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# Report of the Cleveland Experts Meeting: The International Criminal Court and the Crime of Aggression

Experts Meeting

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**REPORT OF THE CLEVELAND EXPERTS MEETING: THE INTERNATIONAL  
CRIMINAL COURT AND THE CRIME OF AGGRESSION\***

*On September 25–26, 2008, Case Western Reserve University School of Law hosted a symposium and experts meeting to help advance the project of defining aggression and arriving at an appropriate trigger mechanism for the International Criminal Court (ICC) to exercise jurisdiction over that crime. The event was in coordination with Christian Wenaweser, President-elect of the ICC Assembly of State Parties, and supported by funding from the Wolf Family Foundation, the Planethood Foundation, the Public International Law and Policy Group, and the Frederick K. Cox International Law Center. This Report summarizes the presentations and discussions of the participants in the experts meeting.*

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## INTRODUCTION

On September 25–26, 2008, Case Western Reserve University School of Law hosted a symposium and experts meeting to help advance the project of defining aggression and arriving at an appropriate trigger mechanism for the International Criminal Court (ICC) to exercise jurisdiction over that crime. The event was in coordination with Christian Wenaweser, President-elect of the ICC Assembly of State Parties, and supported by funding from the Wolf Family Foundation, the Planethood Foundation, the Public International Law and Policy Group, and the Frederick K. Cox International Law Center.

The Cleveland Experts Meeting was chaired by David Scheffer, former U.S. Ambassador at Large for War Crimes Issues and head of the U.S. Delegation during the 1998 Rome Diplomatic Conference for the International Criminal Court. The two dozen other participants in the Experts Meeting, several were a mix of delegates and NGO representatives who have participated in the work of the Special Working Group on the Crime of Aggression (Christian Wenaweser, Stefan Barriga, Roger Clark, Don Ferencz, Robbie Manson). Additional participants were former government, international organization, and NGO representatives who had taken part in the negotiations of the Rome Statute and/or its supplemental instruments (Cherif Bassiouni, Ben Ferencz, Henry King, Michael Newton, Elizabeth Wilmshurst). The remaining participants consisted of leading academic experts on the ICC and international criminal law practitioners from across the globe (Astrid Reisinger Coracini, Shahram Dana, Mark Drumbl, Mark Ellis, Elise Leclerc-Gagne, Larry May, Sean Murphy, Laura Olson, Keith Petty, Christopher Rassi, Leila Sadat, Bill Schabas, Michael Scharf, Ben Schiff, Oscar Solera, Noah Weisbord). The experts participated in their individual/personal capacities, and not as representatives of their respective countries, organizations, or institutions.

The hope was that by holding the session away from the United Nations and involving a wide range of outside expertise and experience, the Experts Meeting could develop and explore new proposals for the Assembly of State Parties' consideration. In an effort to place the proposals of the Cleveland Experts Meeting before the Special Working Group on the Crime of Aggression (SWGCA) in time for its November 2008 sessions, the Experts Meeting provided a brief preliminary report of their work without delay, followed by this more comprehensive document that reflects the details of the discussion. The report follows the "Chatham House Rule;" therefore, with the exception of proponents of the two major proposals under consideration, the views of particular experts remain unidentified in the text. Annexed at the end of the Report is the "Cleveland Declaration." All participants of the Experts Meeting endorsed the Cleveland Declaration, with the exception of government and international organization representatives who

by virtue of their official positions could not associate themselves with the document.

#### DEFINITION OF THE CRIME OF AGGRESSION

The first segment of the meeting focused on the definition of the crime of aggression. Although much progress has been made in defining the crime, a major area still in the working stages is how to incorporate exceptions, if at all. The question posed to the group was whether it could arrive at a definition that satisfactorily takes into account exceptions and how such a definition would look. Potential exceptions posed for consideration included: self-defense, humanitarian intervention, protection of nationals, rescue from embassies under siege, antiterrorism efforts, and nuclear non-proliferation. Humanitarian intervention and self-defense received notable emphasis. Some experts questioned the possibility of agreeing on what would constitute an acceptable form of humanitarian intervention or self-defense before either could be incorporated as an exception to the crime of aggression.

Initially, the group pointed out that by its very nature, aggression is the most political of all international crimes, and the difficulty with defining it is not necessarily inherent within the complexity of the legal issues pertaining to it, but with the political ramifications of what a legal definition may contain. Moreover, states are reluctant to reveal that they color their approaches to the definition with their respective political considerations and with their political relations with other states, particularly the major ones. This is why the question of defining aggression has, for all practical purposes, continued since the Nuremburg charter's inclusion of "crimes against peace." The work of the various committees since 1946 up to the 1974 GA Resolution on defining aggression clearly evidences the use of legal technicalities to mask the politics. From 1995 to the present, the issue is much less the definition as it is a triggering mechanism.

#### *Security Council Trigger*

The experts noted that lawful exceptions to the use of force could be linked to an exclusive Security Council trigger which could allow the Security Council to take into account exceptions when determining aggression. Unless the Security Council has exclusive power to make determinations on aggression, some experts felt the definition of aggression itself must incorporate the exceptions.

*Possibility of Security Council Granting Approval through Resolution*

One expert explained that with the 1974 General Assembly Resolution 3314 definition,<sup>1</sup> the drafters wrote in exculpatory clauses to meet the concerns of various groups who did not want the restriction of a specific definition. The language used in the clauses was intentionally open to interpretation, leaving the Security Council with the discretion to determine aggression.

The current definition of aggression, then, may be able to accommodate proposed exceptions. One of those ways, as suggested by a delegation in the last Assembly of State Parties Special Working Group Meeting, would be to have the Security Council draft a resolution, after-the-fact, sanctioning the use of force by the state. If Article 2 of GA Resolution 3314<sup>2</sup> were absent in the definition, this possibility would always be left open. Although an after-the-fact Security Council resolution would not be determinative for the ICC, the Court would likely give due deference to such a resolution because of the Security Council's political influence.

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<sup>1</sup> G.A. Res. 3314 (XXIX), art. 1, 4-8, U.N. Doc. A/9631 (Dec. 14, 1974). (“*Article 1* - Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. *Explanatory Note*: In this Definition the term “State”: (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations; (b) Includes the concept of a “group of States” where appropriate. *Article 4* - The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter. *Article 5* - 1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. 2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility. *Article 6* - Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provision concerning cases in which the use of force is lawful. *Article 7* - Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particular peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration. *Article 8* - In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.”).

<sup>2</sup> G.A. Res. 3314 (XXIX), *supra* note 1, art. 2. (“The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”).

Another expert suggested that the ICC should not defer to any after-the-fact determination by the Security Council when looking at the facts and evidence within the context of the adjudication process. Multiple members questioned whether defendants could challenge the Security Council's determination on the aggression if it is merely a trigger to jurisdiction.

Some felt that after receiving the Security Council's determination of aggression, the prosecutor could move forward with the case but would still retain the burden of proving the scope and elements of the crime and the criminal responsibility.

#### *Magnitude and General Assembly Resolution 3314*

The experts noted that there is an ongoing debate concerning the use of a magnitude threshold before deeming an act as a crime of aggression. One approach is to use the list of acts that constitute aggression contained in Article 3 of GA Resolution 3314<sup>3</sup> without applying any magnitude test. Other experts advocated an approach to keep the magnitude test and then look to Resolution 3314<sup>4</sup> once an act meets the magnitude test. Some experts voiced concern that a magnitude test itself may not be accurate in determining acts of aggression.

#### *Inclusion of Threats*

The experts noted that one could view the language of proposed Article 8 bis<sup>5</sup> as covering all of the exceptions for acts involving the actual use

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<sup>3</sup> G.A. Res. 3314 (XXIX), *supra* note 1, art. 3. (“*Article 3* - Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attached, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above or its substantial involvement therein.”).

<sup>4</sup> *Id.*

<sup>5</sup> Int'l Criminal Court [ICC], *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, ICC-ASP/6/SWGCA/2 (2 June 2008), Article 8 bis [hereinafter Article 8 bis], available at <http://www2.icc-cpi.int/NR/rdonlyres/2AE911B2-15AA-4276-8F23-5D6818907>

of armed force but as not covering threats of acts of aggression. This is different than Article 2(4) of the U.N. Charter,<sup>6</sup> which prohibits both threats and actual use of force. In paragraph 2 of Article 8 bis,<sup>7</sup> the phrase “use of armed force” eliminates the notion of including threats, but one could view the latter phrase “any other manner inconsistent with the Charter of the United Nations” as permitting the inclusion of threats.

Generally, the group voiced agreement that the definition of aggression should not include threats nor was it intended to include threats. Some participants suggested that other crimes and other venues cover threats of aggression. The ICC would not have jurisdiction over such threats, and the language of Article 8 bis<sup>8</sup> appears clear to this end. As a conceptual viewpoint for why threats may be left out, the experts suggested that threats do not cross the gravity threshold.

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007/146570/ICCASP6SWGCA2English1.pdf. (“ 1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”).

<sup>6</sup> U.N. Charter art. 2, para. 4. (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

<sup>7</sup> Article 8 bis, *supra* note 5 at 2.

<sup>8</sup> *See id.*

*Priority and Intent*

The experts noted that two competing ideas, priority and intent, were incorporated into Articles 1, 2 and 3 of GA Resolution 3314 of 1974.<sup>9</sup> One idea, advanced by the Russians in 1973,<sup>10</sup> was that priority was the determining factor of aggression. In other words, "first use of armed force" constitutes *prima facie* evidence of an act of aggression. The second idea, taken from western law,<sup>11</sup> focused on intent as the most significant factor in determining an act of aggression. In other words, it would necessary to determine if the intent was legitimate, such as self-defense, or rather a pretext for territorial expansion. The use or non-use of Article 2<sup>12</sup> may therefore affect the compromise language by incorporating both the concepts of priority and intent. Removal of Article 2<sup>13</sup> may result in the removal of the idea of priority, making room for the exceptions.

Providing background, one expert explained how a 1969 proposal for the definition of aggression<sup>14</sup> made *specific* reference to intent. In the end, the drafters did not include it because they felt the Security Council was able to make a final determination weighing all appropriate factors including intent.

Another speaker mentioned that the German proposal reiterated the same discussion.<sup>15</sup> The German proposal originally used the element of intent as the only way to determine which uses of force actually constitute aggression.

Another expert stated that intent would indeed be helpful in identifying which uses of force to exclude, whereas elements such as magnitude may not be helpful in that regard; however, problems may arise in defining a specific intent. Since accurately identifying the object of intent is sometimes problematic, the experts did not pursue the German proposal<sup>16</sup> which included intent as the *mens rea* requirement. Ultimately, without an agree-

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<sup>9</sup> See G.A. Res. 3314 (XXIX), *supra* note 1, arts. 1-3.

<sup>10</sup> GAOR, 26th Sess., Supp. No. 19, U.N. Doc. A/8419 at p. 21.

<sup>11</sup> The reports of the Special Committee are contained in GAOR, 23rd Sess., Agenda Item 86, A/7185/Rev. 1; GAOR, 24th Sess., Supp. No. 20 (A/7620), Feb. 14, 1970; GAOR, 25th Sess., Supp. No. 19 (A/8019), July 13-Aug. 14, 1970; GAOR, 26th Sess., Supp. No. 19 (A/8419), Feb. 1-Mar. 5, 1971; GAOR, 27th Sess., Supp. No. 19 (A/8719), Jan. 31-Mar. 3, 1972.

<sup>12</sup> See G.A. Res. 3314 (XXIX), *supra* note 1, art. 2.

<sup>13</sup> *Id.*

<sup>14</sup> See *supra* note 11.

<sup>15</sup> Preparatory Committee on the Establishment of an International Court, Dec. 1-12, 1997, Working Group on Definitions and Elements of Crime, *Proposed by Germany*, U.N. Doc. A/AC.249/1997/WG.1/DP.20 (Dec. 11, 1997).

<sup>16</sup> *Id.*

ment regarding specific intent, there must be an agreement on exceptions, unless the group decided not to consider exceptions at all.

Another expert argued that because defining the exceptions and further agreeing on those definitions may be so difficult, one route for including grounds for the exclusion of responsibility may be to work *mens rea* requirements, even intent and knowledge, into the definition.

### *Elements*

As an alternative to listing specific exceptions or defenses in the statute, or providing that the Security Council must adopt a resolution sanctioning the use of force, another option is to outline the elements for aggression and include them within the statute. Although enumerated and codified elements for other crimes fall within the ICC's jurisdiction, outlining the elements for aggression would be more difficult.

One expert reasoned that defining the elements includes addressing the barrier between state actions and policies with regard to the decision to engage in the use of force. The same is true regarding the specific elements of criminal responsibility. The elements must address the *actus reus* of the individual.

One speaker stated that the general attitude of the group seemed to suggest that one problem with the definition of aggression is a lack of specificity. Remedying the lack of specificity may require, at a minimum, further development of the elements of the crimes. In doing so, drafters would need to ensure that the definition addresses all possible uses of force that would be consistent with the U.N. Charter.

Concurring, another expert referenced Article 22 of the Rome Statute,<sup>17</sup> which requires that judges apply a narrow definition of the crime under the Statute. Therefore, greater specificity is crucial because an ambiguous provision would give rise to a greater presumption that the use of force is lawful.

With regard to the timing of the establishment of the elements, one expert felt that despite the importance of the elements, drafting them before the review conference was unlikely. It would be ideal, another suggested, to have the elements as a package together with everything else at the review

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<sup>17</sup> Rome Statute of the International Criminal Court art 22, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournals/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournals/Rome_Statute_120704-EN.pdf). ("A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a 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. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

conference. Recognizing the difficulty of the task, this expert proposed that defining the elements might be a task to address with a greater sense of urgency.

Other experts agreed that despite the difficulty in drafting and attaining agreement on the elements, including these elements was important. In response to the difficulties, one expert suggested that at a minimum, adding some of the key elements with respect to individual criminal responsibility to the present definition could provide a general indication of what these elements should be.

#### *Applicability of Article 31*

The experts discussed the impact of Article 31<sup>18</sup> on the crime of aggression. Article 31<sup>19</sup> sets forth the general defenses available to the accused, such as mistake, intoxication, self-defense, and obedience to orders. One expert voiced concern about a general perception of the inapplicability

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<sup>18</sup> Rome Statute of the International Criminal Court art. 31, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf). (“Grounds for excluding criminal responsibility- 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court; (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph; (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control. 2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it. 3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.”).

<sup>19</sup> *Id.*

of Article 31<sup>20</sup> because the drafters only intended the enumerated defenses to apply to an individual whereas aggression is a crime of the State. For example, an individual's right of self-defense in terms of Article 31<sup>21</sup> is not the same as a State's right to self-defense under Article 2(4) of the U.N. Charter.<sup>22</sup> Some questioned why an accused would not be able to rely on the defenses under Article 31.<sup>23</sup>

#### *Location of Defenses and Structure of the Statute*

The experts also questioned whether to locate the defenses to the crime of aggression within the general part of the statute or imbed them within the definition of the crime. One expert proposed that the inclusion of enumerated defenses in the definition of aggression would make the statute more clear.

One expert noted that the current definition of aggression does not include matters relating to Article 31<sup>24</sup> or any defenses. The expert suggested that the definition of aggression should stand-alone with the addition of a sub-paragraph to Article 31.<sup>25</sup> In addition, the expert noted that paragraph 3 of Article 31<sup>26</sup> allows the ICC to consider a ground for excluding criminal responsibility other than the grounds laid out in paragraph 1 of Article 31.<sup>27</sup> Since this article would apply to the crime of aggression, it would be possible to enumerate defenses to aggression in a separate document rather than require amendment of Article 31<sup>28</sup> itself.

#### *Judicial Interpretation of the Definition*

Participants noted that many argue a detailed definition of aggression is necessary to give the defendant a fair trial. Another expert argued that because the importance of the crime of aggression would lie entirely in its deterrent effect, it would be best to keep the definition vague, and permit judges to interpret it with reference to general international law. Most States employed this method to apply the Prohibition of Piracy for hundreds of years until the advent of the Law of the Sea Convention.<sup>29</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> U.N. Charter art. 2, para. 4.

<sup>23</sup> Rome Statute, *supra* note 18.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

Another expert pointed out that there has been much work on defining the crimes, identifying exceptions, and looking at *mens rea* to make the statute into an effective means of prosecuting international crimes. Giving the judges the power to bring international law into the statute through judicial interpretation would weaken the statute. In addition, it would be inconsistent with Article 22,<sup>30</sup> which only allows the judges to interpret the penal provisions narrowly.

DEFINITION OF AGGRESSION AND JURISDICTIONAL FILTER (THE SCHEFFER PROPOSAL)

The experts considered, debated, and commented on a proposal for the definition of the Crime of Aggression and jurisdictional filter (Arts. 8bis and 15bis below) submitted by David Scheffer and a proposal for States to opt into the crime of aggression (amendment to Art. 12) submitted by Robbie Manson. The two proposals are complementary and considering them together is a way of facilitating a more flexible standard for operationalizing the crime of aggression beyond the long-standing proposal that the Security Council must first determine that an act of aggression has occurred. As subsequently revised based on the input of the Experts Meeting, the Scheffer proposal (which appears below) conforms to the framework of the SWGCA's latest proposal.<sup>31</sup> As such, the proposed definition of the crime of aggression would appear as new Article 8bis, and the proposed jurisdictional filter would appear as new Article 15bis.

*The Scheffer Proposal (Article 8bis)*

Regarding new Article 8bis, the Scheffer proposal omits any effort to enumerate all possible acts that could constitute an "act of aggression" as the SWGCA seeks to do in its Article 8bis(2)<sup>32</sup> with incorporation of the wording of GA Resolution 3314.<sup>33</sup> Instead, it proposes a definition of the crime of aggression that avoids reference to an "act of aggression" because the Security Council and the International Court of Justice (ICJ) have not in the past, and would not in the future, consider themselves bound to GA Resolution 3314<sup>34</sup> when determining the existence of an act of aggression. Proponents of the Scheffer proposal felt that the ICC should likewise not consider itself bound to GA Resolution 3314<sup>35</sup> when adjudicating the crime

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<sup>30</sup> Rome Statute, *supra* note 17.

<sup>31</sup> See Article 8 bis, *supra* note 5. See *infra* Part III. A.

<sup>32</sup> Article 8 bis, *supra* note 5 at 2.

<sup>33</sup> See G.A. Res. 3314 (XXIX), *supra* note 1.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

of aggression against an individual (or an act of aggression if given the chance under Scheffer Option 1). However, the proposal does provide that the elements of the crime of aggression (when drafted) should draw (but not exclusively) upon the acts listed in Article 3 of GA Resolution 3314.<sup>36</sup> This keeps GA Resolution 3314 “in the game” but in a far more realistic and practical manner than as currently drafted by the SWGCA.

The Scheffer proposed definition of the crime of aggression (Article 8bis(1)), narrows the crime (for purposes of individual criminal responsibility) to military interventions of a specific character, with caveats that reflect the reality of Security Council authorizations, the Uniting for Peace option,<sup>37</sup> and Article 51<sup>38</sup> exercises of the right of individual or collective self-defense. Note, however, that in coming to Article 15bis in the proposal, the Security Council, General Assembly, ICC, or ICJ (depending on what option is used), can override a State’s initial invocation of Article 51<sup>39</sup> and determine that an act of aggression has occurred despite the State’s plea of self-defense. This would launch the ICC into individual criminal accountability. The proposal incorporates much of what the SWGCA draft includes but also focuses on Article 2(4) of the Charter<sup>40</sup> as an alternative to the broader and far more indeterminate (for criminal purposes) scope of “the Charter of the United Nations.”

#### New Article 8bis of the Rome Statute

##### Crime of Aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action (in whole or substantial part) of a State, of an unlawful military intervention by one State into the territory (land, sea, or air) of another State of such character, gravity, and scale that it constitutes a manifest violation of the prohibition on the use of force under article 2(4) of the United Nations Charter,

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<sup>36</sup> See G.A. Res. 3314 (XXIX), *Supra* note 1 art 3.

<sup>37</sup> G.A. Res. 377 (V), U.N. Doc. A/1775 (Nov. 3, 1950).

<sup>38</sup> U.N. Charter art. 51. (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”)

<sup>39</sup> *Id.*

<sup>40</sup> U.N. Charter art. 2, para 4.

provided that the lawful deployment or use of armed force undertaken pursuant to Security Council authorization, United Nations General Assembly resolution 377(V) of 3 November 1950, or Article 51 of the United Nations Charter shall be excluded from such definition.

2. The elements of the crime of aggression shall draw, inter alia, from Articles 2 and 3 of United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 to establish the character of an act of aggression for purposes of criminal responsibility under this Statute.

*The Scheffer Proposal (Article 15bis)*

Regarding the Article 15bis jurisdictional filter, there are two options presented under this proposal. Both options mirror SWGCA Article 15bis, Sections 1 and 2.<sup>41</sup> Both options also use identical language for Section 3(a), which invokes Alternative 1, Option 2 (green light) of the SWGCA Article 15bis<sup>42</sup> (with a clarification regarding the crime of aggression) as the first of two jurisdictional filters available under Section 3. Both Scheffer options then propose new language for sub-section (b) of Section 3.

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<sup>41</sup> Int'l Criminal Court [ICC], *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, ICC-ASP/6/SWGCA/2 (2 June 2008), Article 8 bis [hereinafter Article 8 bis], available at <http://www2.icc-cpi.int/NR/rdonlyres/2AE911B2-15AA-4276-8F23-5D6818907007/146570/ICCASP6SWGCA2English1.pdf>. (“*Exercise of jurisdiction over the crime of aggression* 1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article. 2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents. *Alternative 1*: 3. 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. *Alternative 2*: 4. Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, *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. 5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. 4. *Insert the following text after article 25, paragraph 3, of the Statute*: 3 bis In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.”).

<sup>42</sup> *Id.*

In Scheffer Option 1 (judicial green light), Article 15bis(3)(b) would require a Security Council Chapter VII resolution<sup>43</sup> determining a breach of the peace resulting from the use of armed force (and lacking any conditionality prohibiting Court interference) which then triggers a judicial option for the ICC or the ICJ to determine whether an act of aggression has occurred. (Both judicial options are bracketed to invite consideration whether the SWGCA wants to resort only to the ICC, only to the ICJ, or an option for either.) Scheffer Option 1 invites a judicial consideration provided the Security Council has not prohibited it by the terms of the Chapter VII resolution.<sup>44</sup> Such a prohibition could arise, for example, if it is simply a follow-on sanctions resolution and the Council wants nothing to do with the ICC at that stage.

Scheffer Option 2 (soft green light) offers an Article 15bis(3)(b) that retains more control with the Security Council by requiring that the Security Council first must refer a breach of the peace situation to the ICC Prosecutor who then can launch investigations only if the General Assembly has adopted a resolution determining that an act of aggression has occurred or the ICJ has delivered a judgment or an advisory opinion ruling that an act of aggression has occurred. Scheffer Option 2 thus addresses the situation where the Security Council is interested in an ICC investigation but is unwilling to make the call on an act of aggression itself. In such a case the Security Council is willing to pass the buck to the General Assembly or the ICJ by referring the breach of peace to the Prosecutor.

It is likely that the straightforward SWGCA green light jurisdictional procedure,<sup>45</sup> coupled with an opt-in procedure for the crime of aggression (see discussion in part IV below), would be the preferred formula for the Perm 5 and some others. The aim of this proposal is to present two additional options that may be necessary to bridge the gap between the P-5 and so many other governments, the latter of which are seeking some alternative to an exclusive Security Council filter. The proposal also seeks to clean up the definition of the crime of aggression and leave judgments about an act of aggression to the political organs and, when necessary, to the designated courts, none of which will be bound by GA Resolution 3314<sup>46</sup>.

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<sup>43</sup> U.N. Charter arts. 39-51.

<sup>44</sup> *Id.*

<sup>45</sup> See Article 15 bis, *supra* note 41.

<sup>46</sup> See G.A. Res. 3314 (XXIX), *supra* note 1.

*Option I (judicial green light)*

## New Article 15bis of the Rome Statute

## Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.

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

3. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression unless

a. 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 an act of aggression committed by the State concerned and any crime of aggression that arises thereunder, or

b. the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations and which lacks any conditionality regarding the Court, determined the existence of a breach of the peace as the result of the use of armed force between States and thereafter, with respect to that situation, [the Pre-Trial Chamber has determined at the request of the Prosecutor, a State Party, or the Security Council that an act of aggression has been committed by the State concerned] [or] [the International Court of Justice has delivered a judgment in a contentious case or an advisory opinion, pursuant to the request of the General Assembly or the Security Council, which determines that an act of aggression has been committed by the State concerned].

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

*Option II ("soft green light")*

## New Article 15bis of the Rome Statute

## Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prose-

tor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression unless

a. 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 an act of aggression committed by the State concerned and any crime of aggression that arises thereunder, or

b. the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, referred to the Prosecutor a situation regarding the existence of a breach of the peace as a result of the use of armed force between States but about which the Security Council has not determined that an act of aggression has occurred, and provided thereafter that the General Assembly has determined by resolution or the International Court of Justice has delivered a judgment in a contentious case or an advisory opinion, pursuant to the request of the General Assembly or the Security Council, determining that an act of aggression has been committed by the State concerned in respect of such situation.

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

For both options, add a subsection 3bis after Art. 25(3):

3bis

In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action (in whole or substantial part) of a State.

#### *Discussion Points on Jurisdictional Proposals*

An expert pointed out several issues to discuss: (a) whether the green light option (alternative 1, option 2) can be useful as a basis for a compromise later; (b) whether the Scheffer proposal, alternative 1, option 3, could be a useful basis for a compromise; and (c) whether it would be useful to have a determination of an act of aggression before an indictment is requested against a leader.

#### *Limitations of the Scheffer Proposal Regarding Prosecutors*

One expert cautioned against hindering a prosecutor's investigation, emphasizing that one of the important weapons the prosecutor should have is the possibility of informing the public about the facts of an alleged act of aggression. The expert noted that if the Security Council fails to act, the prosecutor would not be able to make any statement or investigation. The

prosecutor's only recourse in this situation will be to present the facts against the defendant to the public. According to this proposal, the prosecutor could indict for crimes against humanity and war crimes, but with regard to the crime of aggression, he could do nothing. This proposal limits the prosecutor by saying that the prosecutor may not indict, may not commence a proceeding, and may not convict unless one of the three organs has agreed that he may do so. This paralyzes the prosecutor which is not good for long-term goals. The expert asserted that a proposal that puts another barrier in front of the prosecutor is not constructive.

One expert introduced the Republic of Georgia as an analogy of what the prosecutor has done with the traditional crimes. In this case, the prosecutor expressed concern with the situation and reported that his office was considering an investigation. Similarly, in the Ivory Coast, the prosecutor also opened an investigation but the prosecutor was never able to publicly report his findings before the presentation of facts to the ICC, as it would have been inappropriate for the prosecutor to do so. The expert asserted that the proposal does not change this aspect for prosecutors. The expert emphasized that prosecutors should at least be able to investigate because the Security Council will not likely take action. The expert stated that when prosecutors had a situation under review as opposed to investigation, the media knew that the prosecutor was looking into the situation and knew where the prosecutor visited, but the prosecutor was not quoted in the press.

One expert asserted that the public has an essential right to know. As such, it is important for the prosecutor to be able to generate public support based on the reaction or lack of reaction by the Security Council. An expert pointed out that while the prosecutors have been transparent, they have not gone beyond stating that the issue is under review. The expert wants to encourage transparency to a greater degree so that the prosecutor can leverage public pressure to proceed with investigations into state acts of aggression, as he does in connection with crimes against humanity. Showing the public the egregious nature of the aggressor will help to discourage the adulation of the war ethic and affirm that war making itself is a terrible crime.

#### *Nomenclature of the Alternatives*

An expert pointed out that since alternative 1 and alternative 2 are proper alternatives, the correct way to observe this is to call them both alterations to the paragraph, rather than paragraph 3 and paragraph 4.

#### *Red Light Solution*

One expert noted that a proposal considered at the last session of the SWGCA was a permanent red light solution. The expert elaborated that the red light proposal is a suggestion to make the idea of independence of

the ICC more amenable to those countries that want strong Security Council involvement. It gives the Security Council a tool to stop an ICC prosecution that is stronger than the tool in Article 16.<sup>47</sup> If the Security Council makes a substantive determination that an action was not an act of aggression, for example, confirming that a State acted in self-defense, that determination would bind the ICC. The ICC would have to stop the investigation altogether, as opposed to suspending it for a determined length of time. This proposal could serve as an additional negotiating option offered to those delegations that favor strong Security Council involvement. Under this scenario, the Security Council as a whole could, where appropriate, protect States from prosecution for aggression.

#### *Prosecutorial Procedure*

One expert questioned if going to the ICC as a preliminary matter meant going to the pretrial chamber, trial chamber, or the appellate chamber. If it would be an adversary proceeding, the expert inquired who the adversaries would be, and who would argue that there is an act of aggression. Another expert responded that the assumption is that the prosecutor brings the matter, suggesting that the pretrial chamber should be the first venue for considering the matter. The expert pointed out that this gives rise to difficult questions regarding the subject of representation.

#### *Alternative 2, Option 3 and the Uniting for Peace Process*

One expert questioned whether the drafters of alternative 2 envisioned it to be parallel to the Uniting for Peace process<sup>48</sup> or whether alternative 2 was to have a broader role for the General Assembly. The expert elaborated that in the Uniting for Peace process,<sup>49</sup> step one requires that the Security Council must not be able to act because of the veto, and step two requires a super majority vote of the General Assembly. The expert suggested the use of force authorization as a parallel model and that the General Assembly vote on aggression should also require a super majority to trigger the jurisdiction of the ICC.

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<sup>47</sup> Rome Statute of the International Criminal Court art. 16, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf). (“Deferral of investigation or prosecution—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.”).

<sup>48</sup> See G.A. Res. 377(V), *supra* note 37.

<sup>49</sup> *Id.*

The expert also stressed the important point that the Security Council has primary but not exclusive responsibility for making peace and security, thereby warranting a General Assembly option for determining aggression.

*Exclusive Role of the Security Council and the 121 Discussion*

The experts mentioned that this part of the negotiations is subject to political considerations more than legal theory. One expert questioned why there is opposition to the role of the Security Council, which is in alternative 1, option 1, and whether these objections may apply to the Scheffer proposal as well. The expert also inquired whether this consideration is tied to a 121 discussion on entry into force.<sup>50</sup>

Additionally, another expert noted that there is opposition to an exclusive role of the Security Council because of a belief that it would undermine the independence of the ICC; therefore, any option must make clear that it does not require that a Security Council determination that there has been an act of aggression bind the ICC.

*Independence of the ICC*

There was concern over the independence of the ICC, as a purely legal issue as opposed to a political one, and the power or role of the Securi-

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<sup>50</sup> Rome Statute of the International Criminal Court art. 121, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf). (“Amendments 1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties. 2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants. 3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties. 4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them. 5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of 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. 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. 7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.”).

ty Council in the determination process. One expert asserted that the Scheffer proposal can better deal with an objection on the independence of the ICC, pointing out that States' parties generally agree that there should be a jurisdiction-triggering determination and that the Security Council should have the first opportunity to make that determination. The expert noted that the Scheffer proposal does not require that the Security Council make a specific substantive determination that aggression has occurred.

One component of the independence argument is that the ICC has to be independent in terms of process, which also means that the ICC should be able to receive cases from States and from the prosecutor independent of the Security Council determination. It is a more procedural point of the independence of the ICC than a substantive one. One expert pointed out that the resistance to the Security Council as a trigger is not a general objection to the veto but is an objection to the fact that the Security Council has never made a determination of aggression and is unlikely ever to do so, thereby rendering the ICC's jurisdiction over the crime of aggression meaningless.

#### *Trigger Defined as a Threat to the Peace*

If the initial trigger for an investigation into aggression is a determination of a threat to the peace, then a larger area of conduct may be open to consideration than the small subset of cases rising to the level of aggression. An expert pointed out, however, that such a trigger could hamper the Security Council in exercising Chapter VII powers<sup>51</sup> in cases of threats to the peace if States fear that this will automatically authorize an investigation through the ICC. One expert said the unintended effect might be to encourage aggression.

#### *International Criminal Tribunal for the Former Yugoslavia (ICTY) Rule 61 Proceedings and Victim Participation*

Under ICTY Rule 61,<sup>52</sup> the tribunal can conduct a sort of mini-trial to preserve evidence in a case in which it appears that authorities are unlike-

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<sup>51</sup> U.N. Charter arts. 39-51.

<sup>52</sup> ICTY, Rules of Procedure and Evidence, Rule 61. IT/32/Rev. 41, adopted on February 11, 1994, as amended February 28, 2008. ("Procedure in Case of Failure to Execute a Warrant (A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that: (i) the Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and (ii) if the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts,

ly to apprehend the defendant any time soon. During the ICTY Rule 61<sup>53</sup> proceedings, the judges reviewed the prosecutor's investigation and confirmed that there was a *prima facie* case. One expert suggested that judicial review of the prosecutor's investigation could serve as a model for situations involving aggression where the judge is acting in advance of an actual trial. Another expert discussed how Rule 61<sup>54</sup> allows for the possibility of victims participating in the process but the issue remains unaddressed. As a result, the ICC continues to struggle under the present inconsistency or uncertainty in the differing role of victims at the investigatory stage at the post indictment stage. The expert concluded that the victim's role at the investigatory stage and the relationship to the trigger mechanism and post-trigger mechanism is a consequences of leaving this question open, and the implications are unknown.

*Inaction and Lack of Determination by the Security Council*

One expert suggested that the trigger mechanism is largely a political consideration rather than a substantive legal one. According to one expert, political considerations are one of the major concerns of the NGO community. NGOs do not necessarily fear the veto power of a permanent member as much as the Security Council's ineffectiveness in fulfilling its mandate. The expert explained that NGOs find that the proposals are gen-

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including by seeking publication of advertisements pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to the Trial Chamber of which the Judge is a member. (B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge. In addition, the Trial Chamber may request the Prosecutor to call any other witness whose statement has been submitted to the confirming Judge. (C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in paragraph (A) above. (D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties. (E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as the President thinks fit.”).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

erally satisfactory, but wonder what will happen if the Security Council refuses to act to trigger the ICC's jurisdiction over aggression. The NGOs felt that if the members motivation for deciding to act was political, then the language does not matter because those decisions will always be subject to the political whims of members, mainly the permanent five (P5). The expert said the political reality is that the Security Council is the supreme political body that determines whether there has been an act of aggression. NGOs want assurance that silence from the Security Council does not mean that the ICC must be equally silent.

A possible solution to the fear of inaction by the Security Council would entail a combination of Article 121(5) [permitting opt out of amendments]<sup>55</sup> with language containing an alternative trigger in the case of inaction or a lack of determination by the Security Council. The expert agreed that the P5 are not playing a very useful role and have not made a determination on the crime of aggression in the past. Nonetheless, it is very important to the P5 to remain involved. It is an implicit reference to Article 39<sup>56</sup> that the provisions must be consistent with the charter of the United Nations. An expert expressed that it is important to find out what is acceptable to P5 States on substance, noting that currently there is no political will to go that way. Thus, the Scheffer Proposal can be extremely useful since it proposes action. It is necessary to challenge traditional thinking to some extent; Article 39<sup>57</sup> is not the only option.

Experts noted that large prosecutorial competence might put a heavy burden on the prosecutor or on the ICC to charge aggression. On the other hand, if the Security Council has the responsibility to find aggression, there is the risk that the Security Council may not find that an act constitutes aggression. As a result, even if it is a widely held perception that a person should face prosecution, the person will avoid prosecution. Without an alternative, there may be the possibility, although unlikely, that the General Assembly and others agree that an act constitutes aggression, but the Council is not able to pass a resolution reflecting the consensus. Nonetheless, there are solutions on substance that should be acceptable to the P5. The expert noted it is important to keep in mind the difference in the P5 with regard to their status as State parties of the Rome Treaty. Two of the permanent members are States parties, and three are not close to becoming states parties. One reason that discussions of the alternatives are not very productive is due to a lack of indication of interest on the part of the P5.

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<sup>55</sup> Rome Statute, *supra* note 50, art 121(5).

<sup>56</sup> U.N. Charter, Art. 39. ("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.").

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

Other states do not want to advocate an alternative they feel has no promise. Thus, the states have little incentive to compromise.

Another expert clarified that the P5 no longer holds the position that the Security Council should be the exclusive trigger, but rather feels that there be an additional filter in light of the nature of the crime of aggression. The P5 feels that this filter should be the Security Council's substantive determination; however, some believe the filter should be the ICJ while others believe that the prosecutor and the ICC are adequate without a filter.

### *The Strength of the Filters*

One expert inquired whether it is good for the ICC Statute to adopt a strong approach to aggression. The expert used "strong" in two ways: (a) that the ICC could go forward if the Council does not act; or (b) under the Scheffer Proposal, that the ICC go forward even if the Council merely says there is a threat to international peace or invokes Chapter VII.<sup>58</sup> Some experts expressed reservations about whether a strong aggression provision with a weak filter is useful for the ICC. Experts pointed out that a strong aggression provision could be very useful for small states that genuinely fear their neighbor might invade them; they might feel protection from signing the agreement.

The discussion turned to aggression by a permanent member. The expert noted that the Security Council did ultimately invoke Chapter VII<sup>59</sup> with respect to the U.S. invasion of Iraq, and asked what the unintended consequences could be of the Scheffer Proposal. Although the resolution concerned the obligations of occupation and the transition to sovereignty rather than opining that there was an unlawful use of force, it shows that the Chapter VII trigger<sup>60</sup> might be overly broad. A weak filter could have unintended consequences that could ultimately damage the ICC's ability to function well with respect to the other three crimes.

Another expert asked what a strong filter meant. The first expert clarified that option 1 is the strong filter and opined with regards to alternative 1, option 2 that if the two permanent members who are states parties went with that option, they may be able to persuade the other members to accept it. One expert noted, however, that adding stronger filters may cripple the ICC's usefulness in resolving conflict.

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<sup>58</sup> U.N. Charter arts. 39-51.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

*Legitimacy of the ICC*

Both alternatives present risks to the legitimacy of the ICC. The risk in alternative 1, option 1 is that the ICC will not appear to apply the law equally. The risk, on the other hand, of having a more independent court is that it will be ineffectual, and not having the participation of the great powers will undermine its legitimacy. Either approach is going to have risks; the true task is to balance these risks in striving for compromise.

An expert responded that it is an illusion that the ICC is independent or should be independent. The ICC will not be and cannot be independent because of Article 39.<sup>61</sup> No proposal can solve this because the big powers—the P5 and some others—will prevent such a resolution. They have made sure that they will have control, and they have written that into the consensus definition, Article 16 of the Rome Statute<sup>62</sup> and into the provision on complementarity.<sup>63</sup>

*Appeasing the Security Council*

The key question is to determine what filters to include to appease the Security Council. One expert explained that the Security Council has already put many obstacles in place and will need a compromise that can

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<sup>61</sup> U.N. Charter, Art. 39.

<sup>62</sup> ICC Statute, *supra* note 47, art. 16.

<sup>63</sup> Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf). (“Issues of admissibility- 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”).

also appeal to the rest of the members, without giving away too much. For example, a clause that allows no convictions under this statute unless the Security Council has determined that the crime of aggression by a State has occurred would be absolutely consistent with the U.N. Charter and with suggestions in Rome. The expert asserted that the statute must contain safeguards in order to protect the interest of the smaller states. The expert proposed that the Security Council should only act pursuant to the application of principles of law and justice. If the accusation of aggression involves any member nation of the Security Council, that nation must recuse itself and not take part in the determination of aggression.

*The United States of America and the ICC*

One expert suggested that the ICC actually benefited from the non-involvement of the United States. Another expert predicted that the next administration is not likely to be any different than the last two administrations with respect to the ICC, stating that millions of Americans will not accept the idea of any foreign court ruling that an American has committed war crimes or that an act is aggression rather than a humanitarian intervention. The expert believed that once the ICC has proven itself over time, the Americans will sign on with the ICC, as the Major Powers did with the ICJ. For example, the British were very much concerned about setting up an international court but accepted the court once they knew it was not binding or compulsory.

*Interplay between the Security Council and the ICC Prosecutor*

When the Chairman of the Working Group reaches a conclusion that the current proposed text will not receive sufficient majority acceptance, the options will be to either drop the crime of aggression, which repudiates Nuremberg, or work using the types of clauses discussed at the experts meeting as a compromise.

*Political Guidance for the ICC*

The experts noted that it is very hard to move forward without any signals of compromise from the P5 of the Security Council. The Scheffer Proposal is very interesting and helpful, but it does not come from the United States of America.

JURISDICTIONAL OPT-IN/OPT-OUT (THE MANSON PROPOSAL)

The final segment of the meeting focused on the procedure by which states accept the ICC's jurisdiction over the crime of aggression. Most experts agreed it would be preferable for a state to accept jurisdiction through an opt-in or opt-out procedure. One expert submitted a proposal

that reflected the primacy of Security Council's determination of aggression but not its exclusivity and allowed states to opt-in to jurisdiction accordingly. The experts also discussed the political feasibility of the opt-in or opt-out procedures both in the proposal and more broadly. The experts reviewed the need to balance the concerns of existing states parties with those of influential non-states parties, and they reviewed the various motivations for states to opt-in. The experts concluded with a brief exchange regarding victims' issues and if, how, and when to consider them.

*Manson's Proposed Amendment to Article 12*

One of the experts, Robbie Manson of the U.K., circulated a proposed amendment to Article 12. The proposal suggested by Mr. Manson aims to offer a regime for optional acceptance of the proposed new article 15(bis) proposal. Those states who are not yet ready to proceed with respect to the requisite factual pre-determination being made on a basis of primary, as opposed to exclusive, Security Council competence, may nonetheless be willing to agree to such a primary competence amendment being made, under the Article 121(4)<sup>64</sup> mechanism, in the sure knowledge that it will not apply to them unless and until they are ready to accept it by a subsequent unilateral declaration. The proposal would insert "Subject to paragraph (2)(bis) below," at the start of article 12, paragraph (2) then continue as is.

This text anchors the provisions of the proposed new paragraph (2)(bis) within the established existing text of Article 12,<sup>65</sup> which the proponent of the proposal felt to be the natural place to provide for a special "opt-in" regime with respect to the crime of aggression. In this regard, the proponent of the proposal argued that this is only an "opt-in" so far as concerns the preconditions to the exercise of jurisdiction by the Court. This differs from an example of the kind of "opt-in" regime already provided by Art.

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<sup>64</sup> Rome Statute, *supra* note 50.

<sup>65</sup> Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf). ("Preconditions to the exercise of jurisdiction 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. 2. In the case of article 13, paragraph (a) or (c), 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. 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.").

121(5)<sup>66</sup> which language suggests the intent is instead to deal with an opt-in to the jurisdiction of the court over a new crime in its entirety. This would cover a new crime subsequently added to the statute by amendment, which is not the case with aggression. Other experts felt that Art. 121(5)<sup>67</sup> applied to all amendments, including those pertaining to the crime of aggression. Proponents of placing the opt-in provision in Article 12<sup>68</sup> felt that it would also have the advantage of immediately being an appropriate place to exclude a Security Council referral (under Art. 13(b)<sup>69</sup>) from being subject to the provisions of such a proposed opt-in regime, since Art. 12(2)<sup>70</sup> already applies only to the Art. 13(a) or (c)<sup>71</sup> triggers (state party referral or prosecutor referral *proprio motu*).

The two variations offered below reflect a perception of the principal alternatives that States favor depending on their differing perspective as to what is politically achievable or acceptable. Alternative (a) creates a jurisdiction in which an accused person could potentially be captured or transferred to the Court for committing an act of aggression on the territory of a State party which has accepted the jurisdiction of the Court, irrespective as to whether or not the person is also a national of a State which has accepted the jurisdiction (the broader jurisdiction). Whereas, alternative (b) creates a jurisdiction in which an accused can only be captured or transferred to the Court if his national State has accepted the jurisdiction, irrespective as to where in the world his act of aggression occurred (the narrower jurisdiction).

Insert new paragraph (2)(bis) in Article 12 as follows:

Alternative (a)

With respect to the crime of aggression, in the case of article 13, paragraph (a) or (c) the Court may exercise its jurisdiction only if the State,

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<sup>66</sup> ICC Statute, *supra* note 50, art. 121.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Rome Statute of the International Criminal Court art. 13, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf). (“Exercise of jurisdiction-The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”).

<sup>70</sup> Rome Statute, *supra* note 65.

<sup>71</sup> Rome Statute, *supra* note 69.

mentioned in either paragraph (2)(a) or (b) above, has lodged a declaration with the Registrar indicating that it accepts the provisions of article (15)(bis). Such a declaration may be made unconditionally or on condition of reciprocity on the part of several or certain states, or in respect of a particular situation.

Alternative (b)

In place of the words “...either paragraph (2)(a) or (b)...” above, substitute simply “...paragraph 2(b)...”

This language makes the proposed opt-in regime applicable only to the special conditions concerning the exercise of jurisdiction over the crime of aggression, as inserted by the proposed new Art. 15(bis), and does not affect any other aspect of the crime, such as the definitional aspects dealt with by proposed new Articles 8(bis) and 25(3)(bis), etc. The language employed to describe the differing kinds of declarations originates from Article 36(3) of the Statute of the ICJ,<sup>72</sup> which, though not without critics, has the merit of being a long-established workable model.

Finally, with regard to the case of the narrower jurisdiction, if it is considered necessary to address the asserted anomaly, which has been alluded to by some, as respects the position of the nationals of non-states party accused of committing aggression on the territory of a state party acceding to the jurisdiction, when compared to that of nationals of states party who have not so acceded - then that can be achieved simply by the following means:

In article 12, paragraph (3) after the reference to paragraph 2 insert “or paragraph 2(bis)”

*Value of an Opt-In Procedure for States with Shared Borders or a History of Hostilities*

Those in favor of this opt-in approach felt that it would have particular value to States with a shared border or history of hostilities which in the future could chose to make an ICC Crime of Aggression opt-in declaration part of any bi-lateral peace agreement or friendship, commerce, and navigation treaty. Such a provision would strengthen the States’ mutual security since each would feel secure that any act of aggression by the other party would subject its leaders to the jurisdiction of the ICC.

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<sup>72</sup> Statute of the International Court of Justice art. 36(3). (“The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.”).

*Interplay of Manson's Proposed Amendment of Article 12 with Article 15bis, Alternative 2*

The proponent of this proposal suggested this amendment would allow the P5, as well as, those nations who share their concerns, to find a solution by way of Article 15 bis alternative 2. This alternative does not recognize exclusive Security Council predetermination but rather the primacy of the Security Council's determination of an act of aggression. The expert hoped this amendment would represent a middle ground that would appeal to parties who disagree as to how to address jurisdiction.

*Relation to Article 121(5)*

The proponent of this proposal suggested that the ordinary meaning of the language of 121(5)<sup>73</sup> indicated that it naturally lent itself to an amendment regime appropriate to existing and new crimes introduced to the jurisdiction of the Court. He stated that the proposed amendments to the Statute currently under debate in the Special Working Group—Art 8(bis), Art. 15(bis), and Art. 25(3)(bis)—are, in his opinion, amendments which introduce the means (definition and conditions) whereby to allow the Court to exercise its jurisdiction over the crime of Aggression (which is already within the jurisdiction), rather than to either introduce that crime or amend it. In other words, Art. 121(5) is there for amendment to existing core crimes or the introduction of new crimes; whereas, the current project is rather an amendment to enable exercise of jurisdiction in contrast to an amendment to the provisions on an existing or new crime.

Based on this observation, the expert suggested amending Article 12 in order to achieve the objectives laid out in the introductory comments to 121(5).<sup>74</sup> The expert then suggested making proposed amendments to the preconditions to exercise jurisdiction over aggression with respect to *proprio motu* investigations by the prosecutor or by state referral. An amendment to Article 12(2) only applies to Articles 13(a) and (b),<sup>75</sup> which are the two mechanisms that do not involve the Security Council.

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<sup>73</sup> Rome Statute of the International Criminal Court art. 13, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf). (“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.”).

<sup>74</sup> *Id.*

<sup>75</sup> Rome Statute, *supra* note 69.

*Clarification of Proposed Article 12(2)(bis)*

The chair asked for clarification of the new paragraph (2)(bis) of the amendment, asking when the requirement to lodge the declaration would arise and whether it is a declaration that is lodged for any prospective charge of aggression or a case-by-case declaration.

The proponent of this proposal stated the amendment left the timing of the requirement open to generate debate. The amendment reflects the language used in Article 121,<sup>76</sup> which indicates a permanent declaration in which a state has acknowledged the amendment. The language of Article 12(3) is similar to an *ad hoc* declaration, which lends itself only to recognition of jurisdiction for the purposes of a specific case. The proponent of the proposal expressed the view that the better language would be one which adopted a permanent declaration lodged with the Security Council, and that the acceptance of the jurisdiction of the ICC should be on a temporary or *ad hoc* basis. The expert also explained how Article 36 of the UN Charter,<sup>77</sup> which makes a declaration antecedent to the jurisdiction on a reciprocal basis either on a case-by-case or permanent basis, influenced the flexibility of the language used in the amendment.

Another expert asked whether this was an amendment to Articles 5, 6, 7, and 8.<sup>78</sup> The expert also questioned whether the amendment adoption must be pursuant to the procedure in Article 121(4)<sup>79</sup> requiring seven-eighths or if it is part of a package.

The expert responded that the amendment to Article 12 can only be adopted under 121(4),<sup>80</sup> and it is part of a package that will require a seven-eighths vote.

*Possibility of an Opt-Out Procedure*

In response, another expert suggested doing the opposite; instead of filing a declaration to get into the jurisdiction, the default would place a

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<sup>76</sup> Rome Statute, *supra* note 50.

<sup>77</sup> U.N. Charter art. 36. (“1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment. 2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties. 3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”).

<sup>78</sup> Rome Statute of the International Criminal Court arts. 5-8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf).

<sup>79</sup> Rome Statute, *supra* note 50.

<sup>80</sup> *Id.*

nation under jurisdiction unless it files a declaration opting-out. From a sociological standpoint, the advantage of this approach is that most actors will stay put in the situation in which they find themselves. The result would be a regime that requires affirmative action to opt-out with the end goal of having more players in the regime than outside of it. The expert noted that only 60 out of 192 nations have accepted the compulsory jurisdiction of the ICC, which has an opt-in procedure.

#### *Timing of Declaration*

Another expert expanded on this idea questioning the timing of a declaration. The experts agreed the timing for filing a declaration would arise at the earliest moment when the amendment passes. Another expert also suggested substituting war crimes with crimes of aggression in Article 12(4).

#### *Limitation of Jurisdiction to Nationals of States Who Have Accepted Jurisdiction*

Concerning paragraph 2 (bis) of the proposal, an expert raised the notion that only a minority of States are concerned that they might become the target of prosecution for a crime. Most states will show interest in this provision because it will protect them rather than threaten them. Amending the statute to say the only way to prosecute people is if they are non-nationals might emasculate the whole concept. The expert also expressed concern that paragraph 2 (bis) only deals with Article 12(2) and not 12(3) in which a non-states party accepts the jurisdiction of the ICC.

The experts agreed that the proposal excludes imposing jurisdiction in which a State makes an Article 12(3) declaration.

Some experts expressed support for the proposal as it introduced the idea of separating the definition of aggression from accepting jurisdiction, as well as the idea of limiting jurisdiction to people who are nationals of States who have accepted jurisdiction. Any aggressor state would have to accept jurisdiction for itself. This negates the preconditions in Article 12(2)(A), and would require the national be from a State that has accepted jurisdiction.

Other experts felt the proposal would not work because it still does not resolve the issue of extending jurisdiction to non-states parties. An expert suggested adding a reference to paragraph 3(a) to include non-states parties.

The group generally recognized the merits of both opt-in and opt-out procedures. An expert questioned whether the Security Council could, by referral, charge a non-party with aggression. The expert asked whether

this would fall under Article 13(b)<sup>81</sup> or if a non-states party could opt-in to jurisdiction.

The proponent of the proposal stated that non-parties should be in no better or worse condition than State parties who decided not to opt-in. The statute as it stands is only good in offering legal protection between two States who have opted-in. The experts generally recognized it as another leap to apply liability to nationals of a State that has not opted-in, as this would require the approval of the Security Council and hence the P5.

One expert raised the point that the crucial part of the proposal was limiting it to nationals, as it takes away the possibility of handling non-states actors that are acting on states parties' territory. Alternative 1 could accomplish excluding the possibility of handling non-states actors acting on states parties' territory and would not subject permanent members to prosecutions for aggression.

An expert suggested changing the wording in paragraph 2(b) by deleting the words "which the person accused as a national," and inserting "only the State mentioned in either 2(a) or 2(b) above, has lodged a declaration." If the Security Council is unable to act, then it is not a problem to neither opt-in nor opt-out, and then the ICC can proceed. The expert asserted that the Security Council must have primacy but not exclusivity.

#### *Political Feasibility of Jurisdiction in the Proposal*

The experts then discussed the political side of jurisdiction. An expert raised the point that they should not exclude a permanent declaration as an option, and State's might be more prone to accept jurisdiction automatically from a Security Council referral.

An expert suggested flexibility with respect to some states in order to make an opt-in procedure to jurisdiction more palatable. The expert cited the European Union as an example of a strong regime with different obligations for different states.

Several experts discussed why a state would ever agree to opt-in or refrain from opting-out. One expert used the examples of two small states that have a border dispute. Each side of the border dispute would have fears that the other side will someday invade the other; accepting jurisdiction would serve as protection. Another expert suggested States possessing stronger views of international law, and even some Security Council members, would be willing to accept jurisdiction if they are confident they would not commit aggression. Even if a case arises against them, the Security Council could use Article 16<sup>82</sup> or a red light could be added before the Security Council could make a determination.

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<sup>81</sup> Rome Statute, *supra* note 69.

<sup>82</sup> Rome Statute, *supra* note 47.

*Balancing the Concerns of Existing States Parties with those of Influential Non-States Parties*

One expert questioned whether efforts currently underway to make jurisdictional language more acceptable to certain states are repeating the process undertaken to make sections of the Rome Statute palatable to the same parties. Those parties ultimately chose not to join. The expert warned that the debate within the SWGCA should not focus on a few states' acceptance that the drafters do not adequately consider the interests of other states.

Another expert pointed out that, especially as the review conference approaches, there should be a clear effort to attract more states into the state party process. Ideally, there would be universal participation. The alternative view is that the drafters can only go so far to accommodate non-states parties and, at some point, should nuance the documents to suit the preferences of the states parties. Some experts suggested that the best strategy would be to incrementally add more states parties to the statute upon obtaining their acceptance.

Another expert suggested that crafting acceptable language to states like the U.S. has value beyond influencing the U.S. to sign on because it could also reduce hostility toward the ICC. The expert noted that during the Rome Conference, many states expressed frustration with the U.S. positions and suggested that current negotiations should not give U.S. views weight; however, such an approach will not help the ICC. The U.S. delegation contributed significantly at Rome. The expert asserted that it would be valuable for the U.S. to come in as an observer and to participate in working group sessions, as it has the right to do. Greater involvement should lead to more support and reduce the risk of a veto.

There was general agreement with both ideals: attracting more states parties and attracting greater engagement by the U.S. The wish is not to exclude or antagonize the U.S., but the drafters should not emphasize the considerations of the U.S. to the exclusion of those of existing states parties.

*States' Motivations for Opting In*

One expert questioned the motivation for states to opt-in. To gain reciprocity with other states, some states that would not use aggression often opt-in to jurisdictional provisions; however, that is not necessarily the situation here. The expert asked what reasons, presented to state leaders, would convince them to sign onto the jurisdiction of the ICC regarding the crime of aggression. The expert pointed out that there is the possibility that only 30 or 40 states will opt-in. The ICJ's compulsory jurisdiction has only about 60 parties.

Several experts reflected on this question, agreeing that, at least in Washington, it is much easier to make the case for opting-out of a treaty obligation than it is for opting-in.

The experts noted from the surge of ratifications of human rights treaties that newly independent states and African states view opting in as a test of their legitimacy. The Rome Statute and the crime of aggression may require a different leap, although some states may find opting-in to the jurisdiction of the crime of aggression attractive for the same reason.

Ultimately, if the second amendment comes out whereby states get protection from aggressors, more states will see signing-on as attractive. Politically, though, that may be harder to sell to some parties.

Further, some experts stated that if the Rome Statute fails to include the crime of aggression, it would have negative expressive function.

#### *Complexity of Victims Issues*

There was wide agreement among the experts that victim issues could eventually enter more fully into the thinking about the crime of aggression and how to prosecute the crime of aggression; however, this would be an extremely complicated task.

The expert pointed out that victim issues have evolved in recent years enveloping a broader approach that includes jurisdiction, equity, payment, victim identification, and other issues. Victim issues from the Holocaust have lasted fifty years. This issue is far more complicated than originally recognized. Victim issues have not been prominent in the working group, and this is potentially a whole new dimension.

One expert pointed out that the ICC's movement seems to be expanding the role of victims, which could be problematic. Another suggested that though the drafters are not ready to bring victim issues into the special working group, if the crime of aggression goes through in the review conference, there could be a resolution that anticipates looking at procedures that might include some victim issues.

#### CONCLUSION AND RECOMMENDATION

Considering that the United Nations' work on this topic began in 1950, it is evident that the time has come to reach a conclusion to these efforts. For all these reasons we recommend the adoption of a definition of aggression, a triggering mechanism, and their submission to the 2010 Review Conference, so that they may be made part of the ICC Statute.

## ANNEX 1: THE CLEVELAND DECLARATION

The participants<sup>83</sup> of the September 25-26, 2008 Conference and Experts meeting assessing the progress made by the ICC Assembly of State Parties in completing a definition of aggression and a triggering mechanism to be submitted to the 2010 Review Conference, hereby adopt the following declaration to be forwarded to the Assembly of State Parties:

1. It is well-established that world peace and security, particularly in the era of globalized interdependence, require observance of and respect for the Rule of Law and the protection of human rights. No international crime more than aggression produces consequences that negatively impact on the values and interests mentioned above. This was first recognized after World War I and then established in the Nuremberg Tribunal Charter and Control Council Law No. 10 and the Tokyo Tribunal Statute following World War II. The international community then prosecuted at Nuremberg, Tokyo and elsewhere persons charged with the commission of "crimes against peace." Many were found guilty and sentenced to execution or imprisonment.
2. The United Nations Charter enshrined the prohibition of the use of force in its Preamble, Article 2(4), and the provisions of Chapter VII entrusting the Security Council with the protection, preservation and maintenance of world peace and security,
3. The General Assembly in 1974 adopted by consensus Resolution 3314 defining aggression, but efforts by the United Nations since the end of World War II to develop a Code of Crimes Against the Peace and Security of Mankind were frustrated by the Cold War and *realpolitik*.
4. The establishment of the ICC ushered in a new era where international crimes such as aggression, genocide, crimes against humanity and war crimes are to be prosecuted by national legal systems, and whenever this proves not to be feasible, by the ICC itself. Jurisdiction over these crimes has been enshrined in the ICC Statute, save for aggression, pending its definition and the establishment of a triggering mechanism that is consonant with the prerogatives of the Security Council as established by the U.N. Charter. Work on a definition of aggression and a triggering mechanism has been undertaken for fourteen years, by the General Assembly Ad Hoc Committee in 1995, the General Assembly Preparatory Committee (1996-1998), the 1998 Rome Diplomatic Conference, the Commission established by the Diplomatic Conference (1998-2000), and the Special Working Group on Aggression of the Assembly of State Parties (2001-2008).
5. We do not ignore the difficulties of state interests and the disputes in judgments on what constitutes aggression. This is further complicated in an era of new conflicts which are quite different from classic warfare be-

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<sup>83</sup> The participating government and international organization representatives refrained from endorsing the Declaration.

tween regularly constituted armies. These factors, and others, have a bearing on defining aggression and on jurisdictional triggering mechanisms which have to take into account the prerogatives of the Security Council, and also those of the General Assembly and the International Court of Justice. Moreover, we are not unmindful of issues pertaining to individual criminal responsibility for an international crime that involves state policy and state action. But we are also mindful of the legal and symbolic significance of the inclusion of aggression in the ICC's jurisdiction.

#### ANNEX 2: LIST OF PARTICIPANTS

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