



The Road to Kampala: U.S. Participation in the Review Conference of the International Criminal Court

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UCLA School of Law's International Justice Clinic, established in 2008, works with organizations and individuals worldwide in order to help broaden the available policy options to end mass atrocities and hold responsible their perpetrators. Clinic participants provide legal research to domestic and international tribunals, assist NGOs on major accountability projects, develop tools of advocacy and work directly with victims seeking to engage in international justice.

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CONTENTS

Executive Summary.....	i
Key Terms.....	ii
Introduction.....	1
A Review Conference Preview.....	5
The Crime of Aggression	9
Proposed Amendments to the Rome Statute	17
Cooperation with the Court	23
Arrest Warrants Policy.....	29
Deference to National Courts (Complementarity).....	35
Notes	41
Annex	

EXECUTIVE SUMMARY

On May 31 – June 11, 2010, the first Review Conference of the Rome Statute for the International Criminal Court (ICC) will take place in Kampala, Uganda. Hundreds of delegations from around the world will seek to define the crime of aggression and its jurisdictional conditions and, through a stocktaking exercise, evaluate the progress of the ICC since its inception. In a sharp departure from recent U.S. policy, the United States – even though not a State Party to the Rome Statute – will go to Kampala, sending a delegation likely to include high-level officials from the State Department, Pentagon and other agencies.

What can the United States expect from the Review Conference? How should the United States participate? On key issues what positions should the U.S. delegation adopt? How might it navigate between its clear opposition to the crime of aggression and its seemingly genuine desire to become an active contributor to the process of international justice at the ICC?

This paper seeks to address these questions and others, providing an overview of key issues and recommending achievable goals. Based on research by UCLA School of Law's International Justice Clinic, we recommend:

- ✓ ***Genuine Engagement.*** The U.S. delegation should contribute to the Review Conference by expressing U.S. views on substantive matters and hosting side meetings to discuss U.S. policy and State cooperation. To encourage Congressional buy-in, Congressional staff should be invited to join the Review Conference delegation.
- ✓ ***Crime of aggression.*** To the extent possible, the U.S. delegation should avoid a hard-line stance rejecting the consensus definition. The delegation should engage, as it already is doing, and if necessary support a piecemeal approach of adopting components of the crime while deferring jurisdiction to a later negotiation. This is preferable to an “all or none” strategy, which might jeopardize the broader U.S. effort to reengage with the ICC.
- ✓ ***Proposed amendments.*** Consistent with U.S. policy, the delegation should support the Belgian proposal to expand certain war crimes to conflicts of a non-international character. The United States should actively engage in the newly established Working Group to deal with other proposed amendments that will not be on the Kampala agenda.
- ✓ ***Cooperation with the ICC.*** The United States has taken the positive step of offering to meet with the ICC Chief Prosecutor to determine where its contributions would be most useful. While mindful of restrictions and authorities in U.S. law, the U.S. delegation should publicly commit to cooperating with the ICC and identify specific areas where U.S. cooperation is likely to be most forthcoming.
- ✓ ***Enforcement of arrest warrants.*** The United States should find opportunities to share its valuable experience with arrests from its participation in ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY). Rather than merely commenting during the stocktaking, the U.S. delegation should host a side meeting at the Review Conference and offer to hold technical meetings with interested governments on enforcement mechanisms.
- ✓ ***National Accountability.*** The U.S. delegation should be forward-leaning on the issue of “complementarity.” Even though ICC investigation of U.S. actions is unlikely, the United States should ensure that its domestic law would merit scrutiny under the Rome Statute, providing jurisdiction to investigate and prosecute all ICC crimes. The U.S. delegation should also offer technical support to help build the capacity of various States' national accountability mechanisms.

KEY TERMS

Article 98 Agreements	Bilateral immunity agreements between the United States and State Parties to the Rome Statute.
ASP	Assembly of States Parties to the Rome Statute
ASPA	American Servicemembers' Protection Act
BIAs	Bilateral Immunity Agreements (also "Article 98 Agreements")
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
NATO	North Atlantic Treaty Organization
OTP	Office of the Prosecutor of the International Criminal Court
P-5	Permanent Member States of the Security Council: China, France, Russia, United Kingdom and United States
Princeton Process	Alternative name for Special Working Group on the Crime of Aggression
Proprio Motu	ICC Prosecutor's authority to open investigation on her own initiative
Stocktaking	Agenda item for Review Conference, involving discussions of complementarity, cooperation, victim impact, and peace and justice
Rome Statute	The treaty that established the International Criminal Court in 1998
UCMJ	Uniform Code of Military Justice
UN	United Nations
USAID	United States Agency for International Development
WEOG	Western European and Others Group of the United Nations

INTRODUCTION

Late this spring, delegations from 111 States Parties to the Rome Statute for the International Criminal Court (ICC) – along with hundreds of delegates from observing non-party States, international organizations, activists, victims groups, parliaments and many other institutions – will gather in Kampala, Uganda, for their first Review Conference. The Conference promises to be a landmark event in international justice, dominated by questions that are crucial to the Court's future: Will the Conference adopt a definition and jurisdictional trigger so that the Court may prosecute the crime of aggression? How is the Court working to ensure that its jurisdiction complements national courts and tribunals? Is the Court effectively obtaining the cooperation of States and other actors in the international community? Is it adequately protecting victims and witnesses? Does the Court have an appropriate level of oversight?

Beyond the substantive challenges facing this Conference, a sense is building that the United States – participating only since November 2009 in official ICC activities – will bring a new dynamic to the ICC. Senior U.S. policymakers have already announced a desire to meet with the Court's chief prosecutor to determine where U.S. assistance may make a difference.¹ However, in dozens of conversations with delegates to the ICC's Assembly of States Parties (ASP) Meeting in The Hague in November and its Resumed Session at the United Nations (UN) in March, members of UCLA School of Law's International Justice Clinic also heard expressions of a certain amount of unease. The United States brings the possibility of political, operational, logistical and moral support, things the Court badly needs, but it also brings its own sets of interests, concerns and limitations. American policymakers, who attended the ASP meeting as well, are learning that nearly a decade of absence from ICC meetings presents a steep learning curve. They must learn not only where major ICC policies stand today, and where they are headed, but they must also come to terms with an institution that has grown and developed without the imprint of American policy. An ICC culture has developed, not only within the Court but among the delegations to nearly a decade of ASP meetings, and U.S. policy is unlikely to upend it in short order. The United States certainly will not fundamentally alter the ICC culture if, as seems likely, it fails to become a State Party to the ICC.

This policy paper has two main objectives. First, it provides a roadmap to some of the key issues at the Review Conference. Second, it recommends achievable goals for the U.S. delegation to the Review Conference. We note, however, that this report does not address overall ICC policy, which has been well covered by a number of organizations.²

Nor is this report about all of the many issues facing the ICC in the coming years. Throughout, we hope that the report benefits from insights gathered during the Clinic's participation in the ASP Meetings in The Hague and New York, during which time we endeavored to interview on background as many delegations as possible, taking the temperature of the meeting and getting a feel for the direction the Review Conference is likely to take.

Background: U.S. Policy

American policy toward the International Criminal Court has followed a rocky path. The United States was an early leader in international justice, the prime mover behind the international military tribunals at Nuremberg and Tokyo. As international relations thawed in the early years after the Cold War, the United States pressed for the creation of ad hoc United Nations tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). At that same historical moment, the United States engaged deeply in the negotiations to create a permanent international criminal court, designed not only to establish the basic norms of international humanitarian law in a framework of accountability but also to ensure some basic efficiencies – in cost, legal development, politics – in international justice. By 1995, President Bill Clinton could say the following:

By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law. This, it seems to me, would be the ultimate tribute to the people who did such important work at Nuremberg, a permanent international court to prosecute such violations. And we are working today at the United Nations to see whether it can be done.³

Yet strong support and a vision rooted in justice was not enough. When the negotiators reached Rome in the summer of 1998, fundamental issues remained unresolved – and heading in a direction that displeased American negotiators, members of Congress and elements of the military. Americans were isolated or with few friends in key areas: the Security Council would not be the principal, let alone exclusive, trigger for Court jurisdiction; the checks on prosecutorial investigative authority would not be sufficiently

restrictive; the Court's power to investigate and prosecute nationals of non-States Parties would be available. American negotiators in Rome were unable to persuade others to compromise in order to get U.S. participation in a permanent court, but neither were they able to get inter-agency and Congressional buy-in for the kind of court the delegations in Rome were preparing to build. America left Rome defeated, its negotiators demoralized. Despite last-ditch efforts to soften Rome's blow through a series of rule changes and other negotiations after 1998, President Clinton's authorization of a signature of the Rome Statute at the end of 2000 was largely symbolic – support for the Court's purpose but not for the institution soon to enter into force.

Disappointment turned to outright hostility during the early years of the administration of President George W. Bush. The Bush Administration embarked on a policy under which the United States would no longer participate in any ICC activities, even unofficial diplomatic meetings; it sought special agreements from other governments, called Article 98 Agreements by the U.S. Government and Bilateral Immunity Agreements (BIAs) by others, according to which they would promise not to transfer to The Hague Americans accused of Rome Statute crimes; and, in strongly supporting the 2002 American Servicemembers' Protection Act (ASPA), the Bush team sanctioned U.S. friends who ratified the Rome Statute. By the second term, the Bush Administration began to soften its approach, consenting to the ICC's investigation of crimes in Darfur, minimizing the importance of Article 98 Agreements, seeking waivers under the ASPA and engaging directly with ICC officials and supporters. The Obama Administration's early approach to the ICC – supportive politically, observing the annual ASP meetings,⁴ planning to increase its engagement – is the natural extension of policies initiated in the waning days of the Bush presidency.

The Review Conference and U.S. Policy

The Review Conference marks an opportunity for the United States to reassert its long-standing commitment to international justice. But viewing the U.S. role merely as an "opportunity" to "exercise leadership" misses the broader significance of the moment: The ICC, as successful as it has been in attracting State ratifications, has not enjoyed a smooth first decade since the Rome Statute entered into force in 2002. Its first targets of arrest warrants (i.e., indictees) – the leadership of the Lord's Resistance Army in Northern Uganda – remain at large, as do accused individuals from Sudan (including its president) and elsewhere. Cooperation with the Court is spotty at best, with governments, international organizations and NGOs often reluctant to share information on a variety of grounds. The prosecutions themselves have gotten off to rocky starts, sometimes for the

important reason of safeguarding due process rights, other times because of avoidable missteps by prosecutors or judges and often because of basic start-up costs.

Washington's change of policy, in other words, offers an opportunity not only for American engagement but for real contributions to the work of the Court. In conversations with a wide range of diplomats at the 8th Session of the ASP, the International Justice Clinic at UCLA School of Law learned that a majority of countries are responding positively to renewed American engagement and also anxiously awaiting what the new participation might entail. It is thus critical for the United States to know what to expect in Kampala as a first step to engage meaningfully with the ICC. The Administration's decision to send an American delegation in an observer role to the Kampala Review Conference – as the Rome Statute entitles it – means that a well-designed policy, with buy-in from throughout the inter-agency community and members of Congress, must be in place in order to maximize positive engagement with the ICC and the international community.

I. REVIEW CONFERENCE PREVIEW

Review conferences, far from a new phenomenon, have become a common way for governments to evaluate agreements in a wide range of areas. The United States has participated in several conferences to review treaty participation, such as the Nuclear Nonproliferation Treaty (NPT) and the Biological Weapons Convention (BWC). Both treaties are reviewed on a regular basis, with preparatory meetings to discuss and address gaps in the treaties since their adoption. The NPT and BWC aim towards universality, just as the Rome Statute does, in order to ensure the greatest global cooperation and success. Through its participation and support of such reviews, the United States has remained a long-time leader within both treaties, helping shape major international policy in areas that directly implicate U.S. interests.

Mandated by the Rome Statute itself, the Review Conference should be seen in this context: an established mechanism to evaluate and, where deemed necessary, amend a treaty that aspires to universal ratification.⁵ A Review Conference offers something more as well: an opportunity to publicize and promote the achievements of the Treaty. As such, U.S. participants should expect Kampala to be a celebration of the ICC. The business side of the Conference will compete with the celebratory side; one of the U.S. challenges will be to participate honestly (i.e., with appropriate regard and disagreement) in areas such as aggression while demonstrating that it too understands there is much in the Rome Statute to celebrate.

The Kampala Format

Kampala's formal business agenda will be dominated by consideration of amendment proposals and "stocktaking."⁶ Proposals for amendments include the crime of aggression, the opt-out procedure of Article 124, and expansion of certain war crimes to non-international armed conflict. Stocktaking will involve discussions of complementarity, cooperation, victim impact, and peace and justice. Work will be done through plenary sessions, formal and informal side meetings hosted by governments and non-governmental organizations (NGOs) and various drafting, committee and working group meetings. Programs are generally open to accredited parties and governmental and non-governmental observers. Moreover, side meetings may be organized by any State or NGO. These side meetings are crucial opportunities for States to exchange information in a less formal atmosphere than the plenary or drafting sessions.

The Role of Observers

The United States will enjoy observer status at Kampala. Observer status for the ICC, similar to the UN system, enables a non-State Party to participate, including by making interventions, but not to vote. Until November 2009, the United States did not participate at major ICC meetings such as the ASP. At the 8th ASP, the U.S. delegation was in listening mode, learning from the general debate and holding bilateral talks with various delegations, setting markers regarding U.S. policy on aggression and cooperation. However, in order to exert influence and avoid the appearance of an outsider acting with nefarious intentions in the backrooms, the United States should seek to participate actively and openly in the range of discussions at the Review Conference.

Other states have successfully participated as observers. For instance, non-party China has regularly participated in ASP meetings and has observed meetings of the Working Group on the crime of aggression. It is not clear whether the Chinese delegation will be “rewarded” in the aggression discussions with an outcome to its liking, but its participation as an observer over the years has appeared to generate good will towards it in the ASP and some support for positions China has taken.

Active U.S. Engagement

It is likely that Kampala will set the tone for the international community’s engagement with the ICC for years to come. It will also be the highest profile opportunity for the United States to set the terms for its own engagement. While this paper seeks to address a few key areas set to emerge at Kampala, it operates under a broader assumption that active engagement should be serious, genuine and focused on helping build an effective Court. It will be absolutely crucial for the United States to demonstrate a genuine commitment to the ICC if it wants ICC States Parties – and the organs of the Court itself – to respond in ways that acknowledge U.S. concerns and constraints.

The Kampala Conference runs the risk of failing to adequately address global concerns if the United States is not present and contributing to the discussion. While U.S. concerns regarding prosecutorial discretion and the immunity of American personnel persist, the United States’ active participation in the upcoming Review Conference will help ensure a discussion of such concerns.

RECOMMENDATIONS

1. Participate as if U.S. views matters – because they do.

There may be a tendency among American policymakers to play the role of outsider and engage only where there is a perception that U.S. interests are implicated. This would be a mistake. U.S. views and experiences can be brought to bear on a range of ICC issues, and the greater the U.S. delegation participates, the better chance its voice will be taken into account where it matters (as in aggression). In other words, the United States should go to Kampala prepared to speak or otherwise participate in every major issue of substance, particularly on amendments and stocktaking.

2. Get Congressional buy-in.

The Obama administration does not appear to be heading toward any radical break in ICC policy. It is deepening the engagement initiated during the last part of the Bush administration. As such, building a base of support in Congress for U.S. positions at Kampala will be important to crafting a sustainable long-term policy. Members of Congress or their staff should not only be well-briefed on U.S. policy; a few of them should be invited to join the delegation to the Review Conference.

3. Host side meetings and generate papers.

Work gets done in all sorts of ways at international negotiations, and the Review Conference is no different. Because the Review Conference is not only about amendments, however, much of the forward-looking work – how to improve the ICC, stocktaking, and the like – will take place in the context of side meetings. These side meetings are informal opportunities for States or NGOs to present ideas or to lead a discussion. The U.S. delegation, perhaps in collaboration with another State or NGO, should consider hosting one or two side meetings. Two such meetings that would generate great interest: (1) a presentation of the U.S. review process on ICC policy, allowing for give-and-take with delegations in a way that the formal plenary would not allow; and (2) a presentation on U.S. experience with respect to State cooperation and apprehension of suspects, as discussed in sections below.

II. DEFINING AGGRESSION

Defining aggression – the only crime named but not defined in the Rome Statute – is widely seen as the most important goal of the Review Conference. Many governments may secretly harbor a hope that the Review Conference will not conclude the aggression negotiations, but failure to adopt a definition and jurisdictional trigger would almost certainly leave a bitter feeling among many State and NGO supporters of the Court. Indeed, an amendment defining the last of the crimes under the jurisdiction of the Court has generated two polar responses: it will either go a long way in helping the Court exercise its full authority – or it will weaken the Court by exposing it to the deep fissures of politicization.

U.S. Ambassador at Large for War Crimes Issues Stephen Rapp explained the crux of the U.S. position in November at the ASP Meeting:

The United States has well-known views on the crime of aggression, which reflect the specific role and responsibilities entrusted to the Security Council by the UN Charter in responding to aggression or its threat, as well as concerns about the way the draft definition itself has been framed. Our view has been and remains that, should the Rome Statute be amended to include a defined crime of aggression, jurisdiction should follow a Security Council determination that aggression has occurred.⁷

The U.S. team has a pivotal decision to make: If the aggression discussions turn out badly from the Obama Administration's perspective, will the offer of U.S. engagement and cooperation still be on the table? It should be; the ICC represents the key forum internationally for the advancement of norms of international humanitarian law. But realistically, a bad outcome, however defined, will undoubtedly make U.S. cooperation difficult as a political matter. At the very least, the U.S. delegation should make this fact plain to counterparts at the Review Conference – not as a threat, but as a reality of Washington. The Obama Administration, joining the Review Conference with a great dollop of good will, is in a good position to make this clear to other delegations, who will be less likely to see it as a threat than if the message had been delivered by the prior administration.

Whatever the U.S. objectives, the United States will not want to be, or be seen as, the spoiler. For one thing, a forward-leaning role here may, as in Rome, have a paradoxical impact favoring an outcome opposed by the United States. The perception of being the

spoiler, moreover, could undermine the more general effort of the U.S. to engage with the Court and its members.

This section looks at three key issues facing the United States and Rome Statute Parties in Kampala: the draft definition of the crime; conditions for the exercise of jurisdiction; and the entry into force provisions. As important will be discussions on the draft elements of the crime, but those discussions remain at an early stage and will not be considered here.

Key Issues in Negotiation

The delegates in Rome have given us this moment: since they were unable to define the crime of aggression or its jurisdictional conditions in 1998, they left it to the Review Conference, at least seven years after the entry into force, to negotiate the particulars. For the past eight years, a Special Working Group on the Crime of Aggression (also known as the ‘Princeton Process’), involving parties and non-parties to the Rome Statute, has been negotiating the definition and terms of aggression. Where do those negotiations stand?

1. The definition of aggression

The definition of aggression is the least controversial issue facing negotiators, though it has become increasingly controversial among U.S. legal observers. Over years of negotiating the finer details of language and substance, the participants have reached a compromise, boasting a draft text that is largely considered to reflect a consensus. The draft text, which may be found in the Annex, involves a number of issues that appear to have been resolved, with a few exceptions.

The draft distinguishes an *act* of aggression (what a government does) from the *crime* of aggression (what an individual participant does). The draft defines:

- the *crime* of aggression as the planning, preparation, or execution of an act of aggression, grave enough to be a “manifest” violation of the UN Charter, though it does not define “manifest.”
- an *act* of aggression as “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,” and it lists a number of possible acts that could qualify as acts of aggression, including territorial invasions or attacks, bombardment, blockading ports, or allowing another State to use one’s territory to commit an act of aggression against a third State.⁸

Many delegations believe strongly that aggression must be seen as a “leadership” crime, for which the ICC could exercise jurisdiction only when the perpetrator is senior in the subject government. The leadership requirement is designed to ensure that only those who could be “in a position effectively to exercise control over or to direct the political or military action of a State” could be held liable for the crime.⁹ The leadership requirement seeks to allay the fears of those delegations worried that those without any real power might be charged with aggression.

Two issues may continue to be on the agenda by the time of Kampala, though neither should derail the overall process:

- First is whether acts other than uses of armed force can form the basis of an act of aggression. The delegates chose specifically to use the phrase “the use of armed force” in defining an act of aggression,¹⁰ yet many States are concerned that limiting an act of aggression to ‘the use of armed force’ does not fully protect against the types of attacks that can be mounted in this technologically advanced world. Some States support broadening the definition to include economic embargoes, cyber attacks or “other forms of attacks that could affect the political or economic stability or exercise of the right to self-determination . . . of one or more States.”¹¹ The United States need not, in all likelihood, worry that these suggestions will be added, given the tepid support they have garnered.
- Second, some States are uncomfortable with the reference to the UN’s 1974 Definition of Aggression, General Assembly Resolution 3314 (XIX). Many have argued that the Resolution was meant only as a tool to guide the Security Council in determining the existence of an act of aggression, not as a guide for establishing criminal liability. As such, these delegates have contended that the language is too vague and unworkable for judicial purposes, and might thus be seen by the Court in a future prosecution to violate the legality principle, *nullum crimen sine lege*.

2. The trigger for jurisdiction

The exercise of jurisdiction continues to be a much more serious source of controversy than the definition. The draft provision on jurisdiction still has several “open brackets” subject to negotiation. The key issue may be boiled down as follows: Must the Prosecutor rely on an external actor – such as the UN Security Council, the UN General Assembly, the International Court of Justice, or a panel of Court judges – to make a determination of a State act of aggression in order to authorize an investigation or prosecution? Or may the Prosecutor exercise investigative and prosecutorial authority – as

he does with respect to the existing crimes – at his own initiative or upon referral by governments?

The so-called P-5 delegations (permanent Member States of the Security Council: China, France, Russia, United Kingdom and United States) and several of their close allies argue in favor of the primacy of the UN Charter and its provisions which grant the Security Council competence – arguably primary or exclusive – to determine an act of aggression. As a result, the argument goes, the Security Council must determine that an act of aggression has occurred before the ICC could exercise jurisdiction over an individual for the crime of aggression. Anything else, it is said, would undermine one of the core principles of the Charter.

By contrast, other delegations argue that the Charter's provisions were meant for the purpose of identifying breaches of international peace and security, and were never intended to have judicial significance in international criminal law. Furthermore, they argue that requiring a prior determination by the Security Council would politicize the Court and stunt the development of an autonomous definition of aggression based on law. Finally, they note that the Security Council already has power to suspend a prosecution under Article 16, eliminating the need to include special provisions on Security Council pre-determination in the draft additions regarding the exercise of jurisdiction.¹²

Between these opposing views a number of compromise solutions have been considered. These include:

- providing the Security Council with primary but not exclusive competence to make a prior determination on aggression, according to which, if the Security Council is silent, the Prosecutor may move forward with an investigation;
- the 'green light' option, under which the Security Council could give the Prosecutor the go-ahead to begin an investigation into an act of aggression without itself making a substantive determination that such an act occurred (though the impact of Security Council silence is not clear); and
- the 'red light' option, which would give the Security Council power to stop permanently an ongoing investigation by the ICC into a crime of aggression.¹³

These different options have been discussed with varying degrees of seriousness and specificity, but they are all likely to be discussed at the Review Conference. Jurisdiction is by far the biggest threat to the ability of the Review Conference to conclude the aggression

negotiations. At the most recent meeting of the ASP in New York in March, the fault lines remained exposed and the possibility of compromise uncertain.

3. Entry into force provisions

Technically complex, the debate over how an aggression amendment would enter into force is critically important. The negotiation will require the Review Conference to adopt one of the following provisions:

- Article 121(4) provides that an amendment enters into force for *all* States Parties one year after seven-eighths of them have ratified it; the amendment would then apply automatically to any State that becomes a party to the Rome Statute after this time.
- Article 121(5) provides that an amendment to articles 5-8 will enter into force one year after ratification *for the States Parties that have ratified it*; if a State Party has not ratified the amendment, the ICC will not exercise its jurisdiction over a “crime covered by the amendment when committed by that State Party’s nationals or on its territory.”

The argument for using paragraph 4 is that using the ‘opt-in approach’ of paragraph 5 would result in treatment of the crime of aggression that is different from war crimes, crimes against humanity and genocide. Some supporters of the paragraph 4 approach, however, have also expressed their support for an ‘opt-out’ provision similar to the one in Article 124.¹⁴

The supporters of the paragraph 5 approach have argued that allowing States to opt-in to the crime of aggression will promote the universality of the Rome Statute, because States that are not yet parties to the Statute will see that their sovereign decision whether or not to be bound by the provisions of the amendments will be respected by the Court. Many delegations expressed concern during the Princeton Process that some current States Parties might withdraw from the Rome Statute if the amendments relating to aggression will be applied to them automatically under the paragraph 4 approach. In addition, practically speaking, the Court’s jurisdiction over the crime of aggression might be delayed indefinitely if it cannot get seventh-eighths of the States Parties to ratify the amendment. Under the paragraph 5 approach, the Court would immediately be able to exercise its jurisdiction over the crime of aggression for the States Parties that accepted the amendments.

Though the paragraph 5 approach seems to have gained favor over the years, there are several issues of concern that have stopped the States Parties from fully embracing that approach. First, the status of future parties is unclear under the paragraph 5 approach – will ratifying or acceding to the Rome Statute itself bind them to the aggression amendments, or will they have to sign on to those specifically in order to be bound by them? In addition, there is a concern that emanates from the second sentence of paragraph 5, which claims that, if a State has not accepted the aggression amendments, the ICC cannot exercise jurisdiction over aggression “when committed by that State Party’s nationals or on its territory.” This language creates different jurisdictional questions based on the different trigger mechanisms; that is to say, depending on whether a case comes to the ICC based on a Security Council referral, a referral by a State Party, or based on a *proprio motu* investigation, the opt-in approach can have different effects on different States. While the delegates have reached a consensus regarding the idea that, if an aggression case is referred to the ICC by the Security Council, it should not matter whether either State in the dispute has signed the Rome Statute or ratified the amendments, there are still large difficulties regarding State Party referrals and *proprio motu* investigations. In these situations, it is unclear whether the Court would have jurisdiction if an alleged aggressor is not bound by the aggression amendments and an alleged victim is (or vice versa).

There is clear relevance here for non-States Parties. One possible reading of paragraph 5 would hold that, if a Victim State has accepted the aggression amendments, that is enough to establish a territorial link for the ICC’s jurisdiction. The opposite reading of paragraph 5 – namely that only the alleged Aggressor State’s acceptance of the aggression amendments would suffice to establish the territoriality or nationality link that would be required for an exercise of the ICC’s jurisdiction – is likely to be advocated strongly by those who wish to limit the extent to which non-States Parties may be under the jurisdiction of the ICC. In addition, delegations are discussing whether it is desirable to create a mechanism according to which some States Parties are bound by the aggression provisions while other States Parties are not.

RECOMMENDATIONS

1. Package Deal or Piecemeal Approach?

One non-substantive issue that may deeply affect how the aggression debates move forward is whether States Parties will vote on and accept the different components of aggression only as a ‘package deal,’ or whether they will be willing to vote on the component parts in piecemeal fashion. While some States Parties have long indicated that

they see the aggression discussions as indivisible (“nothing is settled until everything is settled”), we detected a growing sense among delegations at the ASP in November that the piecemeal approach might be preferable in order to guarantee *some* success in Kampala. This approach would also allow the United States greater flexibility in seeking to influence the aggression debates.

2. Avoid a fight over the definition.

The U.S. delegation – with support from Congress – should refrain from fighting too much on the definition of the crime or an act of aggression. Where its members have questions, they should ask them in a spirit of clarification, also laying markers for the future if its objections are indeed serious. However, on balance, a hard-line stance rejecting the definition would undermine U.S. leverage over the ultimately more important issue of the exercise of jurisdiction.

3. Find suitable surrogates.

A main goal is to avoid being seen by other nations as a ‘spoiler,’ or a country that derails the negotiations process after much has already been accomplished. To that end, the United States should defer as much as possible to the delegations of the United Kingdom and France, which share the United States’ concerns regarding the jurisdictional conditions for aggression, but who, as States Parties, are more easily able to articulate those concerns as a committed supporter of the ICC. There are many other nations, however, including Australia and Canada, that have made it clear that they would prefer the Security Council to have some power in this situation, but not exclusive power. It would be best for the United States to join a coalition of States already arguing for exclusive competence to be vested in the Security Council. Rather than taking a leading role in the open debates, the United States could let nations that are States Parties take the lead on these arguments, and could instead provide more informal support.

4. Support the Article 121(5) approach.

As regards the entry into force provisions, it seems that most countries favor the Article 121(5) approach, which is beneficial to the United States’ interests. The United States may want to ensure that States agree to a ‘negative’ reading of paragraph 5, precluding jurisdiction over non-States Parties accused of aggression.

III. PROPOSED AMENDMENTS TO THE ROME STATUTE

The Review Conference will consider one substantive amendment other than defining aggression. This amendment, proposed by Belgium, would carefully broaden the definition of a “war crime” under Article 8(2)(b).¹⁵ Under the new language, the use of certain poisonous weapons, asphyxiating gases, and bullets that flatten in the human body would constitute a war crime when used in non-international armed conflict, as it already does under international armed conflict.¹⁶

The Belgian amendment is consistent with longstanding U.S. policy and legal obligations and deserves support. The United States also benefits by engaging in the amendment process for other issues, even where the proposal conflicts with U.S. policy. The United States has the opportunity to enter negotiations on an uncontroversial topic, familiarize itself with the landscape of amendment discussions and position itself for future debate on proposals that could impact U.S. interests. This section looks at the amendment process, both in the narrow case of Belgium’s proposal and the broader question of future amendments concerning issues such as terrorism, nuclear weapons, international drug trafficking and other weapons.¹⁷

For the time being, the United States should avoid speaking out against the other proposals that are not on the agenda. Instead, as a new participant in ICC activities, the United States should closely monitor their status and avoid antagonizing supporters at this stage. The other amendments have not yet approached consensus at the ASP and their adoption is not a current concern – and will not be, in all likelihood, for some years. The U.S. delegation should strike a balance consistent with its historical positions: somewhere between engagement on behalf of the Belgian amendment and general – though reserved – caution regarding future efforts to amend the Statute.

The United States and a Dynamic Rome Statute

The Rome Statute allows any State Party to propose an amendment to the Statute.¹⁸ The process for amendment – for example, modifying the definition of “war crimes” or adding a new crime to the Statute – would fall under the provisions of Article 121(5), described above in the context of aggression.¹⁹ Changes to the ICC’s subject matter jurisdiction extend only to those parties which ratify the amendment and thereby affirmatively opt in.²⁰

The United States would benefit by participating in this process, which includes consensus-building and debate over the status of international humanitarian law. The United States could study the dynamics of ASP plenary sessions, side meetings, and

informal discussions. By establishing contacts and preparing for future debate, the United States would further its goal of “gaining a better understanding of the issues being considered [at the meeting of the ASP] and the Court.”²¹ The United States would be poised to support substantive proposals that further U.S. interests, to clarify U.S. policy, and to lend support to allies.

The Belgian Proposal

Article 8 of the Rome Statute states that the Court shall have jurisdiction over “war crimes,” which it then defines in several paragraphs. Paragraph 2(b) lists several acts that qualify as serious violations of the laws and customs applicable in armed conflicts “of an international character.” Similarly, paragraph 2(e) addresses violations in armed conflicts “not of an international character” (typically civil wars). Belgium’s proposed amendment would copy three categories of unlawful acts from paragraph 2(b) and add them to paragraph 2(e). The proposal thus does not criminalize new methods of warfare but rather expands to non-international armed conflict the current prohibition on three categories of weapons:

- xvii) Employing poison or poisoned weapons;
- xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- xix) Employing bullets which expand or flatten easily in the human body, such as hard envelope which does not entirely cover the core or is pierced with incisions.²²

This amendment, consistent with longstanding U.S. law and policy, deserves strong U.S. support at the Review Conference. The United States has supported expanding the applicability of international humanitarian law to non-international armed conflict.²³ This amendment also provides an opportune moment for the United States to join the discussion precisely because it is non-controversial. Delegations supported the amendment by consensus at the Eighth Meeting of the ASP and others who took no position nonetheless encouraged discussion at the Review Conference.²⁴

The Working Group on Other Amendments

Belgium, the Netherlands, Mexico, South Africa/African Union and Trinidad and Tobago have proposed amendments that will not be discussed at the Review Conference.²⁵ However, the ASP has decided to establish a Working Group to continue discussing their

viability at the 9th Session of the ASP in December 2010. These proposals, if enacted in the future, could have significant policy implications for the United States.

The Belgian Proposals on other International Conventions

Belgium proposed amending the Statute by adding biological weapons, chemical weapons, and anti-personnel mines. These changes would incorporate into the Statute language from three international conventions: the Biological Weapons Convention of 1972, the Chemical Weapons Convention of 1993, and the Anti-Personnel Mines Convention of 1997.²⁶ Belgium also proposed adding restrictions on the use of excessively injurious weapons or indiscriminate weapons.²⁷

Terrorism

The Netherlands proposed amending Article 5 of the Rome Statute to add the crime of terrorism. The Netherlands made this proposal pursuant to a 1998 Rome Conference resolution in which the signatory parties agreed to reconsider the issue at a future Review Conference.²⁸ States have expressed several reasons to postpone discussion of this proposal, including the lack an agreed upon definition of terrorism and the Court's lack of resources to handle such cases. The Netherlands, though, seemed content at the 8th ASP Meeting to keep the idea on the ASP's radar and note broad condemnation of terrorist acts and possible future consideration.²⁹

South Africa/African Union Proposal

South Africa, on behalf of the African Union, proposed amending Article 16 to create two new mechanisms for deferring ICC investigations or prosecutions.³⁰ The first would permit any State with jurisdiction over a situation before the Court to request the UN Security Council to defer the matter before the Court. The second would allow the State Party, if the Security Council failed to act, to request the General Assembly to assume the responsibility to defer ICC investigations or prosecutions. The proposal reflected the concern of some African states that ICC prosecution could upset the peace process in Sudan, and broader displeasure that the Security Council to date has not requested the Court to defer investigation or prosecution of President Al-Bashir in Sudan. The proposal failed to garner consensus and reflects both the highly political reception of the Bashir arrest warrant and ongoing disagreement among States Parties about the role of the Security Council in ICC affairs.

International Drug Trafficking

Trinidad and Tobago and cosponsor Belize proposed amending Article 5 of the Rome Statute to add international drug trafficking to the Court's jurisdiction.³¹ Like the Dutch proposal on terrorism, Trinidad and Tobago made its proposal pursuant to a Rome Conference resolution in 1998 to reconsider the issue at a Review Conference.³² The crime of international drug trafficking also lacks a consensus definition and raises the question of whether the ICC should investigate and prosecute organized crime more generally.³³ Trinidad and Tobago proposed limiting the jurisdiction of the Court to those narcotics crimes "posing a threat to the peace, order and security of a State or region."³⁴ Restricting the Court's prosecutions to major crimes might prove infeasible.³⁵ States have questioned whether the ICC has the resources to investigate and prosecute this additional and far-reaching set of crimes.³⁶

Nuclear Weapons

Mexico proposed expanding the definition of "war crimes" under Article 8 to include, "employing or threatening to employ nuclear weapons."³⁷ States Parties will not consider this proposal at the Review Conference but will address it at the 9th Session of the ASP in December 2010.³⁸ States have argued that the topic is too complicated by political and legal issues for consideration at the Review Conference.³⁹ Thus far, the proposal has garnered little support. Although the ASP permitted discussion of Mexico's proposal at the 8th Meeting of the ASP in November 2009, few delegations spoke in its favor. For the permanent members of the Security Council, many members of NATO, and several countries in the Western European and Others Group (WEOG), the inclusion of nuclear weapons has been a deal breaker since the Rome Conference.⁴⁰

RECOMMENDATIONS

1. Support the Belgian amendment proposal.

This proposal would expand the war crimes definition under Article 8 in a way that is consistent with longstanding U.S. policy. The United States can use the opportunity to engage with the ASP on a non-controversial proposal, learn the dynamics of amendment discussions, and position itself for the future.

2. Refrain from voicing opposition to the other proposals.

Other proposals have not received widespread support and are not on the Kampala agenda. The ASP has decided to create a Working Group on other amendment proposals

that have not received significant backing. That will be the appropriate forum in which to express support or opposition.

3. Monitor the progress of and engage in the Working Group on Other Amendments.

An expanded Court could pose further obstacles to U.S. participation and undermine the Court's ability to carry out its mandate. Yet there may be cases where an amendment would advance U.S. and ICC interests. The United States should engage in the Working Group in order to keep track of possible changes in the ICC framework and to participate in shaping them.

IV. COOPERATION WITH THE COURT

State cooperation is essential to the success of the ICC. Unlike domestic courts, which rely on the enforcement authority of police and other agencies, the ICC depends on the cooperation of States at all phases: from investigation to arrest, trial and sentence enforcement. Without State cooperation the ICC cannot function; in a very real sense, the ICC fails when States fail to deliver cooperation.

Based on more than a decade of experience with international and hybrid tribunals, the United States knows their needs and how to cooperate with them. U.S. Government officials know that tribunals need political and diplomatic support, background and intelligence information, leads for investigations and arrests, and technical assistance on everything from IT issues to the science of court management. In the lead-up to the Review Conference, the United States should look for ways both to extend its technical know-how to States and NGOs seeking to cooperate with the Court and to extend its support to the ICC.

Cooperation with the ICC will advance American interests. For one thing, since the United States is unlikely to ratify the Rome Statute in the near- or medium-term, concrete demonstrations of support will be necessary to claim any substantive role – let alone a leadership role – in ICC activities or even broader efforts in international justice. An assertion of leadership will sound hollow in the absence of cooperation. Across the board, on both sides of the aisle, American policymakers and legislators have touted the American commitment to accountability in the face of war crimes, crimes against humanity and genocide; cooperation will demonstrate that commitment and interest. Moreover, cooperation will initiate a feedback loop, whereby U.S. engagement will generate insights and influence for American policymakers that will be much harder to identify through indirect channels. Of course, the United States is under no obligation to cooperate, making cooperation all the more impressive to States Parties and the Court.

Cooperation will be addressed through “stocktaking” at the Review Conference. To date, States Parties have not always lived up to their obligations under the Rome Statute in four major ways: enactment of national legislation to provide cooperation with the Court; ratification of the Agreement on Privileges and Immunities; enforcement of sentences in national facilities; and agreements with the Court for relocating victims and witnesses.⁴¹

Cooperation Required by the Rome Statute

Although the United States, as a non-party, has no legal obligation to support the work of the Court, Part 9 of the Rome Statute provides a roadmap for cooperation, stipulating all phases in which States Parties are required to cooperate with the Court. The Rome Statute explicitly permits the Court to enter into ad hoc cooperation agreements with non-States Parties,⁴² which the United States can use to cooperate without becoming a State Party. Article 86 generally obligates States Parties “to cooperate fully with the Court in its investigations and prosecutions of crimes.” States Parties are required to pass national legislation to ensure proper procedures are available under national law for *all forms of cooperation*.⁴³ National cooperation legislation is the first step States must take to meet their cooperation obligation.

States Parties are expected to deliver cooperation to the Court during every phase from investigations to the enforcement of sentences. Article 93, for instance, obligates States Parties to “comply with requests by the Court to provide” certain forms of assistance to investigations and prosecutions including:

- Identification of persons or locations,
- Taking of evidence,
- Service of documents to the Court including judicial documents,
- Facilitating appearance of persons as witnesses or experts,
- Temporary transfer of persons,
- Examination of places or sites,
- Execution of searches and seizures,
- Protecting victims and witnesses,
- Financial information for forfeiture, and
- Other types of extradition.⁴⁴

Part 10 of the Rome Statute deals with State assistance in the enforcement of sentences, which as a rule are served in States that are willing to provide facilities (typically space in their existing prisons).

Cooperation under U.S. Law

The 2002 American Servicemembers’ Protection Act (“ASPA”) prohibited U.S. cooperation with the ICC and required the United States to sanction countries that refused

to sign Bilateral Immunity Agreements (“Article 98 Agreements”) by cutting military education and training assistance and foreign military funds to unwilling States. After amendments in 2006 and 2008, the military sanctions for nations refusing to sign Article 98 Agreements were effectively eliminated;⁴⁵ however, U.S. cooperation with the ICC is still restricted in the following ways:

- U.S. funds cannot be used by or to support the ICC;⁴⁶
- Direct or indirect transfer of U.S. national security and enforcement information to the ICC is prohibited, even when no U.S. citizen has been accused of a crime;⁴⁷
- U.S. federal, state, and local courts, agencies and any other entity are prohibited from responding to any requests for cooperation by the ICC;⁴⁸
- The United States is required to use their voice and vote on the UN Security Council to ensure U.S. troops only participate with peacekeeping operations if it is ensured they will not be subject to prosecution by the ICC;⁴⁹ and
- The president is authorized to use “all means necessary” to bring about the release of any U.S. or allied person being detained or imprisoned by, or on the behalf of, the ICC.⁵⁰

The United States will not be able to reengage meaningfully and across the board with the Court unless it minimizes the effect of ASPA and prior U.S. policy and takes steps towards cooperation, both of which can be accomplished without joining the Rome Statute.

ASPA includes certain provisions that would allow U.S. cooperation with the Court. For instance, it permits presidential waivers on a case-by-case basis of certain prohibitions and restrictions, including responding to requests for cooperation by the Court, and direct or indirect transfers of national security and law enforcement information.⁵¹ The waivers are permitted to the degree necessary to allow the United States to cooperate with an investigation or prosecution, so long as the person under ICC jurisdiction is not and was not a protected U.S. or allied person.⁵²

Oversight

Issues of oversight come up in two ways: One involves general ASP oversight of the work of the Court. To date, the ASP arguably has not engaged regularly and meaningfully in ensuring an efficient and effective Court, nor has it regularly provided support for specific

needs of the organs of the Court. As part of the stocktaking exercise, the ASP would be wise to consider making such reviews a normal part of the annual meetings rather than an occasion only for the Review Conference.

Separately, the ASP does not generally provide detailed supervision of the Court, unlike the UN, which has an Office of Internal Oversight, or agencies of the U.S. Government, which have inspectors general. The question of whether an outside body separate from the States Parties to the treaty themselves should review the activities of the Court remains an open one. Article 112(4) of the Rome Statute establishes the right of the ASP to create an independent oversight mechanism for “inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.”⁵³ At the 8th ASP, the Assembly decided on the establishment of such a mechanism with an initial mandate limited to investigating alleged misconduct of elected officials and staff. This mechanism’s scope may be broadened by the ASP after Kampala. The Court’s Committee on Budget and Finance provided the suggestion that the ICC rely on the UN Office of Internal Oversight for guidance.⁵⁴ Though the United States’ role would be limited, since it does not currently make financial or other contributions to the Court, it could contribute to the ASP suggestions of how an independent oversight mechanism should function.

RECOMMENDATIONS

1. Recommit to cooperation with the ICC.

The United States should publicly announce a cooperation commitment that would initiate either a review of ASPA, leading to its modification or regular use of presidential waivers. ASPA could be reviewed in order to narrowly tailor its provisions and promote U.S. cooperation. Where, as a general matter, cooperation is still restricted, the United States should make use of presidential waivers to deliver cooperation to the Court on a case-by-case basis. This approach allows the United States to continue protecting its interests, while not entirely rejecting the efforts of the Court.

2. Offer increased political support.

U.S. diplomacy has already moved toward vocal support for the ICC’s work in a variety of international bodies, including the Security Council and the ASP. The U.S. delegation to the Review Conference should not only catalog that support but should specify the American intention to increase its diplomatic and political support for the ICC, through support of the Court itself, bilateral diplomatic efforts and as a permanent member

of the Security Council. At the same time, it may clarify that U.S. involvement would also bring with it closer attention to the workings of the Court.

3. Provide support for protection of victims and witnesses.

The Court has struggled to secure agreements with countries for the safe relocation of victims and witnesses. The U.S. delegation to the Review Conference could express an intention to initiate the process of getting inter-agency and Congressional buy-in on this issue and work towards entering into a victim and witness relocation agreement with the Court. Such cooperation could involve a fast-track for individual victims or witnesses to obtain refugee or asylum status for entry into the United States. This would allow the United States to offer meaningful cooperation, in a vital area, without over-committing itself – since the numbers of victims and witnesses would be quite low year-to-year. This would be a concrete step towards alleviating an unrealized area of State cooperation and it could act as a catalyst for encouraging other countries to enter into such agreements.

4. Host a side meeting at Kampala.

Hosting a side meeting will allow the United States a working profile at the Review Conference. A meeting would allow the United States to: (1) canvas other States and NGOs on what kind of cooperation is lacking and (2) share U.S. experiences and lessons learned from its cooperation with UN tribunals. Adequate preparation is required to fully realize the value of this stocktaking exercise; a useful presentation would include analysis of U.S. cooperation with the tribunals, and how these efforts were successful or could have been strengthened. A White Paper on best practices and lessons learned regarding cooperation with the tribunals could also be valuable.

V. ARREST WARRANTS POLICY

The enforcement of arrest warrants poses one of the most significant challenges to the ICC's credibility as an institution of international justice.⁵⁵ At present, however, States Parties have been reluctant to take steps to address this major problem.⁵⁶ To ICC Chief Prosecutor Luis Moreno-Ocampo, the lack of political support for the Court critically undermines the international community's commitment to executing arrest warrants and emboldens uncooperative states and individuals. Ocampo has consistently underscored that the outstanding warrants for high-level officials, including President Al-Bashir of Sudan, require the international community to marginalize suspects through coordinated efforts.⁵⁷

Few States, if any, have more experience than the United States in dealing with the apprehension of fugitives from international tribunals. The United States has provided political, logistical and operational support most prominently in the case of the ICTY. Its political support was pivotal in encouraging the arrest of Slobodan Milosevic by Serbia. Clearly the United States has something valuable to offer the ICC. The Review Conference provides an opportunity for the United States to advance objectives it shares with the Court by lending its experience and support to the enforcement of warrants. Given its interests and experience, the United States might very well take on arrest warrants policy as a signature issue to contribute to the Review Conference within the context of stocktaking.

ICC Arrests to Date

Out of 14 ICC suspects today, four are in custody, one is appearing voluntarily though not in custody, and nine remain at large.⁵⁸ Three suspects from the Democratic Republic of the Congo (DRC) have been apprehended. Thomas Lubanga Dyilo, founder of the Patriotic Forces for the Liberation of Congo, and Germain Katanga, commander of the Patriotic Resistance Force in Ituri, were arrested in relation to an attack against U.N. peacekeepers in Ituri in February 2005, in which 9 peacekeepers were killed. These detentions occurred before the ICC issued arrest warrants. DRC authorities promptly surrendered them in March 2005 and October 2007, respectively, after their warrants were unsealed. The third suspect, Mathieu Ngudjolo Chui, a colonel in the National Army of the Government of the DRC, was arrested in February 2008 by DRC authorities, six months after his arrest warrant was issued. The fourth person in custody is Jean-Pierre Bemba Gombo, alleged President and Commander-in-Chief of the Movement for the Liberation of Congo, for crimes committed by his forces in the Central African Republic. Belgian authorities arrested and transferred Bemba to the ICC in May 2008.⁵⁹

There has been little movement to apprehend the five accused members of the Lords Resistance Army (LRA) in northern Uganda, and Ahmad Harun, Ali Kushayb, and President Al-Bashir of Sudan. In Uganda, the warrants led the LRA suspects to flee to the DRC, which prompted the Ugandan government to initiate ceasefire negotiations and declare that it was willing and able to prosecute the case.⁶⁰ President Al-Bashir's warrant marked the first time the ICC sought the arrest of an incumbent head of state. His arrest warrant was the result of a referral by the Security Council to the ICC OTP, but questions of his immunity from arrest remain. Sudan is not a party to the Rome Statute and has no cooperative agreement in place with the ICC, thus raising possible questions of the customary international law norm of head of state immunity from arrest.⁶¹ The powers granted in the Rome Statute provide that even the most senior officials of states do not enjoy immunity from arrest and prosecution.⁶² However, there is customary international law to the contrary, making immunity a muddied issue particularly where an investigated State is not a party to the Statute.⁶³ (Once in custody of the ICC, however, the Rome Statute does not permit a defendant to avoid prosecution by reason of head of state or other immunities.)⁶⁴ Using these ambiguities as a justification, in July 2009, the African Union passed a resolution on non-cooperation with Al-Bashir's arrest.⁶⁵

Legal Framework

The Rome Statute created a system that relies on States' own initiatives for securing the accused. No automatic mechanism ensures that arrest warrants are enforced, and the ICC lacks its own police force.⁶⁶ As a result, the Statute relies on States Parties to cooperate in order to make suspects available to the Court. States Parties are required to make procedures for apprehension and surrender of suspects available under national law.⁶⁷ Under Article 98 of the Rome Statute, a State may not be required to act inconsistently with its existing obligations under international law without first obtaining consent from a sending state or an agreement for a waiver of immunity.⁶⁸

If a State Party fails to comply or cooperate with an indictment, the ASP is statutorily empowered to make a finding to that effect and, if applicable, refer its finding to the Security Council.⁶⁹ However, the parameters, procedures, and consequences that would flow from this function are not yet defined. Some delegations have expressed an interest in beginning discussions on making Article 112(2)(f) findings of non-cooperation, but in general, States Parties did not consider the ASP ready.⁷⁰ As of now, the general consensus seems to be that "cooperation" must be better defined by the ASP before findings of non-cooperation could be made.⁷¹

Experience from the Ad Hoc Tribunals

The experiences of prior ad hoc tribunals can inform approaches to enforcement of ICC arrest warrants.⁷² The United States has extensive experience with the enforcement of warrants for ad hoc tribunals – most notably, it was one of the principal actors behind the efforts to secure fugitives from the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁷³

Before illustrating how the ad hoc tribunals obtained custody of accused individuals, it is necessary to underscore the legal differences between the ad hoc tribunals and the ICC. The two UN ad hoc tribunals – the ICTY and the International Criminal Tribunal for Rwanda (ICTR) – were created under Chapter VII of the UN Charter by Security Council resolutions. The Chapter VII origin of these tribunals imposes a binding obligation on all UN Member States to cooperate on enforcing arrests, unlike the ICC (which imposes obligations only on its parties).⁷⁴ However, as with the ICC, State cooperation has not always been sufficient to capture suspects for the ad hoc tribunals, requiring the use of alternative enforcement mechanisms.⁷⁵

Previous ad hoc tribunals relied on States and the UN Security Council to employ various methods of enforcement that could be categorized into sanctions, incentives, political support, transnational cooperation, and intelligence. Specific mechanisms included:

- 1) Issuing sealed instead of public indictments,
- 2) Luring fugitives to jurisdiction of cooperative states,
- 3) Issuing individual cash rewards (bounties) for cooperation and assistance by private actors,
- 4) Freezing assets of individual suspects,
- 5) Offering economic aid inducements,
- 6) Threatening to impose diplomatic and economic sanctions against uncooperative states,
- 7) Offering E.U. accession inducements,
- 8) Engaging the tribunals to independently track suspects' locations,
- 9) Using military force to apprehend suspects, and
- 10) Entering cooperative agreements with Interpol.

Successful apprehension of suspects has required the use of multiple enforcement methods that both induced broader international cooperation and targeted individual suspects more precisely.

Prosecutors at the ICTY and ICTR have independently attempted to track fugitives who remained free due to either lack of custodial State cooperation or lack of enforcement capacity. Lower ranking suspects who were “politically easier” to capture were arrested by local law enforcement or international forces for the ICTY when the OTP switched from public to sealed indictments that cut short head starts that suspects might have in fleeing.⁷⁶ The prosecutors sought UN Security Council decisions to freeze assets, which helped immobilize suspects facilitated their arrests.⁷⁷ Both the ICTY and ICTR established their own tracking teams that independently maintained information about the movement of fugitives.⁷⁸ The maintenance and sharing of information by the tracking teams assisted cooperative authorities and helped eliminate excuses for the lack of movement on arrests available to uncooperative States.⁷⁹

A cooperative agreement with Interpol facilitated collaboration between the National Central Bureau of Interpol of the Ugandan Police and the ICTR’s OTP tracking team, which resulted in the capture of ICTR fugitive Idelphonse Nizeyimana.⁸⁰ This success led some delegations at the 8th ASP meeting to consider the usefulness of collaborating with Interpol outside of the immediate ICC regime for arrests.⁸¹

The United States has played a crucial role in increasing arrests as an external political actor to the ICTY, which has proven especially useful where custodial States have been reluctant to cooperate with arrests. U.S. Government-funded individual cash rewards are credited with eliciting information from private actors that led to the capture of several indictees.⁸² This tactic is also thought to have helped marginalize fugitives from their harboring communities.⁸³

The U.S. Government’s use of economic and diplomatic sanctions in conjunction with conditional aid helped mobilize the Federal Republic of Yugoslavia (FRY), which was one of the last States to acquiesce to executing ICTY arrest warrants.⁸⁴ The U.S.-imposed diplomatic sanctions precluded the FRY from membership in international organizations and financial institutions, and threatened to block international financial institution lending until full cooperation with the ICTY and the surrender of Slobodan Milosevic materialized.⁸⁵ Serbian forces eventually arrested Milosevic in Belgrade, and then surrendered him to the ICTY after a federal Yugoslav decree was passed that facilitated cooperation with the tribunal.⁸⁶

The use of incentives without sanctions helped mobilize Croatia on arrests. International Monetary Fund and World Bank loans were offered in exchange for the surrender of indictees.⁸⁷ Side payments and the offer of European Union (EU) accession talks conditioned on the arrest of fugitives also increased arrests in Croatia as well as Bosnia and Herzegovina.⁸⁸ EU accession talks with the FRY were also conditioned on cooperation with the ICTY.⁸⁹

Multinational forces have also played a role in executing arrest warrants, but they have not been quick to mobilize in all cases. Pointing to ambiguity in their mandate, NATO forces did not actively enforce arrest warrants in Bosnia, where its forces were stationed, until political and judicial pressure increased enough for them to target suspects on a case-by-case basis.⁹⁰ Multinational forces are also credited with arresting Charles Taylor for the Special Court for Sierra Leone, though Taylor's arrest took three years to realize.⁹¹ After breaking the conditions for his asylum in Nigeria, it took a combination of freezing Taylor's assets, tracking by Interpol, and diplomatic pressure before Taylor was apprehended by U.N. security forces.⁹²

Thus far, the increase in arrest activity for the various tribunals has involved a combination of intelligence cooperation, external pressure and incentives from the Security Council, United States and EU, changed domestic political circumstances, and tribunal engagement. The lessons from this are that arrests might take time to effectuate even when a state is cooperative. The failure to capture suspects may also be an issue of a state's lack of law enforcement capacity, as opposed to its unwillingness to cooperate.

RECOMMENDATIONS

1. Host a side meeting during the Review Conference to discuss arrest warrants issues.

Such a meeting could place arrest warrants on the agenda at the Review Conference and initiate a working group devoted to any necessary institutional reform and political support. In connection with a meeting, the U.S. delegation could prepare a paper that shares U.S. expertise in targeting individual suspects and mobilizing uncooperative States. At the same time, the United States should offer to hold bilateral meetings with interested governments to discuss how it could help develop technical expertise.

2. Ensure that waivers for assisting the ICC are in place, or begin the process of amending ASPA to remove this prohibition entirely.

While the 2008 amendments to ASPA remove restrictions on foreign military financing to States that have not entered Article 98 agreements with the United States, U.S.

law still requires a case-by-case waiver of prohibitions on the use of appropriated funds to assist the ICC on arrests.⁹³ Therefore, at a minimum, the United States should ensure that these waivers are in place in all cases where it is in the national interest of the United States for the ICC's prosecution to proceed with an accused in custody.

3. Consider offering incentives to states in exchange for cooperation with the ICC on arrests.

This recommendation is based on the experience of the ICTY and the effectiveness of inducements as an enforcement mechanism that mobilized States to apprehend high-level officials. Incentives could include on-site training for law enforcement officials, cash awards for information leading to arrest and transfer to The Hague and economic aid to build the capacity of the judiciary.

4. Offer political support through the Security Council using Chapter VII resolutions to make arrests an international obligation.

With this approach, the United States can increase political pressure on States to become cooperative or to actively increase arrests by entering agreements with Interpol and third party States to collaboratively secure fugitives.

VI. DEFERENCE TO NATIONAL COURTS (COMPLEMENTARITY)

When a war crime, crime against humanity or act of genocide allegedly occurs, any number of States may have jurisdiction to investigate and try alleged perpetrators. The Rome Statute deals with multiple jurisdictions in its system of complementarity, the essence of which is that the Court should defer to *national* jurisdictions unless the State is *unwilling or unable genuinely* to carry out such investigations and prosecutions. Since Rome, the United States has had a complicated relationship with complementarity. On the one hand, it has strongly advocated that national jurisdictions must be the primary location for investigation and prosecution, recognizing that national courts are sometimes not available. While it was a principal force behind the complementarity negotiations in Rome, U.S. officials have long expressed opposition to a key element of the complementarity regime, fearing that it enables the prosecutor too much discretion – with too few political or judicial checks – to assess domestic U.S. accountability mechanisms.

Complementarity will be a focus of stocktaking during the Review Conference. The United States should come prepared to discuss what it believes to be the advantages and disadvantages of the system *as it has developed* during the short life of the Court. Stocktaking also presents the United States an opportunity to reexamine and, if possible, advocate on behalf of its own system of accountability. Such a review would not derive from any obligation under the Rome Statute. Rather, it would serve to ensure protection of U.S. personnel from ICC investigation while also, tacitly, recognizing the importance of the Rome Statute in the international system of accountability.⁹⁴

Legal Framework of the Principle of Complementarity

The Rome Statute seeks to balance the ICC's mandate to investigate a potential crime under the Rome Statute and States' recognized authority to pursue accountability for crimes within their domestic jurisdiction. The balance weighs heavily in favor of the State. In evaluating a state's willingness or ability to prosecute a crime enumerated in the Rome Statute, the Court:

“[S]hall consider . . . whether one or more of the following exist:

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;

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;

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 to justice.”⁹⁵

Absent genuine inability to prosecute, parties to the Rome Statute are expected to investigate and exhaust national judicial processes in prosecuting statutory violations within their jurisdiction. Where they meet this obligation, the ICC ultimately defers to national processes.

Even if the Court might exercise jurisdiction – that is, the alleged act is a crime under the Rome Statute and the territorial or national jurisdictional conditions are satisfied – a case may nonetheless *not* be admissible for complementarity reasons. The State of an investigated suspect must show a good faith willingness and ability to investigate crimes within its jurisdiction. A Pre-Trial Chamber ruling that a State fails the admissibility test can be challenged by the State and reconsidered by the Appeals Chamber as to whether the ICC should maintain jurisdiction over a situation.

The United States and Complementarity

The U.S. criminal code and Uniform Code of Military Justice (UCMJ) lack some of the crimes delineated in the Rome Statute, creating some measure of vulnerability to ICC investigation. But that vulnerability is slight and unlikely to result in ICC prosecution of U.S. nationals absent extremely clear jurisdiction and an egregious failure to pursue accountability in the face of a highly grave crime under the Statute.

Say, for example, a unit in Afghanistan captured and allegedly tortured several members of the Taliban. Since Afghanistan is a State Party to the Rome Statute, one could make the argument that jurisdiction over the act exists because (1) the act took place on the territory of a State Party and (2) the alleged acts of torture constitute war crimes under Article 8 of the Rome Statute. The Prosecutor would still need to make a case under the complementarity regime that the United States was genuinely unable or unwilling to investigate and, if necessary, prosecute. Torture is prohibited under U.S. law, so military personnel may be subject to prosecution in military or civilian courts. Depending on the evidence available, if the United States investigated the situation and found no reason to prosecute, one could imagine an ICC prosecutor opening an investigation, particularly if the United States did not conduct the investigation transparently or share its findings with the

Prosecutor. If a U.S. soldier were to be prosecuted in a federal Article III court or military forum as a common crime rather than a Rome Statute crime, the Prosecutor would be unlikely to open its own investigation merely because the crime charged was not grave enough.⁹⁶

That said, aligning the U.S. legal code with ICC crimes would create a two-fold benefit: 1) it would further protect against the potential of ICC engagement in crimes that fall under U.S. jurisdiction; and 2) it would demonstrate U.S. genuine interest in the ICC, even though it is not a party. Some States have incorporated the Rome Statute's crimes into their domestic legal codes wholesale, while others have incorporated key elements into their own systems in efforts to establish subject matter jurisdiction and prosecute Rome Statute criminals within their own courts. With respect to ICC crimes, the United States' criminal code has not been significantly updated since the Rome Statute came into force. There are gaps in provisions on crimes against humanity and many of the war crimes proscribed by Articles 7 and 8 of the Rome Statute.⁹⁷ "Crimes against humanity" is a good example of this gap. Although Title 18 of the U.S. criminal code includes some of the crimes listed under Article 7 of the Rome Statute, specific crimes under the Rome Statute diverge in some instances from analogous crimes enshrined in the federal code.⁹⁸

We should restate that the U.S. vulnerability to ICC investigation is low. The United States military and civilian justice systems are outstanding examples of accountability mechanisms that work. However, policymakers and legislators should recognize the gaps in order to ensure, to the greatest extent possible, that U.S. investigators and prosecutors have the tools to conduct relevant proceedings rather than deferring to the ICC. Although amending the U.S. criminal code to accurately account for the Rome Statute crimes would involve lengthy and complicated legislative processes, the Administration and Congress should push forward with the process set in motion by Senator Richard Durbin.⁹⁹ Even some movement would reflect well on U.S. credibility at Kampala, signaling to States Parties an affirmative effort to engage with the ICC and participate in the Review Conference in meaningful ways.

ASPA and U.S. Resistance to ICC Scrutiny

ASPA institutionalized a certain amount of hostility towards the ICC. In particular, ASPA prohibits the U.S. from engaging with the ICC on extradition matters, or providing support for "the purpose of assisting the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the International Criminal Court."¹⁰⁰ Most notably, the Act prohibits the President from deploying U.S.

troops in U.N. peacekeeping efforts, unless they are immune from ICC investigation and prosecution.¹⁰¹

In addition to its far-reaching protections for any and all U.S. citizens, the Article 98 agreements are widely seen by Rome Statute Parties as conferring immunity in favor of U.S. Government officials and personnel.¹⁰² Nothing in the agreements' texts compels the U.S. government to investigate and prosecute U.S. citizens sought by the ICC for Rome Statute violations upon extradition from a receiving State.¹⁰³ Thus, continued recognition of the Article 98 agreements' authority and broad application to all U.S. citizens sustain the U.S. reputation for hostility towards the Rome Statute.

Although a repeal of ASPA and the Article 98 Agreements is unrealistic in the short term, the introduction of an amendment that would ensure investigation and prosecution of alleged criminals in exchange for extradition would reflect U.S. amenability to ending impunity for international criminals and improve political standing among the States parties. It would signal to the Prosecutor willingness to honor the Rome Statute's goals and decrease the likelihood of ICC intervention in U.S. investigation and prosecutorial endeavors.

Positive Complementarity: Potential Role for U.S. Engagement

The most promising area of U.S. engagement lies in what is known as positive complementarity. Positive complementarity is defined "broadly to describe all actions and activities aimed at supporting national jurisdictions in meeting their obligations under the Rome Statute, including related activities aimed at strengthening the rule of law."¹⁰⁴ Many States encounter obstacles to effective investigation and prosecution, including technical or capacity issues stemming from ineffective or absent legislation; lack of resources in the judicial system; absence of effective security and protection for witnesses, prosecutors, and judges; lack of expertise in investigating and prosecuting crimes against humanity; and a general lack of appropriate political and judicial infrastructure to support investigations and prosecutions.¹⁰⁵ Some States experiencing such problems possess a willingness to prosecute; their failure to act stems largely from lack of ability. Still others have the ability but lack the willingness. Because the ICC does not have the capacity to prosecute everyone responsible for committing atrocities in every situation, States' inability to prosecute criminals within their own jurisdictions preserves the impunity gap even in those situations where a lower level criminal would not be investigated by the ICC.

Before the commencement of the ASP Meeting in November 2009, Denmark and South Africa submitted a widely-discussed paper on the concept of positive

complementarity. The paper discusses the inability of many States parties to prosecute suspects within their own jurisdictions due to lack of resources, well-developed and established court systems, protections for witnesses, judges and prosecutors, and ability to detain suspects. The paper proposes ICC assistance with capacity-building in low income States and material support for the development of effective judiciaries to prosecute people who commit atrocities within the States that have jurisdiction over their crimes. South Africa and Denmark propose that such actions could include:

- 1) assistance to States Parties in identifying areas within domestic judicial systems that require development,
- 2) provision of expertise and training programs at the national level,
- 3) increased outreach to affected communities, sharing of evidence and other information in accordance with article 93, paragraph 10, of the Statute,
- 4) creation of situation-specific 'exit strategies.'¹⁰⁶

In order to implement these strategies, widespread State-by-State cooperation, particularly among developed States, is needed. Capacity building and the creation of universal ability to prosecute crimes within domestic jurisdictions require tremendous resources and material support from wealthier States Parties. An overwhelming majority of Party delegates at the ASP in November expressed support for the concept of positive complementarity; however, many expressed concern that the Court lacks the necessary resources and mandate to carry out developmental efforts.

The United States' ample legal resources, established judiciary, philanthropic bar, and wealth of NGOs could help to realize the proposal for capacity building. Its military justice system, various legal organizations, and government agencies – such as the Department of Justice, Department of Defense, and State Department – could form working groups to develop technical law enforcement training and court management (modeled, perhaps, on international military training conducted by the Pentagon). The State Department could issue a call for proposals from those interested in developing training programs in international humanitarian law and trial practice. NGOs and government agencies like USAID could develop funding proposals with the International Bar Association and the ABA Rule of Law Initiative for projects involving reform in local judiciaries. Such efforts would complement the already robust efforts of U.S. agencies to support rule of law development.

Programs involving capacity building should receive bipartisan support. Facilitating the development of local tribunals would relieve wealthier States of the burden of prosecuting international criminals for poorer States. Ultimately, active participation in realizing the goals of positive complementarity would further improve the U.S. reputation as an advocate of international justice among States Parties and reflect serious efforts to actively participate in a successful Review Conference.

RECOMMENDATIONS

1. Revisit Article 98 Agreements.

Include a provision that would ensure investigation and, when warranted, prosecution within U.S. courts under the condition that receiving States extradite U.S. citizens. If the multiple agreements with States render this recommendation unfeasible, we recommend the Obama Administration issue a policy statement announcing its intention to interpret all Article 98 Agreements in this manner.

2. Review U.S. law to ensure compatibility with the Rome Statute.

Begin process in congressional Judiciary and Foreign Affairs Committees to update the criminal code so that it accurately reflects the crimes proscribed by the Rome Statute. Hold a congressional hearing to discuss gaps in the U.S. criminal code and long term interests in updating the federal criminal code through statutory amendment.

3. Begin process of technical assistance.

A USAID program for technical training programs could include skill development in humanitarian law investigations, trial practice, law enforcement, and court management. They could solicit assistance from NGOs and government agencies to fund private sector lawyers, members of the International Bar Association and ABA Rule of Law Initiative to assist in legal reform efforts for situation countries. They could also develop a working group composed of the Department of Justice, Department of Defense, the State Department, and interested NGOs to create a strategy for improving States' capacity to investigate and prosecute international criminals locally.

Notes

¹ Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, Regarding Stocktaking at the Eighth Resumed Session of the Assembly of States Parties of the International Criminal Court (March 23, 2010) available at <http://usun.state.gov/briefing/statements/2010/138999.htm>.

² See, e.g., INDEP. TASK FORCE, AM. SOC'Y OF INT'L LAW, U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT, March 2009, available at <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>.

³ President William J. Clinton, Remarks at the University of Connecticut (October 15, 1995), available in U.S. Information Agency, ISSUES OF DEMOCRACY: CONFRONTING HUMAN RIGHTS VIOLATIONS 10, 12-13 (April 1996, Vol. 1 No. 3).

⁴ Press Release, Int'l Crim. Ct., Eighth Session of the Assembly of States Parties to the Rome Statute Begins its General Debate (Nov. 19, 2009) available at <http://www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2009/Eighth+session+of+the+Assembly+of+States+Parties+to+the+Rome+Statute+begins+its+general+debate.htm>.

⁵ Rome Statute of the Int'l Crim. Ct. art. 10, adopted July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

⁶ COAL. FOR THE INT'L CRIM. CT., *Review Conference of the Rome Statute*, <http://www.iccnw.org/?mod=review> (last visited March 12, 2010).

⁷ Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, Address to Assembly of States Parties, (Nov. 19, 2009), available at http://www.state.gov/s/wci/us_releases/remarks/133316.htm. State Department Legal Adviser Harold Koh went further during the ASP Resumed Session in March, explaining the U.S. position in greater detail. See Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Regarding Crime of Aggression at the Eighth Resumed Session of the Assembly of States Parties of the International Criminal Court (March 23, 2010), available at <http://usun.state.gov/briefing/statements/2010/139000.htm>.

⁸ Draft Article 8 bis, paragraph 2 of the proposed amendment. This list of acts is derived from G.A. Res. 3314, U.N. GAOR 29th Sess., Supp. No. 31, U.N. Do. A/9631 (Dec. 14, 1974).

⁹ Draft Article 8 bis, paragraph 1 of the proposed amendment. A proposed amendment of Article 25 repeats the leadership requirement, stating that, "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."

¹⁰ Draft Article 8 bis, paragraph 2 of the proposed amendment.

¹¹ Resumed Sess. of the Sixth Assembly of States Parties to the Rome Statute of the Int'l Crim. Ct., N.Y., N.Y., June 2-6, 2008, *Report of the Special Working Group on the Crime of Aggression*, ¶ 35, ICC-ASP/6/20/Add.1/Annex II (June 6, 2008) available at <http://www.iccnw.org/documents/ICC-ASP-6-20-Add1-AnnexII-ENG.pdf>.

¹² Article 13 deals with the ICC's general exercise of jurisdiction, based on the referral by a State Party, a referral by the Security Council, or an investigation initiated *proprio motu* (on his own motion) by the Prosecutor. Article 16 deals with the power of the Security Council to defer an ICC investigation or prosecution for one year.

¹³ The Security Council currently has the power to stop any investigation temporarily, for a period of one year, under Article 16 of the Rome Statute.

¹⁴ Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 124. Article 124 says, in relevant part, "a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [regarding war crimes]."

¹⁵ Assembly of States Parties Res., 8th plen. mtg., Annex III, ICC-ASP/8/Res.6/Annex III (Nov. 26, 2009), available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf.

¹⁶ Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 8(2)(b)(xviii) – (xx).

¹⁷ Press Release, Int'l Crim. Ct., Assembly of States Parties Concludes its Eighth Session (Nov. 27, 2009), available at <http://www.icc-cpi.int/menu/asp/press%20releases/press%20releases%202009/assembly%20of%20states%20parties%20concludes%20its%20eighth%20session?lan=en-GB>.

¹⁸ Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 121,124.

¹⁹ *See infra*, Chapter II.

²⁰ That is, changes to Art. 5-8. See the amendment provisions in Articles 121, (4)-(6) of the Rome Statute. *See also* David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1007-08 (Spring 2008)(stating that pursuant to Article 121(5) of the Rome Statute, any State Party could refuse to be subject to ICC jurisdiction over any such crime that is added by amendment to the Rome Statute).

²¹ Rapp, *supra* note 7.

²² Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 8.

²³ See David Kaye and Steven A. Solomon, *The Second Review Conference of the 1980 Convention on Certain Conventional Weapons*, 96 AM. J. OF INT'L LAW 922, 928 (2002).

²⁴ COAL. FOR THE INT'L CRIM. CT., *supra* note 6.

²⁵ Assembly of States Parties Res., 8th plen. mtg., ICC-ASP/8/Res.6 (Nov. 26, 2009), available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf.

²⁶ COAL. FOR THE INT'L CRIM. CT., *supra* note 6.

²⁷ *Id.*

²⁸ See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution E, Annex I, U.N. Doc. A/CONF.183/10/Annex I (July 17, 1998), available at <http://www.un.org/icc/iccnfact.htm>. The language of the Resolution does not specify that the ASP must take up the issue at the *first* Review Conference.

²⁹ The American Non-Governmental Orgs. Coal. for the Int'l Crim. Ct., Report of the Eighth Session of the Assembly of States Parties, The Hague, November 2009 at 3, www.amicc.org/docs/ASP8.pdf.

³⁰ C.N.851.2009.TREATIES-10 of 30 November 2009 (Proposal of amendment by South Africa).

³¹ COAL. FOR THE INT'L CRIM. CT., *ASP Working Group on Amendments*, <http://www.coalitionfortheicc.org/?mod=asp-wgoa> (last visited March 14, 2010).

³² See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution E, Annex I, *supra* note 28.

³³ COAL. FOR THE INT'L CRIM. CT., *supra* note 6.

³⁴ *Id.*

³⁵ See, e.g., Comments (United States) Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary General, UN Doc. No. A/AC.244/1/Add.2 at 11, 15 (Mar. 31, 1995).

³⁶ See COAL. FOR THE INT'L CRIM. CT., *supra* note 6; see also U.S. Comments at 14.

³⁷ COAL. FOR THE INT'L CRIM. CT., *supra* note 31.

³⁸ Assembly of States Parties Resolution ICC-ASP/8/Res.6, 8th plen. mtg. at 8 (Nov. 26, 2009), available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf.

³⁹ See COAL. FOR THE INT'L CRIM. CT., *supra* note 6.

⁴⁰ See M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* 89 (2005).

⁴¹ See Amnesty International, *International Criminal Court: Concerns at the Eighth Session of the Assembly of States Parties*, p.5-6, Index: IOR 40/011/2009 (2009).

⁴² Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 87.

⁴³ *Id.* at art. 88.

⁴⁴ Arrests are discussed *infra* at Section V.

⁴⁵ American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 899 (22 U.S.C. § 7426 (2002) *repealed by* Pub. L. No. 110-181, 122 Stat. 371 (Jan. 28, 2008)).

⁴⁶ *Id.* at § 7401.

⁴⁷ *Id.* at § 7425.

⁴⁸ *Id.* at § 7423.

⁴⁹ *Id.* at § 7424.

⁵⁰ *Id.* at § 7427.

⁵¹ *Id.* at § 7422(c).

⁵² *Id.*

⁵³ See Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 112(4).

⁵⁴ See Eighth Sess. of the Assembly of States to the Rome Statute of the Int'l Crim. Ct., The Hague, Neth., Nov. 18-26, 2009, *Report of the Comm. on Budget and Finance on the Work of Its Thirteenth Session*, ¶121, ICC-ASP/8/15 (Nov. 16, 2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-15-ENG.pdf.

⁵⁵ See Steven D. Roper and Lilian A. Barria, *State Cooperation and International Criminal Court Bargaining Influence in the Arrest and Surrender of Suspects*, 21 J. OF INTL' L. 457, 458 (2008).

⁵⁶ Interviews with delegates at the 8th Annual Meeting of the Assembly of States Parties, in The Hague, The Netherlands (November 18-24, 2009).

⁵⁷ See, e.g., Luis Moreno-Ocampo, Chief Prosecutor of the Int'l Crim. Ct., Address to the Assembly of States Parties at the 8th Annual Meeting of the Assembly of States Parties, The Hague, The Netherlands (November 18, 2009).

⁵⁸ Bahr Idriss Abu Garda appeared voluntarily but is not in custody for crimes allegedly committed in Darfur, Sudan. See the ICC's "Situations and Cases" for all suspects and situations, available at <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/>.

⁵⁹ See the American Non-Governmental Orgs. Coal. for the Int'l Crim. Ct., *ICC Activities*, http://www.amicc.org/icc_activities.html#pstatements (last visited April 2, 2010); see also BBC NEWS, *Former DR Congo leader arrested*, May 24, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7418932.stm>.

⁶⁰ See A. Kriksciun, *Uganda's Response to International Criminal Court Arrest Warrants: A Misguided Approach?*, 16 TULANE J. OF INT'L & COMPARATIVE LAW, 213.

⁶¹ See L. Sherif and S. Williams, 14 *The Arrest for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court*, J. OF CONFLICT AND SECURITY L., 71 (2009), see also BUANEWS, *South Africa seeks legal advice on indicting al-Bashir*, July 23, 2009, available at <http://www.polity.org.za/article/sa-seeks-legal-advice-on-indicting-al-bashir-2009-07-23>.

⁶² Rome Statute of the Int'l Crim. Ct., *supra* note 5, art 27.

⁶³ The International Court of Justice case, *Congo v. Belgium*, ruled that an incumbent Minister of Foreign Affairs from the Democratic Republic of Congo had inviolable immunity from criminal jurisdiction. See Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), 2002 I.C.J. 121 (February 14).

⁶⁴ Rome Statute of the Int'l Crim. Ct., *supra* note 5, art 27.

⁶⁵ See L. Sherif and S. Williams, *supra* note 60; see also BUANEWS, *supra* note 60.

⁶⁶ INT'L CRIM. CT., OFFICE OF THE PROSECUTOR, *Frequently Asked Questions*, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/Frequently+asked+Questions/> (last visited April 2, 2010).

⁶⁷ Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 91(2)(c).

⁶⁸ Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 98.

⁶⁹ Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 87 (b)(7).

⁷⁰ Interviews with delegates at the 8th Annual Meeting of the Assembly of States Parties, *supra* note 56.

⁷¹ *Id.*

⁷² See Han-Ru Zhou, *The Enforcement of Arrest Warrants by International Forces: from the ICTY to the ICC*, 4 J. OF INTNL' CRIM. JUST. 202, 202-210 (2006).

⁷³ See Julie Kim, Specialist in International Relations, Foreign Affairs, Defense and Trade Division, *Balkan Cooperation on War Crimes Issues*, Congressional Research Service Report (July 25, 2008).

⁷⁴ See WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 5 (2006).

⁷⁵ See RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY* 115 (2004).

⁷⁶ See Roper and Barria, *supra* note 55, at 460.

⁷⁷ See Annie Wartanian, *The ICC Prosecutor's Battlefield: Combating Atrocities While Fighting for States' Cooperation*, 36 GEO. J. INT'L L. 1289, 1308 (2004).

⁷⁸ See INT'T CRIM. TRIB FOR THE FORMER YUGOSLAVIA, *About the ICTY: Office of the Prosecutor, Investigations*, available at <http://www.icty.org/sid/97>; see also ICTR Weekly Summary, *ICTR/Interpol – Interpol will help arrest ICTR fugitives*, HIRONDELENEWS.COM, July 16, 2007 available at <http://www.hirondellenews.com/content/view/4704/311/>.

⁷⁹ Press Release, Security Council, Security Council Meets to Discuss International Tribunals for Former Yugoslavia and Rwanda, U.N. Doc. SC/6956 (November 22, 2000).

⁸⁰ ICTR/Weekly Summary, *ICTR Arrests Second Wanted Genocide Suspect in Less Than Two Months*, HIRONDELENEWS.COM, Oct. 9, 2009 available at <http://www.hirondellenews.com/content/view/12827/1157/>.

⁸¹ Interviews with delegates at the 8th Annual Meeting of the Assembly of States Parties, *supra* note 56.

⁸² See Wartanian *supra* note 77.

⁸³ See Michael Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DE PAUL L. R. 925, 944-946 (2000).

⁸⁴ See Elizabeth Robbins, *Towards Enforcement in the International Criminal Court*, 3(1) EYES ON THE ICC 97 (2006).

⁸⁵ See Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 J. INT'L CRIM. JUST. 558, 566 (2004).

⁸⁶ See Konstantinos D. Magliveras, *The Interplay Between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law*, 13 EUR. J. INT'L L. 661, 663 (2002).

⁸⁷ See Roper and Barria, *supra* note 55, at 461.

⁸⁸ *Id.*

⁸⁹ See Magliveras, *supra* note 86, at 662.

⁹⁰ See Zhou, *supra* note 72, at 217.

⁹¹ Press Release, Spec. Ct. for Sierra Leone, Office of the Prosecutor, Chief Prosecutor Announces the Arrival of Charles Taylor at the Special Court, (Mar. 29, 2006), available at <http://www.sc-sl.org/PRESSROOM/OTPPressReleases/tabid/196/Default.aspx>.

⁹² See Paul Vallely, *Charles Taylor: Africa's monster*, INDEPENDENT.CO.UK, April 1, 2006, available at <http://www.independent.co.uk/news/people/profiles/charles-taylor-africas-monster-472272.html>.

⁹³ American Servicemembers' Protection Act, *supra* note 45, § 2003.

⁹⁴ Although the United States is not a Party to the Rome Statute, the ICC may still investigate and prosecute U.S. citizens in certain situations. The Rome Statute grants the ICC jurisdiction to investigate individuals of any nationality who commits a crime on a State Party's territory.

⁹⁵ Rome Statute of the Int'l Crim. Ct., *supra* note 5, art. 17, para. 2.

⁹⁶ *But see* David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. U. J. INT'L HUM. RTS. 30, 39 (2009); *see also* Thomas Wade Pittman and Matthew Heaphy, *Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court*. LEIDEN J. INT'L LAW, 21 (2008) for a general discussion of whether prosecution for 'war crimes' as it is defined in the UCMJ would satisfy the gravity requirement of the same crime the war crime of willful killing under Article 8(2)(a)(i) of the Rome Statute.

⁹⁷ *See, e.g.*, Scheffer & Cox, *supra* note 20, at 1003.

⁹⁸ *See* Michael P. Hatchell, *Closing the Gaps In United States Law and Implementing the Rome Statute: A Comparative Approach*, 12 ILSA J INT'L & COMP L 183, 223 (2005).

⁹⁹ *See* S. 1346: Crimes Against Humanity Act of 2009, available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-1346>.

¹⁰⁰ American Servicemembers' Protection Act, *supra* note 45, § 2004(f).

¹⁰¹ *Id.* at § 2006.

¹⁰² *See* Scheffer & Cox, *supra* note 20, at 1002.

¹⁰³ *Id.*

¹⁰⁴ Discussion paper submitted by Denmark and South Africa. On file with Clinic.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Annex

The Crime of Aggression

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Reference: C.N.727.2009.TREATIES-7 (Depositary Notification)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT
ROME, 17 JULY 1998

LIECHTENSTEIN: PROPOSAL OF AMENDMENT

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

On 30 September 2009, the Secretary-General received a note verbale from the Government of Liechtenstein transmitting, in accordance with article 121, paragraph 1, of the Rome Statute of the International Criminal Court, the text of a proposed amendment thereto.

The Secretary-General wishes to refer to article 121, paragraph 1, of the Rome Statute of the International Criminal Court, which provides that:

“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.”

..... A copy of the text of the proposal, together with the accompanying note verbale, in the Arabic, Chinese, French, English, Russian and Spanish languages, is attached as an annex.

29 October 2009



Attention: Treaty Services of Ministries of Foreign Affairs and of international organizations concerned. Depositary notifications are currently issued in both hard copy and electronic format. Depositary notifications are made available to the Permanent Missions to the United Nations at the following e-mail address: missions@un.int. Such notifications are also available in the United Nations Treaty Collection on the Internet at <http://treaties.un.org>, where interested individuals can subscribe to directly receive depositary notifications by e-mail through a new automated subscription service. Depositary notifications are available for pick-up by the Permanent Missions in Room NL-300.

[Original: English]

The Permanent Representative of the Principality of Liechtenstein to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honor, in his capacity as former Chairman of the Special Working Group on the Crime of Aggression, to refer to Article 121, paragraph 1 of the Rome Statute of the International Criminal Court. In accordance with that provision, the proposed amendment on aggression elaborated by the Special Working Group is herewith submitted for circulation to all States.

The Permanent Representative of the Principality of Liechtenstein to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of his highest consideration.

New York, 30 September 2009

Proposals for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression

Draft resolution

(to be adopted by the Review Conference)

The Review Conference,

(insert preambular paragraphs)

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) contained in the annex to the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5] of the Statute;

(add further operative paragraphs as needed)

Appendix

Draft amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

1. *Article 5, paragraph 2, of the Statute is deleted.*

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

Article 8 bis

Crime of aggression

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

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

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (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.

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

Article 15 bis
Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

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

Option 4 – add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.

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

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

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

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

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

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

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

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: