Negotiating at the Interface of Power & Law: The Crime of Aggression

Beth Van Schaack, Santa Clara University

Available at: https://works.bepress.com/beth_van_schaack/2/
Negotiating at the Interface of Power & Law: The Crime of Aggression

Beth Van Schaack*

Table of Contents

I. Introduction ....................................................................................................................................... 2
II. Negotiating a Crime of Aggression ................................................................................................... 3
III. Negotiation Chronology .................................................................................................................. 9
A. The State of Play Prior to Kampala ................................................................................................. 9
  1. The Definition of the Crime ........................................................................................................... 9
  2. The Debates Over The Entry Into Force Provisions and Jurisdictional Preconditions Pre-Kampala ........................................................................................................................................................................................................................................... 11
  3. The Debates Over Jurisdictional Filters Pre-Kampala ................................................................ 16
  4. State Preferences on the Eve of Kampala ................................................................................... 18
B. The Foundation for Negotiations in Kampala ............................................................................... 19
C. The Arc of The Kampala Negotiations ........................................................................................... 22
D. The Provisions Adopted .................................................................................................................. 31
IV. Elements of the Package ............................................................................................................... 33
A. Judicial Independence Versus Security Council Supremacy in International Peace and Security . 33
B. Existing Security Council Control Mechanisms .......................................................................... 41
C. State Consent ................................................................................................................................... 44
  1. The Opt Out ................................................................................................................................ 48
  2. The Exclusion of Non-States Parties ......................................................................................... 51
D. Delay ............................................................................................................................................... 52
E. Entry into Force Mechanism ........................................................................................................... 54
V. Conclusion ....................................................................................................................................... 56

* B.A. Stanford University, J.D. Yale Law School. I served on the United States delegation to the International Criminal Court Review Conference in 2010 in Kampala, Uganda as the Academic Advisor. Needless-to-say, the views expressed herein (and any errors) are entirely my own and do not reflect the position of the United States government. All material contained in this Article is available in the public record or is derived from my notes of the Review Conference. I am indebted to Todd Buchwald, John Daley, David Koplow, William K. Lietzau, Teresa McHenry, Jonathan Morgenbauer, Diane Orentlicher, Michael Surgalla, Ron Slye and Allen Weiner for their assistance with this article. Diane Amann, Stefan Barriga and Meg DeGuzman gave valuable comments on this draft. Special thanks go to Harold Hongju Koh and Stephen Rapp for inviting me to join the United States delegation in Kampala. Thanks also go to Martin Guerbadot, Nicola Gladitz, and Mary Sexton for their excellent research assistance. Some of this research is also featured in the series on the crime of aggression on IntLawGrrls, http://intlawgrrls.blogspot.com/search/label/Crime%20of%20aggression%20series.
I. Introduction

Representatives from the international community have just completed marathon negotiations that resulted in the insertion of amendments into the Statute of the International Criminal Court (ICC) that lay the groundwork for the eventual prosecution of the crime of aggression. In so doing, negotiators completed a task that the original drafters of the treaty were unable to accomplish the first time around and with which the international community has been struggling for decades. Throughout this process, state representatives hovered between two competing and ultimately irreconcilable positions: one premised on the contested dogma of Security Council exclusivity in the face of breaches of the peace, and the other based on the conviction that the ICC, as a judicial and penal body, should be empowered to act independently, beyond the control of any political body and independent of the consent of states. Although concessions and the moderation of interests are always predictable in the context of multilateral negotiations, in this case, efforts to forge a compromise between these two positions resulted in an unprincipled and likely unworkable system that betrays both imperatives. Instead of empowering the Council to control aggression prosecutions or allowing the Court free reign to prosecute the crime, delegates adopted a regime of state consent—premised on an opt out option and the complete exclusion of non-states parties—to limit the Court’s reach. The negotiators’ ability to achieve this outcome was facilitated by enduring confusion over which of several competing amendment procedures should govern the aggression amendments. This enduring uncertainty created an opening for the creative, if not unprincipled, juggling of various potential solutions to the jurisdictional impasse. Indeed, the entry into force provision became the lynchpin of the entire package, ensuring a delayed and conditional operationalization subject to a further decision by the Assembly of States Parties in at least 2017 to allow some combination of the three trigger mechanisms—the Security Council, state party referrals, and the Prosecutor acting proprio motu—to function.

This Article engages the aggression amendments and the process by which they were adopted in the next three Parts. Part II introduces the central themes at issue, presents a short history of multilateral efforts to codify the crime and its jurisdictional regime, and introduces the negotiating dynamics. Because it remained unchanged from this point forward, the definition of aggression is considered only tangentially insofar as it exerted an influence on the jurisdictional regime under development. Part III provides a thick description of the arc of the most recent negotiations and recounts states’ recurring efforts to mix and match jurisdictional elements to reach a consensus outcome and avoid either a contentious vote or deferral of the entire project. Part IV discusses the validity of the substantive arguments made by negotiating states and their rhetorical impact and offers a critique of the negotiation process. The Article closes with a discussion of the way in which the negotiations and the final amendments invoked and rebalanced the central themes of power politics, state consent, and judicial independence within...
public international law. This Article demonstrates that the results achieved in Kampala have subtly eroded the primacy of the Security Council, as states revealed a preference for an unimpeachable consent-based regime and a willingness to extend international criminal jurisdiction to their own nationals and over their own foreign policies. Notwithstanding the suggestion in the Statute that there should be greater harmonization between the ICC and the Security Council in the aggression context, the Security Council was not ultimately accorded any additional powers vis-à-vis aggression prosecutions. Indeed, the aggression amendments may have actually diminished the efficacy of the Council’s pre-existing referral power and created the potential for greater conflict between the Council and the Court. The outcome in Kampala thus presents a microcosm of the continual thinning of state sovereignty and the indelible shift in the balance between power and law in contemporary international relations.

II. Negotiating a Crime of Aggression

The idea of prosecuting those who launch unjust wars has long roots. It was not until the post-World War II era that the international community inaugurated the crime of aggression, deemed “crimes against the peace” in the lexicon of the era. Indeed, it was this crime—rather than genocide—that became the centerpiece of the Nuremberg trial, which was to be the “trial to end all wars.” This pride of place reflected the judges’ reasoning that aggressive war was the proximate cause of all of World War II’s atrocities:

3 ICC Statute, Article 5(2) (“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.”).
5 Just war theory goes back centuries. See generally THE MORALITY OF WAR: CLASSICAL AND CONTEMPORARY WRITINGS (Larry May, et al., eds. 2006) (compiling excerpts from just war theorists). In the face of atrocities committed during the “Great War,” the victorious Allies and Associated Powers convened a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to inquire into culpable conduct of particular individuals—“however highly placed”—accused of breaching international law. Foreshadowing the notion of crimes against the peace later developed at Nuremberg and Tokyo, the Commission considered “not strictly war crimes, but acts which provoked the war or accompanied its inception,” such as deliberate violations of the neutrality of Belgium and Luxembourg. See Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties: Report Presented to the Preliminary Peace Conference (March 29, 1919), reprinted in 14 AM. J. INT’L L. 95, 118 (1920). See generally Sheldon Gleuck, The Nuernberg Trial and Aggressive War, 59 HARV. L. REV. 396, 401-3 (1946). Notwithstanding early support for prosecuting the Kaiser and others for initiating World War I, the Commission concluded that acts of aggression should not be the subject of prosecution in light of the lack of legal authority for such a charge and the complexity of undertaking an investigation into the politically-charged question of the causes of the war, which was a question for historians and statesmen, rather than a penal tribunal. Id. at 402 (noting that the Commission concluded that “determining the authorship of the war would entail many hardships of proof”).
[t]o 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.7

Although not uncontroversial,8 defining and prosecuting crimes against the peace proved relatively easy following the complete subjugation of the aggressor states.9 When the international community turned its attention to building what would eventually be known as the International Criminal Court (ICC), however, intractable controversies emerged that stymied efforts to codify the crime for more general and prospective application.

The first to undertake the effort, the International Law Commission was unable to agree on a definition of the crime of aggression; this indecision ultimately delayed progress on the ICC project for years.10 Starting in 1967, the General Assembly tasked several special committees to define aggression,11 which eventually led to a consensus definition in General Assembly Resolution 3314 (1974) that was meant to guide the Security Council in implementing its peace and security mandate.12 After a period of Cold War quiescence, the ICC idea was revived13 and states again sought to define the crime. While influential, the definition of aggression in Resolution 3314 did not easily lend itself to a penal context and so other options were explored.14

---

7 Judgment, 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 - 1 October 1946 at 186 (1947), reprinted in 41 Am. J. Int’l L. 172, 186 (1947) [hereinafter “Nuremberg Judgment”].

8 The notion of crimes against the peace was the most controversial element of the Charter at the time. See F.B. Schick, The Nuremberg Trial and the International Law of the Future, 41 Am. J. Int’l L. 770, 783 (1947) (“Most controversial among the broad legal aspect of the Nuremberg Trial is the basic concept that aggressive war is not only illegal in international law but that those ‘who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.’”) (quoting the Nuremberg Judgment); see also Quincy Wright, The Law of the Nuremberg Trial, 41 Am. J. Int’l L. 38, 62-67 (1947); George Finch, The Nuremberg Trial and International Law, 41 Am. J. Int’l L. 20, 25-37 (1947).

9 The Nuremberg Tribunal convicted twelve of nineteen defendants indicted for crimes against the peace (Count 2). Although the Prosecution indicted all twenty-four defendants for engaging in a common plan or conspiracy to commit crimes against peace (Count 1), the Tribunal only convicted eight defendants for this crime. Nuremberg Judgment, 41 Am. J. Int’l L. at 333. The Tokyo Tribunal convicted twenty-six out of twenty-eight defendants for waging aggressive war. 103 Tokyo Judgment 49,773-49,858 (recounting verdicts).


14 See, e.g., Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2006—ICC-ASP/5/SWGCA/INF.1) (discussing debates over whether Resolution 3314 could provide a penal definition and suggesting alternatives, including the WWII definition of crimes against the peace), reprinted in THE
Delegates attending six sessions of Preparatory Committees (1996-1998) and the 1998 Rome Conference where the ICC Statute was finally opened for signature were again unable to agree on the definition of aggression or a jurisdictional regime to govern the crime’s prosecution. And so, most everyone agreed to punt, listing the crime within the Court’s jurisdiction at the last minute, but pushing off consideration of the remaining details to a mandatory Review Conference to be convened seven years hence. The only guidance the negotiators in Rome offered their successors was the cryptic declaration in Article 5(2) that any pre-conditions for the exercise of jurisdiction over the crime of aggression should be “consistent with the relevant provisions of the Charter of the United Nations.”


Despite years of multilateral negotiations pre- and post-Rome, delegates arrived at the Review Conference with the most contentious issues still undecided and highly controversial, although the definition of the crime enjoyed a shaky consensus. The perennial difficulty of reaching consensus on when and how to prosecute the crime of aggression stemmed from the recognition that the crime by its nature involves both state action and individual conduct. From virtually the beginning of the negotiations, it was argued that an aggression prosecution should not go forward absent some definitive showing that a state had committed a predicate act of aggression. Where delegations diverged was in deciding on which body should be empowered to determine this consensus: the oligarchic Security Council, in keeping with its role under the U.N. Charter as the arbiter of peace and security, or some other body, including perhaps the Court itself. Because state action was deemed to be so central to an aggression prosecution, delegates also raised the question of whether it was necessary for some state—the putative aggressor state(s), the victim state(s), or all of the above—to have consented to the Court’s jurisdiction in some fashion before a prosecution could proceed. Although these two issues—the role of the Security Council and state consent—were present in Rome, they emerged in starker relief in Kampala.

Indeed, the negotiating dynamics in Kampala were more complex than in Rome, where the so-called “Like-Minded States,” with overwhelming support from the non-governmental organization (NGO) community, were able to garner a large and diverse alliance in favor of a

---


16. Stefan Barriga, Against the Odds: The Results of the Special Working Group on the Crime of Aggression, in BARRIGA, supra note ____, at 1, 3 (noting that the definitional issues “could be regarded as contained, but not necessarily as resolved”).

17. See Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2005—ICC-ASP/4/32), reprinted in BARRIGA, supra note ____, at 167, 176 [hereinafter “June 2005 SWGCA Report”] (“While there was general agreement that any provisions on the crime of aggression would have to be consistent with the Charter, there were considerable differences of opinion as to whether this implied that there had to be a prior determination of the act of aggression and whether such determination fell within the exclusive competence of the Security Council.”). See Giogio Gaja, The Long Journey Toward repressing Aggression, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 427, 433 (Antonio Cassese et al. eds. 2002) (recounting efforts pre-Rome to establish a Security Council filter for the crime of aggression).
strong and largely independent Court.\textsuperscript{18} The crime of aggression, by contrast, splintered the negotiations along more diverse fault lines. The permanent five members of the Security Council (the P-5), with only two members of the Court among them, and a few key allies sought to place limits on the definition of aggression and insisted that the United Nations Charter and policy considerations required that the Security Council have the exclusive power to control prosecutions for the crime of aggression. A second camp—featuring many members of the group of Latin American and Caribbean Countries (GRULAC), the so-called “African Group” of states parties, a handful of European states, and other smaller states parties—pushed for an expansive definition of the crime coupled with a jurisdictional regime that applied without reference to state consent and was entirely unfettered by the Security Council, or at least no more fettered than were the original core crimes.\textsuperscript{19} Although members of this “coalition” made impassioned interventions, it was never clear to what extent their public statements belied a more deep-seated ambivalence toward the crime. A third group of diverse states parties were wary of according the Security Council hegemony in this area, but did not share the larger coalition’s unalloyed support for an expansive aggression regime. They sought alternative ways to cabin the Court’s jurisdiction over the crime that would not alienate the Council’s permanent members. NGOs were also split. Some remained agnostic toward the crime on the ground that it ostensibly fell outside their mandate;\textsuperscript{20} others opposed it out of fear that it would distract the Court from the atrocity crimes;\textsuperscript{21} and still others supported the crime as a way to prevent the commission of other crimes within the Court’s jurisdiction and bring about a more peaceful world.\textsuperscript{22}

In the end, the P-5’s interlocutors found themselves drawn toward two irreconcilable positions: one—idealistic if not hopelessly naïve—seeking an independent Court, capable of exercising a universal form of jurisdiction over the crime of aggression, and another—more cautious—insisting that jurisdiction be premised on some manifestation of state consent. Although states in these two camps were natural allies against the P-5’s position that the Council


\textsuperscript{19} See ICC Statute, Article 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”). Original drafts of this provision had required Security Council approval before a prosecution could go forward. The exercise of the veto would have blocked a prosecution. In 1997, Singapore proposed flipping the presumption to allow Security Council to halt a prosecution. Delegates ultimately adopted the so-called “Singapore Compromise” in Rome. Under the current system, the exercise of the veto allows a prosecution to go forward. See Mohamed El Zeidy, \textit{The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422}, 35 VAND. J. TRANSNAT’L L. 1503, 1509-1512 (2002).

\textsuperscript{20} Amnesty international, for example, claimed neutrality, although it did take positions on elements of the jurisdictional regime, insisting, for example, on no Security Council control over the crime and no right of states parties to opt out. Amnesty International, \textit{International Criminal Court: Making the Right Choices at the Review Conference}, IOR 40/008/2010, 11 (2010). See also Coalition for the International Criminal Court, \textit{The Crime of Aggression}, http://www.iccnow.org/?mod=aggression (“The CICC as a whole did not take a position concerning the adoption of specific provisions on the crime of aggression at Kampala. This was because CICC members developed varying positions concerning the complex discussions on the crime.”).

\textsuperscript{21} Human Rights Watch, \textit{Making Kampala Count} (May 10, 2010), available at http://www.hrw.org/en/reports/2010/05/10/making-kampala-count (“We fear that inclusion of a definition and jurisdictional filter could diminish the court’s role—and the perceptions of that role—as an impartial judicial arbiter of international criminal law.”).

\textsuperscript{22} See interventions by the Union Internationale des Avocats.
should control aggression prosecutions, they struggled to overcome their collective action problems and find common ground on a jurisdictional package that did not involve the Security Council, notwithstanding a host of creative solutions put forward in Kampala. For their part, the P-5 had difficulty asserting their full influence as well. Indeed, with China, Russia, and the United States all observers during the negotiations, and the United States a latecomer at that, it was left to France and the United Kingdom (the P-2) to formally defend postwar privileges. And yet, legal arguments in favor of Council exclusivity in the aggression realm proved unconvincing in light of contemporary United Nations practice. Policy arguments, in turn, were never persuasively developed and were in any case undermined by the Security Council’s checkered history of responding to breaches of the peace. States that in the past might have been convinced to endorse a strong, if not exclusive, role for the Council instead espoused voluntarist attitudes that undercut the preferences of the P-5.

Although the GRULAC/African States Parties coalition ostensibly had overwhelming numbers on its side, the threat of a contentious vote in Kampala was ultimately diffused given the demographics of the Conference, the governing voting rules, and principled arguments that adding such a controversial crime to the ICC Statute should be done by consensus or not at all. The ICC Statute is clear that amendments to the treaty are ideally to be approved by consensus, but the relevant provision also contemplates that amendments may be adopted by a two-thirds majority of the Assembly of States Parties in the event that a consensus cannot be reached. There were compelling arguments that the aggression amendments in particular should be adopted by consensus rather than through a contested vote, especially where a raw “majority rules” approach determined the resort to a vote as well as the result. This process question was framed as crucial to the Court’s and the crime’s very legitimacy in the light of the larger principle that reaching consensus is the only valid decision-making rule for issues of constitutional import like adding a complex and controversial crime to the Court’s subject matter jurisdiction. Otherwise, it was feared that every prosecution for aggression would be called into question by the amendments’ divisive provenance. The United States emerged as the strongest proponent for a consensus outcome, and many delegations echoed this call, although often in the same breath as a plea for compromise. In the background of this meta conversation about process loomed the historical dynamics in Rome, where the United States was further marginalized by an ill-advised last minute amendment proposal to the final package that failed

23 The United States did not start participating in the formal negotiations until November 2009. See generally Bill Marmon, Obama Team Seeks to Engage with the Court—a Fence-Straddling Position as a “non-Signatory” Participant, EUROPEAN AFFAIRS (June-July 2010), http://www.europeanaffairs.org/June-July-2010/as-icc-starts-major-review-can-us-and-eu-cooperate.html (“All their political skills will be needed if the U.S. is to manage its nuanced diplomatic goals in Kampala and beyond without appearing hypocritical, or opportunistic, or obstructive, or unilaterally hubristic—or all of the above”).


26 See, e.g., June 4, 2010, U.S. Intervention, supra note __.
on a resounding no action motion and then an unrecorded but easily deciphered vote that clearly revealed the extent of U.S. isolation by the end of the proceedings.\textsuperscript{27}

Although the threat of a vote hung over the Kampala proceedings like Damocles’ sword, it was never entirely clear whether a vote could result in a conclusive outcome given the Review Conference rules and the Conference demographics. According to these rules, an amendment could be adopted by two-thirds of the Assembly of States Parties.\textsuperscript{28} With 111 states parties, a two-thirds vote required the consent of 74 states parties. On June 9\textsuperscript{th}, the Credentials Committee reported that 72 states parties had submitted the necessary credentials to be entitled to vote, if necessary. Latvia subsequently submitted its credentials. Five states in arrears (Burundi, Central African Republic, Comoros, Djibouti, and Nauru) were given exemptions from lost voting rights mid-Conference. Additional states submitted “information concerning the appointment of representatives” bringing the number of potential voting states up to 85, which still meant that virtual unanimity would be required to pass anything with a vote.\textsuperscript{29} Without the credible threat of a vote, mere numbers alone were insufficient to enable the coalition to assert its full weight against the enduring muscle of the permanent members of the Security Council and its few influential and vocal allies or to sway states that wanted a solution the P-5 could accept.\textsuperscript{30}

Separate and apart from the arithmetic question was the lingering uncertainty about how deep the support for the crime really was among coalition members, especially if delegates in Kampala were forced to seek instructions from their capitals in the event of a vote. Although key groups within the coalition—such as the Union of South American Nations (UNASUR), under the \textit{de facto} leadership of Brazil, and the so-called “African Group” of states parties led by South Africa—espoused consistent support for expansive aggression amendments, certain coalition members at times seemed to approach the negotiations primarily as an opportunity to score points on a larger Security Council reform agenda. In the end, all sides recognized that their negotiating leverage was at its maximum in Kampala, under the crucible of waning time and pressing travel schedules, and no one seemed to relish taking these issues up again in the fall at the Assembly of States Parties in New York, even though the voting dynamics would likely have been more favorable for supporters of the crime.

With a contested vote effectively foreclosed, compromise became inevitable. In the end, the coalition abandoned its ideals and backed a regime of state consent with retrograde elements—one that completely insulates the nationals of non-states parties from prosecution and allows states parties to opt out of the crime entirely—in order to defeat one controlled by the Security Council. This concession attests to the extreme—if not irrational—antipathy felt by many states toward the Council. Speaking through the P-2, the P-5 reluctantly joined the consensus. The next Part recounts in greater detail how this result was ultimately achieved.


\textsuperscript{28} See Review Conference Rules, \textit{supra} note ___.


\textsuperscript{30} The Rules of the Review Conference, however, also seemed to allow provisions to be adopted piecemeal by a vote of two-thirds of those present and voting rather than two-thirds of the full Assembly of States Parties. Rules 53, 55, 60, Review Conference Rules, \textit{supra} note ___. This presented the distasteful outcome whereby each individual provision would be adopted by two-thirds of those present and voting but the final package would be un-adoptable.
III. Negotiation Chronology

A. The State of Play Prior to Kampala

At the Resumed Eighth Session of the Assembly of States Parties held March 22-25, 2010 in New York, Prince Zeid Ra’ad Zeid al-Hussein—Jordan’s Ambassador to the United States and Mexico, first president of the ICC Assembly of States Parties, Chair of the Special Working Group on the Crime Of Aggression, and chair of the negotiations in Kampala—circulated a Non-Paper in an attempt to encapsulate the outstanding issues concerning the jurisdictional conditions for the crime of aggression. The text was based on the assumption, virtually constant throughout the negotiations, that all three trigger mechanisms (state, prosecutor, and Security Council referrals) would apply to the crime of aggression. Two sets of issues remained contentious: (1) the applicable amendment entry into force mechanism, which also impacted the preconditions for the exercise of jurisdiction, and (2) the appropriate filter mechanisms for aggression prosecutions triggered by a state referral or the Prosecutor’s exercise of his proprio motu powers. Given that these two issues were central to the operationalization of the crime of aggression, the possibility that the Review Conference might result in a definition-only outcome hovered in the background of the negotiations. This would have been viewed as a welcome conclusion by some participants and a complete failure by others given that the definition already enjoyed considerable support going into Kampala. After a brief discussion of the definitional provisions, this Part discusses these open issues in turn to lay the foundation for the Kampala negotiations.

1. The Definition of the Crime

By June 2008, the Special Working Group on the Crime of Aggression had removed all brackets from the definition of aggression contained in draft Article 8bis. The definition proved impervious to amendment from this point forward. Although the lack of brackets suggested consensus, several states remained ill at ease with the definition, most vocally the United States once it began participating in the aggression negotiations in November 2009. The central problem was that Article 8bis(2) is worded in such a way that it deems any violation of the territorial integrity, political independence, or sovereignty of another state, as well as any use of armed force that is inconsistent with the U.N. Charter, to be an “act of aggression.”

---

31 Non-Paper by the Chairman on Outstanding Issues Regarding the Conditions for the Exercise of Jurisdiction, Appendix I, U.N. Doc. ICC-ASP/8/20/add.1. Non-papers are unofficial and non-actionable documents that aim to consolidate the negotiations and gauge support for particular formulations or concepts in an informal way.
32 Id. at para. 2.
33 Draft Amendments to the Rome Statute of the International Criminal Court, Discussion Paper on the Crime of Aggression Proposed by the Chairman (Revision June 2008), reprinted in BARRIGA, supra note ___, at 94, 96. The aggression amendments have been denominated Article 8bis (definition) and Articles 15bis and 15ter (jurisdiction). All other Articles referenced herein appear within the Statute as adopted at Rome in 1998.
34 Aggression Resolution, supra note ___, at Article 8bis(2) (defining “act of aggression” as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”).
35 This language, with the exception of the added reference to “sovereignty” and the deletion of the concept of a threat to the peace, is drawn from Article 2(4) of the U.N. Charter (“All Members shall refrain in their international
Accordingly, the mere crossing of an international border by military forces without the consent of the neighboring state, for example, could be condemned an “act of aggression” regardless of the circumstances, the gravity or consequences of the state’s actions, or the motive/intent behind the operation.\(^{36}\) Because there is no express reference to codified or uncodified exceptions to the Charter’s prohibition on the use of armed force, such an act could then serve as the predicate to a prosecution for the “crime of aggression.”\(^{37}\) This is notwithstanding that Article 2(4) of the U.N. Charter and Resolution 3314 both envision unlawful uses of force as existing along a continuum, with aggression at the far end of egregiousness.

For such an act of aggression to support a prosecution or the crime of aggression, it must satisfy the requirements set forth in Article 8bis(1) of the amendments. That provision lists a number of acts of aggression that will give rise to the crime of aggression if they constitute a “manifest” violation of the U.N. Charter. The term “manifest,” which was never defined, emerged as a compromise modifier to bridge the gap between those delegates who wanted no threshold at all, on the theory that every act of aggression should be subject to prosecution, and those who wanted a higher threshold that would limit prosecutions to “flagrant” breaches of the Charter,\(^{38}\) wars of aggression,\(^{39}\) “unlawful” uses of force, or acts of aggression geared toward occupying or annexing territory.\(^{40}\) Without a consensus definition, the term remained perennially controversial and indeterminate.\(^{41}\) To some negotiators, it referred to the degree of clarity or ambiguity surrounding the illegality of the act of aggression; to others, it denoted some level of

\(^{36}\) The elements of the crime of aggression better link the definition of act of aggression to the U.N. Charter system when they state that “4. The perpetrator was aware of the factual circumstances that established that such a use of armed force [i.e., the act of aggression] was inconsistent with the Charter of the United Nations.” Aggression Amendments, at Annex II.

\(^{37}\) Article 8bis(1) defines the crime of aggression as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

\(^{38}\) See Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2006—ICC-ASP/5/SWGCA/INF.1), reprinted in BARRIGA, supra note ___, at 141, 143-44 (summarizing debates over the term “flagrant” versus “manifest.”). Early draft texts employed the term “flagrant,” but this term disappeared in 2007, apparently because it was considered too high a barrier to prosecution. See Report of the Special Working Group on the Crime of Aggression (January 2007—ICC-ASP/5/SWGCA/1), reprinted in BARRIGA, supra note ___, at 131, 133 (discussing term “manifest”).

\(^{39}\) See, e.g., Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in BARRIGA, supra note ___, at 109, 119 (discussing debates over including reference to “war of aggression”).

\(^{40}\) Germany, for example, supported a high threshold for the crime requiring proof that the act of aggression had “the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by the armed forces of the attacking State.” See, e.g., Preparatory Commission for the International Criminal Court, Proposal Submitted by Germany, U.N. Doc. PCNICC/1999/DP.13 (July 30, 1999), available at U.N. Doc. PCNICC/1999/DP.13.

seriousness (in terms of the impugned act’s scale or consequences) or willfulness. Because the definitions of “act of aggression” and “crime of aggression” were open to endless interpretation, potentially quite expansive, and yet considered close to sacrosanct, the attention of the crime’s detractors shifted to tightening the jurisdictional regime.

2. The Debates Over The Entry Into Force Provisions and Jurisdictional Preconditions
Pre-Kampala

The first contentious jurisdictional issue arose due to the interplay between Article 12 of the ICC Statute (entitled “Preconditions to the Exercise of Jurisdiction”) and Article 121, which contains two separate regimes governing the entry into force of amendments to the Statute. Jurisdiction over the original ICC crimes is governed by Article 12(2), which provides that absent a Security Council referral under Article 13(b), the Court may exercise jurisdiction over crimes committed on the territory or by the nationals of states parties.

Article 12 sets forth a major compromise achieved at Rome between states advocating a pure consent-based approach to all crimes—that would have required the state of nationality of the accused to be a party to the Statute before a prosecution could go forward absent action by the Security Council—and

---

42 See Discussion Paper 3, Definition of Aggression in the Context of the Statute of the ICC, reprinted in BARRIGA, supra note ___, at 196, 197 (discussing alternative interpretations of “manifest”).

43 Article 12(2) reads:

In the case of article 13, paragraph (a) or (c) [governing state party referrals and proprio motu actions], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

44 Pursuant to Article 13(b) and 12(2), the Security Council can refer a situation to the Court regardless of whether the state of nationality of the accused or the territorial state is a party to the Statute. See S.C. Res. 1593 (2005) (referring the situation in Darfur to the ICC).

45 The granting of non-consensual jurisdiction to the Court over crimes committed on the territory of states parties by nationals of non-states parties has been described as “innovative, even revolutionary.” See Diane Marie Amann, The International Criminal Court and the Sovereign State, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 185, 198 (Ige F. Dekker & Wouter G. Werner eds., 2004).

46 The United States long argued that Article 12 of the ICC Statute, which allows the ICC to assert jurisdiction over the national of a non-state party accused of committing crimes on the territory of a state party, violates the fundamental principle of treaty law that a treaty cannot “create either obligations or rights for a third State without its consent.” Article 34, Vienna Convention, supra note ___. See Sharon A. Williams, Article 12, Preconditions to the Exercise of Jurisdiction, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 329, 336 (Otto Triffterer ed. 1999) (“In cases where the Security Council does not trigger the Court’s jurisdiction, the United States supported as fundamental the consent of the territorial State and the State of nationality of the accused person, or at a minimum only the consent of the State of nationality.”) (citations removed, emphasis in original). (None of the Court’s current cases presents this issue, as the territorial and nationality state are the same in all but one case. In that case, involving Jean-Pierre Bemba Gombo, both the relevant states have joined the Court). This argument has always been controversial and inevitably answered with the observation that the ICC does not exercise jurisdiction over states per se, but rather over individuals. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 260 (2007) (noting that a national of a third state may be subject to a treaty if on the territory of a treaty
states advocating a form of “universal jurisdiction” that would have enabled the Court to prosecute an individual regardless of whether any of the relevant states (the state of nationality of the accused or victim, the territorial state, or the custodial state) was a party to the Statute.\footnote{This designation was somewhat inaccurate as universal jurisdiction generally denotes a species of domestic jurisdiction, rather than international jurisdiction, and the power of any state to prosecute grave international crimes. International jurisdiction is often, however, conceptualized as a form of delegated jurisdiction. In this way, an international court unencumbered by jurisdictional preconditions would be analogous to a domestic court exercising universal jurisdiction. See Williams, \textit{supra} note ___, at 332-333 (discussing German universal jurisdiction proposal).} These default preconditions were destined to work somewhat differently with respect to the crime of aggression, which is generally committed on the territory of both the aggressor and the victim state(s). That said, the very application of Article 12(2) to the crime of aggression at all was called into question by the provisions governing the amendment of the Statute.

Specifically, Article 121(5) governs amendments to Articles 5 (listing crimes within the jurisdiction of the court), 6 (defining genocide), 7 (defining crimes against humanity), and 8 (defining war crimes).\footnote{Kirsch, \textit{supra} note ___, at 83-83 (discussing origins of Article 12 compromise).} All other amendments are governed by Article 121(4).\footnote{Article 121(5) reads: “Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those State Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.”} The question thus presented was whether the inclusion of a definition of aggression (which was to be inserted at Article 8bis) and a dedicated jurisdictional regime (which was to be inserted at Article 15bis) were “amendments” to Articles 5-8 governed by sub-section (5) or more general amendments governed by sub-section (4) of Article 121. This distinction was significant, because amendments under the two regimes enter into force differently vis-à-vis states parties and thus interact differently with Article 12(2)’s jurisdictional preconditions.

Under the 121(5) regime, the aggression amendments would incrementally enter into force for the purposes of state referrals and \textit{pro proprio motu} prosecutions a year after the relevant states parties ratified or accepted the amendments. (It was always understood that ratification was irrelevant where the Security Council triggered a prosecution). While it was accepted that jurisdiction would exist over a crime of aggression committed by the national of a state party that had accepted the aggression amendments, the second sentence of Article 121(5) introduced an element of state consent,\footnote{Article 121(4) reads: “Except as provided in paragraph 5, an amendment shall enter into force for all State 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.”} which confused issues considerably and created uncertainty over when, if ever, jurisdiction would exist over the nationals of states parties that had not ratified or accepted the aggression amendments.

Two competing interpretations were put forward for this language. According to the so-called “Negative Understanding,” if a state party did not accept the amendments, the Court could not exercise jurisdiction over aggression crimes committed in that state’s territory or by that party. The crime of aggression puts the United States’ prior argument on stronger footing given that the crime of aggression requires the ICC to declare the legality of a state’s actions as a predicate to an aggression prosecution.
state’s nationals, even if the putative victim state had accepted the aggression amendments. An argument could be made that the Negative Understanding also required that the victim state accept the amendments, since the act of aggression would have been committed on its territory. The Negative Understanding would also bar the prosecution of nationals of non-consenting states parties who committed aggression on behalf of another state, for example as mercenaries.

If the Negative Understanding governed the aggression amendments, states parties would be able to immunize their nationals from prosecution for aggression by simply not ratifying or accepting the amendments. By contrast, the aggression provisions would apply to non-states parties by operation of Article 12(2) to the extent that either non-party nationals committed the crime of aggression on the territory of a consenting state party or a crime of aggression was committed on non-party territory by the nationals of a state party that had accepted the amendments. From a cynical perspective, the Negative Understanding provided a strong incentive for potential aggressor states to join the Court, because they would be in a better position to avoid the aggression provisions through non-ratification than non-states parties, which would not have the opportunity to reject the amendments. The Negative Understanding provided no incentive, however, for potential aggressor states parties (or states parties opposed the crime of aggression) to ratify or accept the aggression amendments. The aggression provisions could thus have become a dead letter if the majority of states parties simply failed to accept or ratify them once they were adopted by the Assembly of States Parties. States opposed to the crime of aggression could limit the impact of the new aggression provisions by encouraging states to decline to adopt the amendments, thus immunizing their nationals and those territories from the ICC’s jurisdiction over the crime.

By contrast, the so-called “Positive Understanding” of the second sentence of Article 121(5) provided that all that mattered was that the victim state had ratified or accepted the aggression amendments, regardless of whether the aggressor state was a party or had accepted the amendments. This Understanding requires the text to be turned inside out and read as an affirmative statement: “if a State Party has accepted the amendment, then the Court can exercise its jurisdiction over crimes of aggression committed ... on its territory.” If this were the intent of the second sentence, of course, it would have made a lot more sense to word it as such. By this approach, the Court could exercise jurisdiction over the crime of aggression committed on the territory of any state party that accepted the aggression amendments, regardless of whether the putative aggressor state was a state party or had ratified or accepted the amendments. The Positive Understanding strains the text of that provision almost to the breaking point. It nonetheless received significant public support as a fallback position among negotiating states that actually favored the application of Article 121(4).

As compared with Article 121(5), either interpretation, if the amendments were governed by Article 121(4), they would enter into force considerably more slowly, if ever. Once 7/8ths of the states parties had accepted the amendments via instruments of ratification or acceptance, the Court could begin to accept state or proprio motu referrals of cases involving acts of aggression committed on the territory, or by the nationals, of all states parties pursuant to the standard

53 Id.
operation of Article 12. (It was never fully clarified whether Security Council referrals could begin immediately upon adoption of the amendments; presumably the supporters of Article 121(4) would insist that Security Council referrals would also have to await the 7/8ths ratification). Thus, all states parties would be equally bound by the aggression provisions once 7/8ths of the Parties (98 states at the moment given 113 states parties\(^54\)) accepted them, and no opt out or withholding of consent was available.

Under an Article 121(4) regime, the only way for states parties to avoid prosecutions for acts of aggression committed on their own territory would be by withdrawing from the Statute altogether in accordance with Articles 121(6) and 127.\(^55\) Even then, withdrawing states—like other non-states parties—would remain subject to the new aggression provisions to the extent that their nationals committed aggression on the territory of states parties as understood by Article 12(2). With the Article 121(4) amendment framework, an opportunity existed for obstructionist states to block the aggression provisions from entering into force altogether by preventing the necessary 7/8ths support for the new provisions. Powerful states intent on sabotaging the amendments would have to convince only fourteen or so holdouts to decline ratification or acceptance, thus rendering the amendments stillborn.

The different amendment regimes impacted non-states parties differently, which further complicated matters. The application of the aggression amendments to non-states parties pursuant to Article 121(4) was easy: once those amendments entered into force with 7/8ths ratification, the nationals of non-states parties could be prosecuted for the crime of aggression pursuant to the standard preconditions of jurisdiction set forth in Article 12(2). Non-states parties would be in the same position as states parties in terms of their vulnerability to aggression prosecutions of their nationals. By contrast, Article 121(5) created an anomaly whereby states parties could exempt their nationals from the aggression provisions by simply failing to adopt or ratify the amendments.\(^56\) The Negative Understanding in particular allowed potential aggressor states to avoid the crime of aggression so long as they were already party to the Statute. Non-states parties, on the other hand, would not have any opportunity to opt out of the aggression


\(^{55}\) ICC Statute, Article 121(6) (“If an amendment has been accepted by seven-eighths of states parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.”).

\(^{56}\) Concerns were also expressed that newcomers that joined the Statute post-amendment would not benefit from the opt out option and would take the Statute as they found it. Article 40(5) of the Vienna Convention on the Law of Treaties, however, suggests that newcomers may be given the option of acceding to the original version of the treaty rather than the amended version. That provision reads:

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 unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 40(5), Vienna Convention, supra note ____.
provisions by non-ratification. Arguments were made and generally accepted that principles of non-discrimination would suggest that non-states parties should not be worse off than states parties vis-à-vis the amendments.\(^{57}\) States deemed the Negative and Positive Understandings of Article 121(5) necessary to address the issue of non-states parties in the aggression context as well.

Besides these arguments that viewed the two amendment regimes as mutually exclusive, somewhat less compelling arguments posited that neither amendment regime was applicable. Some states argued that Article 5(2), which contemplates the inclusion of a definition of aggression, speaks of a “provision” being adopted rather than an “amendment” being adopted.\(^{58}\) By this argument, the inclusion of aggression amendments would not require ratification by states parties, because they would simply complete the job that had been left unfinished at Rome.\(^{59}\) This argument would have dodged the question of which sub-paragraph of Article 121 applied and rendered the aggression amendments immediately operational once they were adopted by the Assembly of States Parties at the Review Conference. It seems highly unlikely, however, that the delegates participating in the Rome Conference would have written such a blank check to their successors, especially given how contentious the crime of aggression has been since its inception. Alternatively, the position was advanced that the aggression amendments should enter into force pursuant to a complex combination of Article 121(5) (for the definition of aggression and related amendments such as the leadership clause in Article 25) and 121(4) (for the jurisdictional provisions). Although several disaggregated proposals were put forth, in the end, the Assembly proceeded on the understanding that one amendment regime or the other should apply to the entire package to ensure the unity of the amendments.

Remarkably, the question of which amendment regime would govern the anticipated addition of the crime of aggression was not resolved or even appreciably considered by the end of the Rome Conference, in part because the final package—which contained the aggression compromise and the amendment provisions—pulled together the work of different working groups and was presented “take it or leave it” to states in the final hours of the Conference.\(^{60}\) These issues received some attention at prior sessions of the Special Working Group on the Crime of Aggression as the Assembly of States Parties, but there was no consensus on exactly how this amendment conundrum was to be resolved.\(^{61}\) And so, the operative amendment process remained an open—if at the time peripheral—issue leading up to Kampala.

---


\(58\) See supra note ___.


\(60\) Id. at 167 (noting that aggression had been incorporated in Article 5 at a late phase after the completion of the negotiations and drafting of Article 121).

\(61\) See, e.g., Report of the Special Working Group on the Crime of Aggression (November 2008—ICC-ASP/6/SWGCA/1), *reprinted in* BARRIGA, *supra note ___*, at 70, 70-74 (recounting negotiations over the correct interpretation and application of Article 121). Article 119 of the ICC Statute allows the Assembly of States Parties to refer to the International Court of Justice disputes over the interpretation or application of the Statute that cannot be resolved by negotiation, but this option was never seriously considered given that it would delay the addition of the aggression provisions even more.
3. The Debates Over Jurisdictional Filters Pre-Kampala

The second major contentious issue going into Kampala and contained in the Chair’s Non-Paper concerned the appropriate jurisdictional filters for state referrals or *proprio motu* investigations. Since the early days of the aggression negotiations, it was posited as a matter of policy that the Court should be subject to some filter mechanism that would allow the prosecution of individuals only following a prior determination by some entity that the state in question had committed an act of aggression. The International Law Commission originally designated the Security Council to serve this function, a role that was under consideration in Rome. Later, states proposed more filter options for consideration, although not all states agreed to the need for such a filter. The P-5 and several other states favored designating the Security Council as an exclusive and determinative filter for any aggression prosecution such that an aggression prosecution would be barred in the absence of a prior Security Council determination that the state in question had committed an act of aggression. This would require the Council to muster the necessary majority and avoid the operation of the veto by gaining the affirmative vote or abstention of the P-5 in favor of the aggression determination. If the Security Council did not make the necessary determination, no aggression charges could be brought, although the Prosecution could investigate other ICC crimes committed within the same situation. Arguments in favor of an exclusive Security Council filter were premised on the primary, if not exclusive role, of the Security Council in addressing threats to and breaches of the peace in the U.N. Charter system.

The Security Council filter appeared in two forms in the drafting history: one was premised on the Council’s having made an express determination that a state had committed an act of aggression. The second filter, the so-called “green light option,” would have allowed the Council to approve a prosecution through adoption of a Chapter VII resolution requesting the Prosecutor to proceed, but would not necessitate an affirmative aggression determination. Some proponents of Security Council control over aggression prosecutions argued that the Charter required that the Court only be empowered to proceed on the basis of an express

---

64 See, e.g., Informal Inter-Sessional Meeting off the Special Working Group on the Crime of Aggression (June 2005—ICC-ASP/4/32), reprinted in BARRIGA, supra note ____, at 167, 176.
65 See U.N. Charter, Article 27(3) (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”). See Constantin A. Stavropoulos, The Practice of Voluntary Abstentions by Permanent Members of the Security Council Under Article 27(3), 61 AM. J. INT’L L. 737 (1967).
determination by the Council and that the green light option undermined this mandate. There was some question about whether the veto should apply to a green light resolution, although it was clear that members of the P-5 would not easily relinquish their veto rights in the aggression context. Proponents of the idea viewed the green light option as giving the Council greater flexibility in responding to threats to the peace in that the Council could allow a prosecution to go forward without being locked into an aggression determination.

Opponents of an exclusive role for the Security Council proposed alternative or back up filter mechanisms in the event that the Council failed to, or was unable to, make the necessary aggression determination. These alternative filters were designed to ensure that Security Council inaction would not necessarily be fatal to an investigation into potential crimes of aggression. Candidates for this back up filter included the General Assembly, the International Court of Justice (ICJ), and the Court itself, although the precise details on how these alternative entities would make such a determination remained to be worked out. Beyond these alternative filters, several delegations advanced two more permissive options: no filter whatsoever or no back up filter in the event of Security Council inaction.

---

68 See text accompanying notes ___ (articulating the exclusivity thesis) [hereinafter “December 2007 SWGCA Report”].

69 It could be argued that a resolution simply allowing the prosecutor to proceed would constitute a procedural decision subject to Article 27(2) of the U.N. Charter and thus be exempt from the veto. See U.N. Charter, Article 27(2) (“Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.”). If this interpretation were adopted, nine of fifteen Council members could give the approval for a prosecution to go forward without the support of the P-5. The express determination process, by contrast, is more clearly in the nature of a substantive decision. Making such a determination would accordingly require the concurrence (by positive vote or abstention) of the permanent five. That said, an argument could be made that both processes are sufficiently substantive to be subject to the veto, especially in light of the fact that both the referral (Article 13(b)) and the deferral (Article 16) processes are as well, and in any case the veto is the default procedure within Article 27 (subsection (3) of which applies to “all other cases”). Conceptualizing one route to an aggression prosecution that was exempt from the veto may have placated states that opposed Security Council control over aggression prosecutions and rendered them more willing to accept an exclusive Security Council filter. Nonetheless, allowing a route to prosecution that circumvented the veto would also have potentially subjected citizens of the P-5 to prosecution, which was of course problematic from the P-5’s perspective. Ultimately, it would have been for the Council to determine whether the green light option was considered a procedural or a substantive decision. By past practice, the decision regarding the preliminary question as to whether or not a matter is procedural is treated as a substantive one and is subject to the veto (giving rise to the potential for the rarely-used but ever-present “double veto”). See Frederic L. Kirgis, *The United Nations at Fifty: The Security Council’s First Fifty Years*, 89 AM. J. INT’L L. 506, 510 (1995).

70 See December 2007 SWGCA Report, supra note ___, at 106. It seemed clear that the green light option was a favorite of the Chair of the Special Working Group on the Crime of Aggression. Although the green light option received little actual support over the years of negotiations, it nonetheless remained in the draft texts under consideration for years. December 2007 SWGCA Report, supra note ___, at 105 (noting that the green light proposal received “limited support”). See also Robert Schaeffer, *The Audacity of Compromise: The UN Security Council and the Pre-conditions to the Exercise of Jurisdiction by the International Criminal Court with Regard to the Crime of Aggression*, 9 INT’L CRIM. L. REV. 411, 418 (2009) (concluding that the Chair was a proponent of the proposal).


72 January 2007 SWGCA Report, supra note ___, at 134.
otherwise, it was eventually decided that basic principles of due process demanded that the Court not be bound by any determination on aggression by an organ outside of the Court in order to ensure the independence of the Court and the right of the accused to mount a full defense on every element of the crime.

In connection with proposals for a non-exclusive filter role for the Security Council, Belgium proposed a “red light” function that would have empowered the Council to stop an aggression investigation or prosecution from going forward altogether. It was hoped that this function would placate the Security Council by providing it with both a more robust and more flexible power than the Council’s existing deferral power under Article 16. The latter by its terms appears to require the deferral of an entire case, and not just particular charges, and only operates for a year subject to renewal. Although this red light function had been contemplated, it had not yet appeared in any consolidated text by the time of the Review Conference.

4. State Preferences on the Eve of Kampala

At the close of the Resumed Eighth Session of the Assembly of States Parties in March 2010, the Chair of the Working Group on the Crime of Aggression invited states parties to participate in an informal straw poll to express their preferences (real or rhetorical) on the ideal balance between state consent, Security Council power, and judicial independence in the proposed aggression amendments with reference to several combinations of the various filter and amendment options. The Chair organized these options into four proverbial “Boxes” displayed graphically below.

Box 1 required both the acceptance of the aggression amendments by the aggressor state(s) as a jurisdictional precondition and a Security Council filter for any aggression charges. This Box could be implemented through the Negative Understanding of Article 121(5), which would require that the aggressor state had ratified or adopted the amendments. Box 2 required only the Security Council filter; the acceptance of the aggression amendments by the victim state was sufficient as a precondition to jurisdiction. This Box could be implemented by either the Positive Understanding of Article 121(5) or entry into force pursuant to Article 121(4). Box 3 required acceptance of the aggression amendments by the aggressor state(s) as a precondition to jurisdiction, but contemplated a non-exclusive Security Council filter (either no filter at all or one or more alternative filters). Box 3 was premised on the Negative Understanding of Article 121(5). Box 4 did not require consent of the aggressor state(s), thus implicating Article 121(4), and envisioned no filter or a non-exclusive Security Council filter.

74 The final iteration of this principle reads, “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.” Article 15bis(9), Aggression Resolution, supra note ___. See June 2005 SWGCA Report, supra note ___, at 175 (confirming consensus that any Security Council determination would not be binding).
76 See supra note ___.
Straw Poll Results

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Supportive States</td>
<td>11</td>
<td>2</td>
<td>23</td>
<td>32</td>
</tr>
</tbody>
</table>

In the informal vote,\(^78\) participating states parties showed the most support for Box 4 (32 states), followed by Box 3 (23 states) and Box 1 (11 states). Only 2 states parties indicated a preference for Box 2. States were evenly split on whether the consent of the aggressor state should be required (combining Boxes 1 and 3 and Boxes 2 and 4 both yielded 34 states). Combining Boxes 3 and 4 revealed that a strong majority of states parties (55) favored no exclusive Security Council filter, although 13 states disagreed. The fundamental debate was thus whether states wanted a consent-based regime (Boxes 1 and 3), a system controlled by the Security Council (Boxes 1 and 2), or a Court with expansive jurisdiction over the crime (Box 4). The negotiations in Kampala became an effort to “think outside the box” and bridge these disparate positions.

B. The Foundation for Negotiations in Kampala

On the eve of the Kampala Review Conference, the Chair of the Working Group on the Crime of Aggression submitted a Conference Room Paper setting forth a proposed draft outcome for the Review Conference with “a view toward completing the remaining work” on the crime of aggression.\(^79\) The Paper was accompanied by a Non-Paper discussing “Further Elements for a Solution on the Crime of Aggression.”\(^80\) The Conference Room Paper, which did not endeavor to

---


\(^79\) See May 25, 2010 Conference Room Paper, supra note ___.

advance the negotiations from the close of the final preparatory sessions, contained the necessary components that, once finalized, would make the crime of aggression capable of immediate operationalization: a definition of the crime and proposed elements, a jurisdictional regime, an enabling resolution, and interpretive understandings.

Although the Conference Room Paper contained the seeds of a complete package, the text addressed to the two main obstacles to consensus remained in brackets and reflected all four Boxes of the straw poll. First, three broad filter options remained under consideration: an exclusive and determinative Security Council filter (Alternative 1), an exclusive but not determinative Security Council filter (Alternative 2, Option 1), and a menu of alternative “fall back” filters that would operate in the absence of Security Council action (Alternative 2, Options 2-4). The candidates for these alternative filters remained the Pre-Trial Chamber (Option 2), the General Assembly (Option 3), and the International Court of Justice (Option 4). The Security Council filter appeared in two forms: one was premised on an express determination that a state had committed an act of aggression (Article 15bis (3)). The second filter, the so-called “green light option,” would allow the Council to approve a prosecution through adoption of a Chapter

---

81 Proposed Article 15bis read as follows:

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

**Option 1 – end the paragraph here.**

**Option 2 – add:** 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.

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,

**Option 1 – end the paragraph here.**

**Option 2 – add:** 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;

**Option 3 – add:** provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;

**Option 4 – add:** provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.
VII resolution requesting the Prosecutor to proceed, but would not necessitate an affirmative aggression determination (Alternative 1, Option 2). This Conference Room Paper did not envision a “red light” function for the Council.

The second bracketed issue within the Conference Room Paper concerned the entry into force mechanism for the aggression amendments and reflected the longstanding debate over the applicability of Article 121(4) versus (5). In this regard, the Conference Room Paper put forward the two competing interpretations of the second sentence of Article 121(5) as interpretive “understandings” set forth in an Annex: (1) jurisdiction would exist over acts of aggression committed against a state party that had accepted the aggression amendments (regardless of whether the aggressor state(s) was a party or had accepted the amendments) (Alternative 1, the so-called “Positive Understanding”), and (2) jurisdiction would not exist over acts of aggression committed by any state that had not accepted the amendments, whether party or non-party (Alternative 2, the so-called “Negative Understanding”). In this way, the Chair’s formulation of the Negative Understanding in the Conference Room Paper covered both states parties and non-states parties, even though the application to the latter was not obvious from the plain text of Article 121(5). This adaptation reflected the generally accepted view that non-states parties should not be worse off vis-à-vis the aggression amendments than states parties that declined to ratify the new provisions.

Other understandings in the Annex of the Conference Room Paper flagged a few additional open issues. One was the question of when the Security Council could start referring cases, with the options being (1) upon adoption of the amendments or (2) upon entry into force of the amendments. The latter depended on the choice between Article 121(4) and (5); entry into force under the former would have a longer time horizon by requiring 7/8ths ratification whereas under the latter, the provisions could “enter into force” vis-à-vis the Council upon a single ratification plus one year. The Non-Paper suggested that notwithstanding the provisions’ rapid entry into force under Article 121(5), the Court’s ability to assert jurisdiction over the crime of aggression could be further delayed for a period of years. Proposed understandings on temporal jurisdiction suggested that the Court would only have jurisdiction over acts of aggression committed after either the adoption of the amendments or their entry into force, in the alternative. These understandings did little to clarify when an act of aggression is deemed to have been committed or if an act of aggression that leads to a full-blown armed conflict might be considered a continuing crime. In addition to some proposed amendments and understandings governing complementarity and extraterritorial jurisdiction, the non-Room Paper also

82 May 25, 2010 Conference Room Paper, supra note ___, at 7.
83 See supra note ___.
84 May 25, 2010 Conference Room Paper, supra note ___, at 7.
85 May 25, 2010 Non-Paper, supra note ___, at 1.
87 See, e.g., Article 8bis(1) (including the planning and preparation of an act of aggression as a punishable actus reus of the crime).
88 May 25, 2010 Non-Paper, supra note ___, at 2 (“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. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.”). The understandings on complementarity reflected the reticence delegations felt toward national prosecutions for the crime of aggression.
suggested a potential review clause that would allow for the subsequent reconsideration of the jurisdictional regime,\(^8\) ostensibly included in order to “accommodate the concerns of delegations that have shown flexibility in their position.”\(^9\)

C. The Arc of The Kampala Negotiations

The May 25, 2010 Papers served as the basis for the first plenary session of the Working Group on the Crime of Aggression of the Review Conference, which was held on Friday, June 4, 2010, and devoted to general debate. Early at this session, Brazil orally introduced its own proposal that had apparently been the subject of consultations in the weeks leading up to Kampala. This proposal had gained the endorsement of Argentina and Switzerland, thus earning the moniker the “ABS Proposal.”\(^9\) According to the Brazilian delegate, the ABS Proposal identified two elements from all four Boxes of the straw poll that received widespread and possibly consensual support: the definition of the crime and the power of the Security Council to refer situations involving acts of aggression for prosecution. These provisions, it was argued, should enter into force immediately pursuant to Article 121(5), thus responding to the preferences of states in Boxes 1 and 2. The ABS group proposed inserting these provisions into Article 5, signaling an intent to be consistent with Article 121(5), which governs amendments to that article.

In its intervention, Brazil noted that it recognized that other aspects of the aggression

---

The International Law Commission in its 1996 Draft Code of Offenses Against the Peace and Security of Mankind suggested that the three other core crimes would be subject to a complementarity regime, but not the crime of aggression because it would require the courts of one nation to sit in judgment on the sovereign acts of a co-equal sovereign. See Article 8, 1996 Draft Code, supra note___ (“Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17 [genocide], 18 [crimes against humanity], 19 [crimes against U.N. personnel] and 20 [war crimes], irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 [aggression] shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.”). The commentary explained:

The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law par in parem imperium non habet [“an equal has no power over an equal”]. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.

There are comments in the contemporary negotiating records, however, aimed at creating a “clean” definition to better enable domestic prosecutions to go forward. See, e.g., Coalition for an International Criminal Court, Report of the CICC Team on Aggression, 6, 21, 39, available at http://www.iccnow.org/documents/CICC_Princeton_Team_Report_2007.pdf (reporting on debates during the June 2007 Inter-Sessional meetings).

\(^8\) May 25, 2010 Conference Room Paper, supra note __, at 2 n.3.
\(^9\) May 25, 2010 Non-Paper, supra note __, at 1. Notably, this proposed review clause would have allowed a reconsideration of the jurisdictional regime only, as opposed to the definition of the crime, which—while unbracketed—still did not enjoy universal support.
\(^9\) Non-Paper Submitted by Argentina, Brazil and Switzerland as of June 6, 2010 (on file with the author). Many of the texts circulated in Kampala are untitled, undated, and unattributed. I have provided as much detail as possible to identify the particular text.
package, and particularly referrals by states parties and *proprio motu* investigations, were more controversial and thus might be subject to different treatment. Under the ABS Proposal, these other aggression triggers would become operational at a later stage—after 7/8ths ratification pursuant to Article 121(4)—and be subject to an internal judicial filter in the form of the Pre-Trial Chamber in accordance with Boxes 3 and 4. These other provisions were to be inserted in a new Article 15bis. This proposal thus depended on different parts of the aggression provisions being subject to different amendment regimes. The theory was that this sequential approach would allow time for the Court to mature institutionally and gain experience with aggression prosecutions under the supervision of the Security Council while ensuring that the more controversial trigger mechanisms became operational only after the aggression amendments enjoyed a high level of state support as manifested by the 7/8ths ratification. The goal was thus to merge aspects of all four Boxes into a single proposal that would over time lead the Court toward Box 4.

By the time of this plenary, most delegations had not formulated a position on the ABS Proposal, or even seen a draft text for that matter, and so in subsequent interventions they expressed interest and gratitude for Brazil’s contribution to the debate, but no strong support. Japan, however, spoke forcefully against the ABS Proposal and for the imperative that any final package be legally proper and not just politically expedient. The Japanese delegate argued that while flexibility was appropriate on issues of policy, there are limits to creativity where legal interpretations are at issue, especially in the penal context. He reminded delegates that they were forging the aggression amendments within the framework of a pre-existing penal regime and were not in a position to rewrite the treaty. The treaty, he argued, envisioned two mutually exclusive amendment regimes. Any amendments had to be adopted according to the appropriate amendment clause—Article 121(5) and the Negative Understanding in his estimation—and not piecemeal pursuant to one or another clause as convenient, no matter how laudable the intentions. In his estimation, the ABS Proposal was viable only if Article 121 were amended. Japan urged that delegates produce an outcome in Kampala that could be convincingly justified, not only to international but also to domestic audiences. To some applause, rare in such settings, Japan closed with the caution that proceeding otherwise risks undermining the credibility of the Statute and the system of international criminal justice. Denmark and Belgium later associated themselves with the Japanese intervention.

---

92 Echoing something suggested by Switzerland, Japan in its next intervention raised the question of whether it would be possible to amend the amendment procedures pursuant to Article 121(4) and then have the aggression amendments enter into force either simultaneously or consecutively with those amendments. Several weeks after the Review Conference, Japan circulated a Non-Paper reiterating its concerns about the legality of the amendment procedures and the need for legal clarity in the penal context. See Non-Paper on the Crime of Aggression (on file with the author).

93 Several interventions later, Slovenia orally introduced an alternative but derivative proposal that it explained was based on the calculation that the non-Security Council filters would take too long to become fully operational under the ABS Proposal. The Slovenian Proposal thus added a third, interim stage during which time the Court could entertain state party and *proprio motu* referrals involving states parties that had accepted the aggression amendments. Thus, in phase one, Security Council referrals could proceed against the nationals of any state. Once a certain number of states had ratified the amendments (the number thirty was suggested), aggression prosecutions could go forward according to the two other trigger mechanisms on the basis of reciprocity, so long as all the relevant states (the victim and aggressor state(s)) had accepted the aggression amendments. Once 7/8ths of all states parties had ratified or accepted the aggression amendments, all trigger mechanisms would become fully operational in phase three, and the aggression provisions would apply equally to all state and non-states parties. Like the ABS
After a day’s worth of interventions on the original Conference Room Paper and alternative proposals, the Chair released the next Conference Room Paper late on June 5, 2010. Reflecting the clear but at times reluctant preference of delegations, the Paper eliminated all but two filter alternatives: an exclusive Security Council filter (with the green light option relegated to a footnote) (Alternative 1) and an internal judicial filter in the Pre-Trial Chamber (Alternative 2), perhaps enhanced by a requirement of an en banc ruling or an automatic appeals process. This was despite the fact that some states parties had spoken in favor of a General Assembly and International Court of Justice filter (denominated Article 15bis(4)(Alternative 2)(Options 3 and 4)) and very few states outside of the P-5 had spoken in favor of an exclusive Security Council filter. This Paper thus also eliminated the possibility of no filter at all (styled Alternative 2, Option 1 in the prior Conference Room Paper). Absent a surge of negative feedback, it was thus inevitable that the crime of aggression would be subject to some filter, either the Security Council acting alone or subject to a back up filter in the form of the Pre-Trial Chamber. Several other elements remained in brackets, including the appropriate entry into force mechanism, a potential review clause, and the possibility of a delayed entry Proposal, this package envisioned an evolutionary process whereby the aggression regime would begin under the control of the Security Council (a modified Box 2) but end with a form of universal jurisdiction over the crime once a high number of states parties had accepted the amendments (Box 4). Both the ABS and Slovenian Proposals largely ignored the second sentence of Article 121(5) and the debate over the Positive and Negative Understandings. See Amendment on the Crime of Aggression—Adoption in Accordance with the Article 121 (on file with the author). Later, Slovenia later disseminated a second Non-Paper, which built on the ideas of consent and reciprocity already circulating among the delegations while retaining a strong role for the Security Council as desired by the proponents of Boxes 1 and 2. See Non-Paper by Slovenia (June 8, 2010) (on file with the author). According to this Non-Paper, the Court would exercise jurisdiction over the crime of aggression on the basis of a Security Council referral immediately. Where “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,” the other triggers would be operational. Id. at Article 15bis(4). In the event that not all concerned states had ratified the aggression amendments, the Prosecutor would have to go back to the Security Council and “readdress the possibility of the Security Council referral in accordance with article 13(b) with the Secretary-General of the United Nations.” Id. at Article 15bis(4bis). Neither Slovenian proposal received much traction among delegations.


95 June 6, 2010 Conference Room Paper at 3 n.4.

96 In the deliberations, other procedural enhancements to the Pre-Trial Chamber filter were discussed, such as a unanimity requirement and amendments to Article 36 that would mandate the appointment of judges with expertise in public international law and require that such judges be assigned to make aggression determinations. Although this was never formally proposed, delegations might also have considered raising the operative burden of proof before the Pre-Trial Chamber to parallel that required to issue an arrest warrant or confirm an indictment. See Article 58(1)(a), ICC Statute (requiring proof that “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” prior to the issuance of an arrest warrant); Article 61(5) (requiring “the Prosecutor [to] support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”).

97 June 6, 2010 Conference Room Paper at 3 n.5. Guaranteeing a right of appeal would ensure that seven judges—at least four from the Pre-Trial Division (composed of a minimum of six judges) sitting en banc and three from the Appeals Chamber (composed of five judges, including the President of the Court)—had determined that a state had committed an act of aggression and approved the decision to go forward with an aggression prosecution. See discussion infra at note ___.

98 June 6, 2010 Conference Room Paper, supra note ___, at 1.

99 Id. at 1 n.2.
into force.\textsuperscript{100} Annex III containing the understandings now included language on complementarity as well that had come from the May 26, 2010, Non-Paper.\textsuperscript{101} In the interventions on June 4, 2010, most delegations had considered these latter elements to be largely unnecessary, but acceptable if they would alleviate the concerns of other delegations and help achieve consensus, so it was no surprise that to see them in the text of the new Non-Paper.

In the subsequent and last plenary session of the Working Group on the Crime of Aggression held on June 7, 2010, delegations expressed support for the Chair’s changes, but the ABS Proposal also began to show some traction. In particular, delegations felt that the two-tiered sequential approach of the ABS Proposal respected the primary but not exclusive role for the Security Council in aggression prosecutions, but ensured the possibility of supervised prosecutions not enjoying Security Council approval. Advocates also felt that the long entry into force process would provide comfort to those states concerned about relinquishing Security Council control over the crime of aggression from the outset. Most of the criticism of the ABS Proposal mirrored Japan’s legalistic intervention of the week prior and critiqued the Proposal’s reliance upon alternative and mutually incompatible amendment procedures for different components of the aggression amendments.

That evening, the Chair introduced a new Conference Room Paper.\textsuperscript{102} Although the text did not reference the ABS Proposal, the impact of these schemes on the new package was immediately clear. In particular, the Chair’s Paper shifted the attention from filters to triggers, contemplated differential tracts for Security Council- and non-Security Council-triggered prosecutions, and envisioned a sequential activation of different aspects of the aggression regime.\textsuperscript{103} Thus, according to proposed Article 15bis of this Paper, state referrals and \textit{proprio motu} investigations would be subject to a preliminary Security Council filter. Alternative 1, the exclusive Security Council filter, and Alternative 2, allowing for an enhanced Pre-Trial Chamber filter in the absence of Security Council action (either an express determination or a green light to go forward), remained bracketed.

A new proposed Article 15ter governed Security Council referrals, which were subjected to an exclusive Security Council filter. At first glance, it seemed incongruous to imagine that the Council would refer a situation and then exercise its filter power to prevent an aggression prosecution from going forward. The idea was, however, that the Council would refer situations, or crime bases, to the Court rather than particular crimes or defendants. Once the Prosecutor determined that aggression charges might be warranted, he would be obliged to consult the Council to allow the filter function to work and launch a formal aggression investigation. If the Council determined that an aggression prosecution was unwarranted for whatever reason, it could block those charges from going forward by declining to make an aggression determination; other potential charges of war crimes, crimes against humanity or genocide could proceed absent a more blanket deferral under Article 16. In the event of a Council determination of aggression,

\textsuperscript{100} Id. at 3 n.3.
\textsuperscript{101} Id. at 6.
\textsuperscript{103} June 7, 2010 Conference Room Paper, supra note ____, at 4-5.
or alternatively a green light Council resolution, the aggression charges could go forward alongside any other applicable charges.\footnote{In terms of entry into force, the Chair for the first and only time envisioned that the amendments to Article 15 might enter into force pursuant to Article 121(4) and the 7/8ths rule. June 7, 2010 Conference Room Paper, supra note \text{___}, at 1. It was also suggested that all amendments could be activated for the Court immediately upon adoption, but vis-à-vis states parties one year after their ratification or acceptance of the amendments. This would allow the Court to receive Security Council referrals of aggression immediately, but delay the ability of states parties and the Prosecutor to initiate aggression prosecutions until the requisite ratifications had accumulated. \textit{Id.} at 1 n.2. All the new provisions were potentially subject to a delayed entry into force. \textit{Id.} at 4 n.4 and 5 n.7. The rest of the proposed package remained unchanged.}

On June 9, 2010, the ABS Proposal proponents and Canada\footnote{In earlier diplomatic meetings Canada had floated a consent-based menu approach to jurisdictional filters. \textit{See} Draft Proposal of Canada (July 7, 2009) (on file with the author). According to the original iteration of this model, upon ratification of the amendments, states parties could indicate which filter mechanism(s) they would accept. Once the Prosecutor initiated an aggression investigation, the acceptable filter mechanism would operate on the basis of reciprocity along the lines of the ICJ’s optional clause. Once the General Assembly and International Court of Justice filter options disappeared from the Chair’s Conference Room Paper, Canada refined its proposal and circulated a text that provided that in the absence of a Security Council determination that a state had committed an act of aggression, the Prosecutor could proceed with an investigation if the Pre-Trial Chamber so authorized so long as all states concerned with the alleged act of aggression had accepted this role for the Pre-Trial Chamber. \textit{See} 15bis (on file with the author). Attempting to bridge the gap between Boxes 2 and 3, the proposal envisioned that the Court could immediately exercise jurisdiction over aggression cases with a Security Council determination and that the reciprocity regime would become operational once at least two states had adopted the aggression amendments.}\footnote{\textit{See} Declaration (Draft of 9 June 2010 16h00) (on file with the author).} cooperated to prepare a joint submission\footnote{\textit{Id.} at Article 15bis(1).} that made the state party and \textit{propio motu} referral powers operational five years after the entry into force of the aggression amendments for any state party.\footnote{\textit{See supra note \text{___}.}} Both types of referrals would be subject to a preliminary Security Council filter and then a fall-back Pre-Trial Chamber filter as set forth in Alternative 2 of the prior Conference Room Paper. Although this was not spelled out, the joint text seemed to assume that Security Council referrals could commence immediately upon adoption of the aggression amendments.

Signaling an enormous concession on the part of the ABS coalition, the non-paper adopted Canada’s earlier consent- and reciprocity-based approach\footnote{ICC Statute, Article 124 (“Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.”).} and contained an opt out provision for states parties similar to, but more robust than, Article 124 governing war crimes.\footnote{\textit{Id.} at Article 15bis(4bis & ter). If withdrawn, it was not clear if the opt-out declaration could be re-lodged either indefinitely or at least prior to December 15, 2015. Japan subsequently built on this proposal with an opt out scheme of its own that envisioned that upon the ratification of the aggression amendments by 7/8ths of states parties that have not filed the opt out declaration, the Assembly would convene another Review Conference to consider whether the} This provision stated that the aggression provisions would be applicable to state party nationals and territory unless the party submitted an opt out declaration prior to December 15, 2015, to the Secretary-General of the United Nations. (Any state that ratified or acceded to the Rome Statute after that date would have to file the declaration of non-acceptance on the date of ratification or accession). The declaration could be withdrawn at any time.\footnote{\textit{Id.} at Article 15bis(4bis & ter). If withdrawn, it was not clear if the opt-out declaration could be re-lodged either indefinitely or at least prior to December 15, 2015. Japan subsequently built on this proposal with an opt out scheme of its own that envisioned that upon the ratification of the aggression amendments by 7/8ths of states parties that have not filed the opt out declaration, the Assembly would convene another Review Conference to consider whether the} In another concession, this text
stated that in “respect of a State which is not a party to this Statute, this 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.” Although this text seemed designed to exclude non-states parties altogether from the aggression provisions, the draft text contained language identical to the second sentence of Article 121(5), thus reproducing the ambiguity over the Negative and Positive Understanding of that Article. In explanation, proponents insisted that the object of this text was in fact to exempt non-states parties. That said, the entire package, and particularly the opt out declaration, was premised on an entry into force pursuant to the Positive Understanding of Article 121(5), thus suggesting that the same language in different parts of the Statute would have entirely different meanings, contrary to standard interpretative principles.  

This joint text marked the convergence of the two primary positions opposed to Security Council control over aggression prosecutions—the ABS group, which favored a broad jurisdictional regime, and the more moderate group of states, which favored non-political limits on the Court’s jurisdiction.

Once the Working Group completed its work and adopted its Report, the President of the Assembly, Christian Wenaweser, made his first public foray into the aggression deliberations mid-day on June 10, 2010 with a Non-Paper in the form of a draft resolution on the crime of aggression that was based on informal consultations with states. This was the first of three Non-Papers from the President attempting to bring the negotiations to a close. From this point onward, negotiations proceeded in informal settings rather than plenaries, so there is little formal record of states’ views on these texts. Like the Chair’s final Conference Room Paper, the President’s Non-Paper also adopted the two-tiered formula of the ABS Proposal by bifurcating the amendments into Article 15bis, governing non-Security Council triggered investigations, and Article 15ter, governing Security Council-triggered investigations. Filter Alternatives 1 and 2 remained in play for non-Security Council triggered prosecutions under Article 15bis. In other words, for state referrals and proprio motu investigations, the choice was still between an exclusive Security Council filter (Alternative 1) and a filter that, in the absence of Security Council action, reverted to the Pre-Trial Chamber (Alternative 2). The provisions for a Security Council filter in Article 15ter governing Council referrals were bracketed for the first time.

With respect to potential Security Council referrals, the public record does not disclose which state proposed the idea to collapse the trigger and filter in Article 15ter and no participating state spoke in favour of it publicly. This formula seemed positioned as a concession to those states opposed to a strong role for the Security Council in aggression prosecutions, because it eliminated one mechanism of Council control over the process, although it was not

provisions should enter into force for all States pursuant to the conditions for jurisdiction set out in Article 12 and applicable to the other three crimes. This proposal stated unambiguously that “[t]he court may not exercise jurisdiction with respect to a crime of aggression committed by a non-State Party.” This latter phrase probably should have read “act of aggression” given the distinction made in Article 8bis between acts of aggression, which are committed by states, and crimes of aggression, which are committed by individuals. This proposal was not well circulated or extensively discussed. See The Following is inserted after article 15 of the Statute (on file with the author).

111 See generally AUST, supra note ___, at 235, 244 (noting that terms in a treaty are to be given their ordinary meaning unless the parties intended some special meaning).


113 Non-Paper by the President of the Assembly, 10 June 2010 12:00, available at www.mediafire.com/?mmmm2crjzzi.
clear if it was perceived as such or if it generated any counter concessions or change in position from the ABS group. The effect of eliminating the Article 15ter filter was that in the case of a situation referred to the Court by the Security Council, the Prosecutor could investigate potential charges of aggression without any further Security Council involvement (other than a potential Article 16 deferral). Had the filter remained in Article 15ter, the Prosecutor would have to determine whether the Council had made the necessary aggression determination if he wanted to pursue aggression charges. There was some concern that a filter-less Article 15ter would serve as a disincentive to the Council to refer situations involving potential aggression charges to the Court, because it could not easily control which charges the Prosecutor would ultimately seek to bring. This contingency was weakly addressed in footnote 8, which stated that “this article should not negatively affect the ability of the Security Council to exercise its competence under Article 13(b).”

Also as a part of the President’s Non-Paper, Article 15bis was subject to a bracketed opt out option¹¹⁴ and a bracketed exclusion of jurisdiction over non-states parties,¹¹⁵ both elements borrowed from the ABS/Canada joint text. The Non-Paper envisioned amendments entering into force pursuant to Article 121(5), but no longer included any proposed understandings on how the second sentence of that provision should be interpreted and so was conspicuously silent on whether the Positive or Negative Understanding was operative.¹¹⁶ The logic of the opt out declaration, however, suggested that the Non-Paper was based on the Positive Understanding such that absent an opt out, the Court could exercise jurisdiction over the nationals of states parties that had not ratified or accepted the aggression amendments so long as the putative victim state(s) had done so.¹¹⁷

In the waning hours of June 10, 2010, the President issued a second Non-Paper.¹¹⁸ According to this Non-Paper, neither trigger mechanism would be operative until five years after the adoption of the amendments and one year after the ratification or acceptance of the amendments by thirty states parties—a number that would signal at least some state support for

¹¹⁴ Id. at Article 15bis(1bis).
¹¹⁵ Id. at Article 15bis(1ter).
¹¹⁶ This Non-Paper for the first time referred to Article 12(1) in addition to Articles 5(2) in the preamble to the draft enabling resolution text, suggesting that states parties had already pre-consented to the Court exercising jurisdiction over the crime of aggression and thus justifying opt out option and exclusion of express non-states parties from the amendments. Id. at Preamble.
¹¹⁷ The Non-Paper also resolved some smaller open issues, such as the Court’s temporal jurisdiction over crimes of aggression, providing that crimes of aggression committed after the aggression provisions had entered into force (rather than been adopted) would be within the Court’s *ratione temporis*. It was also determined that the Security Council would be able to commence referrals once the amendments entered into force. In an Annex, the Non-Paper included some new understandings on the definition of the crime of aggression and the operation of the principle of complementarity that had been considered in a parallel set of negotiations driven largely by the United States. See Beth Van Schaack, *Understanding Aggression I and II*, INTLAWGRRLS, http://intlawgrrls.blogspot.com/search?q=understanding+aggression. Later that day, the President released a draft text setting forth an alternative opt out mechanism that would expire after seven years unless the state party affirmed it. Although some members of the ABS group had called for any opt out to be subject to a sunset clause, the expiring opt out apparently received insufficient support and did not appear in any subsequent consolidated text. The President also circulated another text proposing a delay in the amendments’ entry into force for seven years, a period of time that paralleled time period originally proposed for the first Review Conference. See Article 123, ICC Statute.
¹¹⁸ Non-Paper by the President of the Assembly, Draft resolution: The Crime of Aggression, 10 June 2010 23:00 [hereinafter “ASP President Non-Paper”].
the amendments. Article 15ter, addressed to Security Council-triggered prosecutions, contained no filter mechanism, as had been anticipated from the prior Non-Paper. Article 15bis, concerning non-Council-triggered situations, was now expressly inapplicable to non-states parties. Alternative 1 (exclusive Security Council filter) and a slightly modified Alternative 2 (which involved a Pre-Trial Division (en banc) rather than a Pre-Trial Chamber back up filter) remained in play with respect to Article 15bis. Alternative 2, however, was subject to new bracketed text suggesting that the Security Council could block a prosecution through the exercise of a “red light” function separate from and more robust than the Council’s deferral powers under Article 16, notwithstanding that the Pre-Trial Division filter had permitted aggression charges to be brought. The green light option appeared in bracketed text in connection with Alternative 1 as another way for the Security Council to allow an aggression prosecution to go forward.

The second Non-Paper also contained a slightly less robust opt out option than the first iteration in that it required states parties to at least “consider” their opt out declaration every three years, although there was no expiration provision. Finally, the second Non-Paper contained a review clause mandating an evaluation of all the amendments on the crime of aggression seven years after the beginning of the Court’s exercise of jurisdiction, which signaled that detractors might get a chance to revisit the definition. In practical terms, this Conference would have convened no earlier than 12 years from now when the seven-year lag was combined with the delayed activation of the amendments, which was slated to take at least five years. Given the increasingly cumbersome procedure set forth in Article 15bis, the Non-Paper prompted renewed calls by some members of the P-5 to eliminate Article 15bis altogether and launch only Article 15ter, with the understanding that delegates would continue work on Article 15bis, and other calls to fall back to the definition-only option.

After a day of informal negotiations and other Review Conference business, the President released a third and final Non-Paper on the afternoon of June 11, 2010 containing almost all of the elements of the final package. Most notably, this third Non-Paper diminished the role of the Security Council in Article 15bis situations even further on several fronts. First, the third Non-Paper revealed a major, controversial, but not totally unsurprising development: the elimination from Article 15bis of Alternative 1, which embodied the idea of an exclusive and determinative

---

119 Id. at Articles 15bis(1bis) and 15ter(2).
120 Id. at Article 15bis(1quarter) (“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.”).
121 The text read: “Where no such determination [by the Council] is made … the Prosecutor may proceed with the investigation … provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime aggression in accordance with the procedure contained in article 15, [and the Security Council does not decide otherwise.]” Id. at Article 15bis(4)(Alternative 2) (brackets in original).
122 Id. at 15bis(1ter) (“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 affected at any time and shall be considered by the State Party within three years.”).
123 Id. at Article 3bis.
124 On the morning of June 11, 2010, the African Group issued an unenthusiastic response to the Second Non-Paper. In essence, the African Group viewed the Non-Paper as a step back, and argued that the opt out should be subject to expiration, no subsequent review conference should be mandated, the delayed entry into force should be eliminated for Article 15bis at least, and Alternative 1 allowing a Security Council filter should be excised. The African Group did, however, accept the language of draft Article 1quarter, which was significant because it exempted non-states parties from the aggression provisions altogether. On file with the author.
Security Council filter.\textsuperscript{125} Instead, prosecutions initiated through state referrals or \textit{proprio motu} action would be subject to a Pre-Trial Division filter in the event that the Security Council had not already made an affirmative aggression determination. The green light option for the Security Council also disappeared, mandating an express aggression determination by the Council. In addition, draft text suggested the Council could block a positive determination by the Pre-Trial Division only through the exercise of its Article 16 powers, which allows for a renewable deferral rather than a complete termination of a case. The temporary nature of an Article 16 deferral renders it a weaker control mechanism as compared to the red light option, which had appeared in brackets in the prior Non-Paper, although both were equally subject to the Council veto.

In other developments, the opt out option remained as did the exclusion of non-states parties.\textsuperscript{126} None of the provisions would be in force until at least one year after thirty states parties had ratified or accepted the aggression amendments—a more uncertain date than envisioned by some prior proposals.\textsuperscript{127} Seven years after the Court began to exercise jurisdiction over the crime, the Assembly of States Parties would review all the amendments—definitional and jurisdictional—on the crime of aggression.\textsuperscript{128} Finally, and crucially, the third Non-Paper contained mere placeholders for activating Articles 15bis and ter, signalling the last open issue of the Review Conference.

With most of the elements of a final package in place, attention now turned to reaching the optimum balance of automaticity and conditionality for operationalizing Articles 15bis and 15ter. In the somewhat frenzied informal negotiations that ensued, proponents of the crime sought to lock in the text achieved and ensure its automatic, if delayed, operationalization. By contrast, other states sought to keep open the possibility of reconsidering on a later date both the text of the amendments and the very operationalization of the crime. One state proposal, for example, would have delayed entry into force for both Articles 15bis and 15ter until at least 2017. After that date, Article 15bis would have entered into force only once states parties so decided. By contrast, Article 15ter was subject to a flipped presumption such that it would have entered into force in that year, unless states parties decided otherwise.\textsuperscript{129} This text thus contemplated the possibility of an exclusive Security Council trigger in the event that the Assembly of States Parties could not agree to activate Article 15bis. Another proposal from a participant solution provided that Article 15bis would only enter into force following a consensus decision of states parties or the entry into force of an amendment to that effect.\textsuperscript{130} Either action had to be taken at a Review Conference to be held no earlier than seven years after the adoption of the amendments on the crime of aggression. This scheme suggested that the states parties could also consider “any related amendments proposed for the Statute with the aim of strengthening the Court,” which was likely code for reconsidering Article 8bis as well. Other ideas swirling around for resolving the conditionality/automaticity conundrum included holding off on operationalization but mandating that the Review Conference convene “with a view toward” adopting the amendments and exploring alternative voting procedures or thresholds, such as a simple majority with some geographic proportionality.

\textsuperscript{125}\textsuperscript{125} Non-Paper by the President of the Review Conference 11 June 2010 16:30.

\textsuperscript{126}\textsuperscript{126} Id. at 3.

\textsuperscript{127}\textsuperscript{127} Id. at 3, 4.

\textsuperscript{128}\textsuperscript{128} Id. at 1.

\textsuperscript{129}\textsuperscript{129} On file with the author.

\textsuperscript{130}\textsuperscript{130} On file with the author.
At the literal eleventh hour on the final day of the Conference, the President released a text containing the entry into force provisions that were missing from the final Non-Paper. According to the final provisions, which are identical, both Articles 15bis and 15ter will be subject to activation into force no earlier than January 1, 2017, following a “decision to be taken ... by the same majority of states parties as is required for the adoption of an amendment to the Statute.” Even then, the amendments adopted will not be operational until a year after thirty states have ratified or accepted them. In a nod to opponents of the crime, the President erred on the side of conditionality, essentially pushing off to another day the decision to operationalize the amendments. Although the enabling resolution calls on states to ratify the amendments, as a practical matter, states may find it politically difficult to ratify or formally accept the amendments until after states parties have decided in 2017 on whether to implement Articles 15bis and/or 15ter, since states parties will not be able to ratify the entire amendment package until then. Accordingly, depending on how long it takes for thirty states parties to ratify the amendments, it may be a decade or more before the Court sees its first aggression case. That said, there is nothing within the final resolution that prevents states parties from ratifying or accepting the amendments in their current, uncertain, and partial form.

Because states parties must decide to whether to activate both Articles 15bis and 15ter, the Assembly could conceivably implement a sequential activation of Security Council and non-Security Council referrals in 2017. According to the final text, this decision need not be taken at a formal Review Conference and there will no doubt be arguments that there is no need to convene an entire Review Conference to consider the operationalization of text that has already been the subject to intensive negotiations. In any case, the text suggests that this decision is to be taken by the “same majority of States Parties as is required for the adoption of an amendment to the Statute”—a reference to Article 123, which urges adoption of amendments by consensus, but allows for a two-thirds majority to prevail where consensus cannot be reached.

D. The Provisions Adopted

Assuming the aggression amendments become operational, a prosecution can only go forward a year after the necessary states parties have accepted or ratified the aggression amendments pursuant to Article 121(5) in the absence of a Security Council referral. With the disappearance of the draft understandings on the interpretation of Article 121(5), the final resolution is concertedly ambiguous as to whether the Negative or Positive Understanding of Article 121(5) applies, so the Court will ultimately decide whether the ratification or acceptance of the aggression amendments by the putative aggressor state(s), the victim state(s), or both is a necessary precondition for jurisdiction (or even whether Article 121(5) is the appropriate amendment provision at all). In so deciding, it will no doubt be guided by Article

---

131 New PP 6: Resolved to activate the Court’s jurisdiction over the crime of aggression as early as possible, 11 June 2010 23:00.
132 Article 123(2) provides that the Secretary General, upon the request of a state party and the approval of a majority of the states parties, can convene subsequent Review Conferences.
22(2) which sets forth the principle of lenity.\textsuperscript{134} This determination will likely consume considerable pre-trial resources in the inaugural aggression case. In any case, no prosecution will go forward if the aggressor state is a state party that has availed itself of the essentially perpetual opt-out option or if the potential defendant is a national of a non-state party.

With either a state party\textsuperscript{135} or \textit{proprio motu} referral,\textsuperscript{136} the Security Council will operate as a preliminary filter mechanism. Six months after ascertaining inaction by the Council, the Prosecutor will go to the Pre-Trial Division and have to convince four judges to allow him to proceed with the aggression investigation.\textsuperscript{137} The Pre-Trial Division will no doubt take judicial notice of, and accord significant evidentiary weight to, the fact that the Security Council declined to either refer the situation itself or to make the necessary aggression determination.\textsuperscript{138} Presumably, this preliminary finding of the commission of an act of aggression will be subject to an interlocutory appeal—either as a decision on jurisdiction (Article 82(1)(a)) or as a “decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the

\textsuperscript{134} Article 22(2), ICC Statute (“The definition of the crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).

\textsuperscript{135} In the event of a state referral, the prosecutor can also decline to initiate an investigation for the reasons set forth in Article 53 of the ICC Statute, including that the particular prosecution is against the interests of justice. ICC Statute, Article 53.

\textsuperscript{136} As the Statute now stands, if prosecutor initiates the investigation \textit{proprio motu}, he will first need to prove to the Pre-Trial Chamber that there is “a reasonable basis to proceed” with the investigation at all, even prior to determining whether aggression charges might be warranted. ICC Statute, Article 15. If the prosecutor decides to bring aggression charges, he will need to pass through the two filters—the Security Council and Pre Trial Division. The latter filter also operates according to Article 15, but involves the Pre-Trial Division rather than just a Pre-Trial Chamber. It is unclear from the final text whether these two pre-trial forays could be collapsed into one. Theoretically, the prosecutor may need to get authority to proceed from the Chamber first and then go back to the entire division if he opts to pursue aggression charges. That said, the text suggests that prior to seeking the authority to proceed at all, the Prosecutor could first confirm inaction on the part of the Security Council and then—six months later—seek both the general approval to proceed as well as to bring aggression charges.

\textsuperscript{137} Article 15 does not give any participatory rights to States. During the preliminary investigation phase, prior to when the Prosecutor goes before the Pre-Trial Chamber for approval to proceed, Article 15(2) invites the Prosecutor to seek additional information and written or oral testimony from States, U.N. organs, non-governmental organizations and other reliable sources to determine the “seriousness” of the information received. Once the Prosecutor goes before the Chamber, however, only victims are entitled to make representations according to Article 15(3). Indeed, States have few participatory rights in the ICC Statute outside of the context of asserting the privilege of complementarity (Articles 18-19) and contesting the existence of preconditions to jurisdiction (Article 12), which is perhaps understandable given that with respect to the original crimes, the Court exercises jurisdiction over individuals and not States. Because the Article 15 process launches the formal investigation, it normally occurs prior to the identification of particular defendants. As a result, no provision allows an accused to participate in this process either. Thus, absent some amendment to the ICC Statute (which would likely be an amendment “of an institutional nature” governed by Article 122) or procedural rule to govern the aggression context, neither states nor defendants are entitled to raise arguments on behalf of the supposed aggressor state at the time that the Pre-Trial Division is to make the aggression determination.

\textsuperscript{138} ICC Statute, Article 15(3). In terms of the applicable burden of proof under Article 15, the Prosecutor must demonstrate a “reasonable basis to proceed” with a \textit{proprio motu} investigation according to Rome Statute Article 15(4). At the moment, this burden of proof appears to apply at the time of the Pre-Trial Division’s aggression finding as well. States did not contemplate altering this burden, although they might have.
proceedings” (Article 82(1)(d)). At any point, the Security Council can exercise its Article 16 powers and defer the prosecution for a year, on a renewable basis, so long as it can garner the necessary majority and avoid the exercise of the veto. In light of the circuitous and cumbersome jurisdictional regime created by the new amendments combined with the existing jurisdictional obstacles in the ICC Statute, aggression prosecutions will likely be rare and far between.

IV. Elements of the Package

Each element of the negotiations and final package implicates baseline concepts of public international law: the supremacy of the Security Council in the face of breaches of the peace, judicial independence, and the principle of state consent. The amendments are ultimately a triumph of voluntarism, which underlies both the opt out provision and the exclusion of non-states parties. With respect to consenting states parties, the amendments largely promote the judicial independence of the ICC, subject only to the extant Security Council deferral power. Although members of the P-5 had hoped to expand the Security Council’s power over ICC prosecutions in the aggression context, this was not achieved. If anything, the amendments signal another subtle erosion of Security Council power. It remains to be seen, however, how malleable the Article 13(b) referral and the Article 16 deferral powers are and if the Council attempts to use these provisions to surgically control the ability of the Court to prosecute the crime of aggression.

A. Judicial Independence Versus Security Council Supremacy in International Peace and Security

Because the definition of aggression seemed destined to remain indeterminately

---

139 It is not clear which person or entity would have standing to invoke such an appeal in the event that the Pre-Trial Chamber allowed a formal aggression investigation to proceed. At this preliminary stage, it is unlikely that an individual defendant will have been publicly identified or made an appearance before the Court. States are not given any rights to appeal under the Statute except within Article 57(d)(3) following a decision by the Pre-Trial Chamber to allow for in situ investigations in non-cooperating states. Allowing implicated States the right to appeal the aggression determination by the Pre-Trial Chamber would have required amendment to Article 82.

140 Assuming the filter allows the investigation into crimes of aggression to go forward and the Council does not defer, the normal pre-trial obstacles come into play. If the Prosecutor subsequently seeks a warrant for the arrest of a suspect, he will need to demonstrate that there are “reasonable grounds to believe that the person” committed the crime of aggression. ICC Statute, Article 58(1)(a). The charges will then have to be confirmed, requiring “sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.” ICC Statute, Article 61(5). Only once these hurdles are crossed, can the prosecution go forward. Conviction of the crime of aggression will require proof beyond a reasonable doubt that a state party committed an act of aggression and the defendant committed the crime of aggression. ICC Statute, Article 66.

141 The question of what limits, if any, are placed on the Security Council when it is operating within its sphere of competency is not new. See Judith Gardam, Legal Restraints on Security Council Military Enforcement Action, 17 MICH. J. INT’L L. 285 (1995-1996) (exploring to what extent the jus ad bellum and jus in bello apply to Council enforcement actions under Chapter VII). To the extent that such limits exist, their justiciability remains equally unresolved. See Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, paras. 13-40 (Oct. 2, 1995) (considering to what extent the Tribunal could assert judicial review over the decision of the Security Council to create it in response to the armed conflict in the former Yugoslavia).
expansive, the filter took on great importance. The debate came down to which entity—political or judicial, internal or external—would be empowered to determine whether a particular act of state constituted a “manifest” violation of the U.N. Charter. This, in turn, presented the question of whether the Court would have some measure of autonomy from the Security Council vis-à-vis the crime of aggression in the event of Council inaction. At the ends of the spectrum of possibilities under consideration were an exclusive and determinative Security Council filter and no filter whatsoever, which would allow state referrals and prosecutor-initiated cases to go forward unsupervised except insofar as they are subject to Article 16. Positioned between these polarities were alternative filters that could operate in lieu of a Council filter or in tandem with it in the event the Security Council declined, or failed, to make the necessary aggression determination. Of all the filter alternatives under consideration, only the Pre-Trial Chamber was both politically palatable to the majority of states parties and logistically feasible. The other alternative filter mechanisms remained controversial and presented problems of implementation that prevented their serious consideration as points of potential compromise.

There was no question that the Security Council could function as an aggression filter. Thus, debates centered on whether fealty to the U.N. Charter demanded, or in any case counseled, that the Council be given such a gate-keeping role, especially in light of the fact that it already possessed a controversial control mechanism in the form of its Article 16 deferral power. In their interventions, the P-5 (and particularly Russia, China and France) identified Security Council primacy and exclusivity in aggression prosecutions as both a legal imperative and a point of principle, although it was not always perceived as such by other states involved in the negotiations. The P-5’s legal arguments were Charter-based and turned on, inter alia, the language in Article 12(1) of the U.N. Charter (stating that while the Council is engaged with a situation, the General Assembly must refrain from making recommendations regarding the dispute), Article 24(1) (conferring “primary” responsibility on the Council for the maintenance of international peace and security), and Article 39 (empowering the Council to determine threats to the peace, breaches of the peace, and acts of aggression). Given this textual mandate in the Charter, the P-5 argued that no act of aggression could be considered a “manifest” violation of the Charter absent a Council determination to this effect. It was also argued that reserving an exclusive role for the Council was consistent with the text, logic, and intent of G.A. Res. 3314, which served as the backbone for the definition of the crime of aggression.

142 That the P-5’s veto operated differently when the Council was acting as a filter versus when it is activating its Article 16 power no doubt led to the Council filter’s unpopularity. Specifically, with respect to Article 16, the operation of the veto allows a prosecution to go forward, whereas with respect to the filter, the veto would have blocked an aggression determination and thus a prosecution.
143 U.N. Charter, Article 12(1) (“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”).
144 U.N. Charter, Article 24(1) (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).
145 U.N. Charter, Article 39(1) (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security.”).
146 This Resolution recognizes at a number of points the unique role of the Security Council. In particular, Article 2 acknowledges that there may be situations when the Council would decline to make an aggression finding notwithstanding a violation of Article 2(4) of the Charter or the Resolution itself. In addition, the Resolution reflects
Notwithstanding these textual arguments, the Security Council exclusivity thesis came under fire for being without basis in the text of the U.N. Charter and inconsistent with United Nations practice. To be sure, the Charter grants the Council an exclusive right to make an aggressive determination for the purposes of enforcement measures governed by Article 44. That said, the Charter envisions a role for other organs of the United Nations in this context. For one, Article 24(1)’s assignment of “primary” responsibility to the Council implies that this power is not exclusive.\footnote{See Crime of Aggression: Statement by the United States, p. 3 (September 26, 2001), http://www.state.gov/documents/organization/16461.pdf (arguing that “primary” refers to the fact that the maintenance of peace and security is the Council’s most important function, rather than that there exists some U.N. organ with concurrent power).} Indeed, Article 1(1) lists the purposes of the entire United Nations as including

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The General Assembly has invoked its recommendatory powers\footnote{See G.A. Res. 377 (1950) (asserting that the Assembly may make “appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force.”).} and the Uniting for Peace Resolution\footnote{See G.A. Res. 498 (Feb 1, 1951) (calling China’s actions in Korea “aggression”). Even the Security Council has invoked the Uniting for Peace Resolution. See S.C. Res. 120 (1956) (Hungary), S.C. Res. 129 (1958) (Lebanon), S.C. Res. 157 (1960) (Congo), and S.C. Res. 303 (1971) (Bangladesh).} to condemn state actions as aggression, especially in situations in which the Council did not act.\footnote{Such a determination would be considered an “important decision” subject to a two-thirds vote of those present and voting pursuant to Article 18(2) of the U.N. Charter. Article 18(2), U.N. Charter, supra note ___.} Presumably, the Assembly could continue this tradition had it been assigned a filter function.\footnote{See infra text accompanying notes ___.} The International Court of Justice has also been asked to rule on the legality of uses of force.

Where the legal arguments proved unconvincing, policy arguments rose to the fore. The United Kingdom in an intervention noted that the ICC will be most effective when it is working in tandem with—or at least not in opposition to—the Council as the latter body seeks to
maintain, or restore, international peace and security. Given that the crime involves both state and individual action, the P-5 posited an effective division of labor between the Council and the Court that would reflect each entity’s core institutional competencies while protecting both the integrity of the Charter system and the legitimacy of the Court. Indeed, it was argued that externalizing the aggression determination to the Council might actually insulate the Court from charges of politicization. The United States posited that states parties should refrain from establishing a system that invited tensions, if not outright conflict, between multiple United Nations bodies or that would generate potentially contradictory interpreters of aggression that might cause confusion within the international community. In particular, the specter of a “constitutional crisis” within the U.N. was raised were the Council to decline to make an aggression determination and the ICC to nonetheless convict a defendant on the basis of an aggression determination by another entity. Such a situation would inevitably undermine the credibility of all the institutions involved and provide an easy basis for observers (hostile or otherwise) to reject the Court’s judgment. Although not without some rhetorical force, arguments that the Charter system could not tolerate multiple interpretations of aggression proved unpersuasive, as this potential already exists in the tripartite U.N. framework where the Security Council, General Assembly, and International Court of Justice might all address the same situation pursuant to their Charter mandates. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ confirmed that to the extent that there may once have been a Charter prohibition of simultaneous action, it has been superseded by subsequent practice.

Other policy arguments were not fully exploited. It was largely left unsaid in the plenaries that a Council gatekeeper would account for the reality that uses of force are rarely evaluated on the basis of their lawfulness alone; rather political, moral, and even consequentialist considerations inevitably come into play. Preserving a determinative role for the Council in aggression prosecutions would enable the Council to insulate from prosecution uses of force whose purpose or results may be deemed legitimate or valuable, notwithstanding that an act of

---

153 See also Special Working Group on the Crime of Aggression (January 2007—ICC-ASP/5/SWGCA/1), reprinted in BARRIGA, supra note ___, at 131, 134 (noting the view that “the Court would benefit from the authority of the Security Council as there would be political backing for the Court’s investigation of situations.”).

154 Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in BARRIGA, supra note ___, at 109, 113 (setting forth arguments that allowing the Council to make the aggression determination would shield the Court from accusations of political bias).

155 The opposite scenario—where the Council finds aggression, but the Court acquits—would presumably not necessarily cause the same concerns, given that the Court must make a legal determination based on a particular definition of aggression, admissible evidence, and a penal burden of proof.

156 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 2004 I.C.J. Rep. 136, para. 27 (July 9) [hereinafter “Wall Advisory Opinion”] (noting an increasing tendency for the Assembly and the Council “to deal in parallel with the same matter concerning the maintenance of international peace and security.”). See also Certain Expenses of the United Nations (Advisory Opinion of July 20, 1962), 1962 ICJ Rep. 151, 163 (“The responsibility conferred [on the Security Council] is ‘primary’, not exclusive. … The Charter makes it abundantly clear … that the General Assembly is also to be concerned with international peace and security. .. [T]he functions and power conferred by the charter on the general Assembly are not confined to discussion, consideration, the initiation of studies and making of recommendations … [but include] ‘decisions’ … with dispositive forced and effect.”).

157 See INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO: THE KOSOVO REPORT, available at http://www.reliefweb.int/library/documents/thekosovoreport.htm (“The Commission concludes that the NATO military intervention was illegal, but legitimate.”).
aggression as understood by Article 8bis(2) may have been committed. Such situations might include instances of anticipatory self-defense in the face of an imminent attack, the defense of nationals or hostage rescues, hot pursuit or the abduction of fugitives, *bona fide* humanitarian interventions, armed responses to prior terrorist attacks (which may be directed against non-state actors or against states harboring terrorist groups or allowing their territory to be used as bases for terrorist attacks), regional responses to breaches of the peace or humanitarian crises, etc. Because the law is in flux in this area, keeping aggression prosecutions dependent on Security Council determinations would ensure that the Court remained consistent with the current state of the law and international relations and did not prosecute the crime of aggression in situations lacking some degree of political consensus as to whether a harmful act of aggression had been committed. Allowing the Security Council to filter uses of force before they went before the Court would also ensure that legitimate uses of force were not deterred by the fear that prosecutions would be launched by an unfettered Prosecutor or retaliating state party.  

This set of legal and policy arguments gained little traction in the face of the Council’s past practice. The Council has classified conduct as “aggression” on multiple occasions over the years, a fact often forgotten or misrepresented by the Council’s detractors. These aggression determinations, however, at times employed somewhat ambiguous or inconclusive rhetoric. Members of the P-5 occasionally abstained in these determinations, or the target state was an easily condemned pariah. In addition, it is unlikely that all of these examples would qualify as aggression under the ICC definition. In any case, there were as many, if not more, counterexamples where the Council failed to condemn conduct that would arguably fit the definition of aggression in Resolution 3314, even in situations that did not implicate one of the P-5 or a key

---

158 Van Schaack, *supra* note ___, at ___ (discussing potential for the crime of aggression to chill humanitarian interventions).


160 In some of the instances, the reference to aggression appeared in the preamble rather than the main text of the resolution. *See, e.g.*, S.C. Res. 386 (1976) (S. Rhodesia). In the alternative, the term was used as an adjective rather than a noun. *See, e.g.*, S.C. Res. 527 (1982) (South Africa).


162 *See supra* note ___ (resolutions against Southern Rhodesia and South Africa).

163 See, *e.g.*, S.C. Res. 405 (condemning private mercenary attacks in Benin); S.C. Res. 611 (1988) (condemning Israeli assassination in Tunisia).

164 Although rarely publicly raised, but nonetheless on the forefront of diplomats’ minds, were the 2003 invasion of Iraq by the United States and its coalition partners and the 2008 conflict in South Ossetia, Georgia, which involved the deployment by Russia of troops, bombing raids, and a partial occupation of Georgia. Neither of these incidents provoked Council action. The Iraqi invasion did, however, give rise to a joint declaration by Russia, Germany and France calling for avenues short of war to be pursued. Joint Declaration By Russia, Germany and France on Iraq (Feb. 10, 2003), available at https://pastel.diplomatie.gouv.fr/editorial/actual/ael2/bulletin.gb.asp?liste=20030211.gb.html. The Security Council resolutions surrounding the war in Iraq are compiled here: http://www.casi.org.uk/info/scriraq.html.
ally.\textsuperscript{165} This haphazard practice was cited as evidence that the Council could not be trusted to make unbiased, principled, or even consistent aggression determinations and that the Council would be paralyzed by political dissent, which would in turn paralyze the Court.

This criticism of the Council’s past practice, while warranted in some circumstances, failed to acknowledge that there are situations in which the Council might decline to make an aggression determination on the merits rather than on self-serving grounds. For example, the Council might decline to make an aggression determination following a minor international scuffle that might best be resolved through diplomacy without Council action.\textsuperscript{166} On the opposite end of the spectrum, there may be situations where a Council aggression determination might escalate tensions, as in the volatile Middle East or on the nuclearized Korean Peninsula. The Council may likewise avoid an aggression determination in conflicts without a clear first mover that is responsible for launching or escalating the dispute\textsuperscript{167} or where there are multiple states that might be in both aggressive and aggressed postures, as in the Great Lakes region.\textsuperscript{168} In addition, there may be situations (including acts of terrorism) involving putative non-state actors where state attribution is difficult on either evidentiary or political grounds or only possible with reference to classified information. In these cases, the Council (if it even addresses the situation) often condemns the act of violence without identifying any responsible state.\textsuperscript{169} Finally, of course, there are situations in which an act of violence might violate the U.N. Charter if analyzed solely on legal grounds, but which might otherwise be deemed legitimate, desirable, or justified. These situations might provoke a rebuke by the Council but no sanction.\textsuperscript{170} In any case, all of this past practice is of limited use in predicting future Security Council practice under the new ICC regime, given that the determination that some state party committed an act of aggression never had the talismanic status that it now has under the new Article 15bis.

While the operation of the Council filter was relatively straightforward, though distrusted, the other external filters under consideration—the International Court of Justice and

\textsuperscript{165} The most oft-cited example was the invasion of Kuwait by Iraq, which was deemed “a breach of international peace and security” rather than an act of aggression. S.C. Res. 660 (1990). The Council never denounced Turkey’s action in Cyprus as aggression \textit{per se} either, although arguably Resolution 3314 would have supported such a determination. Both situations did, however, receive Council condemnation. \textit{See also} S.C. Res. 353 (1974) (demanding an end to foreign intervention in Cyprus and the withdrawal of foreign troops).

\textsuperscript{166} Examples where the Council did not intervene include the 1977 Egypt/Libyan War; the 1981 Ecuador/Peru border incident; the 1985 Agacher Strip Incident between Burkina Faso and Mali; the 2009 Thai/Cambodian border standoff; and the 2009 Colombia/Venezuela abduction incident.

\textsuperscript{167} In these mutuality cases, to the extent that the conflict is addressed, the Council takes a “pox on both your houses” approach. Examples include the Iran/Iraq War (\textit{see}, e.g., S.C. Res. 514 (1982) and subsequent resolutions from 1982-87); the Eritrea/Ethiopia War (\textit{see}, e.g., S.C. Res. 1177 (1998) and subsequent resolutions from 1998-2000); and the conflict in Nagorno-Karabakh pitting Azerbaijan against Armenia (\textit{see}, e.g., S.C. Res. 827 (1993)).

\textsuperscript{168} \textit{See}, e.g., S.C. Res. 1778 (2007) and 1861 (2009) (raising concerns about the situation in the Great Lakes region).


\textsuperscript{170} Examples include the 1998 intervention in Kosovo, the 1981 attack by Israel against Iraqi reactors (\textit{see}, e.g., S.C. Res. 487 (1981)); and the U.S. attacks on Sudan and Afghanistan after the 1998 embassy bombings.
the General Assembly—presented their own problems. Although the International Court of Justice has never condemned a state for committing aggression *per se*, even in the most compelling of circumstances, \(^{171}\) there is general agreement that the ICJ could do so as a theoretical matter if confronted with the right facts. Logistical problems loomed large with respect to a potential ICJ filter, however. In particular, it was unclear if the Court would make the necessary determination pursuant to its advisory or contentious jurisdiction—neither of which provides a clean (or particularly efficient) option. Activating the Court’s contentious jurisdiction would likely require all relevant states \(^{172}\) to have accepted the Court’s compulsory jurisdiction pursuant to Article 36(2) of the ICJ Statute. \(^{173}\) These states parties could potentially refer a matter *inter partes* that might require an aggression determination to the ICJ pursuant to Article 36(1) of the Court’s Statute. The relevant states parties may also have been parties to unrelated bilateral treaties—such as Friendship, Commerce, and Navigation treaties—that designate the ICJ as the arbiter of any dispute arising out of the interpretation or application of the treaty. In the past, such treaties have provided jurisdiction in contentious cases involving uses of force. \(^{174}\)

The Court’s advisory jurisdiction is limited by Article 65(1) of the ICJ Statute to “any legal question.” Arguably, a determination of whether a particular state engaged in an act of aggression presents a host of quintessentially factual questions given all the variables involved. At the same time, the Court has interpreted this language rather loosely by noting that a question relating to “the legal consequences arising from a given factual situation” under the rules and principles of international law remains a legal question. \(^{175}\) As a result of this approach, several of the Court’s advisory opinions have been criticized as disguised contentious cases. \(^{176}\) The Court has even issued advisory opinions in situations in which it pronounced upon the legal obligations and compliance of states not subject to the Court’s compulsory jurisdiction. \(^{177}\) That said, the

\(^{171}\) Even in the *Armed Activities in the Congo* case—where Uganda launched an invasion and air attacks and eventually occupied parts of the territory of the Democratic Republic of Congo—the Court did not find aggression *per se*. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2006 I.C.J. (Dec. 19), para. 163 (holding the “obligations arising under the principles of non-use of force and non intervention were violated by Uganda”) and para. 165 (concluding that Uganda’s conduct constituted a “grave violation of the prohibition on the use of force expressed” in Article 2(4)).

\(^{172}\) See, e.g., *Case of the Monetary Gold Removed from Rome in 1943* (Italy v. United States, United Kingdom & France), 1954 I.C.J. Rep. 19 [hereinafter “Monetary Gold”]. The *Monetary Gold* case might be read to require all states involved in a putative act of aggression to have accepted the Court’s contentious jurisdiction before the Court could have exercised any filter function assigned to it. *But see Case of the Legality of Use of Force* (Yugo. v. Belg., Ger., Italy, Netherlands, Port., Spain, U.K., U.S.A.) 1999 I.C.J. Rep. (allowing case to go forward against members of NATO in the absence of Spain and the United States, which had lodged reservations to Article IX of the Genocide Convention on which Serbia & Montenegro had premised jurisdiction).

\(^{173}\) A total of sixty-six such declarations have been lodged with the Court. http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=JP.


\(^{175}\) In the *Wall* Advisory Opinion, for example, the Court at the request of the General Assembly declared that parts of the wall built by Israel violated international law. The Court had to find a number of facts in connection with this opinion, many of them adverse to Israel, which had not consented to the Court’s jurisdiction. *Wall* Advisory Opinion, *supra* note ___, at para. 37.


\(^{177}\) *Wall* Advisory Opinion, *supra* note ___.
Court regularly acknowledges the relevance of state consent vis-à-vis its advisory jurisdiction, but suggests that it is apposite to the propriety of the Court’s exercise of jurisdiction rather than its legal competence to do so.

The Court may give an Advisory Opinion at the request of the organs of the United Nations (including the General Assembly or the Security Council) or specialized agencies authorized to make such a request (such as the International Labour Organization (ILO), Food and Agriculture Organization (FAO), etc.) pursuant to Article 96 of the U.N. Charter so long as the request falls within the scope of activity of the requesting entity. None of the latter agencies is particularly relevant to the aggression context, so an Advisory Opinion filter would have inevitably involved either the Council or the Assembly. The use of the term “may” in Article 65(1) also indicates that the Court is not required to given an advisory opinion when asked. Only “compelling reasons,” however, should lead the Court to refuse to give such an opinion and the Court has never declined to give an Advisory Opinion on this discretionary basis. Perhaps now that the Court’s docket is full, it will be less inclined to accept requests for Advisory Opinions, although it would likely have been hard pressed to reject a request when the work of the ICC depended upon it. As a practical matter, there is no way to force implicated states parties to participate in, or assist, any such proceedings before the ICJ.

For its part, the General Assembly filter—though deemed a more “democratic” solution by some—received only tepid support. Assuming the Charter could be read to support a General Assembly filter process as a function of the Assembly’s recommendatory powers, the specter of politicization loomed large with this option. While many participants argued that a Security Council filter would indelibly politicize the Court, others argued that assigning any role to the General Assembly in an aggression prosecution would render the proceedings equally if not more politicized (and potentially paralyzed).

Although these alternative filters appeared to present points of potential compromise, the principles underlying the positions of the P-5 and the proponents of an independent Court were

179 *Wall Advisory Opinion*, *supra* note ___, at para. 44 (“the Court has discretionary power to decline to given an advisory opinion even if the conditions of jurisdiction are met.”).
180 Id.
181 The one time the Court declined to give an advisory opinion was on jurisdictional grounds in response to a 1993 request by the World Health Organization, which sought an opinion on the legality of nuclear weapons. The Court ruled that the subject matter of the request was outside the scope of the WHO’s activities. The General Assembly then submitted the same question to the Court a year later in Resolution 49/75K (Dec. 15, 1994), and the Court proceeded to issue the requested opinion. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of July 8, 1996), 1996 I.C.J. Rep. 226. The Permanent Court of Justice, by contrast, did in one case decline to give an Advisory Opinion in a matter based on “the very particular circumstance of the case, among which were that the question directly concerned an already existing dispute” and one of the parties objected to the proceedings and refused to take part in any way. *See Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. 226, para. 14 (July 8), citing *Status of Eastern Carelia*, 1923 P.C.I.J. Series B, No. 4. In the *Wall* Advisory Opinion, however, the Court noted that the lack of consent to the Court’s contentious jurisdiction by interested states had no bearing on the Court’s jurisdiction to given an advisory opinion. *Wall Advisory Opinion*, *supra* note ___, at para. 47. In this regard, *Eastern Carelia* may be said to have been effectively been “over-ruled,” or at least confined to its facts, in favor of a form of de facto compulsory advisory jurisdiction.
182 Schaeffer, *supra* note ___, at 432.
183 See supra text accompanying notes ___.
ultimately irreconcilable. Indeed, if there was any collective red line amongst the P-5’s diverse set of interlocutors it was that the Court must remain liberated from Security Council control beyond Article 16, even in the context of the crime that touches most closely on the Council’s prerogatives. For their part, the P-5 viewed any erosion of exclusivity as an end run around the U.N. Charter and their veto power. This debate, which occurred against the backdrop of a persistent yet faltering Security Council reform movement, surfaced intense antipathy toward the Council. Although the Chair and President retained Alternative 1 (the exclusive Security Council filter) in Article 15bis until the final days of the negotiations in Kampala, this was due solely to the status of its proponents and not because it enjoyed any sort of broad-based support among negotiating parties. As such, Alternative 1 was likely doomed from the start. In the end, the Chair and President could not credibly include Alternative 1 in the final Non-Paper or package without provoking a collective backlash that would likely have sunk the negotiations. By holding out the possibility of an exclusive Security Council filter until the last minute, the Chair and President kept the P-5 engaged and set the stage for them to accept as consolation prizes the opt out clause and the exclusion of non-states parties from the aggression provisions.

While the elimination of an exclusive Security Council filter in Article 15bis was not a surprise, it was somewhat unexpected in Article 15ter, addressing Security Council referrals. The record does not disclose which state proposed this change, and none of the P-5 came out against it even though it removed a Council control mechanism. Without such a filter, it is unlikely that the Security Council will refer a situation involving acts of aggression to the Court if it does not support the leveling of aggression charges (or at least accept their possibility). This lack of a filter power threatens to reduce Security Council referrals, diminish the role of the Council in the work of the ICC, and potentially limit the number of cases coming before the Court—especially cases involving non-states parties—which can only be triggered by the Council. This may have been the object of removing the filter in Article 15ter all along. It remains to be seen whether the Council will attempt to use its remaining control mechanisms to constrain the Prosecutor’s ability to bring aggression charges to the Court.

B. Existing Security Council Control Mechanisms

The ICC is already subject to significant Security Council control, both in terms of the Council’s power to refer situations involving non-states parties under Article 13(b) and in deferring prosecutions under Article 16. In light of the latter provision, the principle of separation of powers is already imperfectly incorporated in the ICC Statute. Adding the crime of aggression into the Court’s subject matter jurisdiction promised to revive and indeed sharpen debates about the optimum balance between Security Council hegemony in situations involving threats to and breaches of the peace and the principle of judicial independence. Although some states offered an additional control mechanism for the Security Council in the form of the red

---


185 Brazil, which happened to hold a rotating spot on the Security Council while these debates were ongoing in Kampala, has been a leader in this effort, but it undercut its credibility at the Conference by virtue its vote against Iranian sanctions. See S.C. Res. 1929 (June 9, 2010).
light proposal—which would have empowered the Council to reject *ex ante* any aggression charges while allowing other charges to go forward to ensure some measure of accountability—the final amendments add nothing to the Council’s textual ability to control which charges the Prosecutor may bring in any particular situation.

None of the factions in Kampala rallied behind the red light option. Although the proposal seemed offered as a concession to the Security Council to give it more flexibility than Article 16, the P-5 rejected the offering given that it was pitched as a check on a Pre-Trial Chamber filter and an alternative to an exclusive Security Council filter. Although the P-5 might have preferred an additional red light function to having to fall back on the power already vested in them by Article 16,\(^{186}\) they could not express support for such a provision without undermining their principled arguments on Council exclusivity. Even though the red light proposal seemed at first glance to respect, if not enhance, the Security Council’s powers, it still raised the potential for inconsistent pronouncements by pitting a political body against a judicial one at the very time that the international community should be united against an act of aggression. The timing of the proposed red light function was such that it would force a matter onto the Council’s agenda six months or so after the events in question. The concern was that this could divert the Council from its response to that particular threat to the peace as well as from other emergent crises. The ABS coalition for its part objected to giving the Security Council another control mechanism that could stymie aggression prosecutions.\(^{187}\) With neither side in support, the proposal ultimately fell away.\(^ {188}\)

And so, the Council’s only control mechanisms are found in Article 13(b) and Article 16. Article 16 at first glance appears to be a rather blunt instrument for the Security Council to influence what charges may be brought before the Court in a particular situation, since by its terms it seems to result in the deferral of the investigation and prosecution of an entire situation

---

\(^{186}\) The Council veto would have operated similarly under both the red light function and an Article 16 deferral: a single veto would allow a prosecution to go forward. Presumably, however, it would have been more difficult to invoke the red light in light of its more permanent nature.


\(^{188}\) As an alternative to the red light proposal, former Ambassador for War Crimes, David Scheffer, advanced a proposal in Kampala that was premised on three potential actions by the Security Council: an affirmative determination of an act of aggression; a negative determination of an act of aggression; and no determination of whether or not an act of aggression was committed. In the event of an affirmative or positive determination, the filter would allow an aggression prosecution to proceed. In the event of a negative determination, the filter would operate to block an aggression prosecution from proceeding. The Pre-Trial Chamber would act as a filter only in the event that the Council did not make a determination of either character. The proposed language read as follows with changes to the Chair’s Non-Paper in bold and strike thorough:

\begin{quote}
(4) bis Where no *such* determination of either character 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 unless the Security Council has directed otherwise. …
\end{quote}

Under Ambassador Scheffer’s model, the Council would then have a second “red light” opportunity to block the prosecution. The proposal raised complex questions of Council practice, particularly with respect to the voting rules. In particular, the model seemed to contemplate too many scenarios that would allow the Pre-Trial Chamber to serve as the filter (as where neither a negative nor a positive determination was made) to be acceptable to the P-5.
rather than operating as a line item veto. Nonetheless, the intense controversy surrounding Security Council Resolutions 1422 and 1487 suggest that the Council might at some point attempt to use its Article 16 power (and perhaps its Article 13(b) referral power for that matter) more surgically to dictate which charges may be brought in particular situations or


191 S.C. Res. 1422 (2002), available at http://daccess-ods.un.org/TMP/3780558.7053299.html. In June 2002 (just shy of two weeks before the ICC Statute entered into force), the United States vetoed a peacekeeping mission in Bosnia-Herzegovina out of fear that participating U.S. nationals would be subjected to prosecution for war crimes before the ICC (even though the International Criminal Tribunal for the former Yugoslavia would likely have had primary jurisdiction). At this time, the United States sought passage of a Chapter VII resolution that would have imposed a permanent bar on the prosecution of any United States peacekeeper in Bosnia-Herzegovina, but the resolution did not garner support. Detractors argued that the proposed resolution was ultra vires under the Charter in the absence of an extant threat to the peace, amounted to an unlawful revision of Article 16 (which is ostensibly meant to be used on a case-by-case basis after an investigation has begun), and undermined the credibility of the Council and the integrity of the ICC. The U.S. then sponsored a resolution invoking Article 16 and exempting all United Nations peacekeepers ex ante from ICC jurisdiction for one year. S.C. Res. 1422 (2002). The operative language of Resolution 1422 is:

1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.


192 S.C. Res. 1487 (June 12, 2003) (renewing Resolution 1422 with abstentions by France, Germany and Syria). Resolution 1487 was not renewed a year later, because it expired right as photographs from Abu Ghraib began to be released and it was clear that the United States could not garner the political support it would need in the Council to extend Resolution 1422 again. See Marco Roscini, The Efforts To Limit The International Criminal Court’s Jurisdiction Over Nationals Of non-Party States: A Comparative Study, 5 The Law & Practice of Int’l Courts & Tribunals 495, 500 (2006). Similarly, S.C. Res. 1497 authorized the establishment of a multinational force in Liberia and provided that “current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing state.”

193 Besides the two peacekeeping resolutions, the Council has yet to invoke Article 16 as it was originally conceived. Efforts to convince the Council to defer the prosecution of Sudanese President Al Bashir did not bear fruit. See International Criminal Court Prosecutor Says Security Council Should Be Prepared for “United Action” To Ensure Execution of Sudanese President’s Arrest Warrant, SC/9516 (Dec. 3, 2008) (discussing debates about potential deferral), available at http://www.un.org/News/Press/docs/2008/sc9516.doc.htm.

194 When the Security Council referred the situation in Darfur to the Court in Resolution 1593 (2005), it also added language to the effect that any nationals from a non-party state involved in Sudan would be subject to the exclusive jurisdiction over the legality of Resolution 1422). The Bosnian peacekeeping mission was thereafter immediately renewed.

195 See for example, Bryan MacPherson, The Efforts To Limit The International Criminal Court’s Jurisdiction Over Nationals Of non-Party States: A Comparative Study, 5 The Law & Practice of Int’l Courts & Tribunals 495, 500 (2006).  Similarly, S.C. Res. 1497 authorized the establishment of a multinational force in Liberia and provided that “current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing state.”

196 The law and practice of international courts & tribunals.
cases. It remains to be seen to what extent the terms of the ICC Statute constrain the Council’s exercise of its Chapter VII powers and whether the Court would over-ride the Council’s preference that no aggression charges be considered within a particular situation, assuming the Council is able to garner the necessary majority and avoid the exercise of the veto to make such a request or decision.

C. State Consent

Both the opt out and non-state party exclusion provisions are premised on the principle of state consent, the defining feature of Box 3 (and a component of Box 1 for that matter). This concept eventually rose to the forefront of the negotiations as an appealing way to limit the Court’s ability to exercise jurisdiction over the crime of aggression without further privileging the Security Council or forsaking aggression prosecutions to power politics. While it was always assumed that the Security Council could refer a situation involving potential aggression charges to the Court independent of whether the relevant state(s) were parties to the Statute or had accepted the aggression amendments, the question of state consent became an issue in so far as non-Security Council triggers and filters were under consideration. In many respects, the debates over the appropriate entry into force provisions were really proxy arguments about consent given the strong legal and textual arguments in favor of the Negative Understanding of Article 121(5).

The theory espoused by proponents of Box 3 for requiring state consent was that the crime of aggression implicates state sovereignty more than any of the other three crimes where a state’s act of aggression serves as a predicate for the prosecution of an individual for the crime of aggression. None of the other ICC crimes is so dependent on state action. Although it may be the product of a state policy, genocide may also be committed by private individuals. Any war crimes occurring in international armed conflicts will inevitably be committed by agents of the jurisdiction of the contributing state. “The inclusion of this paragraph constituted the price to pay in order to secure the abstention of the US in the [referral] vote.” Roscini, supra note ___, at 501 n. 12.


See Article 125, U.N. Charter (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”) and Article 103, U.N. Charter (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”). Although these articles technically only apply to states and not to international organizations with separate legal personality, it could be argued that the Court is ultimately a creature of states acting collectively. See Nigel White & Eric Myjer, Editorial, 7 J. CONFLICT & SECURITY L. 145, 145 (2002).

But see Amann, supra note ___, at 191-93 (arguing that the three original ICC crimes implicate state sovereignty as well).

Article IV, Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948 (“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”). See Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons) (June 1, 2001) (discussing genocide charges against businessman).
state, but most of the same crimes are also prosecutable when committed by non-state actors in the context of a non-international armed conflict.\textsuperscript{199} Even when war crimes are committed by state actors, however, the state is not directly implicated in any element of the crime other than the circumstantial element concerned with the classification of the conflict, although the Court is encouraged to focus on those war crimes that are in fact part of a “plan or policy or as part of a large-scale commission of such crimes.”\textsuperscript{200} A prosecution for crimes against humanity as that offense is formulated in the ICC Statute implicates state action the most: a conviction requires proof that a state or organization was acting pursuant to a plan or policy against a civilian population.\textsuperscript{201} Nonetheless, the perceived exceptionality of the crime of aggression as a function of state action undergirded arguments in favor of premising of jurisdiction on state consent.

The centrality of the determination of a state act of aggression to a prosecution for the crime of aggression invokes a foundational principle governing the jurisdiction of international adjudicative organizations first articulated in \textit{Monetary Gold}\textsuperscript{202} and later re-affirmed in the \textit{Case Concerning East Timor}.\textsuperscript{203} According to this principle, an international tribunal is not competent to pronounce upon the rights and duties of states absent their consent.\textsuperscript{204} In other words, a state

\textsuperscript{199} See Article 8, ICC Statute. Given the almost complete convergence of war crimes committed in international and non-international armed conflicts, conflict classification has become virtually irrelevant from the perspective of penal responsibility for all but a handful of war crimes. This convergence was tightened in Kampala with the adoption of the Belgian amendment to Article 8 enabling for the first time certain weapons crimes to be prosecuted in non-international armed conflicts. See Resolution RC/Res.5 (16 June 2010), Amendments to Article 8 of the Rome Statute, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf.

\textsuperscript{200} Article 8(1), ICC Statute.

\textsuperscript{201} Article 7(3) of the ICC Elements of Crimes states: “‘Attack directed against a civilian population’ in these elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population.” International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

\textsuperscript{202} \textit{Monetary Gold}, supra note ___. In \textit{Monetary Gold}, the ICJ was asked to determine whether the United Kingdom or Italy had a superior claim to Albanian gold that had been held by Italy, but seized by Germany during WWII. Italy claimed the gold as reparations for damage done by Germany; the U.K. sought it in partial execution of the \textit{Corfu Channel} judgment. Albania was not before the ICJ. In dismissing the case, the ICJ ruled that international tribunals cannot adjudicate a matter in which the very subject matter of the dispute involves the legal interests of states not before it. Albania would not have been bound by any judgment had the ICJ reached the merits; nonetheless, the ICJ considered that state’s legal interests to be sufficiently affected to constitute a necessary and indispensable party to the proceedings.

\textsuperscript{203} \textit{Case Concerning East Timor} (Portugal v. Australia), Judgment of 30 June 1995, 1995 I.C.J. Rep. 90, available at http://www.icj-cij.org/docket/files/84/6949.pdf. There, the ICJ was asked to invalidate a treaty resolving sovereignty over the so-called Timor Gap. The treaty had been entered into by Australia and Indonesia, which had been occupying Timor L’Este since 1975. Portugal—claiming to be exercising its duties as administering power of Timor L’Este—argued that Indonesia’s unlawful occupation of the island precluded Australia from entering into a treaty with Indonesia concerning Timorese resources. Rather, Portugal argued, only Portugal as the administering power could enter into treaties on Timor L’Este’s behalf. Australia had recognized the \textit{de facto} incorporation of Timor L’Este into Indonesia since 1978, although it had a standing objection to the way in which the incorporation was effectuated. Australia argued that in addressing Portugal’s claims, the ICJ would be required to rule on the lawfulness of Indonesia’s entry into and continuing presence in Timor L’Este. The Court declined to rule on Portugal’s claims, holding that to do so would required it to pronounce upon the legality of the initial use of force by Indonesia, a state not before the ICJ.

\textsuperscript{204} See generally Dapo Akande, \textit{Prosecuting Aggression: The Consent Problem and the Role of the Security Council} (May 2010) (draft paper on file with the author). Akande makes a connection between the consent principle and the
cannot be forced to submit to international jurisdiction.\textsuperscript{205} To be sure, it might be argued that the principle does not apply to international criminal tribunals, such as the ICC, which do not strictly assert jurisdiction over states.\textsuperscript{206} Indeed, the Nuremberg and Tokyo Tribunals pronounced on acts of aggression committed by Germany and Japan, although the definition of crimes against the peace did not technically require such a determination. Neither Tribunal enjoyed the consent of the aggressor state, unless Japan and Germany can be considered to have constructively consented to jurisdiction by virtue of their defeat, subjugation, and occupation.\textsuperscript{207} Nonetheless, where an aggression prosecution is directly premised on a determination of state action, the Monetary Gold principle seems highly relevant.

Arguably, all states implicated in an act of aggression, as either aggressors or victims, would need to have consented for the ICC to have jurisdiction.\textsuperscript{208} The aggression negotiations were always rather artificially premised on a classic binary conflict, with a clear aggressor and aggressed state. This simplistic model belies the fact that many conflicts involve coalitions on both sides,\textsuperscript{209} lack a proverbial first mover, or may position states in both aggressive and aggressed postures, such as in the Great Lakes region of Africa.

The imperative of state consent is especially compelling given that there is no apparent mechanism for the aggressor state to intervene in a criminal prosecution before the ICC (except in the complementarity phase,\textsuperscript{210} where the merits of whether an act of aggression was committed have no bearing, or when an in situ investigation is ordered\textsuperscript{211}). To be sure, it could be argued that there are no direct or binding implications to an ICC determination that a state has necessity of a Security Council trigger or exclusive referral in the context of a situation in which the actions of non-consenting states serve as the predicate to a prosecution for the crime of aggression. He frames his Council-exclusivity argument not from the perspective of ensuring consistency with the Charter framework but rather from the perspective of ensuring that the ICC is in compliance with legal rules governing the jurisdiction of international judicial institutions generally. In other words, a Council override of state consent goes to the very foundations of judicial competence. In his view, having a Council filter (and indeed, he goes further to suggest that there should be an exclusive Council trigger for aggression) actually serves to expand the power of the ICC by essentially getting around the Monetary Gold principle, which would otherwise constrain the Court when the conduct of non-consenting states is at issue.

\textsuperscript{205} In Alien Tort Statute litigation, United States courts have made clear that political leaders can be sued in their individual capacity, and the state is not a necessary or indispensable party that must be joined.\textsuperscript{206} See Akande, supra note ____, at ___.

\textsuperscript{207} Akande, supra note ____, at ___. Akande notes that it could be argued that the post-WWII tribunals were essentially domestic occupation courts that would not be bound by the Monetary Gold principle. Id. at ___.

\textsuperscript{208} This harkens back to the classic si omnes clauses of the international humanitarian law treaties of yesteryear. See, e.g., Article 24, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva (July 6, 1906), available at http://www.icrc.org/ihl.nsf/FULL/180?OpenDocument (“The provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention”). The Nuremberg Tribunal rejected the application of the si omnes clause in Article 2 of the 1907 Hague Convention on the ground that their provisions constituted customary international law and were thus binding on non-signatories on that basis. Nuremberg Judgment, supra note ____, at 248-249 (“But the Convention expressly stated that it was an attempt ‘to revise the general laws and customs of war,’ which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.”).

\textsuperscript{209} See Patricia A. Weitsman, Wartime Alliances Versus Coalition Warfare: How Institutional Structure Matters in the Multilateral Prosecution of Wars, STRATEGIC STUDIES Q. 113 (Summer 2010) (discussing modern multilateral warfare).

\textsuperscript{210} ICC Statute, Articles 17-19.

\textsuperscript{211} ICC Statute, Article 57(d)(3).
committed an act of aggression. The ruling, for example, will carry no *res judicata* effect in any subsequent inter-state adjudication. This argument belies the expressive force of a judicial determination, which will inevitably carry great moral weight in dealings and negotiations between the relevant parties and the international community and will in any case have evidentiary significance in any subsequent inter-state dispute. Moreover, a declaration of rights standing alone is often conceived of as a remedy in international adjudications.²¹²

As state consent emerged as the principle around which a consensus on the aggression amendments began to coalesce, the P-5 were hard-pressed to advance counter arguments, especially given the centrality of state consent in public international law²¹³ and the apparent willingness of their allies to voluntarily relinquish, or at least encumber, what may be considered core prerogatives of state sovereignty.²¹⁴ The P-5 marshaled arguments to the effect that states parties could not consent their way out of prior commitments to the U.N. Charter framework and their prior delegation of power and responsibility to the Security Council and its system of collective security. This critique was premised, however, on a robust view of Security Council primacy and exclusivity in the aggression context that was belied by subsequent United Nations practice (and the Charter itself to a certain extent).²¹⁵ The P-5 fell back on arguments that allowing states to opt in to the aggression regime would impede coalition building in light of the fact that states’ exposure to prosecution and tolerance for the uncertainty inherent to the aggression provisions would differ among potential coalition partners. It is no doubt true that the aggression provisions may exert a chilling effect on collective uses of force, thus paradoxically leading to more unilateral actions by states that are not subject to the aggression provisions. Nonetheless, this argument was not compelling enough to overcome the obvious utility and attraction of a state consent regime.

In the face of this, the P-5 were left with arguments that the choice to accept jurisdiction was simply deontologically wrong and that states parties should be protected from themselves—arguments sounding of a strong, and no doubt alienating, paternalism.²¹⁶ It could not be credibly argued that states lack decisional capacity and, while there are areas in the law where we deny

---


²¹³ State consent has historically provided the basis for the formation and binding nature of international norms (as where states voluntarily join treaties, engage in state practice, and articulate *opinio juris*) as well as for the jurisdiction of international institutions. See *S.S. Lotus*, PCIJ Ser. A, No. 10, at 18 (1927) (“the rules of law binding on states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. … Restrictions upon the independence of states cannot therefore be presumed.”). *See generally* J. Shand Watson, *State Consent and Sources of International Obligation*, 86 AM. SOC’Y INT’L L. PROC. 112 (1992) (defending classical theory). *But see* Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUST. Y. B. INT’L L. 22 (1988-1989) (arguing that consent does not underlie the formation of customary international law).

²¹⁴ See Amann, *supra* note ___, at 205 (noting how states relinquish power to prosecute their nationals when they create international tribunals).

²¹⁵ See text accompanying notes ___.

full agency, a state’s submitting its nationals to potential prosecution for aggression can hardly be one of them in light of the burgeoning system of international criminal justice. To be sure, the preservation of sovereignty, the maintenance of a sphere of inscrutable domestic jurisdiction, and freedom from outside intervention are presumed to be shared values that historically formed the basis for the international legal order. Increasingly, however, states are voluntarily and deliberately subjecting themselves (or their nationals) to international institutions (including human rights and trade tribunals) that are collectively eroding these prerogatives. These classical sovereign values are thus giving way to other more cosmopolitan, indeed even communitarian, impulses that suggest the emergence (or at least a glimmer) of a new shared political morality. Like any system of government or institution, states involved in the aggression negotiations evinced a willingness to subject themselves to a system that will both constrain and, it is likely hoped, protect them. In the face of this trend, the P-5 were hard pressed to counter arguments premised on state consent.

1. The Opt Out

The opt out provision contained in Article 15bis(4) emerged as one of the two prices to be paid by the ABS coalition for removing the Security Council filter from Article 15bis. Although no doubt a bitter pill for these states to swallow, it had some appeal. For one, it suggested a way to avoid the unwelcome implications of the Negative Understanding of the second sentence of Article 121(5), which was essentially an opt in regime that enabled states parties to passively avoid the aggression provisions by simply failing to ratify them. The opt out seems sub silentio premised on a Positive Understanding of Article 121(5) since Article 15bis(4) implies that the Court can exercise jurisdiction over any state party that has not lodged an opt out declaration, regardless of whether that state party has ratified or accepted the amendments. Under this interpretation of the second sentence of sub-paragraph (5), all that matters is that the putative victim state has accepted the amendments. If so, then a potential crime of aggression involving the territory of the aggressed state can come before the Court regardless of whether the putative aggressor state party has ratified or accepted the amendments. As a result, and by default, would-be aggressor states parties are bound by the amendments absent their ratification/acceptance so long as any of their potential victim states are so bound. Under this scenario, the opt out works to overcome this default by allowing aggressor states to take affirmative action to avoid the operation of the Positive Understanding. By flipping the power of

---

217 For example, according to Article 7 of the Third Geneva Convention governing prisoners of war: “Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.” Convention (III) relative to the Treatment of Prisoners of War, Geneva (Aug. 12, 1949), available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fef854a3517b75ac125641e004a9e68. See also John Locke, Two Treatises of Government (1690) (arguing that a person cannot consent to enslavement).


219 See Article 15bis(4), Aggression Resolution, supra note ___ (“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 [sic] at any time and shall be considered by the State Party within three years.”).

220 See supra note ___.

48
inertia in favor of jurisdiction, and requiring an affirmative act on the part of states, the opt out clause provides an additional obstacle to those states parties that might want to avoid the aggression provisions. It also offers a toehold from which elements of international and domestic civil society can mount a political shame campaign to encourage states to decline the opt out.

The opt out can, of course, be made to work under the Negative Understanding of the second sentence of Article 121(5), but it does seem a bit awkward. Under the Negative Understanding, the nationals of states parties that have not ratified or accepted the amendments cannot be prosecuted for the crime of aggression. There thus remains no obvious incentive for a state party to ratify the aggression amendments, because it is not bound by them absent ratification. One can imagine, however, that states parties may ratify the amendments only to opt out of them if legislators support the aggression amendments in theory, but not as applied to their nationals, and want to contribute to the thirty ratifications necessary to bring the amendments into effect.\textsuperscript{221} As a wait-and-see approach, they might also avail themselves of the opt out to gauge how the Court handles aggression prosecutions before committing their nationals to potential prosecutions. A state party may also ratify and then opt out of the amendments in an abundance of caution given the ambiguity surrounding the interpretation of Article 121(5). In any case, it remains to be seen whether the Court will effectively dismantle the opt out altogether by ruling that the aggression amendments are governed by the Negative Understanding of the second sentence of Article 121(5) (or Article 121(4) for that matter). Although the logic of the opt out certainly tilts in favor of the Positive Understanding, the Negative Understanding is by far the most natural and logical interpretation of the text itself, which puts the utility and efficacy of the opt out in jeopardy.

Negotiations over the operative entry into force language were complicated by the fact that delegates were at the same time considering another proposed amendment to the Statute, namely the proposal by Belgium to add several war crimes to the provisions governing non-international armed conflicts and better harmonize those provisions with the war crimes prosecutable in international armed conflicts.\textsuperscript{222} It was understood that absent some principled reason to treat aggression differently, whatever interpretation adopted for the addition of the crime of aggression would govern the Belgian amendment. The resolution adopting the Belgian amendment contains a literal plain language interpretation of Article 121(5) and also excludes application to non-states parties. Arguments were put forward that the reference to the crime of aggression in the Statute in Articles 5(2) and 12(1) (which avers that states parties accept the jurisdiction of the Court with respect to all crimes referred to in Article 5, which includes aggression) implied some level of pre-acceptance by states parties and thus justified a differential understanding of how the crime would enter into force. This, it was argued, necessitated the proposed “understandings.” The final resolution adopting the aggression amendments “recalls” both of these provisions.\textsuperscript{223}

Some ambiguity surrounds the timing and mechanics for exercising the opt out. First, as written, the opt out provision is geared toward potential aggressor states\textsuperscript{224} rather than potential victim states,\textsuperscript{225} even though there may be situations in which the latter would not want the Court

\textsuperscript{221} Article 15bis(2) & Article 15ter(2), Aggression Resolution, \textit{supra} note ___.

\textsuperscript{222} See supra note ___.

\textsuperscript{223} See Aggression Amendments, Preamble.

\textsuperscript{224} There had been some discussion of extending an opt out to non-states parties, which would have been unique in providing treaty-based rights to non-states parties.

\textsuperscript{225} See \textit{supra} note ___ (referring to acts of aggression committed \textit{by the state party} lodging the opt out declaration).
to prosecute crimes of aggression committed on their territory, as where a case might antagonize
the situation, the dispute has been satisfactorily resolved through diplomatic channels, or the
prosecution might require the production of sensitive national security information. Thus, the
Court will still be able to prosecute acts of aggression committed on the territory of a state party
that has opted out of the amendments, so long as the aggressor state has not also opted out. As a
practical matter, however, a case that does not enjoy the support of the victim state would be
exceedingly difficult to prosecute absent a Security Council referral (or even with such a referral
for that matter).

Second, some question has been raised as to whether a state party can avail itself of the
opt out without subsequently accepting or ratifying the amendments, because the resolution text
provides that the opt out declaration is to be lodged prior to ratification or acceptance.\textsuperscript{226} As a
matter of logic, the opt out is likely meant to serve as an incentive for ratification, but there is
little in the record about the intentions of the ABS group or Canada (or, for that matter, the states
parties that adopted the President’s final package) in this regard. In addition, the opt out option
forms part of the aggression amendments, so presumably it is only available to those states
parties that ultimately ratify or accept the amendments. Otherwise, the opt out might be
construed as a treaty reservation, which is prohibited by Article 120 of the Statute.\textsuperscript{227}

Third, it is not entirely clear how far in advance of any investigation or prosecution a
state party will have to have lodged its declaration to invoke it. Presumably, a state party could
attempt to ratify the amendments and enter the opt out declaration after an investigation into
potential acts of aggression has already been initiated, but nothing in the text of the amendments
would prevent this except the inclusion of the word “previously” in the opt out language.\textsuperscript{228}
Since the definition of the crime of aggression includes the \textit{actus reus} of “planning” an act of
aggression,\textsuperscript{229} the Court’s jurisdictional \textit{ratione temporis} may be extended back in time
considerably, which may limit states’ ability to game the system. Finally, an additional
ambiguity in the opt out concerns situations in which a potential defendant hails from a state
party that has lodged an opt out declaration but acted on behalf of a state party that did not.
Under these circumstances, the Court would have to decide if individuals may invoke for their
benefit any opt out declaration filed by their state of nationality or the state on whose behalf they
acted, or both. Since the opt out is designed to shield state action from scrutiny by the Court, the

\textsuperscript{226} See PmbI, OP 1, Aggression Resolution, supra note __ (noting that “any State Party may lodge a declaration
referred to in article 15 bis prior to ratification or acceptance”). The text of Article 15bis(4) simply assumes that the
opt out declaration has been submitted prior to the initiation of a case. \textit{Id.}
\textsuperscript{227} For a discussion, see Dapo Akande, \textit{What Exactly Was Agreed in Kampala on the Crime of Aggression?}, EJIL
TALK!, http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/.
\textsuperscript{228} Aggression Resolution, Article 15bis(4). Had drafters wanted to exclude this possibility, they should have
included language to the effect that the opt out was available “irrespective of ratification.”
\textsuperscript{229} Article 8bis(1), Resolution RC/Res.4 (June 11, 2010).
\textsuperscript{230} Such situations are likely to be rare, but the Court already has one case presenting similar facts. Jean-Pierre
Bemba Gombo is a citizen of the Democratic Republic of Congo (DRC) who is being prosecuted for crimes
committed in the Central African Republic (CAR). Bemba had been the commander of the \textit{Mouvement de
Libération du Congo}, one of the parties in the Second Congo War (1998-2002) in the DRC. In 2002, the then-
President of the CAR Ange-Félix Patassé allegedly recruited Bemba to assist him in quashing his own rebel
movement. The charges against Bemba stem from his activities in this capacity rather than his activities in his own
state, the DRC. \textit{See Prosecutor v. Bemba}, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b)
of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009). The
involvement of high-level mercenaries in acts of aggression presents another potential example.
status of the putative aggressor state is likely the most relevant, but this remains to be determined.

In the end, this provision may prove to have been more useful to garner consensus in Kampala than for its express purpose as was the case of its likely inspiration, Article 124,\textsuperscript{231} the so-called “Transitional Provision.”\textsuperscript{232} That Article allows states parties to opt out of the war crimes provisions for a single period of seven years. The idea behind Article 124 was to give states that considered themselves to be disproportionately vulnerable to war crimes charges (due, for example, to their high overseas troop commitments or regular involvement in ameliorating humanitarian crises)\textsuperscript{233} time to assess the performance of the Court before opening themselves up to potential prosecution for the most probable of charges.\textsuperscript{234} The provision was immediately and vociferously denounced by human rights groups,\textsuperscript{235} though their concerns turned out to be unfounded. In the end, only two countries—France and Colombia—have availed themselves of the war crimes opt out option to date. France, without explanation, withdrew its opt out declaration in August 2008. Colombia’s declaration expired by its own terms in October 2009. Other states, such as Burundi, apparently contemplated lodging an Article 124 declaration, but declined to take advantage of this option due to internal political dynamics and/or pressure from civil society organizations. Article 124 ultimately had more impact at Rome in getting the final package accepted than it did in securing more widespread ratification of the Statute post-Rome. States parties in favor of the crime of aggression are no doubt hopeful that Article 15bis(4) will serve little more than the same purpose post-Kampala.

2. The Exclusion of Non-States Parties

\textsuperscript{231}See supra note \_\_\_.
\textsuperscript{232}The consideration of Article 124 was the only mandatory agenda item for the Review Conference. See supra note \_\_\_. Although it had been little used, its potential deletion remained controversial. In Kampala, several states parties (e.g., France and Japan) and non-states parties (e.g., Laos and the Philippines) argued in favor of its retention as a means to assist other hesitant states in joining the Court. Delegates to the Kampala Conference ultimately left the provision in place and unchanged to encourage other non-states parties to join the Court. See Resolution RC/Res.4 (16 June 2010 13:00), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf.
\textsuperscript{234}By way of background, Article 124 was essentially the price paid to have France accept the final package of provisions revealed at the close of the Rome Conference in 1998. During the negotiations, France—along with the United States and other delegations—sought a consent-based approach to jurisdiction over war crimes and crimes against humanity that would allow the ICC to prosecute these crimes only with the consent of the nationality and territorial state, absent a referral by the U.N. Security Council. As an alternative proposal, the United Kingdom, with support from the other P-5, proposed an Optional Protocol that states could ratify to exempt their nationals from war crimes or crimes against humanity prosecutions. Germany proposed an alternative solution that addressed only war crimes, was non-renewable, and allowed states to consent to jurisdiction \textit{a la carte} over particular war crimes. In the waning days of the Rome Conference, the Bureau released a carefully balanced package of compromises that included Article 124. See generally Shana Tabak, Note, \textit{Article 124, War Crimes, and The Development Of The Rome Statute}, 40 Geo. J. INT’L L. 1069 (2009).
\textsuperscript{235}Amnesty International, supra note \_\_\_, at 10 (calling Article 124 a “license to kill”).
The second price to be paid for the removal of an exclusive Security Council filter was the provision exempting non-states parties from the aggression provisions. Since prior to the Rome Conference, the United States and other states had advocated for the position that the Court should not exercise jurisdiction over the nationals of non-party states. As such, Article 12(2), which enables the Court to prosecute crimes committed on the territories of states parties in addition to just crimes committed by the nationals of states parties, was a major disappointment at Rome and provided one basis for the United States’ subsequent rejection of the Court. The non-state party exclusion in the aggression amendments thus represents a major victory for the United States and a vindication of its prior position.

The new provision is unique in specifically excluding non-states parties from the terms of a treaty and creates a strong disincentive for current non-parties wary of the amendments to join the Court. As a negotiating tactic, it can be considered little more than a bribe to the P-3 to relinquish Security Council control over aggression prosecutions, as it leaves the nationals of the P-3 (and those of their allies) immune from prosecution. Of course, they would likely have been immune anyway through operation of Article 16, but the exclusion of non-states parties grants the P-3 immunity without them having to bear the costs of engaging in self-dealing via their Article 16 deferral powers. At the same time, the exclusion of non-states parties defuses the ability of these states to critique, or attempt to influence the interpretation of, the aggression amendments because such states are entirely excluded from them.

D. Delay

Delaying the adoption of the aggression amendments altogether would no doubt have been preferable to a number of states in attendance in Kampala, and the possibility of a definition-only outcome in Kampala remained a distinct possibility. Members of the P-5 in particular found complete delay appealing and argued in favor of taking the time to reach a more solid consensus on the aggression amendments. They coupled this claim with arguments that it was premature to evaluate the Court’s success vis-à-vis its current mandate. In particular, it was noted that the Court has yet to reach a verdict on the one case in trial, the other cases are all still in pre-trial proceedings, one of the defendants has twice been ordered released due to prosecutorial misconduct (although the most recent decision has been suspended pending an appeal), the charges against another defendant were not confirmed, the majority of the other arrest

---

236 Article 15bis(5), Resolution RC/Res.6.
237 In making these arguments, the United States drew on Article 34 of the Vienna Convention on the Law of Treaties, which states: “A treaty does not create either obligations or rights for a third State without its consent.” Article 34, Vienna Convention, supra note __.
239 Aust, supra note __, at 257-258 (discussing the way in which treaties may provide rights for third states).
240 June 4, 2010, U.S. Intervention, supra note __.
241 Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 17, Decision on the Prosecutor’s Request to Give Suspensive Effect to the Appeal Against Trial Chamber I’s Oral Decision to Release Mr. Thomas Lubanga Dyilo (July 23, 2010).
242 Prosecutor v. Abu Garda, Case No. ICC-01/05-02/09, Decision on the Confirmation of Charges (Feb. 8, 2010).
warrants remain unexecuted, and the Court has been mired in important yet peripheral pretrial rulings. A delay, it was argued, would give the Court more time to perfect its work in its areas of core competency before adding a new and qualitatively different crime to its repertoire, and with no new resources to boot.

To a certain extent, the P-5’s fixation on delay was short-sighted, as a review of the trend in the negotiations reveals the gradual (though not linear) expansion of the definition of aggression and liberalization of the jurisdictional regime over the years of negotiations since the ICC project was revived. Time, in short, has not been on the side of the P-5. It is thus not clear whether the P-5 could have achieved a better outcome with more time. It was perhaps just as likely that time would result in an expansion of the Court’s ability to prosecute the crime of aggression and a further contraction of the Security Council’s control over the process. More time, however, would certainly have enabled the United States to become more actively engaged in the negotiations without having to rely on the P-4, or the P-2 for that matter, to make its arguments for it.

Notwithstanding a preference for a delay altogether, it soon became clear that it was virtually inevitable that states would achieve some measure of completion in Kampala given the almost palpable momentum toward finishing the work left over from Rome and fulfilling—if only symbolically—the final component of the Nuremberg legacy. Indeed, the threat to resume the negotiations in New York at the next or a subsequent meeting of the Assembly of States Parties, or even to convene another Review Conference in a more accessible locale for that matter, loomed large. A tipping point was eventually reached at which all parties concluded that they were at their maximum negotiating leverage in Kampala, and so delegates reached some measure of completion.

In lieu of total deferral, many of the proposals being tossed about in Kampala hinged on a delayed entry into force of the amendments, either in whole or in part. The ABS proposal broke new ground by suggesting a springing or staggered entry into force for the various trigger mechanisms. The vision was that the Council trigger would be operative first to be followed by the eventual activation of other trigger mechanisms. Supporters argued that this would give the Council a chance to control aggression prosecutions initially, providing the Court with time and space to develop its standards and jurisprudence in tandem with the Council before accepting cases that did not enjoy the Council’s full support. Such a phased entry into force could hinge on a performance-based evaluation of the first phase—whereby phase two would only be implemented in the event the phase one proved successful. Under a such a system, phase one would provide an opportunity for the international community to review the Council’s management of its trigger power, the Court’s handling of aggression cases, the adequacy of existing resources, and the very viability of the provisions. This would ensure that negotiators did not lock in a scheme that later proved to be unworkable. States parties would be obliged to affirmatively launch phase two, perhaps in the context of another Review Conference with an

243 None of the Ugandan defendants is in custody, notwithstanding that Uganda self-referred the situation involving the Lord’s Resistance Army to the Court. In the Darfur case, three rebel defendants appeared voluntarily, but the defendants associated with the government remain at large, including Sudanese President Omar Al-Bashir.

244 Early drafts of the aggression provisions, for example, envisioned an exclusive Security Council filter. See Draft Report of the Intersessional Meeting from 19 to 30 January in Zutphen, the Netherlands, in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 221, 238 (M. Cherif Bassiouni, ed. 1998) (containing draft Article 10 envisioning filter role).

245 See text accompanying note ___.

53
agenda and metrics defined in advance. In the alternative, it could be effectuated automatically after the passage of a certain amount of time or the ratification by a certain number of states parties. The promise of a Review Conference was also dangled as an incentive to states to accept some provisional operationalization of the crime in exchange for the opportunity to subsequently review the definition of aggression and all the other controversial provisions at a later date.

Surprisingly, perhaps, the P-5 were lukewarm on the idea of granting the Council the immediate power to activate the Court’s jurisdiction over the crime of aggression and delaying the other two trigger mechanisms—a point of agreement with the ABS group. Indeed, it was clear over the course of the negotiations that the P-5 had little to gain from adding aggression to the ICC Statute. Although the crime of aggression was billed as a judicial tool the Council could use for dealing with rogue leaders who could not readily be prosecuted for one of the other three ICC crimes, it was an unwanted addition to the Council’s toolbox. They were no doubt concerned that as soon as the Council could instigate prosecutions for the crime, it would come under pressure from states and non-governmental organizations to do so in this or that incident. Moreover, throughout the period of probational jurisdiction, detractors would be gathering fodder for subsequent arguments against Council control over the process, redoubling their commitment to operationalizing the alternative triggers and filters.

In the end, the final package avoids the hard issues and delays both Article 15bis and 15ter until a subsequent decision of the Assembly of States Parties. By subjecting the different trigger mechanisms to separate votes, there is a chance that only one or the other would be adopted in 2017, with the Security Council trigger being perhaps the most vulnerable in this regard. It remains to be seen whether the Assembly of States Parties will convene a new Review Conference for this decision to be made or simply add it to the agenda of a regular meeting. It certainly seems that a decision of this magnitude and importance should be taken at a Review Conference, especially given that the priorities of the Court and global conditions will inevitably change considerably in the next seven years. All that said, the aggression provisions could be amended in the meantime or the decision could be postponed even further.

E. Entry into Force Mechanism

Going into Kampala, academic commentary and diplomatic interventions split on which amendment regime governed the aggression amendments. It was clear that Article 121(4) was the default procedure, subject only to the exception set forth in sub-paragraph (5). Given that the inclusion of the crime of aggression required a new Article 8bis (which is not an amendment to Article 8 governing war crimes but rather a new provision that could not be sequentially numbered) and a new Article 15bis, a strong argument existed that the aggression amendments should be governed by Article 121(4). Article 121(5) seems to address the scenario whereby the Statute’s existing penal definitions were amended after states had already joined the treaty, thus unsettling their expectations about the reach of the Court. By this logic, the addition of a new

246 See, e.g., Roger S. Clark, Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute, 41 CASE WESTERN RES. J. OF INT’L L. 413 (2009) (discussing controversy over amendment provisions and concluding that Article 121(4) applies to the crime of aggression); Donald M. Ferencz, Addendum to the Aggression Issue: Bringing the Crime of Aggression Within the Active Jurisdiction of the ICC, 42 CASE W. RES. J. INT’L L. 531 (2009) (discussing alternative formulations).
crime altogether should involve Article 121(4) and require a high degree of state support before the new crime became prosecutable.

Notwithstanding this logic, the legislative history of the ICC Statute somewhat favored considering Article 121(5) as the *lex specialis* for any amendments to the substantive criminal provisions.\(^{247}\) Until well into the Rome Conference, the definitions of all the crimes were contained in Article 5, thus suggesting that adding the crime of aggression would have necessitated an amendment to Article 5 as understood by Article 121(5). It was only late in the negotiations that the Drafting Committee disaggregated Article 5 and gave each of the three crimes its own dedicated treaty provision.\(^{248}\) The amendment procedures were negotiated and drafted by a different committee, and the last minute change to Article 5 was not reflected in the amendment provisions.

These inconclusive legal arguments—while important—were marshaled at the service of political preferences for the different practical consequences of the competing models, particularly with respect to three factors: the speed at which the amendments would enter into force, the question of state consent, and the application to non-states parties. An argument against the application of Article 121(5) was that the amendments would enter into force piecemeal and only with respect to the Parties that had accepted them, creating a potentially confusing patchwork of acceptances that might stymie aggression prosecutions, especially in situations in which multiple states were involved. As compared to Article 121(4), the operation of 121(4) was always relatively straightforward,\(^{249}\) which was another perennial argument in its favor. Article 121(4), however, threatened to move the Court away from universality if objecting states parties exercised their right to withdraw from the Statute rather than subject their territories to aggression prosecutions. By contrast, Article 121(5) would enable states parties that might object to the aggression provisions to remain members of the Court rather than undertaking the more drastic measure of withdrawing as they might do under an Article 121(4) regime. Article 121(4) also created opportunities for obstructionism, as a dozen or so holdouts could prevent the amendments from ever entering into force. Proceeding under Article 121(4) might also unleash a “cold war” among the Assembly of States Parties, as states jockeyed to achieve, or hinder, the attainment of 7/8ths ratification—a prospect reminiscent of the United States’ Article 98 campaign under the Bush Administration.\(^{250}\) Under these circumstances, the ratification process would distract states parties, and non-states parties, from more constructive cooperation with the Court.

\(^{247}\) See Gaja, *supra* note ___ at 440 (assuming applicability of Article 121(5) to aggression).


\(^{249}\) One open question concerned the fact that the 7/8ths threshold had the potential to be a moving target as more states joined the ICC Statute. Slovenia proposed at one point that the threshold be set at the time the aggression amendments were adopted in Kampala, but there was nothing in the text to support this interpretation.

No consensus was ever reached on which amendment provision, or which interpretation of Article 121(5), governs the aggression amendments. Indeed, this seemingly banal issue, which one would have expected to have been resolved at the threshold of the negotiations, emerged as the final point of contention and the lynchpin of the entire consensus package. The existence of two possible but fundamentally different entry into force regimes—one premised on a rolling entry into force subject to state consent and the other on a longer time horizon but promising universal coverage eventually—coupled with competing interpretations of the provisions’ impact created legal confusion throughout the negotiations. Although this confusion generated an opening for a creative, if not unfettered, juggling of elements in an effort to reach a final consensus, the tendency of particular negotiators to switch back and forth between the two subparagraphs of Article 121 and between the two interpretations of Article 121(5) gave the impression that the provisions of the ICC Statute have no fixed content or meaning and thus could be manipulated at will in an effort to forge a consensus or advance a particular agenda. Rather than push for a resolution of this threshold issue, the Chair prolonged the confusion. This tactic kept the delegations engaged in the process, but also generated costs by enabling the promulgation of unsustainable proposals that served only to distract the negotiators. It also yielded a final consensus that is likely only an illusion of an agreement on what the text means.

In the end, the final package did not include an understanding on the preferred interpretation of Article 121(5), notwithstanding that several competing texts had been proposed. This question has essentially been dumped on the laps of the Court’s judges. Although the opt out regime seems premised on a Positive Understanding of Article 121(5), the Court is not bound by this apparent preference, especially given that the Positive Understanding is not supported by the text of the Statute and seems largely specious. And so, the entry into force provisions lurk in the Statute, threatening to destabilize, if not destroy, the jurisdictional regime carefully crafted in Kampala. No doubt, absent a Security Council referral, much of the first aggression prosecution will be consumed by litigation over this most basic of issues.

V. Conclusion

The aggression amendments are a triumph of voluntarism at the expense of two principled yet ultimately incompatible alternative models: one based on the discomforting and inescapable asymmetry of power in the U.N. system—where sovereign equality is an abstraction rather than an empirical reality—and the other premised on universalism—an ideal that was unattainable in Rome, a fortiori so in Kampala. Indeed, if universalism could not be obtained even with respect to the crimes of genocide, crimes against humanity and war crimes, the prohibition of which without contention constitute *jus cogens*, it was folly to expect it in the aggression context. The pull between these two imperatives resulted in a set of amendments characterized by theoretical incoherence and profound ambiguity where a regime of state consent—in the form of a retrograde opt out and the complete exclusion of the nationals of non-states parties—emerged as the only compromise possible. The final package was thus designed not with the best interests of the Court in mind and has merit solely as an expedient solution enabling the Assembly of States Parties to claim completion, if not success. Aggression prosecutions will thus be left to the vagaries of states parties’ ratification decisions rather than the vagaries of the Security Council’s political agenda. And yet, assuming states parties even

251 See text accompanying notes ___.

56
commence the ratification process at this stage given the conditional nature of the new provisions, national legislators have no real certainty as to what exactly they are ratifying and whether their treaty partners agree with their interpretation of the amendments, even after years of negotiations. In the scramble to reach an outcome—at whatever cost to the rule of law, standard principles of treaty interpretation, United Nations harmony, fairness to future defendants, and the Court’s very legitimacy—the force of an idea was lost: a more peaceful world.

Given that a genuine universality was never realistically possible, we are left with the question of whether the Court would have been better off with a filter system under the control of the Security Council. Rather than attempting to circumvent power realities in international relations, such a system would have at least combined principle with power and enjoyed a measure of uniformity and universality. This position might have been more palatable had the Council exhibited a more consistent and robust response to threats to the peace in the past. As it stood, however, even the most adept negotiators could not have achieved this outcome in light of the ingrained lack of support for the P-5 position and the distrust of, and even outright hostility toward, the Council among some vocal members of the Assembly of States Parties.

With the P-5 unable to convince their interlocutors to vest the Council with exclusive authority over aggression prosecutions, it now remains for them to convince key states (potential coalition partners, states where there are P-5 boots on the ground, etc.) to either refrain from ratifying the aggression amendments or to activate the opt out in order to insulate embattled, or potentially embattled, swaths of territory from prosecution. States that want safety from the aggression provisions must decide for themselves which of these diverging routes to take. Ultimately this choice may depend on how much confidence states parties have in the inevitability that the Court will adopt the Negative Understanding of the second sentence of Article 121(5). Notwithstanding that the plain text of that provision will render it difficult for the Court to reason otherwise, the safest course might be to opt out of the amendments—a trickier political position for states parties if influential elements of civil society end up rallying around full ratification. In this regard, the coalition of states ostensibly in favor of the crime of aggression can claim victory garnering greater formal acceptance of the amendments, but at the expense of an orderly ratification process free of confusion, jockeying, and manipulation.

And so, we are left with a set of aggression amendments that will spawn uncertainty and controversy given the competing interpretations of the text itself, the various opportunities to consent to or defect from the provisions, and the inevitable jurisdictional patchwork that will result. Given all this, the aggression provisions are wide open to challenge by those defendants unlucky enough to serve as guinea pigs in this grand experiment, so that the inaugural aggression proceedings will no doubt be consumed by pre-trial challenges to the very legitimacy of the crime and its provenance. Certainly the rogue regimes that will never join the Court and fall outside of the aggression amendments are likely to view the outcome of Kampala an unmitigated success altogether, unless the Security Council proves willing to trigger a prosecution. Beyond its pre-existing Article 16 deferral power, however, the Council was granted no additional powers to intervene in aggression prosecutions and so if it is going to use its referral power, the Council must trust the Court to get it right once it sets a prosecution in motion.

The ICC now faces the danger of applying an elastic and uncertain set of amendments in a fraught political context. It remains to be seen whether pushing forward on the aggression amendments under these circumstances in their current form has planted a time bomb in the ICC Statute that will indelibly harm the Court or jeopardize its work responding to atrocity crimes.
Most likely, the jurisdictional regime is so cumbersome and pocked with loopholes that aggression prosecutions will be few and far between. Indeed, so little attention was paid to the practicalities of prosecution under the regime adopted that the ultimate result may be largely symbolic—perhaps by design. If the aggression provisions ever enter into force, it remains to be seen to what extent the ICC personnel can and will move the crime from symbolism to reality.