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David Scheffer

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**A PRAGMATIC APPROACH TO JURISDICTIONAL AND DEFINITIONAL  
REQUIREMENTS FOR THE CRIME OF AGGRESSION IN THE ROME  
STATUTE**

*David Scheffer\**

*In an effort to bridge competing visions of how to incorporate the crime aggression in the Rome Statute of the International Criminal Court, the author proposes two options for negotiators to consider in the event there is no Security Council determination of aggression or referral of aggression to the Prosecutor. The first option would require the Security Council, acting under U.N. Charter Chapter VII, to adopt a resolution concluding that a breach of the peace resulting from the use of armed force between States has occurred, which then triggers, unless the Council excludes the possibility, an option for the International Court of Justice or the International Criminal Court (whichever court(s) is (are) selected in the final draft) to decide that an act of aggression constituting an unlawful military intervention has occurred. The second option would require that the Security Council act under Chapter VII to refer a breach of the peace resulting from the use of armed force between States to the Prosecutor and then either the General Assembly adopts a resolution or the International Court of Justice decides or issues an advisory opinion to the effect that an act of aggression constituting an unlawful military intervention has occurred.*

INTRODUCTION

In an effort to achieve a compromise in the examination by the Special Working Group on the Crime of Aggression (SWGCA)<sup>1</sup> concerning the jurisdictional and definitional requirements for activating the crime of ag-

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\* David Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law in Chicago, Illinois. He was U.S. Ambassador at Large for War Crimes Issues from 1997 to 2001. He wishes to thank Ms. Kristen Knapp, a student at Northwestern University School of Law, for her expert assistance with this article.

<sup>1</sup> See International Criminal Court, Assembly of State Parties, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2 (Feb. 20, 2009), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ICC-ASP-7-SWGCA-2%20English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-SWGCA-2%20English.pdf).

gression in the Rome Statute of the International Criminal Court (ICC),<sup>2</sup> I advance a proposal that offers two options. Options I (judicial green light) and II (soft green light), set forth below, enable negotiators and governments to consider a range of opportunities by which to argue the merits of sustaining some form of United Nations (U.N.) Security Council engagement in the jurisdictional filter and yet to do so within a singular approach to the personal jurisdiction and subject matter jurisdiction requirements of the crime of aggression. In accordance with the framework of the May 2008 Chairman's Proposal of the SWGCA,<sup>3</sup> I have structured my proposal so that the definition of the crime of aggression is found in new Article 8bis and the jurisdictional filter is found in new Article 15bis.

The following discussion recognizes the utility of, and broad support that might be obtained, from recognition of the opportunity afforded by Article 121(5) of the Rome Statute. Under this amendment provision, any State Party (and, I would argue as a matter of logic, any non-party State unless covered by a Security Council Chapter VII referral resolution pursuant to Article 13(b) of the Rome Statute) can essentially opt-in to any amendment on the crime of aggression. The use of the opt-in right may constitute the ultimate compromise between the Permanent Five (United States, France, United Kingdom, People's Republic of China, and Russia) and other governments before the crime of aggression can be operationalized in the Rome Statute. Another lawyer's proposal, seeks an amendment to Article 12 of the Rome Statute that may merit serious consideration.<sup>4</sup>

#### NEW ARTICLE 8BIS

In my proposal, new Article 8bis is common to both options, but differs somewhat from the May 2008 Chairman's Proposal. I have omitted any effort to define an "act of aggression," as the SWGCA seeks to do in its Article 8bis(2) with liberal application of U.N. General Assembly Resolution 3314 (GA Res. 3314).<sup>5</sup> I propose 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 have not in the past, and would not in

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<sup>2</sup> Rome Statute of the International Criminal Court preamble, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>3</sup> International Criminal Court, *Discussion Paper on the Crime of Aggression Proposed by the Chairman (revision June 2008)*, ICC-ASP/6/SWGCA/2 (May 14, 2008) [hereinafter *May 2008 Chairman's Proposal*], available at <http://www2.icc-cpi.int/NR/rdonlyres/2AE911B2-15AA-4276-8F23-5D6818907007/146570/ICCAP6SWGCA2English1.pdf>.

<sup>4</sup> Robbie Mason, *The ICC, the U.N. and Crimes of Aggression*, BEPJ, Mar. 1, 2007, <http://www.bepj.org.uk/icc-un-crimes-of-aggression>; see also ICC Statute, *supra* note 2, at sect. 12.

<sup>5</sup> *May 2008 Chairman's Proposal*, *supra* note 3, art. 8 bis, ¶ 2; G.A. Res. 3314 (XXIX), U.N. Doc. A/9619 (Dec. 14, 1974).

the future, consider themselves bound to UNGA Res. 3314 when determining the existence of an act of aggression. Neither should the ICC when adjudicating the crime of aggression against an individual (or an act of aggression if given the chance under Option 1 below). However, I propose that the elements of the crime of aggression (when drafted) should draw (but not exclusively) upon the acts listed in Article 3 of UNGA Res. 3314.<sup>6</sup> This keeps UNGA Res. 3314 “in the game” but in a far more realistic and practical manner than, in my humble view, as currently drafted by the SWGCA.

Within my definition of the crime of aggression in new Article 8(1), I have narrowed the crime (for purposes of individual criminal responsibility) to military interventions of a specific character, with caveats that reflect the reality of U.N.SC authorizations, the Uniting for Peace option, and the Article 51 exercise of the right of individual or collective self-defense. (Bear in mind that in Article 15bis of my proposal, the Security Council, General Assembly, ICC, or the International Court of Justice (ICJ) (depending on what option is used), can override a State’s initial invocation of Article 51 and determine that in fact an act of aggression has occurred despite the State’s plea of self-defense, and thus launch the ICC into individual criminal accountability.) I have incorporated much of what is in the SWGCA draft but also focused on Article 2(4) of the United Nations Char-

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<sup>6</sup> G.A. Res. 3314, *supra* note 5, art. 3. Article 3 of G.A. Res. 3314 states:

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 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.

ter as an alternative to the broader and far more indeterminate (for criminal purposes) scope of “the Charter of the United Nations.”

Furthermore, Article 8 bis (1) of my proposal limits the definition of the crime of aggression to those acts that are “of such a 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 . . . .” This definition conforms to the gravity, duration, and context confirmed by the ICJ in the *Democratic Republic of the Congo v. Uganda* judgment (2005).<sup>7</sup> Given the important gravity and contextual requirements associated with genocide, crimes against humanity, and war crimes under the Rome Statute, there is an obvious need to establish some general threshold for the use of armed force which would qualify it as the crime of aggression. The language I have chosen to express that threshold is open to interpretation, as are the other crimes subject to magnitude conditionality under the Rome Statute. But it is a calculation that the ICC, once seized with an investigation into an act of aggression, should be capable of making.

#### ARTICLE 15BIS: LANGUAGE COMMON TO BOTH OPTIONS

Both of the options for Article 15bis, Sections 1 and 2, mirror the language from the May 2008 Chairman’s Proposal for Article 15bis, Sections 1 and 2.<sup>8</sup> This initial jurisdictional filter would require that “the Security Council has made a determination of an act of aggression committed by the State concerned.” This reflects the longstanding proposal of the five permanent members of the Security Council and other nations which would minimize any concerns about contravening the U.N. Charter because the Security Council has clear, and some would argue sole, authority to make such a determination pursuant to Article 39 of the Charter.<sup>9</sup> Once such a

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<sup>7</sup> Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, 57 (Dec. 19) (“In relation to the first of the DRC’s final submissions, the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda’s actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.”).

<sup>8</sup> *May 2008 Chairman’s Proposal*, *supra* note 3 at 4.

<sup>9</sup> International Criminal Court (ICC), Assembly of State Parties, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, ICC-ASP/6/SWGCA/INF.1 (July 25, 2007), ¶¶ 25, 30 [hereinafter *Special Working Group July 2007 Meeting*]; ICC, Assembly of State Parties, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/5/35 (Jan. 29–Feb. 1, 2007), ¶ 26; ICC, Assembly of State Parties, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, ICC-ASP/5/SWGCA/INF.1 (Nov. 23–Dec. 1, 2006), ¶ 57; ICC, Assembly of State Parties, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, ICC-ASP/4/32 (June 13–June 15, 2005), ¶¶ 66–67; THE INTERNATIONAL

determination on aggression is made by the Council, then the ICC Prosecutor could investigate any individual who might be responsible in a criminal context for such act of aggression identified by the Council. Most proponents of much broader jurisdictional filters for the crime of aggression still embrace the logic of including this procedure of the Security Council's determination on aggression as one of several ways to trigger ICC jurisdiction, and the May 2008 Chairman's Proposal reflects it.<sup>10</sup> Thus, I position it as the first of two alternative means to establish ICC jurisdiction. The reality, however, is that the Security Council rarely makes such an emphatic decision on an act of aggression.<sup>11</sup> The question governments confront is whether there should be a continued role for the Security Council in the jurisdictional framework in the absence of an explicit decision by the Council on aggression, and whether that role should reflect the reality of how the Council actually operates.

Similarly, the language of Section 3(a) is drawn from Article 15bis Alternative 1, Option 2 (green light) of the May 2008 Chairman's Proposal,<sup>12</sup> which simply incorporates what already is permitted under Rome Statute Article 13(b), namely, referrals by the Security Council under Chapter VII of the U.N. Charter.

#### *Option I: Judicial Green Light*

Option I steers the jurisdictional filter away from political determinations of aggression per se and towards a more pragmatic methodology in terms of how the U.N. Security Council operates. The substance of Option I, which is set forth in its entirety in the annex to this article, is as follows:

The new Article 15(3)(b) of Option I would require a Security Council Chapter VII resolution 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. This option

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CRIMINAL COURT AND THE CRIME OF AGGRESSION 121–49 (Mauro Politi & Giuseppe Nesi eds., Ashgate Publ'g Ltd., 2004).

<sup>10</sup> See *May 2008 Chairman's Proposal*, *supra* note 3. See also *Special Working Group July 2007 Meeting*, *supra* note 9, ¶¶ 25, 31 (“While some participants argued that “the Statute did not require a prior determination by the Security Council” and others supported additional trigger mechanisms, such as determinations by the General Assembly or the ICJ none of the members of the Special Working Group on the Crime of Aggression proposed removing entirely the role of the Security Council as an option in the determination on aggression.”).

<sup>11</sup> United Nations, Security Council Resolutions, <http://www.un.org/documents/scres.htm>; See also Keith E. Puls, Book Review, 12 B.U. INT'L L.J. 139, 142 (1994) (*noting* the relative absence of explicit decisions by the Security Council).

<sup>12</sup> *May 2008 Chairman's Proposal*, *supra* note 3, art. 15 bis, ¶ 3, Option 2.

invites a judicial consideration provided the Security Council has not prohibited it by the terms of the Chapter VII resolution (which could arise, for example, if it is simply a follow-on sanctions resolution and the Council determines that ICC intervention at that stage would be too disruptive of peace and security priorities).

If the jurisdictional filter requires a continued role for the Security Council—an outcome that may be necessary in order to reach a broad consensus on the crime of aggression for the Rome Statute—then new Article 15(3)(b) of Option I provides that when the Security Council makes a determination about the existence of any breach of the peace—which it is empowered to make but which may or may not describe an actual act of aggression—then an international court of law has the opportunity to determine whether an act of aggression in fact has occurred. I have bracketed both judicial options to invite consideration whether the SWGCA wants to resort only to the ICC, only to the ICJ, or to either option.

The proposed language narrows the scope for action to those situations which are “the result of the use of armed force between States . . . .” I have structured the proposal in this vein in order to achieve common ground on the character of state-on-state aggression that all governments can agree would constitute the context within which an individual should be subject to investigation and, if merited, prosecution for the crime of aggression under customary international law. The use of armed force is a requirement for the definition of aggression as set forth in Articles 1, 2, and 3 of General Assembly Resolution 3314 (Dec. 14, 1974)<sup>13</sup> and therefore the proposal em-

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<sup>13</sup> G.A. Res. 3314, *supra* note 4, arts. 1–3 states:

*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 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.

*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 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

braces the core principles of that key resolution which many governments rely on to help frame their own positions regarding the crime of aggression of the Rome Statute. Furthermore, this formulation complements the language suggested for Article 8bis.

Absent from this determination by the Security Council would be strictly “economic aggression” (such as economic sanctions or punitive trade measures), “political aggression” (such as diplomatic sanctions or immigration restrictions), or any other alleged “aggression” that occurs without the use of armed force. One can always make the argument that the Security Council can find such non-military forms of aggression to be threats to international peace and security and act accordingly, but that need not throw the situation into the lap of the ICC for criminal investigations and prosecutions. That extreme measure—at this point in history and in the development of customary international law—should be reserved for aggression that arises from the threat or use of armed force.

I have bracketed two sub-options pursuant to which a judicial body would make the determination of state-on-state aggression in the event the Security Council does not explicitly do so as described in new Article 15(3)(b) of Option I. The first sub-option would designate the Pre-Trial Chamber of the ICC as the judicial body empowered to make a judgment about an act of aggression having been committed. Some may find this option too problematic and risky because the ICC judges’ primary expertise likely will be in national or international criminal law and not the international law jurisprudence and theory typically associated with judgments about state-on-state acts of aggression.

The latter kind of expertise would be found in the second sub-option, whereby the ICJ would deliver a judgment on aggression pursuant to either: (1) a contentious case between states or (2) a formal request by the Security Council or the U.N. General Assembly. Advisory opinions often can be delivered within relatively short periods of time compared to judgments in contentious cases,<sup>14</sup> and such a procedure might lend itself to the

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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>14</sup> Of the 24 ICJ advisory opinions since 1948, 62.5% (14) were rendered within eight months of their respective filings. International Court of Justice, List of Advisory Proceed-



need to act in a timely manner to deter alleged aggressors from continuing with plans or actions relating to aggression.

Provided the jurisdictional filter can be established as set forth in Article 15(3)(b) of Option I, the ICC will need to (and Article 5(2) of the Rome Statute requires that the ICC) have a defined crime of aggression for which individuals can be investigated and, if merited, prosecuted. This requirement is fulfilled by Article 8bis described above, specifically Article 8(1).

Article 8bis establishes a leadership criterion for the commission of the crime, namely, “a person in a position effectively to exercise control over or to direct the political or military action (in whole or in 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 . . . .” This does not preclude the further requirement, set forth in new Article 15(3)(b) of Option I, that the decision of the Security Council on a use of armed force still requires a further decision on an act of aggression by either the ICC or the ICJ (depending on whether one or both bracketed options would be agreed to by negotiators and States Parties to the Rome Statute). This definitional provision ensures that the individual who is or has been in a leadership position holds that post in the state that is determined to be the aggressor state.

The Security Council rarely resorts to “aggression” terminology and the examples of the now distant past demonstrate that the Council has used the term to describe relatively minor uses of military force while using other U.N. Charter terminology (threats to or breaches of international peace and security, unlawful use of force, etc.) to describe far more significant uses of military force classically regarded as aggression.<sup>15</sup> Once the Security Council determines that a breach of the peace has occurred, often by condemning it, that determination memorialized in a resolution should be sufficient to trigger a process that can determine whether an act of state-on-state aggression per se has occurred, which then would enable the ICC to investigate persons for purposes of individual criminal culpability.

Permanent members of the Security Council concerned that this methodology too easily would open the door to determinations of state-on-state aggression, which arguably only the Security Council should make pursuant to Article 39 of the U.N. Charter, could remain confident that any determi-

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ings Referred to the Court Since 1946 by Date of Culmination, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&sort=2&p3=0>.

<sup>15</sup> See J.A. Frowein & N. Krisch, *Article 39*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (Bruno Simma ed., 2d ed. 2002, Oxford University Press) 718–29. See also Yoram Dinstein, *WAR, AGGRESSION AND SELF-DEFENCE* (4th ed. 2005, Cambridge University Press) 214–15.

nation or condemnation regarding a breach of the peace as a result of the use of armed force, which is adopted by the Security Council in a resolution, likely will not condemn any one of them. Of course, such a result understandably will be of concern to other governments resentful of the powers and protection that the permanent members enjoy under the U.N. Charter. But the advantage of the proposal is that it realistically would open up most (perhaps all if the Permanent Five refrain from aggression) situations of aggression in the future to scrutiny by the ICC if the Security Council or, depending on which bracketed option is chosen, the ICC or the ICJ reaches the preliminary decision that state-on-state aggression has occurred following a determination by the Security Council that a breach of the peace has occurred.

This kind of determination (breach of the peace) constitutes the *raison d'être* of the Security Council and necessarily will remain the bread and butter of Council work. In other words, addressing threats to international peace and security is the Council's primary job and it is unavoidable. My proposal accepts that reality and uses it to open a logical door to determination whether state-on-state aggression has occurred. I would argue that the equality of states principle<sup>16</sup> remains intact because this process conforms to the U.N. Charter. It remains possible that aggression allegedly committed by a permanent member of the Security Council could be adjudicated by the ICJ if the jurisdictional requirements of that court are met. It would be difficult to argue that somehow the existing procedures of the ICJ challenge the equality of states principle less than would the procedures I have proposed with respect to the ICC's jurisdiction over the crime of aggression.

There has been commentary within the Special Working Group with respect to this approach, namely that "a Council decision might be interpreted as de facto determination of an act of aggression, irrespective of the Council's intention. It might therefore have a negative impact on the decision-making within the Council, which might adjust the way it used certain terms. It was argued that this option would also create a subordinate relationship between the Court and the Council."<sup>17</sup> This merits a response.

Under Option I as I have drafted it, an act of *aggression* must still be determined to have been committed following the initial Security Council determination of "the existence a breach of the peace as a result of the use of armed force between States. . . ." Security Council members would know that their determination alone does not trigger ICC jurisdiction. Rather, a subsequent decision by an international court, either the ICC or the

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<sup>16</sup> LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 106–07, 350, 428 (West Group, 4th ed. 2001); EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (Harvard University Press, 1920); G.A. Res. 2625 (XXV), annex, U.N. Doc. A/8082 (Oct. 24, 1970).

<sup>17</sup> *Special Working Group July 2007 Meeting, supra* note 9, ¶ 30.

ICJ (depending on which bracketed option is chosen), would be required. One might argue that such a prospect alone would cause havoc within Council deliberations, such that both permanent and non-permanent members of the Council would seek to find alternative formulations or decide not to decide in order to avoid potential ICC jurisdiction over the crime of aggression. While that concern is understandable, I do not believe it has as much currency as might be presumed.

First, the U.N. Charter does not provide any flexibility to arrive at decisions in the Security Council other than with respect to and in the context of issues of international peace and security, however they may be described. Option I captures the ambit of Council decision-making. The Council would have an easy supplemental choice if it wishes to adopt a resolution that forecloses the possibility of ICC jurisdiction in a particular matter. The Council either i) could use wording that conforms to the requirements of Article 16 of the Rome Statute<sup>18</sup> or ii) adopt a Chapter VII resolution that would narrowly focus potential ICC jurisdiction. Alternative (i) was used in Security Council Resolutions 1422 (2002)<sup>19</sup> and 1487 (2003).<sup>20</sup> Despite the controversy generated by these resolutions, which ensured that the second one would not be renewed in 2004, the Council has demonstrated its ability to take such a step. Alternative (ii) was used in Security Council Resolution 1593 (2005)<sup>21</sup> referring the Darfur situation to the ICC and in other Chapter VII resolutions pertaining to the international criminal tribunals established by the Security Council.<sup>22</sup>

There might be some dispute over the extent of the Council's powers to establish the scope of the ICC's jurisdiction in a particular situation, but in the end the ICC likely would give great deference to any limitations that the Council might impose under Chapter VII authority. The alternative—to require an explicit Security Council determination on aggression *per se*—invites the predicament that the Security Council may never again make such a determination. If it does not, the issue arises whether that indecision unleashes non-Security Council options on the crime of aggression

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<sup>18</sup> Rome Statute, *supra* note 2, art. 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”).

<sup>19</sup> S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002).

<sup>20</sup> S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003).

<sup>21</sup> S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

<sup>22</sup> S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000); S.C. Res. 1400, U.N. Doc. S/RES/1400 (Mar. 28, 2002); S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 20, 2007).

for the ICC that have been proposed but also have proven so intractable in the Special Working Group negotiations. Option I embraces the obvious reality that nostalgic adherence to the term “aggression” creates a gridlock that defies the actual practice of the Council and how the modern world describes what is occurring in the field, namely as breaches of the peace which sometimes—although likely infrequently—would embrace the classic understanding of “aggression” and yet more often would be defined as uses of armed force falling short of “aggression.”

Second, the Rome Statute already recognizes a *de facto* “subordinate relationship” between the ICC and the Security Council in Article 16 of the Rome Statute and in the limitations that the Council itself might impose in a referral under Article 13(b) of the Rome Statute. It is a very limited and practical (*de facto*) subordinate relationship, but one that was well recognized in the drafting of those provisions. Article 5(2) of the Rome Statute also leaves the door open for a limited subordinate relationship when it requires that the crime of aggression “provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Option I avoids what some governments might view as the extreme position of requiring a Security Council determination of “aggression” per se, which creates a far more radical subordinate relationship to the Council on the crime of aggression; it also avoids, however, the other extreme position that simply includes the Council as one of several different means to initiate a determination that an act of aggression has occurred. In Option I, the Council at least has to be engaged in order to determine that a breach to international peace and security is present, following which another designated body may determine that, within the context established by the Council, an act of aggression between one state and another state has occurred.

The result is the proverbial “you can’t please everybody” compromise. In my opinion, there is far greater risk in challenging the authority of the Security Council and triggering dangerous confrontations between the Council and the ICC if even the Council’s authority with respect to breaches to international peace and security, much less aggression, is ignored by the Rome Statute. Fears that the Council will feel constrained by Option I pale in comparison to how the Council will react if the ICC moves forward on the crime of aggression without any deference to the Council’s overall Charter authority with respect to breaches of the peace, which in any practical sense first would have to be established before determinations regarding acts of aggression could be credibly examined by any other U.N. body. If the ICC could act upon a non-Council determination that an act of aggression has occurred without any initial determination by the Security Council that a breach of the peace has occurred, then potentially destructive jurisdictional battles would be fought between the Council and the ICC, probably to the detriment of both peace and justice.

A further advantage to Option I is that it avoids, at least in significant part, the debate that predictably would arise as to whether a particular use of armed force constitutes an exception to the U.N. Charter Article 2(4) prohibition on “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.” If the Security Council determines that a breach of the peace has occurred and has identified the offending state in a Chapter VII resolution embodying the determination, then the Council for all intents and purposes has denied the legitimacy of any rationale for the use of armed force by the offending state in the particular situation (including self-defense, humanitarian intervention, protection of nationals, counter-terrorism, or advancement of democracy). If, however, negotiators turn to non-Council formulas to trigger ICC jurisdiction over the crime of aggression, then any of those rationales for the use of armed force, such as self-defense, could be employed by governments, defense counsel, scholars, and the media to challenge the ICC’s jurisdiction. The Security Council can preemptively sideline those arguments by using wording and a procedure that establish an unlawful use of armed force and, perhaps, an act of aggression for which there is no justifiable rationale under international law.

*Option II: Soft Green Light*

Option II preserves a significant role for the Security Council but, at the discretion of the Council, offers the option of sharing the final determination of whether aggression has occurred with certain other designated U.N. organs or the ICC itself. It recognizes that the Security Council may not, indeed probably will not, want to make an immediate determination about aggression but may be willing to initiate a process that enables another U.N. organ, or the ICC, to make that call. It is “passing the buck” to other bodies but in a way that remains within the initial control of the Security Council.

Under New Article 15(3)(b) of Option II, the wording of which is set forth in the appendix to this article, I propose a formula that retains more control with the Security Council by requiring that the Security Council must first refer a breach of the peace situation to the Prosecutor who can then launch an investigation in one of two situations. Either the General Assembly must have adopted a resolution determining that an act of aggression has occurred or the ICJ must have delivered a judgment or an advisory opinion ruling that an act of aggression has occurred. Under this proposal, the Security Council steers the decision-making process into the institution of its choosing if the Council has chosen not to make the decision itself.

My hope is that negotiators will recognize the considerable latitude afforded the Security Council in these proposals, such that a far broader range of situations which may constitute state-on-state aggression in fact can be brought before the ICC for investigation of individual criminal cul-

pability. This bridge, between those governments which believe in a central role for the Security Council and those governments which reject that view, is intended to establish a very pragmatic but disciplined process. I purposefully do not include within any definitional structure acts of strictly internal aggression or terrorist or militia acts unconnected to state authority. That is a bridge too far for customary international law and for the ICC's criminal jurisdiction at this stage, in my view. I also think moving in that direction would break the back of the entire exercise.

#### CONCLUSION

I readily concede that the straightforward SWGCA green light jurisdictional procedure, coupled with an opt-in procedure for the crime of aggression, may be the ideal formula for the Permanent Five and some other U.N. members. However, the objective of this article is to present two additional options that may be necessary to consider to bridge the gap between the Permanent Five and a number of other governments, the latter of which are seeking some alternative to an exclusive Security Council filter.

#### APPENDIX: SCHEFFER PROPOSAL

##### *A. 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, 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.

*B. Option 1 (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.

*C. Option II (soft green light)*

Article 15bis

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, 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.

*D. For both option I and option II:*

New Article 25 (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.