The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference

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Abstract
This past June, in Kampala, Uganda, at the first Review Conference on the International Criminal Court, States Parties forged an historic agreement, amending the Rome Statute to define the crime of aggression, and agreeing on conditions for the exercise of jurisdiction. While the definition had been essentially agreed upon during years of earlier negotiations, delegations in Kampala had to grapple with a host of complex issues related to the exercise of jurisdiction. They resolved that jurisdiction will be triggered both through Security Council referrals, as well as State Party or Prosecutor referrals, and the related “filter” mechanisms to achieve this. This result represented a significant breakthrough that was pragmatic, designed to avoid potential conflict with the U.N. Charter, and designed to protect the Court’s independence. The final agreement, however, also contained compromises, excluding the acts of Non-States Parties from jurisdiction, allowing States Parties to opt out of jurisdiction, and delaying the exercise of jurisdiction until at least 2017.

Keywords
aggression; Rome Statute; crime of aggression; jurisdiction; Review Conference; International Criminal Court

Introduction
From 31 May to 11 June 2010, delegates representing states from around the world met for the first Review Conference (the “Review Conference”) on the

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Rome Statute of the International Criminal Court (“ICC” or “the Court”). The conference took place at the picturesque Speke Resort & Conference Centre, in Munyonyo, overlooking the Shores of Lake Victoria, outside Kampala, Uganda. States Parties to the Rome Statute (“States Parties”), as well as Non-States Parties and members of civil society attended. The first week of the Review Conference included panels described as a “stocktaking” of the field of international justice. The key focus of the Review Conference, however, was on amendments to the Rome Statute. A total of three proposed amendments were at issue, the most significant of which (and focus of this article) concerned the crime of aggression. After intensive negotiations, the President of the Assembly of States Parties to the Rome Statute, Ambassador Christian Wenaweser, and H.R.H. Prince Zeid Ra’ad Zeid Al-Hussein of Jordan, assisted by Liechtenstein Deputy Permanent Representative Stefan Barriga, were able to forge an historic agreement: States Parties adopted a resolution amending the Rome Statute to include a definition of the crime of aggression and the conditions under which the Court, in the future, could exercise jurisdiction with respect to the crime.

This achievement was extremely significant. Aggression was described in the Judgment of the International Military Tribunal at Nuremberg as “the supreme international crime”:

“The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”

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3) These panels addressed four areas: the impact of the Rome Statute system on victims and affected communities; peace and justice; complementarity; and cooperation.
4) For discussion of the other two amendment issues—the so-called Belgian war crimes amendment and the proposal to delete Article 124 of the Rome Statute, see note 70 infra.
5) Ambassador Wenaweser is also Permanent Representative of Liechtenstein to the United Nations, and was previously Chair of the Special Working Group on the Crime of Aggression.
6) Prince Zeid became Chair of the Special Working Group on the Crime of Aggression subsequent to Ambassador Wenaweser.
While some have since questioned that position, many maintain that the Nuremberg Tribunal was not wrong. International armed conflict over the last century has resulted in millions of fatalities. While there are detailed laws of war to regulate the conduct of war (jus in bello), it is undeniable that during aggressive use of armed force—even if war crimes do not occur—civilians suffer, and human rights are violated by the score. Although,

10) The definition of the crime of aggression does not cover the initiation of internal armed conflict.
11) There have been an estimated 225 armed conflicts since the end of World War II—“163 internal conflicts (32 of which had external participation by other states …), 21 extrastate conflicts, and 42 interstate conflicts.” Nils Petter Gleditsch et al., ‘Armed Conflict 1946-2001: A New Dataset,’ 39(5), J. of Peace Research p. 615 (2002).
12) These include the four 1949 Geneva Conventions, as well as the two 1977 Protocols thereto. See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Certain civilian fatalities (collateral damage) are permissible under the laws of war. However, even when the laws of war are not violated—i.e., one could not prosecute for war crimes—vast suffering occurs during international armed conflict. Thus, the argument that one does not need to prosecute the crime of aggression because one could alternatively prosecute for war crimes is not necessarily the case. Furthermore, different individuals would most likely be implicated depending if the charges are for the crime of aggression or for war crimes.

14) Needless combatant suffering might occur, for example, when prohibited weapons are used, for example, as was done by the Iraqi Army during the Iran-Iraq war, causing an estimated 20,000 fatalities on the Iranian side. See Federation of American Scientists, ‘Chemical Weapons Programs: History,’ 12 July 2010 (1998), at <www.fas.org/nuke/guide/iraq/cw/program.htm> (citing 5,500 Iranian fatalities due to Tabun-filled aerial bombs during the Iran-Iraq war, and 16,000 Iranian fatalities due to toxic blister agent mustard gas between August 1983 and February 1986). But even when prohibited weapons are not used, the killing of combatants (permitted under the laws of war) undeniably causes extreme suffering as well.

15) Given the pervasive human rights violations that occur in every armed conflict, the failure of key human rights organizations—Amnesty International and Human Rights Watch in particular—to support the conclusion of an agreement on the crime of aggression, was extremely disappointing, and arguably represented a significant lapse in judgment in failing to comprehend the magnitude
historically, the notion has existed that war was simply the way that nation-states behaved, at least since the 1928 Kellogg-Briand Pact, international law has attempted to prevent aggressive war (regulating *jus ad bellum*). The U.N. Charter contains such a prohibition, but has not fully succeeded in stopping the aggressive use of armed force by states. Thus, the goals of those states and members of civil society that have worked to finalize the definition of the crime of aggression and conditions for the exercise of jurisdiction are lofty and idealistic (some might argue, unrealistic or naïve): to reduce the suffering caused by international armed conflict by deterring state actors from launching aggressive use of the stakes at issue (trying to deter aggressive use of armed force), and the vast numbers of human rights violations resulting therefrom. See, e.g., Amnesty International, Press Release ‘Proposals Threaten International Criminal Court’s Independence,’ 8 June 2010; Human Rights Watch, ‘Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference,’ 10 May 2010, at <www.hrw.org/en/node/90282/section/8> (urging “states to reject any jurisdictional regime that requires approval by any entity external to the ICC itself” and arguing “that inclusion of a definition and jurisdictional filter [for the crime of aggression] could diminish the court’s role … as an impartial judicial arbiter of international criminal law.”). The Open Society Institute also opposed the aggression amendment, arguing that such an amendment would “politicize[e] and overburden[…]” the ICC. See letter from Aryeh Neier, President of the Open Society Institute, *et al.* to Foreign Ministers, dated 10 May 2010. Given how restrictive the jurisdiction agreed upon for the ICC will be over the crime of aggression (see Section 3.2. *infra*), OSI’s fears of overburdening the Court clearly will not come to pass. The argument that the Security Council should not serve as a jurisdictional filter vis-à-vis the crime of aggression ignores that the Security Council already may refer cases to the ICC vis-à-vis its other three crimes (genocide, war crimes and crimes against humanity) as well as stop such prosecutions, so an important role for the Security Council already exists under the original Rome Statute. See Rome Statute, Arts. 13 (referrals) & 16 (deferrals). Arguing that the Security Council should play no such role regarding the crime of aggression, while based on understandable and important concerns about judicial independence, was at the same time utterly unrealistic and arguably failed to recognize the Security Council’s role under the U.N. Charter in determining when an act of aggression occurs. See U.N. Charter, Art. 39. Had the Rome Statute amendment process failed to recognize this role—which it was mandated to recognized pursuant to Rome Statute Article 5(2)—it could have created a conflict between the Rome Statute and the U.N. Charter, in which case the U.N. Charter would prevail. See U.N. Charter, Art. 103.


18) Article 2(4) of the U.N. Charter states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter, Art. 2(4).
force that is neither in self-defence,\textsuperscript{19} sanctioned by the U.N. Security Council under Chapter VII of the U.N. Charter,\textsuperscript{20} nor humanitarian.\textsuperscript{21}

The concept of prosecuting the crime of aggression, of course, is not new to the world stage: crimes against the peace (a war of aggression) were prosecuted before the International Military Tribunals at Nuremberg and Tokyo after World War II.\textsuperscript{22} But following those prosecutions, the crime had languished, unused. At Rome, when the ICC Statute was concluded, states agreed that aggression was one of “the most serious crimes of concern to the international community as a whole” and a crime over which the Court would have jurisdiction (along with the crimes of genocide, war crimes and crimes against humanity).\textsuperscript{23} States, however, also agreed that the Court could not exercise jurisdiction over the crime of aggression until a definition was agreed upon as well as conditions for the exercise of jurisdiction.\textsuperscript{24} This article will trace how that final agreement was reached as to

\textsuperscript{19} Article 51 of the U.N. Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security....”

\textsuperscript{20} See U.N. Charter, Chapter VII.

\textsuperscript{21} There is no express provision permitting humanitarian intervention in the U.N. Charter. However, fairly recent advances in the doctrine of the “responsibility to protect” suggest that the law is moving towards the position that a nation that in good faith utilizes its armed forces (unilaterally or multilaterally) to prevent large scale war crimes, crimes against humanity or genocide in another country, should not be considered to violate international law. See, e.g., The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (“ICISS Report”) (2001); see also 2005 World Summit Outcome, G.A. Resolution 60/1, 24 October 2005, A/RES/60/1 (“2005 World Summit Outcome”), at paras. 138-39 (recognizing a responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity). The doctrine, admittedly, is not fully agreed upon, and some sources state that such intervention is still only permissible when sanctioned by the U.N. Security Council, and should not be unilateral or multilateral. See, e.g., 2005 World Summit Outcome, para. 139.

\textsuperscript{22} The Nuremberg (London) Charter defines “crimes against peace” as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” Charter of the International Military Tribunal, Art. 6(a). See also Charter of the International Military Tribunal for the Far East (Tokyo), Art. 5(a) (similar, adding that the war could be declared or undeclared); Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), art. II (1)(a) (also covering “initiation of invasions,” and not limiting the forms of responsibility to planning, preparation, initiation or waging).

\textsuperscript{23} See Rome Statute, Art. 5(1) (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) [t]he crime of genocide; (b) [c]rimes against humanity; (c) [w]ar crimes; [and] (d) [t]he crime of aggression.”).

\textsuperscript{24} Specifically, Article 5(2) of the Rome Statute states: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Rome Statute, Art. 5(2).
the aggression amendment at the Review Conference in Kampala. Specifically, Section 1 will provide a brief background on the crime of aggression negotiations, focusing in particular on where the negotiations stood leading into the Review Conference. Section 2 will trace the negotiations on the crime of aggression during the Review Conference, detailing the key proposals made by States Parties and how the final compromise was forged. Section 3 will comment on the strengths and weaknesses of the final result. The article concludes with some observations about the significance of the agreement reached.

1. The Road to Kampala: An Overview of Aggression Negotiations Leading into the Review Conference

After conclusion of the Rome Statute, in June and July 1998, in Rome, Italy, various preparatory work remained before the Court could commence its operations. Thus, various “Preparatory Commission” meetings were held over the years 1999-2002 to address such issues, as well as the unresolved issue of the crime of aggression. By the time the Rome Statute reached the required number of ratifications to go into effect, the various sub-groups of the Preparatory Commission had completed their work, with the exception of the work pertaining to aggression. Thereafter, the Assembly of States Parties (“ASP”) created a Special Working Group on the Crime of Aggression (“the Special Working Group”), which met from 2003-2009 primarily at The Hague, the United Nations, and Princeton, New Jersey. Because the work of the Special Working Group has recently been extensively documented, this article does not chronicle the negotiating process during those years or prior thereto, but starts its focus with the open issues that existed at the Resumed Eighth Session of the ICC Assembly of States Parties, held at the U.N. from 22-25 March 2010 (the “Resumed Eighth Session”), which was the final key meeting on the crime of aggression prior to the Review Conference.

25) The Preparatory Commission was charged with drafting texts of: (a) rules of procedure and evidence; (b) elements of crimes; (c) a relationship agreement between the Court and the United Nations; (d) basic principles governing a headquarters agreement to be negotiated between the Court and the host country; (e) financial regulations and rules; (f) an agreement on the privileges and immunities of the Court; (g) a budget for the first financial year; (h) the rules of procedure of the Assembly of States Parties; and (i) proposals for a provision on aggression. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998, U.N. Doc. A/CONF.183/10, Annex I, Resolution F.

26) Sixty ratifications were required. See Rome Statute, Art. 126(1). In April 2002, the final ratifications were simultaneously deposited, bringing the total to 66.

1.1. The Definition of the Crime of Aggression

During the Preparatory Commission meetings and meetings of the Special Working Group, extensive deliberations took place as to the definition of the crime of aggression as well as the conditions for the exercise of jurisdiction. By the time of the Resumed Eighth Session in March 2010 (in fact, somewhat earlier), most States Parties were generally satisfied with the draft definition of the crime, as well as the draft elements of the crime. While there had been many contentious issues over the years as to the draft definition, virtually all of them had, by then, been resolved fairly satisfactorily to most.28

The definition of the crime of aggression reached by the end of the work of the Special Working Group in February 200929 became the definition that was ultimately adopted at the Review Conference. To be located in a new Article 8bis to the Rome Statute, it provides:

**Article 8bis**

**Crime of aggression**

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

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

   a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
   b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
   c) The blockade of the ports or coasts of a State by the armed forces of another State;

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28) As discussed further below, the United States—a Non-State Party to the Rome Statute—did not attend the meetings of the Special Working Group, although the meetings were open to Non-States Parties. With the change to the administration of President Obama, the U.S. began to attend negotiations at the Eighth Session of the Assembly of States Parties, which took place in The Hague in November 2009. When the U.S. first voiced its substantive views as to the crime of aggression first in The Hague at the Eighth Session of the Assembly of States Parties, but more fully during the Resumed Eighth Session in March 2010 at the U.N., it had a panoply of concerns with the definition of the crime as well as other concerns. See Comments of Harold H. Koh, Legal Adviser U.S. Department of State, Resumed Eighth Session of the ASP.

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.  

1.2. Key Features of the Definition of the Crime of Aggression

While a complete analysis of the definition is beyond the scope of this article, certain key features deserve mention.

Resolution RC/Res.6, advance version, 28 June 2010, 18:00, available at <www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> [last visited 22 September 2010], Annex I.

Also fairly well-accepted by the time of the Resumed Eighth Session (and also ultimately adopted at the Review Conference) were the Amendments to the Elements of Crimes to cover the crime of aggression:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex II. There is a footnote to element 2 providing: ”[w]ith respect to an act of aggression, more than one person may be in a position that meets these criteria.” Ibid. The following “[i]ntroduction” is also given:

1. It is understood that any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term “manifest” is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Ibid.
Sources of the definition’s text.—First, it is important to note the various sources of the definition’s text. The concept (contained in paragraph 1 of the definition) that the individual’s “crime of aggression” consists of “planning, preparation, initiation or execution” mirrors the London Charter creating the International Military Tribunal at Nuremberg.\(^{31}\) The concept (contained in paragraph 2 of the definition) that an “act of aggression” means “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations” is nearly a verbatim quote from Article 2(4) of the U.N. Charter.\(^{32}\) The list of enumerated acts in subparagraphs (a)-(g) of paragraph 2 which “qualify as an act of aggression,” is taken from General Assembly resolution 3314 of 1974.\(^{33}\) Thus, most of the definition has been derived from pre-existing sources, and thus hardly reflects novel concepts.

The differentiation between an “act of aggression” and the “crime of aggression.”—Second, the wording of Article 8\(^{bis}\) makes the differentiation between an “act of aggression” (covered in paragraph 2), which is the act that the state commits, and the “crime of aggression” (covered in paragraph 1), which is the act that the individual commits. Unlike other ICC crimes, it is impossible for an individual acting alone, absent state action, to commit the crime of aggression.\(^{34}\)

\(^{31}\) Charter of the International Military Tribunal, Art. 6(a). Of course, a significant difference is that the London Charter covered the “planning, preparation, initiation or waging of a war of aggression” (emphasis added), while the new definition covers the planning, preparation, initiation or execution of an act of aggression. As discussed further below, it was specifically debated at Princeton, New Jersey, as part of the negotiations of the Special Working Group whether only a “war” of aggression should be covered by the definition. See June 2006 SWGCA meeting, paras. 21-24, reproduced in The Princeton Process, p. 144. That approach was ultimately rejected as too restrictive. Most states wanted to cover lesser incursions that did not amount to full-scale war.

\(^{32}\) See U.N. Charter, Art. 2(4), quoted at note 18 supra.

\(^{33}\) See General Assembly Resolution 3314 (XXIX) of 14 December 1974.

\(^{34}\) While it is possible to imagine an individual acting alone might engage in “planning,” “preparation” or “initiation” of an act of aggression, the Amendments to the Elements of Crimes make clear that an act of aggression—that is, the act by the state—must also occur. See Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex II, element 3 (“The act of aggression… was committed.”). Indeed, if an individual engaged in planning, preparation or initiation of an act of aggression that did not result, this would hardly meet the gravity threshold necessary for Rome Statute crimes. See Rome Statute, preamble (“[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished …”). “Attempt” is still a form of individual criminal responsibility under Rome Statute Article 25. See Rome Statute, Art. 25(3)(f). Presumably, this means that attempts at “planning”, “preparation”, “initiation” or “execution” of an act of aggression would be covered (even where the attempts at planning, preparation, initiation or execution fail); such a scenario, again, would hardly make a strong ICC case. There was discussion during the Special Working Group meetings of whether to delete “attempt” as a means of committing the crime of aggression. See June 2006 SWGCA Meeting, paras. 36-46, in The Princeton Process, pp. 146-47 (discussing “attempt”); see also June 2005 SWGCA Meeting, paras. 33-43, in The Princeton Process, pp. 171-72 (same). It was ultimately decided that only “indispensable minimal modifications should be made” to the structure of the Rome Statute when adding the crime of
Aggression is a “leadership crime.”—Third, under the definition, the crime of aggression is committed “by a person in a position effectively to exercise control over or to direct the political or military action of a State.” Thus, the crime is solely a “leadership crime.” Ordinary soldiers would never be covered by the definition. This understanding is confirmed as well by the amendment to Rome Statute Article 25, also agreed to at the Review Conference, which would insert into Article 25, a paragraph 3bis stating: “In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.”

Only “manifest” U.N. Charter violations are covered, excluding all factually and legally grey area cases.—Fourth, the crime of aggression will only apply when the act of aggression by “its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” There was considerable debate at Princeton by the Special Working Group as to whether it should be a “manifest” violation, a “flagrant” violation, or any Charter violation that would be covered. The predominant view was that only a “manifest” violation should be covered. Importantly, the definition makes clear that to understand what is a “manifest” violation, one must assess the “character, gravity and scale” of the violation. This requirement is intended to exclude “borderline cases” or those “falling within a grey area”—both factually (when the act of state does not meet the required “gravity” or “scale,” such as minimal border incursions), as well as legally (that is, debatable cases, where the act of state due to its “character” does not constitute a manifest violation of the Charter).

Aggression, June 2004 SWGCA Meeting, conclusions after para. 18, and the provision covering “attempt” as a form of individual criminal responsibility was not altered.

35) For background, see Stefan Barriga, in The Princeton Process, pp. 7-8. For additional discussion of the leadership requirement, see Roger S. Clark, “The Crime of Aggression: From the Trial of Takashi Sakai, August 1946, to the Kampala Review Conference on the ICC in 2010,” paper to be presented 14-16 October 2010, Melbourne Law School [draft, on file with the author].
36) Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8bis, para. 1.
37) Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8bis, para. 1 (emphasis added).
42) Thus, for example, “the requirement that the character, gravity and scale of an act of aggression amount to a manifest violation of the Charter would ensure that a minor border skirmish would not be a matter for the Court to take up.” Stefan Barriga, in The Princeton Process, p. 8.
43) Excluding legally debatable cases means that humanitarian intervention is not covered. See Claus Kreß (German delegation), “Time for Decision: Some Thoughts on the Immediate
Each act listed in subparagraphs (a)-(g) constitutes an “act of aggression,” but would still need to satisfy the “manifest” requirement to constitute the “crime of aggression.”—Fifth, as mentioned above, the definition of the “act of aggression” includes a list of acts taken from General Assembly resolution 3314, each of which (under paragraph 2) qualify as an “act of aggression.” It is important to note, however, that in order for there to be a “crime of aggression” (under paragraph 1), the act would still by “its character, gravity and scale, [need to] constitute[] a manifest violation of the Charter of the United Nations.” So the definition is not saying that every blockade, bombardment or attack listed would necessarily constitute the crime of aggression, but only the most egregious situations. This concept is very much in line with the Rome Statute’s preamble, which makes clear that the ICC is intended to prosecute only the most serious crimes.

The list of acts taken from General Assembly resolution 3314 arguably does not constitute a complete list of covered acts.—Sixth, the language of paragraph 2, that “[a]ny of the following acts … shall, in accordance with United Nations General Assembly resolution 3314 … qualify as an act of aggression,” arguably leaves open the possibility that other acts might be covered, thereby potentially allowing for new forms of aggressive state action (although they too would need to meet the qualifier of a “manifest” violation of the Charter to constitute the crime of aggression). There was much debate during the Special Working Group whether

Future of the Crime of Aggression: A Reply to Andreas Paulus,’ 20 Eur. J. of Int’l L. 1129, p. 1140, citing Elizabeth Wilmshurst (UK delegation), in R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst (eds.) An Introduction to International Criminal Law and Procedure (2007), p. 268 (“genuine humanitarian intervention” is excluded). Additional provisions in the Rome Statute that protect against bringing legally borderline cases include: (i) Article 31(3)’s exclusion of criminal responsibility if conduct is permissible under applicable law; (ii) Article 21’s inclusion of principles and rules of international law; (iii) the requirement of proof beyond a reasonable doubt, and (iv) the principle in dubio pro reo (a defendant may not be convicted when doubts about guilt remain).

44) That point is reinforced by the “understandings” agreed upon at the Review Conference, discussed in Section 2.4. infra. At the same time, as noted above, States Parties did not go so far as to only criminalize a “war” of aggression, as was the case before the Nuremberg and Tokyo Tribunals. See note 31 supra.

Acts covered by sub-paragraph (a), which “corresponds to the most traditional notion of ‘aggressive war,’” “will presumably always constitute ‘a manifest violation of the Charter of the United Nations.” David Donat Cartin, ‘Brief Commentary to the 2010 Amendments to the Rome Statute of the International Criminal Court (ICC) Concerning the Crime of Aggression,’ pp. 2-3 (emphasis omitted). The acts listed in sub-paragraphs (b) and (g) would have to be evaluated to see if they satisfy the threshold in the chapeau of the definition. Ibid., p. 3.

45) See Rome Statute, preamble (“'[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished …'”).

the list of acts from resolution 3314 should be a “closed” or “open” list, and, ultimately, it was resolved to consider it “semi-open” or “semi-closed” in that the list is not closed, but any other act would need to meet the other qualifiers in the definition, which effectively “closes” the list. Of course, to the extent the list is considered “semi-open,” one could anticipate it being challenged by a defendant as violating the principle of legality or nullum crimen sine lege. An “open” list would constitute such a violation, but a semi-open list (with a chapeau that closes it) should not.

1.3. Open Issues Leading into the Review Conference

By contrast to the definition (on which, as mentioned, there was general agreement leading into the Review Conference), the issue of the conditions for the exercise of jurisdiction—that is, when the ICC would be able to exercise jurisdiction over the crime of aggression—left a good deal unresolved by the time of the Resumed Eighth Session, and, thus, leading into the Kampala Review Conference. Another issue on which there was no agreement by the

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2 Göttingen J of Int’l L 689, 696 (2010) (“The list of ‘acts’ in Article 8bis (2), taken verbatim from Resolution 3314, may be open-ended to the extent that it does not say that no other acts can amount to aggression [but additional acts would need to be interpreted narrowly and satisfy the threshold clause].”).

47) With an “open list,” the acts listed in subsections (a)-(g) would be illustrative of acts of aggression, and “sufficiently open to cover future forms of aggression.” See June 2008 SWGCA Meeting, in The Princeton Process, p. 89, para. 75. Those who favoured a “closed list” expressed concerns that the principle of legality or nullum crimen sine lege could be violated by an open list. See Stefan Barriga, in The Princeton Process, pp. 10-11.


49) Nullum crimen sine lege literally means “no crime without law” and refers to the prohibition on ex post facto laws.

50) It is also worth noting that the crime against humanity of “other inhuman acts” has been upheld many times at the international level, without any express statutory articulation of what these other acts might be. See Jennifer Trahan, Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda (Human Rights Watch 2010), pp. 142-46 (citing cases). As explained by the International Criminal Tribunal for Rwanda’s Trial Chamber:

The crime of ‘other inhumane acts’ encompasses acts not specifically listed as crimes against humanity, but which are nevertheless of comparable nature, character, gravity and seriousness to the enumerated acts in sub-articles (a) to (h) of Article 3. The inclusion of a residual category of crimes in Article 3 recognizes the difficulty in creating an exhaustive list of criminal conduct and the need for flexibility in the law’s response ….

Start of the Review Conference was the amendment procedure to be used for amending the Rome Statute, seemingly a technical question, but one which emerged also as quite significant.

1.3.1. Open Issues as to Jurisdiction

While the conditions for the exercise of jurisdiction had been a consistent topic of debate over the years when the Preparatory Commission and Special Working Group were meeting, many of the key issues during these meetings seemed either not to progress, or to progress only very gradually.\(^{51}\) The most significant issue over the years was the role of the Security Council, and whether it should be the only body that could refer a situation of suspected aggression to the ICC. States that argued that only the Security Council should be able to play such a role generally relied upon Article 39 of the U.N. Charter which states that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression …,”\(^{52}\) as well as Article 5(2) of Rome Statute, which states that any provision defining the crime of aggression and setting out the conditions under which the Court shall exercise jurisdiction “shall be consistent with the relevant provisions of the Charter of the United Nations.”\(^{53}\) Other states that maintained that the Security Council should not have such a role, or not such an exclusive role, generally argued that Article 39 was for the purposes of Chapter VII enforcement actions, and not for purposes of applying international criminal law, and that to give a political body such control over the Court would undermine its independence as a judicial institution\(^{54}\) and have the potential to make aggression prosecutions look politically, and not judicially, motivated.

Meanwhile, other alternatives to the Security Council as a “filter” mechanism emerged: the ICC itself (for example, through its Pre-Trial Chamber), the U.N. General Assembly, or the International Court of Justice.\(^{55}\) Thus, the draft text for several years contained language providing that if, after a period of time (such as six months) the Security Council had not made a determination as to referring a

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\(^{51}\) Observations as to the content of discussion at Preparatory Commission meetings, Special Working Group meetings, and the Review Conference not otherwise specifically attributed are based on the author’s observations.

\(^{52}\) U.N. Charter, Art. 39 (emphasis added).

\(^{53}\) Rome Statute, Art. 5(2).

\(^{54}\) Of course, under the original Rome Statute, the ICC is not wholly independent of the Security Council. Under Article 13, the Security Council may refer cases to the ICC, and under Article 16, the Security Council may suspend an investigation or prosecution for a period of 12 months in a resolution adopted under Chapter VII. See Rome Statute, Arts. 13 & 16.

\(^{55}\) See, e.g., ICC-ASP/7/20/Add.1, Annex.
situation of potential aggression to the ICC, then one or more of these institutions might be utilized (with the different options left in brackets, to reflect the issue was unresolved). Over the years of the meetings of the Special Working Group, there was much debate about the potential benefits and detriments of involving these various additional institutions. By the time of the Resumed Eighth Session, however, most states had moved away from wanting to use the General Assembly or International Court of Justice as a “filter,” and states were left with the seemingly starker choice of the Security Council or the ICC’s Pre-Trial Chamber.

By then, however, it was clear that the issue of the “filter” mechanism was not the only one still to be decided. A related question pertained to where the crime of aggression was considered to “occur.” For the crimes of genocide, war crimes and crimes against humanity, the Rome Statute creates jurisdiction, in the absence of Security Council referral, for crimes committed on the territory of a State Party or by its nationals. However, as to the crime of aggression, it was less clear how to interpret when the crime is committed on the territory of a State Party. Unlike the other ICC crimes, as to aggression, there would always seem to be both one state (or more) that launches the aggression (the aggressor state(s)) and one state (or more) that is the recipient of the incursion (the victim state(s)). Should the ICC have “jurisdiction” over the crime of aggression, in the absence of Security Council referral, when the aggressor state had ratified the aggression amendment, when the victim state had ratified the aggression amendment, or only when both had ratified?

By the Resumed Eighth Session, the Chair—Prince Zeid—essentially requested States Parties to vote on these interrelated issues of (a) the “filter” mechanism, and (b) which state would have to consent to the aggression amendment to create jurisdiction in the absence of a Security Council referral. Specifically, States Parties were asked to state into which “box” they fell on these issues, the four boxes being formulated as follows:

States Parties at the Resumed Eighth Session were divided on these issues. An informal count by the author was that approximately nine States Parties agreed with the approach contained in “box 1”; approximately two States

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56) Ibid.
57) If there is a referral by the Security Council, ratification becomes irrelevant, as even crimes committed in the territories of Non-States Parties may be referred to the ICC by the Security Council. See Rome Statute, Art. 13(b).
58) Rome Statute, Art. 12(2).
59) See February 2009 SWGCA Report, paras. 38-39; November 2008 SWGCA Report, paras. 28-29 (acknowledging that the crime of aggression is usually considered to take place concurrently on the territory of both the aggressor state and victim state).
Parties agreed with the approach contained in “box 2”; approximately 20 States Parties agreed with the approach contained in “box 3”; and approximately 32 States Parties agreed with the approach contained in “box 4.” Thus, none of these combinations marshaled enough support for the type of consensus that would be needed at the Review Conference. It is with these starkly divergent views that the issue of jurisdiction reached the Review Conference.

<table>
<thead>
<tr>
<th>Box 1</th>
<th>Box 2</th>
<th>Box 3</th>
<th>Box 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance by aggressor State required + SC filter</td>
<td>Acceptance by aggressor State not required + SC filter</td>
<td>Acceptance by aggressor State required + non-SC or no filter</td>
<td>Acceptance by aggressor State not required + non-SC or no filter</td>
</tr>
<tr>
<td>Step 1: Prosecutor may only investigate situations where the aggressor State has accepted the Court’s jurisdiction over the crime of aggression.</td>
<td>Step 1: Prosecutor may investigate any situation in which the victim State has accepted the Court’s jurisdiction over the crime of aggression.</td>
<td>Step 1: Prosecutor may only investigate situations where the aggressor State has accepted the Court’s jurisdiction over the crime of aggression.</td>
<td>Step 1: Prosecutor may investigate any situation in which the victim State has accepted the Court’s jurisdiction over the crime of aggression.</td>
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</tr>
<tr>
<td>Step 2: Prosecutor may only proceed with the Security Council’s agreement.</td>
<td>Step 2: Prosecutor may proceed in the absence of a SC determination, either without any external filter or on the basis of a “broader” filter (GA, ICJ).</td>
<td>Step 2: Prosecutor may proceed in the absence of a SC determination, either without any external filter or on the basis of a “broader” filter (GA, ICJ).</td>
<td>…</td>
</tr>
</tbody>
</table>

60) “Illustrative chart on conditions for the exercise of jurisdiction,” dated 2 March 2010, 10:00.

61) Author’s notes of the Resumed Eighth Session, on file. Considering these figures a bit, one can extrapolate that both “box 1” and “box 2” states (11 in total) wanted a Security Council filter. On the other hand, both “box 3” and “box 4” states (52 in total) wanted an external filter (GA or ICJ) or no filter. (While the voting did not differentiate between those States Parties that support the GA or ICJ as filter, versus those States Parties that supported no filter (e.g., the ICC itself as an “internal filter”), as noted above, most states appeared to be moving towards using no filter—the ICC itself.) It was at least clear that, numerically, far more States Parties favoured not using the Security Council as a filter. However, the voting in no way considered the geopolitical influence of some of the “box 1” states nor did it factor in the views of Non-States Parties, among whom there would be some strong “box 1” supporters.
1.3.2. Open Issues as to the Amendment Procedure

By the Resumed Eighth Session, the issue of the appropriate amendment procedure to be utilized at the Review Conference was also hotly contested.⁶² The debate was whether to use the procedures set forth in Rome Statute Article 121(4) or Article 121(5). Article 121 provides in relevant part:

4. Except as provided in paragraph 5, 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.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of

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⁶² The issue of which State Party would have to accept the aggression amendment in part overlapped with the question of amendment procedures, because Article 121(5)’s second sentence reads: “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.” Rome Statute, Art. 121(5). It had previously been discussed that there could be either a “positive understanding” or “negative understanding” of the second sentence of Article 121(5). The “positive understanding” would have provided: “It is understood that article 121, paragraph 5, second sentence of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment.” RC/WGCA/1, p. 7, Annex III, understanding 6, Alternative 1. The “negative understanding” would have provided: “It is understood that article 121, paragraph 5, second sentence of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment.” RC/WGCA/1, p. 7, Annex III, understanding 6, Alternative 2. Neither of these understandings was incorporated into the final understandings agreed upon in Kampala. See Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex III.

Given that the Review Conference ultimately decided to use the amendment procedure of Article 121(5), see Section 2.6. infra, it would have been helpful to include in the Review Conference’s resolution some mention of how to interpret the second sentence of Article 121(5) vis-à-vis the crime of aggression. One possibility is that one is simply reading it out of the Rome Statute for the current aggression amendment (but possibly still reading it in for future amendments vis-à-vis new crimes or future aggression amendments). See, e.g., Jutta F. Bertram-Nothnagel, ‘A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court,’ [draft version of 20 August 2010, submitted to the African Legal Aid Quarterly, on file with the author] (offering two interpretations that, in the absence of Security Council referral, exercise of jurisdiction may be possible even if the aggressor State Party has not ratified the amendment; one interpretation does not require ratification by the victim state, but the other one does. The argument that ratification by the aggressor State Party is not absolutely necessary follows from the possibility of opting out prior to ratification; if exercise of jurisdiction were never possible without ratification of the amendment by the aggressor State Party, there would be no need for a pre-ratification opt out). That author also argues that one could avoid applying the second sentence of Article 121(5) because it pertains to the exercise of jurisdiction, and Rome Statute Article 5(2) charged the Review Conference to set forth conditions for the exercise of jurisdiction for the crime of aggression—thereby suggesting that Article 121(5)’s second sentence could be freely revised for the crime of aggression. Others have argued that the second sentence of Article 121(5) must be read according to its plain meaning; thus, as to the crime of aggression, the ICC will not be able to exercise jurisdiction if the crime has been committed by nationals of, or on the territory of, a State Party that has not accepted or ratified the aggression amendment. See, e.g., R. Manson, ‘Identifying the Rough Edges of the Kampala Compromise.’ For further discussion of this issue, see note 148 infra.
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.63

Thus, if Article 121(4) were utilized, once seven-eighths of States Parties had ratified the amendment, it would enter into force one year thereafter for all States Parties to the Rome Statute—including the one-eighths that had not ratified the amendment. If Article 121(5) were utilized, the amendment would only enter into force for those States Parties that accepted or ratified it, one year after their acceptance or ratification.64 (Both of these articles would apply after “adoption” of the amendment, pursuant to Article 121(3) by a two-thirds vote or consensus, as occurred at the Review Conference.)

It did not make matters easier that the ultimate amendments would delete Rome Statute Article 5(2), create new Articles 8bis, 15bis, 15ter, and make slight changes to Articles 25, 9 and 20.65 Did that literally mean that the Article 5(2) deletion and Article 8bis addition were amendments to Articles 5 and 8—if one even considers Article 8bis to amend Article 866—and fell within one amendment regime (article 121(5)), while the rest of the amendments were not amendments to Articles 5, 6, 7 and 8, and thus fell under another amendment regime (article 121(4))? That result seemed hopelessly complex.67 Thus, at the end of the Resumed Eighth Session, there was no agreement either as to what amendment procedure was to be used at the Review Conference, or whether it would be one procedure

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63) Rome Statute, Art. 121(4)-(5) (emphasis added).
64) “[T]he ‘disadvantage’ [of using Article 121(5)] is the creation of a ‘two-tier’ jurisdiction in the Court, as between accepting and non-accepting [States Parties].” R. Manson, “Identifying the Rough Edges of the Kampala Compromise.”
65) For discussion of the new Article 8bis, see Sections 1.1.-1.2. supra. For discussion of the new Articles 15bis and 15ter, see Section 2.6. infra. As to Article 9 (on elements of the crimes), it was agreed at the Review Conference that the first sentence of article 9, paragraph 1 of the Statute would be replaced by the following sentence: “Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.” As to Article 20, paragraph 3 (ne bis in idem), the chapeau is replaced by the following paragraph: “No person who has been tried by another court for 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.” For discussion of the change to Article 25, see text accompanying note 36 supra.
66) A better interpretation might be that Article 8bis is a new article falling between Articles 8 and 9.
67) As one representative closely involved in the negotiations has explained, there were at least six approaches to the issue: (1) that the provisions on aggression need not be ratified, but only “adopted” in accordance with Article 5(2); (2) that the amendments must be ratified pursuant to Article 121(5); (3) that the amendments must be adopted pursuant to Article 121(4); (4) that a combination of Articles 121(4) and (5) should be utilized; (5) that a consequential approach to Articles 121(4) and (5) should be utilized; and (6) that the amendment procedure should be amended, using Article 121(4). For additional discussion of the Rome Statute’s amendment procedures, including the argument that the crime of aggression amendment could have been accomplished under Article 121(3) by mere “adoption” at the Review Conference, see Roger S. Clark, ‘Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute,’ 41 Case W. Res. J. of Int’l L. (2009).
at all. Not only would this issue determine how any aggression amendment would enter into force (and the extent to which it might bind States Parties that had not consented to the amendment), but it also had implications for whether states that would join the ICC in the future would automatically have to join a four-crime court (including aggression) or might have the option of joining a three-crime court (excluding aggression).

2. The Review Conference Negotiations as to the Crime of Aggression

It is an understatement to say that those primarily in charge of the Review Conference aggression negotiations—Ambassador Wenaweser and Prince Zeid, assisted by Stefan Barriga—had an exceedingly difficult task ahead of them. This task was complicated somewhat by the fact that the crime of aggression was not the only item on the Review Conference's agenda. Emerging a couple of years previously, it was agreed that during the Review Conference there also would be a “stocktaking” of international justice, and this emerged in the form of four

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68) Use of the amendment procedures of Article 121(4) would suggest that once seven-eighths of States Parties ratified the amendment, future states to join the Rome Statute would have no choice whether or not to accept the aggression amendment. Use of the amendment procedures of Article 121(5)—which, as discussed below, was ultimately done—would suggest more of a consensual regime, that future states to join the Rome Statute would have a choice whether or not to ratify the aggression amendment.

The wording of the final agreement, discussed below, leaves it somewhat unclear how future States Parties will be treated. Article 12(1) of the Rome Statute states that “[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5,” which includes the crime of aggression. On the other hand, the enabling resolution agreed to at the Review Conference states that the amendment is being done pursuant to Article 121(5) of the Rome Statute, which suggests that future States Parties would have to ratify the amendment for jurisdiction to be exercised. The default rule contained in the Vienna Convention on the Law of Treaties, suggests a mixed regime whereby absent a contrary expression, the new state party would be bound to the amended agreement vis-à-vis states also bound, but not vis-à-vis states not bound. See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), Art. 40(5) (“Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be considered as a party to the una-mended treaty in relation to any party to the treaty not bound by the amending agreement”) (emphasis added). These provisions suggests that future States Parties will be bounded to the amended Rome Statute (with the crime of aggression added) at least vis-à-vis other States Parties that have accepted the amendment, but, because the aggression amendment is done pursuant to the amendment procedures of Article 121(5), will not have aggression jurisdiction exercised against them absent ratification or acceptance of the amendment. (That interpretation rests on a strict reading of the second sentence of Article 121(5); see note 148 hereto.) A question also exists whether future States Parties could express an intention not to be bound to the amended treaty, or whether that might be treated as a reservation, and the Rome Statute permits no reservations. See Rome Statute, Art. 120.
panels to be held during the first week of the conference. Also on the agenda were two other potential Rome Statute amendments—the so-called Belgian “war crimes amendment,” and the issue of whether to eliminate Article 124. This meant that the agreement on the crime of aggression had to be worked out in significantly less than the two weeks allotted to the Review Conference.

During the first week of the Review Conference, in the sessions that did concern aggression, some of the key features of the interventions by States Parties suggested that: (a) many states were willing to be flexible and to compromise in order to reach an agreement as to the crime of aggression; (b) many states did want a successful outcome, that is, an amendment concluded as to aggression; (c) many states expressed satisfaction with the definition of the crime (draft Article 8bis) and the elements of the crime previously negotiated, signalling that they did not want to re-open those topics; and (d) states were beginning to put forward new, creative proposals as to how to resolve the impasse on the conditions for the exercise of jurisdiction and entry into force.

Not all states expressed such favourable views, of course. The U.S. delegation, for example, in its opening statement by State Department Legal Adviser Harold H. Koh on 4 June 2010, still expressed concerns that “the current draft definition

69) See note 3 supra. Some states expressed concern that “stocktaking” had been added to the Review Conference’s agenda in case no agreement could be reached on the crime of aggression, so that the conference could appear to be at least a partial success. Others took the view that the “stocktaking” focus was extremely significant in itself, as a measure of states’ commitment to the field of international justice and the ICC as a whole. The author’s view is that the “stocktaking” will only prove significant if it results in a sustained focus on the issues raised.

70) The Belgian war crimes amendment (which was adopted) added three war crimes that had previously been Rome Statute crimes if committed during international armed conflict, but will now be crimes if committed during internal armed conflict: (i) employing poison or poisoned weapons; (ii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices; and (iii) employing bullets which expand or flatten easily in the human body. See Report of the Review Conference, Resolution RC/Res.5, advance version 16 June 2010, 13:00, at <www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf> [last visited 23 September 2010]. States Parties at the Review Conference were also expected to agree to delete Article 124 of the Rome Statute, which allows States Parties to opt out of jurisdiction over war crimes for seven years. See Rome Statute, Art. 124. Ultimately, the decision whether to remove that provision was deferred until the 14th session of the Assembly of States Parties (five years from now). For additional discussion of the Belgian war crimes amendment and decision to retain Article 124, see Clark, supra note 46, pp. 691-92 & pp. 707-09.

71) See note 30 supra (listing the Amendments to the Elements of Crimes).

73) The author did not attend the first week of the Review Conference; thus, this article presents only a very rough synthesis of arguments presented during the first week. Aggression-related sessions were held on Tuesday, 1 June (to introduce the Chairman’s paper and non-paper), with the first formal debate occurring on Friday, 4 June. See Astrid Reisinger Coracini, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression – at Last … in Reach … Over Some,’ 2 Göttingen J of Int’l L 745, 756 (2010). A “non-paper” was also presented by Brazil entitled “2 successive modalities on the entry into force of the amendment on the crime of aggression,” 4 June 2010. Ibid.

72) See Section 1.1., supra (quoting the definition).
remains flawed,” and that there was no “consensus … [on] the elements of the crime,” on the “jurisdictional filter,” or as to when “any aggression amendments [should] enter into force and become operational.” 74 The overall message was clear: that the Conference should not rush to reach “an unworkable and divisive compromise that weakens the Court, diverts it from its core human rights mission, or undermines our multilateral system of peace and security.” 75 The United States, of course, is a non-State Party to the Rome Statute, and did not ultimately have a vote at the Review Conference. On the other hand, due to the influence of the United States in international affairs and as a permanent member of the U.N. Security Council, the United States’ views also could not be ignored.

During the second week of the Review Conference, States Parties forged ahead to provide new, concrete proposals as to jurisdiction and amendment procedures. The key proposals that emerged during the second week of negotiations, and which are detailed below, were the Argentine, Brazilian and Swiss Proposal (referred to as the “ABS Proposal”), the Canadian proposal, the Slovenian proposal, and the President’s “Non-Paper,” which, ultimately, evolved into the final agreement. Realizing that momentum in the room was to adopt the definition as it was, the U.S. delegation shifted its stance from opposing the definition to setting forth a proposal for various “understandings” to accompany the definition, some of which were ultimately adopted. The negotiation of these understandings is also discussed below.

2.1. The Argentine, Brazilian, Swiss Proposal

By the start of the second week of the Review Conference, the Argentine, Brazilian and Swiss delegations had produced a new proposal on jurisdiction and entry into force. 76 The key features of the ABS Proposal were that: (1) the Security Council could make a determination of an act of aggression, allowing the Prosecutor to proceed with an investigation; (2) however, if after six months of non-action by the Security Council, the Pre-Trial Chamber could also authorize the commencement of an investigation after state referral or proprio motu (on the Prosecutor’s


75 Ibid. These comments arguably fail to consider the vast number of human rights violations that occur during aggressive use of armed force, and that the multilateral system of peace and security that exists under the U.N. Charter prohibits aggressive use of force, see U.N. Charter, Art. 2(4), but has not succeeded in preventing it. Thus, aggression prosecutions are designed to protect against human rights violations during aggressive use of armed force, and to reinforce the importance of using, and thus strengthening, the multilateral system of peace and security.

76 See “Non paper submitted by Argentina, Brazil and Switzerland as of 6 June 2010.”
own initiative); (3) Security Council referrals would commence one year after deposit of one instrument of ratification (using Article 121(5)'s amendment procedures);\textsuperscript{77} (4) Pre-Trial Chamber authorizations would only commence once seven-eighths of States Parties had ratified the aggression amendment (using Article 121(4)'s amendment procedures), meaning that when seven-eighths had been achieved, the amendment would bind all States Parties (\textit{i.e.}, the remaining one-eighths).\textsuperscript{78} (The full text of the ABS Proposal is set forth in Appendix A hereto.)

Some of the benefits of this proposal in the eyes of some of the states that supported it\textsuperscript{79} were: (a) a Pre-Trial Chamber filter—something many states wanted to see\textsuperscript{80}—could be possible, not only the Security Council as a filter; (b) once seven-eighths ratifications had been achieved, all States Parties would be subject to the Pre-Trial Chamber's filter, after state referral or \textit{proprio motu}.\textsuperscript{81} These same features, however, made the proposal completely unacceptable to other states. “Box 1”-type states wanted only a Security Council filter.\textsuperscript{82} Various states were also concerned about any States Parties being bound to an aggression amendment absent consent, and strongly rejected using Article 121(4)'s amendment procedures.\textsuperscript{83} The proposal also contained a significant unknown: would seven-eighths ratifications of the aggression amendment be achieved? If not, that meant that, under the ABS Proposal, only the Security Council could act as a filter. This was a significant risk for the states that did not want to see the Security Council (a political body) as the only filter. On the other hand, never reaching seven-eighths ratifications and having only a Security Council filter was something with which the Permanent Members of the U.N. Security Council (China, France, the

\textsuperscript{77} Under the ABS Proposal, Security Council referrals would be covered by amending Article 5, making use of Article 121(5)'s amendment procedures (which govern amendments to Articles 5-8) completely appropriate. The changes to Article 8 would also use Article 121(5)'s amendment procedure.

\textsuperscript{78} Under the ABS Proposal, Pre-Trial Chamber authorizations would be covered by an amendment to Article 15, making use of Article 121(4)'s amendment procedures (which govern amendments to articles other than 5-8) completely appropriate. The ABS Proposal, thus, comes the closest of all the proposals to adhering to the text of the Rome Statute to accomplish the amendments.

\textsuperscript{79} States Parties and Non-States Parties had extremely diverse views. It is beyond the scope of this article to specify the views of particular states.

\textsuperscript{80} Both “box 3” and “box 4” States Parties (a total of 52 states) wanted a non-Security Council filter or no filter (\textit{i.e.}, an internal ICC filter). For discussion of “box 3” and “box 4,” see Section 1.3.1. \textit{supra}.

\textsuperscript{81} Those states that supported jurisdiction that would cover all States Parties were presumably concerned that absent it, certain States Parties (presumably those most likely to commit aggression) simply would never ratify the aggression amendment. Use of Article 121(4)'s amendment procedures was thus seen to create more of a level playing field among States Parties, and thus more uniform application of the rule of law.

\textsuperscript{82} For discussion of “box 1,” see Part 1.3.1., \textit{supra}.

\textsuperscript{83} Both “box 1” and “box 3”-type states (a total of 29 states) supported requiring aggressor state consent.
Russian Federation, the U.K. and the U.S.) and certain other states\textsuperscript{84} would no doubt have been quite content.\textsuperscript{85}

During discussion, it became clear that a significant number of States Parties found merit to the ABS Proposal, but that a significant number of States Parties (as well as various Non-States Parties) had significant disagreements with it. Overall, there was not sufficient support to suggest this proposal would prevail.

\subsection*{2.2. The Canadian Proposal}

By Tuesday, 8 June 2010, the Canadian delegation meanwhile launched their proposal (the “Canadian Proposal”), referred to by the Canadian delegation as presenting a “menu approach.”\textsuperscript{86} The key features of the Canadian Proposal were that: (1) the Security Council could make a determination of an act of aggression, allowing the Prosecutor to proceed with an investigation; (2) but, if after six months of non-action by the Security Council, the Pre-Trial Chamber could also authorize the commencement of an investigation if “all state(s) concerned” or “the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused” declared their acceptance.\textsuperscript{87} (The full text of the Canadian Proposal is set forth in Appendix B hereto.)

Some of the benefits that States Parties that supported the Canadian Proposal saw in it were that (1) the Security Council could immediately commence making referrals; (2) there was a mechanism in addition to the Security Council that could authorize the commencement of an investigation—the Pre-Trial Chamber; and (3) as to those states that were upset about the ABS Proposal’s binding the one-eighths of States Parties that had not consented to the aggression amendment (use of the Article 121(4) amendment procedures), the Canadian Proposal was much more consent-based. On the other hand, the Canadian Proposal also contained a significant unknown. The Pre-Trial Chamber would not be able to act without the consent of “all state(s) concerned” or agreement of “the state on

\textsuperscript{84} Both “box 1” and “box 2” states (a total of 11 States Parties) supported using a Security Council filter; thus, use of a Security Council filter was not only supported by the Permanent Members of the Security Council.

\textsuperscript{85} Comments by one member of the U.S. negotiating team to the author suggested that, if the ABS Proposal were agreed to, the U.S. might do its utmost to ensure that ratification by seven-eighths of States Parties was never achieved. Given the massive effort of the U.S. during the Bush Administration to enter into so-called “Article 98 agreements” or “bilateral immunity agreements,” and the threatening of states with the loss of U.S. assistance should they not enter into such agreements, such threats were not to be considered idle boasts. For background on “bilateral immunity agreements,” see American Non-Governmental Organizations Coalition for the International Criminal Court, Bilateral Immunity Agreements (BIAs), at <www.amicc.org/usinfo/administration_policy_BIAs.html>.

\textsuperscript{86} Proposal by Canada, dated 8 June 2010, 9:30.

\textsuperscript{87} These were alternative formulations set forth in brackets in the proposed text.
whose territory the alleged offence occurred and the state(s) of nationality of the persons accused” (depending on which formulation were selected). Would all states at issue provide such consent? It was difficult to know, and thus hard to assess, how meaningful the role of the Pre-Trial Chamber filter would be. Without significant acceptance, it would mean that the Security Council, again, would be the only meaningful filter.

Canada also expressed flexibility with respect to its proposal, suggesting it could add language providing for: (i) a mandatory review conference (i.e., review of the jurisdictional regime after a certain number of years); (ii) the Security Council giving a “green light”—that is, simply referring the situation to the ICC, instead of having to make a substantive determination that an act of aggression had occurred; and/or (iii) reduction of the period of time that the Pre-Trial Chamber would have to wait for Security Council action from six months to three months.

As with the ABS Proposal, it quickly became clear that while a number of States Parties supported the Canadian Proposal, many others did not. Clearly, there was no general agreement, or consensus, emerging behind either proposal. Yet, both proposals were helpful in advancing the negotiations. Key features that both proposals contained, or were willing to accommodate, were that: (a) the final agreement might encompass both the Security Council and the Pre-Trial Chamber as jurisdictional filters; (b) another variable was when these mechanisms might commence acting as such (either in a certain number of years or after a certain number of ratifications); and (c) there could be review of the jurisdiction regime (another review conference) in a certain number of years.

These concepts were key. By using the Security Council as a “trigger” and “filter” mechanism, it was hoped to assuage the concerns of the Permanent Members of the Security Council and other “box 1” and “box 2”-type states. By also using the Pre-Trial Chamber as a “filter,” it was hoped to gain the support of some of the “box 3” and “box 4”-type states that did not want a Security Council filter, or not an exclusive Security Council filter. Building in the concept of consent to jurisdiction was hoped to gain the support of “box 3”-type states. The concept of delay of the exercise of jurisdiction simply offered states more time to get used

88) Many states supported such “green light” language, out of concern that it would be far more difficult for the Security Council to reach an actual determination that an act of aggression had occurred than to make a more generic referral that contained no such express finding. See December 2007 SWGCA Meeting, paras. 35-38, in The Princeton Process, pp. 105-06 (discussing the Security Council giving a “green light”).

89) Conversations of the author with the Canadian delegation.

90) When the Security Council refers a case to the ICC, it is acting both as a “trigger”—in making the referral—and as a “filter.”

91) With a Pre-Trial “filter” mechanism, the State Party making the referral or the Prosecutor, acting proprio motu, is the “trigger.”

92) For discussion of “box 1,” “box 3,” and “box 4,” see Section 1.3.1., supra.
to the whole endeavour. The concept of reviewing jurisdiction at a later date gave states some comfort that the jurisdictional regime agreed upon might not be permanent (for example, if it were shown not to function well or as anticipated).

2.3. The Slovenian Proposal

After the Canadian Proposal, Slovenia made a proposal, also dated 8 June (the “Slovenian Proposal”), that modified the Canadian Proposal in two primary ways: (1) “if not all States Parties concerned with the alleged crime have deposited instruments of ratification or acceptance of the amendment on the crime of aggression,” the Prosecutor could “readdress the possibility of the Security Council referral” (i.e., re-check with the Security Council if its members would want to make the referral), and (2) there would be a mandatory review conference to consider “the applicability of the amendment on the crime of aggression to all States Parties” once seven-eighths of States Parties had ratified it. (The full text of the Slovenian Proposal is set forth in Appendix C hereto.)

The Slovenian Proposal did not appear to significantly alter the mix. The Canadians had already expressed flexibility about adding a provision providing for a mandatory Review Conference in a certain number of years. The Slovenian Proposal added the unknown that one did not know when (or if) seven-eighths ratifications would be achieved, so it was unclear when or whether such an additional review conference might occur. It also suggested that the additional review conference should consider making the aggression amendment apply to all States Parties—so hinting at a direction for the additional review conference to take. It was unclear how significant it was to allow the Prosecutor to re-check with the Security Council as to whether the Council wanted to make a referral. While the Slovenian Proposal attracted some States Parties as adherents, there was also no great outpouring of support for it. Thus, by the close of Wednesday, 9 June, with only two days of the Review Conference remaining, states were clearly divided in their support for the ABS Proposal, the Canadian Proposal, and the Slovenian Proposal, with not all States Parties necessarily favouring any one of the three proposals.

93) In the final agreement reached, see Section 2.6., infra, the delay gives States Parties time to determine whether they want to ratify the aggression amendment and/or file an “opt out” declaration, prior to jurisdiction commencing. It could also allow countries to implement national legislation on the crime of aggression, and thus be able to utilize the complementarity feature of the Rome Statute. See Rome Statute, Art. 17.

94) Non-Paper by Slovenia, dated 8 June 2010.

95) Non-Paper by Slovenia, dated 8 June 2010, 4bis.

96) Ibid.

97) For example, the U.K. delegation opposed the Canadian proposal, even though that proposal was giving a considerable role to the Security Council and made it quite hard to use the Pre-Trial Chamber as a jurisdictional filter.
2.4. The U.S.’s Proposal to add “Understandings” to the Definition

Meanwhile, on 6 June, the U.S. negotiating team had produced a paper setting forth various “understandings” that it proposed in order to clarify the definition. 98 While the United States had at both the Resumed Eighth Session and during the first week of the Review Conference expressed numerous concerns with the definition of the crime, 99 as noted above, by the second week of the Review Conference, the United States’ negotiating team clearly realized that most States Parties supported the definition, and that there was a strong likelihood it would be adopted at the Review Conference. 100 Thus, as mentioned above, the team switched negotiating tactics, and, in addition to its advocacy as to the issues of jurisdiction and entry into force, began to focus on attaching understandings to the definition. 101

In its first articulation, the United States’ proposed understandings were as follows:

It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute, and shall not be interpreted as

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98) Untitled document distributed at the Review Conference. The draft “understandings” were formally introduced with the U.S.’s presentation on 7 June 2010, in a statement by William K. Lietzau, Deputy Assistant Secretary of Defense (Detainee Policy).
99) See, e.g., Statement of Harold H. Koh, Legal Adviser U.S. Department of State, Resumed Eighth Session of the ASP.
100) The author had advocated to the U.S. delegation prior to the Resumed Eighth Session that the U.S. was joining the negotiations too late to effectively change the definition, having failed to participate in nearly a decade of negotiations, and should concentrate its focus on open issues. See Letter by the American Branch of the International Law Association ICC Committee, dated 19 March 2010, to State Department Legal Adviser Harold H. Koh and U.S. War Crimes Ambassador Stephen J. Rapp, signed by chairperson, Jennifer Trahan. While the U.S. delegation did not appear receptive to that letter at the Resumed Eighth Session, they appear to have heeded the advice (or perhaps independently reached the same realization) by the time of the second week of the Review Conference.
101) The U.S., at the Review Conference, had also suggested not adopting the elements of the crime of aggression until a later date, but that approach did not obtain support from other states.
constituting a statement of the definition of “crime of aggression” or “act of aggression” under customary international law.

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.

It is understood that, consistent with the principles set forth in General Assembly resolution 3314:

• only the most serious and dangerous forms of illegal use of force are considered to constitute aggression;
• a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the purposes for which force was used and the gravity of the acts concerned or their consequences;
• it is only a war of aggression that is a crime against international peace;
• nothing in this resolution or the amendments set forth in Annex [1] should be interpreted or applied in any manner inconsistent with General Assembly resolution 3314, nor should they be construed as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is unlawful;

It is understood that, for purposes of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression.

It is understood that, for purposes of the Statute, an act cannot be considered a manifest violation of the United Nations Charter absent a showing that it was undertaken without the consent of the relevant state, was not taken in self-defense, and was not within any authorization provided by the United Nations Security Council.

It is understood that in determining whether an act of aggression is manifest, all three components of character, gravity and scale must be sufficient to justify a “manifest” determination. Satisfaction of one criterion could not by itself be sufficiently severe to meet the “manifest” standard. 102

By the time the proposed understandings were circulated, the meetings had moved from plenary meetings or informal plenary meetings (in which all States Parties’ and Non-States Parties’ delegations could attend and speak) 103 to bilateral negotiations, in which States Parties and Non-States Parties were asked to communicate their views directly to Ambassador Wenaweser or Prince Zeid, with some informal regional and “like-minded” group meetings. Thus, there were no public statements made by states’ delegations in response to the proposed understandings.

Clearly, some of the text proposed by the United States was problematic on its face. The proposed understanding that only a “war” of aggression would be

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102 Untitled paper by the U.S. delegation (emphasis in original).
103 NGOs could also attend such meetings, but were only given very limited opportunities to intervene directly.
covered—as was the case before the International Military Tribunals at Nuremberg and Tokyo—would have contravened the text of the definition (which covers an “act of aggression” and not only a “war of aggression”); furthermore, the concept of solely criminalizing aggression in the context of full-scale “war” had been previously debated and rejected during the Princeton Process. Similarly, the part of the proposed understanding that the definition of the “crime of aggression” or “act of aggression” “shall not be interpreted as constituting a statement of… customary international law” was problematic because States Parties do not have the competence to tell national courts or legal experts what is or is not customary international law. The understanding suggesting that intervention in another state would not be a “manifest violation of the United Nations Charter” if taken with “consent of the relevant state” did not sufficiently consider puppet regimes that might be installed to provide such consent. The language that action taken “in self-defense” or pursuant to “authorization provided by the United Nations Security Council” would not be a “manifest violation of the United Nations Charter” was unnecessary; state action taken in self-defence or pursuant to Security Council authorization are provided for under the Charter. The language that “nothing in this resolution or the amendments” shall be “construed as in any way enlarging or diminishing the scope of the Charter of the United Nations” was unnecessary; of course the Assembly of States Parties had no power to alter the U.N. Charter.

As to the understanding clearly designed to ensure that humanitarian intervention was not inadvertently encompassed by the definition of the crime of aggression, the language referring to a “[s]tate conducing itself in the matter in accordance with normal practice” was puzzling. In normal practice, unfortunately, states have often invaded each other with impunity, and virtually ignored dire humanitarian catastrophes that warranted robust intervention (Rwanda in 1994 and Darfur in 2003-2004). Similarly, the language that intervention “undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression,” while helpful in concept, was clearly overbroad. It failed to set forth criteria when humanitarian intervention would be permissible, and suggested that

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104 See note 22 supra. See also Clark, supra note 46, p. 698, note 27 (discussing that the requirement of a “war of aggression” “prompted the International Military Tribunal to draw a de facto distinction between the conquests of Austria and Czechoslovakia (achieved without actual fighting) on the one hand, and the invasions of Poland and others (achieved with considerable fighting) on the other.”).
105 See June 2006 SWGCA Meeting, paras. 21-24, in The Princeton Process, p. 144 (reflecting the issue being debated).
106 See U.N. Charter, Art. 51 & Chapter VII.
107 For example, the ICISS Report suggests the following criteria would need to be satisfied to justify military intervention to protect human rights: ongoing or imminent “serious and irreparable harm” involving “large scale loss of life,” or “large scale ’ethnic cleansing’; the use of force as a last resort; and the use of “proportional means” meaning that “[t]he scale, duration and intensity of the
attempts to prevent “any” of the ICC crimes, such as war crimes, would suffice to permit intervention, which failed to set forth a sufficient threshold.

Presumably so that Ambassador Wenaweser and Prince Zeid could concentrate on the impasse concerning the conditions for the exercise of jurisdiction and entry into force, the German delegation was put in charge of negotiations concerning the U.S.’s proposed understandings. States were asked to provide their comment on the proposed text directly to the German delegation. By the time the proposed understandings emerged from this process, the topics covered by them had been whittled down to four understandings, which were ultimately adopted:

**Domestic jurisdiction over the crime of aggression**

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. 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.

**Other understandings**

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

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.


108) Claus Kreß, a Professor at the University of Cologne and member of the German delegation, primarily handled these discussions.

109) The understandings in paragraphs 4-5 were already included in the proposed understandings in an earlier Conference Room paper. See Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.1, 6 June 2010, Annex III, p. 6, para. 4bis.

110) Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex III. In addition to the understandings quoted above, three other understandings were adopted:

**Referrals by the Security Council**

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes
The understanding in paragraph four is similar to text already found in Article 10 of the Rome Statute, which provides: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." 111 The understanding in paragraph five suggests that the aggression amendment should not be seen to create any rights or obligations vis-à-vis domestic aggression prosecutions. This appears in line with Article 17 of the Rome Statute which provides that a State Party may render a case “inadmissible” by investigating and/or prosecuting it through its national courts, but does not require such domestic proceedings, 112 any domestic obligation to prosecute, for example, genocide, war crimes or crimes against humanity would derive from other sources—such as the Convention on the Prevention and Punishment of the Crime of Genocide, 113 the Geneva Conventions, 114 customary international law, or domestic criminal codes. 115

of aggression committed after a decision in accordance with article 15 ter, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.

**Jurisdiction ratione temporis**

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 bis, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.


111) Rome Statute, Art. 10.
112) *See* Rome Statute, Art. 17 (complementarity).
114) *See* note 12 *supra* (listing the Geneva Conventions).
115) There is, however, at least some concern that the understanding could be interpreted as narrowing the principle of complementarity to imply that a victim state does not have the right to exercise jurisdiction over individual leaders of an aggressor state. [Carrie McDougall e-mail to author, dated 5 September 2010.] That interpretation could lead to some confusion. A good number of states already include the crime of aggression under their domestic laws. *See* note 157 *infra* (listing states). For those states, the aggression amendment would not create obligations to prosecute the crime before their national courts, but those states may have such obligations based on their national laws. Similarly, if States Parties that in the future ratify the aggression amendment incorporate the definition of the crime of aggression into their national laws, again, the aggression amendment would not create a basis for prosecutions, but such national laws might. Furthermore, under the principle of complementarity in Article 17 of the Rome Statute, an option to avoid ICC prosecutions is to conduct a domestic trial (as long as it satisfies certain criteria that the domestic judiciary is not “unwilling” or “unable” to conduct such a prosecution). *See* Rome Statute, Art. 17. Clearly this understanding should not be read to alter the complementarity regime established under Rome Statute Article 17; a future ICC aggression prosecution should be able to be prosecuted before
The understanding in paragraph six, that “aggression” is “the most serious and dangerous form of the illegal use of force” (language taken from the preamble of General Assembly resolution 3314)\(^{116}\) might be seen to increase the threshold requirement of a “manifest” violation of the Charter in the definition of the crime of aggression, but given that the Rome Statute only criminalizes the most serious crimes, is arguably fully in line with language already found in the preamble.\(^{117}\) The final understanding in paragraph seven suggests all three criteria of “character, gravity and scale” need to be considered when evaluating whether a “manifest” violation of the Charter occurred, something already provided for by the language “character, gravity, and scale.”

At least this author, however, expresses some disappointment that the United States did not obtain an understanding—although it would have required re-drafting of the language proposed—to the effect that humanitarian intervention would not be covered by the definition.\(^{118}\) While, as explained above, the requirement of a “manifest violation of the Charter” in the definition is intended to exclude all factually and legally grey area cases\(^{119}\) (and humanitarian intervention, if truly humanitarian, would certainly fall within this legal grey area),\(^{120}\) in this author’s opinion, it would have been desirable to have an understanding expressly stating that, had that been possible.\(^{121}\)

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116) See General Assembly resolution 3314. The language that “a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case” is also taken from the preamble to General Assembly resolution 3314. Ibid.

117) See Rome Statute, preamble (the ICC has “jurisdiction over the most serious crimes of concern to the international community as a whole”).

118) The understandings in paragraphs six and seven, discussed above, may be somewhat helpful in this respect.

119) See Section 1.2., supra.

120) See note 43 supra.

121) Some states, of course, remain deeply suspicious of “humanitarian intervention,” particularly when it is unilateral, out of concern that its use could be used as a pretext for other goals. (Indeed, some have suggested that much of that suspicion may be aimed at the United States, so the likelihood of the U.S. successfully negotiation such an understanding was perhaps particularly unlikely.) An express carve-out of humanitarian intervention from the definition of aggression was not really possible because the law regarding the “responsibility to protect” is not fully formed. There is
2.5. The President’s “Non-Paper”

After debate very clearly revealed that neither the ABS Proposal, Canadian Proposal, nor Slovenian Proposal carried enough support to attract consensus, and with only two days left to reach agreement, the President of the Assembly of States Parties, Ambassador Wenaweser, provided a “non-paper,” dated 10 June (the “President’s Non-Paper”), which ultimately became the basis for the agreement reached. (The text of the President’s Non-Paper is set forth in relevant part in Appendix E thereto.)

The President’s Non-Paper broke out state referrals and proprio motu into a new Article 15bis, and Security Council referrals into a new Article 15ter. As to 15bis—based on a compromise suggested by Argentina, Brazil, Switzerland, Canada, Slovenia, and other like-minded countries—there were two key concepts as to Pre-Trial Chamber authorizations after state referral or proprio motu:

The Court may, in accordance with Article 12, exercise jurisdiction with respect to an act of aggression committed by a State Party, unless that State has lodged a declaration of non-acceptance with the Registrar.

The Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State party.

The new 15bis did not quite give the go-ahead that the Pre-Trial Chamber could authorize an investigation when these conditions had been met, because there were still two bracketed versions in the text, one providing that absent Security Council authorization the Prosecutor could not proceed, and the other providing that the Pre-Trial Chamber could proceed if after six months the Security Council had not made a determination. As to 15ter, the President’s Non-Paper provided that the Security Council could exercise jurisdiction over the crime of aggression in accordance with Article 13(b)—that is, by referring

neither full agreement as to precisely when it should occur, whether there are specific criteria that would need to be satisfied as to its use, nor what body (if any) other than the Security Council may authorize it. Compare 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (2001); Secretary-General's High-Level Panel, supra note 107; 2005 World Summit Outcome, supra note 21 (suggesting different criteria as to when the responsibility to protect should be triggered). For these reasons, it became impossible to create an express carve-out because aggression negotiations would have devolved into a discussion of the scope, requirements, and trigger mechanisms for the “responsibility to protect,” something that has been discussed at great lengths in other fora, and not conclusively resolved.

Non-Paper by the President of the Assembly, 10 June 2010, 10:00.

Ibid., (emphasis added). This language was set forth in bracketed new paragraphs 1bis and 1ter. Both concepts were first introduced by way of a document suggested by Argentina, Brazil, Switzerland, Canada, Slovenia, and other like-minded countries, titled “Declaration (Draft of 9 June 2010 16h00).” See discussion, note 97 supra.

Ibid. (setting forth both an “Alternative 1” and “Alternative 2” to paragraph 4).

Ibid.
the situation.\textsuperscript{126} Draft text also provided that the amendment would “enter into force in accordance with article 121, paragraph 5.”\textsuperscript{127} In a footnote to the proposed Article 15\textit{bis}, the President’s Non-Paper suggested that there could be “a clause delaying the exercise of jurisdiction by a number of years or ratifications.”\textsuperscript{128} Another footnote suggested that instead of requiring the Security Council to make a determination that an act of aggression had occurred, one might use the “green light” proposal, whereby the Prosecutor would proceed “if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.”\textsuperscript{129} Another footnote suggested that it would be possible to use an enhanced “internal filter” by “involving all judges of the Pre-Trial Chamber”\textsuperscript{130} or by subjecting the decisions of the Pre-Trial Chamber to an automatic appeal process.\textsuperscript{131}

Thus, the key features of the President’s Non-Paper were that under Article 15\textit{bis} as to state referrals and \textit{proprio motu}: (1) if the text in “Alternative 2” were selected, the Pre-Trial Chamber could authorize an investigation after six months of non-action by the Security Council; (2) States Parties could “opt out” of aggression jurisdiction by lodging a declaration with the ICC Registrar; (3) the Court could not exercise jurisdiction with respect to acts committed by Non-States Parties. Under Article 15\textit{ter}, the Court could proceed after Security Council referral.

The President’s Non-Paper thus accomplished several things: (a) it incorporated use of both the Security Council and Pre-Trial Chamber as jurisdictional filters (and suggested use of the Pre-Trial Division as an alternative to the Pre-Trial Chamber); (b) in addition to utilizing Article 121(5)’s amendment procedures to create an “opt in” regime, it added an “opt out” regime,\textsuperscript{132} whereby States...
Parties could opt out of such jurisdiction by filing a declaration with the ICC Registrar. But it also added new language exempting Non-States Parties from jurisdiction, and suggested adding a clause delaying the exercise of jurisdiction. All of these features ultimately came to be contained in the final agreed text.

After the President’s Non-Paper was provided, as mentioned above, negotiations proceeded on a bilateral basis. At that point, it became rather difficult for individuals attending as NGOs (such as this author) to track the progress of the negotiations.\footnote{\textit{NGOs were left to informal means of asking delegates what was happening and offering comments to delegates, in the hope that the delegates, if in agreement, might pass them on to Ambassador Wenaweser or Prince Zeid. NGOs were able to “compare notes” through periodic and extremely useful NGO team meetings coordinated by William Pace and Osvaldo Zavala-Giler of the Coalition for the International Criminal Court (“CICC”), under the leadership of NGO team leader Jutta Bertram-Nothnagel, who also represented \textit{Union Internationale des Avocats}.}} 133\textsuperscript*) New draft text did emerge around 2 p.m. on Friday, 11 June 2010, suggesting that the opt out declarations could be made to expire after seven years.\footnote{\textit{Untitled paper. This concept was suggested by the author to a member of the Canadian delegation.}} 134\textsuperscript*) Other new draft text emerging around the same time suggested that a “red light” could be added that would allow the Security Council, acting under Rome Statute Article 16, to stop an investigation,\footnote{\textit{Untitled paper. That language, of course, was unnecessary, since the Security Council could use existing Rome Statute Article 16.}} and the draft text now referred to the authorization being done by the “Pre-Trial Division,” not the Pre-Trial Chamber. Other draft language that was circulated suggested that the Security Council could commence referrals in seven years “unless States Parties decided otherwise,” but that Pre-Trial Division authorizations could not commence “until States Parties so decided, [but] no earlier than 2017.”\footnote{\textit{Untitled paper.}} By 4:30 p.m., when a new draft was circulated, the concept of the “opt out” declaration expiring in seven years had been deleted; there was a reference to the Security
Council stopping an investigation under Article 16; the Pre-Trial Division still replaced the Pre-Trial Chamber; but as to entry into force, the text merely stated “insert provision on delayed entry into force.”

2.6. The Final Agreement

Until around 11:00 p.m. of the final night of the Review Conference (Friday, 11 June 2010), it was unclear that there would be any agreement as to conditions for the exercise of jurisdiction and entry into force. By around 9:30 p.m., Stefan Barriga reported that an agreement was close, but that unresolved issues remained—it was the text delaying the exercise of jurisdiction and what would be needed for such exercise to commence. Speculation abounded. Could there simply be agreement to a definition of the crime of aggression but the issue of jurisdiction put off until another Review Conference, for example, in seven years? Could everything simply be tabled until the next meeting of the Assembly of States Parties this December at the U.N.? Around 11:00 p.m., rumours (possibly not entirely correct) emerged from at least one delegation that an agreement had been reached. Around 12:20 a.m., Ambassador Wenaweser came to the podium in the main conference room and announced to assembled state delegations and NGOs that there was an agreement. The final result, at least as to jurisdiction, was clearly very much of a compromise—one that probably left few states entirely happy—and there was no cheering from the NGOs present when it was announced. At the same time, there seemed almost a collective sigh of relief in the room that the negotiation had not fallen apart entirely; there was both a definition (an historic achievement), and agreement to jurisdiction (almost).

The final text that emerged as to jurisdiction, retained the structure of the President’s Non-Paper, with a new 15bis addressing investigations authorized by the Pre-Trial Division, and a new 15ter addressing Security Council referrals. But a new agreement on timing had been reached: neither jurisdictional filter could commence immediately; both would have to wait at least until after 1 January 2017 and another vote by States Parties, as well as one year after 30 States Parties ratify the aggression amendment.

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137 On 11 April 2002, at the U.N., when the final instruments of ratification were deposited bringing the Rome Statute into effect, the NGO representatives present erupted in cheers of excitement. By contrast, at the close of the Kampala Review Conference, while Don Ferencz (son of Nuremberg Prosecutor Benjamin Ferencz) did play his bagpipes, the mood was not entirely celebratory. Ferencz explained that he played *Nkosi Sikelel’ iAfrika*, the national anthem of South Africa, considered a pan-African piece, titled “Lord, bless Africa”).

138 The text of the definition did not change during the Review Conference. It remained what had been previously designated as Article 8bis. See discussion of Article 8bis, Section 1.1., supra.

139 Thus, the earliest aggression jurisdiction could commence would be 2 January 2017, if the required vote is achieved on 2 January 2017, and 30 States Parties ratify the aggression amendment by 1 January 2016. If 30 ratifications take longer, the earliest jurisdiction could commence
The text agreed upon as to Article 15bis is as follows:

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

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute;
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. 140

Thus, the key features of the final Article 15bis are that, as to state referrals and proprio motu: (1) the Pre-Trial Division may authorize the commencement of an investigation after six months of non-action by the Security Council (assuming the relevant States Parties concerned have ratified the aggression amendment and not opted out of aggression jurisdiction); 141 (2) States Parties may opt out of

would be one year after the 30 ratifications are achieved (assuming the vote is also by then accomplished).

140 Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I (emphasis added).

141 Exactly which States Parties (the victim and/or aggressor state) must ratify or accept the aggression amendment for there to be ICC jurisdiction in the event there is no Security Council referral appears open to some debate. One interpretation would be that because of the use of Article 121(5)'s amendment procedures, the Court cannot exercise any jurisdiction regarding crimes committed by the nationals of or on the territory of a State Party that has not ratified or accepted
aggression jurisdiction by lodging an opt-out declaration with the ICC Registrar; 142
(3) nationals of Non-States Parties and crimes committed on the territory of Non-States Parties are excluded from jurisdiction; 143 and (4) as already mentioned, none of this will go into effect until a vote by States Parties after 1 January 2017, and one year after 30 ratifications of the amendment. 144

The questions are not limited to these scenarios: one could imagine at least 25 permutations based on whether the aggressor state and victim state each: (a) have ratified the amendment but opted out of jurisdiction; (b) have not ratified the amendment but have opted out of jurisdiction (theoretically possible because the Review Conference’s resolution in paragraph 1 states that “any State Party may lodge a[n] [opt out] declaration … prior to ratification or acceptance”); (c) have ratified the amendment but not opted out of jurisdiction; (d) have not ratified the amendment and not opted out of jurisdiction; or (e) are Non-States Parties. Chart of R. Manson, <www.bepj.org.uk/wordpress/wp-content/uploads/Robbies-Table.pdf> [viewed 1 October 2010] (chart including 16 permutations); Coracini, supra note 73, p. 782 (chart including 16 permutations). The areas of dispute primarily appear to be when the aggressor State Party has not ratified the amendment and not filed an opt out declaration, whether there would be jurisdiction vis-à-vis a victim State Party that has ratified the amendment, or a victim State Party that has not ratified the amendment.

142) The opt out declaration may be withdrawn at any time. Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, Article 15bis, para 4.

143) This language was a change from the language of the President’s Non-Paper which stated only that the Court would not have jurisdiction “with respect to an act of aggression committed by a Non-State Party.” Non-Paper by the President of the Assembly 10 June 2010, 10:00.

144) Seven years “after the beginning of the Court’s exercise of jurisdiction,” there would also be “review [of] the amendments on the crime of aggression.” See Resolution RC/Res.6, advance version, 28 June 2010, 18:00, preamble, para. 4.

145) Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I (emphasis added).
Thus, the key features of the final Article 15ter are that: (1) the Security Council may refer a situation of aggression to the ICC—indeed it would have the first option to do so; (2) this referral could essentially be a “green light” (go ahead) to the ICC without the Security Council having to make an express determination that there had been an act of aggression; \(^{146}\) (3) but Security Council referrals also could not commence until a vote by States Parties after 1 January 2017, and one year after 30 ratifications of the amendment. \(^{147}\) Language in paragraph 1 of the Review Conference’s enabling resolution continued to provide that the amendments will “enter into force in accordance with Article 121, paragraph 5.” \(^{148}\)

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\(^{146}\) This is presumably the case, because there is no language in Article 15ter that the Security Council must have “made a determination” of an act of aggression (which existed in prior drafts). In fact, it appears that the Security Council could merely refer the situation, without being aggression-specific. See Rome Statute, Art. 13(b) (the ICC may exercise jurisdiction over “[a] situation in which one or more of [the] crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”). An interesting question exists whether the Security Council could refer a situation for the Prosecutor to investigate the possible occurrence of genocide, war crimes and/or crimes against humanity, and exclude a referral for the crime of aggression. [R. Manson e-mail to author, dated 21 July 2010.]

Because the Security Council’s powers emanate from Chapter VII of the U.N. Charter, and not from the Rome Statute or any amendment to it, presumably the Security Council could do so. This interpretation would also be helpful in not discouraging Security Council referrals regarding the other three crimes.

Strangely, the language in Article 15bis is not parallel to the language in Article 15ter, but states that the Prosecutor would ascertain whether the Security Council “has made a determination of an act of aggression.” (emphasis added.) In fact, Article 15ter does not require such a “determination,” so presumably the Prosecutor will simply ascertain whether the Security Council has made a referral.

\(^{147}\) The language that “[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings” is crucial to maintain the presumption of innocence and keep the burden of proof on the prosecution. See June 2006 Princeton Meeting, in *The Princeton Process*, p. 151, para. 71. Thus, even if the Security Council makes a determination that an act of aggression has occurred, that conclusion would not bind the ICC, which would make its own determination. See December 2007 SWGCA Meeting, in *The Princeton Process*, p. 103, para. 24; June 2007 Princeton Meeting, in *The Princeton Process* pp. 118-19, para. 54.

\(^{148}\) Resolution RC/Res.6, advance version, 28 June 2010, 18:00, para. 1. The use of Article 121(5) presents two peculiar issues. First, as noted above, the amendments deleted Article 5(2), added Articles 8bis, 15bis and 15ter, and made minor changes to Articles 25, 9 and 20. See note 65 supra and accompanying text. Given that only the deletion of Article 5(2) and the addition of Article 8bis—if adding 8bis is even viewed as amending Article 8; it might more appropriately be viewed as a new article—are the only amendments arguably to Rome Statute Articles 5, 6, 7 and 8, how do we reconcile the use of Article 121(5)’s amendment procedures, which are supposed to only be used for amendments “to articles 5, 6, 7, and 8”? The best answer perhaps is this: Article 121(5) is clearly to be used for amendments to the “core crimes” (contained in Articles 5, 6, 7 and 8). The aggression amendment is clearly an amendment to a core crime (and thus, it is appropriate to use Article 121(5)), but there are other areas of the Rome Statute that require modification to achieve that. The argument would be that these changes should be seen as a “package,” which amends a core crime, even though other provisions of the Rome Statute are impacted. One could have drafted the amendments so that they were all amendments to Articles 5 and 8—and that might have been
What this agreement offered to “box 3” and “box 4”-type states (which did not want an exclusive Security Council filter) was: (a) there would be a jurisdictional filter other than the Security Council; (b) there is parity between when the Security Council and Pre-Trial “filters” could commence their work. The agreement offered “box 3”-type states—which had desired aggressor state consent to jurisdiction—precisely, that, through use of Article 121(5)’s amendment procedures. preferable. See, e.g., R. Manson, ‘Smoothing out the Rough Edges of the Kampala Compromise,’ at <iccreviewconference.blogspot.com/> (making that suggestion); see also David Donat Cattin, supra note 44, p. 10 (arguing that the “ordinary meaning” of Articles 121(4) and 121(5)—which should govern pursuant to Article 31 of the Vienna Convention on the Law of Treaties—“is that only the amendments to articles 5, 6, 7 and 8 shall enter into force through article 121(5).”). The Japanese delegation, in its interventions at the Review Conference, was clearly troubled by these issues, and ultimately nearly spoiled consensus over them. Other states did not appear as troubled, and perhaps considered the Japanese objections unduly technical. The ABS Proposal perhaps best dealt with these issues, by drafting the changes as ones to Articles 5 and 8, to be governed by Article 121(5)’s amendment procedures, and the changes to Article 15 to be governed by Article 121(4)’s amendment procedures. See notes 77-78 supra.

The use of Article 121(5) also presents one other difficulty. The final text of Article 15bis, creates an “opt out” regime (states need to file “opt out” declarations with the ICC Registrar in order not to accept jurisdiction as to state referrals and proprio motu), yet using Article 121(5)’s amendment procedures appears to create an “opt in regime”—states need to ratify the amendment to be bound to it. How are these two concepts to be reconciled? In other words, must States Parties ratify the aggression amendment (as one would assume from the use of Article 121(5)) before they can be subject to jurisdiction under Article 15bis? One might think so (For an alternative construction, see Clark, supra note 46, p. 704, note 55 (“If all State Parties are not to be bound, the opt-out option makes no sense.”).) As noted above, while it had been debated what kind of understanding to attach to the second sentence of Article 121(5), see note 62 supra (discussing the “positive” and “negative” understandings of the second sentence), ultimately, no such understanding was included in the final text agreed upon at the Review Conference, presumably leaving the second sentence as written: “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 States Party’s nationals or on its territory.” Rome Statute, Art. 121(5) (second sentence). Thus, the plain language suggests that absent acceptance or ratification (at least by the “aggressor state”) there can be no exercise of jurisdiction (once the exercise of jurisdiction commences) related to its allegedly aggressive actions, absent Security Council referral. See R. Manson, “Identifying the Rough Edges of the Kampala Compromise.” (Indeed, a strict reading of the second sentence would tend to suggest that the victim state must ratify as well for crimes committed “on its territory” to be covered; such a strict reading for the victim state, however, can be avoided because the crime most likely also occurred on the territory of the aggressor state if planning, preparation, initiation or execution of the crime occurred there, making the victim state’s ratification less significant.) As discussed above, contrary interpretation have been offered that aggressor state ratification is not required, at least as to an aggressor State Party that has not filed an “opt out” declaration, particularly where the victim state has ratified the amendment. See note 62 supra. The author takes no position in this article as to which position is correct, but suggests that it is the intent of those States Parties that forged the compromise to use the “opt out” mechanism (particularly Argentina, Brazil, Switzerland, and Canada), as communicato to other States Parties at Kampala, that should govern.

149) For discussion of “box 3” and “box 4,” see Section 1.3.1., supra.

150 As noted elsewhere, the issue of precisely which States Parties (aggressor and/or victim state) would need to ratify or accept the amendment for jurisdiction to exist absent Security Council referral is in some debate, see notes 141, 148 supra.
What this agreement offered to “box 1”-type states was: (a) the Security Council remains the initial trigger mechanism; and (b) even if the Pre-Trial Division were to authorize an investigation, the Security Council could always still defer it under existing Article 16 of the Rome Statute.\(^{151}\) The final text also bought some time before any of this could go into effect, arguably also leaving open the possibility of jurisdiction not going into effect if the vote in 2017 (or later) fails or 30 ratifications of the amendment are not achieved. Thus, the final agreement left open considerable uncertainty. Will this regime receive the required number of votes after 1 January 2017 to cause the exercise of jurisdiction to commence? Some states (such as Brazil) in their closing remarks made their understanding clear, that the vote will be a simple “thumbs up” or “thumbs down” vote at an ASP, with a two-thirds vote\(^{152}\) fairly easy to achieve.\(^{153}\) Other States Parties delegates shared this interpretation.\(^{154}\) The United States, meanwhile, in closing remarks, suggested that it could want to re-open the negotiations as to jurisdiction, and that the vote should not occur at an ASP, but a full review conference.\(^{155}\) These and other issues\(^{156}\) will certainly warrant more attention as 2017 approaches.

3. An Assessment of the Strengths and Weaknesses of the Final Agreement

When the excitement of having an agreement concluded wore off, and those who stayed to hear the final remarks (around 1:30 a.m. Saturday morning, 12 June

\(^{151}\) See Rome Statute, Art. 16.

\(^{152}\) A vote at an Assembly of States Parties would normally be governed by the ASP’s rules of procedure, and could either be done by consensus (Rule 61) or two-thirds (Rule 63). However, Articles 15bis and 15ter state that the vote shall be done “subject to a decision … by the same majority of States Parties as is required for the adoption of an amendment to the Statute,” Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I. That would also require consensus or a two-thirds vote—but a two-thirds vote of all States Parties (not just those present). See Rome Statute, Art. 121(3) (“[t]he adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.”); see also D. Scheffer, “Adoption of the Amendments on Aggression to the Rome Statute of the International Criminal Court,” dated 12 June 2010, and R. Manson, ‘Smoothing out the rough edges of the Kampala Compromise,’ both posted at <iccreviewconference.blogspot.com/> (agreeing that Article 121(3) would apply, and thus that two-thirds or consensus vote would be required); Coracini, supra note 73, p. 770 (agreeing and making the point that it would be two-thirds of States Parties, and not merely two-thirds of the States Parties present).

\(^{153}\) The sixth preambular clause of the enabling resolution also states the intent “to activate the Court’s jurisdiction over the crime of aggression as early as possible,” which is clearly aspirational, but, at the same time, probably represented the view of most delegations in Kampala.

\(^{154}\) Conversations with Swiss, German and Samoan delegates on 11 June 2010.

\(^{155}\) Statement by Harold H. Koh, on behalf of the U.S., early Saturday morning, 12 June 2010.

\(^{156}\) See, e.g., note 148 supra (discussing the difficulty of explaining the use of Article 121(5) when not all amendments were amendments to Rome Statute Articles 5, 6, 7 and 8).
2010) received some rest, one was left pondering: was the agreement reached as to jurisdiction a sound one? Will the jurisdictional regime (even if it does receive a two-thirds vote at an ASP after 1 January 2017 and 30 States Parties ratify or accept the aggression amendment and one year passes) cover that many states? Will States Parties ratify or accept the amendment? How many States Parties will lodge declarations opting out of aggression jurisdiction? Isn't sending an opt out declaration to the ICC Registrar too easy of a method for States Parties to avoid aggression jurisdiction? At what point is it too late for a State Party to file such an opt out declaration—once the State Party has begun to commit the act in question, or must it be filed before its nationals first start planning, preparation, initiation or execution of the act? How can the crime of aggression be systematically enforced if jurisdiction is so optional? Why are the crimes of States Parties that are committed in the territory of Non-State Parties excluded from jurisdiction unless referred by the Security Council? Why are the crimes of nationals of a Non-State Party that are committed in the territory of a State Party excluded from jurisdiction absent Security Council referral?

3.1. The Importance of Amending the Rome Statute to Define the Crime of Aggression

While this article cannot hope to fully answer all of the questions presented about the agreement reached in Kampala, some preliminary observations can be offered. First, the fact that a definition has been agreed upon, and the Rome Statute amended, is an extremely historic accomplishment. The U.N. Charter has prohibited aggressive use of force since 1945, but has not created sufficient deterrence to prevent it. Efforts to prosecute the crime of aggression are designed to enforce the international system of peace and security established under the U.N. Charter and thereby reduce the human suffering caused by aggressive use of armed force.

Will any deterrence be created (even if jurisdiction commences)? Can the definition possibly change state behaviour before jurisdiction commences? Will it change state behaviour after jurisdiction commences as to Non-States Parties (exempt from jurisdiction) or as to States Parties that have not filed an opt out declaration? As to deterrence, it is extremely hard to prove that deterrence works vis-à-vis the worst crimes. Clearly, the less comprehensive a jurisdictional regime is, the less deterrence one can anticipate will be created; thus, the loopholes created as to jurisdiction vis-à-vis the crime of aggression can be anticipated to have some significant impact in this respect. At the same time, the mere existence of an accepted definition may cause international leaders to be far more circumspect when committing troops to international armed conflicts. Even if jurisdiction does not exist for prosecutions based on State Party referral or prioprio motu, that will not eliminate the possibility of Security Council referrals once the exercise of jurisdiction commences. Even if no Security Council referral will be possible
(due, for example, to use, or threat of the use, of veto power by a Permanent Member), that does not diminish the fact that there is now a concrete definition of the crime, against which state actions and the actions of individual leaders can be measured. It is possible that the mere adoption of amendment may create moral and political weight against launching aggressive use of armed force even absent ICC jurisdiction.

Another possible impact (for good or bad) is that when countries ratify the Rome Statute and implement its crimes into their national law, they now have a definition of the crime of aggression, which they may choose to implement as well (particularly if the countries perceive themselves as having threatening neighbouring countries). Accordingly, it is possible that the first aggression prosecutions applying the definition agreed upon at the Review Conference might occur before national courts, when a neighbouring country invades, but its political or military leaders are apprehended by the victim state. Will such national court proceedings adhere to the fair trial standards required for the rule of law? Will such national court proceedings occur before a fair and impartial tribunal? It is conceivable that a botched and/or biased national prosecution or two will make the ICC look like the preferred forum for adjudications as to the crime of aggression, and actually accelerate States Parties into ratifying the aggression amendment and not lodging opt out declarations.

157) To date, there has been at least one aggression-related case in the U.K. and two aggression-related investigations in Germany. See, e.g., House of Lords, R. v. Jones, Session 005–006, [2006] U.K.H.L. 16 (where several criminal defendants were charged with criminal damage and trespass arising from actions taken against U.S. bombers and British tanks stationed in England while awaiting deployment during the 2003 Iraq war tried unsuccessfully on appeal to the House of Lords to assert prevention of the crime of aggression as an affirmative defence), discussed in “R v. Jones: A Crime Against Justice,” R. Manson, at <www.bepj.org.uk/legal-issues/the-fairford-five>; see also Claus Kreß, ‘The German Chief Federal Prosecutor’s Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq,’ 2(1) J. of Int’l Crim. Justice (Oxford U. Press, 2004), 245-64 (discussing the decisions not to investigate Germany’s participation in the use of force against the Federal Republic of Yugoslavia and Iraq).

158) At a future date, additional consideration might be given to whether the ICC’s relationship to national court proceedings regarding the crime of aggression should be a relationship of “primacy” and not “complementarity,” so that the ICC could preempt national court aggression prosecutions by conducting its own investigation and/or prosecution. “When the International Law Commission (ILC) was about to finalize its Draft Code of Crimes against the Peace and Security of Mankind, it reported to the General Assembly that the crime of aggression was inherently unsuitable for trial...
3.2. The Potential Strengths and Weaknesses of the Jurisdictional Regime

Additional hard questions should be asked about the jurisdictional regime created. As mentioned, there is some doubt as to whether this is the jurisdictional regime that will be voted in in 2017 (or later). Because States Parties presumably will be ratifying the aggression amendment over the next seven years on the basis of the text agreed upon at the Review Conference, the presumption seems to be that the jurisdictional regime set forth in that text will be the one voted into activation. Perhaps the two most troubling features as to state referrals and *proprio motu* are: (1) the fact that States Parties can simply decide not to ratify the aggression amendment, and, even if they do, the ease with which they may opt out of jurisdiction (making the whole enterprise of jurisdiction appear rather optional); and (2) the breadth of the language exempting the nationals of Non-States Parties and crimes committed in the territory of Non-States Parties from jurisdiction.

As to the opt out regime, there is nothing inherently problematic about adding such a regime. On the other hand, the final text makes it sound rather easy for a State Party to exercise its opt out: it sounds like a simple facsimile sent to the ICC Registrar would suffice. Isn’t that simply too tempting for States Parties?

by national courts and should instead be dealt with only by an international court.” Astrid Reisinger Coracini, *supra* note 157, p. 547, citing Report of the International Law Commission on the Work of its Forty-Seventh Session, 2 May to 2 July 1995 (A/50/0), p. 9; Statement by Harold Hongju Koh, *supra* note 74 (questioning when it would be “appropriate for one state to bring its neighbor’s leaders before its domestic courts for the crime of aggression”). *See also* Pål Wrange, ‘The Principle of Complementarity under the Rome Statute and its Interplay with the Crime of Aggression,’ in summary of Conference on International Criminal Justice held in Turin, Italy, 14-18 May 2007, Doc. ICC-ASP/6/INF.2 at 37 (2007) (raising the issue of whether domestic aggression prosecutions might be blocked by domestic immunity laws vis-à-vis foreign leaders, at least while they hold office); *see also* Clark, *supra* note 35 (noting that “it is at least possible that the immunity problems will have been removed in Rome Statute implementation legislation”; also raising the question of whether, under Rome Statute Article 17, domestic prosecutions could be brought by a state using universal jurisdiction).

As to whether the definition agreed upon is a sound one, a full analysis is beyond the scope of this article. This author believes that many of the concerns that have been raised, for example, by Michael Glennon’s recent article are overstated and/or fallacious. *See* M. Glennon, ‘The Blank-Prose Crime of Aggression,’ 35 *Yale J. of Int’l L.* 71 (2010). For a response to similar criticisms, *see* Claus Kreß, ‘Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus,’ 20 *Eur. J. of Int’l L.* 1129 (2010).

The “opt out” regime applies only to state referrals and *proprio motu*, so even a State Party that exercises the opt out could be referred to the ICC by the Security Council pursuant to Article 15ter, so use of the opt out does not provide complete insulation from jurisdiction. Similarly, the exemption from jurisdiction for individuals from Non-States Parties and vis-à-vis crimes committed on the territory of Non-States Parties applies only to state referrals and *proprio motu*; jurisdiction could still result if there is a Security Council referral.

*See* Coracini, *supra* note 73, p. 779 & note 176 (questioning why the U.N. Secretary General was not made the recipient of such opt out declarations, expressing concern that the ICC Registrar might not even be required to make public the receipt of such declarations, and recommending that the ASP require the Registrar to make such information public).
Why should States Parties subject themselves to jurisdiction if their neighbouring states are opting out? Can there be created a “circle of virtuous states”\footnote{The idea of a “circle of virtuous states” was first raised by Robbie Manson, who attended the Kampala Review Conference as a representative of the UK Coalition for the ICC and on behalf of the Institute for Law, Accountability and Peace. [11 June conversation of author with R. Manson.]} that ratify the aggression amendment and do not opt out of jurisdiction? Can there be some badge of ignominy attached to States Parties who do opt out of jurisdiction—so that the political “heat” or embarrassment factor will create political pressure not to exercise the opt out? (There was no great apparent ignominy attached to exercising the Article 124 war crimes opt out,\footnote{See note 70 supra for discussion of the war crimes opt out.} which Colombia and France did exercise, although perhaps the fact that only two States Parties exercised it suggests there was an embarrassment factor in essentially reserving the ability to commit war crimes.)\footnote{Also, as noted above, this author had advocated that the opt out declaration expire after a certain number of years, but under the text accepted, it would last indefinitely, although its withdrawal would need to be “considered within three years.” The wording is not clear whether the withdrawal of the opt out would have to be considered only once—three years after the filing of the initial opt out declaration—or every three years thereafter, or whether there would be an ongoing duty of good faith consideration created after three years.} Most States Parties are probably unlikely to send their armed forces outside their territories in situations that are neither authorized by the Security Council under its Chapter VII powers nor legitimate exercises of self-defence under Article 51 of the U.N. Charter; thus, hopefully, States Parties will have no need to exercise the opt out.

As to the language that “the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory,” that is extremely broad. The text was no doubt included because Non-States Parties wanted to ensure that their nationals would not be prosecuted based on state referrals or \emph{proprio motu}, even if the acts at issue occur on the territory of a State Party. (Presumably, the U.S. delegation was one of the key delegations insisting on this text.)\footnote{By the time this language was added, as mentioned above, deliberations were occurring bilaterally, making it very hard to ascertain which states were taking which positions. David Scheffer, former U.S. Ambassador at Large for War Crimes Issues (who also attended the Review Conference), suggests that the provision was sought by China, India, Indonesia, Russia and the U.S. \textit{See} D. Scheffer, “States Parties Approve New Crimes for International Criminal Court,” ASIL Insight, 22 June 2010, vol. 14, issue 16.} This provision is thus more protective of Non-States Parties than is the current Rome Statute which \textit{does} provide for jurisdiction if a national of a Non-State Party commits genocide, war crimes or crimes against humanity on the territory of a State Party.\footnote{\textit{See} Rome Statute, Art. 12. As one author has pointed out, the amendment is disadvantageous to States Parties. Even if a State Party ratifies the aggression amendment, it can still be freely
that: it would provide no jurisdiction vis-à-vis the crime of aggression over the actions of a State Party (even one that has ratified the aggression amendment and not lodged an opt out declaration) on the territory of a Non-State Party that it invades.\footnote{See David Donat Cattin, supra note 44, p. 9 (“the Kampala amendment procedure … will result in all States Parties losing any form of protection against nationals of Non-Sates Parties, as these individuals will be completely exempted from the Court’s jurisdiction on aggression (unless the jurisdiction will be given through a UN Security Council referral).”).} Why allow that? Presumably, it is intended to facilitate coalition building. Thus, if, hypothetically, the United States (completely exempt, as a Non-State Party, from aggression jurisdiction vis-à-vis actions of its nationals and acts committed on its territory) wanted to build a coalition that included States Parties (such as France or the U.K.) in launching an intervention in the territory of a Non-State Party, those States Parties would not have any excuse not to join the coalition over doubts about the legality of the intervention, because acts in the territory of a Non-States Party are excluded from jurisdiction. (That might not necessarily completely insulate those coalition members from jurisdiction, however, if the “planning,” “preparation” or “initiation” of the use of force occurred in France or the U.K. and the countries had ratified the aggression amendment and not filed an opt out declaration).\footnote{This assumes a conservative interpretation that the aggressor State Party must ratify the aggression amendment; other views are possible. See note 68 supra. In theory, a Security Council referral would be possible, but of course the U.S., U.K. and France would all be in a position to veto such a referral.} Assuming France or the U.K. had filed an opt out declaration, the fact that we now have a definition of the crime of aggression might still provide added reasons for French and U.K. citizens (again, hypothetically) to question their leaders, and advocate that their governments not join a coalition conducting an intervention of questionable legality.\footnote{One concern, however, is whether States Parties will decline to join coalitions to engage in humanitarian intervention, particularly if their country has ratified the aggression amendment and not filed an opt out declaration. Hopefully this will not come to pass, as the definition does not encompass such humanitarian intervention, see note 43 supra, and various of the understandings agreed upon may help to clarify that, see note 118 supra.}

So why are these compromises—allowing such easy opt out declarations for States Parties, and no jurisdiction as to crimes committed by, or on the territory of, Non-States Parties—contained in the final text? Presumably, it was the realization that the ICC could adopt an amendment favourable to many countries, but as to which the Permanent Five members of the Security Council and some of

invaded by a Non-State Party (i.e., there would be no ICC jurisdiction over actions of the nationals of the Non-State Party). See David Donat Cattin, supra note 44, p. 9 (“the Kampala amendment procedure … will result in all States Parties losing any form of protection against nationals of Non-Sates Parties, as these individuals will be completely exempted from the Court’s jurisdiction on aggression (unless the jurisdiction will be given through a UN Security Council referral).”).
their close allies were in adamant opposition.\textsuperscript{169} What would that do to the ICC, a court that has no arrest capabilities and relies on state cooperation? Clearly, a decision was made, one that this author supports, that consensus needed to incorporate the views of the five Permanent Members of the Security Council, at least to some extent. Arguably, this was not only geopolitically sound, but necessary to ensure that the amendment did not arguably conflict with the U.N. Charter—and the role given to the Security Council under Article 39.\textsuperscript{170}

The U.S. delegation clearly went to Kampala, not wanting any definition agreed upon, and did not achieve that, but they did obtain something of tremendous perceived value to the U.S. negotiating team: an iron-clad exemption for the nationals of Non-States Parties from aggression prosecution. Was that too much of a concession? That will no doubt be debated for years to come. One good result is that the U.S. clearly now has no reason to turn its back on the ICC, and can continue on its course of constructive engagement with the Court. Thus, while it can be argued that the final agreement as to jurisdiction has flaws, they may have been unavoidable.

Should States Parties have held out for a better jurisdictional regime? There is no reason to believe that the negotiating climate would have been more favourable to a more comprehensive jurisdictional approach in the future; in fact, it could become less favourable under a different U.S. administration. Is the delay of seven years and the requirement of an added vote for the exercise of jurisdiction to commence a disappointment? Yes, but, again, if that was what was needed to reach an agreement (and that appears to have been the case), it also may have been unavoidable. Unfortunately, international law does not always evolve in perfect steps, and given the decades these steps can take to be achieved, the agreement reached is far better than no agreement.

Conclusions

It is a tall task to try to make the international system of peace and security under the U.N. Charter work as it was envisioned, without aggressive use of force by states, but that was the role that the states that negotiated the Rome Statute envisioned for the ICC and the task at hand for States Parties at the Review Conference. It was said that aggression was simply “too political” for a judicial institution to adjudicate. It was said that to involve the Security Council would undermine the

\textsuperscript{169} Actually, that might not have even been possible by the end of the Review Conference, because either the U.K. or France could have ruined the “consensus” vote. By the final night of the Review Conference (with some delegations having left Kampala already), there probably were no longer enough delegations present to adopt the amendment by 2/3\textsuperscript{rd} vote.

\textsuperscript{170} As noted above, if a conflict were created, the Charter would prevail over inconsistent treaty language. See U.N. Charter, Art. 103.
ICC’s independence. It was said that the ICC could not handle the flood of aggression cases that would come its way. The Review Conference has taken a tremendous step towards fulfilling the vision of the drafters of the Rome Statute, a vision similar to that of the prosecutors and judges of the International Military Tribunals at Nuremberg and Tokyo, and those states that drafted or endorsed the Charters establishing those tribunals. 171 There is now a concrete and accepted definition of the crime of aggression, to be interpreted by the ICC judges, taking the issue of when aggression occurs out of the political realm (where the Security Council can act absent the use of any criteria), 172 and into the judicial realm (where the ICC judges will have to apply the definition, guided by the elements of the crime, and, where appropriate, consider the extensive travaux preparatoire created during the drafting process). Involving the Security Council (assuming jurisdiction is activated) will not undermine the Court’s independence, because the Pre-Trial Division can also act as a filter mechanism for the crime of aggression. How meaningful Pre-Trial Division authorizations will be depends on how many States Parties ratify the aggression amendment and do not lodge opt out declarations. Blocking Pre-Trial Division authorizations would require an affirmative vote of the Security Council (meaning that only one Permanent Member would be required to block it), and was no concession made in Kampala—that agreement was already made at Rome, when Rome Statute Article 16 was agreed upon. Those that demanded the complete independence of the ICC from the Security Council were ignoring both Article 16 as well as arguably the U.N. Charter—neither States Parties nor the Rome Statute can restrict Security Council action that is provided for under Chapter VII. Finally, given the restrictions on jurisdiction agreed upon at the Review Conference—allowing (for state referrals and proprio motu) that States Parties “opt out” of jurisdiction, and not covering the nationals, or crimes committed in the territories, of Non-States Parties—the ICC clearly will not be flooded by aggression cases, and aggression is not an everyday occurrence in any event. Thus, the fears of naysayers in that respect will not come to pass.

171) The London Charter creating the Nuremberg Tribunal was originally agreed upon by the U.S., U.S.S.R., France and the U.K., but many of its provisions were later also endorsed by the U.N.’s General Assembly and International Law Commission. See UN Doc. A/RES/95 (1946) para. 1, 11 December 1946; International Law Commission, Principles of the Nuremberg Tribunal (1950), at <deoxy.org/wc/wc-nurem.htm>.  
172) While General Assembly Resolution 3314 was intended as “guidance” for the Security Council, see United Nations General Assembly resolution 3314 (XXIX), para. 4, the General Assembly lacks the power to mandate that the Security Council apply any particular criteria, and the Security Council would certainly not have to set forth its reasoning in a manner similar to a judicial opinion, and is not necessarily obligated to act consistently in similar cases.
While the Review Conference outcome amending the Rome Statute was disappointing to quite a few governments, NGOs, and individuals in terms of the significant limitations on jurisdiction, the delay of at least seven years for the exercise of jurisdiction, as well as the need for another vote to activate jurisdiction, the result was nonetheless a solid achievement designed to advance the rule of law and the cause of international peace and security.
Appendix A

*Non paper submitted by Argentina, Brazil and Switzerland as of 6 June 2010*

* This non paper builds on the Chairman’s Conference Room paper of 5 June 2010. New language is in bold.

Draft resolution on the crime of aggression

_The Review Conference,

..._

1. Decides to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) contained in annex I of the present resolution, which are subject to ratification or acceptance simultaneously through one single instrument of ratification or acceptance, and that amendments 1, 2, 4, 5 and 6 shall enter into force one year after the deposit of one instrument of ratification or acceptance in accordance with Article 121, paragraph 5, of the Statute and amendment 3 shall enter into force one year after the deposit of instruments of ratification or acceptance in accordance with article 121, paragraph 4, of the Statute.

..._

Annex I: Amendments to the Rome Statute of the ICC on the Crime of Aggression

(Security Council referral)

1. _Article 5, paragraph 2, of the Statute is replaced by the following text:_

2. The Court may exercise jurisdiction over the crime of aggression as defined in article 8 bis, in accordance with article 13, paragraph (b), subject to the provisions of this paragraph.

(a) Where the Prosecutor examines a situation referred to him or her by the Security Council and concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
(b) Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

(c) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression, unless the Security Council has in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

(d) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.

(e) This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

2. The following text is inserted after article 8 of the Statute:

Article 8 bis
Crime of aggression
...

3. The following text is inserted after article 15 of the Statute:

(State referral, proprio motu)

Article 15 bis
Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression as defined in article 8 bis in accordance with article 13 (a) and (c), subject to the provisions of this article.

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15[.]
5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 25, paragraph 3 of the Statute:

3. *bis* 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.

5. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

6. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for 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:
Appendix B

8 June 2010 9:30

PROPOSAL BY CANADA*

Article 15 bis

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. Where the Security Council has not made such a determination within six (6) months after the date of notification and where a State Party has declared its acceptance of this Paragraph, at the time of deposit of its instrument of ratification or acceptance or at any time thereafter, the Prosecutor may proceed with an investigation of a crime of aggression provided that

(i) the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15;

and

(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.

*) This proposal is intended as contributing towards an eventual compromise package. As such it is compatible with other proposals that may assist in a consensus resolution, such as a potential provision allowing for a delay in the ability of the Court to exercise its jurisdictional competence.
Appendix C

NON-PAPER BY SLOVENIA

Article 15 bis - Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
4. Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression provided that

   (i) the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;
   and
   (ii) all State Parties concerned with the alleged crime of aggression have deposited instruments of ratification or acceptance of the amendment on the crime of aggression.

4. bis If not all States Parties concerned with the alleged crime of aggression have deposited instruments of ratification or acceptance of the amendment on the crime of aggression under paragraph 4 of this article, the Prosecutor shall readdress the possibility of the Security Council referral in accordance with article 13(b) with the Secretary General of the United Nations.
4. ter After instruments of ratification or acceptance of the amendment on the crime of aggression have been deposited with the Secretary-General of the United Nation by seven-eighths of the State Parties, the Secretary-General of the United Nations shall convene a Review Conference to consider the applicability of the amendment on crime of aggression to all State arises.
5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5 ....
Appendix D

Declaration (Draft of 9 June 2010 16h00)

Based on the Chairman’s Conference Room Paper Rev.2

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

1. Beginning five years after the entry into force of this article for any State Party, the Court may exercise jurisdiction over the crime of aggression in accordance with articles 13 (a) and (c), subject to the provisions of this article.

4. (Alternative 2)

4bis The Court may exercise its jurisdiction over the crime of aggression committed by a State Party’s nationals or on its territory in accordance with article 12, unless that State Party has filed a declaration of its non-acceptance of the jurisdiction of the Court under paragraph 4 of this Article.

4ter Such a declaration may be submitted to the Secretary General of the United Nations at any time before December 31, 2015 or, in the case of States that ratify or accede to the Rome Statute after that date, upon ratification or accession. This declaration may be withdrawn at any time, in which case the Court, subject to the provisions of paragraph 1, may exercise its jurisdiction in respect of the State concerned.

4cor In respect of a State which is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression as provided for in this article when committed by that State’s nationals or on its territory.
Appendix E

Non-Paper by the President of the Assembly, 10 June 2010, 10 a.m.

Annex I: Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

3. The following text is inserted after article 15 of the Statute:

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 (a) and (c), subject to the provisions of this article.²

[1 bis The Court may, in accordance with article 12, exercise jurisdiction with respect to an act of aggression committed by a State Party, unless that State has lodged a declaration of non-acceptance with the Registrar.³

1 ter The Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State Party.]

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

² The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. “The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression.” Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

³ The suggestion has been made to add modalities for the lodging of the declaration, as well as a clause delaying the exercise of jurisdiction by a number of years or ratifications.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. (Alternative 1) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.\(^4\)

4. (Alternative 2) Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Chamber\(^5\) has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

3 bis. The following text is inserted after article 15 bis of the Statute:

**Article 15 ter**

**Exercise of jurisdiction over the crime of aggression**

**(Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13 (b).

[2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

\(^4\) The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

\(^5\) The suggestion has been made to enhance the internal filter, e.g. by involving all judges of the Pre-Trial Division or by subjecting the decision of the Pre-Trial Chamber to an automatic appeals process.
4. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.  

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

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6) The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. “The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression.” Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

7) The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.