

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**

www.ila-americanbranch.org

(FOUNDED 1873)

*Officers and Members
of the Executive Committee
of the ABILA*

**Chair, Executive
Committee**

Charles D. Siegal

President

John E. Noyes

Vice-Presidents

Valerie Epps
Gary N. Horlick
Leila N. Sadat
David Stewart
Ruth G. Wedgwood

Honorary

Vice-Presidents

Charles N. Brower
Theodore R. Giuttari
Edward Gordon
Louis Henkin
P. Nicholas Kourides
Luke T.C. Lee
Cynthia C. Lichtenstein
John F. Murphy
James A.R. Nafziger
Ved P. Nanda
Cecil J. Olmstead
Alfred P. Rubin
Robert B. von Mehren

Honorary Secretary

Houston Putnam Lowry

Honorary Treasurer

James Lynch

Executive Committee

William Aceves
Catherine M. Amirfar
Kelly D. Askin
Jeffery C. Atik
David J. Bederman
Ronald A. Brand
Lorraine M. Brennan
Christina M. Cerna
Paul Dubinsky
Malvina Halberstam
Scott Horton
Karen A. Hudes
Philip M. Moremen
Anibal Sabater
Michael P. Scharf
Louise E. Teitz
Nancy Thevenin
Susan Tiefenbrun
George K. Walker
Peter Yu

Co-Director of Studies

Valerie Epps
Philip M. Moremen

Webmaster

Mark Cuevas

Program Director

Rachel Smith

Jennifer Trahan
Chair, American Branch, International Law Association, ICC Committee
Assistant Professor of Global Affairs, NYU
15 Barclay Street
New York, NY 10007
jennifer.trahan@att.net

March 19, 2010

War Crimes Ambassador Stephen J. Rapp
Legal Adviser Harold Koh
U.S. Department of State
2201 C Street NW
Washington, DC 20520

*Re: Recommendations to the Administration regarding its approach
to aggression negotiations*

Dear War Crimes Ambassador Rapp and Legal Adviser Koh:

As the U.S. prepares to attend negotiations at the upcoming Assembly of States Parties of the International Criminal Court ("ICC") in March 2010, and the Review Conference set to commence on May 31, 2010, in Kampala, Uganda, it is faced with the task of developing a position regarding the proposed draft definition of the crime of aggression and preconditions to the exercise of jurisdiction (document ICC-ASP/7/20 Add.1, Annex), as well as the current draft elements of the crime (document ICC-ASP/8/INF.2, Appendix I, p. 14). The International Criminal Court Committee of the American Branch of the International Law Association ("ABILA") is writing to make recommendations as to the U.S.'s approach, and to differentiate, in particular, some of the fairly well-decided issues regarding the definition and elements of the crime, from the open issues regarding the conditions for the exercise of jurisdiction and amendment procedures.

Recommendation as to a Basic Approach

Negotiations on the crime of aggression have taken place for the past ten years, most recently, through the Special Working Group on the Crime of Aggression. These negotiations were open to all UN Member States on an equal footing. Yet, the U.S. did not take the opportunity to attend these negotiations and participate in shaping the draft provisions, unlike China, Russia and other non-states parties. While this non-attendance policy is

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

understandable given the prior administration's approach to the ICC, it does put the current administration at a certain disadvantage as it joins into this process.

In shaping its participation in these negotiations, it is important that the U.S. delegation differentiate between (i) issues that over the past 10 years have been well-debated and upon which a majority of delegates has already reached consensus; and (ii) issues that are still very much open to debate. Making this distinction is important, so that the U.S. delegation does not squander any goodwill it has achieved by virtue of attending the negotiations, or create the perception of acting counterproductively, which could harm any substantive positions the U.S. may choose to take during the negotiations.

Not Seeking To Re-Open Issues Upon Which Majority Consensus Has Been Reached

The process of crafting a draft definition of the crime of aggression has been a lengthy one. Presently, there is general consensus by a majority of states supporting (a) the current draft definition of the crime (which would appear in a new Article *8bis* of the Rome Statute if adopted), and (b) the current draft elements of the crime.

For example, some of the key areas upon which there is current agreement by a majority of state participants include that, as to the *crime* of aggression (that is, the crime *by an individual*, of aggression):

- only “manifest” violations of the U.N. Charter would be covered, such that any “grey area” situations would be excluded from prosecution (which would suffice to exclude humanitarian intervention from inadvertently being covered);
- common foot-soldiers would never be prosecuted, because aggression would solely be a “leadership crime”;
- “attempt” or “planning” absent actual state aggression would not be criminalized.

These points are reflected in the current draft definition and elements of the crime, and are explained more fully in Appendixes A-C to this letter.

The result is that the definition is generally conservative, and would lead to prosecutions only in the clearest of cases. Additional guarantees that only well-founded cases would proceed are provided by the other procedural obligations required of all ICC cases as per the Rome Statute (detailed in Appendix D). Far from being novel, the text of the draft definition is taken primarily from existing legal authority, including: the U.N. Charter (1945), the London Charter of the International Military Tribunal at Nuremberg (1945), and General Assembly resolution 3314 (1974). The prohibition on aggression by a state of course already exists under both the U.N. Charter and customary international law, and arguably also rises to the level of a *jus cogens* norm. Agreement on the amendment would in no way change state responsibility with regard to the use of force. Furthermore, the U.S. in fact charted the path for codifying the crime of aggression through its prosecutions of “crimes against the peace” before the International Military Tribunals at Nuremberg and the International Military Tribunal for the Far East (Tokyo).

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

Other points upon which there has been extensive debate, and which are fairly well-settled pertain to the *act* of aggression (that is, the act *by the state* of aggression). They include:

- The use of resolution 3314. There was extensive debate over whether there should be an “open-ended list” of crimes illustrative of aggression, or whether, due to the requirements of the principle of legality or *nullum crimen sine lege*, the list should be “closed.” The result in the current draft is a combination thereof, whereby there is a list of acts illustrative of state aggression taken from G.A. resolution 3314, but any acts would also have to satisfy certain “chapeau” requirements, which in effect creates a semi-closed list. There has also been extensive debate, and resolution reached, about how to incorporate the use of resolution 3314 into the definition, and which parts to incorporate.

(These issues are detailed further in Appendix E.)

Constructively Weighing In On Issues Where Consensus Has NOT Been Reached

By contrast, there are at least two key areas which are unresolved regarding the conditions for the exercise of jurisdiction over the crime of aggression (draft Article 15*bis* of the proposed provision): (i) whether the alleged aggressor state would have to have accepted the Court’s jurisdiction over the crime of aggression; and (ii) whether the Security Council, unlike for other ICC crimes, should serve as a “jurisdictional filter” whose consent would be required for all aggression cases to proceed. A subsidiary issue is whether to utilize Article 121(4) or 121(5) of the Rome Statute for the amendment to come into effect.

These topics are critically important, and the U.S. should engage in these discussions. The first issue of whether aggressor state consent would be required for a case to proceed is of obvious interest to the U.S. The issue arises because aggression would not only “occur” within the territory of one state. Yet, where a case occurs has important jurisdictional consequences under the Rome Statute. If a state has ratified the Rome Statute, the ICC has jurisdiction over crimes committed on the territory of that state or by its nationals. Aggression necessarily involves both an alleged “aggressor” state and an alleged “victim” state. This presents the quandary of whether the alleged aggressor state’s consent would be required for the ICC to exercise jurisdiction, or the alleged victim state’s consent would suffice, in the absence of a Security Council referral.

The second question as to whether the Security Council should serve as a “jurisdictional filter” for aggression cases is also of obvious interest to the U.S. as a permanent member of the Security Council. Specifically, this issue involves (a) whether the Security Council would be the sole “jurisdictional filter” for aggression cases, which could not proceed absent Security Council consent (in which case where the crime “occurs” becomes less significant); (b) whether some other body, such as the General Assembly or International Court of Justice, should be involved in making that determination if there has been inaction by the Security Council for a certain period of time, or (c) whether the ICC could commence a case *proprio motu* or after state referral without any “jurisdictional filter”—

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

that is, once jurisdiction otherwise exists (in which case where the crime “occurs” is important).

Despite extensive debate over many years, particularly on the second topic, negotiations have not produced significant consensus. If anything, for a variety of reasons, there seems to have been movement away from involving either the International Court of Justice or General Assembly, leaving the seemingly more stark choice of either the Security Council as a necessary “jurisdictional filter” (supported by the other four permanent members of the Security Council and some of their allies), or the ICC initiating cases without such a “filter” (supported by the vast majority of other states). There has been less debate on the first topic, which has been focused on only more recently.

Thus, because these issues are unresolved, constructive U.S. intervention would be welcome (and has in fact been requested by the Chairperson of the negotiations, Prince Zeid Ra’ad Zeid Al-Hussein of Jordan) regarding:

- whether consent of the aggressor state would be required for an aggression case to proceed; and
- whether the Security Council should serve as a “jurisdictional filter” for all aggression cases.

Particular attention should be paid to how these issues interact, and whether concerns that the U.S. might have as to a preclusive Security Council role could be addressed through specification of where aggression occurs for jurisdiction purposes, and choice of the amendment procedure. A more restrictive amendment procedure would require each state to accept an aggression amendment for it to bind that state. (These issues are discussed more fully in Appendixes F-G.) These recommendations do not take a position on the substance of these issues, and, therefore do not address the ultimate substantive negotiating position of the U.S.

Conclusion

The ABILA ICC Committee strongly urges that the U.S. not attempt to re-open debate upon well-resolved and thoroughly negotiated issues—particularly regarding the draft definition—at the upcoming negotiations. The current definition may not be perfect, but it is the product of extensive work over the years by many states, coordinated under very able leadership of the Working Group’s chairpersons, and represents a carefully-crafted compromise acceptable to most states that have taken part in the negotiations. If there are issues the U.S. seeks to raise as to the definition, it should do so as constructively as possible—offering concrete proposals of proposed text alterations that advance U.S. concerns but do not seek to reopen already extensively debated areas. (Possibly, it could clarify points through proposing changes to the draft elements of the crime, which have been taken up fairly recently in negotiations, creating slightly more leeway to re-examine them.)

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

By contrast, the U.S. should set forth its positions as to conditions for the exercise of jurisdiction (as well as amendment procedures), as these issues are very much unresolved. The U.S. should work to resolve these issues in a way that satisfies U.S. interests, and yet is seen as constructive engagement by the majority of states.

Our committee stands ready to assist you and your staff should you seek any clarification or further material on the topics we have raised.¹

Respectfully submitted,



Jennifer Trahan
Chair, American Branch of the International Law
Association, International Criminal Court
Committee

¹ Three members of the committee opted not to endorse this letter.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

**Appendix A: Substantial Agreement on a Threshold Covering Only “Manifest”
Violations of the U.N. Charter and Thereby Excluding All “Grey Area” Situations**

The current draft² of Article 8*bis* initially defines first the “crime of aggression”—that is, the crime by the individual—and then the “act of aggression”—that is, the act by the state that constitutes aggression.³ (“Aggression” is not something an individual alone can commit, but requires state action; thus, the definition necessarily must define, as the draft does, both the crime by the individual and the act by the state.)

The current draft of Article 8*bis* defines the crime of aggression as occurring only after the state has passed a certain “threshold”—that is, a “manifest” violation of the U.N. Charter. It states:

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.*⁴

The draft elements of the crime likewise contain this requirement:

5. The act of aggression, *by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.*⁵

(Added requirements for what constitutes the “act of aggression” by the state are found in the second draft paragraph of the definition and are discussed in Appendix E hereto.)

There has been extensive debate on whether to use the qualifier of “manifest” or “flagrant,” or no such qualifier in Article 8*bis*.⁶ After lengthy back and forth, most states agree that the word “manifest” should be used, although some continue to maintain that the use of the word “manifest” would be too restrictive, and thus exclude too many situations from constituting the crime of aggression.⁷ The rationale for the use of the term “manifest” is that the crime should only cover the *clearest* situations of aggression

² For an excellent compilation of the drafting history of the work of the Special Working Group on the Crime of Aggression, see “The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009” (Liechtenstein Institute on Self-Determination, at Princeton U. 2009) (hereafter, “Princeton Process”).

³ While the Appendixes are designed to assist in understanding where the negotiations stand, they are not a comprehensive discussion of all relevant issues, which is beyond the scope of the current document.

⁴ ICC-ASP/7/20/Add.1, Annex (emphasis added).

⁵ ICC-ASP/8/INF.2, Annex I (emphasis added). For discussion of the latest work regarding the elements, see Princeton Process, pp. 24-28.

⁶ See, e.g., June 2006 Princeton Meeting, Princeton Process at p. 143, paras. 18-20 (discussing the terms “manifest” and “flagrant”).

⁷ See February 2009 SWGCA Meeting, Princeton Process at p. 51, para 13 (there is still some concern that the “threshold clause” was too restrictive and “unnecessary because any act of aggression would constitute a manifest violation of the Charter of the United Nations”; other delegations expressed support for the threshold as preventing “borderline cases”).

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

and not “borderline cases”⁸ or those “falling within a grey area.”⁹ The required examination of “character, gravity and scale” is intended to be both quantitative and qualitative, excluding both factually and legally borderline cases. Thus, for example, “the requirement that the character, gravity and scale of an act of aggression amount to a manifest violation of the Charter would ensure that a minor border skirmish would not be a matter for the Court to take up.”¹⁰ Additional provisions in the Rome Statute that protect against legally borderline cases include: (i) Article 31(3)’s exclusion of criminal responsibility if conduct is permissible under applicable law; (ii) Article 21’s inclusion of principles and rules of international law; (iii) the requirement of proof beyond a reasonable doubt, and (iv) the principle *in dubio pro reo* (a defendant may not be convicted when doubts about guilt remains). Thus, as to legally dubious cases, the use of force must be *clearly* without justification, and “grey areas” such as “humanitarian intervention” would be excluded.¹¹

Similarly, while there are various acts by the state that would constitute the act of aggression, and which are listed in the draft definition (*see* Appendix E hereto), all of those situations would additionally have to satisfy the qualifier of a “manifest” violation of the Charter based on the “character, gravity and scale” of the act in order to constitute the crime of aggression. Ultimately then, the current definition is quite conservative, intentionally excluding any debatable case.

⁸ February 2009 SWGCA Meeting, Princeton Process at p. 51, para 13.

⁹ June 2008 SWGCA Meeting, in Princeton Process, p. 87, para. 68.

¹⁰ Stefan Barriga, in Princeton Process, p. 8. Stefan Barriga is Deputy Permanent Representative of Lichtenstein to the UN. Christian Wenaweser, Liechtenstein’s Permanent Representative to the U.N., was chairman of the Special Working Group for the last several years of its existence.

¹¹ *See* Claus Kress (German delegate to the SWGCA), “Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus,” 20 Eur. J. of Int’l L. 1129, at 1140, citing Elizabeth Wilmshurt (UK delegate to the SWGCA), in R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst (eds.) “An Introduction to International Criminal Law and Procedure (2007), at 268 (“genuine humanitarian intervention” is excluded).

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

Appendix B: Agreement on Aggression only as a “Leadership Crime”

There is virtual unanimity among states that aggression would be a “leadership crime.” This position is accordingly reflected in the current draft definition, elements of the crime and a proposed amendment to Article 25(3).¹²

As noted above, the current draft of Article 8*bis* states with respect to the “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 aggression¹³

In addition, it is proposed that the following text would be inserted after article 25, paragraph 3 of the Statute (which addresses individual criminal responsibility):

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*.¹⁴

Similarly, the current draft elements of the crime state:

2. The perpetrator was a person *in a position effectively to exercise control over or to direct the political or military action of the State* which committed the act of aggression.¹⁵

Because any act of state of aggression could theoretically involve a huge numbers of individuals, especially considering all the possible forms of criminal responsibility covered by Article 25 of the Rome Statute, it was necessary to consider whose conduct should be criminalized. It was never the intent to cover common foot-soldiers (or, most likely, mid-level commanders)—hence, this agreement on the “leadership” nature of the crime. As explained in “Report of the Special Working Group on the Crime of Aggression”:

As in previous meetings of the Group, there was general agreement on the inclusion of draft article 25, paragraph 3 *bis*, which would ensure that the leadership requirement would not only apply to the principal perpetrator, but to all forms of participation. It was noted that this provision was crucial to the structure of the definition of aggression in its current form.¹⁶

Also, it would not be all “leaders” who would be covered, but only those “in a position effectively to exercise control over or to direct the political or military action of a State.”

¹² For some background, see Stefan Barriga, in Princeton Process, pp. 7-8.

¹³ ICC-ASP/7/20/Add.1, Annex (emphasis added).

¹⁴ Princeton Process, at 62 (emphasis added).

¹⁵ ICC-ASP/8/INF.2, Annex I (emphasis added).

¹⁶ ICC-ASP/7/20/Add.1, Annex II, para. 25.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

**Appendix C: “Attempt” Or “Planning” Of Aggression Absent The Act of State of
Aggression Would Not Be Criminalized**

Under the current draft elements of the crime, actions by an individual would not be criminalized absent a state act of aggression. The current draft elements of the crime state:

3. *The act of aggression* – 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 – *was committed*.¹⁷

Thus, although “attempt” and “planning,” for example, are otherwise criminalized under Rome Statute Article 25 (and “planning” as well as “preparation” are also contained in the text of proposed Article 8*bis*), they would not be relevant as to the crime of aggression, unless an act of aggression in fact followed.

There has been various debate about whether “attempted” aggression which does not result in aggression should be criminalized,¹⁸ and, if not, whether another amendment to Rome Statute Article 25 would be required. (In general, there has been an attempt to minimize the number of changes needed to incorporate the crime of aggression into the context of the Rome Statute, with the goal of having aggression cases treated, where possible, in a manner similar to genocide, war crimes and crimes against humanity cases.)

While there has not been agreement on the need of an amendment to exclude “attempted” aggression, the elements, as currently worded, make clear that any form of individual responsibility would not otherwise suffice for purposes of the “crime of aggression” unless the act of the state of aggression *has* occurred. Thus “planning” or “attempted” aggression that does not culminate in an act of state of aggression would not be covered.

¹⁷ ICC-ASP/8/INF.2, Annex I.

¹⁸ *See, e.g.*, June 2006 Princeton Meeting, Princeton Process, pp. 146-47, paras. 36-50.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

**Appendix D: All the Normal Rome Statute Protections Would Apply
To The Crime Of Aggression**

Because the amendment regarding the crime of aggression would, if it enters into force, become part of the Rome Statute, all of the other procedural and substantive safeguards that are present in the Statute, and which guard against inappropriate prosecutions, would apply vis-à-vis the crime of aggression. These include:

Safeguards against reaching an ICC case:

- ***Complementarity.*** Only where a government is “unable” or “unwilling” to prosecute, does a case become “admissible” before the ICC.¹⁹ A state whose situation has been referred to the ICC, or a State Party that has accepted the ICC’s jurisdiction, can always avoid the ICC prosecuting its nationals by conducting a domestic prosecution, if it is “willing” and “able” to do so under the “complementarity” provisions of Article 17 of the Rome Statute.²⁰
- ***Security Council Deferral.*** Regardless of which “conditions for the exercise of jurisdiction” might be utilized vis-à-vis the crime of aggression, the Security Council would always have the power (as to an aggression or another type of ICC case) to defer the case for a twelve-month renewable period pursuant to its Chapter VII powers.²¹
- ***SOFA and SOMA Agreements to Protect Jurisdiction.*** While it is the position of the ABILA ICC Committee that the U.S. has misused Article 98 of the Rome Statute through its campaign, under the past U.S. administration, to obtain so-called “Article 98 agreements” or Bilateral Immunity Agreements (“BIAs”),²² Article 98 does allow states to utilize SOFA and SOMA agreements to protect jurisdiction over its military and civilians on mission.²³

Safeguards before the ICC:

- ***Fair Trial/ Due Process Protections.*** If a case reaches the ICC, the Rome Statute requires comprehensive fair trial protections. These include all the due process protections of the U.S. Bill of Rights, except for trial by jury: (i) the right to remain silent or to not testify against oneself;²⁴ the right against self-incrimination;²⁵ the right to cross-examine witnesses;²⁶ the right to be tried with undue delay;²⁷ the protection against double jeopardy;²⁸ the right to be present at

¹⁹ See Rome Statute, Art. 17.

²⁰ *Id.*

²¹ See Rome Statute, Art. 16.

²² See ABILA ICC Committee letter dated March 12, 2010.

²³ See Rome Statute, Art. 98.

²⁴ Rome Statute, Art. 67(1)(g).

²⁵ Rome Statute, Art. 54(1)(a), 67(1)(g).

²⁶ Rome Statute, Art. 67(1)(e).

²⁷ Rome Statute, Art. 67(1)(c) (speedy and public trials).

²⁸ Rome Statute, Art. 20.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**

**www.ila-americanbranch.org
(FOUNDED 1873)**

trial;²⁹ the presumption of innocence;³⁰ the right to assistance of counsel;³¹ the right to a written statement of charges;³² the right to have compulsory process to obtain witnesses;³³ the prohibition against ex post facto crimes;³⁴ freedom from warrantless arrest and search;³⁵ and the ability to exclude illegally obtained evidence.³⁶

- ***ASP Safeguards on Judges.*** The judges elected by the Assembly of States Parties (“ASP”) to the ICC are required to be highly qualified professionals of untarnished moral character, and competent and experienced in either criminal or international law.³⁷ The ASP, which has ultimate oversight authority over the Court, can remove a judge if he or she acts inappropriately.³⁸ Many of the U.S.’s closest allies are active members of the ASP. If the United States were to some day become a State Party, it could nominate an American to be an ICC judge.
- ***ASP Safeguards on the Prosecutor.*** The Prosecutor is subject to similar stringent qualifications as the judges.³⁹ The ASP can also remove the Prosecutor if he or she acts inappropriately.⁴⁰
- ***High Threshold For All ICC Crimes.*** As discussed above, there are various safeguards for ensuring that only the clearest aggression cases would be pursued: for example, the qualifier “manifest” creates a high threshold;⁴¹ and the “leadership” clause limits the potential number of defendants.⁴² The other crimes to be tried by the ICC are also extremely serious ones for which there is a high threshold. The Rome Statute limits prosecutions of crimes against humanity to situations where there has been a “widespread or systematic attack” against the civilian population pursuant to a “plan or policy.”⁴³ It limits prosecutions of genocide to situations where there is “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁴⁴ As to war crimes, the ICC

²⁹ Rome Statute, Art. 63, Arts. 67(1)- 67(1)(c).

³⁰ Rome Statute, Art. 66.

³¹ Rome Statute, Art. 67(1) (b),(d).

³² Rome Statute, Art. 61(3).

³³ Rome Statute, Art. 67 (1)(e).

³⁴ Rome Statute, Art. 22.

³⁵ Rome Statute, Arts. 57 (3), 58.

³⁶ Rome Statute, Art. 69(7). The above-listed fair trial rights compilation is found in AMICC, “Safeguards in the Rome Statute Against Abuse of the Court to Harass American Servicemembers and Civilian Officials,” at 7, at <http://www.amicc.org/docs/Safeguards.pdf>.

³⁷ Rome Statute, Art. 36.

³⁸ Rome Statute, Art. 46.

³⁹ Rome Statute, Art. 42.

⁴⁰ Rome Statute, Art. 46.

⁴¹ See Appendix A hereto.

⁴² See Appendix B hereto.

⁴³ Rome Statute, Art. 7.

⁴⁴ Rome Statute, Art. 6.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

is to particularly focus on situations where they are committed “as part of a plan or policy or as part of a large-scale commission of such crimes.”⁴⁵

- ***Pre-Trial Chamber Approval as Check on Prosecutor.*** The Prosecutor cannot commence cases on his own, but once the Court has jurisdiction over a situation, he or she must obtain the permission of the Pre-Trial Chamber to open an investigation.⁴⁶ Thereafter, the Prosecutor cannot issue a warrant, even based on sufficient evidence, but must make a request of the Pre-Trial Chamber for approval.⁴⁷ Similarly, a case will not proceed until the Pre-Trial Chamber has confirmed the charges against a suspect⁴⁸ and the defendant is in custody (sometimes difficult to achieve as the ICC is wholly dependent upon states to conduct arrest).⁴⁹
- ***Other Protections.*** The Prosecutor or the accused may request the disqualification of a judge if there are doubts about his or her impartiality.⁵⁰ Additionally, the accused may also request the disqualification of the Prosecutor if there are doubts about his or her impartiality.⁵¹ No two judges may be from the same state, and many of the judges are from countries that are America's allies and friends.⁵² The Prosecutor must immediately notify a suspect's state of nationality about an impending investigation.⁵³ A state can withhold, or choose to negotiate protected disclosure of, any information that it feels would prejudice its national security interests.⁵⁴

⁴⁵ Rome Statute, Art. 8(1).

⁴⁶ Rome Statute, Arts. 54(2)(b), 57(3)(d).

⁴⁷ Rome Statute, Art. 58(1).

⁴⁸ Rome Statute, Art. 61.

⁴⁹ Rome Statute, Art. 63(1) (“[t]he accused shall be present during the trial.”). An investigation or prosecution can also be terminated if it is “in the interests of justice” to do so. Rome Statute, Art. 53.

⁵⁰ Rome Statute, Art. 41(2)(b).

⁵¹ Rome Statute, Art. 42(8)(a).

⁵² Rome Statute, Art. 36(7).

⁵³ Rome Statute, Art. 18(1).

⁵⁴ AMICC, <http://www.amicc.org/usinfo/administration.html#power>

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

Appendix E: Agreement on the Use of G.A. Resolution 3314 Within The Definition

The current draft of Article 8*bis* with respect to the “act of aggression”—that is the act *by the state* of aggression—derives from Article 2(4) of the U.N. Charter and U.N. General Assembly resolution 3314. It states:

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.⁵⁵

The list of actions contained in subparts (a)-(g) above is a direct quote from the Annex to U.N. General Assembly resolution 3314.⁵⁶ U.N. General Assembly resolution 3314 was drafted “as guidance” to the Security Council in determining “in accordance with the Charter, the existence of an act of aggression.”⁵⁷

⁵⁵ ICC-ASP/7/20/Add.1, Annex (emphasis added).

⁵⁶ See United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, Annex, reproduced at Princeton Process, pp. 231-34.

⁵⁷ United Nations General Assembly resolution 3314 (XXIX), para. 4 of resolution.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

There has been extensive debate about (1) whether to utilize resolution 3314 in the definition of the “act of aggression.” That was resolved affirmatively,⁵⁸ in large part, not to open a “proverbial can of worms” as to what acts would be covered and to utilize what the General Assembly had already accomplished over “twenty years of negotiations.”⁵⁹ Then, there was extensive debate about (2) whether to reference it, or incorporate it directly into the text of the proposed definition (which is more an issue of form than substance), and (3) whether to reference or incorporate only certain parts of the resolution, or the totality.⁶⁰ The majority view as to these issues is reflected in the current draft as to which there is “very solid acceptance.”⁶¹

There has also been extensive past debate about whether the list of acts should be an “open list” or a “closed list.” With an “open list,” the acts listed in subsections (a)-(g) would be illustrative of acts of aggression, and “sufficiently open to cover future forms of aggression.”⁶² Those who favored a “closed list” expressed concerns that the principle of legality or *nullum crimen sine lege* could be violated by an open list.⁶³ The current text resolves this issue, again based on general agreement, with a list that can be viewed as “semi-closed.”⁶⁴ Namely, the acts listed in (a)-(g) constitute “acts of aggression,” but there could be additional acts of aggression; nonetheless, all such acts would have to meet the “chapeau” or criteria outlined in the first sentence (“the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”), as well as the qualifier of “manifest” for there to be the crime of aggression (*see* Appendix A). In this way, because the definition would be “closed” by these “chapeau” requirements, there would not be a violation of the principle of legality. Generally, states are in agreement that “the right balance” has been struck by this approach of a “generic definition in the chapeau” along with the “non-exhaustive listing of acts of aggression.”⁶⁵

⁵⁸ *See, e.g.*, December 2007 SWGCA Meeting, Princeton Process, p. 101, para. 14 (“[b]road support was expressed for using resolution 3314 (XXIX) as the basis of the definition of an act of aggression”).

⁵⁹ Stefan Barriga, in Princeton Process, pp. 9, 10.

⁶⁰ *See, e.g.*, Stefan Barriga, in Princeton Process, p. 10; *see also* December 2007 SWGCA Meeting, Princeton Process, p. 101, paras. 14-16; June 2007 Princeton Meeting, Princeton Process, p. 116, paras. 38-43.

⁶¹ Stefan Barriga, in Princeton Process, p.11.

⁶² June 2008 SWGCA Meeting, Princeton Process, at p. 89, para.75.

⁶³ *See, e.g.*, Stefan Barriga, in Princeton Process, pp. 10-11.

⁶⁴ Stefan Barriga, in Princeton Process, p. 11. Some have formulated it as “semi-open.”

⁶⁵ June 2008 SWGCA Meeting, Princeton Process, p. 89, para 78.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

Appendix F: Open Issues As To The Conditions For The Exercise Of Jurisdiction

One of the most difficult issues has always been determining “the conditions for the exercise of jurisdiction,” which refers to how an aggression case would start. As to the other Rome Statute crimes (genocide, war crimes and crimes against humanity), jurisdiction exists (a) on the territory of a ratifying state; (b) over the nationals of a ratifying state, or (c) based on Security Council referral.⁶⁶ For years now, there has been extensive discussion as to whether the crime of aggression is fundamentally different from the other Rome Statute crimes and thus requires a special jurisdictional regime or whether the normal jurisdiction provisions should apply.

Clarifying where aggression “occurs” for jurisdiction purposes

Fairly recently, there has been focus on the issue of where the crime of aggression “occurs” for jurisdiction purposes. That is, in the absence of Security Council referral (which would create jurisdiction), would the alleged aggressor state need to consent to ICC jurisdiction over aggression, or only the alleged victim state? At present, there does not yet appear consensus on this issue, which appears to be linked to the issue of whether there should be a special jurisdictional filter. Indeed, one can imagine various permutations of that linkage: (a) aggressor state consent and Security Council filter; (b) neither aggressor state consent nor Security Council filter; (c) no aggressor state consent but Security Council filter; or (d) aggressor state consent but no Security Council filter. (Another option that could be explored is whether aggressor state consent, if ultimately required, could be only temporary—for example, lasting 7 years after ratification but then expiring.)

Whether a special “jurisdictional filter” is needed

Some states take the view that there is need for a special jurisdictional filter for the crime of aggression, and that it must be the Security Council that provides approval before an ICC aggression case could commence. States taking that view have cited to the requirement in Article 5(2) of the Rome Statute that any amendment defining the crime and conditions for the exercise of jurisdiction “shall be consistent with the relevant provisions of the Charter of the United Nations.”⁶⁷ They also cite to the role of the Security Council under Article 39 of the U.N. Charter in making determinations (for Chapter VII purposes) as to what constitutes an “act of aggression.”⁶⁸

Other countries have expressed the views that, should the Security Council not act within a certain period of time, the General Assembly could be involved, or the International Court of Justice, as both institutions have historically also played a role in the

⁶⁶ See Rome Statute, Art. 12-13.

⁶⁷ Rome Statute, Art. 5(2).

⁶⁸ See U.N. Charter, Art. 39.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

maintenance of international peace and security⁶⁹ or the adjudication of cases involving aggression.

Other countries (probably a majority) have suggested that there is no such need for a jurisdictional filter, and that the ICC could simply proceed with a case if jurisdiction otherwise exists, after giving the Security Council a period of time to act. Countries that support this approach argue, among other things, that allowing the ICC to act without Security Council involvement is necessary to preserve the ICC's independence, and avoid politicizing whether a case is pursued. Furthermore, by (a) still providing the Security Council with the first opportunity to act, and (b) the Security Council's existing ability to defer (stop) an investigation or prosecution from proceeding under Article 16 of the Rome Statute⁷⁰ (which would likewise apply to aggression cases), there would be no encroachment upon the Security Council's role, and therefore no conflict between the Rome Statute and the U.N. Charter.⁷¹ Additionally, as noted above, the ICC already has a variety of internal "filters," where the Prosecutor, at various stages, must obtain Pre-Trial approval to proceed.⁷²

As noted above, states seem to be moving away from involving either the International Court of Justice or General Assembly, leaving the seemingly more stark choice of either the Security Council as a "jurisdictional filter" (supported by the other four permanent members of the Security Council and some of their allies), or the ICC initiating cases without such a "filter" (generally supported by the vast majority of other states).

The Current Draft regarding the Jurisdictional Filter

Thus, the current draft of Article 15*bis* still has various alternatives and options in it as to the jurisdictional filter (and more options and alternatives are certainly possible):

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.

⁶⁹ In maintaining that the General Assembly could have a role, Article 24 of the U.N. Charter has sometimes been invoked. *See* U.N. Charter Art. 24(1) ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary responsibility* for the maintenance of international peace and security") (emphasis added).

⁷⁰ *See* Rome Statute, Art. 16.

⁷¹ Additionally, states have argued that the ICC would be determining individual responsibility for the *crime* of aggression, which is different from what the Security Council does, which is to determine whether a state has committed the act of aggression for purposes of employing its Chapter VII powers. *See* U.N. Charter, Art. 39.

⁷² *See* Appendix D above ("*Pre-Trial Chamber Approval as Check on Prosecutor*").

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

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.⁷³

Autonomy of the Security Council

One thing that is resolved, however, is the autonomy of the Security Council and the ICC in determining an act of aggression, regardless of which options and alternatives are selected. As explained in the December 2007 Report of the Special Working Group:

There was agreement that the Security Council would not be bound by the provisions of the Rome Statute regarding aggression, which would define aggression for the purposes of criminal proceedings against the responsible individuals. In turn, the Court [would not be] bound by a determination of an act of aggression by the Security Council or any other organ outside the Court. The Court and the Security Council thus [would have] autonomous, but complementary roles.⁷⁴

In terms of the ICC making an independent evaluation of the existence of an act of state of aggression, this was seen as necessary “in order to safeguard the defendant’s right to due process,” so that “[t]he Prosecutor would bear the burden of proof regarding all elements of the crime, including the existence of an act of aggression.”⁷⁵ Thus, even if

⁷³ ICC-ASP/7/20/Add.1, Annex.

⁷⁴ Report of the Special Working Group on the Crime of Aggression (December 2007 – ICC-ASP/6/SWGCA/1) at Princeton Process, p.103, para. 24. See also June 2007 Princeton Meeting, at Princeton Process pp. 118-19, para 54.

⁷⁵ June 2006 Princeton Meeting, at Princeton Process, p. 151, para 71.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

the Security Council were to determine that an “act of aggression” had occurred for Chapter VII purposes, the Court would still have the flexibility to determine that it did not amount to the “crime of aggression” under the proposed definition, which the ICC would be required to apply. For instance, the ICC might find that although there was an “act of aggression,” by virtue of its “character, gravity and scale,” it did not constitute a “manifest” violation of the U.N. Charter.

Likewise, the Security Council’s determination would not be restricted in any way by any aggression amendment (and it was never restricted by General Assembly resolution 3314),⁷⁶ because the Security Council’s power emanates from the U.N. Charter and cannot be modified by the Rome Statute or any amendment to it. Thus, the Security Council’s role for making determinations under Article 39, Chapter VII, of the Charter would remain completely intact.

⁷⁶ General Assembly resolutions are non-binding.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

Appendix G: Open Issues As To Amendment Procedures

A final open issue concerns the amendment procedures with regard to any aggression amendment and whether it would enter into force in accordance with Article 121(4) or 121(5) of the Rome Statute. This issue also appears to be linked to the questions concerning the exercise of jurisdiction, and resolution of those may point to an answer of this question.

Article 121 provides:

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.⁷⁷

Thus, if only Article 121(4) is used, 7/8 of the States Parties must ratify, and then the amendment would enter into force for all States Parties. If only Article 121(5) is used, the aggression amendment would bind only those States Parties that have accepted it. Technically, the current proposals primarily would be adding to (but not amending) Article 8 (suggesting the use of Article 121(5) *if* adding is considered an amendment), as well as adding to Article 16 (suggesting the use of Article 121(4)). Yet, using different amendment procedures seems hopelessly complex, and there seems general agreement on the need to select one amendment procedure.

The amendment issue is important because use of Article 121(4) would create a more “unified regime”⁷⁸ and level “playing field,” while use of Article 121(5) would allow each individual state to choose whether or not to accept the amendment. The choice would also impact on “whether States that become Parties to the Rome Statute after the entry into force of amendments on aggression (future States Parties) would have a choice to accept the amendment on aggression or not, or whether it would apply to them automatically”⁷⁹—that is, whether they would have the option of joining a three crime court (genocide, war crimes and crimes against humanity), or would necessarily have to accept the forth crime (aggression). The United States clearly has an interest in weighing in on this issue. Greater skepticism of the correctness of the definition suggests advocacy for the use of Article 121(5)’s amendment procedures. This would also preserve the

⁷⁷ Rome Statute, Art. 121(4)-(5).

⁷⁸ Stefan Barriga, in Princeton Process, p. 15.

⁷⁹ November 2008 SWGCA Report, Princeton Process, p. 73, para 17.

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**
www.ila-americanbranch.org
(FOUNDED 1873)

option of joining a three crime court some day in the future, and not necessarily a four crime court.

As noted above, the remaining issues are interrelated. Thus, for example, as to states that have insisted on a strong Security Council role, if there were agreement to utilize Article 121(5)'s amendment procedures (meaning the amendment would bind only those States that have accepted it), coupled with agreement that aggression prosecutions may only occur if the aggressor state "consents,"⁸⁰ then there might be less need of the Security Council as a jurisdictional filter. (A state that does not agree with the proposed definition, would not ratify the amendment, and thus not be bound by it; and, if the crime of aggression is clarified as "occurring" only on the territory of the aggressor state, there would be no jurisdiction created vis-à-vis the nationals of that non-ratifying state.) The Security Council's role in making determinations under Chapter VII would in no way be impacted by anything the ICC does, so the amendment would be consistent with the U.N. Charter—something expressly required under the Rome Statute.⁸¹

Thus, it is possible that by some creative combination of the open issues, agreement can be reached. Alternatively, if the above linkage, for example, is not seen as sufficient to protect the Security Council's role (or if there are other serious objections regarding the definition that cannot be adequately resolved), then the U.S. should engage in negotiations and strenuously advocate for the Security Council as a jurisdictional filter. The amendment process is moving forward, and it is in the best interests of the U.S. to engage in the process, and, in a constructive way, advance negotiations consistent with U.S. interests.

⁸⁰ For example, there could be clarifying language as follows:

It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed by a State Party that has accepted the amendment on aggression.

February 2009 SWGCA Meeting, Princeton Process, p. 56, para 32.

⁸¹ See Rome Statute, Art. 5(2).