposed by the Coordinator* of July 11, 2002.<sup>37</sup> The Discussion Paper contained the following general definition of the crime of aggression:

For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.<sup>38</sup>

Already at that stage, the proposed definition contained certain components that finally came to be accepted by the Review Conference. The Working Group’s definition—

- (a) designated the person who commits the crime of aggression as someone “in a position effectively to exercise control over or to direct the political or military action of the State”;<sup>39</sup>
- (b) confined the *actus reus* to “the planning, preparation or execution of an act of aggression”;<sup>40</sup>

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<sup>36</sup> Rep. of the Preparatory Comm’n for the Int’l Criminal Court, 10th Sess., July 1–12, 2002, pt. II, U.N. Doc. PCNICC/2002/2/Add.2, add. (July 24, 2002).

<sup>37</sup> See Discussion Paper Proposed by the Coordinator, Preparatory Comm’n for the Int’l Criminal Court, 10th Sess., July 1–12, 2002, U.N. Doc. PCNICC/2002/WGCA/RT.1/Rev. 2 (July 11, 2002); see Roger S. Clark, *Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*, 15 LEIDEN J. INT’L L. 859, 872–86 (2002) (reviewing the Discussion Paper); Noah Weisbord, *supra* note 1, at 173–76 (analyzing the Discussion Paper).

<sup>38</sup> Discussion Paper Proposed by the Coordinator, *supra* note 37, ¶ I(1).

<sup>39</sup> *Id.* ¶ II(1); see also Incorporating the Crime of Aggression as a Leadership Crime into the Definition, Proposal Submitted by Belg., Cambodia, Sierra Leone & Thai., Preparatory Comm’n for the Int’l Criminal Court, 10th Sess., July 1–12, 2002, ¶ 2, U.N. Doc. PCNICC/2002/WGCA/DP.5 (July 8, 2002) (adding the adverb “effectively” before the words “exercise control” in order to reflect the principle that “the crime of aggression is a leadership crime which may only be committed by persons who have effective control of the State and military apparatus . . .”).

<sup>40</sup> Discussion Paper Proposed by the Coordinator, *supra* note 37, ¶ II(3).

(c) required that the act of aggression must “by its character, gravity and scale, constitute[] a flagrant violation of the Charter of the United Nations.”<sup>41</sup>

“Flagrant violation” of the Charter of the United Nations did eventually become “manifest violation.”<sup>42</sup>

The Coordinator’s Discussion Paper proceeded on the assumption that the means of perpetration stipulated in Article 25(3) of the ICC Statute, vicarious liability of military commanders and other superiors as regulated by Article 28, and the provisions of Article 33 designating circumstances under which superior orders will or will not be an excuse, do not apply to the crime of aggression.<sup>43</sup> Although these assumptions were not included in the final decision of the Review Conference, they are nevertheless implicit in the definition adopted by the Review Conference.

The definition that went forward to the next phase of its design orchestrated by the Assembly of States Parties also contained elements, and reflected controversies, that were eventually omitted. References in the definition (a) to the means of perpetration (ordering or participating actively in the conduct that constitutes an act of aggression), and (b) to the element of *mens rea* (intentionally and knowingly executing the act that constitutes an act of aggression), was in the end omitted from the definition in order to bring the provisions relating to the crime of aggression into conformity with the general structure of the ICC Statute which separated the definitions of crimes (Articles 5 to 8) from the means of perpetration (Article 25(3)) and the mental element (Article 30).<sup>44</sup>

The Working Paper of the Coordinator furthermore reflected the opinion of some delegations that wanted to limit the acts of aggression that could constitute the basis of prosecutions for the crime of aggression to ones that constitute (or amount to) a war of aggression, military occupation, or annexation

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<sup>41</sup> *Id.* ¶ 1(7).

<sup>42</sup> See Int’l Criminal Court [ICC], Rep. on the Informal Inter-Sessional Meeting of the Special Working. Grp. on the Crime of Aggression, transmitted by note of the Secretariat, Assembly of State Parties, 5th Sess., Nov. 23–Dec. 1, 2006, ¶ 20, ICC Doc. ICC-ASP/5/SWGCA/INF.1 (Sept. 5, 2006) [hereinafter 5th Sess. Rep. on the Informal Inter-Sessional Meeting] (“A general preference was noted for the term ‘manifest’ rather than ‘flagrant’ if the qualifier was to be retained.”).

<sup>43</sup> *Id.* ¶ 86; see also Clark, *supra* note 37, at 883–86 (arguing that, given the nature of the crime of aggression, these general provisions do not fit the commission of that crime).

<sup>44</sup> See Weisbord, *supra* note 1, at 192 (discussing how this approach would “retain the consistency of the Rome Statute by treating aggression like the other crimes”).

of the territory of another State—thereby eliminating several other instances of acts of aggression mentioned in Resolution 3314.<sup>45</sup>

The provisions dealing with the conditions under which the ICC can prosecute the crime of aggression remained controversial throughout the Preparatory Commission's life span. As noted by Silvia Fernández de Gurmendi, the issues to be decided "raise not only thorny political difficulties, but also technical problems that need to be addressed."<sup>46</sup> The main focus was on the role of the Security Council.<sup>47</sup> Different sets of options, and variants within the confines of particular options, dealing particularly with instances where the Security Council has not made a determination as to the existence of an act of aggression by the State concerned, remained in contention.<sup>48</sup> Some views reflected in the labyrinth of options and variants sought to afford to the General Assembly of the United Nations,<sup>49</sup> or to the ICJ,<sup>50</sup> the power to determine the existence of an act of aggression for purposes of setting ICC prosecutions of a crime of aggression in motion. It is fair to conclude that the Preparatory Commission did not even come close to reaching agreement on the conditions under which the ICC would be competent to prosecute the crime of aggression.

The Preparatory Commission did initiate the drafting of Elements of Crimes for the crime of aggression, based on a proposal submitted by Samoa.<sup>51</sup>

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<sup>45</sup> Discussion Paper Proposed by the Coordinator, *supra* note 37, ¶ 1(1)(Options 1 & 2).

<sup>46</sup> Fernández de Gurmendi, *supra* note 2, at 605.

<sup>47</sup> *See id.* at 599 ("The articulation of an adequate relationship with the Security Council was one of the most sensitive issues during the drafting of the Rome Statute.").

<sup>48</sup> *See id.* at 602 (discussing the Council's inaction as an argument against the Council's exclusivity to determine an act of aggression); Weisbord, *supra* note 1, at 168–70 (noting the Council's historical reticence in naming aggression).

<sup>49</sup> Discussion Paper Proposed by the Coordinator, *supra* note 37, ¶ 1(5)(Option 3).

<sup>50</sup> *Id.* ¶ 1(5)(Options 4 & 5). By virtue of its own Statute, the ICJ cannot simply decide that an act of aggression has taken place. A Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania in 2001 was to the effect that if the Security Council has not made a determination of an act of aggression, the ICC can invite the General Assembly to request the ICJ for an advisory opinion regarding the commission of an act of aggression. *See Incorporating the Crime of Aggression as a Leadership Crime into the Definition, Proposal Submitted by Bosnia & Herzegovina, New Zealand and Rome, Preparatory Comm'n for the Int'l Criminal Court, 7th Sess., Feb. 26–Mar. 9, 2001, U.N. Doc. PCNICC/2001/WGCA/DP.1 (Feb. 23, 2001); see also Proposal by the Netherlands concerning PCNICC/2002/WGCA/RT.1, Preparatory Comm'n for the Int'l Criminal Court, 9th Sess., Apr. 8–19, 2002, U.N. Doc. PCNICC/2002/WGCA/DP.1 (Apr. 17, 2002) (proposing that "[t]he Court may request the Security Council . . . to seek an advisory opinion from the International Court of Justice . . . on the legal question of whether or not an act of aggression has been committed by the State concerned").*

<sup>51</sup> Elements of the Crime of Aggression, Proposal Submitted by Samoa, Preparatory Comm'n for the Int'l Criminal Court, 10th Sess., July 1–12, 2002, U.N. Doc.

In the period 2002–2010, defining the crime of aggression and determining the circumstances under which the ICC would be competent to prosecute the crime was considered by a Special Working Group on the Crime of Aggression of the Assembly of States Parties, of which membership was open to all Member States of the United Nations.<sup>52</sup> The Permanent Representative of the Principality of Liechtenstein in the United Nations, Ambassador Christian Wenaweser, initially chaired the Special Working Group.<sup>53</sup> He was subsequently succeeded by His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein of Jordan,<sup>54</sup> who deserves special mention for his extremely competent leadership role as facilitator of the Special Working Group in the final year before, and during, the Review Conference.

Informal inter-sessional meetings on the crime of aggression, commonly referred to as the Princeton Process, were held annually in the period 2004–2007 at Princeton University.<sup>55</sup> Those meetings were hosted by the Liechtenstein Institute on Self-Determination and the Woodrow Wilson School of Princeton University.<sup>56</sup> The Princeton Process received generous financial support from the governments of Canada, Denmark, Finland, Germany, Liechtenstein, Mexico, the Netherlands, Sweden and Switzerland.<sup>57</sup> It conducted its business with a focus on three distinct “baskets”: defining acts of aggression (coordinated by Phani Dascalopoulou-Livada of Greece); defining the crime of aggression (coordinated by Claus Kreß of Germany); and establishing the conditions for the exercise of jurisdiction (coordinated by Pal Wrangé of Sweden).<sup>58</sup>

Progress made during this phase of the proceedings is reflected in the 2007 Chairman’s Discussion Paper of Christian Wenaweser,<sup>59</sup> of which a revised

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PCNICC/2002/WGCA/DP.2 (June 21, 2002). See Discussion Paper Proposed by the Coordinator, *supra* note 37, ¶ II, for the final draft of the elements of the crime of aggression.

<sup>52</sup> ICC, *Continuity of Work in Respect of the Crime of Aggression*, Assembly of States Parties Res. ICC-ASP/1/Res.1, ICC Doc. ICC-ASP/1/3 (Sept. 9, 2002).

<sup>53</sup> Weisbord, *supra* note 1, at 176.

<sup>54</sup> Claus Kreß, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1217 n.83 (2010).

<sup>55</sup> See PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2009, at viii (Stefan Barriga, Wolfgang Danspeckgruber & Christian Wenaweser eds., 2009).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at x.

<sup>58</sup> *Id.*

<sup>59</sup> ICC, Discussion Paper Proposed by the Chairman, Assembly of States Parties, Resumed 5th Sess., Jan. 29–Feb. 1, 2007, ICC Doc. ICC-ASP/5/SWGCA/2, Annex (Jan. 16, 2007). See

version was published in 2008.<sup>60</sup> The revised version of the Chairman's Discussion Paper contained a proposed definition of the crime of aggression (Article 8*bis*) which is the one that eventually came to be accepted by general agreement at the Review Conference in Kampala.<sup>61</sup> As to the conditions for the exercise of jurisdiction over the crime of aggression (Article 15*bis*), the Working Group remained divided, particularly as far as the role of the Security Council was concerned. Different options for alternative jurisdictional filters (a Pre-Trial Chamber of the ICC, the General Assembly of the United Nations, or the ICJ), remained in contention. It is perhaps worth noting that Belgium submitted a proposal in January 2007, confining a jurisdictional filter for investigations into the crime of aggression, following a State Party referral or investigations *proprio motu*, to an extended (six-judges) Pre-Trial Chamber of the ICC.<sup>62</sup> That, after all, formed the basis of what came to be accepted in Kampala by general agreement.

The December 2007 *Report of the Special Working Group on the Crime of Aggression* recorded that several delegations preferred to link the crime of aggression to an "armed attack" rather than to an "act of aggression" but that those delegations were willing to accept the deletion of the "armed attack" option.<sup>63</sup>

A final informal meeting of the Assembly of States Parties was held from June 8–10, 2009 at the Princeton Club in New York City.<sup>64</sup> A substantial part of the proceedings dealt with the Elements of Crimes for the crime of aggression.<sup>65</sup>

These initiatives paved the way for reaching the final goal of the Assembly of States Parties and its Special Working Group on the Crime of Aggression at the Review Conference in Kampala.

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Weisbord, *supra* note 1, at 176–208, for an overview of the discussion paper.

<sup>60</sup> ICC, Discussion Paper on the Crime of Aggression Proposed by the Chairman (Revision June 2008), Assembly of States Parties, Resumed 6th Sess., June 2–6, 2008, ICC Doc. ICC-ASP/6/SWGCA/2, Annex (May 14, 2008).

<sup>61</sup> *Id.* art. 8*bis*.

<sup>62</sup> ICC, Rep. of the Special Working Grp. on the Crime of Aggression, Assembly of States Parties, Resumed 5th Sess., Jan. 29–Feb. 1, 2007, ¶ 29, ICC Doc. ICC-ASP/5/35, Annex II (Feb. 2007) [hereinafter 5th Sess. Rep. of the Special Working Grp.].

<sup>63</sup> ICC, Rep. of the Special Working Grp. on the Crime of Aggression, Assembly of States Parties, 6th Sess., Nov. 30–Dec. 12, 2007, ¶ 13, ICC Doc. ICC-ASP/6/SWGCA/1 (Dec. 13, 2007) [hereinafter 6th Sess. Rep. of the Special Working Grp.].

<sup>64</sup> ICC, Rep. on the Informal Inter-Sessional Meeting on the Crime of Aggression, Hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, 8 to 10 June 2009, Assembly of States Parties, 8th Sess., Nov. 18–26, 2009, ICC Doc. ICC-ASP/8/INF.2 (July 10, 2009) [hereinafter 8th Sess. Rep. on the Informal Inter-Sessional Meeting].

<sup>65</sup> *Id.*

## III. DEFINING THE CRIME OF AGGRESSION

On February 13, 2009, at the Resumed Seventh Session of the Assembly of States Parties (February 9–13, 2009) and after lengthy and intense deliberations during the preceding years, the Special Working Group on the Crime of Aggression, chaired at the time by Ambassador Christian Wenaweser of Liechtenstein, proposed a definition of the crime of aggression which enjoyed wide support and was eventually inserted into the ICC Statute as Article 8*bis*.<sup>66</sup> Professor Roger Clark recorded that the definition was adopted by “a substantial consensus,” noting that “not everyone in the Working Group was entirely happy with everything” contained in the definition.<sup>67</sup> At its Eighth Session (November 18–26, 2009), the Assembly of States Parties decided to forward to the Review Conference for its consideration amendments of the ICC Statute,<sup>68</sup> which included the definition of the crime of aggression proposed by the Working Group in February 2009.<sup>69</sup>

Although there was overwhelming support for inserting the proposed Article 8*bis* in the ICC Statute, several delegations (for example Iran and Malaysia) still questioned aspects of the definition, notably a passage in the definition requiring that the crime of aggression must amount to “a *manifest* violation of the Charter of the United Nations” (emphasis added).<sup>70</sup> At the final session of the Assembly of States Parties that preceded the Review Conference, and in the first week of the Review Conference, the delegation of the United States questioned aspects of the definition and appealed to the Conference not to proceed with any final decisions on the crime of aggression. Professor Harold Koh, speaking on behalf of the United States, maintained that “as yet, no authoritative definition of aggression exists under customary international law,” and that the crimes listed in Resolution 3314, “if committed in isolation, would not necessarily qualify as a crime of aggression.”<sup>71</sup> He proposed the addition of

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<sup>66</sup> ICC, Rep. of the Special Working Grp. on the Crime of Aggression, Assembly of States Parties, Resumed 6th Sess., June 2–6, 2008, ¶ 2, art. 8*bis*, ICC Doc. ICC-ASP/6/20/Add.1, app. I, Annex (2008) [hereinafter Working Group Report].

<sup>67</sup> Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Conditions for ICC Exercise of Jurisdiction over It*, 20 EUR. J. INT’L L. 1103, 1104 (2009).

<sup>68</sup> ICC, *Review Conference*, Assembly of States Parties Res. ICC-ASP/8/Res.6, ¶ 3, ICC Doc. ICC-ASP/8/Res.6 (Nov. 26, 2009).

<sup>69</sup> *Id.* Annex II, app., art. 8*bis*.

<sup>70</sup> See *supra* text accompanying notes 38, 42.

<sup>71</sup> Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Statement at the Review Conf. at the Int’l Criminal Court (June 4, 2010), <http://www.state.gov/s/l/releases/remarks/142665.htm> (last visited Feb. 11, 2011) [hereinafter Koh Statement]; see also Theodor Meron, *Defining Aggression for the*

“understandings” to the definition of aggression “to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes that the Rome Statute is designed to deter—do not commit ‘manifest’ violations of the U.N. Charter . . . and should not run the risk of prosecution.”<sup>72</sup>

On the final day of the Review Conference it was decided by general agreement to insert Article 8*bis*, into the ICC Statute, which defines as follows the crime of aggression and an act of aggression:

(1) For the purpose of the 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 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 weapon by a State against the territory of another State;

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*International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 9 (2001) (expressing doubt as to whether G.A. Res. 3314 reflects customary international law for the crime of aggression). *Contra* 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, 1139 (2010) (referring to “the crime of aggression under customary international law, as it has evolved from the ‘creative precedents’ of Nuremberg and Tokyo”).

<sup>72</sup> Koh Statement, *supra* note 71; 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, 698–99 (2010).



- (c) The blockade of the ports or coast 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.<sup>73</sup>

The definition of “crime of aggression” has several special features worth emphasizing:

- (a) It denotes the offence as a leadership crime: only “a person in a position effectively to exercise control over or to direct the political or military action of a State” can be prosecuted for the crime of aggression.<sup>74</sup>
- (b) The definition of “act of aggression” simply repeats General Assembly Resolution 3314 (XXIX) of 14 December 1974.<sup>75</sup>
- (c) The Drafters were particularly sensitive to a resolve to confine the subject-matter jurisdiction of the ICC to conduct that constitutes offences under customary international law, and to that end inserted a phrase requiring that the act of aggression, from which prosecution for the crime of aggression may stem, must “by its character, gravity and scale, constitute[] a manifest violation of the Charter of the United Nations.”<sup>76</sup>
- (d) Drafters excluded from the definition the means of perpetration, such as “participation in a common plan or conspiracy,” which constituted part of

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<sup>73</sup> ICC, *The Crime of Aggression*, Review Conf. Res. RC/Res.6, ¶ 2, ICC Doc. ICC-ASP-RC/11, Annex I (June 11, 2010).

<sup>74</sup> *Id.* ¶ 1.

<sup>75</sup> *Id.* ¶ 2.

<sup>76</sup> *Id.* ¶ 1.

the definition of crimes against peace in the Nuremberg Charter, or “participates actively” in the conduct that constitutes a crime of aggression, which was included in earlier drafts of the crime of aggression for ICC purposes.<sup>77</sup>

The definition of the crime of aggression was further elaborated by a number of introductory paragraphs and Elements of Crimes.<sup>78</sup> The introductory observations explain that every one of the acts listed in Article 8bis(2), taken on their own, qualifies as an act of aggression; that it is not necessary for a conviction of the crime of aggression to show that the perpetrator made a legal evaluation as to whether the use of armed force was inconsistent with the U.N. Charter, or as to whether the violation of the U.N. Charter was “manifest”; and that “manifest” is an objective qualification of the wrongful act.<sup>79</sup>

The Elements of Crimes are for the most part self-evident: An act of aggression was committed; the perpetrator planned, prepared, initiated or executed the act of aggression; the perpetrator was 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; the perpetrator was aware of the factual circumstances that rendered the use of armed force inconsistent with the U.N. Charter, and also of the factual circumstances that rendered the act a manifest violation of the U.N. Charter; and it is the character, gravity and scale of the act of aggression that renders it a manifest violation of the U.N. Charter.

The distinct components of the crime of aggression as defined by the Review Conference will next be analyzed in slightly more detail.

#### *A. Aggression as a Leadership Crime*

Defining aggression as a leadership crime renders this crime, in comparison with other crimes within the subject-matter jurisdiction of the ICC, quite unique; that is, in at least two respects:

- (a) It adds a political dimension to the crime of aggression which is not necessarily part of genocide, crimes against humanity, or war crimes; and
- (b) It limits the basis of liability (almost) entirely to principal or co-principal perpetrators.

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<sup>77</sup> Nuremberg Charter, *supra* note 6; 5th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 42, Annex II, ¶ 1.

<sup>78</sup> Review Conf. Res. RC/Res.6, *supra* note 73, Annex II.

<sup>79</sup> *Id.*

The political dimension derives from the link between the crime of aggression and an act of aggression, which is essentially an act of state. It raises the question whether state consent is required for the exercise of jurisdiction by the ICC over the crime of aggression.

Prosecutions in international tribunals of natural persons (individuals) for customary-law crimes are indeed not dependent on consent of the accused or of the State of his or her nationality.<sup>80</sup> However, the competence of the ICC to decide that an act of aggression has taken place could arguably fall under the norm of general international law, which makes the jurisdiction of international tribunals over States subject to consent of the States concerned.<sup>81</sup> The judgment of the International Court of Justice in the *Monetary Gold Removal Case* of 1954 may be cited in support of the proposition that an international tribunal cannot decide a dispute between State A and State B that implicates the interests of State C without the consent of State C.<sup>82</sup> The rule was quite clearly summarized by the ICJ in that case:

Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.<sup>83</sup>

Although the ICJ was not here dealing with criminal prosecution, the Review Conference nevertheless decided to play it safe by affording to States Parties, in the case of State Party referrals and investigations *proprio motu*, the right not to accept the exercise of jurisdiction by the ICC over crimes of

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<sup>80</sup> See Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, 861–62 n.23 (2002) (referring to a paper submitted by Germany, which stated that, under current international law, jurisdiction was not dependent on the nationality or consent of the accused).

<sup>81</sup> Cf. Gerald Hafner, Kristen Boon, Anne Rubesame & Jonathan Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108, 116 (1999) (“Detractors claim that [the] potential jurisdiction over the nationals of non-state parties is a contravention of international law . . .”).

<sup>82</sup> *Monetary Gold Removal from Rome in 1943 (It. v. Fr., U.K. & U.S.)*, 1954 I.C.J. 19, ¶¶ 32–33 (June 15) [hereinafter *Monetary Gold*]; see also Covey T. Oliver, *The Monetary Gold Decision in Perspective*, 49 AM. J. INT'L L. 216, 221 (1955) (“[The] dispute could not be decided without the appearance of [the third party] Albania.”); D.H.N. Johnson, *The Case of the Monetary Gold Removed from Rome in 1943*, 4 INT'L & COMP. L. Q. 93, 94 (1955) (discussing a submission that argued that the Court had no jurisdiction because the first submission in the Italian Application included an issue of the international responsibility of Albania to Italy, and Albania had not provided consent to such jurisdiction).

<sup>83</sup> *Monetary Gold*, *supra* note 82, at 33.

aggression committed by their nationals or on their territory.<sup>84</sup> The “opt-out” option will be dealt with hereafter in greater detail.<sup>85</sup>

The Review Conference saw fit to add a subsection to Article 25(3), which outlines the means of perpetration for which one can be convicted in the ICC, to record that aggression is a leadership crime.<sup>86</sup> This added section reiterates what is already stated in the definition of aggression, namely:

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>87</sup>

It stands to reason that such persons in authority can be prosecuted as principal perpetrators or co-perpetrators, or for ordering, soliciting or inducing persons under their political or military control to commit the crime of aggression.<sup>88</sup> Liability for the crime of aggression of a person in a leadership position who merely “aids”, “abets”, or “otherwise assists” in the commission or attempted commission of the crime,<sup>89</sup> or who “contributes” in any other way to the commission or attempted commission of the crime by a group of persons acting with a common purpose,<sup>90</sup> would seemingly be out of the question. As noted by Roger Clark, the crime of aggression “has its own set of ... nouns”, such as planning, preparation, initiation or execution of an act of aggression, that do not cover all the means of perpetration listed in Article 25(3).<sup>91</sup> It is also highly unlikely that prosecutions for attempted aggression would be feasible.<sup>92</sup> Roger Clark noted that Resolution 3314 does not contemplate an attempt to commit aggression but that attempted aggression might be construed “where troops are massed at the border but bombed into oblivion before they can move,” or where the perpetrator “tries to contribute to the ‘planning, preparation, initiation or waging’ of an aggression that takes place, but he or she fails in the effort to contribute.”<sup>93</sup> The Special Working Group on the Crime of Aggression noted,

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<sup>84</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶ 3, art. 15bis(4).

<sup>85</sup> See *infra* Part C.4.

<sup>86</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶ 5.

<sup>87</sup> *Id.*

<sup>88</sup> ICC Statute, *supra* note 4, art. 25(3)(a)–(b).

<sup>89</sup> *Id.* art. 25(3)(c).

<sup>90</sup> *Id.* art. 25(3)(d).

<sup>91</sup> Clark, *supra* note 37, at 883–84.

<sup>92</sup> ICC Statute, *supra* note 4, art. 25(3)(f).

<sup>93</sup> Clark, *supra* note 37, at 884; see also ICC, Rep. of the Informal Inter-Sessional Meeting of the Special Working Grp. on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 13 to 15 June 2005, Assembly of States Parties, 4th Sess., Nov. 28–Dec. 3, 2005, ¶¶ B(II)(1)(b), B(II)2, ICC Doc. ICC-ASP/4/32, Annex II.B (June

with acclamation, that “*such cases of attempt remain rather theoretical in nature.*”<sup>94</sup>

The question whether the person in a position of authority could also be held vicariously liable, in the case of military commanders or persons acting effectively as military commanders, for crimes of aggression committed by persons under their effective command and control, or, in the case of non-military superiors, for crimes of aggression committed by persons under their effective authority and control,<sup>95</sup> was debated at earlier stages of the deliberation.<sup>96</sup> The matter was raised in the 2008 Chairman’s Paper presented to the Special Working Group, but was dismissed by delegations who maintained that Article 28 of the ICC Statute (dealing with vicarious liability of military commanders and other persons in a position of authority) will never be relevant to the crime of aggression.<sup>97</sup>

In its earlier deliberations, the Special Working Group on the Crime of Aggression also paid attention to the (non-) applicability of Article 33 of the ICC Statute, which stipulates the circumstances under which superior order will and will not be an excuse.<sup>98</sup> The view that prevailed was the one which noted that, as a leadership crime, the crime of aggression is “not applicable to mid-, or lower-level individuals.”<sup>99</sup> Since the subordinate acting upon superior orders is not the one that will be prosecuted for the crime of aggression, Article 33 simply does not apply and nothing further need to be said or done in this regard.

Confining the perpetrator of a crime of aggression to persons who “effectively . . . exercise control over or . . . direct” the political or military action of a State has been criticized as being too restrictive. One analyst proposed that the reach of aggression should be extended to also include conduct of secondary perpetrators, such as “private economic actors” (industrialists who facilitate acts of aggression) and third-State officials (political or military officials of State B who are complicit in acts of aggression committed by State A), and to that end proposed that “exercise control over or . . . direct” be replaced in the definition

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2005) [hereinafter 4th Sess. Rep. of the Informal Inter-Sessional Meeting] (discussing “the case of an attempted individual act of participation in a completed collective act” and “the case of the ‘commenced but uncompleted’ collective act”).

<sup>94</sup> 4th Sess. Rep. of the Informal Inter-Sessional Meeting, *supra* note 93, ¶ B(II)(1)(b).

<sup>95</sup> See ICC Statute, *supra* note 4, art. 28 (setting forth the responsibility of commanders and other superiors).

<sup>96</sup> Working Group Report, *supra* note 66, Annex II, ¶¶ 19–22.

<sup>97</sup> *Id.* ¶ 20.

<sup>98</sup> See, e.g., 4th Sess. Rep. of the Informal Inter-Sessional Meeting, *supra* note 93, Annex II.A, ¶¶ 44–46 (discussing the “retention, exclusion or adaptation of article 33 of the Rome Statute”).

<sup>99</sup> *Id.* ¶ 45.

of the crime of aggression with “shape or influence.”<sup>100</sup> With certain Nuremberg cases in mind, the “shape or influence” option was raised in the June 2007 session of the Special Working Group on the Crime of Aggression, but was not acceptable to some delegation, because “the responsibility of persons beyond the direct leaders would be difficult to prove.”<sup>101</sup>

### *B. Acts of Aggression*

Acts of aggression are confined for ICC purposes to those specified in General Assembly Resolution 3314.<sup>102</sup> Resolution 3314 in addition affords to the Security Council the competence to determine that acts other than those listed by name also “constitute aggression under the provisions of the [U.N.] Charter.”<sup>103</sup> Drafters of Article 8*bis* saw fit not to add such an open-ended provision to the particular instances of acts of aggression listed in Resolution 3314 but to confine acts of aggression to those enumerated in Resolution 3314.<sup>104</sup>

Concerns that have been articulated by some analysts regarding the substance of Resolution 3314 are not entirely without foundation.<sup>105</sup> As noted by Ben Ferencz shortly after its adoption in 1974, Resolution 3314 contained “negotiated compromises and deftly obscured clauses which were deemed necessary in the process of reaching consensus,”<sup>106</sup> and the list of acts that

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<sup>100</sup> Kevin J. Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L L. 477, 496–97 (2007).

<sup>101</sup> ICC, Rep. on the Informal Inter-Sessional Meeting of the Special Working Grp. on the Crime of Aggression, Held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007, transmitted by note of the Secretariat, Assembly of States Parties, 6th Sess., Nov. 30–Dec. 14, 2007, ¶ 12, ICC Doc. ICC-ASP/6/SWGCA/INF.1 (July 25, 2007) [hereinafter 6th Sess. Rep. on the Informal Inter-Sessional Meeting]; see also Elements of the Crime of Aggression Proposed by Samoa, Working Grp. On the Crime of Aggression, 10th Sess., July 1–12, 2002, pt. 5, U.N. Doc. PCNICC/2002/WGCA/DP.2 (2002) (referring to the perpetrator as someone “who need not formally be a member of the Government or the military,” and being in “an . . . [effective] position to exercise control over or direct the military action of the State,” in order to encapsulate the Nuremberg “industrialist cases”).

<sup>102</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶ 2.

<sup>103</sup> G.A. Res. 3314, *supra* note 5, art. 4.

<sup>104</sup> See Clark, *supra* note 67, at 1105 (“The drafting of Article 8*bis* is aimed at avoiding the open-ended nature of Resolution 3314.”).

<sup>105</sup> See Kreß, *supra* note 71, at 1136 (“The idea of using Resolution 3314 was by no means uncontroversial.”).

<sup>106</sup> Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance*, 10 J. INT'L L. & ECON. 701, 709 (1975).

would qualify as aggression admittedly also contains ambiguities.<sup>107</sup> However, generality and ambiguity are not uncommon in legal instruments, and judges are well trained to apply sweeping provisions to specific fact scenarios, to create consistency within the array of conflicting provisions, and to afford a workable degree of legal certainty and practicality to dubious language often employed by law makers. And should the Security Council find cause to identify new instances of aggression beyond those listed in Resolution 3314, nothing would prevent the Assembly of States Parties to consider adding those to the enumerated acts of aggression by means of an amendment of the ICC Statute.<sup>108</sup>

A number of delegations, including the one of Germany, nevertheless preferred a “generic approach” that would denote the act of aggression merely as an “armed attack” in contravention of the U.N. Charter without reference to Resolution 3314.<sup>109</sup> Proponents of the generic approach noted that Resolution 3314 “was a political instrument negotiated in a different context and not related to issues of individual criminal responsibility.”<sup>110</sup> At the June 2005 Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression it was noted that there was “a considerable preference” for the generic approach.<sup>111</sup>

There is one passage in the Elements of Crimes that seemingly qualifies, and in fact narrows down, the acts of aggression listed in Resolution 3314. Those acts of aggression will only constitute the basis of the crime of aggression if they amount to “the use of armed force . . . against the sovereignty, territorial integrity or political independence of another State.”<sup>112</sup> This provision exceeds the provision in the U.N. Charter that calls on Member States to “refrain in their international relations from the threat or use of force against the territorial

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<sup>107</sup> *Id.* at 711–13; see also Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 556 (2002) (“[N]o consensus exists within the international community as to what constitutes ‘aggression.’”); Daniel D. Ntando Nsereko, *Aggression under the Rome Statute of the International Court*, 71 NORDIC J. INT’L L. 497, 501–04 (2002) (explaining that the definition of aggression is flawed and imprecise in several respects).

<sup>108</sup> See ICC Statute, *supra* note 4, art. 121 (noting that any state may propose an amendment to the statute without setting forth any definitional restrictions).

<sup>109</sup> 6th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 101, ¶ 37.

<sup>110</sup> 5th Sess. Rep. of the Special Working Grp., *supra* note 62, ¶ 22.

<sup>111</sup> ICC, Rep. on the Informal Inter-Sessional Meeting of the Special Working Grp. on the Crime of Aggression, held by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 13 to 15 June 2005, Assembly of States Parties, Resumed 4th Sess., Nov. 28–Dec. 5, 2005, ¶ 75, ICC Doc. ICC-ASP/4/32, Annex II.A (2005).

<sup>112</sup> 8th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 64, Annex I, element 3.

integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>113</sup> Including in the Elements of Crimes “the use of armed force . . . against the sovereignty . . . of another State”<sup>114</sup> adds a dimension to the crime of aggression that is not part of the U.N. Charter proscription. The U.N. Charter refers only to “the territorial integrity” and “political independence” of the State under attack.<sup>115</sup> This is an important distinction since it may implicate the future legality of humanitarian interventions.

Humanitarian intervention will admittedly only be warranted in exceptional circumstances.<sup>116</sup> It is per definition not aimed at the changing of territorial borders of the State under attack, nor does it challenge the political independence of that State.<sup>117</sup> Its sole purpose is to bring to an end extreme, and at the time ongoing, violations of human rights perpetrated by a repressive political regime.<sup>118</sup> Humanitarian intervention may perhaps be seen as an affront against the sovereignty of the State under attack, but does not amount to the use of force “against the territorial integrity or political independence of any state” within the meaning of the U.N. Charter.<sup>119</sup> According to Julius Stone, a blanket prohibition of the threat or use of force, furthermore, cannot be reconciled with the provisions of Article 2(3) of the U.N. Charter, which calls upon Member States to settle international disputes by peaceful means and in such a manner that international peace “and justice” are not endangered.<sup>120</sup> Michael Reisman argued in similar vein that the prohibition in the U.N. Charter of the threat or use of force must be read in conjunction with the overarching human rights concerns of the United Nations as recorded in several provisions of the U.N. Charter,<sup>121</sup> of which humanitarian intervention is, according to him, a logical extension.<sup>122</sup>

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<sup>113</sup> U.N. Charter art. 2, para. 4.

<sup>114</sup> 8th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 64, Annex I, element 3.

<sup>115</sup> U.N. Charter art. 2, para. 4.

<sup>116</sup> See Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard B. Lillich ed., 1973) (noting that humanitarian intervention is justified when it is precipitated by extreme human rights deprivations and conforms to general international legal regulations governing the use of force).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> JULIUS STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 95 (Joseph Perkovich ed., The Lawbook Exchange Ltd. 2006) (1958).

<sup>120</sup> *Id.* at 95; see also *id.* at 98–101 (discussing the “absurdities of the extreme interpretation”).

<sup>121</sup> Reisman, *supra* note 116, at 177–78.

<sup>122</sup> *Id.*; see also Adam Roberts, *The So-Called “Right” of Humanitarian Intervention*, 3 Y.B.



Besides the general prohibition of the use of force against the territorial integrity or political independence of any State, certain particular instances of armed action are expressly authorized by the U.N. Charter, namely, (i) collective armed intervention under auspices of the Security Council as a means of putting an end to a situation that constitutes a threat to the peace, a breach of the peace or an act of aggression;<sup>123</sup> and (ii) individual or collective self-defense in cases where an armed attack occurred against a Member State of the United Nations.<sup>124</sup> This raises the question whether the U.N. Charter deals comprehensively with all instances of (un)lawful armed interventions. There are strong arguments to be made in support of the proposition that it does not.

- (a) In the 1950 *Uniting for Peace Resolution*, the United Nations itself went beyond its own Charter provisions by authorizing the sanctioning of armed interventions by the General Assembly as a means of counteracting a breach of the peace or an act of aggression in instances where the Security Council, “because of lack of unanimity of the Permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security.”<sup>125</sup>
- (b) The General Assembly has also on several occasions acknowledged the legitimacy of wars of liberation against colonial rule, foreign domination or racist regimes,<sup>126</sup> and on occasion stated explicitly that a “legitimate

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INT’L HUMANITARIAN L. 3, 8 (2000) (discussing three bases of support for the view that the U.N. Charter leaves some scope for humanitarian intervention).

<sup>123</sup> U.N. Charter art. 42.

<sup>124</sup> See *Id.* art. 51 (requiring that in cases of collective self-defense, the State for whose benefit this right is used must declare itself to be the victim of an armed attack); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 196, 199 (June 27) (stating that the victim State must furthermore request the assistance of the other State or States participating in the collective defense of the victim State).

<sup>125</sup> G.A. Res. 377 (V), ¶ 1, U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (Nov. 3, 1950).

<sup>126</sup> See G.A. Res. 3163 (XXVIII), ¶ 5, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 5 (Dec. 14, 1973) (proclaiming the legitimacy of the struggle of the people under colonial and alien domination to exercise their right to self-determination and independence by all necessary means); G.A. Res. 3411 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034, at 36 (Dec. 10, 1975) (proclaiming the legitimacy of the struggle against a racist regime by all means possible); G.A. Res. 35/206, ¶ 1, U.N. GAOR 35th Sess., Supp. No. 48, U.N. Doc. A/35/48, at 29 (Dec. 16, 1980) (reaffirming “the legitimacy of the struggle of the people of South Africa”); G.A. Res. 36/172, ¶ 13, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51, at 38 (Dec. 17, 1981) (condemning the actions of states that have “increased their . . . relations with the racist regime of South Africa despite repeated appeals by the General Assembly”); see also S.C. Res. 437, ¶ 4, U.N. SCOR 35th Year, U.N. Doc. S/INF/36, at 18 (June 13, 1980)

struggle” includes the armed struggle of liberation movements.<sup>127</sup>

- (c) Protocol I to the Geneva Conventions of 12 August 1949 also afforded legitimacy to wars of liberation by proclaiming that such wars are governed by the rules of humanitarian law applying to international armed conflicts.<sup>128</sup>

Humanitarian intervention, though not expressly sanctioned by the U.N. Charter, will therefore most likely not be considered as an act of aggression for ICC purposes. Humanitarian intervention is exclusively aimed at liberating the subjects of a repressive government from current and ongoing atrocities that shocks the conscience of the world. Those engaged in humanitarian interventions do not intend to undermine the territorial integrity or political independence of the State under attack. It also seems feasible to conclude, as did Michael Reisman,<sup>129</sup> that the humane concerns which motivate humanitarian intervention are in conformity with, and not contrary to, the human rights commitments of the United Nations.<sup>130</sup>

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(proclaiming the legitimacy of the struggle of the South African people for the elimination of apartheid); Stephen M. Schwebel, *Wars of Liberation as Fought in U.N. Organs*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 446, 447 (John Norton Moore ed., 1974) (noting that wars of liberation “are treated by the international community as an exception from Charter prohibitions on the use of force”).

<sup>127</sup> G.A. Res. 38/39A ¶ 4, U.N. GAOR 38th Sess., Supp. No. 47, U.N. Doc. A/38/47, at 36 (Dec. 5, 1983); G.A. Res. 37/69A ¶ 16, U.N. GAOR 37th Sess., Supp. No. 51, U.N. Doc. A/37/51, at 28 (Dec. 9, 1982); see also G.A. Res. 38/39A ¶ 4, U.N. GAOR 38th Sess., Supp. No. 47, U.N. Doc. A/38/47, at 36 (Dec. 5, 1983) (recognizing the right of oppressed people to resort to “all the means at their disposal, including armed struggle, in their resistance to the illegitimate racist minority regime of South Africa”).

<sup>128</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1, para. 4, June 8, 1977, 1125 U.N.T.S. 3, reprinted in 16 I.L.M. 1391; see also Karl Joseph Partsch, *Armed Conflict*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 249, 251 (Rudolf Bernhardt ed., 1992) (including wars of liberation in the list of international armed conflicts).

<sup>129</sup> See *supra* the text accompanying notes 116–18.

<sup>130</sup> Elise Leclerc-Gagné and Michael Byers proposed that humanitarian intervention should be legalized by adjusting the *mens rea* requirement for convictions in the ICC so as to recognize the perpetrator’s “principal motivation” to use force based on “a genuine humanitarian desire to prevent gross human rights violations.” Elise Leclerc-Gagné & Michael Byers, *A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention*, 41 *CASE W. RES. J. INT’L L.* 379, 387 (2009). This is a bad idea. Motive can have an aggravating or mitigating effect on sentencing but is not a constituent component of *mens rea*. And as noted in the text, humanitarian intervention most likely does not amount to an act of aggression within the meaning of U.N. Charter directives.

Direct military interventions without United Nations approval to overthrow corrupt regimes, which is included in the so-called “Reagan Doctrine” as explained to the Security Council on January 20, 2000 by the late Senator Jesse Helms,<sup>131</sup> do amount to acts of aggression.

### C. *The U.N. Charter Constraint*

Proclaiming that the crime of aggression must “by its character, gravity and scale, constitute[] a manifest violation of the Charter of the United Nations” may also invite disputed interpretations.

What, for example, is the meaning to be attributed to “a manifest violation” of the U.N. Charter, which qualifies the act of aggression upon which prosecutions for the crime of aggression can be based? Some delegations defined it as “an obvious illegal violation,” while others interpreted the phrase to mean “a violation with serious consequences”, and yet a third group attributed to the concept of “manifest” a meaning that would require the violation to be both obviously illegal and one with serious consequences.<sup>132</sup>

“A manifest violation of the Charter of the United Nations” is furthermore dependent on the character, gravity and scale of the act of aggression.<sup>133</sup> Two Understandings were added to the definition of the crime of aggression to clarify the meaning of “a manifest violation of the Charter of the United Nations,” and which also have a bearing on the meaning to be attributed to the “character, gravity and scale” of the act of aggression. Understanding 6 provides:

It is understood that aggression is the most serious and dangerous form of illegal use of force, and that a determination whether an act of aggression has been committed requires consideration of all circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.<sup>134</sup>

This Understanding suggests that the gravity and consequences of the act of aggression are more important than its scale. However, Understanding 7

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<sup>131</sup> Senator Jesse Helms, Address to the United Nations Security Council (Jan. 20, 2000), *reprinted in In the Words of Helms: ‘A Lack of Gratitude’*, N.Y. TIMES, Jan. 21, 2000, at A8; JOHAN D. VAN DER VYVER, IMPLEMENTATION OF INTERNATIONAL LAW IN THE UNITED STATES, 240–41 (2010).

<sup>132</sup> JUSTIN HACCIUS, CHATHAM HOUSE, THE INTERNATIONAL CRIMINAL COURT: REVIEWING THE REVIEW CONFERENCE 6 (2010).

<sup>133</sup> 8th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 64, Annex I, element 5.

<sup>134</sup> Review Conf. Res. RC/Res.6, *supra* note 73, Annex II, ¶ 6.

places the three attributes of acts of aggression on an equal footing. It provides:

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>135</sup>

These understandings reflect the view that prosecutions in the ICC of the crime of aggression will not be justified in all instances of the unlawful use of force but will be confined to the most serious and dangerous armed interventions.<sup>136</sup>

#### *D. A Differentiated Approach*

The ICC Statute regulates in different sections the definitions of crimes (Articles 6, 7 and 8), and the various means of participation in the concerned criminal conduct that would attract criminal responsibility (Article 25(3)). It thus deviated from the Nuremberg Charter, which referred in the definition of crimes against peace to participation in a “common plan or conspiracy,”<sup>137</sup> and from the definition of the crime of aggression proposed by the Preparatory Commission, which included the phrase “orders or participates actively” in the conduct constituting an act of aggression.<sup>138</sup> The Preparatory Commission’s definition also incorporated the *mens rea* requirement of “intentionally and knowingly” committing any of the acts of aggression.<sup>139</sup> The mental element of crimes within the jurisdiction of the ICC is also separated from the definitions of crimes and dealt with in a distinct section of the ICC Statute (Article 30).

At the inter-sessional meeting of the Special Working Group on the Crime of Aggression held at Princeton University in June 2006, a distinction was made between the “monistic approach” reflected in the definitions of the crime of aggression in the Nuremberg Charter and as proposed by the Preparatory Commission, and a “differentiated approach” adhered to by drafters of the ICC Statute. It was agreed in principle “that the differentiated approach was preferable in that it treated the crime of aggression in the same way as the other

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<sup>135</sup> *Id.* Annex III, ¶ 7.

<sup>136</sup> Clark, *supra* note 72, at 699.

<sup>137</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>138</sup> Rep. of the Preparatory Comm’n for the Int’l Criminal Court, Discussion Paper Proposed by the Coordinator, 10th Sess., July 1–12, 2002, add., pt. II(I)(1), U.N. Doc. PCNICC/2002/2/Add.2 (July 24, 2002).

<sup>139</sup> *Id.*

crimes under the jurisdiction of the Court.”<sup>140</sup> The differentiated approach was reflected in the definition of the crime of aggression contained in a non-paper of the Chairman attached to the *Report of the Special Working Group on the Crime of Aggression* of December 2007.<sup>141</sup>

In conformity with the differentiated approach, the Review Conference omitted references to the means of perpetration of the crime of aggression from the definition of that crime and, while noting that the means of perpetration of the crime of aggression is quite unique, decided instead to add a provision to Article 25(3) to make the point. Article 25(3) reiterates that perpetrators of the crime of aggression are confined to “persons in a position effectively to exercise control over or to direct the political or military action of the State.”<sup>142</sup> This constraint does not apply to those who can be held liable for any of the other crimes within the jurisdiction of the ICC.<sup>143</sup>

Differentiating between the definition of a crime (Articles 5–8 of the ICC Statute) and the modes of participation in the commission of the crime (Article 25(3) of the ICC Statute) has been criticized by some analysts in the context of incitement to commit genocide. By virtue of the fact that incitement to commit genocide is treated in the ICC Statute as a mode of participation, those analysts raised the question whether incitement to commit genocide constitutes a crime in its own right.<sup>144</sup> The fact is, though, that distinguishing between a crime and the means of committing the crime is to be commended and should not in any way detract from prosecutions for any of those modes of commission of a crime.<sup>145</sup> This also applies to the prosecutions based on different means of committing the crime of aggression, except of course to the extent that some of

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<sup>140</sup> 5th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 42, ¶ 84; *see also* 6th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 101, ¶¶ 6–8 (noting the “broad support for the proposal as a basis for a solution”); Clark, *supra* note 72, at 1108 (discussing the resolution of the issues through the adoption of the “differentiated” approach to drafting).

<sup>141</sup> 6th Sess. Rep. of the Special Working Grp., *supra* note 63.

<sup>142</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶ 5.

<sup>143</sup> *Id.* ¶ 4, art. 15ter(5).

<sup>144</sup> *See* Thomas E. Davies, Note, *How the Rome Statute Weakens the International Prohibition on Incitement to Commit Genocide*, 22 HARV. HUM. RTS. J. 245, 266–69 (2009) (discussing the flaws of the Rome Statute’s treatment of incitement and making an argument for “going back to the Genocide Convention’s treatment of incitement as a separate crime”).

<sup>145</sup> *See* Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT’L CRIM. JUST. 953, 957, 974 (2007) (discussing how modes of criminal participation should be “understood as indicative of the degree of individual guilt, and thus as helpful guidelines in sentencing matters”).

those means of participation in criminal conduct might not be applicable to the crime of aggression.

#### IV. CONDITIONS FOR THE EXERCISE OF JURISDICTION OVER THE CRIME OF AGGRESSION

The problems that predominated at the Rome Conference with regard to the conditions under which the ICC would be competent to exercise jurisdiction over the crime of aggression were mainly centered upon the role of the Security Council as an exclusive filter of all such prosecutions.<sup>146</sup> During the debates that preceded the Review Conference, the matter was made much more complex by the introduction of several additional side issues, such as the number of ratifications required for the entry into force of the amended text of the ICC Statute, the effect of non-acceptance by a State Party of the amended text, and liability of the nationals of non-party States for the crime of aggression.<sup>147</sup> Some of these issues depended on the meaning to be attached to certain existing passages in the ICC Statute and should perhaps have been left to interpretation by the ICC of those passages.

##### A. Filter Mechanisms

Prosecution in the ICC of perpetrators of the crime of aggression is dependent on the commission of an act of aggression.<sup>148</sup> Who is to decide that an act of aggression has taken place as a condition precedent to an investigation by the Prosecutor into the situation in order to identify the perpetrator(s) of a crime of aggression emanating from the act of aggression; and what binding effect will the decision as to an act of aggression have on the Prosecutor's own assessment, or indeed that of the ICC, of the situation?

The debate centered almost entirely on the role of the Security Council in this regard. A relatively small number of delegations, including those of the Super Powers (China, France, Russia, the United Kingdom and the United States) and of Australia and Canada insisted that the exercise of jurisdiction by the ICC over the crime of aggression must in all instances be made conditional upon a prior decision of the Security Council that an act of aggression has been

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<sup>146</sup> See ICC, Rep. on the Informal Inter-Sessional Meeting of the Special Working Grp. on the Crime of Aggression, transmitted by Note by the Secretariat, Assembly of States Parties, 5th Sess., Nov. 23–Dec. 1, 2006, ¶ 9, ICC Doc. ICC-ASP/5/SWGCA/1 (Nov. 29, 2006) [hereinafter ASP 5th Sess. Rep. on the Informal Inter-Sessional Meeting] (noting that opinions differed on whether jurisdiction over a crime of aggression should be determined by the Security Council or another body).

<sup>147</sup> See *infra* Part C.3.

<sup>148</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶ 3, art. 15*bis*(6).

committed.<sup>149</sup> Australia more precisely proposed that the Security Council be granted “the first bite at the cherry,” but not necessarily the last.<sup>150</sup> Delegations insisting upon a Security Council filter for all prosecutions of the crime of aggression relied almost exclusively on Article 39 of the U.N. Charter which provides in part: “The Security Council shall determine the existence of any . . . act of aggression.”<sup>151</sup>

It should be noted, though, that the Security Council was granted an exclusive role to determine the existence of an act of aggression under Article 39 *for a particular purpose only*, namely to decide what punitive action is to be taken against the State responsible for the act of aggression as a means of restoring international peace and security.<sup>152</sup> Prosecution of the crime of aggression in the ICC is a totally different cup of tea. The ICC is not responsible for maintaining or restoring international peace and security and cannot take action against the aggressor State.<sup>153</sup> Nor, in this writer’s respectful opinion, is the reasoning of Theodor Meron that “a Security Council determination of aggression would create the necessary legitimacy and therefore increase the probability of prosecuting the crime of aggression,”<sup>154</sup> convincing.

Delegations that opposed a Security Council filter noted, on the contrary, that decisions of the Security Council are inspired by political rather than juridical considerations and that affording to a political body a decisive role in prosecutions would undermine the independence of the Court.<sup>155</sup> As noted by Judge Schwebel (dissenting) in the *Nicaragua Case*:

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<sup>149</sup> ASP 5th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 146, Annex II, ¶ 26; Clark, *supra* note 72, at 699 (noting that the Special Working Group had difficulty with the issue of whether there is an essential precondition that the Security Council determine an act of aggression); Donald M. Ferencz, *Bringing the Crime of Aggression Within the Active Jurisdiction of the ICC*, 42 CASE W. RES. J. INT’L L. 531, 535–56 (2009) (examining the issues surrounding the Court’s jurisdiction over the crime of aggression in relation to the Security Council); *see also* McDougal, *supra* note 13, at 281–82 (examining the argument for exclusive Security Council authority to determine an act of aggression).

<sup>150</sup> Coalition for the Int’l Criminal Court, Rep. of the Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, 8–11 June 2006, CICC Team on Aggression, at 12 (Aug. 26, 2006), *available at* [http://www.coalitionfortheicc.org/documents/TeamReportOnIntersessionalMeeting\\_26Aug06.pdf](http://www.coalitionfortheicc.org/documents/TeamReportOnIntersessionalMeeting_26Aug06.pdf).

<sup>151</sup> U.N. Charter art. 39.

<sup>152</sup> *Id.*

<sup>153</sup> Meron, *supra* note 71, at 13–14.

<sup>154</sup> *Id.* at 5.

<sup>155</sup> 5th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 42, ¶ 25; Clark, *supra* note 72, at 700 (noting that a Security Council filter “would . . . subvert the power

[W]hile the Security Council is invested by the Charter [of the United Nations] with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It might arrive at a determination of aggression—or, as more often is the case, fail to arrive at a determination of aggression—for political rather than legal reasons.<sup>156</sup>

It is of course also true that, due to the veto powers of the P5, affording a role to the Security Council in legal proceedings will in addition undermine the principle of equal protection of the law,<sup>157</sup> and also the principle of *nemo debet esse iudex in propria causa* (no one should be a judge in his own cause).<sup>158</sup> While negotiations on the crime of aggression were still in their infancy, Antonio Cassese articulated the expectation that affording to the Prosecutor or to a State the power to initiate investigations into acts of aggression would be “a welcome development” since it “might prove a useful counterbalance to the monopolizing power of the Security Council.”<sup>159</sup> Matthias Schuster represented an interesting variety on the theme of the necessity/undesirability of a role for the Security Council in prosecutions of the crime of aggression: He agreed with the P5 and others that a Security Council determination of an act of aggression is a *sine qua non* under the current United Nations regime, and also agreed with those who maintain that affording a role to the Security Council in criminal prosecutions is

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of the Court to decide itself on the existence or otherwise of all the elements of the crime”); Clark, *supra* note 67, at 1105 (noting that the Security Council, as a political body, “may act in a completely unprincipled and arbitrary manner”); Ferencz, *supra* note 149, at 536 (noting that a role of the Security Council in judicial proceedings would “undermine the independence of the Court”); see also Nsereko, *supra* note 107, at 513 (noting that if a role were to be given to the Security Council it would “subordinate law and justice to power and politics”); Schuster, *supra* note 10, at 40 (stating that the political rather than judicial nature of the Security Council “makes the consequences of its required linkage for the Court even more objectionable”).

<sup>156</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 60, 211 (June 27) (Schwebel, J., dissenting).

<sup>157</sup> Kreß, *supra* note 71, at 1143. At the Review Conference, the delegation of Venezuela emphasized the importance of securing the independence of the ICC from political influences, but also spoke out against undermining of the principle of equal justice through Security Council involvement in criminal proceedings of the ICC. ICC, Remarks of the Bolivarian Republic of Venezuela, Review Conference General Debate (June 1, 2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-gendeba-Venezuela-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Venezuela-ENG.pdf) (last visited Feb. 28, 2011).

<sup>158</sup> Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression*, 16 IND. INT'L & COMP. L. REV. 1, 10 (2005).

<sup>159</sup> Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 147–48 (1999).



highly inappropriate; and for those reasons he believed that aggression should not be incorporated in the subject-matter jurisdiction of the ICC.<sup>160</sup>

Delegations that opposed an exclusive Security Council filter emphasized Article 24 of the U.N. Charter, which provides that “Members confer on the Security Council primary responsibility for the maintenance of international peace and security.”<sup>161</sup> In view of this provision, it was argued that the U.N. Charter afforded to the Security Council a primary, but not exclusive, responsibility with regard to aggression.<sup>162</sup> Proclaiming that, for purposes other than executing its Chapter VII punitive powers, the Security Council has been entrusted with a primary and not an exclusive role in determining that an act of aggression has taken place derived support from an advisory opinion of the ICJ in the 1962 case *Concerning Expenses of the United Nations*,<sup>163</sup> and in the 1984 contentious case in which the ICJ assumed jurisdiction to adjudicate a dispute involving acts of aggression in the case of *Nicaragua v. United States of America*.<sup>164</sup> The Court (not the Security Council) finally decided (by 12 votes to 3) that by conducting certain military attacks in 1983–1984 and resorting to the use of force on Nicaraguan territory, the United States “has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State.”<sup>165</sup>

Delegations within this fold proposed alternative filters, namely the General Assembly of the United Nations, or the ICJ, or a Pre-Trial Chamber of the ICC.<sup>166</sup> Toward the end of the Resumed Eighth Session of the Assembly of States Parties (March 22–25, 2010), a roll call invited by the Facilitator of the Special Working Group on the Crime of Aggression, H.R.H. Prince Zeid Raad Zeid Al-Husseini, revealed overwhelming support for a Pre-Trial Chamber of the ICC to be

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<sup>160</sup> Schuster, *supra* note 10.

<sup>161</sup> U.N. Charter art. 24.

<sup>162</sup> 5th Sess. Rep. on the Informal Inter-Sessional Meeting, *supra* note 42, ¶ 55.

<sup>163</sup> Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20) (holding that “[t]he primary responsibility is conferred upon the Security Council” under Article 24, and further, with reference to Article 14 of the U.N. Charter, “that the General Assembly is also to be concerned with international peace and security”).

<sup>164</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, ¶ 95 (Nov. 26).

<sup>165</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 146–47 (June 27); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, 280 (Dec. 19) (“[T]he Republic of Uganda . . . violated the principle of non-use of force in international relations and the principle of non-intervention.”).

<sup>166</sup> ICC, Non-paper by the Chairman on Outstanding Issues Regarding the Conditions for the Exercise of Jurisdiction, Assembly of States Parties, Resumed 8th Sess., Mar. 22–25, 2010, app. I, ¶ 12, U.N. Doc. ICC-ASP/8/20/Add.1, Annex II (2010).

an exclusive (internal) filter.<sup>167</sup> This did not exclude a role for the Security Council.<sup>168</sup> Besides requiring that the Security Council make a determination of an act of aggression before the ICC Prosecutor can commence an investigation into the crime of aggression, there also remained substantial support for the so-called “green light option” included in a proposal referred to by the Special Working Group on the Crime of Aggression in its report of January, 2007 and which meant in essence that the Security Council could allow the ICC to proceed with a case without making a determination that an act of aggression had occurred.<sup>169</sup>

A non-paper of the Chair of the Special Working Group on the Crime of Aggression, annexed to the *Report of the Working Group on the Review Conference* and adopted by the Eighth Session of the Assembly of States Parties (March 22–25, 2010), summarized as follows the options that remained in dispute in the present context on the eve of the Review Conference:

- (a) If the Prosecutor finds on the available evidence that a “reasonable basis” exists to proceed with an investigation in respect of a crime of aggression, he must first inform the Secretary-General of the United Nations of that fact, thereby giving the Security Council an opportunity to make a determination of an act of aggression.<sup>170</sup> Should the Security Council make such a determination, the Prosecutor can proceed with the investigation.<sup>171</sup>
- (b) If the Security Council has not made such a determination, two alternative views remained in contention:

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<sup>167</sup> ICC, Rep. of the Working Grp. on the Review Conference, Assembly of States Parties, Resumed 8th Sess., Mar. 22–25, 2010, ¶ 11, U.N. Doc ICC-ASP/8/20/Add.1, Annex II (2010) [hereinafter 8th Sess. Rep. of the Working Grp.].

<sup>168</sup> *Id.* ¶ 10.

<sup>169</sup> 5th Sess. Rep. of the Special Working Grp., *supra* note 62, ¶ 31, ICC Doc. ICC-ASP/5/35. In the Report of the Working Group on the Crime of Aggression submitted to the Seventh Resumed Session of the Assembly of States Parties (9–13 February 2009), mention was made of the alternative red light option, which would afford to the Security Council the power to decide to stop an ongoing investigation into the crime of aggression by adopting a resolution under Chapter VII of the United Nations Charter. ICC, Rep. of the Special Working Grp. on the Crime of Aggression, Assembly of States Parties, Resumed 7th Sess., Feb. 9–13, 2009, ¶ 23, ICC Doc. ICC-ASP/7/20/Add.1, Annex II (2009); *see also* 6th Sess. Rep. of the Special Working Grp., *supra* note 63, ¶ 23 (noting that some delegations believed resolution 3314 was not meant to serve as the basis for criminal proceedings).

<sup>170</sup> Non-paper by the Chairman on Outstanding Issues Regarding the Conditions for the Exercise of Jurisdiction, *supra* note 166, ¶ 10.

<sup>171</sup> *Id.*

*Alternative 1:* The Prosecutor can only proceed with an investigation if the Security Council has determined that an act of aggression has taken place (Option 1), or the Prosecutor can only proceed with an investigation if the Security Council has authorized the investigation by giving the ICC a procedural “green light” (Option 2).<sup>172</sup>

*Alternative 2:* Absence of a determination by the Security Council will not preclude the ICC from exercising jurisdiction, either because no filter is required (Option 1), or the ICC’s own internal filter would apply (a determination of an act of aggression by a Pre-Trial Chamber) (Option 2), or the General Assembly of the United Nations has decided that an act of aggression has been committed (Option 3), or the ICJ has decided that an act of aggression has been committed (Option 4).<sup>173</sup>

A roll call revealed that stubborn support remained for Alternative 1, Option 1, though a vast majority of delegations preferred Alternative 2, with increasing support for Alternative 2, Option 2.<sup>174</sup>

In a *Draft Report of the Working Group on the Crime of Aggression* submitted to the Review Conference at the end of its first week of deliberations, it was recorded that “[s]ome delegations reiterated their preference for Alternative 1,” either as reflected in Option 1 (where the Security Council has made a determination of an act of aggression), or in Option 2 (where the Security Council has requested the Prosecutor to proceed with an investigation in respect of a crime of aggression).<sup>175</sup> The Working Group noted that support for this alternative was based on the assumption that Article 39 of the U.N. Charter afforded to the Security Council exclusive competence to determine that an act of aggression has been committed and that Article 5(2) of the ICC Statute required that amendments of the Statute relating to the crime of aggression must be “consistent with the relevant provisions of the Charter of the United Nations.”<sup>176</sup> The Draft Report went on to note support by other delegations for Alternative 2, which affords to the Prosecutor the power to proceed with an investigation in the absence of a Security Council determination; and within the

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<sup>172</sup> *Id.* ¶ 11.

<sup>173</sup> *Id.* ¶ 12.

<sup>174</sup> 8th Sess. Rep. of the Working Grp., *supra* note 167.

<sup>175</sup> Review Conference of the Rome Statute, Kampala, Uganda, May 31–June 11, 2010, *Draft Report of the Working Group on the Crime of Aggression*, ¶ 18, ICC Doc. RC/WGCA/3 (June 6, 2010).

<sup>176</sup> *Id.*

ranks of those delegations, “[s]trong support” emerged for Option 2, which gives the role of jurisdictional filter to a Pre-Trial Chamber of the ICC.<sup>177</sup> Proponents of this position emphasized the need for the ICC to act independently;<sup>178</sup> and in order to garnish further support for an exclusive Pre-Trial Chamber filter, some delegations, including the one of Germany, proposed that a determination of an act of aggression by the Pre-Trial Chamber should perhaps require a unanimous decision.<sup>179</sup>

Although some delegations still expressed support for the General Assembly or the ICJ to act as a jurisdictional filter (for example Nigeria and New Zealand, respectively), those options were deleted from subsequent drafts.<sup>180</sup> And although overwhelming support emerged for Alternative 2, France in the second week of the Review Conference, at a time when all other delegations emphasized the need for compromises to be made, stated quite bluntly that it would under no circumstances agree to a proposal that would not recognize the Security Council as the sole jurisdictional filter.<sup>181</sup>

In its final report to the Assembly of States Parties, the Special Working Group recorded the fact that different opinions still prevailed as to how the ICC should proceed in cases where the Security Council had not made a determination of an act of aggression, but noted that “most delegations . . . preferred that such a decision [should] rest with the Court itself, for example with the Pre-Trial Chamber.”<sup>182</sup> An earlier Conference Room Paper proposed the addition to the ICC Statute of two distinct articles dealing separately with the exercise of jurisdiction over the crime of aggression in the case of State Party referrals and *proprio motu* investigations by the Prosecutor (Article 15*bis*), and in the case of Security Council referrals (Article 15*ter*).<sup>183</sup>

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<sup>177</sup> *Id.* ¶ 19.

<sup>178</sup> *Id.*

<sup>179</sup> See Review Conference of the Rome Statute, Kampala, Uganda, May 31–June 11, 2010, *Report of the Working Group on the Crime of Aggression*, ¶ 19, ICC Doc. RC/5 (June 10, 2010) (recording a submission “that the judicial [Pre-Trial] filter could be enhanced”).

<sup>180</sup> Compare Non-paper by the Chairman on Outstanding Issues Regarding the Conditions for the Exercise of Jurisdiction, *supra* note 166 (including the General Assembly and the ICJ as options 3 and 4, respectively), with *Draft Report of the Working Group on the Crime of Aggression*, *supra* note 175 (omitting these options).

<sup>181</sup> Remarks at the Review Conference of the Rome Statute, Kampala, Uganda, May 31–June 11, 2010 (on file with author).

<sup>182</sup> *Report of the Working Group on the Crime of Aggression*, *supra* note 179, ¶ 6.

<sup>183</sup> See Review Conference of the Rome Statute, Kampala, Uganda, May 31–June 11, 2010, *Conference Room Paper on the Crime of Aggression*, ¶¶ 3, 3*bis*, ICC Doc. RC/WGCA/1/Rev.2, Annex I (June 10, 2010) (inserting text regarding State and Security Council referrals to articles 15*bis* and 15*ter*); see also Non-paper Submitted by

*B. Exercise of Jurisdiction over the Crime of Aggression*

The proposed Article 15*bis* deals with the competence of the Prosecutor to conduct an investigation into the crime of aggression following a State Party referral, or upon his or her own decision to conduct an investigation *proprio motu*.<sup>184</sup> The substance of the proposed Article was for the most part acceptable by general agreement: If the Prosecutor has concluded that a reasonable basis exists for him or her to proceed with an investigation in respect of the crime of aggression, he or she must before anything else ascertain whether the Security Council has made a determination of an act of aggression by the State concerned.<sup>185</sup> To this end, the Prosecutor is required to notify the Secretary-General of the United Nations of the situation under consideration and to provide the Secretary-General with the information and documents at his or her disposal relating to that situation.<sup>186</sup> If the Security Council “has made such a determination,” the Prosecutor may without further ado proceed with the investigation in respect of the crime of aggression.<sup>187</sup>

But what if the Security Council has not made a determination that an act of aggression has been committed by the State concerned? Here, consensus could not be reached in the Working Group, and two alternative points of view remained in contention. Some delegations maintained that the Prosecutor may then not proceed with the investigation (Alternative 1),<sup>188</sup> while others persisted that if no such determination has been made within a certain period of time, and most delegations in this category seemed to settle for a period of six months, the Prosecutor can proceed with the investigation following authorization by a Pre-Trial Chamber of the ICC for him or her to proceed (Alternative 2).<sup>189</sup> The procedure to be followed by the Prosecutor under Alternative 2 is the one prescribed in Article 15 of the ICC Statute for investigations by the Prosecutor *proprio motu*.<sup>190</sup>

In the final week of the Review Conference, Argentina, Brazil and Switzerland submitted a non-paper that “builds on the Chairman’s Conference

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Argentina, Brazil and Switzerland as of 6 June 2010 (unpublished manuscript) (on file with the author) (differentiating in distinct articles between prosecutions of the crime of aggression based on State Party referrals and *proprio motu* investigations by the Prosecutor on the one hand, and based on Security Council referrals on the other).

<sup>184</sup> *Conference Room Paper on the Crime of Aggression*, *supra* note 183, ¶ 3, art. 15*bis*.

<sup>185</sup> *Id.* art. 15*bis*(2).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* art. 15*bis*(3).

<sup>188</sup> *Id.* art. 15*bis*(4)(Alternative 1).

<sup>189</sup> *Id.* art. 15*bis*(4)(Alternative 2).

<sup>190</sup> *Conference Room Paper on the Crime of Aggression*, *supra* note 183, art. 15*bis*(4)(Alternative 2).

Room paper of 5 June 2010” and which in essence laid the foundation for and acceptance of Alternative 2, including a six months period within which the Security Council is required to make a determination before the Prosecutor can proceed with an investigation based on a Pre-Trial Chamber authorization for him to proceed.<sup>191</sup> Shortly thereafter, Canada also submitted a proposal, “intended as contributing toward an eventual compromise package,” based upon, but which deviated somewhat from, the provisions of Alternative 2.<sup>192</sup> It required, in addition to the Pre-Trial Chamber filter, that either all States concerned with the alleged crime of aggression, or alternatively, the State on whose territory the alleged crime of aggression occurred and the State of nationality of the person accused of the crime, have accepted the competence of the Prosecutor to proceed with an investigation in the circumstances stipulated in the current paragraph.<sup>193</sup> A Non-Paper submitted by Slovenia on June 8, 2010 sought to combine the compromise proposals of Argentina/Brazil/Switzerland and of Canada.<sup>194</sup> The Slovenian Non-Paper also preferred a Pre-Trial Chamber filter in cases where the Security Council has not within a period of six months made a determination of an act of aggression, but added to that a further condition for the exercise of jurisdiction by the ICC over the crime requiring that all States Parties involved in the alleged crime of aggression must have ratified or accepted the amendment of the ICC Statute relating to the crime of aggression.<sup>195</sup>

Other provisions included in the proposed Article 15*bis* were uncontroversial: A determination of an act of aggression by an organ outside the ICC is not binding on the Court;<sup>196</sup> that is to say, for example, that if the Security Council has decided that an act of aggression has been committed, the ICC must of its own accord decide whether or not that is indeed the case. The proposed Article 15*bis* furthermore proclaims that its provisions apply to the crime of aggression only and not to investigations into other crimes within the subject-matter jurisdiction of the ICC.<sup>197</sup>

The proposed Article 15*ter* applies exclusively to the exercise of jurisdiction over the crime of aggression under the rubric of a Security Council referral, and its provisions were accepted in the Working Group by general

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<sup>191</sup> Non-paper submitted by Argentina, Brazil and Switzerland as of 6 June 2010, *supra* note 183, art. 15*bis*.

<sup>192</sup> Proposal by Canada (June 8, 2010) (unpublished manuscript) (on file with the author).

<sup>193</sup> *Id.*

<sup>194</sup> Non-paper submitted by Slovenia as of 8 June 2010 (June 8, 2010) (unpublished manuscript) (on file with author).

<sup>195</sup> *Id.*

<sup>196</sup> ICC Statute, *supra* note 4, art. 15*bis*(5).

<sup>197</sup> *Id.* art. 15*bis*(6).

agreement.<sup>198</sup> It provides in essence that a determination of an act of aggression by the Security Council serves as authorization for the Prosecutor to proceed with an investigation into the crime of aggression;<sup>199</sup> and conversely, that in the absence of such a determination, the Prosecutor may not proceed with an investigation into the crime of aggression.<sup>200</sup> One must bear in mind that a determination of an act of aggression as such by the Security Council will not trigger the competence of the Prosecutor to conduct an investigation within the confines of Article 15*ter*; the Security Council must, in addition to a determination of an act of aggression, refer the situation to the ICC for investigation by its Prosecutor in accordance with Article 13(b) of the ICC Statute.<sup>201</sup>

Other provisions in the proposed Article 15*ter* are essentially similar to corresponding sections in Article 15*bis*: if the Prosecutor has established a reasonable basis to proceed with an investigation in respect of the crime of aggression, he must first establish whether the Security Council has made a determination of an act of aggression by the State concerned, and must notify the Secretary-General of the United Nations of the situation under consideration and provide the Secretary-General with the information and documents at his or her disposal;<sup>202</sup> a determination of an act of aggression by an organ outside the ICC is not binding on the Court;<sup>203</sup> and the provisions of Article 15*bis* apply to the crime of aggression only and not to investigations into other crimes within the subject-matter jurisdiction of the ICC.<sup>204</sup>

### *C. Ratifications and Entering into Force of the Crime of Aggression*

Article 5(2) of the ICC Statute requires that the definition of the crime of aggression and a provision setting out the conditions under which the ICC can exercise jurisdiction with respect to that crime must be adopted in accordance with Articles 121 and 123 of the ICC Statute.<sup>205</sup> Article 123 makes provision for a

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<sup>198</sup> Review Conference of the Rome Statute, Kampala, Uganda, May 31–June 11, 2010, *Amendments to the Rome Statute of the International Criminal Court*, ¶ 4, art. 15*ter*, ICC Doc. ICC-ASP-RC/11, Annex I (June 11, 2010).

<sup>199</sup> *Conference Room Paper on the Crime of Aggression*, *supra* note 183, ¶ 3, art. 15*ter*(3).

<sup>200</sup> *Id.* art. 15*ter*(4)(Alternative 1).

<sup>201</sup> *See id.* art. 15*ter*(1) (stating that the Court may exercise jurisdiction over the crime of aggression); *see also* Non-Paper submitted by Argentina, Brazil and Switzerland, *supra* note 183, Annex I, ¶ 2(a) (stating “[w]here the Prosecutor examines a situation referred to him or her by the Security Council . . .”).

<sup>202</sup> *Conference Room Paper on the Crime of Aggression*, *supra* note 183, art. 15*ter*(2).

<sup>203</sup> *Id.* art. 15*ter*(5).

<sup>204</sup> *Id.* art. 15*ter*(6).

<sup>205</sup> ICC Statute, *supra* note 4, art. 5(2).

Review Conference to be held “[s]even years after the entry into force of the Statute,”<sup>206</sup> and stipulates that the adoption and entry into force of any amendments of the ICC Statute are governed by Article 121(3) to (7).<sup>207</sup> In terms of Article 121(3), “[t]he adoption of amendments at . . . a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.”<sup>208</sup> Article 121(4) provides that “an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.”<sup>209</sup> Article 121(5) provides in part:

Any amendment to article[s] 5 . . . of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s Nationals or on its territory.<sup>210</sup>

Article 121(6) makes provisions for States Parties that have not accepted an amendment of the ICC Statute to withdraw from the ICC with immediate effect, subject though to an obligation of the State Party concerned to honor obligations that arose while it still was a State Party.<sup>211</sup> Article 121(7) places an obligation on the Secretary-General of the United Nations to inform all States Parties of amendments adopted at the Review Conference.<sup>212</sup>

The interpretation of these provisions in the Special Working Group on the Crime of Aggression and by the Review Conference was fraught with many difficulties. Some delegations emphasized the different rules attending the entering into force of “amendments” of the ICC Statute under Article 121(4) and 121(5) respectively.<sup>213</sup> Amendments governed by Article 121(4) enter into force “for all States Parties” one year after seven-eighths of States Parties have deposited instruments of ratification or acceptance with the Secretary-General of the United Nations, and will thus also be binding on States that have not ratified the amendment.<sup>214</sup> Amendments falling under Article 121(5) only

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<sup>206</sup> *Id.* art. 123(1).

<sup>207</sup> *Id.* art. 123(3).

<sup>208</sup> *Id.* art. 121(3).

<sup>209</sup> *Id.* art. 121(4).

<sup>210</sup> *Id.* art. 121(5).

<sup>211</sup> ICC Statute, *supra* note 4, art. 121(6), *read with* art. 127(2).

<sup>212</sup> *Id.* art. 121(7).

<sup>213</sup> Ferencz, *supra* note 149, at 534; *see also* Clark, *supra* note 67, at 1114 (referring to “a fundamental ambiguity in the Statute on how the aggression amendment is to be done”).

<sup>214</sup> ICC Statute, *supra* note 4, art. 121(4).



become binding on “States Parties which have accepted the amendment” one year after those State Parties have deposited their instruments of ratification or acceptance with the Secretary-General.<sup>215</sup> Here, the seven-eighths requirement does not apply; the amendment becomes binding on every State Party that has ratified or accepted the amendment irrespective of the total number of ratifications.<sup>216</sup> The key question is, therefore, whether a definition of the crime of aggression and a decision specifying the circumstances under which the ICC can exercise jurisdiction over that crime is governed by Article 121(4) or 121(5).

Article 121(5) applies to amendments of the subject-matter jurisdiction of the ICC (Articles 5, 6, 7 and 8), while Article 121(4) applies to other amendments of the ICC Statute.<sup>217</sup> Since Article 5 already included the crime of aggression in the subject-matter jurisdiction of the ICC,<sup>218</sup> can it truly be said that the Review Conference in defining the crime of aggression and in laying down the conditions under which the ICC can exercise jurisdiction with respect to that crime would amount to an amendment of the ICC Statute within the meaning of Article 121(5)? Roger Clark, an advisor to the delegation of Samoa, in arguing that Article 121(4) is the one to be applied, laid special stress on the wording of Article 5(2), requiring for the exercise of jurisdiction by the ICC over the crime of aggression that “a provision is adopted” defining the crime and setting out the conditions under which the ICC can exercise jurisdiction over that crime:

“Amendment” normally implies that something is being changed or altered. One could contend strongly that it is not necessary to change the wording of Article 5 in order to fulfil the expectations of the drafters. Article 5(2) . . . is arguably an example of a facilitative or enabling provision which is a condition to be met, rather than an obstacle that needs to be changed.<sup>219</sup>

One need not dwell upon the provisions regulating the adoption of amendments of the ICC Statute and their application to the crime of aggression because the definition of the crime of aggression, as well as the conditions under which the ICC can exercise jurisdiction in the future with respect to that crime and all other concomitant amendments of the ICC Statute, were adopted in the

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<sup>215</sup> *Id.* art. 121(5).

<sup>216</sup> See Clark, *supra* note 67, at 1115 (noting that the majority treats the proposed amendments as amendments “to” Article 5 and applicable only to those who specifically accept).

<sup>217</sup> ICC Statute, *supra* note 4, art. 121(4), 121(5).

<sup>218</sup> *Id.* art. 5(1)(d).

<sup>219</sup> Roger S. Clark, *Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute*, 41 CASE W. RES. J. INT’L L. 413, 415; see also Clark, *supra* note 67, at 1114–15 (discussing the fundamental ambiguity in the meaning of “adopt” and stating that paragraph 4 is the general rule on amendments).

closing hours of the Review Conference by general agreement.<sup>220</sup> The two-thirds majority alternative laid down in Article 121(3) was therefore never in issue.

More complicated, though, were deliberations on the entry into force of the amended text of the ICC Statute. Two issues remained in contention almost right to the end: will the exercise of jurisdiction by the ICC be dependent on acceptance of the amendments relating to the crime of aggression by the culprit State; and when exactly will the power of the ICC to prosecute the crime of aggression take effect?<sup>221</sup>

The debate as to the first of these two highly controversial matters was almost entirely focused on what commonly came to be referred to as “the second sentence of Article 121, paragraph 5.”<sup>222</sup> That sentence reads as follows:

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>223</sup>

In the course of the proceedings, two distinct interpretations of the second sentence of Article 121, paragraph 5, “a negative and a positive interpretation,” came onto the agenda.<sup>224</sup>

The negative interpretation of the second sentence of Article 121(5) would have it that the ICC cannot exercise jurisdiction with respect to the crime of aggression committed by nationals or on the territory of a State Party that has not accepted the amendments of the ICC Statute relating to the crime of aggression.<sup>225</sup> The negative interpretation therefore makes the exercise of jurisdiction by the ICC conditional upon acceptance of the amendments by the culprit State.<sup>226</sup>

The positive interpretation of the second sentence of Article 121(5) affords to the ICC jurisdiction to prosecute the crime of aggression committed by a national or on the territory of a State Party that has accepted the amendments of the ICC Statute relating to the crime of aggression (the victim State).<sup>227</sup> The reasoning of the “positivists” basically proclaimed that a provision requiring that

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<sup>220</sup> Review Conf. Res. RC/Res.6, *supra* note 73, Annex II.

<sup>221</sup> *Report of the Working Group on the Crime of Aggression*, *supra* note 179, ¶ 12.

<sup>222</sup> *Id.*

<sup>223</sup> ICC Statute, *supra* note 4, art. 121(5).

<sup>224</sup> *Report of the Working Group on the Crime of Aggression*, *supra* note 179, ¶ 12.

<sup>225</sup> *Id.* ¶ 12; Kreß & von Holtzendorff, *supra* note 24, at 1197–98.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

the Court shall not exercise its jurisdiction regarding a crime of aggression committed by the nationals or on the territory of a State Party that has not accepted the relevant amendments of the ICC Statute means, *ex contrario*, that the Court can exercise jurisdiction over the crime of aggression when committed by the nationals or on the territory of a State Party that has accepted those amendments.<sup>228</sup> The positive interpretation therefore does not make the exercise of jurisdiction by the ICC conditional upon acceptance of the amendments by the culprit State, provided only that the victim State has accepted the amendments.<sup>229</sup> Some delegations, including the one of Sweden, noted that the positive interpretation does justice to the basic international-law principle of reciprocity, in terms of which a State (*in casu* the culprit State) should not be allowed to refer a situation to the ICC unless that State is also subject to the exercise of jurisdiction by the ICC.<sup>230</sup>

The negative interpretation found favor with most European countries, with some exceptions, though, which included Greece and Switzerland.<sup>231</sup> African, Latin American and Caribbean countries by and large considered acceptance of the Court's jurisdiction by the culprit State unacceptable and consequently preferred the positive interpretation.<sup>232</sup>

Entry into force of the provisions amending the ICC Statute with respect to the crime of aggression was equally controversial. There seemed to be wide support for a "menu approach" that distinguished the entering into force of the competence of the ICC to exercise jurisdiction in the event of Security Council referrals on the one hand, and State Party referrals and investigations conducted by the Prosecutor *proprio motu* on the other.<sup>233</sup>

Some delegations supported the application of the first sentence of Article 121, paragraph 5 to the entering into force of the definition of the crime of aggression and of prosecutions in the ICC based on Security Council referrals; i.e. the amendments should for these purposes "enter into force for those States Parties which have accepted the amendment[s] one year after the deposit of their instruments of ratification or acceptance."<sup>234</sup> The competence of ICC to exercise jurisdiction based on a Security Council referral would thus, under this option, commence one year after the very first instrument of ratification or acceptance has been deposited by a State Party with the Secretary-General of

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<sup>228</sup> *Id.*

<sup>229</sup> *Report of the Working Group on the Crime of Aggression, supra* note 179, ¶ 12.

<sup>230</sup> Remarks at the Review Conference of the Rome Statute, *supra* note 181.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Kreß & von Holtzendorff, *supra* note 24, at 1203.

<sup>234</sup> ICC Statute, *supra* note 4, art. 121(5).

the United Nations.<sup>235</sup> Since the exercise of jurisdiction by the ICC in cases of Security Council referrals is not confined to the jurisdictional principle of territoriality or active personality but is on the contrary a matter of universal jurisdiction, the ICC can then prosecute any crime of aggression that comes within the confines of the Security Council referral irrespective of acceptance of the concerned amendments by the State of nationality of the perpetrator or the territorial State, provided though that the underlying act of aggression has been established by the appropriate filter.<sup>236</sup> Several delegations maintained that the filter in this instance must be confined to the Security Council itself.<sup>237</sup>

The entry into force of the amendments for purposes of prosecutions based on State Party referrals or investigations by the Prosecutor *proprio motu* will, on the contrary, be governed by the provisions of Article 121, paragraph 4; that is to say the amendments “shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.”<sup>238</sup>

The compromise reflected in the final decision of the Review Conference relating to the entry into force of the aggression-related amendments of the ICC Statute did not, in the end, distinguish between the different trigger mechanisms. The entry into force dispute was laid to rest by identical provisions applying to the two categories of trigger mechanisms that postponed the competence of the ICC to prosecute the crime of aggression until a future date.<sup>239</sup> In the case of Security Council referrals, as well as State Party referrals and investigations *proprio motu*, the Court may only exercise jurisdiction over the crime of aggression “committed one year after the ratification of the amendment by thirty States Parties.”<sup>240</sup>

This provision clearly deviates from the decree in Article 121(4) of the ICC Statute making the entry into force of amendments to the Statute dependent on ratification of those amendments by seven-eighths (at the time of the Review Conference, 97 of the 111) States Parties.<sup>241</sup> The Working Group on the Crime of Aggression had noted in its final report to the Assembly of States Parties that the entry into force provisions of the ICC Statute alluded to earlier “seemed to be

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<sup>235</sup> *Report of the Working Group on the Crime of Aggression*, *supra* note 179, ¶ 13.

<sup>236</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶ 4, Article 15ter(1); ICC Statute, *supra* note 4, art. 13(b).

<sup>237</sup> *Report of the Working Group on the Crime of Aggression*, *supra* note 179, ¶ 18.

<sup>238</sup> ICC Statute, *supra* note 4, art. 121(4).

<sup>239</sup> Clark, *supra* note 72, at 701.

<sup>240</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶¶ 3(art. 15bis (2)), 4(art. 15ter (2)).

<sup>241</sup> See ICC Statute, *supra* note 4, art. 121(4) (“[A]n amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.”).

ambiguous and not to apply well to the crime of aggression.”<sup>242</sup> Those provisions therefore required what some delegations referred to as “creative interpretations.”<sup>243</sup> It is perhaps worth noting that several delegations, including those of China, Denmark and Japan, warned against too much creativity in the application of the ICC Statute.<sup>244</sup> Japan noted, with reference to Article 31 of the *Vienna Convention on the Law of Treaties*, that the ICC Statute should first and foremost be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in light of its object and purpose.”<sup>245</sup> Several delegations, including those of Japan and the Russian Federation, warned that the Review Conference cannot go against the provisions of Article 121 without formally amending that Article.<sup>246</sup> Samoa, on the other hand, maintained that the entry into force provisions of the ICC Statute can be amended implicitly through decisions taken by the Review Conference.<sup>247</sup> Amendment by implication of the ICC Statute seemingly became a reality as far as the entry-into-force arrangement of prosecutions of the crime of aggression is concerned.<sup>248</sup> However, the actual implementation of the 30 States Parties requirement was made conditional on confirmation thereof at a later date.<sup>249</sup>

Proposals had been made to delay the *de facto* exercise of jurisdiction by the ICC over the crime of aggression to “help allay fears that the Court may be too young to exercise jurisdiction over the crime of aggression.”<sup>250</sup> Delegations that supported a delayed entry into force included the one of Austria.<sup>251</sup> This rather distrustful assessment of the capabilities of (judges of) the ICC was upheld by the Review Conference in its final decision on the circumstances under which the Court will be competent to exercise jurisdiction in regard to the crime of aggression.<sup>252</sup> It was decided, by general agreement, to postpone the competence of the Court to exercise jurisdiction over the crime of aggression for a period of seven years, and to make the competence of the Court to do so after the lapse of seven years dependent on a decision of States Parties required for

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<sup>242</sup> *Report of the Working Group on the Crime of Aggression*, *supra* note 179, ¶ 14.

<sup>243</sup> *Id.*

<sup>244</sup> Remarks at the Review Conference of the Rome Statute, *supra* note 181.

<sup>245</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

<sup>246</sup> Remarks at the Review Conference of the Rome Statute, *supra* note 181.

<sup>247</sup> *Id.*

<sup>248</sup> According to Roger Clark, “[t]he [Review] Conference presumably found power to impose conditions such as these under the general reference in Art. 5(2) ICC Statute to ‘setting out the conditions’ for the exercise of jurisdiction over aggression.” Clark, *supra* note 72, at 702 n.48.

<sup>249</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶3, art. 15*bis*(3).

<sup>250</sup> *Report of the Working Group on the Crime of Aggression*, *supra* note 179, ¶ 27.

<sup>251</sup> Remarks at the Review Conference of the Rome Statute, *supra* note 181.

<sup>252</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶¶ 3(art. 15*bis* (3)), ¶ 4(art. 15*ter* (3)).

the amendment of the ICC Statute (consensus, or a two-thirds majority of all States Parties).<sup>253</sup>

The requirement that at least 30 States must have ratified the amendments relating to aggression before the ICC can exercise jurisdiction over that crime, and that the competence of the ICC to exercise jurisdiction over the crime of aggression will be reconsidered after the lapse of close to seven years as from the Kampala Review Conference (January 1, 2017), apply to all such prosecution irrespective of the trigger mechanism that set proceedings in motion.<sup>254</sup> The United States, among others, argued in favor of making no distinction in this regard between Security Council referrals and other trigger mechanisms.<sup>255</sup>

However, an Understanding added to the amended text of the ICC Statute relating to jurisdiction *ratione temporis* in respect of the crime of aggression does again distinguish between State Party referrals and *proprio motu* investigations on the one hand, and Security Council referral on the other. It provides that in the case of State Party referrals and investigations conducted by the Prosecutor *proprio motu*, the Court may only exercise jurisdiction with respect to crimes of aggression committed after a decision has been taken to implement the amendments decided upon by the Review Conference (that is, after January 1, 2017), or one year after ratification or acceptance of the amendments by 30 States Parties, whichever is the later of these two dates.<sup>256</sup> This seems to mean that, following a Security Council referral and provided implementation of the amendments has been sanctioned by the post-January 1, 2017 meeting, the ICC can prosecute crimes of aggression that have been committed one year after 30 States Parties have ratified or accepted the amendments even if the crimes were committed prior to the post-January 1, 2017 decision to implement the amendments.

#### D. Opting Out Provisions

A distinction between prosecutions based on a Security Council referral on the one hand, and those based on a State Party referral and investigations *proprio motu* on the other, was also retained in one further important respect: The right of a State Party not to accept the exercise of jurisdiction by the ICC over crimes of aggression arising from an act of aggression committed by that State Party.<sup>257</sup> This opt-out provision applies to prosecutions deriving from State

<sup>253</sup> *Id.* ¶¶ 3(art. 15bis(2)–(3)), 4(art. 15ter(2)–(3)).

<sup>254</sup> ICC Statute, *supra* note 4, arts. 15bis(2), 15ter(2).

<sup>255</sup> Remarks at the Review Conference of the Rome Statute, *supra* note 181.

<sup>256</sup> Review Conf. Res. RC/Res.6, *supra* note 73, Annex I, ¶ 3, art. 15bis(4)

<sup>257</sup> *Id.*

Party referrals and investigations *proprio motu* only.<sup>258</sup> The State Party can lodge the opt-out declaration with the Registrar of the ICC at any time, but for the declaration to be effective, it must precede the act of aggression from which an investigation into the crime of aggression emerged.<sup>259</sup> A State Party can withdraw the opt-out declaration at any time and must reconsider its declaration within three years.<sup>260</sup>

A pertinent question in this regard is whether the opt-out provision was at all necessary. Under the provisions of Article 121(5), a State Party can exclude the exercise of jurisdiction by the ICC over crimes of aggression committed on their territory or by their national by simply not accepting the amendment.<sup>261</sup> It sounded quite ludicrous to afford to States Parties the power to ratify the concerned amendments (opting in) and at the same time decline to accept the exercise of jurisdiction in respect of crimes of aggression committed on their territory or by any of their nationals (opting out). However, given the fact that one is here dealing with decisions of the ICC over political matters and uncertainties as to the applicability of the consensual basis upon which the exercise of jurisdiction by an international tribunals over acts of states depends, the Review Conference decided to remain on the safe side by adding the opt-out arrangement.

For present purposes it will suffice to note that the opt-out provision is seemingly in conflict with the provision in the ICC Statute that precludes States from ratifying the Statute subject to reservations,<sup>262</sup> but was supported by delegations that emphasized the unique political dimension of the crime of aggression.<sup>263</sup> It was based on a compromise proposal submitted by Canada during the second week of the Review Conference.<sup>264</sup>

Differentiating between prosecutions based on Security Council referrals on the one hand, and on State Party referrals and investigations *proprio motu* on the other, also prevailed in respect of prosecutions in the ICC of crimes of

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (stating that the State Party that allegedly committed the act of aggression must “previously declare[]” that it does not accept the exercise of jurisdiction over the crime of aggression by the ICC).

<sup>260</sup> *Id.*

<sup>261</sup> ICC Statute, *supra* note 4, art. 121(5).

<sup>262</sup> *Id.* art. 120.

<sup>263</sup> See HACCUS, *supra* note 132, at 6–7.

<sup>264</sup> Proposal by Canada, *supra* note 192, art. 15*bis*(4) (“[T]he Prosecutor may proceed with an investigation of a crime of aggression provided that: . . . (ii) [all state(s) concerned with the alleged crime of aggression] [the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused of the crime] have declared their acceptance of this Paragraph.”).

aggression allegedly committed by nationals or on the territory of a non-party States. The ICC cannot on the basis of State Party referrals or investigations *proprio motu* prosecute crimes of aggression allegedly committed by nationals or on the territory of a non-party State.<sup>265</sup> This impediment does not apply to prosecutions based on Security Council referrals.<sup>266</sup>

## V. THE FINAL OUTCOME

These, then, are the provisions that were finally inserted in the ICC Statute to regulate the conditions under which the ICC can exercise jurisdiction over the crime of aggression:

### **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, paragraph (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 this 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 the 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 the crime of aggression,

<sup>265</sup> ICC Statute, *supra* note 4, art. 15*bis*(5).

<sup>266</sup> *See id.* art. 15*ter* (failing to apply the jurisdictional impediment in article 15*bis* to article 15*ter*, which deals with the Security Council referrals).



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 a determination, the Prosecutor may proceed with the investigation in respect of the crime of aggression.
8. Where no determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of the crime of aggression, provided a Pre-Trial Division has authorized the commencement of the investigation in respect of the 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 finding 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.

#### **Article 15ter**

##### **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 by the adoption of an amendment to this Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own finding 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.

Several other additions had to be made to the ICC Statute to accommodate inclusion of the competence of the ICC to prosecute crimes of aggression in the Statute.

Article 9, dealing with Elements of Crimes, had to be amended to include a reference to the Elements of Crimes applying to the crime of aggression and now provides in its introductory paragraph: "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8*bis*."<sup>267</sup> Article 8*bis* defines the crime of aggression.

Article 20, proclaiming the principle of *ne bis in idem* had to be amended to make the rule against double jeopardy also applicable to the crime of aggression. The relevant subsection of that Article now provides in its introductory passage: "No person who has been tried by another court of conduct also proscribed under article 6, 7, 8 or 8*bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: ..."<sup>268</sup>

It should be noted, though, that an Understanding was added to the definition of the crime of aggression that deviates from the principle of complementarity, which affords to national States the prior right and obligation to prosecute the crimes within the jurisdiction of the ICC.<sup>269</sup> The Understanding provides: "It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State."<sup>270</sup> This understanding was inserted to address a concern of the United States, which was articulated as follows by Prof. Harold Koh:

Too little attention has yet been paid to the question of how, if at all, the principle of complementarity would apply to the crime of aggression. The definition does little to limit the risk that State Parties will incorporate a definition—particularly one we believe is flawed—into their domestic law, encouraging the possibility that under expansive principles of jurisdiction, government officials will be prosecuted for alleged aggression in the courts of another state. Even if

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<sup>267</sup> ICC Statute, *supra* note 4, art. 9(1) (as amended).

<sup>268</sup> *Id.* art. 20(3) (as amended).

<sup>269</sup> *See, e.g., id.* art. 18(1) (referring to "States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned").

<sup>270</sup> Review Conf. Res. RC/Res.6, *supra* note 73, Annex III, Understanding 5.

states incorporate an acceptable definition into their domestic law, it is not clear whether or when it is appropriate for one state to bring its neighbor's leaders before its domestic courts for the crime of aggression. Such domestic prosecutions would not be subject to any of the filters under consideration here, and would ask the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security.<sup>271</sup>

And just as an aside: The principle of complementarity was not intended to afford a prior right to prosecute to States whose interest in the matter is merely confined to the exercise of universal jurisdiction;<sup>272</sup> and although a person in authority cannot in virtue of their office avoid prosecutions in international criminal tribunals, sovereign immunities do remain intact in prosecutions in the courts of States other than their own.<sup>273</sup>

A further Understanding was added to the amendments of the ICC Statute to reiterate, with reference to Article 10 of the ICC Statute, that those amendments must “not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”<sup>274</sup>

In summary, the following rules prevailed:

Entry into force of amendments to the ICC Statute pertinent to the crime of aggression is delayed until, at the earliest, January 1, 2017. Subsequent to that date, the Assembly of States Parties can decide to implement the competence of the ICC to prosecute the crime of aggression. A decision to implement the competence of the ICC to prosecute the crime of aggression must preferably be taken by consensus, but if consensus cannot be reached, then by a two-thirds majority of all States Parties.<sup>275</sup> The two-thirds majority is to be calculated with a view to the number of States Parties at the time the decision is taken. Exercise of jurisdiction by the ICC over the crime of aggression further requires that at least 30 States Parties have ratified or accepted the amendments to the ICC Statute pertinent to the crime of aggression. The competence of the ICC to prosecute the crime of aggression will take effect one

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<sup>271</sup> Koh Statement, *supra* note 71.

<sup>272</sup> *See, e.g.*, ICC Statute, *supra* note 4, art. 18(1) (referring to “States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned”).

<sup>273</sup> *See* Arrest Warrant of 11 April, 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14) (“[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts . . .”).

<sup>274</sup> Review Conf. Res. RC/Res.6, *supra* note 73, Annex III, Understanding 4.

<sup>275</sup> ICC Statute, *supra* note 4, art. 121(3).

year after ratification or acceptance of those amendments by the 30<sup>th</sup> State Party. If after January 1, 2017 the Assembly of States Parties decide to activate the competence of the ICC to prosecute the crime of aggression, and at that time one year has already expired after ratification of the amendments by 30 States Parties, the ICC can immediately bring perpetrators of the crime of aggression to justice,<sup>276</sup> but subject to the following further constraints:

- (a) If the situation has been referred to the ICC by the Security Council, the ICC can proceed with an investigation provided:
  - (i) The Security Council has referred the matter to the ICC;<sup>277</sup>
  - (ii) The act of aggression was committed at the earliest one year after 30 States Parties had ratified the amendments to the ICC Statute pertinent to the crime of aggression;<sup>278</sup>
  - (iii) It matters not whether the State that was found to have committed an act of aggression has, or has not, ratified the ICC Statute or has, or has not, accepted the amendments incorporating into the ICC Statute the definition of the crime of aggression and the circumstances under which that crime can be prosecuted in the ICC.

It should be noted that Article 15<sup>ter</sup> does not expressly require the Security Council to make a determination that an act of aggression has occurred. It is submitted that referring the situation to the ICC and determining that an act of aggression has been committed are two distinct modalities of proceedings in the ICC and must not be confused with one another. The assumption that such a determination is required may further be based on the definition of the crime of aggression, which makes prosecution of the crime of aggression dependent on the commission of an act of aggression. It is also reasonable to assume that the Security Council will not refer a situation that might involve a crime of aggression to the ICC unless it has determined that an act of aggression has occurred. And finally, the section of Article 15<sup>ter</sup> providing that [a] determination of an act of aggression by an organ outside the ICC shall be without prejudice to the Courts own findings under this Statute clearly suggests that such a determination will be

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<sup>276</sup> Two Understanding added to amendments of the ICC Statute adopted by the Review Conference confirm that the ICC may exercise jurisdiction following a decision activating its competence to do so has been taken subsequent to the seven years period and one year after ratification of the amendments by 30 States Parties, "whichever is the later." Review Conf. Res. RC/Res.6, *supra* note 73, Annex III, ¶¶1, 3 (in respect of Security Council referrals and Party referrals and investigations *proprio motu*).

<sup>277</sup> ICC Statute, *supra* note 4, art. 13(b).

<sup>278</sup> Review Conf. Res. RC/Res.6, *supra* note 73, ¶ 4(2).

forthcoming from an organ outside the ICC, in this instance the Security Council.

This latter provision may prove to be problematic in the following respects: It clearly suggests that, following a determination of an act of aggression by the Security Council, (a Pre-Trial Chamber of) the ICC can decide that an act of aggression has in fact not been committed. Does it also mean that (a Pre-Trial Chamber of) the ICC can decide that an act of aggression has been committed in cases where the Security Council has decided that this was not the case?

(b) If an investigation into an alleged crime of aggression derives from a State Party referral or is to be conducted by the Prosecutor *proprio motu*, the ICC can proceed with an investigation subject to the following rules of law:

- (i) If the Security Council has determined that an act of aggression has occurred, the Prosecutor can proceed with an investigation into crimes of aggression emanating from that act of aggression, unless (i) the crime of aggression was allegedly committed by a national or on the territory of a State which is not a State Party to the ICC Statute, or (ii) the State that committed the act of aggression is a State Party to the ICC Statute but has previously (before the Security Council determination) lodged a declaration with the Registrar of the ICC stating that it does not accept the exercise of jurisdiction by the ICC over the crime of aggression;<sup>279</sup>
- (ii) If within six months of having been invited by the Prosecutor to consider the matter, the Security Council has not made a determination that an act of aggression has occurred, the Prosecutor can proceed with an investigation into a crime of aggression, subject to the proceedings governing investigations *proprio motu*, provided a Pre-Trial Chamber of the ICC has authorized the commencement of the investigation, but again subject to the condition (i) that the crime of aggression was not committed on the territory or by a national of a State that is not a State Party to the ICC Statute, and (ii) the State that committed the act of aggression has not previously (before the Pre-Trial authorization) lodged a declaration with the Registrar of the ICC stating that it does not accept the exercise of jurisdiction by the ICC over the crime of aggression.<sup>280</sup>

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<sup>279</sup> *Id.* Annex I, ¶¶ 3(4), (5), (7).

<sup>280</sup> *Id.* ¶¶ 3(4), (5), (8).

Reference is also made in the applicable Article 15*bis* to Article 16 of the ICC Statute, which authorizes the Security Council in a resolution adopted under its Chapter VII powers, to call for the suspension of proceedings in the ICC for a renewable period of 12 months.<sup>281</sup> It is important to recall that Article 16 can only be applied to delay, and not to terminate, an investigation or prosecution, that it was intended to avoid a conflict of interests between the Security Council and the ICC, and that it should only be applied if the Security Council is seized with the situation under investigation under its powers to deal with a threat to the peace, a breach of the peace, or an act of aggression.<sup>282</sup>

## VI. CONCLUDING OBSERVATIONS

In a sense, the final outcome of the Review Conference was a great disappointment, especially in virtue of the fact that implementation of the provisions agreed upon has been put on hold for approximately seven years and must then, subsequent to January 1, 2017, be reconsidered by perhaps a Review Conference and approved by at least a two-thirds majority of States Parties. Excluding the exercise of jurisdiction by the ICC in respect of crimes of aggression emanating from acts of aggression committed by non-party States (except in virtue of a Security Council referral) also deviates from general principles endorsed by the ICC Statute in the case of other crimes. If a national of a non-party State were to commit a crime within the jurisdiction of the ICC on the territory of a State Party, that person can be brought to trial in the ICC pursuant to a State Party referral or following an investigation by the Prosecutor *proprio motu* but not if the offence happens to be the crime of aggression. And what is more, States Parties have been afforded the right to exclude the jurisdiction of the ICC, absent a Security Council referral, for crimes of aggression emanating from an act of aggression committed by that State Party!

In the end, though, the outcome of the Review Conference was perhaps commendable. It has been emphasized by several delegations that the crime of aggression is quite unique since it always involves acts of state that constitute a violation of customary international law.<sup>283</sup> Political acts and decisions are therefore a conspicuous element of the crime of aggression. As noted in the Review Conference by a delegate of the Russian Federation, aggression is for that reason a highly politicized crime.<sup>284</sup> It is perhaps true that prosecutions

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<sup>281</sup> *Id.* ¶ 3(8).

<sup>282</sup> See ICC Statute, *supra* note 4, art. 16 (“Deferral of an investigation or prosecution.”).

<sup>283</sup> Remarks at the Review Conference of the Rome Statute, *supra* note 181.

<sup>284</sup> Mr. H.E. Kirill G. Gevorgyan, Dir. of the Legal Dep’t of the Ministry of Foreign Affairs of the Russian Federation, Head of the Delegation of the Russian Fed’n to the Review Conference of the Rome Statute of the ICC, Statement at the Review Conf. at the Int’l

based on acts of aggression “are controversial precisely because the use of force in international relations remains a sovereign prerogative the sovereigns are understandably unwilling to disavow entirely, and because of the structurally decentralized and morally heterogeneous nature of international society.”<sup>285</sup> Gerry Simpson predicted for that reason that “as a legal category, it is more likely that aggression will be consigned to the class of a ‘crime to come’ because it can neither be defined and applied universally ... nor removed altogether from the international agenda.”<sup>286</sup> It is also our assessment that there will perhaps in the foreseeable future never be any prosecutions in the ICC for the crime of aggression, and to let the possibility of such prosecutions stand in the way of universality is perhaps in the final analysis not warranted.

Particularly praiseworthy is the fact that the Review Conference, building on years of deliberations, consensus seeking, and compromises, succeeded, beyond all expectations,<sup>287</sup> to reach general agreement on all, extremely controversial, issues at stake. Flexibility in the event of State Party referrals and investigations *proprio motu* was inspired by the overarching objective of universal support for the ICC. All the Super Powers, and many other delegations, were never at ease with jurisdiction of the ICC over the crime of aggression, and by affording to States Parties the option to exclude the competence of the ICC to prosecute crimes of aggression based on their own acts of aggression is perhaps not conducive to the principle of equal justice but may promote ratification of the ICC Statute by States that might have been reluctant to become parties to a treaty that could implicate their own belligerent practices and policies. Ambassador Stephen Rapp and Prof. Harold Koh could for example give

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Criminal Court (June 1, 2010), [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-gendeba-RussianFederation-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-RussianFederation-ENG.pdf) (last visited Mar. 4, 2011).

<sup>285</sup> Gerry Simpson, *Stop Calling It Aggression: War as Crime*, in 61 CURRENT LEGAL PROBLEMS 192, 218 (Colm O’Cinneide & Jane Holder eds., 2008).

<sup>286</sup> *Id.* at 228.

<sup>287</sup> See Andreas Zimmermann, *The Creation of a Permanent International Criminal Court*, 2 MAX PLANCK Y.B. U.N. L. 169, 204 (1998) (expressing doubt as to “whether it will indeed be possible to bring about a situation in which the crime [of aggression] will be finally contained in the Statute of the future International Criminal Court”); Fernández de Gurmendi, *supra* note 2, at 604 (predicting that “there will be no quick ‘fix’ to the issues involved”); Schuster, *supra* note 10, at 16, 17 (noting that deliberations proceeded “without a realistic chance of ever reaching a final settlement of the issue” and forecasting in 2003 that “no compromise solution is to be expected any time soon”); Weisbord, *supra* note 1, at 219 (“It would be optimistic to wait expectantly for the ICC’s Assembly of States Parties to incontrovertibly resolve the question of individual responsibility for aggressive war in 2010.”).

assurances to (skeptics in) the Department of State that “the outcome [of the Review Conference] protected our vital interests.”<sup>288</sup>

There is also the following positive potential of the final outcome. We do now have an authoritative definition of the crime of aggression and acknowledgment across the board that this definition reflects customary international law. That in itself will most likely serve as a deterrent against armed interventions, blockades, and support for unbecoming military actions by trigger-happy regimes.

And finally, much time has been devoted to the crime of aggression over the last number of years. Having exposed of the matter at least for the next seven years will enable the Assembly of States Parties to apply its mind to other pressing issues.<sup>289</sup>

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<sup>288</sup> U.S. DEP'T OF STATE, *supra* note 29.

<sup>289</sup> HACCUS, *supra* note 132, at 9.