American Society of International Law

Beyond Kampala:

Next Steps for U.S. Principled Engagement with the International Criminal Court

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BEYOND KAMPALA:

NEXT STEPS FOR U.S. PRINCIPLED ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT

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Foreword

In mid-2008, the American Society of International Law convened a bi-partisan independent expert task force to review U.S. policy toward the International Criminal Court (ICC) and to make recommendations to the next U.S. administration about its policy toward the Court. The Task Force was co-chaired by William H. Taft IV and Patricia M. Wald and also included Mickey Edwards, Michael A. Newton, Sandra Day O'Connor, Stephen M. Schwebel, David Tolbert, and Ruth Wedgwood. The group met multiple times and received briefings from over a dozen experts, including both the President and Prosecutor of the Court, the U.S. Ambassador-at-Large for War Crimes Issues, members of the State Department and Pentagon delegation that negotiated the Rome Statute in 1998, and Congressional Staff. On the basis of this review, the Task Force reached consensus on a series of recommendations aimed at a new policy of "positive engagement" with the International Criminal Court. The report is available on the ASIL website at http://www.asil.org/icc-task-force.cfm.

We have been gratified to see many of the Task Force's recommendations adopted as part of the Obama Administration's new policy of "principled engagement" with the Court, and in particular through its robust participation in the ICC Review Conference in Kampala in June 2010. Yet some of the specific steps the Task Force suggested remain to be implemented. The Review Conference rightfully consumed significant U.S. government attention in the first half of 2010, but with that meeting now behind us, the time is ripe to consider further development of U.S. policy toward the Court. In support of that process, ASIL has commissioned from its member experts eight briefing papers, to summarize the results of the Kampala meeting and elaborate U.S. policy options on four issues that featured prominently in Kampala: cooperation with the Court; the impact of the Court on victims; complementarity between the jurisdiction of the Court and national courts; and the crime of aggression. This latest report in the ASIL Discussion Paper series contains the eight papers. The authors do not all agree with each other (nor will everyone agree with them); but they all support continued U.S. engagement with the Court, which has become a significant player in areas of great interest to the United States.

In the best tradition of the Society, we are pleased to provide a platform for exchange of views on this important topic. We gratefully acknowledge the support of the John D. and Catherine T. MacArthur Foundation and the Planethood Foundation, which makes this possible.

Elizabeth Andersen
ASIL Executive Director
November 2010

Fostering State Cooperation with the International Criminal Court

ASIL Discussion Paper

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NOVEMBER 2010

State Cooperation & The International Criminal Court: A Role for the United States?

Beth Van Schaack*

Introduction

The International Criminal Court (ICC) is almost entirely dependent on State cooperation to effectuate its mandate to bring to justice individuals responsible for committing "the most serious crimes of concern to the international community as a whole."[1] State cooperation is also central to the evolving relationship between the ICC and the United States.[2] President Barack Obama entered office with a pledge to temper the prior administration's hostility toward the ICC. Since then, he has been conducting a high-level review of U.S. policy toward the ICC.[3] Although no official position has been announced, subsequent public statements by Secretary of State Hillary Rodham Clinton, U.S. Ambassador to the United Nations Susan Rice, Ambassador-at-Large for War Crimes Issues Stephen J. Rapp, and Legal Advisor Harold Hongju Koh have confirmed that the United States stands ready to re-engage with the Court. Notwithstanding this rapprochement, domestic legislation dating from the Bush Administration prohibits most forms of cooperation with the Court absent specific waivers or other contingencies. If the United States is to best position itself to use all international tools available to it to advance United States interests in responding effectively to the commission of international crimes, this legislation should be repealed or significantly scaled back. Short of ratifying the ICC Statute, there are a number of ways that the United States can work with the Court to both promote the United States' foreign policy agenda and support the mission of the Court. Re-engaging with the Court through appropriate cooperative efforts will go far toward restoring the United States to its prior leadership position in the arena of international justice.

* Associate Professor of Law, Santa Clara University School of Law. Prof. Van Schaack served as the Academic Advisor to the United States delegation to the 2010 Kampala Review Conference. The views expressed herein are hers alone and do not reflect the policy of the United States toward the International Criminal Court. The author is indebted to the research assistance of Bruce Yen for this project.

State Cooperation and International Justice

Fully effectuating a system of international justice depends on the involvement and cooperation of States, regional organizations, and the United Nations. International tribunals can assert jurisdiction over only a limited number of cases, so domestic courts must bear the primary responsibility for investigating and prosecuting international crimes. Where international tribunals do assert jurisdiction, they are dependent on the assistance and support of States. This assistance can come in many forms, including the arrest and surrender of the accused; public outreach; diplomacy; procuring evidence; the identification, tracing, and freezing of assets; the relocation of victims and witnesses; the provision of security, logistical, and operational support in country; the accommodation and transport of court personnel and defense counsel; sanctioning uncooperative States; and enforcement of orders for interim release and sentencing judgments. The experience of the ad hoc tribunals for the former Yugoslavia, Rwanda, and elsewhere reveals that the execution of arrest warrants is the most critical form of cooperation; this is already proving to be true in the ICC context as well.[4]

Notwithstanding U.N. Charter or treaty-based obligations to cooperate on the part of target and other States, the original ad hoc tribunals have struggled to gain full and effective cooperation. As subsidiary organs of the Security Council enjoying a Chapter VII provenance, the International Criminal Tribunals for the former Yugoslavia and Rwanda (the ICTY and ICTR) have been able to call on the Security Council in the event that State cooperation from target States was not forthcoming. Nonetheless, the Council's response to such non-compliance was often less than robust; as such, the tribunals have struggled to fulfill their mandates in the face of State recalcitrance. This was especially true for Serbia, and to a lesser extent, Rwanda and Croatia. Other ad hoc tribunals have either been part of United Nations transitional administrations (as with the Special Panels for East Timor or the Kosovo Special Panels) or the subject of an agreement with the host State (as with the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia). These features have also facilitated cooperation to a certain extent. Nonetheless, target and other States have harbored fugitives, refused to turn over evidence relevant to ongoing prosecutions, or simply failed to put their muscle behind judicial directives.

The United States, along with other States, has over the years rendered a range of formal and informal assistance to the ad hoc tribunals. In addition to supplying technical assistance and seconding personnel, the United States has utilized diplomatic and economic sanctions, frozen assets, shared evidence, offered rewards for information leading to the arrest or conviction of indictees, and authorized and participated in multilateral military efforts to track and apprehend suspects.[5] As such, the United States has extensive experience using its intelligence

capabilities, criminal justice expertise, and military muscle to further international justice. Even as a non-State party, the United States is poised to continue to play this role vis-a-vis the ICC in light of the détente between the United States and the Court.[6] Aspects of domestic law, however, render a whole range of forms of assistance potentially unlawful.

State Cooperation and the International Criminal Court

Lacking its own enforcement mechanism, the ICC is entirely dependent on States and other entities to carry out many of its core functions. As former ICC President Philippe Kirsch has noted, "[l]ike any judicial system, the ICC system is based on two pillars. The Court is one pillar, the judicial pillar. The operational pillar belongs to States, international organizations, and civil society."[7] Part nine of the ICC Statute is devoted to the issue of State cooperation. Article 88 specifically obliges States Parties to alter their domestic legal arrangements in connection with ratification of the treaty.[8] In particular, States Parties are to ensure that their domestic legal arrangements enable them to render a number of forms of cooperation, including the arrest and transfer of suspects, the freezing of assets, the protection of victims and witnesses, and the procuring of documentary and testimonial evidence (see Articles 86-93). In the event of non-compliance, the Court can refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council (Article 87(7)). These obligations are subject to exceptions yet to be tested in situations in which the disclosure of information would threaten national security, as determined by the State itself in consultation with the Court (Article 72). In addition, the Court can provide assistance to States Parties investigating and prosecuting ICC crimes pursuant to Article 93(10). States parties are to execute requests for assistance in accordance with their relevant domestic procedures pursuant to Article 99(1), although domestic law may not be invoked to deny cooperation per Article 93(3). In the event of noncompliance, the Assembly of States Parties likely cannot do much more than make a finding to this effect. In the event that the Council refers a situation, it can utilize its Charter-based enforcement powers to gain State cooperation, but it may be unable or reluctant to invoke this power to the fullest extent, as has been seen in the Darfur context.

Article 87(5) of the ICC Statute also envisions that the Court might invite assistance from non-States Parties, such as the United States and two other permanent members of the Security Council that have yet to join the Court: China and the Russian Federation. Non-States Parties are welcome to enter into cooperative arrangements with the Court on an ad hoc basis. If these non-State Parties fail to cooperate, they too can be forwarded to the Assembly of States Parties, or the Security Council in the event of a Council referral. The public record reveals that at least one formal request for assistance from the ICC to the United States is outstanding with respect

to the situation in Darfur.[9] Since President Obama took office, United States personnel have been in regular contact with high-level Court personnel, so no doubt other forms of potential assistance have been discussed.

The issue of State cooperation was central to the stocktaking component of the 2010 Kampala Review Conference.[10] States Parties adopted a number of declarations reinforcing the importance of, while also identifying the challenges to, effective and comprehensive State cooperation.[11] In addition, States issued dozens of pledges, committing themselves to cooperating with the Court. The United States pledged as follows:

1. The United States renews its commitment to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide.

2. The United States reaffirms President Obama's recognition on May 25, 2010 that we must renew our commitments and strengthen our capabilities to protect and assist civilians caught in the [Lord's Resistance Army's] wake, to receive those that surrender, and to support efforts to bring the LRA leadership to justice.[12]

As the only non-State Party to make such a pledge, the United States received tremendous positive feedback from the ICC's Assembly of States Parties. It also signaled its support for the Ugandan prosecutions, which focus on crimes committed by the Lord's Resistance Army.

U.S. Cooperation with the Court

Even if the United States was so inclined, it is barred from providing many forms of cooperation to the Court by the American Service-Members Protection Act of 2002 (ASPA).[13] The ASPA—enacted a month after the Rome Treaty entered into force—is a product of the initial hostility of the Bush Administration toward the Court[14] as symbolized by the May 6, 2002 retraction of the United States' signature on the Rome Treaty. At the time of the signing of the Rome Treaty in 2000, President Clinton did not recommend that his successor submit the Treaty to the Senate for advice and consent until the United States' fundamental concerns were addressed, most notably the ability of the Court via an unaccountable prosecutor to exercise jurisdiction over the nationals of non-states parties. The retraction of this signature was accomplished by a letter from John Bolton when he was President George W. Bush's Undersecretary for Arms Control

and International Security, to Kofi Annan, then Secretary-General of the United Nations.[15] This indication of an intent not to ratify the treaty removed any obligation of the United States to refrain from acting contrary to the object and purpose of the treaty, as required by Article 18 of the Vienna Convention on the Law of Treaties, which states: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty."

The American Service-Members Protection Act contains a number of provisions geared toward limiting both U.S. involvement with the Court and the exposure of U.S. or allied citizens to prosecution before the Court. For example, members of the U.S. Armed Forces are prohibited from participating in any UN peacekeeping force or UN peace enforcement operation unless permanently exempted from prosecution.[16] This prohibition is subject to a presidential waiver so long as notice is given to the appropriate congressional committee, U.S. nationals are exempt from prosecution, and target countries are either not parties to the ICC Statute or have entered into agreements not to extradite (or otherwise transfer or surrender) U.S. citizens to the Court. The United States succeeded in getting the Security Council to issue a number of resolutions to temporarily protect U.S. citizens from prosecution in regions where the United States has deployed troops.[17]

In its original incarnation, other aspects of the ASPA were geared toward intimidating potential ICC States Parties by threatening to withhold various forms of international aid—including military assistance in the form of International Military Education and Training (IMET) and Foreign Military Funds (FMF)—unless they agreed not to transfer U.S. citizens to the Court.[18] In 2004, the Nethercutt Amendment to an appropriations act added economic aid to the types of foreign assistance subject to suspension.[19] These so-called Economic Support Funds (ESF) include funds for promoting antiterrorism and security operations, anti-corruption efforts, economic and democratic development, human rights, and peace processes. Together, these pieces of legislation provided that aid could continue so long as one of three contingencies was in place: (1) the country entered into an agreement insulating United States nationals from the Court; (2) the President waived this sanction in the national interest; or (3) the country was a NATO member, a non-NATO ally (such as Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan. All of these sanctions were subject to exceptions and additional waivers.

The Bush Administration used the coercive provisions in the ASPA to extract a number of bilateral treaties with States in which parties pledged not to refer each other's nationals to the

Court without the consent of the State of nationality. Human rights NGOs deemed these agreements "bilateral immunity agreements" (BIAs). The United States claimed authority for such agreements in Article 98 of the ICC Statute, which bars the Court from proceeding with "a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law" regarding diplomatic immunity or its obligations under "international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court."[20] At the moment, over 100 such agreements—terminable at will by either party—remain in force, although it appears that the United States has not entered into an Article 98 agreement since its 2007 agreement with Montenegro.[21] President Bush granted a number of waivers to strategic States (some in connection with Operation Enduring Freedom/Iraqi Freedom), but suspended various forms of assistance to over thirty States Parties to the ICC.[22] Not surprisingly, this strong-arm approach had negative repercussions[23] insofar as it antagonized our allies, alienated States subject to sanctions, angered the human rights community,[24] and enabled other States to step into the void in foreign assistance, especially in Latin America.[25] The European Parliament, for example, issued a resolution condemning the ASPA and calling upon the United States to participate in the common endeavor of the international community to bring tyrants to trial.[26] The European Union originally issued "guiding principles" limiting the degree to which its members could enter into Article 98 agreements with the United States, but ultimately granted its members permission to enter into such agreements so long as only American military personnel and diplomats were exempt from prosecution.[27] Although the United States has not entered into any new Article 98 in recent years, the Obama Administration has yet to indicate that it does not intend to enforce these agreements or use these or other means to discourage additional States from joining the Court.

The Bush Administration's second term witnessed a moderation of the relationship with the Court. In keeping with this evolution, the ASPA's punitive provisions began to see significant dismantling, by either congressional repeal or non-renewal, starting in 2006.[28] This change of policy reflected the fact that the withholding or complete denial of foreign aid proved to be counter-productive and contrary to United States interests, particularly in a post-September 11th era when military and other forms of foreign assistance had become central to the United States' anti-terrorism agenda. Members of the Department of Defense testified publicly that such agreements reduced troop training opportunities and hindered the United States' ability to fight terrorism abroad.[29] Indeed, then-Secretary of State Condoleezza Rice noted in 2006 that adhering to some provisions of the ASPA was akin to "shooting ourselves in the foot."[30]

Although the ASPA has largely been declawed, other aspects of the legislation remain in full force.[31] Most importantly for the question of State cooperation, the ASPA continues to prohibit many forms of cooperation with the Court by U.S. courts, state or local government entities, and in some cases federal agencies and personnel.[32] Forms of prohibited cooperation include transmitting letters rogatory, aiding in the investigation or transfer of any U.S. citizen or permanent resident to the Court, using appropriated funds to assist the Court, and assisting in the extradition of any person to the Court.[33] An earlier piece of legislation prohibits any appropriated funds from being used to support the ICC.[34] Treaties of mutual assistance are to be interpreted to comply with the ASPA.[35] No agent of the ICC may conduct any investigative activity in the United States (§ 7423(h)), and no U.S. court or state or local governmental entity may respond to requests for cooperation from the Court.[36] Even information sharing is prohibited; the President must ensure that appropriate procedures are in place to prevent the direct or indirect transfer of not only classified national security information, but also any law enforcement information to the Court or to a party to the ICC Statute.[37] In addition, the legislation bars U.S. government entities from providing any support to the Court.[38] "Support" is broadly defined in the legislation as "assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals".[39] These limitations do not apply to actions taken by the President pursuant to his authority as Commander-in-Chief of the Armed Forces or in the exercise of executive power.[40] The result of these provisions is that the Court is deprived not only of U.S. support and assistance, but also of U.S. training and expertise.

The President is entitled to waive the provisions barring cooperation and the transfer of information to the Court.[41] This waiver is allowed where the investigation or prosecution is within the United States' national interest and the suspect is not a "covered" U.S. person or allied person, such as a member of the U.S. Armed Forces, an elected or appointed member of the U.S. government, any other person working on behalf of the U.S. government, or military or other personnel of NATO member countries and major non-NATO allies so long as that government is not a party to the ICC.

Notwithstanding all these particular limitations, the statute also provides that the United States is not prohibited from participating in international efforts to bring to justice certain foreign nationals (including Osama bin Laden, Saddam Hussein, Slobodan Milošević, and members of al Qaeda) and "other foreign nationals accused of genocide, war crimes or crimes against humanity," thanks to an amendment proposed by Senator Christopher Dodd (D-CT).[42] It is unclear to what extent the Dodd Amendment trumps other more restrictive elements of this

legislation.[43] Unofficially, it has been suggested that the Office of Legal Counsel produced a memorandum suggesting that the Dodd Amendment might allow for the provision of certain forms of case-by-case, in-kind, and facilitative assistance to the Court without breaching ASPA. Moreover, there are some contributions the United States can make to situations under consideration in the Court that likely do not run afoul of ASPA. For example, the United States can assist in international justice efforts by encouraging and enabling positive complementarity in national systems. Indeed, in Kampala, the United States hosted an important side event on positive complementarity in the Democratic Republic of Congo—one of the countries with cases before the ICC.[44] The United States can also likely assist in witness protection and relocation efforts so long as no funds are provided directly to the Court. Likewise, it can condition aid to countries that are in a position to assist with arrests, such as Kenya, which has already played host to President Omar Al-Bashir, who has been indicted by the ICC.

Cooperation and the Obama Administration

As a non-State party, the United States is under no legal obligation to cooperate with the ICC,[45] although there may be some customary law obligations not to actively hinder accountability for international crimes.[46] Nonetheless, there have already been situations in which cooperation with the Court as a matter of policy will advance U.S. foreign relations and other interests. The 2005 Darfur referral by the Security Council, which the United States allowed, has already demonstrated that ICC action can be consistent with United States foreign policy. No doubt, capturing Joseph Kony and his indicted LRA henchmen is also within the strategic interests of the United States.[47] Notwithstanding that the United States and the Court are enjoying a détente, it is exceedingly difficult for the United States to render much meaningful broad-based assistance to the ICC without running afoul of the ASPA, even as the Dodd amendment may provide some cover in this regard on a case-by-case basis.[48] Given that the coercive aspects of the American Service-Members Protection Act are no longer in force, repealing, scaling back, or mitigating the anti-cooperation aspects of the ASPA should be a high priority for the Obama Administration.

To enable increased cooperation with the Court, President Obama could effectuate case-specific waivers within the ASPA to the maximum extent possible. In addition, the United States can take steps to dismantle the Article 98 agreements, if only by indicating that it does not intend to enforce them or seek additional such protections in the future from other members, or potential members, of the Court. That said, a more thorough legislative reform agenda targeted at the ASPA's anti-cooperation provisions is necessary to enable a "more systemic and institutionalized program of cooperation with or support of the Court"[49] beyond what the Dodd

amendment may allow with respect to particular cases. These more broad-based changes would enable the United States greater flexibility in providing cooperation where the ICC's investigations and prosecutions are consistent with its interests and in engaging in long-term cooperative activities and building institutional ties with the Court.

Short of total repeal of the ASPA, Congress could be encouraged to make surgical amendments to the legislative scheme to curtail its over-broad elements. The most effectual fix would be the repeal of § 7423 of the ASPA, which prohibits a number of forms of cooperation and support. This would enable the United States to choose from a range of ways to cooperate with the Court—entirely at its discretion and when it is in its interests to do so. Congress could also tinker with specific parts of § 7423. In particular, the limitations on cooperating with ICC investigations or transferring suspects to the Court could be removed in the case of non-U.S. nationals (so-called covered allied persons in § 7432(3)) and—more controversially—in the cases of individuals who are not members of the U.S. armed forces or elected/appointed government officials (i.e., "other persons employed by or working on behalf of the United States Government" (§7432 (4)). "Support" could be more narrowly defined to exclude only financial support and thus allow for the provision of in-kind assistance, such as training, intelligence or collaboration in law enforcement (§7432(12)). The 2001 Foreign Relations Authorization Act could be repealed or amended to be consistent with the terms of ASPA, since it may be interpreted as even broader than the provisions of ASPA preventing the provision of support for the Court. Congress could also permit the ICC to conduct investigations within the United States (§ 7423(h)). Similarly, Congress at a minimum could redraft § 7425 to allow for the sharing of law enforcement information for the purpose of facilitating the investigation of ICC crimes, the apprehension of fugitives, and the prosecution of defendants. The ban on the sharing of classified information could remain in place subject to the waiver provisions. Finally, the various waiver provisions in § 7422(c) could be liberalized. A risk inherent to seeking legislative reform is that it may result in the return of ASPA's more restrictive provisions, or a weakening of the modus vivendi provided by the Dodd Amendment, so the timing of any such effort should be carefully considered to ensure Congress's receptivity to cooperating with the Court.

Conclusion

The total ban on U.S. cooperation with the ICC contained within the ASPA hampers the ability of the United States to advance U.S. interests in accountability where they dovetail with situations under investigation by the Court. It also leaves the ICC without U.S. expertise in intelligence and law enforcement. By effectuating modest amendments to the ASPA, the United States can remain a non-State party and still provide cooperation and other forms of support where

consistent with United States interests. This mutually beneficial relationship will ultimately enhance international justice efforts and restore the United States to a leadership position in this arena.

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[1] Rome Statue of the International Criminal Court, Preamble, 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.

[2] See generally American Coalition for the International Criminal Court, Chronology of U.S. Actions Related to the International Criminal Court, http://www.amicc.org/ docs/US%20Chronology.pdf (Aug. 30, 2010).

[3] In connection with this policy review, the American Society of International Law convened an independent task force to recommend ways in which the Obama Administration could further enable positive engagement with the Court. See ASIL, U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement (March 2009), available at http://www.asil.org/files/ASIL-08-DiscPaper2.pdf (hereinafter "ASIL Policy Paper").

[4] See [Draft] Declaration on Cooperation, Doc No. RC/ST/CP/2, at 1 (June 7, 2010), available at http://www2.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-CP-2-ENG.pdf, (emphasizing "the crucial role that the execution of arrest warrants plays in ensuring the effectiveness of the Court's jurisdiction and . . . the primary obligation of States Parties, and other States under an obligation to cooperate with the Court, to assist the Court in the swift enforcement of its pending arrest warrants").

[5] See generally Michael P. Scharf, The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, 49 DEPAUL L. REV. 925 (2000) (describing forms of formal and informal assistance).

[6] See State Dep't Press Briefing, U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference, available at http://www.state.gov/s/wci/us_releases/remarks/143178.htm (comments of Ambassador-at-Large for War Crimes Issues, Stephen J. Rapp: "even while we don't become a member of the ICC, the opportunity to do some of those same kinds of things presents itself with the ICC, where that court is pursuing the same kind of cases that we prosecuted through these international institutions in Rwanda and Sierra Leone").

[7] Citizens for Global Solutions, Citizens for Global Solutions with President Kirsch, http://www.globalsolutions.org/node/1175.

[8] That provision reads: "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part."

[9] Daily Press Briefing, Transcript, U.S. Department of State, Sean McCormack, Spokesperson (July 14, 2008), available at http://2001-2009.state.gov/r/pa/ prs/dpb/2008/july/106986.htm. See also Clint Williamson, Ambassador-at-Large for War Crimes Issues, U.S. Department of State, Remarks at the Century Foundation on Reassessing the International Criminal Court: Ten Years Past Rome (Jan. 13, 2009). Transcript available at http://www.tcf.org/publications/internationalaffairs/ICC%20 Transcript.pdf.

[10] See, e.g., Stocktaking of International Criminal Justice, Cooperation, Summary of the Roundtable Discussion, Doc. No. RC/ST/CP/1/Rev. 1 at 7 (June 28, 2010), available at http://www2.icc-cpi.int/NR/rdonlyres/FB6E4F55-DCF6-4D5F-9500-6BD25E578667/0/RCSTCP1Rev1ENG.PDF (highlighting the fact that many states parties had not yet implemented their obligations under Article 88); Report of the Bureau on Stocktaking: Cooperation, Background Paper and Proposals for Outcome, Doc No. ICC-ASP/8/50 (Mar. 18, 2010), available at http://www2.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-50-ENG.pdf (setting forth focal points on the issue of cooperation in preparation for the Review Conference).

[11] [Draft] Declaration on Cooperation, supra note 5.

[12] Pledges, Doc. No. RC/9 at 18 (July 15, 2010), available at http://www.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFF-BE56-903F2062B797/0/ RC9ENGFRASPA.pdf.

[13] 2002 Supplemental Appropriations Act for Further Recover from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909, codified at 22 U.S.C. §§ 7421-7432. See generally Lilian V. Faulhaber, American Service-Members Protection Act of 2002, 40 HARV. J. ON LEGIS. 537 (2003) (discussing legislative history and statutory framework). Representative Tom DeLay (R-TX) introduced the legislation as an amendment to the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States. As an amendment to an appropriations bill, the legislation went through the Appropriations Committee rather than the International Relations Committee. Efforts to enact an earlier version of the ASPA date to 2000.

[14] The Congressional findings associated with the ASPA evince this hostility. See 22 U.S.C. § 7421 (cataloging perceived flaws in the ICC Statute).

[15] See Letter from John R. Bolton, U.S. Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary-General (May 6, 2002) (on file with the U.S. Department of State), available at http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

[16] 22 U.S.C. § 7424 (2010).

[17] See, e.g., S.C. Res. 1593 (Mar. 31, 2005) (providing that nationals from non-ICC states deployed to Sudan are subject to the exclusive jurisdiction of the contributing state); S.C. Res. 1422 (July 12,

2002) (providing that the ICC shall not commence or proceed with an investigation or prosecution of any current or former officials or personnel from a non-state party to the ICC Statute for one year).

[18] 22 U.S.C. § 7426 (repealed in 2008).

[19] The Nethercutt Amendment was part of the appropriations bill adopted on December 7, 2004, for fiscal year 2005. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 108-447, § 574, 118 Stat. 2968, 3027-8 (2004). The Amendment was not included in the Omnibus Appropriations Act adopted for Fiscal Year 2009. Omnibus Appropriations Act, 2009, Pub. L. No. 111–8, 123 Stat. 524 (2009).

[20] Article 98 was likely drafted with Status of Forces and Status of Mission Agreements in mind. Kimberly Prost & Angelika Schlunck, Article 98: Cooperation With Respect to Waiver of Immunity and Consent to Surrender, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1131, 1131 (Otto Triffterer, ed., 1999).

[21] See Georgetown Law Library, International Criminal Court—Article 98 Agreements Research Guide, http://www.ll.georgetown.edu/guides/article_98.cfm.

[22] See Congressional Research Service, International Criminal Court Cases in Africa: Status and Policy Issues 6 (May 18, 2009) (discussing sanctions and waivers), available at http://fpc.state.gov/documents/organization/128346.pdf.

[23] See generally Diane F. Orentlicher, Unilateral Multilateralism: United States Policy Toward the International Criminal Court, 36 CORNELL INT'L L.J. 415, 418 (2004) (arguing that "the United States' over-reliance on 'hard power' to alter the ICC's constitutional framework has diminished its ability to achieve its goals, on a more sustainable basis, through persuasion. Resentment of aggressive U.S. tactics aimed at securing an ironclad exemption from ICC jurisdiction has radiated across other arenas of national concern, impairing the United States' ability to secure support for other policy objectives").

[24] See, e.g., Amnesty International, International Criminal Court: U.S. Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes, IOR 40/025/2002 (Sept. 1, 2002) (arguing that Article 98 agreements violate the Rome Statute and urging countries not to enter into these agreements with the United States), available at http://www.amnesty.org/en/library/info/IOR40/025/2002.

[25] See generally Coalition for the International Criminal Court, Comments by US Officials on the Negative Impact of Bilateral Immunity Agreements (BIAs) and the American Service-Members Protection Act (ASPA) (Dec. 1, 2006), http://www.iccnow.org/documents/CICCFS-CommentsUSOfficials_BIA-ASPA_current.pdf (compiling statements by U.S. officials).

[26] European Parliament Resolution on the Draft American Service-Members Protection Act, Eur. Parl. Doc. P5 TA-PROV 1367 (2002), available at http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=020704&LANGUE=EN&TPV=DEF&LASTCHAP=57&SDOCTA=8&TXTLST=1&Type_Doc=FIRST&POS=1.

[27] See European Union, Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court (Sept. 30, 2002), 42 ILM 240, 241 (2003).

[28] Most importantly, the National Defense Authorization Act of 2008 eliminated restrictions on military assistance for states that refuse to sign Article 98 agreements with the United States. Pub. L. No. 110-181, § 1212, 122 Stat. 3, 371 (2008).

[29] Id.

[30] Condoleezza Rice, U.S. Secretary of State, Trip Briefing: En Route to San Juan, Puerto Rico (Mar. 10, 2006) (on file with the U.S. Department of State), available at http://2001-2009.state.gov/secretary/rm/2006/63001.htm.

[31] This includes the radical provision that the United States can use "all means necessary and appropriate" to bring about the release of any U.S. citizen detained or imprisoned by the Court—the so-called "Invade the Hague" provision (22 U.S.C. § 7427 (2010)).

[32] 22 U.S.C. §§ 7423-7425.

[33] Id. at §§ 7423(b)-(f).

[34] Foreign Relations Authorization Act, Pub. L. No. 106-133, § 705 (2000-2001).

[35] 22 U.S.C. § 7423(g).

[36] Id. at § 7423(b).

[37] Id. at § 7425.

[38] Id. at § 7423(e).

[39] Id. at § 7432(12).

[40] Id. at § 7430.

[41] Id. at § 7422(c).

[42] Id. at § 7433.

[43] Clint Williamson, former Ambassador-at-Large for War Crimes, stated publicly, "We have really relied on the final provision of ASPA, which is sort of this get-out-of-jail-free card, which says that nothing in this act shall constrain the U.S. from doing what's necessary to bring people to justice for genocide and other serious crimes. We have used this final provision to license our interaction with the ICC. But it's really can [sic] be applied on a case-by-case basis, and this has allowed us, I think, great latitude on Darfur." Clint Williamson, U.S. Department of State, Remarks at the Century Foundation on Reassessing the International Criminal Court: Ten Years Past Rome 10 (Jan. 13, 2009), available at http://www.tcf.org/publications/internationalaffairs/ICC %20Transcript.pdf.

[44] See Press Briefing, supra note 10 (noting the role that the United States can play in promoting and assisting national-level prosecutions).

[45] Article 34 of the Vienna Convention on the Law of Treaties states the pacta tertiis nec nocent nec prosunt principle: "a treaty does not create either obligations or rights for a third state without its consent."

[46] See G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 79, U.N. Doc. A/9326 (1973), available at http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/46/ IMG/NR028146.pdf ("8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.").

[47] On May 24, 2010, President Obama signed into law the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, which aims to "support stabilization and lasting peace in northern Uganda and areas affected by the Lord's Resistance Army through development of a regional strategy to support multilateral efforts to successfully protect civilians and eliminate the threat posed by the Lord's Resistance Army and to authorize funds for humanitarian relief and reconstruction, reconciliation, and transitional justice, and for other purposes." Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209 (2010).

[48] The United States did facilitate the surrender of Thomas Lubanga Dyilo to the ICC by enabling the lifting of Security Council travel restrictions and sanctions. See Judge Philippe Kirsch, Address to the United Nations General Assembly (Oct. 9, 2006), http://www.icc-cpi.int/NR/rdonlyres/53692E4E-2B35-41BD-8B90-91828D55880A /278543/PK_20061009_en.pdf.

[49] ASIL Policy Paper, supra note 4, at 33. Models include the cooperation agreements between the United States and the ICTY and ICTR.

United States Cooperation with the ICC: Support and Arrest

Ron Slye*

The Review Conference of the International Criminal Court recently held in Kampala, Uganda, concluded with a resolution on cooperation that emphasizes implementing legislation and other national legal procedures to facilitate cooperation with the Court; compliance with requests for cooperation from the Court; and more specifically the primary obligation of State Parties and "other States under an obligation to cooperate with the Court" to assist in the "swift enforcement of its pending arrest warrants."

The United States' obligation to cooperate with the Court is less than that of a State Party. As a signatory to the Rome Statute, the U.S. is obligated to not act contrary to the object and purpose of the Statute. In addition, the U.S. is under an obligation to cooperate with the Court if a Security Council Resolution requires such cooperation. United States cooperation with the ICC is hindered by a package of legislation that was passed during the Bush Administration. Under current U.S. law, no U.S. funds may be "obligated for use by, or for support of, the International Criminal Court" unless and until the U.S. becomes a party to the Rome Statute.[1] In addition, non-financial cooperation with the ICC is limited by the American Service-Members Protection Act (ASPA), which specifically prohibits collaboration, extradition, support, funding and the sharing of classified information. However, the President may cooperate or share intelligence information on a case-by-case basis if he determines it is in the national security interest of the U.S. The prohibitory provisions of the ASPA are also severely curtailed by the Dodd amendment, which states that nothing in the ASPA "shall prohibit the United States from rendering assistance to international efforts to bring to justice….foreign nationals accused of genocide, war crimes or crimes against humanity."[2]

Thus, while Congress has clearly prohibited direct financial support to the ICC, there is considerable room for the United States to provide other means of support to the ICC. Given

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this domestic legal framework, should the United States increase cooperation with the ICC, and if so in what way?

There is no question that the current administration is more committed than the previous administrations to increasing cooperation with the ICC within the limits of current domestic U.S. law. The Obama Administration has made a clear commitment to engagement with the ICC. As State Department Legal Adviser Harold Koh has stated before, the Obama Administration has "reset" the default position of the U.S. with respect to the ICC from one of hostility to one of positive engagement.

While there are many areas of cooperation that one could discuss with respect to the U.S. and the ICC, this paper will focus on two areas: (1) indirect cooperation with the ICC, and (2) direct cooperation with the ICC with respect to detention, arrest, and surrender of those indicted by the ICC. At Kampala, the Assembly of State Parties singled out the issue of the enforcement of arrest warrants, an area of cooperation that is crucial to the future success of the Court. [3] There are currently eight outstanding arrest warrants; four with respect to Uganda; one with respect to the DRC; and three with respect to the Sudan. The oldest arrest warrants were issued against the leadership of the Lord's Resistance Army five years ago.

Indirect Cooperation

Cooperation with the ICC does not require direct engagement with the ICC itself. The overall purpose of the ICC is to further accountability and justice internationally for the four international crimes within its jurisdiction: genocide, crimes against humanity, war crimes, and aggression. There are a number of ways that the U.S. can pursue this overall objective without directly providing support to the ICC.

First, the U.S. can support efforts to enhance domestic legal processes that either supplant ICC involvement (as complementarity gives preference to domestic processes) or complement ICC involvement. The U.S. is engaged in this sort of activity in, inter alia, the Democratic Republic of the Congo (DRC) and Uganda, two of the five situation countries before the ICC. At the Review Conference, the U.S. co-sponsored a discussion on domestic prosecutions in the DRC as part of a broader program of increasing the capacity of the government of the DRC to prosecute international crimes domestically. The U.S. also pledged to renew "its commitment to support of rule of law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide." [4] With respect to Uganda, Congress recently passed the Lord's Resistance Army Disarmament and

Northern Uganda Recovery Act of 2009, which empowers the President to provide a variety of support to further reconciliation, peace, and accountability efforts in Uganda.[5]

Second, the United States can provide military, intelligence, and other assistance to countries that are in a position to detain or arrest suspects indicted by the ICC. Both the ASPA (by virtue of the Dodd Amendment) and the LRA legislation clearly authorize such cooperation.

Third, the U.S. can support the cause of international accountability and justice more generally by bringing U.S. domestic practices into compliance with basic international norms of justice. This would include accelerating current Administration efforts to close Guantanamo and other U.S. detention facilities that are designed to be out of the reach of U.S. law, and providing the minimum guarantees of U.S. and international due process to those individuals currently within U.S. custody. This would both provide an example for other countries to follow and increase the moral and political capital of the U.S. in U.S. efforts to bring other countries into compliance with U.S. interests and international law.

Fourth, the U.S. can use its diplomatic and economic powers to reward or punish those states who cooperate or who refuse to cooperate with the ICC. Such a policy could be based solely upon how much a country cooperates with the ICC, or the policy could be focused on a range of U.S. policy interests that would include cooperation or, less controversially, based upon that country's efforts to further accountability within its territory or region (through domestic legal reforms or the support of regional accountability mechanisms).

Detention, Arrest, and Surrender

Another area of potential collaboration between the U.S. and the ICC concerns the detention, arrest, and surrender by the United States of those indicted by the ICC. This proposal raises complex legal and policy issues because of U.S. domestic legislation and the fact that the U.S. is a signatory but not a State Party to the Rome Statute.

The legal framework regulating the detention, arrest, and surrender of ICC suspects has received particular attention in the context of the visit of President Omar Al-Bashir of the Sudan to a number of states, most recently Kenya. There are three possible positions with respect to a State faced with such a visit: 1) an obligation to arrest; 2) permission to arrest; and 3) prohibition against an arrest.

First, are States obligated to arrest individuals indicted by the ICC? The ICC has been surprisingly unclear on this issue, giving rise to competing legal arguments on what, if any, obligation States have to arrest ICC suspects.[6] Under the Rome Statute, the ICC may transmit a request to a State Party for the arrest and surrender of a person and that State Party is obligated to comply with that request.[7] This suggests that absent such a formal request, State Parties are not obligated to arrest and surrender such a person.

The case of Sudan and the arrest warrant against President Al-Bashir raise two additional issues worth considering. First, Sudan is not a State Party to the Rome Statute; therefore, the treaty's terms including its obligations do not apply directly to Sudan. Secondly, does President Al-Bashir's immunity as a sitting Head of State protect him from ICC jurisdiction and arrest? With respect to Sudan not being a State Party, the Sudanese situation is before the ICC because of a referral by the UN Security Council. Sudan's obligation to cooperate with the ICC thus arises directly from the Security Council itself, which in turn incorporates the Rome Statute through its deferral resolution. Security Council Resolution 1593, which brought the matter of the conflict before the ICC, states that "the Government of Sudan, and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant this resolution."[8] There is thus little debate concerning Sudan's obligations with respect to Al-Bashir and other Sudanese officials indicted by the ICC; they are obligated to arrest and surrender these officials to the ICC.

However, what obligations do third party states such as Kenya or the United States have with regards to arresting or surrendering indicted parties? The Rome Statute makes clear that State parties like Kenya "shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[9] After this general statement of cooperation, the Statute goes on to provide specific procedures for the Court to request specific types of cooperation from a State Party, including procedures for the arrest and surrender of individuals.[10] In particular State Parties "shall, in accordance with this Part [on cooperation] and the procedure under their national law, comply with requests for arrest and surrender."[11] The real issue for a State Party, such as Kenya, is whether such a request by the Court has been made. If the Court made a specific request for the arrest and surrender of President Al-Bashir (or any other indictee), then Kenya would be obligated to arrest and surrender that individual. The Registrar, instructed by the Pre-Trial Chamber, apparently transmitted requests for cooperation with respect to the Bashir indictment to all State Parties to the Rome Statute and to all Security Council members who are not party to the Rome Statute.[12] Since it appears that this request was then made to Kenya as a State Party to

the Rome Statute, Kenya's obligations were triggered under the Rome Statute to arrest President Al-Bashir and any other indictees found on their territory. [13]

Absent such a specific request, do State Parties have an obligation to arrest and surrender President Al-Bashir? Given the specific procedures set forth in the Rome Statute, including the reference to transmittals of request for arrest and surrender, there is little argument that a State Party is obligated to arrest and surrender an indictee to the ICC. With respect to the Security Council, the Security Council Resolution reiterated the general obligation of Sudan and other parties to the conflict to cooperate fully with the Court; this cooperation leads back to obligations to arrest and surrender under the Rome Statute language.

The obligation of a State Party to arrest an indictee like Al-Bashir is clear if a formal request has been made to that State Party. What obligations do non-State Parties, like the United States, have with regards to these requests? Notwithstanding the statements by some critics from the U.S., the Rome Statute does not itself impose any obligation on a non-State Party.[14] While the ICC can request such assistance from a non-State Party like the United States, there is no obligation on the U.S. or any other non-State Party to comply with such a request.

Does the fact that the referral came from the UN Security Council impose any obligation on non-State Parties? There is no question that the Security Council could impose ICC related obligations on a non-State Party; the Security Council imposed obligations on all States with respect to the ad hoc tribunals created for former Yugoslavia and Rwanda (the International Criminal Tribunal for Former Yugoslavia (ICTY) and International Tribunal for Rwanda (ICTR)). The Security Council, however, has not imposed such an obligation in this case, only going so far as to state:

> While recognizing that States not party to the Rome Statute have no obligation to the Statute, [the United Nations Security Council] urges all States and concerned regional and other international organizations to cooperate fully.[15]

Absent an express Security Council obligation, non-State Parties like the United States, are thus not obligated to arrest or surrender ICC indictees like President Al-Bashir. Are they permitted to arrest such individuals? In the case of President Al-Bashir, the question of whether a state may arrest and surrender him to the ICC is related to the question of whether such States are prohibited from arresting him because of the immunity he enjoys as a sitting head of state.

First, absent the prohibition created by immunity, are States permitted to arrest an ICC indictee? While the issue has not been addressed by any authoritative body, the better position seems to be that a state may arrest an individual indicted by the ICC even if there has not been a specific request from the ICC to that state for such an arrest. The more difficult question is whether competing claims for immunity, such as that raised by President Al-Bashir's status as a sitting Head of State, trump this permissive rule. The ICC has not ruled on this issue, an oversight some have strongly criticized.[16] Academic opinion is split, though most scholars appear to conclude that such immunity does not affect an ICC indictment.[17] In support of this position, the International Court of Justice opined in dicta in an unrelated decision, that while the immunity of a State official barred another State from executing an arrest warrant against that individual when the arrest arose out of a domestic prosecution; such an immunity might not apply to an arrest warrant arising from a prosecution before an international tribunal like the ICC.[18] Thus Al-Bashir's immunity as a sitting Head of State probably does not trump the obligation of State Parties who have received a formal request from the ICC to arrest him or other state officials; nor would it then prohibit both State Parties and non-State Parties from exercising their discretion to arrest officials like Al-Bashir absent such an obligation.

As a matter of international law, the United States is clearly permitted to arrest and surrender to the ICC, any individual indicted by the ICC. While the UN Security Council could impose an obligation to arrest and surrender on the U.S. and other non-State Parties; to date, it has declined to do so.

As a matter of domestic U.S. law, there are two issues with respect to the legality of the arrest and surrender of an ICC suspect. First, is the package of legislation passed during the Bush Administration that restricts U.S. cooperation with the ICC. As noted above, with the passage of the so-called Dodd Amendment, such restrictions on cooperation do not apply with respect to efforts to bring to justice those individuals indicted by the ICC.

Second, is a series of bilateral immunity agreements entered into between the United States and many State Parties to the ICC under Article 98 of the Rome Statute. While the purpose of these treaties was to ensure that U.S. citizens could not be handed over to the ICC, most of these bilateral treaties provide reciprocal obligations.[19] In other words, under these treaties, the United States agrees not to hand over any citizens of the other state to the ICC, in addition to the other state in turn agreeing not to hand over any U.S. citizen to the ICC. The U.S. has reciprocal Article 98 agreements with three of the five states that are situation countries before the ICC: Central African Republic, the DRC, and Uganda. Academics, governments, and advocates have asserted that such agreements are illegal under international law, particularly if

entered into by State Parties to the Rome Statute. [20] To date, the legality of these agreements has not been tested before an authoritative body, either internationally or domestically.

The presence of a bilateral immunity agreement with three of the five States over which the ICC has asserted jurisdiction means that there is a strong argument that the U.S. may not hand over a suspect from any of those states to the ICC. This would mean that if the U.S. were to apprehend and surrender Joseph Kony of the Lord's Resistance Army to the ICC, then the U.S. would be in violation of its treaty obligation to the State of Uganda as set forth in the bilateral immunity agreement. One clear action the Obama Administration can thus take is to terminate either all such agreements or those agreements with the three states over which the ICC has asserted jurisdiction. The lack of such a bilateral agreement with the Sudan and Kenya means that the U.S. could, as a matter of both international and domestic law, arrest and surrender any person indicted by the ICC arising from either of those two situations.

Conclusion

The Obama Administration's commitment to engage constructively with the ICC is to be applauded. The active U.S. participation at the recent review conference in Kampala is one of many manifestations of this commitment. While the U.S. has a number of unique concerns regarding the ICC (most notably with respect to U.S. participation in UN peacekeeping operations), there is a strong overlap between the national interests of the United States and efforts to bring to justice those responsible for the most heinous crimes. While domestic U.S. legislation limits the form in which the Administration may further international justice by supporting the ICC, there are a number of specific policy changes that such legislation does allow. The Administration has already engaged with the ICC through indirect and informal forms of support, in many cases supported by Congressional legislation such as the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009. Yet, there is more that can be done, particularly if the approach is one that focuses less on the support of the ICC per se, but instead focuses on the overall goal of promoting international justice and accountability. In addition, the U.S. can provide direct support towards the detention, arrest, and surrender of those indicted by the ICC. While the U.S. is not obligated to do so, there is no legal impediment under national or international law that would prohibit such cooperation. The policy recommendations urged in this paper will support the work of the ICC in most cases; but more importantly, these proposals will further the overall mission of the ICC and the international community by fulfilling the promise at Nuremberg, Tokyo, and Rome to never

again allow those who commit the most heinous crimes do so with the comfort of immunity from accountability.

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[1] Consolidated Appropriations Act, Pub. L. No. 106-113, 113 Stat. 1501 (2000).

[2] Supplemental Appropriations Act for Further Recover from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909, (2002), codified at 22 U.S.C. §§ 7421-7432 (2002). The Dodd Amendment is codified at Section 2015.

[3] In briefings prior to the review conference in Kampala, both the President and Prosecutor of the Court also highlighted the lack of cooperation with respect to arrest warrants. As noted by the Prosecutor, eight-five percent of requests for cooperation to State Parties and non-States Parties have received positive answers. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, 18th Diplomatic Briefing, (April 26, 2010). See also Judge Sang-Hyun Song, President of the International Criminal Court, 18th Diplomatic Briefing, (April 26, 2010).

[4] ICC Assembly of States Parties, Review Conference of the Rome Statute, Pledges, May 31- June 11, 2010, ICC Doc. RC/9, at 18, (July 15, 2010) available at http://www.icc-cpi.int/Menus/ASP/ReviewConference/Pledges.htm.

[5] Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209 (2010).

[6] Compare Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities," 7 J. INT'L CRIM. JUST. 333 (2009) (arguing for such an obligation), with Paola Gaeta, "Does President Al-Bashir Enjoy Immunity from Arrest?," 7 J. INT'L CRIM. JUST. 315 (2009) (arguing for a more limited obligation).

[7] Rome Statue of the International Criminal Court, Art. 89(1), 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 [hereinafter Rome Statute].

[8] SC Res. 1593, Paragraph 2.

[9] Rome Statute, Art. 86.

[10] Id., Art. 89.

[11] Id., Art. 89(1). Such a request was made, for example, to the Governments of Uganda, the Democratic Republic of the Congo, and the Sudan with respect to the indictments against the leaders of the Lord's Resistance Army. Report of the International Criminal Court, UN Doc. A/61/217

(3 August 2006), para. 5. In fact an agreement was entered into between the ICC and the Government of the Sudan on the arrest of the leaders of the Lord's Resistance Army. Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) , para. 23 (2010). A similar request was also made with respect to the warrants against Ahmad Muhammad Harun and Ali Muhammad Ali Abd-al-Rahman of the Sudan to all State Parties, all Security Council members that are not party to the Rome Statute, and to the following non-State Parties that border the Sudan: Egypt, Eritrea, Ethiopia, and the Libyan Arab Jamahiriya. Report of the International Criminal Court. UN Doc. A/62/314 (31 August 2007), para. 31. This request was made prior to the indictment of President Al-Bashir.

[12] UN General Assembly, Report of the International Criminal Court, para. 17, UN Doc. A/64/356 (September 17, 2009).

[13] The Pre Trial Chamber did issue a decision on the visit of President Al-Bashir to Kenya to inform both the Security Council and the Assembly of State Parties of the visit "in order for them to take any measure they deem appropriate." In that decision the Pre Trial Chamber stated that Kenya had "a clear obligation to cooperate with the Court in relation to the enforcement of [the] warrants of arrest against [President Al-Bashir]," and cited to both UN Security Council Resolution 1593 and Article 87 of the Rome Statute. Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of State Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, (August 27, 2010).

[14] Such critics confuse obligations imposed on the United States itself, with jurisdiction that the Court may assert over a US citizen. Such assertion of jurisdiction derives from the universally recognized principle of territoriality, by which a State has maximum authority to regulate, including criminally prohibit, activity within its territory. The Rome Statute provides State Parties with another mechanism by which they can assert this universally recognized territorial jurisdiction – instead of an individual being prosecuted within its own domestic courts for war crimes, the prosecution may occur before the ICC if the admissibility requirements of the Court are otherwise met.

[15] Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 249 (March 4, 2009).

[16] See Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities" 7 J. INT'L CRIM. JUST. 333, 337 (2009)

[17] See Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities," 7 J. INT'L CRIM. JUST. 333 (2009) (concluding that such immunity does not apply); But see Paola Gaeta, "Does President Al-Bashir Enjoy Immunity from Arrest?," 7 J. INT'L CRIM. JUST. 315 (2009).

[18] See Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 11, para. 27 (Feb. 14).

[19] Not all of the Article 98 treaties entered into by the US are reciprocal. See the Coalition for the International Criminal Court, List of American Non-Governmental Organizations, available at http://www.amicc.org/usinfo/administration_policy_BIAs.html#countries (listing the 102 such treaties entered into by the US which indicates if they are reciprocal or not).

[20] See e.g. Council of the European Union, "Draft Council Conclusions on the International Criminal Court," 12488/1/02 Rev. 1, Annex, at http://www.coalitionfortheicc.org/documents/ EUConclusions30Sept02.pdf (30 September 2002) (stating that the US agreements are inconsistent with State Parties obligations to the Rome Statute); Human Rights First, "Human Rights First Criticizes US Attempts to Exempt its Nationals from the ICC" at http://www.humanrightsfirst.org/ cah/ij/icc/us_role/us_role_02.aspx (September 10, 2002) (stating that the US agreements are illegal under both the Rome Statute and general international law). For a more nuanced view that finds some bilateral agreements legal, see Opinion by James Crawford, Philippe Sands, and Ralph Wilde, "In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute: Joint Opinion," available at http://www.coalitionfortheicc.org/documents/ SandsCrawfordBIA14June03.pdf.

Developing Complementarity Between the International Criminal Court and National Jurisdictions

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Evolving U.S. Efforts to Support Domestic Accountability

Michael A. Newton*

Introduction

The principle of complementarity and its interconnected textual strands in the Rome Statute may be the fulcrum supporting the long term legitimacy and effectiveness of the ICC as an apolitical arbiter of justice. The monumental development in the Rome Statute is that the proponents of international justice established a treaty-based framework for a permanent supranational prosecutorial authority built on the principle that state sovereignty can be subordinated on occasion to the goal of achieving accountability for egregious international crimes.[1] The evolution of U.S. policy towards the ICC reflects the realization that "an instrument of impartial and effective justice"[2] at the supranational level is an important facet of the integrated framework for punishing perpetrators responsible for acts of genocide, crimes against humanity, and egregious violations of the laws and customs of war. The large and well-prepared U.S. delegation at the Review Conference in Kampala punctuated this pragmatism and served as implicit confirmation that a viable ICC advances important American interests in some circumstances.

The 2002 entry into force of the Rome Statute symbolized the definitive beginning of the era of accountability. Nevertheless, the dominant theme of the negotiating history as well as the plain text of Article 1 compels the conclusion that the Court was intended to supplement the foundation of domestic punishment for violations of international norms rather than supplant good faith domestic investigations or prosecutions. The structure of the Rome Statute is absolutely clear in that it curtails sovereign authority by displacing domestic trials only in exceptional circumstances; its detailed procedures are designed to balance sovereign enforcement against improper extensions of ICC prosecutorial power. The textual references to standards for assessing the admissibility of cases, for deference to good faith domestic investigations or prosecutions, and for the right of interested States to appeal admissibility determinations all reflect the centrality of complementarity to the properly functioning ICC. In

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this light, it is worth recalling that even prior to the Rome Statute's entry into force, the U.S. policy towards the court contained an uncategorical commitment to assist any sovereign state in strengthening its domestic mechanisms for addressing mass atrocities.[3] This clear policy preference accords with the concept of complementarity irrespective of U.S. accession to the Rome Statute or its present status as a non-State Party entitled to observer status at the Assembly of States Parties. The Court should be joined in a partnership with all sovereign States based on mutual respect and a shared resolve to end impunity.

Post Kampala Complementarity

The unambiguous reaffirmation of the complementarity principle by the Assembly of States Parties at the 2010 Kampala Conference means that the U.S. policy preference for assisting States in strengthening domestic prosecutorial systems should move ahead reflecting a principled harmony of values rather than being misbranded as a manifestation of institutional hostility. In the wake of the Kampala Conference, U.S. policymakers and legislators have a clear window of opportunity to augment the efforts of the Assembly of States Parties by reinvigorating aid to domestic systems seeking to develop or enhance domestic capacity to address the enforcement gap that remains an unfortunate reality.

Properly understood and implemented, the jurisdictional relationship between the ICC and sovereign States is conceived as a tiered allocation of authority to adjudicate. The creation of a vertical level of prosecutorial authority that operates as a permanent backdrop to the horizontal relations between sovereign States in large part depended on a delineated mechanism for prioritizing jurisdiction to serve the ends of authentic justice while simultaneously preserving sovereign rights. The balance of adjudicative authority between the ICC and States is the bridge that carries the weight of the entire Court structure. In fact, the complementarity structure was an integral component of the overarching multilateral agreement without which the ICC would arguably not have been created. Unsurprisingly, mechanisms that uphold the principle of complementarity are integrated into all three departments of the Court – the Office of the Prosecutor, the Pre-Trial and Trial Chambers, and the Appellate Chambers – to ensure that the Court exercises only its proper scope of authority with the ever-present possibility of review, albeit entirely internal institutional review.

While the Rome Statute embodies textual formulations that sustain the sovereign investigative or prosecutorial authority of individual States, the Court should view considerations of complementarity and legal grounding as a matter of prudence and best practices. The very genesis of the Court in a multilateral treaty should generate reluctance to stray from the clear

precepts adopted by States after years of diplomatic effort. Because complementarity is so intimately intertwined with the vision of the ICC as an autonomous international institution, the United States should be clear that sound implementation of the admissibility regime along with the implied corollary of cooperative synergy with sovereign States is a necessary predicate to any future inter-agency policy review aimed at re-examining the overarching U.S. policy stance towards the Court. In other words, a fully functioning complementarity mechanism built on the twin precepts of institutional predictability and sovereign prerogative is a necessary but not sufficient condition for further movement by the United States toward accession to the Rome Statute.

Reevaluation of the emerging practice of complementarity was a key aspect of the Stocktaking Exercise undertaken by States Parties at the Kampala Review Conference. Because early critics of the court invoked public perceptions that its role undermines national prerogatives, the Complementarity Stocktaking was intellectually interrelated with parallel prongs aimed at assessing the best practices for Transnational Cooperation and the appropriate balance between Peace and Justice. The rhetoric from within the ICC has repeatedly emphasized that the overarching objective of ending impunity would be well advanced if functioning domestic systems made ICC involvement the rare exception. In theory, then, complementarity should not provide a basis for latent hostility or jurisdictional battles between the Court and sovereign States. For example, delegates overwhelmingly welcomed the passage of the Ugandan domestic statute that gave statutory shape to the domestic War Crimes Division [termed the WCD] created as a subcomponent of the High Court immediately prior to the Kampala Conference. This development is particularly relevant because Uganda is the first situation state to move forward with domestic prosecutions for atrocity crimes, even as the ICC continues to investigate aspects of the situation and pursue outstanding warrants of arrest. The reality on the ground in Uganda represents a microcosm of the larger truth that the ICC functions against the backdrop of state cooperation and support for an array of activities inherent in the pursuit of accountability. The implementation of complementarity through the admissibility regime nevertheless remains a key point of friction between the Court proponents and those who attempt to paint its provisions as an unwise and perhaps even immoral subversion of sovereign prerogatives.

The discussions in Kampala resoundingly reaffirmed the notion that justice is not, and should not be portrayed as, a zero sum game in which domestic success in prosecution and investigation is characterized as undermining the institutional credibility of the ICC. There was almost universal agreement among delegations that the admissibility regime, with all of its potential ambiguities, is far preferable to a system of explicit concurrent jurisdiction that would almost certainly have resulted in ever present jurisdictional clashes between the ICC and one or

more States with valid claims based on established principles such as nationality, territoriality, or passive personality.[4] Delegates in Kampala overwhelmingly agreed that the ICC should not reflexively assume an adversarial posture vis-a-vis sovereign States that are working in good faith to serve the ends of justice. Judge Kirsch, former President of the ICC, has pointed out that "[t]he ICC is founded on two pillars. The Court is the judicial pillar. The operational pillar belongs to States."[5] The textual predicates agreed upon in Rome have now begun to be implemented in the real world of judicial rulings and jurisdictional battles. Delegates in Kampala widely accepted the truism that the principle of complementarity (as implemented in the admissibility regime) requires the type of progressive factual inquiries and judicial findings that implement an appropriate balance of authority between the supranational court and domestic States. Progress towards achieving authentic justice in the future should be predicated on the establishment of consultative and constructive relations between domestic officials and the representatives of the Court. To this end, there was broad and deep consensus that complementarity is a cornerstone institutional principle of the ICC. U.S. leadership and largesse can be vital to assisting States and the Court achieve a holistic system of international justice.

Prospective Recommendations for U.S. Policy Priorities

With the focus in Kampala on implementing complementarity coinciding with renewed U.S. engagement with the Court, the time is ripe for reassessment of the American approach to strengthening this aspect of the international justice system. The U.S. has long been a staunch advocate of national prosecutions for the gravest of crimes. Reinvigorated efforts to strengthen that important dimension of the holistic system of international justice are fully warranted. Indeed, such efforts could be plausibly perceived as a vital element for strengthening the practical impact of the Court despite the U.S. status as a non-State Party to the Rome Statute. It cannot be forgotten that the ICC is designed to prosecute a tiny fraction of the potential cases in any given situation state. The lion's share of the responsibility both for preventing crimes within the jurisdiction of the Court and for punishing their commission belongs to sovereign States. The remainder of this paper outlines a four pronged approach for refining just such a strategy on the part of U.S. officials.

1. Revitalized development assistance focused on rule-of-law capacity building, including that which enables countries to effectively exercise their right to complementarity

In his first inaugural address, Thomas Jefferson articulated an American vision to provide an enduring purpose and principle in the international arena. Summarizing the themes that would

guide a maturing Republic through the uncertainties of a new era, President Jefferson began his speech by asserting the foundational principle of seeking "[e]qual and exact justice to all men, of whatever state or persuasion, religious or political."[6] President Jefferson portrayed a "bright constellation" composed of nonnegotiable values that would combine to form the "creed of our political faith" and serve as the touchstone for the future. Undersecretary Grossman echoed these enduring values more than two centuries later in the context of the ICC by publicly recommitting the U.S. to the promotion of the rule of law, in particular through the purposeful use of U.S. power to seek punishment for those who commit the crimes of most serious concern to the international community. As in other areas affecting important national interests, the United States has remained engaged in diplomatic discussions and legal development despite its overall unwillingness to become a State Party to the Rome Statute.[7]

To that end, the U.S. should reiterate its policy position that States are primarily responsible for ensuring justice and lasting societal stability in the wake of egregious international crimes. America has long been a generous funder for accountability efforts around the world, and has repeatedly used provisions of federal law to provide technical expertise, forensic assistance, investigative muscle, critical evidentiary support, and expert testimony to support judicial processes in the ad hoc and internationalized tribunals. U.S. information and other resources should of course be provided in strict accordance with U.S. law and with fully developed procedures for protecting sensitive information made available to the officials of other States or tribunals in the context of investigation or prosecution. These benefits should be consciously expanded and funded to assist domestic efforts to prosecute atrocity crimes based on the preexisting U.S. commitment to combating the most serious crimes of concern to the international community by building domestic judicial systems, strengthening political will, and using targeted aid to promote human freedom. This commitment should accelerate in the wake of Kampala, and should be augmented by an interagency review of the best process for providing such targeted assistance as expeditiously as possible.

Furthermore, the United States should have clear plans in place and designated expert teams available to help domestic States implement the best practices gleaned from the efforts to support international justice over the past decade plus of U.S. engagement. Such planning should include clear lines of authority and streamlined interagency mechanisms designed to speed aid and expertise to the precise point of greatest need in response to emerging requirements. At the same time, U.S. policymakers should not hesitate to acknowledge that the ICC is an inescapable component of the larger system of justice, which may serve American values when domestic States prove to be incapable of addressing atrocity crimes. U.S. efforts to support the rule of law should be cognizant of and on occasion consciously structured to support ICC efforts. In addition to investments in prosecutorial or judicial capacity to augment

the ICC role at the supranational level, for example, U.S. efforts could also develop investigative capacity and domestic procedures that would enable national governments to obtain, preserve, and share valuable evidence with the Court and to support the needs of the ICC in the context of complex investigations.

2. Assistance to domestic efforts to amend statutory frameworks to permit prosecution of crimes within the jurisdiction of the Court so as to ensure the primacy of domestic jurisdiction.

The obvious corollary to refocused U.S. development assistance is a renewed commitment to assist foreign domestic States in revising existing criminal statutes and enacting new codes or provisions necessary to implement complementarity. Preserving the individual state right to primacy of jurisdiction is perhaps the most important reason for codifying the range of crimes found in the Rome Statute. The cornerstone of complementarity means that the Court itself has a very strong policy interest in ensuring that the burden of addressing all cases involving violation of international norms is not displaced onto the Court. The ICC would predictably buckle under the weight of raised expectations and burgeoning dockets without sustained domestic enforcement efforts.

Further complicating these concerns is the reality that there is no universal statutory template for a satisfactory domestic criminal code that suffices in itself to preserve primary domestic jurisdiction. Some States have replicated the substantive crimes of the Rome Statute into their domestic codes either explicitly or by reference. Using the identical formulations from the Rome Statute simplifies ICC admissibility analysis because the identical definitions ensure that the judicial system is "able" to prosecute.[8] Though this approach superficially satisfies an admissibility test for those States that investigate or prosecute in good faith, the hidden danger is that the ICC could automatically decide that domestic officials who fail to allege the same charge that the Court deems appropriate are "unwilling genuinely" to prosecute the perpetrator and therefore unable to exercise their right to complementarity. There are other factors that may impel States to criminalize acts within ICC jurisdiction, including helping to strengthen the international criminal justice system by ensuring that atrocity crimes do not go unpunished and preventing sovereign territory from being used as a safe haven for those individuals who are fleeing prosecution.[9]

The U.S. has made notable progress with regard to its own domestic framework based upon its earlier commitment to "take steps to ensure that gaps in United States' law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice."[10] Congress should reexamine the interconnected

provisions of U.S. law to ensure that crimes within the jurisdiction of the ICC are fully proscribed under U.S. federal law. The U.S. government should field an interdisciplinary team of experts well versed in the field of international criminal law and familiar with the pragmatic problems associated with these complex cases. Such an official team of experts, leading academics, and practitioners should be available to assist other States in addressing the shortcomings of their own criminal and procedural codes. Furthermore, the U.S. should lend its support to interested States as they seek to develop a regularized process to enable the ICC to transfer cases from its own docket back to the sovereign authority of domestic States. A system similar to that developed in the ad hoc tribunals would permit a continuing engagement and even monitoring of due process adherence by domestic officials.

In addition, international expertise may well aid domestic officials in providing credible and legally correct solutions to recurring constitutionally based barriers encountered in other nations, such as the potential nullem crimen sine lege problem, sovereign immunity, and other issues of concern drawn from the framework of domestic human rights precepts. Congress should specifically consider amendment or repeal of other laws to the extent needed to enhance flexibility in the U.S. Government's engagement with the Court and its ability to support the enforcement efforts of other States.

3. Advocate and support evolution of ICC practice to preserve the prosecutorial prerogatives of States

ICC jurisprudence should not evolve to the point that domestic prosecutors make charging decisions based on the faint hope that the ICC will accept the form of the charges. If the ICC moves past the admissibility barrier based on a prima facie finding that the form of the domestic charges does not precisely mirror those deemed appropriate by the prosecutor applying the Rome Statute, nations such as the United States will confront a new hurdle in exercising their right to complementarity because they have implemented varying definitions of the ICC crimes into their domestic law. These domestic codes rest jurisdictional primacy on the strength of conduct proscribed under the various formulations found in the definitions of national legislation rather than expressly criminalizing every precise substantive provision of the Rome Statute.

The Court of the future could determine that the failure to allege the precise crime under ICC authority would itself constitute an unwillingness to prosecute sufficient to waive the right to complementarity. ICC judges could therefore view such prosecutions through the same lens as those cases arising in States that simply lack domestic implementation. These cases could predictably be deemed admissible before the court, and States would have no recourse other

than the appeals specified in the Rome Statute. Similarly, arguing that a domestic conviction for a lesser crime[11] does not preclude charges for the "real crime," the ICC Prosecutor could simultaneously circumvent the principles of ne bis in idem[12] and complementarity, which are preserved in the Rome Statute to protect the respective rights of perpetrators and the prosecutorial prerogatives of States.

U.S. policy on this point should be clear and consistent. The subordination of domestic charging prerogatives to the prosecutorial discretion of the ICC Prosecutor or Pre-Trial Chambers would turn the principle of complementarity on its head. Unlike other international tribunals, the ICC does not enjoy an inherent jurisdictional superiority. Although the Rome Statute allows the Prosecutor to select from a wide array of potential charges, and includes some offenses that could be charged under overlapping provisions, domestic officials are not thereby reduced to hoping that their selection of charges is sufficient to withstand ICC oversight. In such a scenario, States whose criminal codes duplicate the range of offense in the Rome Statute may very well face a prosecutorial paradox in that, while they are automatically presumed to be able, decisions to pursue any other charges against an accused other than those that conform precisely to those selected by the ICC prosecutor could be automatically construed as manifesting unwillingness to prosecute within the meaning of the admissibility criteria. Such an embedded ICC practice would violate the very purposes of the precepts of complementarity.

Ideally, a sentence should be added to Article 17, Paragraph 3 of the Rome Statute to the effect that any state cannot be considered as "unwilling or unable to prosecute based on good faith differences in the application of law and charging decisions. The Prosecutor shall give deference to the good faith application of law and charging decisions by States in proceedings against State nationals or others within a State's jurisdiction." This language would align Article 17 with Article 20 by focusing on the underlying conduct rather than the precise formulation relied upon by national authorities. In practice, the ICC should defer to the good faith reasoning of domestic officials applying the law of the sovereign, even where the form of the domestic charges varies from the prosecutorial preferences of the Office of the Prosecutor or the Pre-Trial Chamber. The United States should commit itself to providing expertise to States or individuals who seek to challenge a finding of admissibility by any future ICC component that limits domestic prosecutorial prerogatives in such a manner. U.S. officials should also file amicus briefs and communicate with the Court as needed to ensure that this adverse understanding of the complementarity criteria does not ossify in ICC practice.

Finally, as a parallel measure, the U.S. should assist States seeking to develop consultative mechanisms needed to demonstrate domestic good faith in criminal investigations or in the selection of a subset of available crimes for prosecution in the domestic forum. The subjective

requirement found in Article 17 that the state be "genuinely" incapable or unwilling to handle a particular perpetrator is left for the Court to ascertain. This gap caused one of the most distinguished international scholars to observe that this aspect of Article 17 is "enigmatic."[13] Accepting the reality that some external standard of review was needed to prevent illusory efforts by states, delegates rejected a series of proposed phrases such as "ineffective", "diligently", "apparently well founded", "good faith", "sufficient grounds", and "effectively" on the basis that such formulations remained too subjective.[14] In the final analysis, the formulation "genuinely" was accepted by delegations as being the least subjective concept considered, while at the same time eliminating external considerations of domestic efficiency in the investigation or prosecution.[15]

4. Designation of an Interagency Focal Point for Consultation and Coordination

In clarifying the accepted protocols for cooperation between the Court and sovereign states, the former President of the Court, Judge Phillipe Kirsch, publicly acknowledged that the ICC "will really have to invent, create, and define the meaning of a state that is unable or unwilling to conduct genuine proceedings."[16] As noted above, the U.S. should work with interested States to develop a set of best practices guidelines to aid domestic officials in their interactions with the ICC and facilitate demonstrations of good faith investigative or prosecutorial efforts. One such practice that should be encouraged and assisted where necessary is the designation of a domestic focal point for ICC coordination. There is at present no established framework under the Statute for States Parties to consult collectively or to develop consensus communications to the Court on complementarity and related matters, which requires States or groups of States to do so on an ad hoc basis. Conversely, Court officials are forced to consult with, and gather information from, various officials in different parts of situation states. National officials often may be unable to coordinate responses to Court requests in a coherent, consistent, and unified manner.

Appointing a single authorized spokesperson, with a supporting bureau and an accompanying statement of political support can fill this gap. A distinct and designated bureau, headed by a single qualified official, to facilitate ongoing communication between domestic officials and representatives of the ICC will provide a clear point of contact to reduce confusion and ensure the efficient progression of cases. Such a focal point will be able to oversee all stages of the investigation, and better coordinate with organs of the Court. The Rome Statute nowhere specifies a regime for achieving a harmonization of effort between the investigative and prosecutorial efforts of the Court and those of domestic states. The Office of the Prosecutor is obligated to notify "all States Parties and those States which, taking into account the

information available, would normally exercise jurisdiction" prior to proceeding with a propio motu investigation.[17] This obligation is of course subject to limitation based on the needs of confidentiality and the preservation of evidence, but is notably not accompanied by any obligation to assist a state that is both willing and able to prosecute or investigate a perpetrator. There is no correlative process accompanying notification for actually providing assistance to those States that are willing and able to initiate investigations and prosecutions where appropriate using the applicable domestic procedures.

This gap in the Rome Statute structure creates a one sided scheme whereby States Parties must comply with their obligations to cooperate in all stages of investigation and prosecution; meanwhile, the Prosecutor need not reciprocate. Indeed, in the Ugandan situation, the State Party has assisted with the collection of evidence that is now unavailable to its Directorate of Public Prosecutions, even for the investigation and trial of perpetrators not subject to warrants of arrest in the Court. The Statute therefore creates an imbalance that, at best, undermines the rights of States to exercise complementarity, and at worst creates barriers to the effective and efficient use of domestic forums that are capable of assisting the efforts of the Court to create a comprehensive system of criminal accountability.

A system of designated domestic focal points would facilitate the Prosecutor's responsibility to periodically inform affected States that would normally exercise jurisdiction of the progress of its investigations and any subsequent prosecutions. The United States should set the example for other States by establishing precisely such a coordinating mechanism at the federal level. This approach would provide the tangential benefit of helping to aid Court support to ongoing domestic prosecutions or investigations when warranted.

This evolution should occur in the broader context of a cooperative synergy between States and the Court based on the shared commitment to the principles of justice and equality of arms in the investigation or prosecution of perpetrators. Such a synergy between the Court and domestic officials is the essential core of complementarity as it was designed in the Rome Statute. By extension, a network of designated focal points among nations would create a permanent channel for consistent communication among States for the discussion of complementarity related issues. A network of domestic focal points would thus provide States Parties with readily available channels for disseminating legal and policy decisions related to complementarity. Designated focal points for Court coordination would be a tangible demonstration of a revitalized constructive dynamic between the Court and all States affected by its investigations and prosecutions. A more institutionalized approach, particularly by States Parties, to communications regarding good faith decisions whether to proceed with an investigation or prosecution would also help streamline complementarity considerations and

the subsequent review of admissibility under the Statute. Furthermore, domestic focal authorities would provide a predictable avenue for Court officials to raise concerns in connection with admissibility challenges, thereby increasing the cooperative synergy between sovereign States and the organs of the Court. The net effect of these changes would be to foster a constructive and continuing dialogue on the implementation of complementarity between States which would in turn facilitate political oversight, analysis, and assessment to ensure that complementarity is functioning as intended by the drafters of the Rome Statute.

Finally, the United States should work with States Parties to insist that any information or assistance provided to the ICC be done on the basis of reciprocity. In other words, the Prosecutor should be obliged to cooperate with and provide assistance to domestic officials conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the legislation implementing the right to exercise complementarity. Harmonizing the free flow of communication between sovereign States and the Court and vice versa would foster a climate of trust and cooperation which in turn would enhance the operational aspects of a viable complementarity regime. Complementarity obligates the Court to defer to good faith domestic investigations or prosecutions. Improving the constructive dynamic by providing information on a reciprocal basis could enhance the effectiveness of the Court's investigations, particularly insofar as it might facilitate more active U.S. engagement in the form of investigative assistance or information to the ICC.

Conclusion

More than a century ago, the creator of the Hague Peace Conference, Czar Nicholas, cautioned, "[o]ne must wait longer when planting an oak than when planting a flower."[18] Even in the post Kampala era, "no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable."[19] Thus, while the Kampala Review Conference represented one important signpost marking the evolutionary innovations necessary to achieve lasting justice, its discussions by no means marked the endpoint of American efforts to achieve a fully functioning complementarity regime. It is worth recalling that the original intent of the Moscow Declaration, issued at the height of the horrors of World War II,[20] was the preference for punishment in the national courts of the countries where the crimes were committed.[21] Modern international criminal law is an integrated discipline that is far more than the "codeless myriad of precedent" that Tennyson famously described as a "wilderness of single instances."[22] Judges around the world may now refer to a sweep of readily available jurisprudence to inform domestic enforcement efforts.[23] The ICC has helped to

initiate a new era of universalized understanding of international norms along with an accompanying cadre of prosecutorial and judicial expertise that can be marshaled to assist sovereign states. The right to complementarity empowers those domestic officials who are willing to undertake the task of investigating complex violations of international norms despite the siren songs of political expediency or personal danger. The era of enforcement is irrevocably underway and sovereign States retain primacy for the good faith investigation and enforcement of international norms alongside an overarching ICC authority. The United States should be resolute in its determination to stand on the side of domestic justice when it strengthens the roots of societal stability and long-term peace.

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[1] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002 [hereinafter Rome Statute], arts. 12-19.

[2] President Clinton, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), 37 Weekly Comp. Pres. Doc. 4 (Jan. 8, 2001), reprinted in Sean D. Murphy, United States Practice in International Law, Volume 1: 1999-2001 384 (2002).

[3] In the official policy pronouncement on May 6, 2002, the Under Secretary of State for Political Affairs restated the U.S. commitment to promoting the rule of law and ensuring accountability as the ICC came into existence and promised that to "support politically, financially, technically, and logistically any post conflict state that seeks to credibly pursue domestic humanitarian law." Marc Grossman, Under Sec'y of State for Political Affairs, U.S. Dep't of State, "American Foreign Policy and the Criminal Court" remarks to the Center for Strategic and International Studies, May 6, 2002, available at http://www.iccnow.org/documents/USUnsigningGrossman6May02.pdf.

[4] M. Cherif Bassiouni & Christopher Blakesly, The Need for an International Criminal Court in the New International World Order, 25 Vand. J. Transnat'l L. 151, 170 (1992).

[5] Philippe Kirsch, President of the ICC, "Current Challenges to International Criminal Justice—ICC ten years after adoption of the Rome Statute," remarks made at Seminar Organized by the Finnish Institute for International Affairs in cooperation with the Ministry of Foreign Affairs, June 12, 2008, available at http://www.icc-cpi.int/library/organs/presidency/PK_20080612-ENG.pdf (last viewed Jan. 15, 2009).

[6] Thomas Jefferson, First Inaugural Address, March 4, 1801, reprinted in WILLIAM J. BENNETT, THE SPIRIT OF AMERICA 347 (1997).

[7] See, e.g. Michael A. Newton, Exceptional Engagement: Protocol I and a World United Against Terror, 42 TEX. INT'L L. J. 323 (2009).

[8] See generally R v. Sec'y of State for Def., (2007) 3 W.L.R. 33 (H.L.) (Where British soldiers were accused of committing war crimes and the case was brought to the attention of the ICC prosecutor. The UK stepped in and prosecuted the soldiers, which they were able to do since they had the proper domestic legislation. Subsequently, the ICC prosecutor found the prosecution sufficient and did not try the soldiers under the ICC).

[9] Roy S. Lee, State's Responses: Issues and Solutions, in STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 22 (Roy S. Lee ed., Transnational Publishers 2005).

[10] Marc Grossman, Under Sec'y of State for Political Affairs, U.S. Dep't of State, "American Foreign Policy and the Criminal Court" remarks to the Center for Strategic and International Studies, May 6, 2002, available at http://www.iccnow.org/ documents/USUnsigningGrossman6May02.pdf.

[11] Some states refer to these as "cognate offenses" and "minor offenses."

[12] Rome Statute, supra note 1, art. 20.

[13] William Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 67 (2001).

[14] Rod Jensen, Complementarity, "Genuinely"and Article 17: Assessing the Boundaries of an Effective ICC, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY 147, 155 (Jann Kleffner & Gerben Kor, eds. 2006).

[15] John Holmes, Complementarity: National Courts versus the ICC, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (A. Cassese, et. al eds. 1st ed. 2001

[16] Phillipe Kirsch, John Tait Lecture in Law and Policy (Oct. 7, 2003), cited in Gregory McNeal, ICC Inability Determinations in Light of the Dujail Case, 39 CASE W. RES. J. INT'L L. 325 (2006).

[17] Rome Statute, supra note 1, art. 18(1).

[18] James Brown Scott, The Hague Peace Conferences of 1899 and 1907 xiv (1915).

[19] Report of the Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies", 23 Aug 2004, UN Doc S/2004/616 , available at http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement (last visited Oct. 27, 2007).

[20] MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 146-47 (2007). The text of the Moscow Declaration is available at http://www.yale.edu/lawweb/avalon/wwii/moscow.htm (last visited Oct. 31, 2007).

[21] IX Department of State Bulletin, No. 228, 310, reprinted in REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11 (1945) The Moscow Declaration was actually issued to the Press on November 1, 1943. It purported to put criminals on notice that they would be "brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged."

[22] Alfred, Lord Tennyson, Aylmer's Field (1793), available at http://www.everypoet.com/archive/poetry/Tennyson/tennyson_contents_aylmers_field.htm

[23] Al-Waqa'i Al-Ivaqiya [The Official Gazette of the Republic of Iraq], Law of the The Iraqi Higher Criminal Court, Oct. 18, 2005, 4006 No. 10, art. 17 (Second) (expressly permitting the Iraqi judges to "resort to the decisions of international criminal tribunals" when needed to interpret and apply the provisions punishing genocide, war crimes, and crimes against humanity as incorporated into Iraqi law), available at http://law.case.edu/grotian-moment-blog/documents/IST_statute_official_english.pdf .

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Beyond Kampala Complementarity and the International Criminal Court: The Next Steps for U.S. Engagement

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Introduction

The Rome Statute of the International Criminal Court rests on the fundamental principle that the Court is to be complementary to national criminal jurisdictions.[1] This idea emerged in the early stages of the ICC negotiations[2] and stands in contrast to the primacy jurisdiction exercised by the International Criminal Tribunals for the former Yugoslavia and Rwanda. Potential States Parties to the ICC Treaty wished to limit the Court to cases that otherwise would not or could not be heard by national courts, and, for the most part, did not wish to endow the ICC with any power to oust domestic courts of their own jurisdiction.

Complementarity is not a defined term in the Rome Statute, but has three dimensions: substantive (what does it mean), procedural (how is it implemented) and what I have referred to in earlier writings as prudential or political (what policy choices it represents).[3] Procedurally, complementarity is effectuated through the application of Article 17 of the Rome Statute, which provides that a case is inadmissible before the ICC if: (1) national jurisdictions are investigating or prosecuting (or have already done so), unless they are unwilling or unable to genuinely carry out the investigation or prosecution; (2) the crime is not of sufficient gravity; or (3) the person has already been tried for the conduct on which the complaint is based.[4] Admissibility differs from jurisdiction, although the two concepts are related; to proceed with a case under the Rome Statute, the Court must have the power to hear the case— that is, the Court must have jurisdiction (personal, subject matter, temporal, geographic, etc.) and the case must also be admissible. The criteria in the Statute for exercising the Court's jurisdiction are relatively clear; the same is not true for the Statute's admissibility requirements. This is probably in part due to the fact that complementarity, unlike jurisdiction, is a new concept in international criminal law.

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Article 19 of the Rome Statute provides that the Court must satisfy itself to jurisdiction, but may on its own motion determine the admissibility of a case under Article 17. The Prosecutor, however, must always determine that a case is admissible,[5] which includes a requirement that the complementarity principle be satisfied.[6] Indeed, in cases referred by a State Party or initiated by the Prosecutor on his own initiative proprio motu, the Prosecutor is essentially required to activate the complementarity requirement by notifying all States Parties of his investigations to permit those States to inform the Court that they, rather than the ICC, will undertake the investigations required.[7] Additionally, the Prosecutor must alert all States that would normally exercise jurisdiction over the crimes concerned.

The notion of complementarity provided fertile soil for debate both before and after the Statute's adoption and entry into force, in part because of the complexity of the articles on the question of complementarity, jurisdiction and admissibility. For example, may a State waive a complementarity-based objection? Does it do so in cases involving self-referrals, in which the State refers cases arising within its own territorial jurisdiction? Does complementarity apply to a Security Council referral? Finally, how can the Court make the complexity of the ICC regime on jurisdiction and admissibility operational so that it fairly limits the Court's jurisdiction, but does not overwhelm the Court with procedural obstacles to its proceedings or otherwise impede the fair and effective administration of justice?

Early Case Law on Complementarity

Some of these questions have been addressed by the Court in its first decisions on the application of Article 17. The first cases on admissibility arose in situations of self-referral by a State Party to the Rome Statute, namely Uganda and the Democratic Republic of the Congo (DRC), and the Court did not find any of these cases inadmissible. Regarding admissibility at the arrest warrant phase of the proceedings, the Court has articulated a principle of inactivity: so long as no State is active with respect to a particular case, it is admissible before the Court without further analysis of the State's unwillingness or inability.[8] Additionally, "inactivity" has been broadly construed; Pre-Trial Chamber I held in the Lubanga case (DRC) that for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court.[9]

With respect to proceedings at a later stage, in the case of Germain Katanga (DRC), the accused, who had been arrested by national authorities, argued that he had been subject to legal proceedings for the same crimes in the DRC. His claim was rejected both by Trial Chamber II and the ICC Appeals Chamber, which found the case admissible due to inaction on the part of

the State. Trial Chamber II observed that if a State chooses not to investigate or prosecute an accused on the crimes charged by the ICC prosecutor before its own courts, that evidences "unwillingness," even if the State nonetheless wishes justice to be done.[10]

While the "inactivity" and "same conduct" doctrines have been criticized,[11] they are not inconsistent with the text of Article 17. Moreover, it seems entirely consistent with the policy considerations that led to the adoption of the complementarity doctrine at Rome for the Court to favor a reading of the Statute that permits States engaging in self-referrals, to essentially waive their possible complementarity objections (but not necessarily those of the accused who would in all cases still be protected by the other provisions of Article 17) unless they later determine to charge a particular accused with the same conduct and crimes as the ICC has done. Perhaps this is not only a legal issue, but also a political "cost" to a State of the self-referral process. Nor is it inconsistent with the drafters' intentions or expectations in Rome that cases would come to the Court by States referral of crimes taking place within their own territories. Indeed, this early jurisprudence arguably promotes a clear understanding of how a State must proceed to successfully challenge admissibility, one that appears consistent with the drafters' intentions to protect States from unwanted intrusion from the ICC.[12]

Nonetheless, it must be acknowledged that these early decisions permit States to render cases admissible before the ICC by failing to investigate or prosecute international crimes for "political, financial, logistical, local, or even external reasons."[13] Moreover, the question of what happens if a self-referring State changes its mind and wants the case returned, and what that implies for the allocation of resources by the ICC (which may have invested time, energy and financial resources in a particular prosecution) remains unanswered. The Statute's response is that the State in question can mount a challenge under Article 19(2)(b), but unless there are extenuating circumstances, it may only do so once, and must do so prior to or at the commencement of the trial.[14] Even in cases where a State is the unwilling target of an ICC investigation and argues that it should be given the opportunity to proceed itself, such as the Sudanese and Kenyan situations, the Court's jurisprudence has been remarkably consistent. For example, the holding in Harun (Sudan) was that a case is admissible unless national proceedings "encompass both the person and the conduct which are the subject of the case before the Court."[15] Because Article 18 of the Statute permits States to intervene at very early stages of the proceedings when they may not have developed specific case files, the Court's jurisprudence may be more problematic in situations where the Prosecutor has initiated a case proprio motu or the State is an unwilling target of the ICC. This is particularly so, since the entire philosophy of Article 18 permits States (even non-party States) to open investigations to require

the ICC Prosecutor to defer proceedings. There has certainly been more discussion on these cases, but until now, the Court's position has remained both consistent and clear.

Positive Complementarity and the Practice of the ICC Prosecutor

In spite of initial fears that the complementarity principle could hamper the operations of the Court, the idea now has been embraced as one of the Rome Statute's greatest strengths. This is largely due to the emergence of the concept of "positive" complementarity. This idea, which was first pioneered by the ICTY and the ICTR, suggests that a major contribution of an international criminal jurisdiction is not only to try perpetrators itself, but to serve as a resource and a catalyst for national legal systems, helping them to build capacity and encouraging them to take up cases themselves. ICC Prosecutor Ocampo took this position from the outset of his term, producing a policy paper that emphasized first, that the OTP would only "take action . . . where there is a clear case of failure to take national action"; and second, that "[a] major part of the external relations and outreach strategy of [OTP] will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes."[16] Uganda, for example, took this idea seriously and adopted legislation creating a special War Crimes chamber to take cases that otherwise might have gone to the ICC.

The ICC Prosecutor has suggested that his approach to complementarity will involve two "guiding principles": (1) partnership with States and (2) vigilance on the part of his office to ensure that States are truly fulfilling their duties to investigate and initiate proceedings.[17] This approach, read in conjunction with the Court's early jurisprudence, suggests that complementarity requires ICC States Parties to enact implementing legislation both enabling them to cooperate with the Court and domesticating the crimes within the Court's jurisdiction so that their own national prosecutorial authorities can investigate and proceed with cases that could otherwise be heard before the Court.[18]

Complementarity and the Review Conference

The Kampala Review Conference involved two separate activities: consideration of a limited number of amendments to the Rome Statute, and a "stocktaking" of the Court's performance. The stocktaking exercise involved four categories of discussions, one of which addressed complementarity. The discussion paper circulated prior to the Review Conference noted that States have the primary responsibility to investigate and prosecute massive crimes and that the capacity of the Court is limited by a variety of factors. The combination of these two factors

suggests that any impunity gap, whether horizontal or vertical, stemming from the Court's lack of capacity should be addressed by national legal systems.[19] The Report and the Review Conference focused almost entirely on the question of positive complementarity referring, as the Bureau noted to:

> [A]ll activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States.[20]

Questions involving complementarity as operationalized in the Court's Statute were therefore emphasized much less than those involving national capacity, but they did emerge during the opening panel discussion and the reflections subsequently presented by President Song and Prosecutor Ocampo.

The formal stocktaking session on complementarity took place on June 3, 2010, during the seventh plenary session of the Conference. Six panelists were convened and the discussion was moderated by Professor William A. Schabas, Director of the Irish Centre for Human Rights, and himself an outspoken critic of the ICC's complementarity jurisprudence. Participants included Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights; Serge Brammertz, the Chief Prosecutor of the ICTY; The Honorable Akiiki Kiiza, Justice of the War Crimes Division of the High Court of Uganda; Colonel Toussaint Muntazini Mukimapa, Deputy Auditor General in the DRC; Geraldine Fraser-Moleketi, Director of the Democratic Governance Group for the United Nations Development Programme; and Karel Kovanda, Deputy Director General for External Relations from the European Commission.[21]

The discussion was animated, and focused upon three general points. First, the panel focused on how the ICC, through the principle of complementarity, could encourage States to assume primary responsibility for investigations and prosecutions of the crimes within the Court's jurisdiction.[22] Second, the panel looked at what forms of technical assistance, training, and financial assistance States might need to implement positive complementarity. Third, there was much discussion of the relationship developed between national legal systems and the ICC with respect to the evolution of the situation in the DRC and Uganda. The High Commissioner for Human Rights and Colonel Mukimapa made a generally favorable reference in passing to the Court's case law on inactivity.[23] Interestingly, however, both Colonel Mukimapa and Justice Kiiza suggested that although the initial referral and admissibility of the cases involving their

countries was proper, national authorities in Uganda and the DRC now stood ready to "try anyone brought before them . . . including the indictees before the Court".[24] Two additional points emerged from subsequent discussions. First, that the Court itself cannot assume full responsibility for national capacity building. Second, that financial and other assistance to victims and witnesses should take place even prior to cases moving forward at the ICC.

The ninth plenary session of the Review Conference adopted a resolution on complementarity emphasizing the primary responsibility of States to investigate and prosecute the most serious crimes of international concern; calling for more effective implementation of domestic measures to implement the Rome Statute and the strengthening of domestic capacity to permit them to do so; and remanding the issue to be further taken up at the tenth session of the Assembly of States Parties.[25] The Kampala Declaration adopted by the Review Conference reinforces this Resolution, providing that the States Parties to the Rome Statute:

> Resolve to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally recognized fair trial standards, pursuant to the principle of complementarity.[26]

Thus, participants at the Review Conference agreed upon the importance of domestic implementation of the Rome Statute but opined little regarding the actual operation of the principle of complementarity in the practice of the Court, perhaps implicitly signaling their acceptance of the Court's jurisprudence in this regard. Yet, it is not clear how these broad statements on positive complementarity will be translated into action. It remains to be seen how keen the Assembly of States Parties is to charge its Secretariat with the task of facilitating the exchange of information between the Court and other interlocutors in order to strengthen domestic jurisdictions.[27] The President of the Court, Judge Sang-Hyun Song, recently emphasized that the Court is "neither a development agency nor a training academy and does not aim to be one."[28] The generality of the outcome documents is probably to be expected given the high-level nature of the meetings and the fact that the stocktaking exercises took place in plenary session, making a detailed discussion of the technical aspects of the Statute's operation difficult to achieve.

The U.S. Position on Complementarity

As a non-party State to the ICC, the United States is not required either to implement the Rome Statute or to cooperate with the Court. Nevertheless, complementarity as a guiding principle resonates very much with the U.S. perspective on international criminal justice, and the concept was strongly supported by the U.S. delegation during the Rome Statute's negotiation. Thus, the U.S. delegation at Kampala was supportive of the discussions on complementarity and was an active participant on this issue, even sponsoring a well-attended side event during the Conference on the question of complementarity regarding the case of the DRC. The United States also pledged during the Conference to "renew its commitment to support rule-of-law and capacity-building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide," thereby taking a public stance favoring the notion of positive complementarity in practice.[29]

Next Steps for U.S. Engagement on the Question of Complementarity

In his speech at Kampala, Ambassador-at-Large for War Crimes issues Stephen J. Rapp emphasized the U.S. desire to assist the Court in achieving its core objectives. Quoting from the National Security Strategy of the United States, he emphasized that "the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs."[30] The ICC will clearly never be able to prosecute all those responsible for crimes under its jurisdiction. Even States with the will to move forward may have difficulty doing so due to an absent or incomplete legislative framework for doing so, limited expertise in carrying out investigations, lack of resources, an inability to protect witnesses, judges and lawyers, and overcrowded or insufficient prison facilities. These difficulties may plague not only a State's ability to address the crimes within the ICC's jurisdiction but impede the administration of justice in that State more generally. This means that assistance in this way is not just about supporting the ICC, but falls under the rubric of a more general "rule-of-law" approach.

As noted by the Report of the Bureau on Stocktaking, States like the United States can promote positive complementarity in three primary ways:

> (1) By offering legislative assistance, which may include drafting appropriate legislative framework and even assistance in overcoming domestic hurdles for adopting such legislation;

(2) By offering technical assistance and capacity building with respect to domestic judicial systems, including training of police, investigators and prosecutors, supplying judges and prosecutors, training judges, prosecutors and defense counsel or even providing security or assisting in helping States develop programs for witness and victim protection;

(3) By assisting with the construction of physical infrastructure such as courthouses and prison facilities.[31]

All three of these areas involve the kind of assistance that the United States excels at; both through government programs under the aegis of U.S.AID or the Departments of State, Justice and Defense, and through private efforts undertaken by civil society organizations and the American Bar Association. Indeed, this is a domain where the United States has both the tools and the expertise to be of assistance. All that needs to be done is to orient this assistance explicitly to support ICC complementarity. The U.S. government could establish an interagency working group to assist in this kind of technical assistance and capacity building, and could support national and international efforts to do so as well. These activities would fulfill the U.S. pledge at Kampala to support rule-of-law and capacity building projects. They also allow the United States to pursue a constructive agenda that engages both ICC States Parties and non-party States in a way that benefits U.S. interests in a more peaceful and secure world. This will further assist other State interests in seeing the United States assume its traditional role as a key supporter and protector of the international rule-of-law.

A second, but considerably more challenging, potential avenue for U.S. engagement in the area of complementarity is for the United States to adopt additional legislation incorporating the Rome Statute crimes into U.S. domestic law. This is more difficult because it requires a clear mandate not only from the Executive branch, but also from Congress. The United States already has legislation permitting prosecutions of war crimes[32] and genocide.[33] Congress recently amended the U.S. code to criminalize the recruitment and use of child soldiers[34] and to expand the United States' jurisdictional capacity in genocide cases.[35] The largest gap is in the area of crimes against humanity, where legislation has been discussed, but no action has yet been taken.[36] As noted above, the early jurisprudence from the Court suggests that for a State to successfully invoke complementarity before the ICC, it must be pursuing the individual in question for the same conduct and using the same incrimination as the ICC. While this case law is preliminary, it would nonetheless seem prudent for the United States to equip itself with the ability to invoke complementarity before the Court, should it wish to do so in the future. An additional bonus of adding these provisions to U.S law would be the ability of the United States

to fully prosecute cases of war crimes, crimes against humanity and genocide against individuals who may have emigrated to the United States but who may have committed atrocities abroad or even, should such a situation arise, to prosecute U.S. nationals accused of these crimes. In that way, the United States would be embracing positive complementarity not only for lesser developed countries in need of assistance, but for itself, as well.

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[1] Rome Statue of the International Criminal Court, Preamble & art. 1, 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 [hereinafter Rome Statute].

[2] See generally Leila Sadat Wexler, The Proposed Permanent International Criminal Court: An Appraisal, 29 CORNELL INT'L L. J. 665 (1996).

[3] Leila Nadya Sadat & S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 88 GEO. L. J. 381, 414 (2000). See also LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW (2002).

[4] Rome Statute, supra note 1, art. 17.

[5] Id. art. 53(1)(b).

[6] Id. arts. 19 & 53(1)(b).

[7] Rome Statute, supra note 1, arts. 18(1) & (2).

[8] See, e.g., Prosecutor v. Joseph Kony et al., Case No. ICC-02/04-01/05-1-OA3, Judgment on the Appeal of the Defense against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009 ¶ 85 (Sept. 16, 2009) (affirming Pre-Trial Chamber's findings of admissibility); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, (Reclassified as public pursuant to Decision, Case No. ICC-01/04-01/06-37) (March 9, 2006).

[9] Lubanga, supra note 8, ¶ 38.

[10] Prosecutor v. Germain Katanga et al., Case No. ICC-01/04-01/07, Reasons for the Oral Decision on the motion challenging the Admissibility of the Case (Art. 19 of the Statute), ¶ 77 (June 16, 2009). In the Kony case, Pre-Trial Chamber II initiated proceedings on the admissibility of the case, but, after a hearing, affirmed that the case was admissible due to inaction on the part of the relevant national authorities. See note 8, supra.

[11] See, e.g., William Schabas, Prosecutorial Discretion v. Judicial Activism, 6 J. INT'L. C. J. 731 (2008).

[12] Indeed, Darryl Robinson argues not only that the Court's jurisprudence is correct, but mandated by the Statute itself. Darryl Robinson, The Mysterious Mysteriousness of Complementarity, 21 CRIM. L. FOR. 67 (2010).

[13] Nidal Nabil Jurdi, Some lessons on complementarity for the International Criminal Court Review Conference, 34 S. AFR. Y. BK. INT'L L. 28, 31 (2009). For additional criticism see William Schabas, Carsten Stahn and Mohamed M. El Zeidy, The International Criminal Court and Complementarity: Five Years On, 19 CRIM. L. FOR. 1, 1-3 (2008).

[14] Rome Statute, supra note 1, art. 19(4).

[15] Prosecutor v. Ahmad Mohammad Harun, et. al., Case No. ICC-02/05-01/07, Decision on the Prosecution application under Article 58(7) of the Statute, ¶ 24 (PTC-I, Apr. 27, 2007)

[16] Paper on some policy issues before the Office of the Prosecutor, 3 (September, 2003).

[17] ICC OTP, Informal Expert Paper: The Principle of Complementarity in Practice, para. 68, ICC-OTP 2003, available at http://www.icc-cpi.int/library/organs/otp/ complementarity.pdf.

[18] Pursuant to Articles 18 and 19, non-party States may challenge admissibility under the Statute as well, but they have no obligation to cooperate with Court unless the Security Council has so mandated pursuant to its Chapter VII authority.

[19] Resumed Eighth Session, ICC Assembly of States Parties, Report of the Bureau on Stocktaking: Taking stock of the principle of complementarity: bridging the impunity gap, ICC-ASP/8/51 (Mar. 18, 2010)[hereinafter Bridging the impunity gap]. Horizontal gaps may emerge between situations that are investigated by the Court and others that for legal or jurisdictional reasons are not; vertical gaps may emerge between those most responsible, who presumably will be tried before the Court, and lower level perpetrators who will not. Id. ¶ 14.

[20] Id. ¶ 16.

[21] The Panel discussion was intended to address four questions: elaboration of the principle of complementarity; practical application of complementarity and the Rome Statute system; concept of positive complementarity, what is it and why is it necessary?; possible practical implementation of positive complementarity/enabling national jurisdictions. Stocktaking of International Criminal Justice: Complementarity, Template, RC/ST/CM/INF.1 (May 30, 2010).

[22] Review Conference of the Rome Statute, Stocktaking of international criminal justice: Taking stock of the principle of complementarity: Bridging the impunity gap, [Draft] informal summary by the focal points, paras. 6, 16, 22-23, 44 RC/ST/CM/1 (June 22, 2010).

[23] Id. ¶ 9, 34.

[24] Id. ¶ 25 (relating to the situation in Uganda); see also ¶ 34 (asserting that Democratic Republic of the Congo . . . was capable of judging all cases). As noted above, under article 19, the ability of States and the accused to challenge complementarity after the commencement of trial is limited, however.

[25] ICC Assembly of States Parties, Review Conference of the Rome Statute, Resolution on Complementarity, RC/Res.1, (June 8, 2010) (adopted by consensus), available at http://www.icc-cpi.int/Menus/ASP/ReviewConference/Resolutions+and+Declarations

[26] ICC Assembly of States Parties, Review Conference of the Rome Statute, Kampala Declaration, RC/Decl.1, ¶ 5 (June 1, 2010) (adopted by consensus), available at http://www.icc-cpi.int/Menus/ASP/ReviewConference/Resolutions+and+Declarations

[27] Bridging the impunity gap, supra note 8, at ¶ 54(e).

[28] Judge Sang-Hyun Song, ICC President, Keynote Remarks at ICTJ Retreat on Complementarity, Greentree Estate, New York (Oct. 28, 2010).

[29] ICC Assembly of States Parties, Review Conference of the Rome Statute, Pledges, May 31- June 11, 2010, ICC Doc. RC/9, at 18, (July 15, 2010) available at http://www.icc-cpi.int/Menus/ASP/ReviewConference/Pledges.htm.

[30] Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes, Review Conference of the International Criminal Court, Kampala Uganda (June 1, 2010).

[31] Bridging the impunity gap, supra note 19, at ¶ 17.

[32] Nonetheless, the War Crimes Act of 1996, as amended, 18 U.S.C. § 2441 does not provide for universal jurisdiction and may permit for amnesty arrangements, so it does not quite track art. 8 of the Rome Statute.

[33] 18 U.S.C. § 1091 (2010).

[34] 18 U.S.C. § 2442 (2010).

[35] The reach of the Genocide Implementation Act of 1987, 18 U.S.C. §1091 was recently expanded with the adoption of the Genocide Accountability Act of 2007, Pub. L. No. 110-151; 121 Stat. 1821

(2007), codified at 18 U.S.C. § 1091 (2010), but most commentators maintain that the reach of the U.S. law on genocide is more limited than the text of the Rome Statute.

[36] Leila Nadya Sadat, A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, ¶¶ 133-134 in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat, ed., Cambridge 2011)(forthcoming).

Strengthening the Impact of the International Criminal Court on Victims and Witnesses

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United States Government Engagement With the International Criminal Court Post-Kampala: Victims and Affected Communities

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Introduction

At the time of the adoption of the Statute of the International Criminal Court (ICC) in Rome in 1998, the parties had yet to reach agreement on a definition of the crime of aggression, and thus provided in the Statute a provision for a Review Conference seven years after its entry into force. This Review Conference took place in Kampala, Uganda from May 31 to June 11, 2010. While debates regarding the crime of aggression occupied a substantial portion of the discussions in Kampala, the architects of the Review Conference, responding in part to calls from non-government organizations ("NGOs") and civil society groups, wisely decided to expand the Review Conference to look more broadly at the work of the Court and its impact as well as the future trajectory of the Rome system. This exercise, termed as "stocktaking on international criminal justice", occupied much of the first week of the Review Conference and was widely perceived as useful by those attending the conference, including representatives of ICC States Parties, observer States, international organizations and NGOs. The format for discussion of each of these stocktaking exercises was similar, with a session of the conference devoted to the particular theme and approximately one-half of the allotted time going towards a moderated panel discussion composed of experts and the balance of the time allotted to responses by States and NGOs.

One of the four stocktaking subjects was "Victims and Affected Communities". This was certainly a natural subject to be examined in view of the important place that victims and affected communities occupy in the Rome Statute and the work of the Court. In its preamble,

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the Rome Statute puts the "millions of children, women and men [who] have been victims of unimaginable atrocities that deeply shock the conscience of humanity" at the center of its mission and a critical part of its raison d'être. Moreover, the Rome Statute and the ICC have, in a groundbreaking step, established the rights of victims as key participants and rights-holders in international criminal proceedings. In view of this motivation and these commitments, these issues are urgent ones for the Court and its supporters.

Outcomes of Stocktaking Exercise on Victims and Affected Communities

The official stocktaking on victims at the Review Conference was coordinated by Finland and Chile as focal points. Ms. Radhika Coomaraswamy, Special Representative of the United Nations Secretary-General for Children and Armed Conflict was the keynote speaker. I sat on the panel alongside Elisabeth Rehn, Chairperson of the Board of Directors of the Trust Fund for Victims (TFV), Carla Ferstman, Director of REDRESS, Binta Mansaray, Registrar of the Special Court for Sierra Leone, Silvana Arbia, Registrar of the ICC, and Justine Masika Bihamba, coordinator of Synergie des femmes pour les victimes des violences sexuelles (SFVS), an umbrella organization of many local NGOs in the Democratic Republic of the Congo (DRC). The panel was moderated by Eric Stover, Director of the Human Rights Center of the University of Berkeley.

The discussion itself was a wide-ranging one, commencing with a discussion of the provisions of the ICC Statute relating to victims and affected communities and the work of the Registry and Court in implementing these provisions. Unlike the ad hoc tribunals, the ICC Statute provides for the participation of victims in the Court's proceedings as well as providing for the right to reparations. At the ICC, victims have therefore, moved from the periphery of international law (as objects of the proceedings or, at best, serving as witnesses) to having standing in the proceedings themselves as well as the right to claim and receive reparations. These are ground-breaking, if not revolutionary, developments and have been justly celebrated. However, tremendous practical challenges remain in making these rights a reality. Thus, much of the discussion on the panel and the debate that followed focused on the difficulties that the ICC faces in converting the ICC's promise to victims into reality. A key challenge is developing effective outreach strategies and programs, as many victims have very limited information regarding the Court, much less an understanding of their rights under the Statute. Useful outreach examples were brought to bear from the Special Court for Sierra Leone, the International Tribunal for the former Yugoslavia (ICTY) and other international and hybrid courts and tribunals. In Sierra Leone, these outreach methods included innovative community-based approaches where local communities were provided regular updates about judicial work, often

with the support and participation of senior court officials. The ICTY's Bridging the Gap series provided information about the Tribunal's investigations, trials, and appeals to affected communities in the region in open fora, allowing for direct discussion between court officials and victims.

Another key element for victim involvement is their protection, as victims will not be able to fully participate in the proceedings unless their safety and security is ensured. In many contexts, this is further complicated by gender-based crimes where the victims are hesitant or fearful that their participation in the proceedings will cause them further trauma due to reactions in their communities. Thus, the discussion in this connection should focus on building victim protection programs that would provide security to victims but also take into account their special needs, particularly in the cases of gender crimes or when children are victims. Examples, both positive and negative, from other courts and tribunals are useful in this connection. In particular, the importance of adequate relocation programs was noted, and the participants stressed that States needed to support and provide for relocation of vulnerable victims and witnesses.

A third area of discussion, both between the panelists and among States and civil society, was the role of the Trust Fund for Victims (TFV). The TFV is a significant step forward, as it marks a break in the traditional link between the perpetrator and the victim for purposes of reparations, which essentially leaves the actual payment of reparations to the luck of the draw. While reparations may still be ordered against a perpetrator, the TFV can provide for reparations programs that address the injuries and needs of victims on a broad and non-exclusive basis. As reported by the new Chair of the TFV, this approach has already, in essence, been adopted in northern Uganda, where reconstructive surgery programs are being offered to victims. However, the TFV remains significantly underfunded, and the panelists, States Parties, and civil society all called for much greater financial and material support for the TFV.

Following the panel discussion and debate, the Review Conference adopted a resolution on "the impact of the Rome Statute system on victims and affected communities". In this resolution, the Review Conference recognized, as essential components of justice, the right of victims to equal and effective access to justice, support and protection, adequate and prompt reparation for harm suffered and access to information concerning violations and redress mechanisms. In addition, the resolution recognized the need to optimize outreach efforts by adapting activities in light of different phases of the Court's judicial cycle, and by encouraging efforts to ensure that victims and affected communities have access to accurate information about the Court, its mandate and activities, as well as about victims' rights under the Rome Statute, including their rights to participate in judicial proceedings and to claim for reparations.

The Review Conference also emphasized the importance of the TFV and called upon States Parties, international organizations, individuals, corporations and other entities to contribute to the TFV to ensure that timely and adequate assistance and reparations can be provided to victims in accordance with the Rome Statute. Governments, communities and civil society organizations at the national and local level were also called on to play an active role in sensitizing communities to the rights of victims. Finally, the resolution highlighted the need to speak against victims' marginalization and stigmatization, to assist them in their social reintegration process, and to combat a culture of impunity for these crimes, particularly crimes of sexual violence.

United States Government Position on the ICC and the Issue of Victims

The United States has moved beyond the outright rejection and open hostility that it showed to the ICC in the early years of the Bush administration. This shift in policy was underlined by the attendance of a substantial and high level interagency observer delegation at the Review Conference in Kampala, led by State Department Legal Adviser, Harold Hongju Koh and Ambassador-at-Large for War Crimes Issues, Stephen Rapp. While the U.S. is not a party to the Rome Treaty and there are no immediate prospects for ratification, the Obama administration has taken an approach of "principled engagement" with the Court. In this connection, the U.S. delegation was active in the Review Conference, particularly on the question of the crime of aggression, but also on the issue of complementarity (including co-sponsoring a side event on the DRC and complementarity). U.S. officials also made supportive statements regarding the work of the ICC, such as that made by Ambassador Rapp: "The cases that [the ICC] has taken up in Northern Uganda involving Joseph Kony and the crimes of the Lord's Resistance Army in the DRC, the various militia groups that have engaged in campaigns of mass atrocity in Darfur, Sudan, and in the Central African Republic were cases that cried out for justice and accountability and for the protection of the victims."

Focusing primarily on the crime of aggression and, to a lesser extent, complementarity, U.S. representatives said little on victim issues and did not make a statement in the public debate during the stocktaking exercise on victims and affected communities. Apart from generic statements regarding the need to strengthen national systems, undertake capacity-building, coordinate aid, and prosecute cases close to the victims and affected communities, the U.S. delegation did not directly address the topic of victims and affected communities.

Next Steps for U.S. Engagement on Victims' Issues

Victim Protection

In terms of the next steps for U.S. engagement, issues related to victims and affected communities would seem a fruitful area for U.S. cooperation with the Court. While the U.S. is not an ICC State Party, it is active as a donor and provider of rule of law development assistance on the ground in most of the countries in which the ICC is exercising jurisdiction, including in the DRC, Kenya and Uganda. Thus, the U.S. is well placed to support the efforts of the ICC to protect victims and witnesses by providing technical assistance via support of local partners which complement the ICC's own efforts to protect them. By building the capacity of domestic victim and witness programs in these countries, the U.S. Government can indirectly provide much needed assistance to the ICC's investigations and prosecutions, while at the same time building local capacity, which in turn meets the long-term goal of U.S. rule of law assistance programs. The U.S. has already begun to provide assistance in this regard in the DRC and now in Kenya. These steps should be continued and where possible, strengthened. The U.S. should also, to the extent allowed by domestic law, share with the ICC and/or its partners, information that would facilitate the protection of victims and witnesses, by the ICC, the UN and other actors.

Victim Participation and Outreach

With regard to victims' participation in ICC proceedings, the U.S. Government is not likely to play a direct role in either facilitating or promoting such participation. In addition to not being a State Party to the Rome Treaty, American officials, as with those from some other common law countries, have often been somewhat leery of victim participation rights before the ICC (a view noted again post-Kampala). This reluctance no doubt stems in part from the absence in common law proceedings of such victim participation provisions, which derive principally from civil law systems where victims participate as parties civiles in criminal proceedings. It also stems from reasonable concerns shared by many legal experts that the inclusion of victim participation will further lengthen court proceedings, thus adding to already quite long processes experienced by other international tribunals and courts.

Despite these cultural and pragmatic concerns, the U.S. has previously supported victim participation in the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), which provides for victim participation akin to that in the ICC. Moreover, through its support of outreach efforts in all the international courts and tribunals, beginning with its provision of start-up

funding for the ICTY Outreach Program in the late 1990's, the U.S. has strongly supported the engagement of victims and affected communities in the international accountability process.

In the case of the ECCC, the U.S. through its Ambassador to Cambodia, Joseph Mussomeli, indicated its support of the ECCC's creation of a Victims Unit, which was designed to assist those who file a complaint or join a civil party application. Ambassador Mussomeli also indicated the U.S. Government's strong and longstanding support, which included substantial direct financial support to the Documentation Center of Cambodia for providing assistance to the Cham victims in this effort, noting "[w]ith the filing of these [victim] cases, the Cham are re-claiming a part of their identity so clearly linked to Cambodia's history for hundreds of years." Thus, there is some practice in other contexts of U.S. support for victim participation in judicial processes, and the U.S. should, as a matter of policy, now move beyond any concerns it has regarding victim participation and support these efforts on the ground to the extent that it can, consistent with U.S. law, via its work with local partners and outreach programs. Victims' participation is now a cornerstone of international justice, and the U.S. should indicate its support of this approach wherever possible. In this regard, it is worth underlining that victim groups in the U.S. are among the best organized and most effective in the world; therefore, U.S. experience in integrating victims' concerns into domestic justice procedures may provide useful insight on improving outreach from international tribunals. In this connection, U.S. jurisdictions should also take lessons from the international courts and incorporate victims' rights more fully into domestic legislation and strengthen the domestic framework that underpins the rights of victims.

Reparations Programs and the TFV

For many victims, justice in the form of reparations is of paramount importance, and the ICC holds great promise in this regard. However, the ICC faces two significant challenges with regards to reparations; defining which principles should apply in individual cases, while also responding to large numbers of victims. The Court's role will be complicated by the fact that it will not be possible to assess the harm done to each victim and to compensate for this harm. Moreover, reparations can take different forms; a combination of material reparations and other measures such as health care, education, or pensions are more likely to assist victims in the long run rather than one-off lump sums or restitution to the status quo ante.

While the Court has not yet ordered any reparations measures, when the issue comes to the fore, the practice of national reparations programs will be helpful in providing guidance on how to deal with certain challenges. A historical look at the way that the U.S. has legislated

reparations for victims of its own war-related violations provides some insight into how the U.S. may play a role in the strengthening of the ICC's policy on reparations. For example, President Ronald Reagan issued an apology and signed the law that provided compensation to officially acknowledged victims, such as the Japanese-Americans who suffered in internment camps during World War II. Thus, the U.S. should assist the Court by providing advice and expertise, either formally or informally from its own domestic reparations programs.

While implementation of the ICC's reparations program has yet to be addressed, the Trust Fund for Victims is active in both the Democratic Republic of the Congo and northern Uganda, and as many as 40,000 people have reportedly benefited from the TFV's programs. The TFV has been given a broad interpretation to its mandate, allowing it to pursue assistance to victims in situations under investigation. This is a welcome development that enables the TFV to reach out more broadly to the universe of victims in a particular situation under investigation, not just those linked to a particular perpetrator or case before the court. At the same time, the current activities of the TFV are limited to assistance. Assistance can be important and helpful in addressing the immediate needs of victims of Rome Statute crimes, taking forms that overlap with reparations, such as medical care, scholarships, housing, and financial help. However, reparations differs from assistance in that the former constitutes an acknowledgement of responsibility for what happened to the victims and the responsibility for attempting to repair its causes and consequences through various measures of accountability. In the national context, it is particularly significant if such responsibility is acknowledged by the State. The most meaningful reparations measures have been those in which the State not only tries its best to repair the physical and material harm done to the victims, but also takes steps toward ensuring the accountability of the people behind the violation and preventing its reoccurrence through reform and remembrance.

Reparations can provoke conflict among victims themselves. In addition, the Court and the TFV are operating in many situation countries where victims and non-victims alike live in poverty and have no access to basic social services. In providing both assistance and reparations, these tensions are inherent; there is a perception that fewer (or no) resources are allocated to reparations versus resources for non-victim-centered justice efforts, such as criminal courts and disarmament, demobilization and reintegration programs. There is also competition for resources between reparations for victims and broad development efforts catering to all citizens, not just victims. These tensions can be addressed to some extent, but often cannot be fully resolved. It is often just as important to empower victims to rebuild their lives more actively via development programs (e.g. microfinance), as it is to provide direct assistance or benefits to them. Thus, broader reparations programs that take these factors into account may be of particular value and also reduce tensions between groups in a post-conflict setting. In

establishing such programs, the most important step may be to ensure that victims can participate in the process of designing reparations programs and have the opportunity to understand how decisions are made.

Given its presence on the ground in ICC situation countries, the U.S. can assist in addressing some of these tensions amongst victims by ensuring that the implementers of U.S. rule of law and development programs are aware of these strains and work with the TFV and the ICC to address them. The U.S. could also work to complement and support ICC and TFV outreach efforts in this regard. Thus, in myriad practical and substantial ways, the U.S. Government could take steps that would complement and assist the efforts of the TFV and any future reparations programs that the Court may adopt.

Another issue of concern for the TFV and for victims' advocates generally is the essentially tepid financial support for the TFV from State Parties. From the outset of the fund's establishment, contributions from States have been small, and current resources only amount to around five million Euros. These limited resources are a proverbial "drop in the bucket" when the needs for viable reparation programs, to say nothing of assistance, are considered. If the TFV is to be seen as nothing more than an afterthought to the criminal justice process, then much of the ICC's promise will be squandered and its call to put victims at the center of the process will ring hollow. While the U.S. is not a party to the Rome Statute, it has a strong interest in seeing that victims and their suffering are addressed; otherwise, the cycles of violence in these countries are likely to be repeated. Thus, the U.S. has a strong interest in seeing that funding issues relating to the TFV are addressed immediately.

Given the current legal impediments to the U.S. Government's ability to directly support the ICC, a U.S. contribution to the TFV is likely not to be possible. If it were, it would be a great symbolic step for the U.S. Government to address the real needs of victims; moreover, U.S. engagement on this issue would provide a boost to the TFV and to victims generally. Assuming that such direct U.S. Government support would not be possible in the near term, substantial contributions by U.S. citizens and/or organizations would similarly be significant symbols of support for the TFV and its work.

Concluding Remarks

The presence of the U.S. delegation in Kampala clearly signaled that the Obama administration's policy of "principled engagement" is now in full force. This is a welcome development after the damage inflicted by the approach taken during the Bush administration.

The U.S. delegation's presence was thus an important and significant first step in putting the relationship between the U.S. and the ICC on a more solid ground and moving forward in a positive direction. Even short of U.S. ratification of the Rome Statute, much can be achieved by the development of a constructive relationship between the U.S. and the ICC. While there are many areas of cooperation and assistance that the U.S. should engage in with the ICC, the area of victims and affected communities are quite natural ones given the U.S. presence on the ground in the ICC relevant countries. Much practical assistance can be provided to the ICC and its partners in terms of assistance and support on critical matters of victim and witness protection, as well as on victims' participation and, with some creativity, even in the area of reparations. Thus, the U.S. should now move from simply shifting its rhetoric to implementing practical support for the ICC wherever possible.

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Gender Issues, Stocktaking and the Kampala ICC Review Conference

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Background

Gender issues were very much in evidence at the 1998 Rome Diplomatic Conference during the drafting and adoption of the Statute of the International Criminal Court (ICC). Difficult discussions surrounded the inclusion of provisions on the selection of a "fair representation of female and male judges", including those with legal expertise on "violence against women or children"; on the crime against humanity and war crime of forced pregnancy; and on the term "gender" itself.[1] Negotiations also took place on provisions related to other crimes against humanity and war crimes of sexual and gender-based violence, as well as on gender-sensitive participation of victims in the proceedings of the Court, victim protection, and composition of the staff of the Registry and the Office of the Prosecutor.[2] Given the number of gender-related provisions, it is not surprising that the Rome Statute has been hailed for its attention to issues of gender. This attention to gender was not as evident at the Review Conference of the Rome Statute in June 2010 in Kampala, Uganda. While nearly all of the issues discussed in Kampala had gendered aspects,[3] gender issues only really came to the fore in the stocktaking exercise, particularly under the theme of "the impact of the Rome Statute system on victims and affected communities".

Following a proposal by Chile and Finland, the eighth session of the ICC's Assembly of States Parties decided to focus one of the Review Conference's stocktaking sessions on the impact of the Rome Statute system on victims and affected communities.[4] This was a natural topic to consider in the stocktaking exercise since it reflected the fact that victims are stakeholders in the ICC and its related processes. Victims interact with the Court in a variety of ways: they send communications or provide information on potential crimes to the Prosecutor; they apply to participate in proceedings and some are approved by the relevant Chamber to do so; they serve

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as prosecution or defence witnesses and may require specific measures of protection or psychosocial support related directly to their appearance before the Court; they may receive reparations as a result of an order of a Trial Chamber following a conviction; and they may benefit from assistance provided in a project by the ICC's Trust Fund for Victims.[5] Victims are therefore crucial to the ICC's mandate and operation. The stocktaking session was therefore meant to consider how, at this early phase of the Court's functioning, victims and affected communities experience and perceive justice.[6] It was also to contribute to identifying areas in which the Court's positive impact can be strengthened, including through actions by States and non-State actors."[7]

The stocktaking discussion was to maintain a cross-cutting gender perspective, as well as incorporate discussion on "breaking the silence around gender violence, deterring gender-based violence, or finding justice for victims of gender-based crimes."[8] A cross-cutting gender perspective was considered to be crucial by many States, nongovernmental organizations, and the ICC itself for several reasons. To begin, the Rome Statute requires gender-sensitive treatment of victims, whether they are vulnerable because they are females in a society in which women and girls are routinely discriminated against or because they are male or female and have been targeted for gender-based (including sexual) violence. Thus, it was important to take stock of whether the ICC is fulfilling this mandate at all stages of its interactions with victims. Additionally, the ICC's investigations have resulted in a number of charges related to gender-based crimes, namely rape and sexual slavery, as crimes against humanity or war crimes.[9] Finally, the ICC's first prosecution, in Prosecutor v. Thomas Lubanga Dyilo, has highlighted the experiences of girl soldiers who were subjected to various forms of gender-based violence, illustrating that, even in the absence of gender-specific charges, seemingly "gender-neutral" crimes are themselves often intensely gendered.

Stocktaking on Victims Issues at the Review Conference

The official stocktaking discussion took place over a three hour period at the Review Conference on June 2, 2010. Radhika Coomaraswamy, Special Representative of the Secretary-General on Children and Armed Conflict, gave the keynote address. Her speech was followed by a panel discussion involving Justine Masika Bihamba of Synergie des femmes pour les victimes des violences sexuelles in the Democratic Republic of the Congo, Elisabeth Rehn of the Trust Fund for Victims, Carla Ferstman of REDRESS, David Tolbert of the International Center for Transitional Justice, Binta Mansaray of the Special Court for Sierra Leone and Silvana Arbia of the ICC. Many of these speakers raised gender-related points, as did some of the questioners at the close of the session. As an outcome of this official stocktaking exercise, ICC States Parties

adopted a resolution on the impact of the Rome Statute system on victims and affected communities. This Resolution directly mentions gender issues in three ways. First, it refers to UN Security Council Resolutions 1325, 1820, 1888 and 1889 on women, peace and security and underlines "the need to address the specific needs of women and children as well as to put an end to impunity for sexual violence in conflict".[10] Second, it encourages the Court to optimize its internal processes and field presence to "improve the way in which it addresses the concerns of victims and affected communities, paying special attention to the needs of women and children".[11] Third, it encourages governments, communities and civil organizations at the national and local levels to play an active role in sensitizing communities on the rights of victims of sexual violence by speaking against the victims' marginalization and stigmatization, assisting them in their social reintegration and participation in consultation, and in combating a culture of impunity for these crimes.[12]

Important conversations on gendered victims' issues also took place on the margins of the official stocktaking discussion in various side-events. For example, on June 1, the Coalition for the ICC (a coalition of over 2,500 civil society organizations) and the Victims' Rights Working Group (a network of over 200 civil society groups and individual experts) hosted an event titled "Civil Society Taking Stock – Impact of the Rome Statute on Victims and Affected Communities", which discussed several gender-specific issues, such as difficulties related to the Court's protection of victims of sexual violence in conflict and immediate post-conflict scenarios. The outcome document stemming from this event called upon states to increase the ICC's outreach capacity with gender-specific programs executed in partnership with civil society organizations. It asked states to assist and cooperate with the Prosecutor to ensure effective investigation and prosecution of gender-based crimes. Finally, it urged States to support the Court to further develop the range of measures to protect especially vulnerable victims and witnesses, such as victims of gender-based crimes, and women.[13] This event was complemented by a large number of other gender-related side-events that took place during the Review Conference.[14]

Many publications relevant to gendered victims' issues were released in anticipation of, or at, the Review Conference. For example, the discussion paper prepared for the official stocktaking exercise notes both the need for the ICC to enhance its outreach efforts so as to more effectively engage marginalized and vulnerable populations such as women and children, and for States to develop national reparations mechanisms that ensure access to and benefits for women and children.[15] On the non-governmental side, the Victims' Rights Working Group developed and distributed a questionnaire to assess the Court's impact, which outlined a number of gender-specific responses.[16] Additionally, the Women's Initiatives for Gender Justice issued "Advancing Gender Justice: A Call to Action", which included a detailed list of

recommendations to the ICC and other actors for enhancing gender-sensitive international criminal justice. For example, its recommendations call on the ICC to undertake proactive and effective strategies to include more women on the "List of Legal Counsel" and to require greater competence on gender issues among the legal representatives for victims. This call to action also asked States to respond to the donor appeal by the Trust Fund for Victims for victims of sexual violence, and requested the appointment by the United Nations of female chief mediators and Special Envoys to ensure gender-sensitive peace processes.[17]

The Review Conference's official stocktaking discussion, associated side-events, and related publications all identified successes and overarching challenges in the Court's efforts to make participation in the ICC's processes more meaningful for victims. For example, the ICC has had success in undertaking gender-specific outreach in northern Uganda.[18] On the other hand, the ICC has also generally faced difficulties in meeting victims' needs for clear information about the timelines of investigations and prosecutions, logistical and psychological support, legal representation, physical security, and the possibility of reparations.[19] Within these discussions of successes and difficulties, three key gender-related themes emerged. First, the ICC has difficulties in ensuring gender-sensitive protection for victims and intermediaries; it faces challenges in ensuring gender-sensitive investigations and prosecutions; and it has adopted some arguably narrow approaches to gender-based crimes. Second, the ICC faces significant challenges in accessing, and getting sufficient information to, women, girls and victims of gender-based violence in affected communities. Finally, the projects of the ICC's Trust Fund for Victims have a significant and necessary gender component and this focus should be maintained in the future. Each of these themes is explored in turn below.

Gender Issues, Victims and the ICC's Proceedings

In the formal investigations and proceedings before the ICC, gender issues arise in at least three areas of the Court's work: in the protection afforded victims and witnesses participating in the proceedings; in the gender-sensitive aspects of investigations and prosecutions, and in the Court's jurisprudential understanding of the scope of gender-based crimes.

Protection of victims is absolutely necessary to ensure that the ICC can pursue investigations and prosecutions of gender-based violence. A lack of protection, or gender-insensitive forms of protection, will make victims reluctant to come forward to the Court to provide evidence and will discourage victims from applying for victim status under Article 68 of the Rome Statute.[20] The victims' issues stocktaking exercise provided a great deal of information on what the ICC was already doing correctly in terms of providing victim protection. For example, it explained to

States and others, the complex roles and responsibilities of the Registry's Victims Participation and Reparations Section, Outreach Unit and Victims and Witnesses Unit, the Office for Public Counsel for Victims, the Trust Fund for Victims, and the Office of the Prosecutor in providing psycho-social assistance, gender-sensitive protection, and support to vulnerable victims.[21] For example, States learned how the Victims and Witnesses Unit, the Office of the Prosecutor, and national and local security actors collaborate to carefully approach vulnerable witnesses without exposing them, through, for example, the use of safe sites for interviews, safe transport, psychological assessments and paying attention to the gender of the interviewer.[22]

It also became clear through the stocktaking exercise that the ICC can improve its policies and practices on victim protection. For example, there are no specific protection and support measures in place in situation countries tailored to the needs of applicants for victim status.[23] This leaves a large number of victim-applicants at potential risk. As of April 2010, the ICC's Chambers had received 2,035 applications from victims to participate in ICC proceedings, while only 760 were authorized to do so.[24] Masika Bihamba expressed concern that the low numbers of victims admitted as participants was especially discouraging to female victims of crimes in the Democratic Republic of the Congo.[25] Another concern, this time expressed by the Women's Initiatives for Gender Justice, was that, at present, many victims of gender-based violence feel that they must testify in closed session for safety reasons. However, some would prefer to do so in public session, if provided with more support.[26] Two issues which were not discussed, but which naturally arise from the overarching concern with victim protection are, first, the ICC's field offices could benefit from having more individuals on the ground trained in providing gender-sensitive protection; this protection cannot only be provided from The Hague. Second, it is likely that the ICC faces difficulties in securing information about, and from, men and boys who have suffered gender-based crimes, including sexual-violence. It is important that the ICC not overlook this type of violence, which is as deeply rooted in the social construction of masculinity and femininity in a given society, as is sexual violence directed at women and girls.

The ICC relies upon intermediaries to access vulnerable women, girls, men and boys. As noted by Carla Ferstman of REDRESS, during the official stocktaking discussion, intermediaries such as women's associations in ICC situation countries are crucial to helping victims in their efforts to access legal representation at the ICC "through people they know and can trust".[27] Sometimes, these intermediaries are at risk simply for having assisted the ICC, and therefore require protection themselves. Although the ICC's basic texts do not explicitly recognize obligations to protect intermediaries, decisions of the Court have recognized the central role that intermediaries play in permitting ICC prosecutions and the existence of an obligation to protect them in certain circumstances.[28] However, a large number of commentators participating in the

Review Conference noted correctly that the Court would benefit from implementing a comprehensive policy with respect to the identification, recognition and protection of intermediaries.[29]

The Court cannot meet these protection needs alone; States have a significant role to play. States can help the Court provide relocation and other protective measures to victims and witnesses.[30] However, in order to do so, States lacking relevant domestic legislation (especially ICC situation countries) will need to adopt laws permitting such ICC assistance.[31] International organizations and non-governmental organizations can also play a role in helping the Court to carefully and safely access, inform and protect victims of gender-based violence.

The ICC's Prosecutor has charged gender-based crimes in a number of cases. This is very positive as it reflects the gendered nature of the crimes committed in the conflicts in the Central African Republic, Darfur, the Democratic Republic of the Congo, and northern Uganda. However, prior to and at the Review Conference, victims and others expressed concern that the Prosecutor and the Court have taken some decisions that seem to narrow or limit justice for gender-based crimes.[32] Elisabeth Rehn of the Trust Fund for Victims explained in the official stocktaking discussion that female victims (or victims of gender-based crimes) must have their own outcomes; they need to see their experiences reflected in the Court process.[33] But for at least some victims, this has not been the case. For example, victims and non-governmental organizations have criticized the Prosecutor's decision not to initiate charges of gender-based violence in the case of Thomas Lubanga Dyilo.[34] They felt that the narrow scope of the charges did not capture the reality of the experience of women and girls in the conflict.[35] Others have expressed disappointment at Pre-Trial Chamber decisions that resulted in the exclusion of certain sexual violence charges in the case of Jean-Pierre Bemba Gombo.[36] These decisions seemed to be based on an interpretation of the cumulative charging principle which is both at odds with some of the ICC's applicable documents and inconsistent with interpretations by other international criminal tribunals.[37] Thus, one recommendation that emerged from the Victims Rights Working Group in response to the concerns expressed prior to, and during the Review Conference, was a need for the ICC's Office of the Prosecutor to adopt an overarching gender-sensitive investigative and prosecution strategy in order to help the Office include gender-related charges in every relevant case.[38] The Women's Initiatives for Gender Justice made a different recommendation for the "adoption of a considered and responsive amendment policy by the ICC to allow the prosecutorial process to be able to correct itself when initial indictments exclude charges for which strong evidence exists."[39] Furthermore, to address the concern involving the Pre-Trial Chamber, the War Crimes Research Office at the American University Washington College of Law urged judicial reconsideration of the approach

taken in the Bemba case, so as to avoid exclusion of valid gender-based charges in other cases.[40] All of these suggestions merit close attention and consideration, as they would help to avoid the possibility of the ICC itself re-traumatizing victims through its application of the law.[41]

The broader stocktaking exercise identified a number of ways in which the ICC is already doing positive work in providing gender-sensitive victim protection and in charging crimes of gender-based violence. However, the exercise also showed that the ICC and States can both improve the experience of victims requiring ICC protection, and that the ICC can improve its approach to the inclusion and consideration of gender-sensitive charges.

Gender Issues, Victims and the ICC's Outreach

It was clear from the stocktaking exercise that the area in which the ICC can most improve its gender-sensitivity is through its outreach to victims and affected communities. In order to do so, however, the ICC must overcome significant challenges. Given the nature of the areas in which the ICC is attempting to conduct outreach—war-torn, largely rural zones covering vast geography—the ICC faces difficulties in accessing the victims, whether in person or through other means. Experiences to date have shown that face-to-face meetings and engagement with local media are the most effective ways for the ICC to reach victims and affected communities.[42] This is why, from October 1, 2008 to September 31, 2009, ICC field teams held three hundred fourteen in-person interactive information sessions targeting 69,363 people in situation countries, and also reached thirty-four million people through local radio and television programming.[43] However, women and girls are often in charge of keeping house and tending to children and farming; thus, they are less able to attend community meetings. This inability to access in-person ICC outreach sessions is compounded by the fact that women and girls often do not possess a radio or batteries, so media-based outreach is less likely to reach them.[44] As well, women and girls are more likely than men and boys to be illiterate, and therefore are less likely to benefit from written outreach materials.[45] Even if they know about the ICC's outreach sessions and are available, women and girls (and men and boys) who have suffered from sexual violence are often stigmatized and socially ostracized and therefore may be reluctant to attend an outreach session. In the official stocktaking session, Arbia noted another barrier; sometimes women do not realize that they might be considered a victim by the ICC, because they are too busy concentrating on their family and their community.[46]

In order to address these issues, the ICC has used women's rights groups to facilitate outreach. Commentators recommended more such outreach strategies in partnership with local grassroots women's organizations to help break through the social, physical and psychological

barriers that can hinder access to the ICC.[47] Given that many victims of sexual-based crimes understandably feel that a female lawyer would be in the best position to understand their suffering and represent their interests before the ICC, at the Review Conference, the ICC highlighted its new campaign to recruit such lawyers, titled "Calling African Female Lawyers".[48]

The stocktaking exercise raised a number of recommendations related to gender-sensitive outreach, many of which will require additional financial resources from States. Generally, it was recognized that the ICC and States Parties need to enhance outreach efforts so as to more effectively engage marginalized and vulnerable populations such as women and children, especially those in rural areas.[49] This could be done through the development of a specific policy for addressing the needs of vulnerable populations.[50] This policy should increase the profile and outputs of gender-specific outreach sessions, and this approach should be systematized across all ICC situation countries.[51] For example, outreach coordinators can set specific targets for female participants.[52] Gender-specific outreach should begin at the commencement of the ICC's work in a new situation country, and all outreach staff should receive training in dealing with trauma related to crimes involving sexual violence.[53] This will require "a robust field presence with well-resourced and well-staffed field offices" [54] and hence, an increase in the outreach budget.

Gender Issues and the ICC's Trust Fund for Victims

The ICC's Trust Fund for Victims was created pursuant to Article 79 of the Rome Statute to fulfill two mandates: first, to implement awards for reparations ordered by the Court against a convicted person; and second, to use other resources for the benefit of victims.[55] This latter aspect is distinct from the first, in that, it is not linked to a conviction; the Trust Fund can provide assistance separate from and prior to a conviction by the Court using resources the Trust Fund has raised through voluntary contributions.[56] Since the Court has yet to complete a trial, the Trust Fund has focused its efforts on implementing this second mandate. The Trust Fund addresses the harm resulting from the crimes under the jurisdiction of the ICC by providing victims with psychological and physical rehabilitation as well as material support, all aimed at helping them return to a dignified and contributory life within their communities. The Fund has directly reached nearly 60,000 victims in the last year alone.[57] The Trust Fund is guided by the concept of local ownership and leadership.[58]

During the official stocktaking exercise on victims' issues, and in related side-events, the Trust Fund was repeatedly, and understandably, held up as a success story for the ICC in terms of

addressing gender issues to date. The Trust Fund has adopted two strategies in order to ensure gender-sensitive operations. First, it works to mainstream a gender perspective across all of its projects and programming.[59] Second, it specifically adopts projects and programming to target victims of rape, enslavement, forced pregnancy, and other forms of gender-based violence.[60] This programming is done with women's associations and other groups rooted in affected local communities.[61] In 2008, in order to enhance its capacity in gender-sensitive programming, the Trust Fund launched a global appeal to raise earmarked funds to assist 1.7 million victims of sexual violence over three years.[62] At the time of the Review Conference, the Trust Fund was directly assisting 3,980 victims of gender-based violence (including sexual violence), 740 children of victims of gender-based violence, and 400 former child soldiers who had suffered gender-based violence, through projects in northern Uganda and the Democratic Republic of the Congo.[63] In addition, 12,375 community peace builders and 300 children were sensitized to gender-based violence and the rights of victims through Trust Fund projects.[64] These projects include one in Uganda's Oyam District, providing protection, counselling and shelter for about 500 victims of gender-based violence at community centres. In the Democratic Republic of the Congo, projects in North Kivu, South Kivu and Ituri Districts provide, inter alia, safe shelter, counselling, vocational training, education and vocational equipment or micro-credit to victims of gender-based violence, accelerated education for girls abducted by armed forces who bore children while in captivity, and grants to allow children of female victims to attend school.[65]

It is therefore not surprising that many of the gender-specific recommendations stemming from the stocktaking exercise focused on assisting, enlarging and improving the work of the Trust Fund. For example, States were urged to contribute to the Trust Fund generally, or specifically to the Trust Fund's global funding appeal to assist victims of sexual violence.[66] Some States did respond in this way during the pledging portion of the Review Conference.[67] Even though there was widespread support for the gender-sensitive work of the Trust Fund, there were also some suggestions for improvement. For example, the Women's Initiatives for Gender Justice asked the Trust Fund Secretariat to adopt proactive strategies to explicitly solicit proposals from women's groups and organizations, proposing that these amount to forty-five to fifty-five percent of the overall number of proposals received and funded.[68] This may be a difficult goal to reach, but it would likely increase the involvement of local women in the work of the Trust Fund. Others noted that the Trust Fund should increase its engagement with victims of sexual violence so these victims can better access and benefit from its general assistance work.[69] The Victims' Rights Working Group identified a need for the communication and outreach strategy of the Trust Fund (including outreach to victims of gender-based violence) to be integrated in the Public Information and Outreach strategy of the Court, ensuring better victim communication overall.[70] Mindful of the first mandate of the Trust Fund, during the official

stocktaking discussion, Ferstman also pressed States to enact domestic legislation to ensure that they can identify, trace and seize assets of individuals accused or convicted by the ICC, and that they can turn such assets over to the Trust Fund.[71] Others called on the Court to adopt gender-inclusive, victim-centered guidelines on case-based reparations without delay, given that the ICC's first trial is nearing completion.[72] Such guidelines represent a necessary step for the Court's work. Finally, some noted the need for national systems to develop gender-sensitive reparations mechanisms to complement the ICC's reparations system.[73]

In sum, the discussions surrounding gender issues and the ICC's Trust Fund for Victims were largely complimentary. However, there were some helpful recommendations for improvement made both to the Trust Fund and to States to further develop the gender-sensitivity of the Fund, and perhaps most crucially— to increase the amount of money available within the Fund.[74]

Conclusion

In one of his interventions at the Review Conference, U.S. Ambassador-at-Large for War Crimes Issues Stephen Rapp stated that the United States is willing to consider ICC cooperation requests on a case-by-case basis. He suggested that this can be done in a number of ways; for example, by making supportive political or diplomatic statements, sharing information, or providing witness assistance.[75] He also reminded other States that, even if a State does not owe obligations to the ICC, it can still collaborate with the Court.[76] This constructive approach opens a number of possibilities for the United States to support gender-sensitive victim involvement with the ICC.

The United States is well-placed to enhance the prosecution of gender-based crimes and protection of victims of these crimes and other vulnerable populations. Keeping in mind Beth van Schaack's recommendations in this volume on amendments to, or use of the Presidential waiver within the American Service-Members' Protection Act, the United States should provide information on an ongoing basis to the ICC on gender-based crimes in situation countries. Ambassador Rapp, in particular, has particular expertise in the prosecution of gender-based crimes before the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. He is therefore, in a position to understand the types of information that could be most useful for enhancing such prosecutions. The United States could also offer witness relocation assistance or other protective measures to the ICC on a case-by-case basis, especially in cases involving gender-based violence. In doing so, the United States should ensure that U.S. domestic legislation permits the provision of U.S. witness assistance to the ICC, including in

cases involving gender-based crimes or vulnerable populations. The United States could further encourage ICC situation countries to ensure the same. Additionally, the United States could share experience and lessons learned with the ICC on potential additional methods for enhancing field protection for victims of gender-based crimes and their intermediaries based on its domestic and international experience in addressing these issues. Similarly, the United States could provide assistance and advice to ICC situation countries on gender-sensitive victim and witness protection at the domestic level. At the United Nations, the United States is in a position to support Security Council mandates for United Nations peacekeeping operations that allow such operations to play a role in helping the ICC to access, inform and protect victims in a gender-sensitive manner. Internationally, it is important for the United States to continue to indicate diplomatic support for the arrest of fugitives charged by the ICC with gender-based crimes, as it recently did with respect to the October 11, 2010, arrest of Callixte Mbarushimana.[77]

On the issues of gender-sensitive outreach and support for the work of the Trust Fund for Victims, the United States could consider providing voluntary funding for specific outreach programming directed at women and girls or victims of gender-based violence or to the Trust Fund's global appeal focused on victims of sexual violence (insofar as is permitted under the American Service-Members' Protection Act). In addition or alternatively, the United States could also ensure that U.S. international development funding complements such work by the ICC.

The conclusion of the stocktaking exercise on the impact of the Rome Statute system on victims and affected communities notes that "the Court and its staff cannot walk this road alone. They need the Stewards of the Court – the States Parties – to continue their commitment, support and leadership."[78] To this, we should add that the Court will undeniably benefit from the positive engagement of non-state parties such as the United States. The year 2010 marks the tenth anniversary of the adoption of Security Council Resolution 1325 on women, peace and security— a resolution that recognized the significant contribution of international criminal courts in combating impunity for gender-based crimes. It would therefore be fitting for the United States to ensure that the Kampala Review Conference is not the endpoint for U.S. engagement on the ICC on gender-sensitive victims' issues, but only the beginning.

[1] Rome Statue of the International Criminal Court, arts. 7(1)(g); 7(3); 8(2)(b)(xxii); 8(2)(e)(vi); and 36(8)(a)(iii) and (b), , 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 [hereinafter Rome Statute].

[2] Id., arts. 7(1)(g) and (h); 7(2)(c); 8(2)(b)(xxii); 8(2)(e)(vi); 21(3); 42(9); 43(6); 44(2); 54(1)(b); 68(1) and (2).

[3] For example, on the gendered nature of aggression, See Beth Van Schaack, 'The Grass that Gets Trampled When Elephants Fight': Will the Codification of the Crime of Aggression Protect Women? (September 13, 2010). Santa Clara Univ. Legal Studies Research Paper No. 10-10, available at SSRN: http://ssrn.com/abstract=1676506

[4] International Criminal Court Assembly of States Parties Res. 6, Review Conference, ICC-ASP/8/Res.6, at para. 5 and Annex IV (Nov. 26, 2009). The other three stocktaking sessions focused on cooperation, complementarity, and peace and justice.

[5] International Criminal Court, Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/45, at para. 8 (Nov. 10, 2009).

[6] International Criminal Court Assembly of States Parties, Report of the Bureau on Stocktaking: The Impact of the Rome Statute System on Victims and Affected Communities, ICC-ASP/8/49 at para. 2 (Mar. 18, 2010) [hereinafter Bureau Report on Stocktaking].

[7] Id. para. 3; See also id. para. 34.

[8] Id. paras. 33, 36(c) and 40.

[9] In the Uganda situation, Joseph Kony is charged with the crimes against humanity of rape and sexual slavery and the war crime of rape and Vincent Otti (may be deceased) is charged with the crime against humanity of sexual slavery and the war crime of rape. In the Democratic Republic of the Congo situation, German Katanga and Mathieu Ngudjolo Chui are charged with the crimes against humanity and war crimes of rape and sexual slavery and Callixte Mbarushimana is charged with the crimes against humanity and war crimes of rape, as well as persecution. In the Central African Republic situation, Jean-Pierre Bemba Gombo is accused of the crimes against humanity and war crimes of rape. In the Darfur, Sudan situation, Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb') are charged with the crimes against humanity and war crimes of rape and the crime against humanity of persecution carried out through rape, while President Omar Hassan Ahmad Al-Bashir is charged with the crime against humanity of rape and genocide carried out through rape and sexual assault.

[10] Review Conference of the Rome Statute of the International Criminal Court Res. 2, The Impact of the Rome Statute System on Victims and Affected Communities, RC/Res.2, at preambular para. 3 (June 8, 2010).

[11] Id., operative para. 2.

[12] Id., operative para. 4.

[13] Coalition for the International Criminal Court and Victims' Rights Working Group, Civil Society Takes Stock of the Impact of the Rome Statute System on Victims and Affected Communities: Outcome Recommendations, at para. 2 (June 1, 2010), http://www.iccnow.org/documents/CICC-VRWG_Stocktaking_Outcome_ Recommendations.pdf.

[14] For example, some events on victims' issues the during the first week of the review Conference included: International Society for Traumatic Stress Studies, "Trauma and Reparative Justice" (May 31, 2010); Women's Initiatives for Gender Justice, "Women's Court" (June 1, 2010); World Vision, "The Plight of War Victims and Affected Families in Northern Uganda: Implications for the Rome Statute System for Child Victims and Affected Families (June 1, 2010); Chile and Finland, "The Trust Fund for Victims" (June 2, 1010); No Peace Without Justice, "Sexual Orientation, Gender identity and Article 7(3): Prosecuting Persecution on the Basis of Gender" (June 2, 2010); International Center for Transitional Justice, "Taking Stock of the Impact of the ICC in Kenya, Uganda, the Democratic Republic of the Congo, Sudan and Colombia (June 2, 1010); Victims' Rights Working Group, "Implementing Victims' Access to Justice" (June 3, 2010); DOMAC, REDRESS, Denmark and South Africa, "The Joint Role of International and National Courts in Prosecuting Serious Crimes and Providing reparations: The African Experience" (June 4, 2010); and War Crimes Research Office, American University Washington College of Law, "Launch of The Case-Based Reparations Scheme at the International Criminal Court" (June 4, 2010).

[15] Review Conference of the Rome Statute of the International Criminal Court, The Impact of the Rome Statute System on Victims and Affected Communities, RC/ST/V/INF.4, at paras. 36(a)(ii) and (ix) and 36(c)(iii) (May 30, 2010) [hereinafter Victims Stocktaking Discussion Paper]. See also International Criminal Court, Turning the Lens: Victims and Affected Communities on the Court and the Rome Statute System, RC/ST/V/INF.2, at 4 and 5-6 (May 30, 2010) [hereinafter Turning the Lens].

[16] Victims' Rights Working Group, The Impact of the Rome Statute System on Victims and Affected Communities (April 2010), http://www.vrwg.org/downloads/ publications/05/VRWG%20Impact%20of%20ICC%20on%20victims%2021%20April%202010%20_2_.pdf [hereinafter Impact Survey].

[17] Women's Initiative for Gender Justice, Advancing Gender Justice: A Call to Action, at 3, 5 and 7 (May 2010), http://www.iccwomen.org/documents/Advancing-Gender-Justice-A-Call-to-Action-FINAL.pdf [hereinafter Advancing Gender Justice].

[18] Impact Survey, supra note 17 at 7-8.

[19] Victims Stocktaking Discussion Paper, supra note 16, para. 10.

[20] Rome Statute, supra note 2, art. 68 (this article permits victims to present their views and concerns to the Court when their personal interests are affected. In this way, victims may be recognized as a party to an ICC proceeding).

[21] Victims Stocktaking Discussion Paper, supra note 16, paras. 6 and 16.

[22] World Vision, Protecting Children: Improving the International Criminal Court to Respond to Children and Armed Conflict, A Policy Briefing, at 17 (2010).

[23] Victims Stocktaking Discussion Paper, supra note 16, para. 16.

[24] International Criminal Court, Registry and Trust Fund for Victims Fact Sheet, RC/ST/V/INF.3, at 1 (June 1, 2010). Arbia noted during the official stocktaking exercise that, as of the Review Conference, 2600 people have applied to be admitted as victim participants and more than 800 accepted.

[25] Review Conference of the Rome Statute of the International Criminal Court, Impact of the Rome Statute System on Victims and Affected Communities: Draft Informal Summary by the Focal Points, RC/ST/V/1, at para. 17 (June 10, 2010) [hereinafter Draft Informal Summary].

[26] Advancing Gender Justice, supra note 18, at 6.

[27] Draft Informal Summary, supra note 26, para. 14.

[28] Victims Stocktaking Discussion Paper, supra note 16, para. 17.

[29] Draft Informal Summary, supra note 26, para. 58. See also World Vision, supra note 23, at 17-18; Advancing Gender Justice, supra note 18, at 5; and Impact Survey, supra note 17, at 36. The Court is currently consulting on a draft paper on intermediaries: Victims' Rights Working Group, Victims and Affected Communities: Incorporating the Review Conference 'Stocktaking' Recommendations into the ICC's Strategies, at 4 (Oct. 14, 2010), http://www.vrwg.org/VRWG%20Documents/2010%20VRWG%20Kampala%20follow-up%20paper.pdf [hereinafter Incorporating].

[30] Victims Stocktaking Discussion Paper, supra note 16, para. 15.

[31] Amnesty Int'l, International Criminal Court: Updated Checklist for Effective Implementation, at 27-28 (May 2010), available at http://www.amnesty.org/en/library/asset/IOR53/009/2010/en/38132683-2e8e-41fc-a6b6-ec9f69482a29/ior530092010en.pdf.

[32] Victims Stocktaking Discussion Paper, supra note 16, para 10.

[33] Author's notes from June 1, 2010, Stocktaking discussion on "The Impact of the Rome Statute System on Victims and Affected Communities" (on file with the author) [hereinafter Author's notes from June 1, 2010, stocktaking discussion].

[34] See e.g., the 2006 letter written by the Women's Initiative for Gender Justice to the Prosecutor of the International Criminal Court, included as Annex 2.2 in Women's Initiatives for Gender Justice, Legal Filings Submitted by the Women's Initiatives for Gender Justice to the International Criminal Court (2d. ed., 2010), http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf; See also, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1891, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under regulation 55 of the Regulations of the Court (May 22, 2009), http://www2.icc-cpi.int/NR/exeres/51E25E4A-F65D-4D21-8262-11E3E7F342C8.htm.

[35] Turning the Lens, supra note 16, at 3.

[36] Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009), http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf; Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC/01/05-01/08, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo", paras. 52 and 54 (September 18, 2009), http://www2.icc-cpi.int/NR/exeres/E8174A7F-24F2-4F18-B8C2-3B61A14012D2.htm. See also Women's Initiatives for Gender Justice, In Pursuit of Peace, at 29 (April 2010), http://www.iccwomen.org/documents/Pursuit-ENG-4-10-web.pdf.

[37] War Crimes Research Office, American University Washington College of Law, The Practice of Cumulative Charging at the International Criminal Court, at 6-10 and 22-31 (May 2010), http://www.wcl.american.edu/warcrimes/icc/documents/ WCRO_Report_May2010.pdf?rd=1. [hereinafter Cumulative Charging].

[38] Incorporating, supra note 30, at 3.

[39] Advancing Gender Justice, supra note 18, at 6.

[40] Cumulative Charging, supra note 38, at 22-31.

[41] This point was made by Susannah Sirkin of Physicians for Human Rights, author's note from the panel organized by the International Society for Traumatic Stress Studies, "Trauma and Reparative Justice" (May 31, 2010) (on file with the author).

[42] Bureau Report on Stocktaking, supra note 7, para. 7.

[43] International Criminal Court, Report on the Activities of the Court, ICC-ASP/8/40, at para. 70 (Oct. 21, 2009).

[44] Victims Stocktaking Discussion Paper, supra note 16, para. 11; Impact Survey, supra note 17, at 8.

[45] Impact Survey, supra note 17, at 8.

[46] Author's notes from June 1, 2010, stocktaking discussion, supra note 34. Even where the Court has undertaken excellent gender-specific outreach sessions, the very limited number of dedicated outreach staff in situation countries, the vastness of the situation countries, and the large numbers of victims mean that "there are many victims in neighbouring villages, towns and regions [who] will never have heard of such activities: Impact Survey, supra note 17, at 7-8.

[47] Victims Stocktaking Discussion Paper, supra note 16, para. 11.

[48] Turning the Lens, supra note 16, at 8; International Criminal Court, Calling African Female Lawyers (2010), http://femalecounsel.icc-cpi.info/.

[49] Victims Stocktaking Discussion Paper, supra note 16, para. 36(a)(ii); and Draft Informal Summary, supra note 26, para. 49.

[50] Draft Informal Summary, supra note 26, para. 56.

[51] Impact Survey, supra note 17, at 37.

[52] Incorporating, supra note 30, at 2.

[53] Impact Survey, supra note 17, at 37.

[54] Incorporating, supra note 30, at 3.

[55] International Criminal Court Trust Fund for Victims, Recognizing Victims & Building Capacity in Transitional Societies: Spring 2010 Programme Progress Report, at 3 (2010) [hereinafter Spring 2010 Trust Fund for Victims Report].

[56] Id., at 3.

[57] Id., at 2 and 4; International Criminal Court, Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2009 to 30 June 2010, ICC-ASP/9/2, at para. 6 (28 July 2010) [hereinafter July 2010 Trust Fund for Victims Report].

[58] Victims Stocktaking Discussion Paper, supra note 16, para. 22; July 2010 Trust Fund for Victims Report, supra note 63, para. 6.

[59] Spring 2010 Trust Fund for Victims Report, supra note 61, at 10-11; July 2010 Trust Fund for Victims Report, supra note 63, para. 6.

[60] Spring 2010 Trust Fund for Victims Report, supra note 61, at 10.

[61] July 2010 Trust Fund for Victims Report, supra note 63, para. 6.

[62] Spring 2010 Trust Fund for Victims Report, supra note 61, at 11.

[63] July 2010 Trust Fund for Victims Report, supra note 63, Table 2.

[64] Id.

[65] International Criminal Court Trust Fund for Victims, Assistance to Victims of Sexual Violence, http://trustfundforvictims.org/projects.

[66] Victims Stocktaking Discussion Paper, supra note 16, para. 25; Advancing Gender Justice, supra note 18, at 5.

[67] Australia, Austria, Finland, Germany, Ireland, Liechtenstein, Netherlands, Poland, Spain, Switzerland, Tanzania, and the United Kingdom (the last specifically referencing supporting victims of sexual violence), pledged to contribute funds to the Trust Fund for Victims: Review Conference of the Rome Statute of the International Criminal Court, Pledges, RC/9, at 2, 6, 7, 8, 10, 13, 14, 15 and 16 (July 15, 2010).

[68] Advancing Gender Justice, supra note 18, at 5.

[69] Victims Stocktaking Discussion Paper, supra note 16, para. 36(b)(iii).

[70] Impact Survey, supra note 17, at 37.

[71] Author's notes from June 1, 2010, stocktaking discussion, supra note 34.

[72] Advancing Gender Justice, supra note 18, at 5; War Crimes Research Office, American University Washington College of Law, The Case-Based Reparations Scheme at the International Criminal Court (June 2010), at http://www.wcl.american.edu/ warcrimes/icc/documents/report12.pdf?rd=1; REDRESS, Comments to the Trust Fund for Victims on the Progressive Realisation of its Mandate, at

11-12 (Mar. 22, 2010), http://www.redress.org/downloads/publications/REDRESS_Paper_for_TFV_Board_22March2010.pdf.

[73] Victims Stocktaking Discussion Paper, supra note 16, para. 36(a)(ix).

[74] For example, Incorporating, supra note 30, at 5: "with a reparation phase potentially starting next year and the continued need for assistance projects in the Democratic Republic of the Congo, Uganda, Central African Republic and Kenya, the Trust Fund Secretariat has to develop detailed fundraising strategies as a matter of urgency".

[75] Author's notes from May 31, 2010, side-event on "Civil Society Taking Stock: Cooperation" (on file with the author).

[76] Author's notes from June 3, 2010, stocktaking discussion on "Cooperation" (on file with the author).

[77] Philip J. Crowley, Democratic Republic of the Congo: Arrest of Callixte Mbarushimana (Oct. 13, 2010), PRN: 2010/1459, http://www.state.gov/r/pa/prs/ps/2010/10/149362.htm.

[78] Draft Informal Summary, supra note 26, para. 61.

The Crime of Aggression Under the Rome Statute

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The Crime of Aggression

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Introduction

The Kampala Review Conference of the Rome Statute of the International Criminal Court (ICC)[1] conquered decades of challenges for international justice. Ever since the prosecution and convictions of German and Japanese military and political leaders at the Nuremberg and Tokyo military tribunals, respectively, for aggression following World War II, the prospect of a permanent jurisdictional basis for such cases arising from future wars was much debated but never achieved.[2] Negotiators at the Rome Conference in the summer of 1998 failed to close the gap between conflicting visions of the definition for the crime of aggression and the structure of its jurisdictional parameters within the Rome Statute of the ICC. However, there emerged a placeholder, including the crime of aggression in Article 5(2) of the Rome Statute as one of the crimes over which the ICC has subject matter jurisdiction. The treaty left the crime of aggression suspended until States Parties could agree upon a definition for it and a means for activating the jurisdiction of the ICC over this particular crime.[3] Following years of working group and Assembly of States Parties discussions,[4] the scene was set for a final push in Kampala to agree upon a formula for the crime of aggression that proved complex in design but ultimately acceptable by consensus of the States Parties.

The Outcome in Kampala

The crime of aggression that emerged from the Kampala Conference represents a compromise, one creating a fairly broad definition of the crime (albeit tempered by strict leadership criteria) and establishing a complex jurisdictional filter through which the referral must travel before the Court is seized with actual investigation and prosecution in any particular situation of alleged aggression. How the formulation now codified in new Articles 8bis, 15bis, and 15ter, new Elements of Crimes, and a set of new Understandings—all arrived at by consensus in Kampala—

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will fare in actual practice remains entirely speculative until put to the test, and that opportunity will arise no sooner than 2017.[5]

The Definitions

The Review Conference defined the "crime of aggression"[6] in terms of an "act of aggression" which was further defined below.[7] Both definitions were actually developed prior to Kampala in the Special Working Group on the Crime of Aggression,[8] and the Review Conference validated those earlier negotiations. The U.S. delegation, which was present in Kampala as a non-party observer State with no authority to vote, acknowledged Washington's long absence from the Special Working Group during the George W. Bush administration but nonetheless sought to reveal weaknesses in the definitions. In the end, U.S. negotiators' concerns were addressed in substantive Understandings adopted by the Conference regarding the new Article 8bis.

The confluence of the two definitions for the "crime of aggression" and "act of aggression" to arrive at a definitional platform on which to build investigations and prosecutions of individuals before the Court ultimately should work, but there are interpretive challenges ahead for all concerned, particularly the judges. The "crime of aggression" cannot be understood without comprehension of an "act of aggression," but how the Court determines the latter event remains problematic under the Kampala formulation.

New Article 8bis(2) of the Rome Statute defines an "act of aggression" as,

> the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. 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....[9]

What follows in the definition are seven examples, drawn from United Nations General Assembly Resolution 3314 (XXIX) of December 14, 1974, that describe different types of armed attacks orchestrated by one State against another State.[10] The truly operative wording is found in the opening words about "the use of armed force by a State..." No real distinction is drawn between the U.N. Charter Article 2(4) prohibition on use of force[11] and an act of aggression. Article 8bis(2) of the Rome Statute thus establishes no magnitude or gravity criteria for the use of armed force that would constitute an act of aggression. Such an act could include a pinprick

cross-border incursion, a single mortar shell firing across a territorial border, or an armed helicopter rescue mission into foreign territory to save scores of women from rapist militia.

The absence of such a magnitude test in the definition of an "act of aggression" means that when a State Party or the Security Council refers to the Prosecutor a "situation in which one or more of such crimes appears to have been committed", or the Prosecutor "has initiated an investigation in respect of such a crime in accordance with article 15,"[12] gravity will only be relevant with respect to how the "crime of aggression" is defined in Article 8bis(1). That definition has two key requirements; first, there has to be an act of aggression (as defined in Article 8bis(2)) "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." Second, the crime only exists if there is at least one person whom the Court can investigate and who is: a) "in a position effectively to exercise control over or to direct the political or military action of a State"; and b) engaged in "the planning, preparation, initiation or execution" of an act of aggression, "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[13] The raw act of aggression is not a crime for purposes of the Rome Statute. The act only contributes to the finding of criminality if there is a political or military leader of sufficient responsibility (one who exercises "control over" or directs "the political or military action of a State") who has overseen the commission of such an act of aggression that must meet a certain scale of magnitude, as generally described in Article 8bis(1).

The task before the Court, then, needs to be properly understood. Under the Rome Statute, situations referred to the Court by States Parties or by the Security Council are not classified as crimes per se. In the beginning, either of these two referring entities determine not the criminality of any particular act, but reach a decision to refer an overall situation where alleged genocide, crimes against humanity, war crimes, and now aggression (together, atrocity crimes) appear to have been committed. With respect to the crime of aggression then, this will require the referring entity to find acts of aggression that are of a criminal character (as defined by Article 8bis(s)). There is a risk that a State Party or even the Security Council can get sloppy in that analysis and not focus on the need to evaluate apparent criminal conduct by individuals of acts of aggression of sufficient magnitude before making a referral to the Court. Both the Prosecutor and the judges will need to be guardians at the gate to deflect, if necessary, spurious or strictly politically motivated referrals poorly grounded in the requirements of a crime of aggression.

In contrast, under the investigative authority in Article 13(c), the Prosecutor has to ensure that he or she is presenting not simply an act of aggression to investigate to the Pre-Trial Division pursuant to Article 15 procedures, but that the situation is one that he or she already has

reasonably determined (not speculated) involves a political or military leader plotting an act of aggression of sufficient magnitude to constitute a crime of aggression. The State Party or Security Council can speculate about what "appears" to be crimes of aggression occurring within a "situation," and refer that speculative observation to the Court. But if the Prosecutor were to invoke proprio motu investigative power, he or she should be held to a higher standard of actual knowledge about the criminal conduct of individuals associated with acts of aggression that should qualify as a "situation."[14]

Political realities suggest, however, that we might anticipate a different outcome. Based upon a long history of aversion to reaching decisions about aggression,[15] the Security Council will be the most hesitant to refer a situation in which crimes of aggression appear to have been committed. If the Council does so refer a situation, it almost certainly will do so only if the acts of aggression are of considerable magnitude, the individual leaders responsible for such acts are in the Council's sights, and the Council's peace enforcement or peacemaking objectives do not trump the rule of law. Indeed, the Security Council initially might seek the advice of a commission of experts or even an advisory opinion from the International Court of Justice.

A State Party may be diligent to identify what appears to be the crime of aggression within an overall armed conflict situation erupting next door or somewhere else in the world. But it is entirely possible that State Party governments will find political advantage in simply referring a situation of armed attack(s) by an adversary to the Court without rigorously factoring in the requisite elements of the crime of aggression. Similarly, an ambitious Prosecutor may leap at acts of aggression for bold investigative purposes without first taking the time to determine the criminal character of such acts, including their magnitude and leadership characteristics. There is no reason to think the Court cannot handle such politically inspired or ambitious initiatives and reject them if they do not satisfy the strict requirements of the Rome Statute for jurisdiction. But the possibilities should be well understood before the activation date of the Court's jurisdiction.

The Jurisdictional Filters

The amended Rome Statute establishes two jurisdictional filters through one of which any Article 13 referral or investigation must pass before the crime of aggression can be investigated and prosecuted. This proved to be an artful compromise in Kampala and was the result of intensive negotiations there to achieve consensus.[16] Both jurisdictional filters are qualified by a critical temporal procedure. The Court may exercise jurisdiction only over crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States

Parties.[17] Further, at least a two-thirds majority of the States Parties must confirm the substance of the Kampala amendments on aggression by decision taken no earlier than 1 January 2017.[18] This second bite at the apple was part of the essential compromise for major non-party States, like the United States, to acquiesce in the Kampala amendments.

The first jurisdictional filter, set forth in Article 15bis, applies to a State Party referral or the initiation of an investigation by the proprio motu Prosecutor. The Article 12 preconditions for jurisdiction still must be followed.[19] This means that the crime of aggression must occur on the territory of a State Party, the accused is a national of a State Party, or a non-party State has lodged a relevant Article 12(3) declaration accepting the exercise of jurisdiction by the Court with respect to the crime of aggression. The Court must determine whether the crime of aggression arises from an act of aggression by a State party that previously declared to the Registrar of the Court that it does not accept the Court's jurisdiction on aggression.[20] If such a declaration was filed, then the Court may not proceed against the nationals of such a State Party—apparently even in connection with any crime of aggression committed on its own territory. In the event the United States were to become a State Party to the Rome Statute, it could file such a declaration and avoid liability for its nationals with respect to the crime of aggression.

Furthermore, the Court cannot exercise jurisdiction over the crime of aggression when committed by a non-party State's nationals or on a non-party State's territory.[21] This critical concession achieved the much sought-after protection from jurisdiction regarding aggression for key nations with non-party status, including the United States. This special consideration also corrected, at least for the crime of aggression, the apparent drafting flaw in Article 121(5) of the Rome Statute in which only a State Party can declare its non-acceptance of a new crime to the Rome Statute while oddly leaving non-party States exposed to the Court's jurisdiction for such newly added crimes.[22]

The next stage of the jurisdictional filter set forth in Article 15bis concerns the Security Council. If the Prosecutor decides that there is a reasonable basis to proceed with an investigation of a crime of aggression following an Article 13(a) referral by a State Party or on the Prosecutor's own initiative under Article 13(c), he or she must first "ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned." Such a determination likely would arise from a U.N. Charter Article 39 decision by the Security Council.[23] If the Council has so determined, then the Prosecutor may proceed with the investigation of a crime of aggression.[24]

If such a Security Council determination is not made within six months after the date on which the Prosecutor notifies the U.N. Secretary-General that there is a reasonable basis to proceed with an investigation of an alleged crime of aggression, then the Prosecutor may proceed with such an investigation, provided the Pre-Trial Division of the Court first has authorized the commencement of the investigation in accordance with the original procedures under Article 15 of the Rome Statute.[25] Negotiations at the Review Conference led to the requirement that all of the six Pre-Trial Chamber judges constituting the Pre-Trial Division must participate and approve the commencement of the investigation by majority vote. This fall-back to the Pre-Trial Division challenged the primacy of the Security Council in determining acts of aggression under the U.N. Charter. The possibility of keeping an investigation of aggression alive before the Court when the Council fails to act was debated intensively for years in the Special Working Group on the Crime of Aggression, and among the entire Assembly of States Parties and major non-party States.

On the final day of the Review Conference, however, language appeared that confirms Security Council power to flash a "red light" on the Pre-Trial Division. The compromise language provides that the Pre-Trial Division can trigger an investigation of the crime of aggression, provided "the Security Council has not decided otherwise in accordance with article 16."[26] Article 16 of the Rome Statute explicitly empowers the Security Council to prevent an investigation or prosecution from commencing or proceeding for twelve months after the Council adopts a U.N. Charter Chapter VII resolution requesting the Court to that effect. Such a request, and hence the Council's "red light", can be renewed by the Council under the same conditions in subsequent years.[27]

The "red light" authority would require the Security Council to take an affirmative action to block the Pre-Trial Division as opposed to simply remaining silent, but that means that any one of the five permanent members of the Council could veto the resolution and thus hand the decision back to the Pre-Trial Division. Nonetheless, in order for the Pre-Trial Division to authorize the investigation of a crime of aggression, it would need to determine pursuant to Article 15bis(4), that a crime of aggression arises from an act of aggression. That requirement challenges the view that the Security Council has the exclusive authority to determine acts of aggression. The judges of the Pre-Trial Division must wade deeply into State responsibility factors in order to evaluate acts of aggression. That will involve judgments anchored in international law on the use of force in addition to analysis drawn from international criminal law.

The second jurisdictional filter is applied when the Security Council, pursuant to Article 13(b) and Article 15ter of the Rome Statute, refers to the Prosecutor a situation in which one or more crimes of aggression appear to have been committed. Here the jurisdictional terrain is quite different from that found in the new Article 15bis. The original scope of jurisdiction for a Security Council referral holds, namely, that any State Party and any non-party State can be swept into such a referral "irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard."[28] Therefore, the nationals of any such State Party or non-party State can be investigated and prosecuted for the crime of aggression, provided the Security Council has referred the situation to the Prosecutor, pursuant to a U.N. Charter Chapter VII Resolution that identifies the territorial and personal jurisdiction of the referred matter. Such a resolution also could serve the useful purpose of constituting a U.N. Charter Article 39 determination by the Security Council that an act of aggression indeed has occurred, thus satisfying those governments that look to the Security Council for primary jurisdiction on aggression. It is possible that the Security Council could refer aggression in such a manner that it leaves the actual judgment of whether acts of aggression have occurred to the ICC judges to determine in the first instance. Passing the buck to the ICC in this manner may prove politically attractive for the Council, which is traditionally loath to invoke the word "aggression" but might feel comfortable letting the ICC reach that determination in a unique situation where the stakes involved are considered manageable by Council members.

However the crime of aggression might be referred to or initiated with the Court under Article 13 of the Rome Statute, once the Court is fully seized with the crime of aggression in any particular case, a determination of an act of aggression by an organ outside the Court "shall be without prejudice to the Court's own findings" under the Rome Statute.[29] Thus, the ICC judges are authorized to make their own determinations on both acts and crimes of aggression once the Pre-Trial Division authorizes an investigation under Article 15bis(8) (absent any Security Council action under Article 16 of the Rome Statute) and individual cases come before the Court, or after the Security Council refers a situation pertaining to aggression in accordance with Articles 13(b) and Article 15ter of the Rome Statute.

Elements of Crimes

The Special Working Group on the Crime of Aggression had finalized elements of the crime of aggression prior to the Review Conference and these elements were easily adopted at the Review Conference.[30] The elements mirror some of the points raised in the U.S.-sponsored Understandings to the crime of aggression and clarify that the perpetrator need not be shown as having made a legal evaluation about "whether the use of armed force was inconsistent"

with the U.N. Charter[31] or "as to the 'manifest' nature of the violation" of the U.N. Charter.[32] The elements reiterate a key requirement, namely that the "act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations."[33] The perpetrator must be aware of both the factual circumstances that established the use of armed force inconsistent with the U.N. Charter,[34] (such as a violation of U.N. Charter Article 2(4)) and of those factual circumstances that established the act of aggression as a manifest violation of the U.N. Charter.[35]

Understandings about the Crime of Aggression

Annex III of Resolution RC/Res. 6 of the Review Conference sets forth seven "Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression" ("Understandings"). These Understandings are intended to guide the interpretation of the amendments on aggression by ICC judges, the Prosecutor, and defense counsel. One can only speculate as to whether any of these individuals, particularly the judges, will consider themselves bound to the Understandings as opposed to their own interpretations of the wording of the statutory provisions.

During these negotiations, the U.S. delegation was instrumental in successfully advancing four of the seven Understandings. In Understanding No. 4, there is a cautionary signal that the amendments defining the act of aggression and crime of aggression are limited to the Rome Statute only and that nothing should be interpreted as limiting or prejudicing existing or developing rules of international law for purposes other than the Statute. Non-party States in particular would want to ensure that the law evolves with their guidance outside of the Rome Statute. Understanding No. 5 clarifies that there is no obligation to exercise domestic jurisdiction over aggression committed by another State and, by inference, its nationals. This is an important caveat to the complementarity regime being developed under the Rome Statute for the other atrocity crimes and is intended to signal that States need not duplicate the definitions for acts of aggression or the crime of aggression in their domestic law. Understanding No. 5 nonetheless leaves implicitly understood the need to enact domestic penal law covering any crime of aggression committed by a State's own nationals in order to establish the basis for preventing ICC jurisdiction over them.

Understandings Nos. 6 and 7 were pressed hard by the U.S. delegation as they raise the bar on the gravity of acts of aggression that should come before the Court. Both should prove instructive although their ultimate influence will have to await actual cases. By stressing that all of the circumstances of each particular case must be considered, Understanding No. 6

encourages examination of justified uses of armed force that might arise, for example, in self-defense, anti-terrorism strikes, and even humanitarian interventions. Understanding No. 7 seeks to ensure that a "manifest violation of the Charter of the United Nations" is understood to mean that each of the three "components of character, gravity and scale must be sufficient to justify a 'manifest' determination." Unfortunately, the grammar of the final sentence of Understanding No. 7 might lead one to believe that only two of the three components need be of that dimension to constitute a "manifest violation" of the U.N. Charter.[36]

The first three Understandings clarify that 1) the Court should adjudicate only crimes of aggression committed after establishment of the trigger date for activating referrals under new Articles 15bis and 15ter, thus confirming an operational date no earlier than January 1, 2017, for both the commission of the crime and the triggering of the Court's jurisdiction,[37] and 2) the Security Council's referral authority under Article 13(b) negates the need for acceptance of the Court's jurisdiction over the crime of aggression by the State concerned in order to establish that jurisdiction.[38]

The U.S. Position on the Crime of Aggression

The U.S. Government position on the crime of aggression has remained relatively consistent ever since the Nuremberg military tribunal prosecutions after World War II. The London Charter of the Nuremberg Tribunal, which the United States was deeply influential in drafting, established criminal jurisdiction over; 1) a conspiracy to wage an aggressive war that swept within its reach war crimes and crimes against humanity; and 2) crimes against peace, which involved the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[39] The common theme then was the requirement of "an aggressive war" or a "war of aggression," which suggests large-scale cross-border attacks followed by military occupation. For the drafters of the London Charter, the dominant example was the September 1, 1939 German invasion and military occupation of Poland.[40] In more contemporary times, one would view the Iraqi invasion and military occupation of Kuwait in 1990 as falling within the same category of aggressive war. Awkwardly, the Anglo-American invasion and military occupation of Iraq in 2003 arguably could be viewed as a war of aggression.

During the negotiations in the 1990s leading to the Rome Statute and in the years thereafter, the American position remained fairly consistent and in union with many other governments. Washington's initial interest was to focus the Court's subject matter jurisdiction on genocide,

crimes against humanity, and war crimes and not encourage adoption of a far more problematic understanding of aggression as well. However, as the years progressed in the negotiations the U.S. delegation engaged in long and spirited talks about how to incorporate the crime of aggression with a sufficiently precise definition and an acceptable jurisdictional trigger. Washington, joined by other governments, sought a definition grounded in customary international law and more akin to the Nuremberg formula that focused on a "war of aggression," and not a definition tailored to the state responsibility objectives tied to a wide range of uses of armed force found in United Nations General Assembly Resolution 3314 (1974). The United States, again joined by other States, also insisted on a mandatory Security Council role in first determining that an act of aggression has occurred between two States before the Court could exercise jurisdiction in any particular situation.[41] A sizable number of other governments took different positions, some embracing the list of armed attacks under Resolution 3314, as well as a formula that would permit the Court to investigate the crime of aggression if the Security Council failed within a stipulated period of time to reach a decision that an armed attack indeed was an act of aggression.

Gridlock took hold in Rome in July 1998 and the result, reflected in original Article 5(2) of the Rome Statute, was a last minute insertion of the crime of aggression into the treaty but without any operational value until a definition and jurisdictional trigger for the crime could be approved by amendment to the Rome Statute no sooner than the Review Conference to be held seven years (in fact eight years) following the entry into force of the Rome Statute.[42] The United States participated in ongoing discussions at the United Nations about the crime of aggression in 1999 and 2000. But with the arrival of the George W. Bush Administration in 2001, the United States abandoned its seat in U.N. talks on the ICC and, significantly, never attended the Special Working Group on the Crime of Aggression throughout its years of intensive work and discussions among the growing number of States Parties and the active participation as observers of such non-party States as Russia, China, Israel, Pakistan, India, and Indonesia.[43] U.S. views on the crime of aggression thus stagnated during the eight years of the George W. Bush Administration.

The Obama Administration's Resumption of American Engagement

Finally, towards the end of the first year of the Obama Administration (2009), the United States resumed its seat in the aggression talks. By then, however, it was too late to influence the wording of the definition of the crime of aggression and what would become Article 8bis. The best the United States could do was to press in Kampala, as it did with remarkable success, for the Understandings that seek to clarify the meaning of Article 8bis. The final battleground

would be the jurisdictional filter (Articles 15bis and 15ter). U.S. negotiators Stephen Rapp, U.S. Ambassador at Large for War Crimes Issues, and Harold Koh, State Department Legal Adviser, played major roles along with a sizable delegation of U.S. officials accompanying them in Kampala. The delegation included William Lietzau, a former U.S. Marine Judge Advocate General and military judge who had been on the U.S. delegation during the Rome negotiations in 1998 and thereafter, in New York for critical talks on the Elements of Crimes in 1999 and 2000. Widely respected by foreign delegates, Lietzau's particular engagement in Kampala proved decisive in achieving a favorable, or at least tolerable, outcome for the United States.

The U.S. delegation believed the definition of aggression was flawed and that it remained premature for the Assembly of States Parties to come to closure on either the definition or the jurisdictional filter for the crime of aggression at Kampala. As Ambassador Rapp commented afterwards, the United States did not want to "overload" the ICC with the additional responsibility of investigating and prosecuting aggression.[44] Koh emphasized the priority of President Obama's December 2009 Nobel lecture, namely that "in the 21st century, sometimes there are uses of force in which nations must engage that are lawful. And the question is how to make sure that they are not criminalized if they are lawful."[45] The best outcome, from Washington's perspective, was to leave Kampala with aggression still unresolved as an operational crime in the Rome Statute. Much of the commentary prior to the Kampala Conference and even an initiative by a group of non-governmental organizations argued that moving ahead with the crime of aggression would undermine the existing core tasks of the ICC to investigate genocide, crimes against humanity, and war crimes. Such reasoning for a deferral resonated strongly with Washington and ultimately was salvaged in the amendments with a delay mechanism set in place targeting 2017 for another review of the Kampala formula.[46]

On the fifth day of the Kampala conference, Legal Adviser Harold Koh stressed the critical need to reach consensus on both the definition and jurisdictional filter for the crime of aggression, but noted that delegations were far from reaching that objective. One had the sense that day that the United States remained determined to achieve its goal of deferring aggression to another quite distant day, or more likely year, when consensus might be achieved rather than achieve that difficult goal in Kampala. Doom and gloom descended on many of the delegates and observers in the talks, but negotiations follow odd trajectories at times, and Kampala proved no different.

Hard work over the following week by the top U.S. negotiators, other delegations, and by Chairman Christian Wenaweser of Liechtenstein (who also was Chairman of the Assembly of States Parties) and Prince Zeid Ra-ad Zeid al-Hussein of Jordan (the Chairman of the Special

Working Group on the Crime of Aggression and former Chairman of the Assembly of States Parties) led to a consensus decision late on June 11, 2010. Koh's insistence on consensus prevailed and the United States achieved its core objectives, which Koh described as follows:

> [T]he outcome protected our vital interests. The court cannot exercise jurisdiction over the crime of aggression without a further decision to take place sometime after January 1st, 2017. The prosecutor cannot charge nationals of non-state parties, including U.S. nationals, with a crime of aggression. No U.S. national can be prosecuted for aggression so long as the U.S. remains a non-state party. And if we were to become a state party, we'd still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.[47]

These were the negatively framed justifications and Washington-centric explanations of what was achieved in Kampala to demonstrate that the United States need not worry about its political or military leaders being investigated or prosecuted on the crime of aggression in the future, regardless of whether the United States becomes a State Party to the Rome Statute.

While Koh and Rapp promised renewed American cooperation and engagement with the ICC, particularly on specific cases of genocide, crimes against humanity, and war crimes; they expressed no particular interest in supporting the ICC in aggression investigations and prosecutions in the future. Indeed, Koh emphasized that the United States, despite it being only an observer State, might use the seven years following Kampala to reopen the aggression amendments: "We hope that crime will be improved in the future and will continue to engage toward that end."[48] However, he explained that serious concerns over the crime of aggression being activated for investigation and prosecution of U.S. officials before the ICC have been greatly diminished:

> I think the big picture is we are the country of Nuremberg. [U.S. Supreme Court] Justice [John] Jackson is one of our most esteemed legal figures, and that, therefore, we had an important role to play in figuring out how a crime of aggression could be successfully and responsibly applied. I think the chance of a prosecution of U.S. officials is zero at this point. The chance of a chilling effect is as close to zero as you can get, and on this basis, with this issue being put off, I think it is not the time for this country to adopt a defendant's

> mentality toward a set of issues on which we have very strong interest in promoting accountability and ending impunity.[49]

The "defendant's mentality" has dominated Washington thinking about the ICC since the early 1990s. It would be refreshing to climb out of that mind sink and think positively and constructively about how the Obama Administration could forge ahead to build an increasingly constructive and forward-leaning relationship with the ICC, for the sake of one of America's most vital interests—international justice.

Next Steps for U.S. Engagement

In coming years, the United States, even as a non-party State, can help strengthen the incorporation of the crime of aggression into the operational framework of the Rome Statute and ultimately in actual investigations and prosecutions before the ICC. There will doubtless be skepticism and criticism by those in Washington who have always opposed U.S. participation in the ICC and even the existence of the Court. But any argument premised upon what best protects American interests should factor in the long view of how certain steps toward U.S. engagement can achieve far more than blind opposition.

There are at least six policy steps that the Obama Administration, for starters, could undertake with respect to the crime of aggression. The following suggestions do not seek to address the larger issue of U.S. engagement with the ICC, rather, these are focused strictly on how the United States can best approach the reality that the crime of aggression is on a pathway towards activation under the Rome Statute.

President Obama should discuss international justice in a forthcoming speech and applaud the achievements made in Kampala.

In particular, President Obama should reaffirm America's commitment to the objective of a consensus formula on the definition of acts of aggression and the crime of aggression, as well as the range of issues that confront States Parties and non-party States regarding the jurisdictional filters. His remarks need not be more than a few sentences. But they should be eloquent words that assure governments worldwide of the Obama administration's commitment to the process and the substance of what was achieved in Kampala.

The United States, as an observer State, should remain actively engaged in all future discussions about the crime of aggression by the Assembly of States Parties.

The American engagement, however, should not be designed to thwart implementation of the crime of aggression as 2017 approaches, as that kind of strategy surely would backfire on U.S. interests. If Washington were seen to be undermining the achievements of Kampala, which in the eyes of many governments were minimalist at best, the United States would risk returning to an isolated and outlier status, reminiscent of the George W. Bush years. Rather, the United States should start from the premise of "living with" Kampala's formulation on aggression and seek to build upon it towards a fair and effective Court. Re-opening the formulation agreed to in Kampala would risk sacrificing the very provisions that protect and advance U.S. interests. Recognizing that risk, there are legitimate issues to raise in coming years about how to prepare the Court for the arrival of the crime of aggression. The United States can be at the forefront with major States Parties like Japan, France, Argentina, the United Kingdom, South Africa and others to examine those issues and constructively improve the Court's performance. These issues include the training that will be required for the Office of the Prosecutor and for the judges to properly assess acts of aggression and their magnitude in the context of state responsibility, how to handle the role of victims of aggression before the Court, the composition of the judicial bench to address allegations of aggression (see below), and the integrity of the amendment procedures that guided the Kampala negotiations and those that will be used as 2017 approaches.[50]

The Obama Administration should consult with its allies, particularly those in the NATO alliance, about how to plan for the arrival of an operational crime of aggression before the ICC, perhaps as early as 2017.

One of the traditional concerns expressed by American negotiators has been whether allies will ratify the crime of aggression and yet decline to withdraw from its jurisdiction as permitted by the amended Rome Statute, thus creating a fractured matrix of legal exposure among NATO nations in connection with the use of military force and in the context of charges, however frivolous or unjustified they may be, of aggression. As a result, two allies acting in unison could be subject to very different liabilities under the Rome Statute.

However, the United States must not implement a strategy akin to the Article 98(b) non-surrender agreement initiative of the George W. Bush Administration, a multi-year effort that pressured and compelled America's friends and allies to sign bilateral agreements in numbers and content that far exceeded what was required and only ignited fierce opposition to the

United States, further undermining American influence and dismantling military relationships in critical parts of the world.[51] In contrast to the Bush strategy, the Obama plan should encourage allies to ratify the Kampala amendments, including those pertaining to aggression. But the administration should select key allies that likely will join the United States in the future in collective self-defense, U.N. military enforcement measures, humanitarian interventions, and counter-terrorism operations within alliance structures like NATO. With these select allies, the U.S. can discuss the merit of possibly filing declarations of non-acceptance of ICC jurisdiction over the crime of aggression pursuant to new Article 15bis(4).

This strategy has to be understood by all as an American effort to activate the crime of aggression while ensuring that critical and lawful uses of force can be undertaken to confront the on-going commission of atrocity crimes and pursuant to U.N. mandates. Such a strategy will not be popular abroad and States Parties acting in good faith must undertake it with great restraint and sophistication to preserve the Court's jurisdiction over the crime of aggression while recognizing practical and legally justifiable exceptions to such jurisdiction. Indeed, it may be possible to frame a NATO declaration of non-acceptance to limit it to publicly declared actions consistent with the right of self-defense, U.N. mandates (including under the responsibility to protect doctrine), humanitarian imperatives, and limited, strictly necessary, counter-terrorist actions.

The Obama Administration should begin to work with various States Parties to ensure that in coming years, some highly qualified retired military judges are elected by the Assembly of States Parties to the bench of the ICC.

The presence of military expertise among the judges of the Court should enhance its ability to properly analyze the use of military force, whether lawful or unlawful, in the context of cross-border acts of aggression and leadership engagement as set forth in new Article 8bis. The United States also could lend a constructive voice to the idea of a specialized chamber of the ICC that in the future could be used to examine aggression claims and better understand the inter-play between acts of aggression and the crime of aggression in the Rome Statute. If the United States were to become a State Party to the Rome Statute some day, it should consider nominating one of its most talented retired military judges to a judgeship on the Court.

The U.S. should formulate its foreign policy while being cognizant of the crime of aggression under the Rome Statute.

There is no escaping the reality that activation of the crime of aggression in the Rome State as early as 2017 should be factored into how the United States formulates its foreign policy and the use of armed force overseas. Even if the United States remains a non-party State and takes advantage of continued non-application of the Court's jurisdiction over it with respect to the crime of aggression, it would be a matter of profound lack of foresight to ignore the issue entirely. This is particularly true in terms of alliance actions that might trigger the Court's jurisdiction over aggression. The Department of State, Department of Defense, and the National Security Council should be sensitive to how military actions are planned, under what circumstances they proceed, and be cognizant of how United States actions might be viewed by others as crossing the trip-wires of the crime of aggression. Such awareness on the part of Washington policy-makers need not constrain U.S. military actions, but it should keep everyone on their toes to ensure the legality of American interventions abroad. With or without the existence of the ICC and of the crime of aggression within its jurisdiction, policy-makers and military strategists should be more attentive to international law and American compliance with it as a routine norm, not an exception.

Once the crime of aggression becomes operational, the United States, as a permanent member of the U.N. Security Council, should work constructively with other members of the Council, particularly States Parties to the Rome Statute, to approve referral of situations of aggression to the Court for adjudication consistent with the Rome Statute Article 13(b) authority.

This always will be a highly political and sensitive initiative by the Security Council given the views of other nations about the role of the Council and the power it wields. But within the Security Council, the United States can demonstrate a highly responsible attitude towards the Court and its importance in assisting with the resolution of threats to international peace and security through the instrument of international justice.

Conclusion

The full definitional, jurisdictional, and operational dimensions of the crime of aggression before the ICC will take years to sort out among scholars, governments, and finally the judges of the Court who will adjudicate the crime in actual cases. The United States played a critical role for decades in the process that ultimately led to the Kampala Review Conference of 2010, even though for a number of years during the first decade of the 21st century, Washington

abandoned the discussions bearing upon the final amendments to the Rome Statute. The Obama Administration re-entered the diplomatic talks and made important contributions to the outcome in Kampala.

The definition of the crime of aggression may, in Washington's view, remain flawed; but enough was accomplished in Kampala to lend strength to a workable interpretation of the definition. While jurisdictional filters proved complex to negotiate and perhaps hard to comprehend in the final wording, significant U.S. interests were protected in the end product. At least the jurisdictional pathway to a case charging the crime of aggression is established and set for a final review by States Parties in 2017 or at some agreed time thereafter. The United States should work to strengthen the incorporation and entire implementation of the crime of aggression in the Rome Statute so that the leaders of aggressor nations can be brought to justice and lawful uses of military force for the sake of humankind remain available in the future.

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[1] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002), available at http://untreaty.un.org/cod/icc/ statute/romefra.htm [hereinafter Rome Statute].

[2] M. Cherif Bassiouni & Benjamin B. Frencz, The Crime Against Peace and Aggression: From Its Origins to the ICC, in INTERNATIONAL CRIMINAL LAW, V. 1, 207 (M. Cherif Bassiouni, ed., 3rd ed., 2008).

[3] Roger S. Clark, The Crime of Aggression and the International Criminal Court, in INTERNATIONAL CRIMINAL LAW, V. 1, 243 (M. Cherif Bassiouni, ed., 3rd ed., 2008); Astrid Reisinger Coracini, The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression—at Last…in Reach…Over Some, 2 GOETTINGEN J. INT'L L. 745, 749-752 (2010) .

[4] See Stefan Barriga, Against the Odds: The Results of the Special Working Group on the Crime of Aggression, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 621 (Roberto Bellelli, ed., 2010).

[5] See David Scheffer, States Parties Approve New Crimes for International Criminal Court, 14 ASIL Insight 16 (June 22, 2010), at http://www.asil.org/insights100622.cfm (providing a summary analysis of the results of the Kampala Review Conference) ; See also David Scheffer, Aggression is Now a Crime, INT'L HERALD TRIB., July 1, 2010, at 6.

[6] ICC Assembly of States Parties, Res. on the Crime of Aggression, 13th plenary meeting, June 11, 2010, ICC Doc. RC/Res. 6, Art. 8 bis (1) (advance version) (June 28, 2010), available at http://www.icc-cpi.int/Menus/ASP/ReviewConference/

Resolutions+and+Declarations/Resolutions+and+Declarations.htm [hereinafter The Crime of Aggression, RC/Res. 6].

[7] Id. art. 8 bis (2).

[8] Report of the Special Working Group on the Crime of Aggression, Doc. ICC-ASP/7/SWGCA/2 (2009), available at http://www.icc-cpi.int/nr/exeres/dea630a9-e656-4870-a2a8-1ebfa35857cb.htm.

[9] The Crime of Aggression, RC/Res. 6, art. 8 bis (2).

[10] The seven acts are as follows:

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;

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;

The blockade of the ports or coasts of a State by the armed forces of another state;

An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

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;

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;

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. Ibid.

[11] U.N. CHARTER art. 2, para. 4 (stating that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

[12] Rome Statute, art. 13.

[13] The Crime of Aggression, RC/Res. 6, art. 8 bis (1).

[14] The initiation of an investigation into the Kenyan violence electoral violence, approved by the Pre-Trial Chamber of the ICC, reflects this interpretation of Article 13(c) authority. Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, ICC-01/09 (March 31, 2010).

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

[16] For a blow-by-blow account of the Kampala negotiations, see the blog entries by David Scheffer and John Cerone at http://iccreview.asil.org/.

[17] The Crime of Aggression, RC/Res. 6, arts. 15 bis (2) and 15 ter (2).

[18] Id. arts. 15 bis (3) and 15 ter (3).

[19] Id. art. 15 bis (4).

[20] Id.

[21] Id. art. 15 bi s(5).

[22] See David J. Scheffer, Staying the Course with the International Criminal Court, 35 CORNELL INT'L L.J. 47, 76, 81, 86, 96 (Nov. 2001-Feb. 2002) (explains measures to correct the flaw in the second sentence of Article 121(5) of the Rome Statute, which reads: "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 on 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.").

[23] U.N. CHARTER, art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

[24] Missing from the Kampala amendments is any consideration of what to do if the Security Council affirmatively determines by resolution that no act of aggression has occurred. See David Scheffer, The Complex Crime of Aggression under the Rome Statute, 23 LEIDEN J. INT'L L. 897, 901-902 (2010).

[25] The Crime of Aggression, RC/Res. 6, art. 15 bis (8).

[26] Id.

[27] Rome Statute, art. 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.").

[28] The Crime of Aggression, RC/Res. 6, Annex III (Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression), Understanding No. 2 ("It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.").

[29] The Crime of Aggression, RC/Res. 6, arts. 15 bis (9) and 15 ter (4).

[30] The Crime of Aggression, RC/Res. 6, Annex II.

[31] Id.; Introduction No. 2.

[32] Id.; Introduction No. 4.

[33] Id.; Elements No. 5.

[34] Id.; Elements No. 4.

[35] Id.; Elements No. 6.

[36] The Crime of Aggression, RC/Res. 6, Annex III (Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression), Understanding No. 7 ("It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. No one component can be significant enough to satisfy the manifest standard by itself.").

[37] Id.; Understanding Nos. 1 & 3.

[38] Id.; Understanding No. 2.

[39] Art. 6, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis [London Charter], Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in 39 AM. J. INT'L L. 259 (1945) (SUPP.).

[40] See Whitney R. Harris, Tyranny on Trial 514-538 (Rev. ed., 1999); R.S. Clark, Nuremberg and the Crime against Peace, 6 Wash. U. Global Studies L. Rev. 527 (2007).

[41] See David J. Scheffer, The United States and the International Criminal Court, 93 AM. J. INT'L L. 12, 21 (1999); David J. Scheffer, Staying the Course with the International Criminal Court, 35 CORNELL INT'L L.J. 47, 82-83 (Nov. 2001-Feb. 2002).

[42] Rome Statute, art. 5(2) ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.").

[43] See Stefan Barriga, Chapter 29: Against the Odds: The Results of the Special Working Group on the Crime of Aggression, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 621 (Roberto Bellelli, ed., 2010); THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003-2009 (Stephan Barriga et al., eds., 2009).

[44] State Department Press Conference, Koh and Rapp's Remarks on U.S. Engagement in the International Criminal Court and the Outcome of the ICC Assembly of States Parties Conference, June 2010, p. 5 (June 15, 2010), at https://secure.www.cfr.org/publication/22454/koh_and_rapps_remarks_on_us_engagement_in_the_international_criminal_court_and_the_outcome_of_the_icc_assembly_of_states_parties_conference_june_2010.html.

[45] Id. at 6.

[46] Id. at 4.

[47] Id. at 1-2.

[48] Id. at 2.

[49] ASIL, The U.S. and the International Criminal Court: Report from Kampala Review Conference, at 5 (June 16, 2010). Transcript available at http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf.

[50] See David Scheffer, The Complex Crime of Aggression under the Rome Statute, 23 LEIDEN J. INT'L L. 897, 902-903 (2010).

[51] See David Scheffer, Article 98(2) of the Rome Statute: America's Original Intent, 3 J. INT'L CRIM. JUSTICE 333 (2005).

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U.S. Engagement After Kampala: The Crime of Aggression

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Introduction

In the early morning hours of June 12, 2010, the Assembly of States Parties of the International Criminal Court (ICC) adopted a resolution setting forth a definition for the crime of aggression, as well as a package of rules regulating the pre-conditions to the exercise of the Court's jurisdiction over the crime. This resolution was adopted in the context of the ICC Review Conference, which was held in Kampala, Uganda, in late May and early June of 2010. The Assembly of States Parties welcomed active U.S. engagement at the Review Conference and several U.S. objectives were met as a result.

The purpose of this paper is to provide background on the U.S. government position regarding the crime of aggression, to analyze the aggression negotiations and outcomes at the Review Conference, and to recommend next steps for the development of the U.S. relationship with the ICC and its Assembly of States Parties.

Historical Position of the U.S. Government in Relation to Attempts to Define Aggression

The crime of aggression is derived from the criminalization of the rules of the jus ad bellum—the rules of international law regulating recourse to the use of armed force between states. As such, its operationalization implicates some interests that are distinct from the other crimes within the subject matter jurisdiction of the ICC, i.e., war crimes, genocide, and crimes against humanity. These latter crimes pertain to the way in which force is employed (e.g., the methods and means of conflict, the status of the victims), but are generally unconcerned with the legality of the initial decision to employ armed force, as such. The crime of aggression focuses primarily on this decision, and thus implicates policy considerations more closely connected to states' assessments of national security and potentially entails liability for states' most senior political and military leaders.

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The positions taken by the United States in relation to attempts to define aggression over the course of the past century have been variable. Not all such positions have been expressed in the context of criminalization—indeed, criminalization of aggression is a relatively modern development.

After World War I, in the context of the 1919 Paris Commission on the Responsibilities of the Authors of the War, the U.S. noted the lack of positive law concerning the jus ad bellum, and opposed the prosecution of the German Kaiser for aggression. The U.S. delegation did, however, express "substantial accord" with the Commission's recommendation that "for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law."[1]

A decade later, the United States became a party to the Kellogg-Briand Pact of 1928, which provided for "a frank renunciation of war as an instrument of national policy."[2] Although this treaty was not concerned with criminalization, the U.S. response to this attempt to codify rules of the jus ad bellum is instructive. Upon expressing consent to be bound, the U.S., among other contracting states, made a statement reserving to itself the right to go to war in self-defense as well as the exclusive competence to determine for itself when the right of self-defense had arisen.[3]

The issue of criminalization arose again in the wake of World War II. The United States proposed a definition for the crime of aggression at the London Conference, at which the WWII Allies negotiated the Agreement establishing the International Military Tribunal (IMT) at Nuremberg. The U.S. took an active role in shaping the Tribunal's subject matter jurisdiction. Its proposed definition enumerated various acts, which, if committed first, would constitute aggression. The list of acts included not only such paradigmatic uses of force as invasion and attack by military forces, but also included naval blockades and the provision of support to non-state actors. The U.S. later replaced its proposed definition excluding these latter two types of acts. Ultimately, the proposed definition was not included in the IMT Charter, which criminalized Crimes Against Peace in fairly general terms.[4]

The conclusion of World War II also witnessed the creation of the United Nations. The UN Charter confers on the Security Council primary responsibility for the maintenance of international peace and security, and the competence to determine "the existence of any threat to the peace, breach of the peace, or act of aggression." The context here was quite different from the London conference. While the IMT Charter was concerned with individual criminal responsibility, the UN Charter was designed to create a collective security

arrangement. As a veto-wielding, permanent member of the Security Council, the U.S. has a privileged position with respect to determining the existence of acts of aggression within the framework of the Charter. This differing context may account for the resistance of the United States to attempts to include a definition of aggression in the UN Charter.[5]

Disagreements over the legal definition of aggression also complicated early UN efforts to draft a statute for a permanent international criminal court.[6] The UN worked on a draft statute for several years, but differences among UN Member States, exacerbated by the nascent Cold War, led the UN to abandon its efforts on this project. Nonetheless, the controversy spilled over into other General Assembly efforts to define aggression for purposes of the UN Charter. Delegates disagreed on a number of issues, including whether there should be a general definition, a list of specific acts regarded as aggression, or both; whether the purpose for which force is employed is legally relevant (e.g. to acquire territory or to protect human rights); the extent to which the first acting state may be presumed to be an aggressor; and the relationship between the definition and the Security Council.

A number of special committees were created to examine the issue and to develop a proposal for a definition. The U.S. was a member of each committee, and remained skeptical throughout the exercise about the wisdom and value of elaborating a definition, as well as the feasibility of legally defining such a politically loaded concept. The U.S. was keen to preserve the power, and prerogative, of the Security Council, and also sought to narrow the definition to situations where the acting state had an aggressive purpose. The General Assembly's efforts ultimately culminated in the adoption of Resolution 3314 of December 14, 1974, which sets forth a definition of aggression. The U.S. did not welcome the adoption of this definition, but neither did the U.S. block consensus. This definition would later become the basis for the definition of the crime of aggression adopted at the ICC Review Conference.

GA Resolution 3314 reflected to some extent the original U.S. proposal for aggression at the London Conference. It consisted of a general definition, followed by a list of acts that would presumptively constitute acts of aggression. This list included acts that fall well short of invasion or military attack, including, e.g., 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." The general definition does not make explicit reference to the purpose for which force is used, despite U.S. efforts to include such language.

U.S. skepticism about legal determinations of aggression was also revealed in the course of the 1980s Nicaragua v. U.S.A litigation before the International Court of Justice, in which Nicaragua asserted that the U.S. had violated the prohibition on the use of force. The U.S. had pled several grounds upon which it asserted that the case was inadmissible. Among these grounds was the assertion that questions concerning the use of force were not amenable to judicial settlement, and that furthermore, such questions were committed by the Charter to other UN organs, in particular, the Security Council. These concerns were reiterated when the United States subsequently withdrew its acceptance of the compulsory jurisdiction of the International Court of Justice.

In the 1990s, the UN turned its attention back to the elaboration of a statute for a permanent international criminal court. These efforts culminated in the International Criminal Court (ICC) Statute, adopted at the 1998 Rome Conference.

The U.S. delegation arrived in Rome with a number of concerns that it sought to be addressed during the conference. Broadly, these fell into three categories: the crimes that would fall within the subject matter jurisdiction of the court; the way in which cases would be triggered; and the exposure of U.S. personnel. In general, the delegation engaged in what it considered to be a constructive approach—to influence the Conference to accede to U.S. demands in the hope of establishing a court acceptable to the United States.

To the NGO community, it was clear that the U.S. delegation wanted to limit the jurisdictional reach of the ICC. The delegation wanted either Security Council control or a clear exemption for nationals of non-States Parties. The United States pushed particularly hard on three issues: bases of jurisdiction; proprio motu investigations by the Prosecutor; and peacekeeper exemptions.

Although many of its concerns were addressed, a few key issues were not resolved to the satisfaction of the U.S. government. Indeed, the United States was one of only a handful of states that voted against the adoption of the Rome Statute.

The statute, as adopted, included the crime of aggression. However, the crime was left undefined. The Statute's article 5(2) provided, "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."

Shortly after the adoption of the Rome Statute, David Scheffer, Ambassador-at-Large for War Crimes Issues at the U.S. Department of State, testified before the Senate Foreign Relations Committee, setting forth the reasons why the delegation voted against adoption. The United States objected to the breadth of the court's jurisdiction, in particular, its jurisdiction over nationals of non-States Parties (absent a Security Council referral), the proprio motu power of the prosecutor, the inclusion of a "no reservations" clause, and the possibility of a definition for the crime of aggression that would not maintain the "vital linkage" with a prior decision by the Security Council.[7] The United States subsequently entered a period in which its relationship with the ICC grew hostile. This was then followed by a period of détente and a return to a policy of pragmatic engagement.

The Obama administration's decision to engage with international institutions, and with the ICC in particular coalesced in its objective to stabilize its relationship with the ICC, and to bring U.S. policy toward the ICC in line with the relatively consistent U.S. policy of support for other international criminal courts and tribunals.

In fall 2009, the U.S. began its reengagement with the ICC Assembly of States Parties. By that time, the Assembly of States Parties had concluded the major part of its negotiations on defining the crime of aggression. These negotiations had been ongoing for the better part of a decade in the context of a Special Working Group that had been constituted specifically for that purpose.

Positions within the Assembly of States Parties with respect to the Crime of Aggression During the Lead-up to the Review Conference

By the end of 2009, the Special Working Group on the Crime of Aggression had reached consensus on a number of issues. One of the most important developments in the Working Group was the consensus that the ICC should have jurisdiction over the crime of aggression. During the Rome Conference, many states, including a number of states that would become parties to the Rome Statute, expressed skepticism about the inclusion of aggression in the ICC's subject matter jurisdiction. Through the discussions of the Special Working Group, many of these states were persuaded of the importance of including it.

Symbolic Importance

In particular, it became apparent that the inclusion of aggression had tremendous symbolic importance for many of the States Parties. This symbolic importance resulted from the

experience of war on the part of some states and also from the perception that failure to include the crime would compromise the appearance of impartiality, and thus credibility, of the Court. While principled arguments may be made to distinguish aggression from the other types of crimes within the Court's subject matter jurisdiction, the perception remained that the exclusion of aggression would serve the interests of powerful states—those most capable of projecting military force beyond their borders—to the detriment of the interests of weaker states.

Definition

It also became apparent that the 1974 General Assembly definition of aggression would serve as the basis of the definition. This was problematic for the U.S., which took the position that the GA definition does not constitute customary law, and a fortiori does not constitute customary law for the purpose of criminal prosecution of individuals.

Despite broad agreement on the wisdom of including aggression in the Court's effective jurisdiction[8] and on the contours of the definition, the Assembly of States Parties remained divided on certain key issues relating to the jurisdictional regime for prosecuting the crime. These issues included: the proper procedure for amending the Statute in this context; the related question of the proper interpretation of art. 121(5)-2 of the Statute, and implications for non-states parties; and, most importantly, the package of triggers that would activate the Court's jurisdiction over a case of aggression, including whether prior Security Council authorization would be required for any such prosecutions.

Amendment procedure and implications for non-States Parties

The relevant provisions of the Statute are found in paragraphs 3, 4, and 5 of Article 121:

> Art. 121 (3): The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
>
> Art. 121 (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.

> Art. 121 (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.

Any amendment adopted at Kampala would be subject to ratification or acceptance. The legal consequence of ratification or acceptance would depend upon whether the amendment falls under paragraph four or five. Art. 121(4) sets a high threshold for entry into force (acceptance by seven-eighths of States Parties), but then provides that all States Parties are bound, whether they accepted the amendment or not. Art. 121(5) is more consent-based, with a correspondingly lower threshold for entry to force.

As an amendment to the Court's subject matter jurisdiction, an aggression amendment would seem to fall within the terms of paragraph five,[9] and as such would enter into force for consenting states one year after they deposit their instruments of ratification or acceptance. The uncertainty arises with the second sentence of paragraph five.

The second sentence of Article 121(5) seems to indicate that nationals of States Parties that did not accept the amendment would not be bound by it, even if they were to commit the relevant conduct (i.e. the conduct criminalized by the amendment) on the territory of a State Party that had accepted the amendment. This interpretation has led to concern on the part of some states that nationals of non-States Parties would be more exposed to criminal liability than nationals of States Parties that had not accepted the amendment.

The Assembly of States Parties, through the Special Working Group, seemed to reach consensus on a principle of non-discrimination with respect to States Parties and non-States Parties in this context. However, they disagreed about which way this would cut. Two different understandings of Art. 121(5)-2 were proposed. According to the so-called "positive" understanding, Art. 121(5)-2 would not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment (meaning that, in such cases, nationals of states parties that had not accepted that amendment and nationals of non-states parties would all be subject to the Court's aggression jurisdiction in such cases). According to the so-called "negative" understanding, Art. 121(5)-2 would prevent the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment (meaning that, even where a state that was a victim of

aggression had accepted the amendment, nationals of aggressor states who had not accepted the amendment, whether states parties or not, would not be subject to the Court's aggression jurisdiction.)[10] Of course, neither of these understandings comports with the plain meaning of Art. 121(5)-2.[11]

Jurisdictional triggers

The Assembly of States Parties was also divided over the question of which events should trigger the exercise of the Court's jurisdiction over the crime of aggression. While all states recognized the special role of the Security Council in relation to the issue of aggression, there was sharp disagreement over whether a prior Security Council determination of aggression would be required for any such prosecutions. The UK and France, the only States Parties who are also permanent members of the Security Council, emphasized the primacy of that body. However, most States Parties were reluctant to effectively extend a veto power over ICC prosecutions to each individual permanent member of the Security Council. Skepticism about Security Council exclusivity in this domain perhaps indicated an underlying fear that this power would be used to serve the interests of the individual permanent members, rather than the interests of the international community as a whole.

Civil society divided

Civil society was divided on the wisdom of activating the Court's jurisdiction over aggression. Some organizations felt strongly that the Court's jurisdiction should be activated for reasons similar to those espoused by the Assembly of States Parties. Others asserted that the crime of aggression should not be activated as it would politicize the Court to a degree that would impair its credibility. Still other groups took the position that the crime of aggression, although important to the work and credibility of the Court, should not be activated at this early time in the life of the Court, which in their view needed more time to develop. Finally, some groups were internally divided over the issue, and took no position.

U.S. Objectives for the ICC Review Conference

According to State Department Legal Advisor Harold Koh, the U.S. delegation to the Review Conference was generally guided by three related policy goals: to pursue a policy of principled engagement with international institutions; to stabilize U.S. policy toward the ICC; and to adopt a coherent approach toward all international criminal courts and tribunals.

Specifically in relation to the crime of aggression, the delegation sought to ensure that uses of force that the United States considers to be lawful (especially humanitarian intervention), remain within the scope of legally permissible behavior for the United States. This was manifest in the U.S. delegation's attempt to narrow the definition of aggression; to ensure that the definition set forth in the amendment could not be applied to the conduct of U.S. officials; and to prevent any spill-over effect of the definition of aggression into customary international law or into other legal developments that might expand possibilities of prosecution under domestic law. With respect to potential ICC jurisdiction over the crime of aggression, the U.S. delegation sought to ensure that U.S. officials would not be subject to the Court's jurisdiction to prosecute aggression in the absence of U.S. consent in the individual case; to limit the extent to which the U.S. would be constrained by restraints on coalition partners who may be parties to the ICC Statute; and to preserve to the greatest extent possible the exclusivity of the Security Council's role in relation to determinations of aggression.

The Evolution and Outcome of the Negotiations at the Review Conference

The first week of the Review Conference was largely devoted to the stocktaking exercise, discussed in companion papers. By the end of that week, the Assembly of States Parties turned to the proposed amendments to the Statute. In addition to the proposed amendments on the crime of aggression, the Conference also had before it proposals to drop the Statute's seven year war crimes opt-out provided for in Article 124 and to amend Article eight of the Statute to extend the criminal prohibition on certain types of weapons to non-international armed conflict.

Although not directly related to the aggression issue, the outcomes on these proposals are worth mentioning as they shed some light on questions of amendment procedure and implications for non-States Parties.

Amendment procedure

Both proposals were disposed of by consensus.

There was a strong push for consensus decision-making at Kampala. A number of delegations, including the United States, expressly endorsed the notion that modification of the Court's subject matter jurisdiction should only happen by consensus. The United States believed that a vote would likely work against U.S. interests, as those States Parties that wanted a heavily consent-based regime for aggression and/or Security Council exclusivity, were a clear minority.

In any event, the threat of a vote was minimal, in part because it was not clear that the required two-thirds of States Parties would be present in Kampala at the time of a potential vote on aggression, which, if at all, would happen at the bitter end of the Kampala Review Conference.

The conference adopted the Article eight amendment by consensus, and additionally through consensus, decided to retain the seven year war crimes opt-out for new States Parties to the Statute. This set a precedent for the ensuing discussions on aggression.

Other aspects of the adoption of the Article eight amendment provided additional momentum for the U.S. position regarding the proper amendment procedure. The Article eight amendment was adopted under Art. 121(5) of the Statute, affirming that this was the appropriate amendment procedure for changes to the Court's subject matter jurisdiction. Recall that Art. 121(5) is consent based. Nationals of States Parties that do not accept the amendment are not bound by it. In addition, the preamble language of the resolution adopting the Article eight amendment reflected the "negative" understanding of Art. 121(5)-2, which again is the more consent-based understanding.[12]

Definition of aggression

As noted above, the Assembly of States Parties had already achieved a large degree of consensus on the definition for aggression, as well as on the elements of the crime. Early in the conference, it became apparent that any U.S. attempt to modify the definition or elements would be a steep uphill battle.

The crime of aggression was generally defined as "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." This general definition was then followed by a list of "acts of aggression" that tracked General Assembly Resolution 3314.

The U.S. delegation had expressed concern that the proposed definition, based on the General Assembly definition of aggression, was not consistent with customary international law, and as such, should not be used as a basis for international criminal prosecution. Among its criticisms

was that the definition was too vague, failing to provide adequate notice to individuals as to precisely what conduct was being criminalized.

To this end, the United States proposed a series of Understandings that attempted to narrow the definition. These proposed understandings were met with hostility by some delegations, which expressed their resentment that a non-State Party would enter the negotiations with a list of requested changes at such a late stage in the process. The majority of delegations, however, seemed inclined to entertain the U.S. proposals. Indeed, when an informal meeting was called to discuss the proposed Understandings, the room was packed, and the conference plenary, which continued across the hall, was practically empty.

Some of the proposed U.S. Understandings were directed toward ensuring that the proposed definition would not resonate beyond the ICC Statute—to reduce the probability that it would serve as a basis for the exercise of domestic jurisdiction over the crime as defined or that it would in any other way contribute to the development of customary international law. However, most of the proposed Understandings sought to clarify and/or narrow the definition of aggression. Some of these drew upon language from Nuremberg jurisprudence and from General Assembly Resolution 3314 (defining aggression).

After consulting with other delegations, a German delegate, who served as a focal point for the discussion and chaired the informal meeting, circulated a new non-paper setting forth three proposed Understandings. He explained that he was taking a "minimalist" approach, noting that several of the proposed Understandings (those that had met with the most resistance) had been dropped. Of the three that remained, the first concerned preventing the definition from creeping beyond the Statute, and the other two went to the definition.

Of the definitional Understandings that were dropped was an understanding that "it is only a war of aggression that is a crime against international peace," harkening back to the Nuremberg Charter and seemingly intended to raise the threshold for the crime of aggression. The two that made into the German focal point's non-paper were as follows:

> Understanding X: It is understood that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the purposes for which force was used, the gravity of the acts concerned and of their

> consequences, and that only the most serious and dangerous forms of illegal use of force constitute aggression.
>
> Understanding Y: It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the UN, each of the three components of character, gravity, and scale must independently be sufficient to justify a 'manifest' determination.

Both Understandings were met with some resistance. The United States, in what turned into a slightly embarrassing episode, agreed to drop the reference to "purposes" and to reformulate the last clause in Understanding X. With respect to Understanding Y, one delegate found it to be inconsistent with her understanding of the definition of aggression (upon which there was already consensus). Her delegation understood the components as cumulative, in the sense that the 'manifest' threshold could be reached by the cumulative effect of the components. She therefore proposed to delete "each of" and "independently." The United States responded that it was concerned that without these terms, the definition could be interpreted as permitting the 'manifest' threshold to be reached on the basis of only one of the components. However, it could live with the proposed deletion if a sentence was added to clarify that satisfaction of only one component could not by itself be sufficient to meet the 'manifest' standard. This seemed acceptable to the other delegations. Both of these Understandings, as revised, as well as the understandings attempting to limit definition creep into customary law and domestic legal systems, were ultimately included in the resolution adopting the aggression amendments.

While there was clear consensus on the definition, there was not consensus on whether the definition should be adopted in the absence of consensus on jurisdictional triggers. It became increasingly apparent that any aggression amendment(s) would have to be adopted as a package deal.

Jurisdictional triggers

As noted above, all delegations agreed that the Security Council should be able to trigger an aggression prosecution. However, there was sharp division over whether this should be the exclusive trigger, with a clear majority of delegations taking the position that prosecution should also be triggered by the mechanisms of State Party referral and proprio motu

investigations by the Prosecutor. These more controversial triggers were strongly opposed by the permanent members of the Security Council.

A series of creative proposal were put forward to try and bridge this gap. The first, which was proposed by Argentina, Brazil, and Switzerland, entailed a combination of the procedures set forth in art. 121 (4) and 121 (5). It essentially proposed that the definition of aggression and the Security Council trigger mechanism be adopted under Art. 121 (5), entering into force one year after the first State Party deposits its instrument of ratification or acceptance, and that the more controversial triggers (i.e. State Party referral and proprio motu investigations by the Prosecutor) be adopted under Art. 121 (4), which would not enter into force until one year after seven-eighths of all States Parties have deposited their instruments of ratification or acceptance. This presumably would have delayed entry into force, buying time for those who were not entirely persuaded and giving opponents time to lobby against acceptance of the amendment.[13]

This was followed by a Canadian proposal that embodied a 'menu' approach, where states could opt-in to the controversial triggers. This was further tweaked by a Slovenian proposal that would turn the opt-in into an opt-out. None of these proposals garnered the support of a clear majority of delegations, though the opt-out feature was retained in all subsequent proposals.

This was then followed by a draft compromise text on trigger mechanisms that contained a few new features designed to accommodate the various positions. The principal features were an opt-out for States Parties and a pretty much wholesale exclusion for non-States Parties. Thus, it would not be sufficient for a 'victim state' to have accepted the aggression amendment (i.e. to have not opted-out) to activate the controversial triggers if the aggressor state was a non-State Party or a State Party that had opted-out.[14] The new draft also provided for a five-year delay in the activation of these trigger mechanisms and mandatory review clauses (for the Assembly of States Parties to review the aggression amendments and for State Parties availing themselves of the opt out to reconsider).

In addition to the opt out provision, this latest draft text retained two additional, alternative hurdles to the use of the controversial triggers even for those States Parties that have accepted the amendment(s) and declined to opt out. In one alternative, the Prosecutor would not be able to proceed with an investigation unless the Security Council has determined that there has been an act of aggression by the State concerned or has requested the Prosecutor to proceed with the investigation (the so-called "green light" proposal). In a second alternative, the

Prosecutor could proceed even in the absence of a Security Council determination or request, unless the Security Council decided otherwise. This would essentially shift the burden of inertia. This second alternative would also require that the Prosecutor obtain the approval of the Court's Pre-Trial Division as an additional, internal filter.[15]

The new text also incorporated additional delays to activation of the trigger mechanisms. With respect to the more controversial triggers (State Party referral and proprio motu), the Court's jurisdiction would not be activated until "States Parties so decide no earlier than 2017." With respect to the Security Council trigger, the Court's jurisdiction would become activated "seven years after the adoption of the amendments on the crime of aggression, unless States Parties decide otherwise," again reflecting a shift in the burden of inertia. While the more controversial triggers would not be activated until the States Parties make any affirmative decision, the Security Council trigger would activate unless the States Parties decided to stop it.

The final version was circulated on the afternoon of the last day of the Review Conference. The Chair circulated the draft with the understanding that "nothing is agreed until everything is agreed."

Unlike the prior text, which provided for differential treatment between activation of the Security Council trigger and activation of the other triggers (State Party referral and proprio motu), the final draft made the two delayed activation provisions identical. In addition to synchronizing the delayed activation provisions, the text also specified the threshold required for the decisions referred to in those paragraphs. The earlier text had simply referred to decisions of States Parties. The new text required the same majority as that for adoption of an amendment, which is two-thirds of all States Parties (not just two-thirds of those present and voting).[16]

The aggression amendments were then adopted by consensus, followed by explanations of position. A handful of delegations expressed some concerns about the amendments, perhaps leaving markers to re-open the package some time after 2017 and before activation of the jurisdictional triggers. At least one delegation indicated its position that the package may not be re-opened, and that the post-2017 decisions referred to in the amendments could relate only to activation of the package as adopted.

Analysis of the Review Conference Outcome and Recommendations

Ultimately, most of the U.S. delegation's central concerns were addressed to its satisfaction. The Review Conference produced a highly consent-based regime for aggression that included a complete exemption from the controversial jurisdictional triggers for nationals of non-States Parties. As Security Council referral can only occur with the acquiescence of the permanent members, the regime adopted ensures that U.S. nationals will not face prosecution for aggression without U.S. consent.

The opt-out provision for States Parties protects the unity of the Statute while allowing partners in multilateral operations to similarly exempt their nationals from the aggression jurisdictional regime.

The amendments were adopted by consensus under Art. 121(5).

The Review Conference's explicit adoption of the negative understanding of Art. 121(5) in the context of the Article eight amendment effectively addressed the U.S. concern that nationals of non-States Parties might be bound by new crimes added to the Statute via the amendment process.[17]

The delayed activation provisions (no earlier than 2017, subject to a further decision by the Assembly of States Parties, and requiring also a minimum of 30 ratifications, plus an additional year beyond the 30th ratification) provide some breathing room for states to increase their comfort with the regime and also allow the ICC more time to develop its core capacities.

The controversial triggers are made subject to additional filters, including the requirement of approval by judges of the Court's Pre-Trial Division.

The authority of the Security Council is preserved. While it does not have exclusive authority to trigger an aggression prosecution, it is afforded a role in all prosecutions and is empowered to block prosecutions.

Recommendations

Definition

If the United States continues to advocate for narrowing the definition of aggression, it must be able to articulate why the definition must be narrowed, beyond the simple assertion that the definition is vague.[18] All international criminal tribunals to date had ambiguities to contend with in their statutes, and those provisions, unlike ICC crimes, were applicable to conduct that occurred prior to the adoption of their respective statutes. The line of criminality for the crime against humanity of "other inhumane acts" or the war crime of disproportionate attacks was far from clear. Tribunals have effectively dealt with the resulting fair notice issues by limiting prosecutions to cases in which all potential lines have been crossed.[19] The ICC should, and should be expected to, do the same.[20]

If the goal of the United States is to clarify the definition in order to more specifically identify the evil, which the law intends to prohibit, then it is important to explain the relationship between proposed modifications or understandings and that goal. Failure to explain that relationship makes it seem as though the U.S. seeks to narrow the definition for its own sake, i.e., to narrow the definition out of existence. Indeed, some of the understandings proposed by the U.S. delegation would have essentially eviscerated the aggression amendment altogether.[21]

Security Council exclusivity

The United States should abandon its demands for Security Council exclusivity over legal determinations in the context of international criminal law in the strict sense. It is becoming increasingly clear that the international community will not accept further entrenchment of the P-5 privilege. This is particularly true when it would result in permanent members being able to unilaterally block prosecutions of their nationals.

Continued engagement

The overall reception to U.S. engagement was positive. States Parties were generally highly amenable to U.S. participation, and were prepared to respond in a spirit of cooperation. This was evident in the manner of proceeding by consensus, as well as the flexibility shown in the application of Art. 121(5)-2.

The inclusion of some of the U.S. Understandings relating to the definition and the highly consent based jurisdictional regime demonstrate that U.S. concerns were heard and addressed. The United States should continue to engage in this constructive manner.

Finally, the United States should also consider ratification of the Rome Statute. While it is true that the ICC has not been fully tested, it has already made important strides in its institutional development. U.S. participation could further its development. At the same time, the U.S. could also give the Court more time to develop by availing itself of the Art. 124 war crimes opt out, which was preserved by the Review Conference, as well as the aggression opt out.

The United States' continued viability as a global leader is undermined by its remaining outside this institution, which is rapidly becoming a central pillar of the international community.

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[1] Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919, Annex II: Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, reprinted in 14 Am. J. Int'l L. 95 (1920).

[2] Treaty providing for the Renunciation of War as an Instrument of National Policy, signed Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (entered into force July 24, 1929).

[3] 2 Oppenheim. International Law, 187 (7th ed. 1952).

[4] IMT Charter, Art. 6(a): "CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing..."

[5] 5 Whiteman, Digest of International Law 740 (1965) (The US took the position that "[a]ny definition of aggression is a trap for the innocent and an invitation to the guilty."). Bear in mind also the limited personal jurisdiction of the IMT, which had jurisdiction to prosecute only those who were "acting in the interests of the European Axis countries." Art. 6, IMT Charter.

[6] See, e.g., Report of the Sixth Committee, Doc. A/3770, 6 December 1957, at para. 5 and following. See also G.A. Res. 12/1186, 11 December 1957.

[7] Article 5(2) did not specify any particular requirement for the yet to be adopted jurisdictional regime for aggression. It simply required that "[s]uch a provision ... be consistent with the relevant provisions of the Charter of the United Nations."

[8] Although aggression has been included in the statute since its adoption, it effectively remains a dead letter until activated by the ASP.

[9] A possible argument in favor of using art. 121(4) is that the jurisdictional regime for the crime of aggression, in particular the elaboration of trigger mechanisms, is not itself an issue of subject matter jurisdiction and therefore falls outside the scope of art. 121(5). A counterargument would be that art. 5(2) of the Statute contemplates using the art. 121(5) procedure for the elaboration of both the definition of and the jurisdictional regime for aggression.

[10] See ICC Assembly of States Parties, Conference Room Paper on the Crime of Aggression, 13th plenary meeting, June 7, 2010, ICC Doc. RC/WGCA/1/Rev.1, available at http://www.icc-cpi.int/nr/exeres/dea630a9-e656-4870-a2a8-1ebfa35857cb.htm.

[11] It has been speculated that there may have been a drafting error in art. 121(5)-2, and that it was never intended to provide a complete exemption from jurisdiction for nationals of States Parties that had not accepted the amendment. Rather, it had been intended only that the mere fact of State Party nationality would not be a sufficient basis for the Court to exercise its jurisdiction in such cases, and that the pre-conditions for the exercise of the Court's jurisdiction could otherwise be fulfilled, e.g., where such individuals committed the crime on the territory of a State Party that had accepted the amendment. This would accord with the so-called "positive" understanding of art. 121(5)-2.

[12] The preamble states, "Noting article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the 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 and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute."

[13] This proposal was rejected in part over doubts as to whether both Art. 121(4) and 121(5) could both be applied in this context. Some delegations opined that this attempt to utilize both paragraphs four and five simultaneously was inconsistent with the scheme entailed in those paragraphs, which according to these delegations rendered mutually exclusive the modes of acceptance contained therein. It was suggested that in order to proceed in this manner, Article 121(5) would have to be amended pursuant to the procedure in Article 121(4). This of course could also have the effect of delaying the entire enterprise, though the Swiss delegation seemed to indicate that this amendment too could be adopted simultaneously with the aggression amendments. The proposal also failed to resolve the disagreement over the proper meaning of art. 121(5)-2.

[14] The opt out for States Parties and the paragraph on non-States Parties seemed to embed in the text the negative understanding of Art. 121(5)-2. Or they at least seemed to effectively

accommodate that understanding. The legal posture of a State Party that has not accepted the amendment and does not opt out (on the theory that since they haven't accepted the amendment, they need not opt out of it) remains unclear. Ultimately, there is no indication in the final text as to whether there has been a convergence between the positive and negative understandings of 121(5)-2 as such. Perhaps this was a constructive ambiguity to facilitate consensus. If that is the case, then it would presumably be for the Court to decide if the issue arose. For example, if nationals of a State Party that had not accepted the amendment (and had not filed an opt out declaration) were to be prosecuted for aggression, they could argue that such jurisdiction was excluded by 121(5)-2. In all likelihood, States Parties that do not want the Court to have jurisdiction over their nationals for the crime of aggression, and for that reason do not accept the aggression amendment(s), will still file a declaration opting out just to cover themselves. They would probably also include language in the declaration making clear that they do not accept the amendment(s) and that their filing may not be understood as prejudicing their position that they do not consider themselves bound by the amendment(s). At the same time, the provision of the opt-out possibility may serve to protect the unity or integrity of the Statute. Failure to accept the amendment by some States Parties would mean that different versions of the Statute would exist vis-à-vis different States Parties. The opt-out procedure may encourage all States Parties to accept the amendment, and thereby preserve the unity of the Statute.

[15] A subsequent draft modified the second alternative. The earlier version provided that "[w]here no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council does not decide otherwise." The modified version would change the last clause to: "and the Security Council has not decided otherwise in accordance with article 16." This is a potentially significant change. The early version could have been interpreted as a so-called 'fixed red light', meaning that once the Security Council decided that the Prosecutor could not proceed, the matter would be over. The article 16 procedure, on the other hand, empowers the Security Council to require the Prosecutor to defer an investigation for one year, with the possibility of renewal. The reference to the article 16 procedure, which has been in the Statute from its adoption, would seem to reject the 'fixed red light' concept. At the same time, it could perhaps be argued that the reference to article 16 goes only to the type of resolution required (i.e. that it incorporates only the article 16 requirement that the resolution be adopted under Chapter VII, as opposed to incorporating the one year time-limit for deferrals). An argument in support of this latter interpretation would be that if the phrase "and the Security Council has not decided otherwise in accordance with article 16" was interpreted to mean simply that aggression prosecutions were subject to article 16 deferrals, then the phrase would be superfluous since that procedure would apply even in the absence of such language.

[16] The text, however, failed to indicate the nature of the decision. Is it just a decision to activate the jurisdiction or can the decision entail something more? Presumably, the answer to that is whatever 2/3 of States Parties can agree upon. Could this be a way of masking disagreement and then re-opening the whole jurisdiction debate some time after 2017? Alternatively, could these provisions be read as allowing activation of the Court's jurisdiction to proceed (after the required 30 States Parties have ratified), and then permitting States Parties to cut off jurisdiction some time after 2017

if they so decide? This does not appear to be what is intended (particularly since they've been referred to as the 'delayed activation' and even 'delayed entry into force' provisions).

[17] Although this understanding is not technically binding upon the Court, it is unlikely that an organ of the Court would deviate from this understanding. In any event, for the crime of aggression, nationals of non-States Parties need not rely on this understanding. They are expressly excluded by the amendments.

[18] Concerns about correspondence with customary law are similarly overblown. There likely is no customary law definition for the crime of aggression. Certainly there was none at the time of the IMT, but that did not stop the IMT from prosecuting violations of the jus ad bellum. Correspondence with customary law is of course a good thing because it generally means that there has been a body of practice that bears out the wisdom of the rule. But that certainly has not been the case with most rules of international criminal law in the strict sense. The supporting practice has been mostly rhetorical. Domestic prosecutions for these crimes have been few and far between. The US, along with the major part of the international community, has not objected to the ICTY and ICTR exercising jurisdiction over these crimes and developing jurisprudence as they went.

[19] There was of course a degree of legislation in the elaboration of the statutes of all international criminal tribunals. The Tribunals were conscious of the fact that they were developing international criminal law as they applied it, particularly for crimes that did not have a clear treaty basis. This cautioned against prosecuting close cases.

[20] The Court and its constituencies must remember that the Court's role is to adjudicate international minimum standards, not model standards.

[21] An example would be the understanding that "each of the three components of character, gravity, and scale must independently be sufficient to justify a 'manifest' determination." It is also unhelpful to argue that only "wars of aggression" are criminal. This assertion is equally ambiguous and sounds somewhat reminiscent of the much maligned distinction made by the US government between "genocide" and "acts of genocide" during the Rwandan genocide.