A Historic Breakthrough on the Crime of Aggression

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At 12:20 in the morning on Saturday, June 12, 2010, the Review Conference of the Rome Statute of the International Criminal Court in Kampala, Uganda, adopted by consensus a comprehensive package of amendments on the crime of aggression.[1] States parties to the Rome Statute thereby delivered on their promise, reflected in Article 5(2) of the Statute, to define the crime of aggression and to agree on the conditions for the Court's exercise of jurisdiction over that crime. Despite a thorough and more than decadelong preparatory process, few, if any, had predicted such a substantive outcome on the crime of aggression in light of the serious disagreements on major questions, which persisted until the last days of the conference. The key elements of the final package are a definition of the crime of aggression, which limits criminal responsibility to leaders who are responsible for the most serious forms of the illegal use of force between states, and a complicated set of conditions for exercising jurisdiction. Investigations would be based on either a Security Council referral or state consent. Non–states parties are excluded from the Court's jurisdiction altogether. Additionally, states parties will have to "activate" the Court's jurisdiction by mustering at least thirty ratifications of the amendments and by taking a separate decision on this issue in 2017 at the earliest. Such a decision would then allow for criminal prosecution at the international level of the crime of aggression for the first time since the Nuremberg and Tokyo trials following the Second World War. This historic breakthrough was made possible by an enormous good-faith negotiation effort among delegations in Kampala, including both states parties and non–states parties. The following is an inside account of the main strands of negotiation, followed by a brief summary of the key components of their outcome.

I. The Situation at the Outset of Kampala

From May 31 until June 11, 2010, states parties to the Rome Statute, observer states, and representatives of civil society gathered in Kampala, Uganda, for the first Review Conference of the Rome Statute. It was the final stretch of a negotiation process dating back to the 1998 Rome Diplomatic Conference, where delegates had been unable to agree on the definition of the crime of aggression and on the role of the Security Council in respect of the Court's proceedings. Instead, Article 5(2) of the Rome Statute made the Court's exercise of jurisdiction

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[1] International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res.6 (June 11, 2010) [hereinafter Aggression Resolution]. The official records of the Review Conference, ICC Doc. RC/11 [hereinafter Review Conference Official Records], are available at http://www.icc-cpi.int/Menus/ASP/Sessions/Official+Records/Review+Conference.htm. Part I includes the proceedings, and Part II the resolutions, declarations, and various annexes. The Web site for the Assembly of States Parties, http://www.icc-cpi.int/Menus/ASP/, provides access to all official records, general debates, and other records and documentation. The Rome Statute, July 17, 1998, 2187 UNTS 90, as well as other legal texts, information about situations and cases, and press releases, is available at http://www.icc-cpi.int.

conditional on a provision being "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."[2] The Preparatory Commission for the Court, which was also tasked with preparing draft Rules of Procedure and Evidence, Elements of Crimes, and a host of agreements, rules, and regulations, was the forum for continued, but inconclusive, discussions on the crime of aggression from 1999 to 2002.[3] With the Statute's entry into force in July 2002, the Assembly of States Parties established the Special Working Group on the Crime of Aggression (Special Working Group) to take over the mandate of preparing proposals on the crime of aggression for the first Review Conference.[4]

Meetings of the Special Working Group were open to both states parties and non–states parties on an equal footing. It met formally eight times between 2003 and 2009 in New York and The Hague. These meetings were complemented by a series of informal, intersessional meetings hosted by the Liechtenstein Institute on Self-Determination at Princeton University.[5] The collegial atmosphere of meetings on the Princeton campus permeated the formal negotiations and was soon identified as the "Princeton spirit." Eventually, the negotiations as a whole were coined the "Princeton Process."[6] The Review Conference benefited enormously from the camaraderie fostered by the Princeton Process and from the high level of expertise developed by many delegates during this six-year period. On February 13, 2009, the Special Working Group successfully concluded its mandate. It adopted by consensus a set of "proposals for a provision on aggression."[7] Most importantly, these proposals included a draft definition of the crime of aggression without any brackets or any other explicit signs of reservations held by any negotiating partner. In June 2009, states parties proceeded quickly to find agreement on a draft text amending the Elements of Crimes with respect to the crime of aggression. At this point, only two major issues were open: whether state consent should be a condition for the exercise of jurisdiction (largely a question of applicable amendment procedures) and

[2] Article 121 contains a series of rules for amending the Rome Statute, and Article 123 requires the convening of a Review Conference to consider amendments to the Rome Statute seven years after its entry into force. On the controversial inclusion of the crime of aggression in the Rome Statute, see Andreas Zimmermann, *Article 5: Crimes Within the Jurisdiction of the Court*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 129, 135–37 (Otto Triffterer ed., 2008).

[3] Within the Preparatory Commission, Silvia Fernández de Gurmendi served as coordinator of the Working Group on the Crime of Aggression. The Coordinator's Paper and a list of proposals and documents relating to the crime of aggression are contained in UN Doc. PCNICC/2002/2/Add.2 (2002). *See also* Roger S. Clark, *Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*, 15 LEIDEN J. INT'L L. 859 (2002).

[4] International Criminal Court, Assembly of States Parties, *Continuity of Work in Respect of the Crime of Aggression*, ICC Doc. ICC-ASP/1/Res.1 (2002).

[5] The final Princeton meeting on the crime of aggression was held at the Princeton Club in New York in June 2009.

[6] THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2009 (Stefan Barriga, Wolfgang Danspeckgruber, & Christian Wenaweser eds., 2009). This volume contains all the reports and other materials pertaining to this process up to June 2009. A collection of the complete *travaux préparatoires* (spanning the period from 1995 to 2010) and most relevant historical documents, as well as introductory commentary, is forthcoming from Cambridge University Press in THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION (Stefan Barriga & Claus Kreß eds., forthcoming).

[7] *Report of the Special Working Group on the Crime of Aggression*, ICC Doc. ICC-ASP/7/20/Add.1, Annex II, App. I (2009).

whether a Security Council determination of an act of aggression should be a condition for formally opening an investigation.

Somewhat ironically, the U.S. government was not represented in the Princeton Process, following its then policy of non-engagement with the Court. It was only in November 2009 that states parties to the Rome Statute heard the first official comments from the U.S. delegation regarding the crime of aggression, followed by a more detailed intervention at the March 2010 session of the ASP.[8] That statement was carefully worded—given how far the negotiations had come and the long U.S. absence from them—but the message was clear and worrying to many states parties: the United States had serious concerns about the draft amendments. It considered the already agreed-upon definition of the crime of aggression to be overly broad and a departure from customary international law; it warned against overburdening the Court with what would inevitably be seen as a political crime; and it rejected the notion that, as a consequence of the amendments, domestic courts might, in the future, sit in judgment over the use of force by other states.[9] For the lead negotiators—Ambassador Christian Wenaweser (Liechtenstein), who was president of the conference, and Prince Zeid Ra'ad Zeid Al-Hussein (Jordan),[10] who chaired the Working Group on the Crime of Aggression at the conference—this new U.S. activism[11] on the crime of aggression was welcome but also posed an enormous challenge. As the negotiations had been strongly chair-driven since the early days of the Special Working Group, the U.S. delegation expected Ambassador Wenaweser and Prince Zeid to proactively address their concerns. At the same time, some states parties viewed the U.S. engagement with suspicion, and Ambassador Wenaweser and Prince Zeid had to ensure that they would not be perceived to be opening new issues on the simple cue of a non–state party, albeit a very powerful one with close allies among states parties. Subsequently, they made cautious new proposals addressing at least some of these concerns.[12] Reopening the definition of the crime was not supported by U.S. allies among the states parties, however, and was strongly rejected by others; since the definition, with its delicate and deliberate

[8] *See* United States Mission to the United Nations, Statement by Harold Hongju Koh, Legal Advisor, United States Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court (Mar. 23, 2010), *at* http://usun.state.gov/briefing/statements/2010/139000.htm.

[9] Other aspects of the U.S. position—favoring both a consent-based regime and an exclusive role for the Security Council in "filtering" aggression cases—caused less of a stir as they conformed to well-known positions of other permanent members of the Security Council.

[10] The details of the formal positions are as follows. Ambassador Wenaweser served as chair of the Special Working Group from its first meeting in September 2003 to its conclusion in February 2009 and as president of the Assembly of States Parties (and therefore the Review Conference) beginning in November 2008. In June 2009, Prince Zeid took over as chair of the working group–level negotiations on the crime of aggression. From that time until the end of the Review Conference, Ambassador Wenaweser and Prince Zeid worked closely together on the aggression negotiations. Ambassador Wenaweser formally took over the negotiations only in the final days of the conference in his capacity as president.

[11] In the run-up to Kampala, the U.S. delegation was by far the most active non–state party in this process and was instrumental in organizing intersessional discussions in Glen Cove, New York (March 2010), and in Mexico City (May 2010). At the Review Conference itself, no state party or non–state party had more delegates in attendance dealing with the crime of aggression.

[12] They suggested, in essence, that the definition of the crime of aggression in the Rome Statute would not automatically be considered a statement of customary international law, that the amendments themselves would not authorize domestic prosecutions regarding the use of force by other states, and that the Court's jurisdiction could be delayed for several years. *See Non-paper by the Chair: Further Elements for a Solution on the Crime of Aggression*, Review Conference Official Records, *supra* note 1, pt. II, Annex III, App. IV, at 67.

wording, was the product of years of difficult debate, new discussions were simply out of the question.

At the outset of the Kampala Conference, Ambassador Wenaweser and Prince Zeid could be reasonably confident that a consensus adoption of the definition of the crime of aggression was within reach ("definition only"), whereas agreement concerning the conditions for exercising jurisdiction and, in particular, the role of the Security Council seemed as elusive as ever. Their goal was consequently to lead the conference to an outcome that could be characterized as "definition plus"—with it being entirely unclear how far that "plus" could go. The task was further complicated by the goal of achieving an outcome by consensus, as was required by the conference Rules of Procedure and also by prudence: a divisive vote on such a sensitive issue would all but certainly have spelled trouble for the Court. Some delegations voiced skepticism whether the time was ripe for the Court to take up such a politically charged crime and also whether the negotiations had matured to the point where consensus was possible. Still, numerous delegations pushed to resolve the issue of aggression by consensus. Irrespective of these appeals, the risk of any delegation pressing for a vote on a nonconsensual text turned out to be low for practical reasons. Article 121(3) of the Rome Statute requires a two-thirds majority of states parties (111 at the time) for the adoption of an amendment—that is, at least 74 votes. But only 84 states parties to the Rome Statute had made the journey to Kampala, and some delegations left before the final meeting of the conference, thereby handing the blocking minority to a mere half-dozen delegations.

The intense negotiations over the course of the next two weeks generated a consensus on all three major points of contention: the definition of aggression, the question of state consent, and the role of the Security Council. The process continued to be strongly driven by Ambassador Wenaweser and Prince Zeid, who redrafted the main negotiating text five times.[13] Only brief periods were spent in open discussions and plenary meetings, which would not have brought about any of the difficult concessions required. Instead, Ambassador Wenaweser and Prince Zeid pursued "shuttle diplomacy" with individual delegations and groups, among them the permanent members of the Security Council (who also often met individually with one or both of them), the African Group (which was keenly interested in reaching a consensus on this issue on African soil), the Group of Latin American and Caribbean Countries (with strong leadership from Argentina and Brazil), the Group of Eastern European States, and a largely Western group of "like-minded" countries. Through these and other informal configurations, all delegations that were willing to play an active part in the negotiations, as well as non–states parties and civil society observers, had full access to the process, although its transparency suffered as a consequence. The constant informal interaction—including at the conference hotel itself, where all key players were accommodated—allowed Ambassador Wenaweser and Prince Zeid to test compromise ideas in small settings before "upgrading" them to proposals contained in the next version of the negotiating paper. In addition, as further explained below, several delegations went out of their way to draft and submit compromise ideas that went

[13] Prince Zeid revised his initial "Conference Room Paper," submitted in preparation of the Review Conference, twice in Kampala. These papers were attached to the *Report of the Working Group on the Crime of Aggression*, ICC Doc. RC/5, *in* Review Conference Official Records, *supra* note 1, pt. II, Annex III, at 45. Subsequently, Ambassador Wenaweser submitted three further non-papers, the last of which formed the basis for the Aggression Resolution (RC/Res.6) as adopted.

far beyond their official positions. These factors created a dynamic in which more and more delegations were willing to compromise, thereby raising the price for delegations that were for various reasons still standing in the way of a historic agreement on the crime of aggression. Of course, many other factors also played a role, including the personalities involved in what was at times an intense and emotional discourse, and things could have gone entirely wrong on many occasions. In the end, as Ambassador Wenaweser put it the day after the conference, it was an "alignment of the stars."

II. Defining the Crime and Act of Aggression

The Review Conference adopted the definition of the crime of aggression without making any changes to the draft text produced by the Special Working Group. Uncontroversial were those parts of the definition that concern individual criminal liability—the "crime" of aggression proper—as opposed to the definition of the state "act" of aggression to which the crime is linked. The relevant part of Article 8 *bis*(1) adopted by the Review Conference provides: "For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of the State, of an act of aggression . . . ."

There was strong agreement that individual criminal liability for the crime of aggression should follow the Nuremberg precedent and be limited to leaders. Furthermore, the Special Working Group's draft inserted the definition of the crime of aggression into the Statute in such a way that its Part 3—"General Principles of Criminal Law," which addresses, for example, modes of individual criminal responsibility, requisite mental elements, grounds for excluding criminal responsibility, and mistakes of fact and law—would fully apply to the newly defined crime, making further debate on those matters unnecessary.

By contrast, the definition of the state act of aggression generated considerable debate. The Special Working Group ultimately resolved the matter by using a two-step approach. First, it defined an act of aggression in the same way as Article 1 of UN General Assembly Resolution 3314 (XXIX) of December 14, 1974—namely, 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." In addition to the requirement of using armed force in violation of the UN Charter, the definition replicates the list of acts contained in Article 3 of Resolution 3314 (XXIV) that "may qualify as acts of aggression"—when, for example, the armed forces of a state invade, militarily occupy, annex, bombard, or blockade the territory of another state, when such forces attack the land, sea, or air forces or fleets of another state, or when they remain on the territory of another state in violation of agreed-upon conditions. Second, in response to concerns that such acts of aggression might include minor incidents as well as legally uncertain Charter violations, the Special Working Group's draft required the act of aggression, "by its character, gravity and scale," to constitute a "manifest violation" of the Charter. Accordingly, only the hard core of the illegal use of force should be taken up by the Court as a matter of individual criminal justice; falling outside the definition are matters

where the wrongfulness of the state act may be less clear, such as a good faith use of force aimed at preventing massive crimes against civilians without Security Council authorization.[14]

The Special Working Group adopted the draft definition above at its last meeting in February 2009 without a vote, more than one year prior to the Review Conference. The United States, having failed to convince states parties during that time to reopen the draft definition, pursued a different approach during the Review Conference itself by seeking the inclusion of several interpretive understandings. Ambassador Wenaweser appointed the delegation of Germany to facilitate a separate negotiation track for the purpose of drafting such understandings. In light of the late hour, the facilitators pursued a "minimalist" approach and presented to states only three understandings in open consultations—in particular, ones on which they thought consensus to be feasible.

The meeting at which the proposed understandings were presented—which was skillfully chaired by Germany's Claus Kreß[15]—was as successful as it was memorable. While states parties were reluctant to comment on the draft understandings that appeared to pave the way for at least some buy-in from the United States, it was a non–state party, Iran, that was most assertive in raising concerns about the formulations chosen. Even more remarkably, the U.S. and Iranian delegations were quick to agree on several revised formulations.[16] One such understanding, for example, states that "aggression is the most serious and dangerous form of the illegal use of force" and that, in determining an act of aggression, the Court must consider "all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations."[17] This understanding thus reinforces the above-mentioned threshold clause and confirms that not every illegal use of force amounts to an act of aggression. Furthermore, the United States sought and ultimately obtained an understanding aimed at clarifying the requirement of a "manifest violation" of the UN Charter: "It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. No one component can be significant enough to satisfy the manifest standard by itself."[18] Further understandings that the United States sought and obtained dealt with the interplay between the definition and

[14] A genuine humanitarian intervention without Security Council authorization would, by its gravity and character, not fulfill the criterion of a manifest Charter violation since its legality under general international law is at least debatable. *See* Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 EUR. J. INT'L L. 1129 (2010).

[15] For his account on this negotiation track and on the aggression negotiations as a whole, see Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179–1217 (2010).

[16] Remarkably, the delegation of Iran was willing to engage directly and constructively on this issue only a few hours after the UN Security Council had decided to strengthen the sanctions regime against Iran.

[17] Aggression Resolution, *supra* note 1, Understanding 6.

[18] Aggression Resolution, *supra* note 1, Understanding 7. An earlier draft suggested by the U.S. delegation would have explicitly required that *each* of the three criteria, considered by itself, would have to establish a "manifest violation." The Canadian delegation disagreed; on its understanding of the language in draft Article 8 *bis*, the "manifest violation" could reflect a cumulative assessment. Accordingly, even though the individual elements might, each by itself, be something short of "manifest," the elements considered together might be considered such.

customary international law,[19] and the question of domestic jurisdiction over the crime of aggression.[20]

Agreement on these understandings was reached two days before the end of the Review Conference, making the adoption of the definition itself a realistic possibility. This incremental success increased the pressure on all sides to find a compromise on the other outstanding issues that would "operationalize" the definition. Two major issues remained, both pertaining to state referrals and the prosecutor's *propio motu* investigations concerning the crime of aggression: whether some form of consent of the alleged aggressor state would be required and, once the prosecutor intended to move from a preliminary analysis to the formal opening of an investigation, whether the Security Council would have a role to play as a jurisdictional filter.

III. The Question of State Consent and Applicable Entry-into-Force Procedures

Since 2004, the negotiations on the crime of aggression were marked by inconclusive discussions about the applicable entry-into-force provision for future amendments on the crime of aggression. The ambiguous wording of Article 5(2) of the Rome Statute was itself the source of the problem. The article defers the exercise of jurisdiction until "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." This phrase led to three different interpretations. One approach was to stick closely to the wording of the sentence, which seemed to require only that the amendments be "adopted." If so, only a two-thirds majority of the Review Conference would be required, and ratifications would not be needed for their entry into force.

Some delegations rejected the notion that the aggression amendments could be added to the Statute without having to submit this substantive and sensitive matter to the parliamentary process of ratification, but the delegations were split as to the applicable ratification requirement under Article 121. Article 5(2) refers to Article 121 without specifying which of the two entry-into-force procedures contained therein applies. In what can be considered the second approach, some delegations posited that Article 121(5) should apply, given that it appeared to govern amendments to the core crimes:

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

[19] Understanding 4 of the Aggression Resolution, *supra* note 1, provides:

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

[20] Understanding 5 of the Aggression Resolution, *supra* note 1, provides: "It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State."

In what can be considered the third approach, others argued that adding the crime of aggression would not necessarily entail that Article 5, 6, 7, or 8 be amended. Instead, a new Article 8 *bis* and further articles[21] on the exercise of jurisdiction could be added. Article 121(4) should therefore apply:

> Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

This debate was not about mere legal technicalities. It had important political implications regarding the question whether the Court could, in the absence of a Security Council referral, exercise jurisdiction over a crime of aggression without the consent of the accused aggressor state. Those delegations preferring a consent-based regime (in particular, Australia, Canada, New Zealand, most European states, and permanent members of the Security Council) argued for Article 121(5), which had the additional advantage that the exercise of jurisdiction could, in principle, begin after the first ratification. Those arguing for Article 121(4) (in particular, all of the African states, members of the Non-aligned Movement, and most Latin American and Caribbean countries) stressed that the crime of aggression should be treated equally to the other core crimes: requiring aggressor state consent would depart from the territoriality principle enshrined in Article 12(2) of the Statute and lead to impunity rather than preventing aggression and protecting potential victims of this crime. In order to achieve such a protective regime, they were willing to accept the high number of ratifications required for entry into force of the amendments under Article 121(4) (seven-eighths of states parties), even though that could very significantly delay their entry into force because of the time expected to reach this number.[22] The idea of achieving a more protective regime was also supported by those preferring the "adoption only" model, although their approach would have allowed the provisions on aggression to enter into force immediately.

In the early years of this discussion, the clear preponderance of states parties, including many European states, favored the application of Article 121(4). But once the Special Working Group had achieved a preliminary agreement on the definition of aggression in February 2009—which raised the possibility that it would actually be adopted by the Review Conference—several delegations adapted their positions and spoke in favor of the entirely consent-based regime under Article 121(5). In March 2010, Prince Zeid conducted an informal "roll call," inter alia on the question of state consent, which revealed a roughly even split among delegations.[23] While some concluded from this exercise that consensus on the issue of aggressor

[21] Eventually, Articles 15 *bis* and 15 *ter*.

[22] In case of a controversial adoption of the amendments, the Article 121(4) route would also entail the risk of a campaign against ratification, given the small blocking minority required: one-eighth of states parties could thereby thwart the efforts of the overwhelming majority.

[23] The following countries expressed a preference for a consent-based regime: Albania, Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Croatia, Estonia, Fiji, France, Germany, Hungary, Ireland, Italy, Japan, Latvia, Luxembourg, Macedonia (FYROM), Mexico, the Netherlands, Norway, Paraguay, Peru, Poland, Portugal, New Zealand, Slovakia, Spain, Sweden, and the United Kingdom. The following countries clearly expressed a preference for a regime that is not based on the consent of the alleged aggressor state: Argentina, Belize, Bolivia, Botswana, Brazil, Burkina Faso, Chile, Congo, Costa Rica, Democratic Republic of Congo, Djibouti, Ecuador, Finland, Gabon, Ghana, Greece, Guinea, Guyana, Jordan, Kenya, Lesotho, Madagascar, Namibia, Nigeria, Republic of Korea, Romania, Samoa, Senegal, Slovenia, South Africa, Switzerland, Tanzania, Trinidad and

state consent was not attainable, others—realizing that neither side could win this argument by the necessary majority—resolved to work hard on possible compromise ideas.

In Kampala, a joint initiative by Argentina, Brazil, and Switzerland (known as the "ABS proposal") set the ball in motion.[24] The proposal involved a compromise between the 121(4) and 121(5) camps by applying the two paragraphs to different provisions in the package of amendments on aggression. Article 121(5) was to be the applicable entry-into-force regime for Security Council referrals and, in this regard, would have allowed aggression cases to go ahead in the near future. Article 121(4) was to be applicable to state referrals and *proprio motu* investigations, allowing such cases to go ahead only after the Assembly of States Parties had been able to muster ratifications by seven-eighths of states parties. Given this high threshold, this latter group of provisions could have remained "dormant" forever, but if they had entered into force, the consent of the alleged aggressor state would not be required for a case to proceed. Accordingly, nationals of both states parties and non–states parties could have potentially faced Court trials for the crime of aggression.

The ABS proposal sparked much interest among delegations—but also some criticism as to its legal foundation in the Rome Statute. For Ambassador Wenaweser and Prince Zeid, the ABS proposal was extremely useful. First, it brought new momentum into a discussion that had turned in circles for years, and it showed that many delegations had realized the need to work hard on compromises that were far beyond their original negotiating positions. Second, the ABS proposal introduced the idea of drafting separate provisions dealing with Security Council referrals versus state referrals or *proprio motu* investigations. Such a split was helpful in the negotiation process because it channeled the problem of aggressor state consent to those parts of the draft text where it was relevant (draft Article 15 *bis*) and thereby produced an almost clean draft provision on Security Council referrals (Article 15 *ter*). Prior to the ABS proposal, it would have been difficult for Ambassador Wenaweser and Prince Zeid to suggest this split on their own. Such a move could have appeared biased toward the permanent members of the Security Council, since it conveyed the message that there actually was agreement regarding Security Council referrals, but little hope of reaching such an agreement for the other two trigger mechanisms: it would have been seen by some as a first step toward dropping those mechanisms altogether. At this late stage of the negotiations, however, the split cleared the way for the focused drafting of compromise proposals.

The delegation of Canada introduced a further important proposal on the problem of aggressor state consent in relation to state referrals and *proprio motu* proceedings.[25] The Canadian paper (or, in the parlance of the Review Conference, a "non-paper" circulated for discussion purposes) posited that an investigation should be allowed to continue in the absence of Security Council approval provided that all states concerned—namely, the victim and the presumed aggressor state(s)—have actively consented to the proceedings.

The ABS and the Canadian papers diametrically opposed each other on the question of aggressor state consent, though both were intended to bring some compromise elements to the

Tobago, Uganda, Venezuela, and Zambia. The result of the roll call outlined here is based on the notes of the authors, who were present at that meeting. The result was not formally recorded.

[24] *Non-paper Submitted by Delegations of Argentina, Brazil and Switzerland as of 6 June 2010*, Review Conference Official Records, *supra* note 1, Annex III, App. V, A.

[25] *Non-paper Submitted by the Delegation of Canada as of 8 June 2010*, Review Conference Official Records, *supra* note 1, Annex III, App. V, B.

table. Two days before the end of the Review Conference, as the negotiations were about to move from the working group level to the plenary of the conference, representatives of these delegations locked themselves in together for several hours, trying to come up with a text that could be supported by both sides. Much to everyone's surprise, the attempt resulted in a common "ABCS" proposal on the conditions for exercising jurisdiction based on state referrals and *proprio motu* investigations. According to this compromise proposal, non–states parties would be completely excluded from the Court's jurisdiction under these two trigger mechanisms—both as potential aggressors and as potential victim states. By contrast, states parties to the Rome Statute would be allowed to submit a declaration opting out of the Court's jurisdiction over the crime of aggression. Article 121(5) would apply to all amendments, which would therefore enter into force for each state party individually within one year after ratification. As a further compromise element, however, the proposal delayed the exercise of jurisdiction by another five years, thereby attempting to respond to arguments expressed by some delegations that the Court was not yet sufficiently well established to handle aggression cases.

Ambassador Wenaweser and Prince Zeid could not ignore this significant agreement struck between delegations that represented fundamentally opposed positions on the question of aggressor state consent, and that were willing to promote their compromise actively among other delegations. At this point, negotiations had moved from the working group level to the plenary of the Review Conference. Following informal bilateral and group consultations, Ambassador Wenaweser included the main elements of this compromise in his draft negotiation text, which he presented to the plenary on the morning of Thursday, June 10, 2010, the day before the end of the conference. The enabling resolution now referred to Article 121(5) as the provision governing the entry into force of all amendments and no longer contained any reference to Article 121(4). Ambassador Wenaweser explained his proposal as being strongly based on the existing Article 12(1) of the Statute, by which states parties have accepted the Court's jurisdiction over all four crimes referred to in Article 5, including the crime of aggression, and from which states parties could now opt out under the draft amendment. In the course of the day, support for this approach as the only way forward solidified among the negotiating parties. To agree to a consent-based regime, which excluded non–states parties entirely, was a massive compromise for the many delegations that had favored a protective regime. Late Thursday night, Ambassador Wenaweser presented a further refined text, which now also contained the negotiated understandings regarding the definition of aggression.[26] The revised draft left only one issue open for further negotiation: the role of the Security Council as a filter for aggression cases. Twenty-four hours were left to strike a deal on this thorny issue.

IV. THE ROLE OF THE SECURITY COUNCIL

The role of the Security Council in future aggression cases before the Court is not explicitly mentioned in Article 5(2) of the Rome Statute, which innocuously mandates that the provisions on the crime of aggression "be consistent with the relevant provisions of the Charter of the United Nations." The concrete meaning of this reference, specifically in relation to the

[26] *Non-paper by the President of the Review Conference* (June 10, 2010, 11:00 p.m.). The non-paper itself was not issued as an official document. Nevertheless, this version of the non-paper was subsequently considered by the linguistic Drafting Committee and therefore published in the Review Conference Official Records, *supra* note 1, Annex II(b), App. II.

Security Council's role, had been a matter of dispute ever since the Preparatory Commission took up negotiations on this crime in 1999.

Article 39 of the UN Charter provides: "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 41 and 42, to maintain or restore international peace and security." Permanent members of the Security Council have consistently argued that Article 39 confers upon the Council the exclusive competence to determine the occurrence of an act of aggression. Accordingly, an investigation by the Court into a crime of aggression—which, by definition, presupposes the occurrence of an act of aggression by one state against another—should not proceed absent such a determination by the Council. The vast majority of delegations opposed this interpretation of Article 39 and submitted that such a determination might well be a best-case scenario for the Court in a specific situation, but that it was not legally required under the Charter. They argued that Article 39 merely required the Council to determine an act of aggression for the purpose of deciding Chapter VII measures and did not bar any other Charter organ, such as the International Court of Justice or any other organization, such as the International Criminal Court, from making a determination of aggression for its own purposes. In any event, it was argued that the Charter gave the Council only primary, but not exclusive, responsibility for maintaining international peace and security.[27]

Pre-Kampala: Some Progress on Ancillary Issues

The central question of whether a case on the crime of aggression should proceed in the absence of a Security Council determination of an act of aggression remained open until the last day of the Review Conference. Nevertheless, the Princeton Process had resolved a number of related issues—which, in turn, helped focus the discussions on outstanding questions in Kampala. The proposals adopted by the Special Working Group in February 2009 reflected the delegates' previously reached consensus on the following conditions for the Court's exercise of jurisdiction over the crime of aggression. First, all three existing jurisdictional triggers in the Rome Statute would apply to the crime of aggression—Security Council referrals, state party referrals, and *proprio motu* investigations of the prosecutor. This concession was a constructive and highly significant one by those advocating for the exclusive role of the Security Council in determining an act of aggression. It made clear that, as a procedural matter, the initiative for an investigation into a crime of aggression could come from individual states parties, as well as the prosecutor, even when the Security Council did not take action itself. Second, when the prosecutor has identified a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she should notify the UN secretary-general to that effect—who would, in turn, inform the Security Council. The delegations agreed early on that such a course of action would be appropriate in light of the Council's competences under the Charter. Third, if the Security Council then determined that the state concerned had committed an act of aggression, the prosecutor could proceed with the investigation in respect of a crime of aggression. The delegates thus agreed that the Security Council should always have the first

[27] Article 24(1) of the UN Charter reads: "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."

opportunity to confirm the prosecutor's assessment that an act of aggression had occurred, and that such a determination would be a sufficient condition for the Court to proceed. Fourth, a determination of an act of aggression by an organ outside of the Court shall be without prejudice to the Court's own findings. This provision was agreed upon following extensive discussions in the Special Working Group on the question of due process for alleged perpetrators.

Prior to Kampala, it was thus already agreed that the Security Council should have the primary role in determining the occurrence of an act of aggression and that the Court should retain its substantive judicial independence vis-à-vis all external organs. Most importantly, in light of the four above points of consensus, the question was no longer whether the Security Council would be the exclusive *trigger* for a Court investigation into a crime of aggression, but whether the Council should serve as an exclusive jurisdictional *filter* at a later stage—namely, after the prosecutor's own independent preliminary analysis identified a reasonable basis for concluding that an act of aggression had occurred. What, though, if the Security Council did not confirm this finding by making its own determination of aggression—due, for example, to one of its permanent members exercising its veto?

Kampala: A Cascade of Mutual Concessions

Prior to Kampala, the Special Working Group had not come to any conclusion on the question of a jurisdictional filter but had, instead, presented states parties with six options, organized under two alternatives. Once in Kampala, Prince Zeid made quick gains at the working group level by eliminating four of these six approaches in only a few days.[28] Each of these options had attracted the support of different delegations over the years, but as the pressure mounted at the Review Conference itself, no single delegation complained openly about the now inevitable process of reducing the number of options. Among the abandoned suggestions were that a determination of an act of aggression by the General Assembly or the International Court of Justice could be a sufficient condition for a case to proceed before the Court in the face of Council inaction, and that the Court could proceed unilaterally, with no additional filter being required at all. On the table remained Alternative 1, under which the Security Council would be the exclusive filter, and Alternative 2, under which the Court's own pretrial chamber would serve as a secondary filter if the Council made no determination of an act of aggression within six months.

Once it was proposed to have separate provisions for Security Council referrals (Article 15 *ter*) and for state referrals and *proprio motu* proceedings (Article 15 *bis*), the pace of progress significantly quickened. Prince Zeid's first draft of Article 15 *ter* contemplated that, in the case of a Security Council referral, the prosecutor would have to go back to the Council for a substantive determination of an act of aggression (or at least for a simple decision authorizing the prosecutor to proceed).[29] This approach meant that, when the Council had been the trigger, it would also be the exclusive, and not just primary, filter. The alternative filtering option, the pretrial chamber, was no longer mentioned in this draft in relation to Council referrals. Not to object to an exclusive Security Council filter for investigations triggered by the Council itself

[28] *Conference Room Paper on the Crime of Aggression* (Rev. 1), Review Conference Official Records, *supra* note 1, Annex III, App. II.

[29] *Conference Room Paper on the Crime of Aggression* (Rev. 2), Review Conference Official Records, *supra* note 1, Annex III, App. I.

was a significant concession by those many delegations that had previously rejected the notion of such Council exclusivity. Instead, these delegations appeared to have shifted their attention to the filter question in the new draft Article 15 *bis*.

At this point—negotiations had moved from the working group level to the plenary—Ambassador Wenaweser could be reasonably confident that draft Article 15 *ter* had enough support to be adopted as it stood. Nevertheless, he subsequently forwarded to the plenary a further idea that had been put to him in bilateral consultations. Given that it was cumbersome for the prosecutor to go back to the Security Council for a determination of aggression when the referral initially came from the Council itself, it was suggested that the Council filter be deleted from Article 15 *ter* altogether. Not surprisingly, those delegations that disliked the Council filter in the first place embraced the suggestion. Remarkably, the other side of the aisle did not object either, based on the pragmatic argument that the decision to refer a situation remained under the control of the Council.[30] It was a surprising concession at that point since it was conceptually a retreat from the long-standing position that the Court should proceed only when the Security Council had made a determination of an act of aggression, and since the controversial question of the jurisdictional filter was still open in draft Article 15 *bis*.

The question of the Security Council filter was thus reduced to the realm of state referrals and *proprio motu* investigations only, with two possible alternatives remaining—either an exclusive Council filter (Alternative 1: the investigation may not proceed if the Council does not determine an act of aggression) or a primary Council filter (Alternative 2: after six months of inaction by the Council, the Court's pretrial judges may authorize the investigation). By 11 p.m. on Thursday, June 10, 2010, this issue was the only one from Ambassador Wenaweser's revised draft that was still to be decided.[31]

The Ultimate Trade-Off

In the last few days of the Review Conference, the search for a compromise on the issue of aggressor state consent was largely driven, as we have seen, by the initiatives of individual delegations. That process did not yield convergence, however, on the issue of the Security Council filter. A previously circulated proposal by Canada, according to which an exclusive Security Council filter would apply except when all the states involved in a concrete case agreed otherwise, did not generate enough interest, and it was subsequently overtaken by the above-mentioned joint ABCS proposal, which retained the non-exclusive Security Council filter in Alternative 2. Inexplicably, after Ambassador Wenaweser's revised draft of Thursday night (with only Friday left) had identified the filter question as the only outstanding issue, no direct negotiations ensued between the interested parties. It was therefore incumbent upon Ambassador Wenaweser himself to bring new momentum into this discussion. He did so, taking into account a number of new circumstances. In his Thursday night draft, the scope of jurisdiction based on state referrals and *proprio motu* investigations had been drastically reduced: Article 15 *bis* limited jurisdiction to consenting states parties and excluded non–states parties

[30] It is not unimaginable, however, that the prosecutor might uncover evidence of aggression of which the Council was unaware at the time of its referral—for example if a third state turns out to be "substantially involved" in the activities of rebel groups in the sense of Article 8 *bis* (2)(g). In such circumstances, the only way for the Council to exert control would be to suspend the investigation under Article 16 of the Statute.

[31] See *Non-paper by the President of the Review Conference*, *supra* note 26.

altogether. Furthermore, having overcome the question of state consent, which previously divided delegations right down the middle, the fault lines had shifted. On the last outstanding question, the vast majority of delegations preferred a primary, but not exclusive, Security Council filter. Therefore, when Ambassador Wenaweser floated his ideas for a final compromise—in a tense exploratory meeting with a number of delegations on Friday morning—he had no choice but to premise his proposal on the primary, but not exclusive, Security Council filter in Alternative 2.

The new proposal had three main features. First, it highlighted that the Security Council could always suspend an investigation of aggression in accordance with Article 16 of the Statute.[32] Second, in case of Council inaction for more than six months, the competence to authorize the prosecutor to proceed would fall not upon the three-judge pretrial chamber as originally envisaged in Alternative 2, but upon the six judges of the Pre-trial Division as a whole. Such an "enhanced" filter had been suggested earlier as providing stronger protection against politically motivated and meritless cases. Third, and most importantly, Ambassador Wenaweser suggested language to delay the activation of the Court's exercise of jurisdiction over the crime of aggression until at least 2017, thereby responding to concerns that "breathing room" was required for such a fundamental decision as to bring state aggression within the Court's purview. In concrete terms, he suggested a differentiated regime for delayed activation. The exercise of jurisdiction based on Security Council referrals (Article 15 *ter*) would start automatically in 2017, except if states parties decided otherwise. By contrast, the exercise of jurisdiction under the more controversial Article 15 *bis* would not start automatically in 2017; instead, it would require an active decision to be taken by states parties to that effect. This privileged treatment for the Security Council trigger was inspired, in part, by the ABS proposal itself, which had included an even higher threshold for the activation of jurisdiction based on state referrals and *proprio motu* investigations.[33]

With the clock ticking and pressure mounting on the final day of the Review Conference, the approach outlined above was not rejected outright, and attracted some interest. Direct negotiations between various groups of delegations now focused on the "activation formula." A further revised draft by Ambassador Wenaweser of 4 p.m. Friday reflected this progress by incorporating the choice of a non-exclusive Security Council filter into draft Article 15 *bis* and adding placeholders in draft Articles 15 *bis* and 15 *ter* referring to the ongoing discussions on activation. But as these negotiations continued into the evening, divisions ran deeper than expected. Whereas some delegations requested that the activation decision be taken by consensus at a future Review Conference—which could also review the amendments themselves—others posited that the delayed activation of jurisdiction under both Articles 15 *bis* and 15 *ter* should not require a further decision by states parties and that it should, in any event, not be

[32] Article 16 provides:

> 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.

[33] Under the ABS proposal, Article 15 *bis* would have required *ratifications* by seven-eighths of states parties, not just an activation *decision* by states parties (by consensus or at least two-thirds of states parties present and voting in accordance with Article 112(7)(a) of the Rome Statute).

connected to revisiting the amendments. Surprisingly, some countries that had previously supported the differentiated regime of the ABS proposal now insisted that Articles 15 *bis* and 15 *ter* be treated equally.

As the evening hours passed, a further compromise proposal by Ambassador Wenaweser became inevitable, lest the Review Conference end in a stalemate. His formula thus sought to provide a middle road. It rendered the exercise of jurisdiction over the crime of aggression for both Articles 15 *bis* (state party referrals and *proprio motu* investigations) and 15 *ter* (Security Council referrals) conditional on an activation decision "to be taken after 1 January 2017 by the same majority of states parties as is required for the adoption of an amendment to the Statute," meaning an absolute majority of two-thirds.[34] In addition, the proposal included a new preambular paragraph indicating that states parties are "*[r]esolved* to activate the Court's jurisdiction over the crime of aggression as early as possible." For those worried about the postponement of the activation decision, this paragraph was intended to express the conference's joint political will to make that decision at the beginning of 2017.

The proposal did not say so explicitly, but the very late hour conveyed that it was a final "take it or leave it" attempt to overcome the deadlock. An objection by any state party would likely have led to the end of the negotiations. A "Plan B" draft resolution—on the adoption of the "definition only," with deferral of the question of jurisdiction—was ready for that eventuality, but it remained in the drawer. Following a final suspension of the plenary meeting for group consultations, no delegation objected in the resumed plenary session to adopting the draft resolution on the crime of aggression. It was thus adopted by consensus.

V. Main Features of the Aggression Package

The package adopted in Kampala comprises an enabling resolution (Resolution RC/Res. 6), six amendments to the Rome Statute (Appendix I), an amendment to the Elements of Crimes (Annex II), and a set of interpretive understandings (Annex III). The following are their main features.

The enabling resolution contains only a few preambular paragraphs, the first of which recalls Article 12(1) of the Statute, under which states parties have accepted the Court's jurisdiction over all four crimes referred to in Article 5. In the operative part, the resolution states that the amendments are subject to ratification or acceptance and shall enter into force in accordance with Article 121(5)—meaning, for each state party, one year after the deposit of its ratification instrument.[35] The resolution also specifies that the amendments will be reviewed seven years after the beginning of the Court's exercise of jurisdiction, which translates to 2024 at the earliest, provided that states parties stick to their resolve expressed in the preamble to activate the Court's jurisdiction over the crime of aggression as early as possible.[36]

Amendment 1 deletes Article 5(2) of the Statute, which contains the mandate, now satisfied, to adopt the amendments on the crime of aggression.

[34] Rome Statute, *supra* note 1, Art. 121(3).

[35] The enabling resolution states only that Article 121(5) governs the entry into force of the amendments. It does not explicitly address the related, but separate, question whether the Court may exercise jurisdiction over an alleged crime of aggression committed by a state party that has not ratified the amendments on the territory of a state party that has ratified them. The resolution hints at this possibility by noting that "any state party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance." *But see infra* note 38.

[36] The beginning of the exercise of jurisdiction can take place in 2017 at the earliest. Aggression Resolution, *supra* note 1, Arts. 15 *bis* (3), 15 *ter* (3).

Amendment 2 adds a new Article 8 *bis* to the Statute, which defines the crime of aggression as described above. Most notably, individual criminal jurisdiction over the crime of aggression is limited to leaders and extends to acts of aggression as referred to in General Assembly Resolution 3314 (XXIX) of 1974, provided that any such act "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." The definition thus limits the crime of aggression to leaders responsible for the clearest and most serious cases of the illegal use of force by one state against another.

Amendment 3 adds a new Article 15 *bis* to the Statute, which describes the conditions for exercising jurisdiction in the case of state referrals and *proprio motu* investigations by the prosecutor. Since it enters into force for each ratifying state party individually under 121(5), the Court would have no jurisdiction whenever the amendment has not entered into force for any of the states parties involved. Jurisdiction is also excluded for crimes of aggression involving non–states parties as either victims or aggressors.[37] Furthermore, Article 15 *bis* provides consent-based jurisdiction in that it allows any state party to declare prospectively that it does not accept the Court's jurisdiction over the crime of aggression.[38] Such a declaration may be withdrawn at any time, and the declaring state party is explicitly encouraged to consider withdrawing the declaration within three years. Within this scope of jurisdiction, the prosecutor may conduct a preliminary analysis to ascertain whether a crime and, in particular, an act of aggression has occurred, and must inform the Security Council accordingly. Should the Council not make a determination of an act of aggression within six months, the judges of the Pre-Trial Division may authorize the formal opening of an investigation.

Amendment 4 adds a new Article 15 *ter* to the Statute, which describes the conditions for exercising jurisdiction in the case of Security Council referrals. This article is much shorter than Article 15 *bis*, as it does not impose any additional procedures on the prosecutor when seeking to investigate a possible crime of aggression.

Both Articles 15 *bis* and 15 *ter* contain the same provisions regarding their "activation." First, even though the amendments enter into force for each ratifying state party individually in accordance with Article 121(5) of the Statute, the Court has to wait until one year after the

[37] Articles 15 *bis* (5) and 15 *bis* (4) exclude the possibility of a non–state party accepting jurisdiction over the crime of aggression under Article 12(3) of the Statute. As confirmation, the reference to Article 12(3) was deliberately deleted in the final interpretive understandings accompanying these provisions, whereas all previous drafts of these understandings retained an explicit reference.

[38] As the final package does not contain an explicit understanding on the question whether a nonratifying state party that has allegedly aggressed, but not opted out, may be subject to the Court's jurisdiction under Article 15 *bis*, divergent interpretations on the issue have emerged after Kampala. The approach that Ambassador Wenaweser presented to the plenary on the morning of Thursday, June 10, 2010, was strongly based on Article 12(1) of the Statute, under which states parties have already accepted jurisdiction over the crime of aggression. Consequently, nonratifying and allegedly aggressing states parties that do not accept the Court's jurisdiction under Article 15 *bis* would have to submit an opt-out declaration to prevent the Court from exercising jurisdiction. See the statements made in the 2010 debate of the UN General Assembly on the Report of the International Criminal Court, UN Doc. A/65/PV.41, at 8–9 (Switzerland), 17–18 (Brazil) (2010). *See also* Kreß & von Holtzendorff, *supra* note 15, at 1212; Christian Wenaweser, *Reaching the Kampala Compromise on Aggression: The Chair's Perspective*, 23 LEIDEN J. INT'L L. 883 (2010). Those opposing this view maintain that the second sentence of Article 121(5) already precludes the Court from exercising jurisdiction with respect to nationals or the territory of nonratifying states parties. See, for example, the statements made by France and the United Kingdom during the general debate of the ninth session of the ICC Assembly of States Parties in December 2010. See also the U.S. statement made in the 2010 General Assembly debate, UN Doc. A/65/PV.41, at 26–27. In essence, both views coincide in that Article 15 *bis* is a consent-based regime, though opinions diverge as to whether active consent is required by the alleged aggressor state (that is, ratification) or passive consent only (that is, not to submit an opt-out declaration).

amendments have entered into force for at least thirty states parties. In addition, states parties have to take a decision to activate the Court's jurisdiction by consensus or by a two-thirds majority of all states parties, and they may do so only after January 1, 2017. Both Articles 15 *bis* and 15 *ter* also state that any determination of an act of aggression by external organs would not be binding for the Court, and that the special procedures established for the crime of aggression do not affect the course of investigations and trials regarding the other three core crimes in the Statute.

Amendment 5 adds a new subparagraph to Article 25(3) of the Statute, which confirms that secondary perpetrators are criminally responsible for a crime of aggression only if they also fulfill the leadership requirement in Article 8 *bis*(1).

Amendments 6 and 7 contain merely technical changes to Articles 9 (Elements of Crimes) and 20 (*ne bis in idem*) of the Statute, adding references to the new Article 8 *bis*.

Annex II ("Elements of Crime") provides what is, in effect, a checklist of the elements of the crime of aggression that the prosecutor would have to prove to the Court, and it clarifies how the "committed with intent and knowledge" standard of Article 30 of the Statute applies to the these particular elements. In so doing, the elements also further clarify some aspects of the definition. For example, the use of force must in all cases be "inconsistent with the Charter of the United Nations"; an act of aggression must have occurred and not only have been attempted; and the leadership qualification may apply to more than one person.

Annex III contains the above-mentioned interpretive understandings, including further understandings regarding the nonretroactivity of the crime of aggression and the absence of a state consent requirement for Security Council referrals. Thus, the Court's jurisdiction arising from these referrals extends to states parties and non–states parties alike.

VI. Conclusion

Philippe Kirsch, chair of the Committee of the Whole at the Rome Diplomatic Conference and the Court's first president, once stated that the outcome in Rome "contains uneasy technical solutions, awkward formulations, [and] difficult compromises that fully satisfied no one."[39] Before inviting delegates to adopt the final package of amendments on the crime of aggression, Ambassador Christian Wenaweser, the president of the Review Conference, echoed this very sentiment. He conceded that all components of the package did not meet with the full agreement of any delegation but that that was precisely his understanding of what it meant to forge a compromise. Ultimately, the political will in Kampala to end impunity for the crime of aggression united delegations and enabled them to overlook any imperfections in the final outcome. Days earlier, Ben Ferencz[40] had implored delegates to work in a spirit of consensus, remarking that every lawyer is great at tearing apart a proposal but that it does not get us where we want to go. It would appear that these wise words were ultimately heeded, thus enabling international criminal justice to take a historic step forward.

[39] Philippe Kirsch & John T. Holmes, *The Birth of the International Criminal Court: The 1998 Rome Conference*, 1998 Canadian Y.B. Int'l L. 3, 38.

[40] In 1947–1948, Ferencz was chief prosecutor in Nuremberg for the Einsatzgruppen case, which involved twenty-two defendants who were charged with murdering over one million people. All defendants were convicted, and the press hailed it as the "biggest murder trial in history." Since then, Ferencz has argued tirelessly for recognizing international criminal law, defining the crime of aggression, and peace. He has published widely on these topics and played an integral role in the creation of the Court and in the work of the Special Working Group and the Review Conference on the crime of aggression. In gratitude, this article is dedicated to him.