

**Amendments to the Rome Statute of the  
International Criminal Court Considered at the  
first Review Conference on the Court,  
Kampala, 31 May-11 June 2010**

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Table of Contents

Abstract .....	690
A. Introduction .....	690
B. Non-Deletion of Article 124 of the Statute .....	691
C. The Crime of Aggression .....	692
I. The Basic Structure of Article 8 <i>bis</i> – the Definition.....	695
II. Structure of Articles 15 <i>bis</i> and 15 <i>ter</i> – Conditions for Exercise of Jurisdiction .....	699
D. Forbidden Weapons in the Statute .....	707
E. Conclusion .....	711

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## Abstract

The first Review Conference on the International Criminal Court had three items on its agenda proposing amendments to the Rome Statute. The proposal to delete Article 124 of the Statute (which permits States to opt out of the war crimes provisions of the Statute for seven years) failed. Proposals for a comprehensive set of provisions facilitating the Court's exercise of its jurisdiction over the crime of aggression were adopted. The existing provisions on weapons that are banned in international armed conflict were incorporated also into the part of the Statute dealing with non-international armed conflicts.

## A. Introduction

Article 123 of the Rome Statute of the International Criminal Court<sup>1</sup> provided for a Review Conference on the workings of the Statute, to be convened seven years after the Statute's entry into force. Specifically, the Article said that the Conference was "to consider any amendments to the Statute." While the Conference used a generous interpretation of "review" and devoted much of the first week of a two-week conference to a "stocktaking",<sup>2</sup> the primary work of the Conference was to examine three potential amendments to the Statute that had been forwarded by the governing body of the Court, the Assembly of States Parties ("ASP"). These were: deletion of Article 124 of the Statute, completion of negotiations to activate the Court's jurisdiction over the crime of aggression, and the addition of a proscription on the use of certain weapons in the provisions of Article 8 dealing with non-international armed conflict.<sup>3</sup> I consider each of

<sup>1</sup> U.N. Doc.A/CONF.183/9, 17 July 1998.

<sup>2</sup> The stocktaking entailed a rich review of the topics of complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice. There are some very useful papers on these issues on the Court's website for the Conference. For the conference website <http://www.icc-cpi.int/Menu/ASP/ReviewConference/> (last visited 20 August 2010). Perhaps the most distressing fact to emerge from the discussions is that fewer than half of the parties to the Statute have adopted adequate domestic implementation legislation to give effect to the treaty.

<sup>3</sup> The Assembly had the power to set the agenda for the Conference. Meeting the previous November, it took a cautious view of the amendments that could be considered, limiting the agenda to the three just noted. One of the three, possible

these proposals, and the outcomes on them, *seriatim*. No votes were necessary as a consensus was reached on each of the items, albeit in one case to do nothing.

## B. Non-deletion of Article 124 of the Statute

Article 124 of the Statute is the only provision in the Statute that specifically required its own inclusion on the agenda of the first Review Conference. It provides that, upon becoming a party to the Statute, a State may declare that, for a period of seven years, it is not bound by the provisions of Article 8 of the Statute (which deals with war crimes) “when a crime is alleged to have been committed by its nationals or on its territory”. The Rome Statute has a general prohibition of reservations;<sup>4</sup> this provision, which is headed “Transitional Provision” and often described as an “opt-out clause”, permits, in this special case, what is functionally a reservation. It was negotiated at the very end of the 1998 Diplomatic Conference to enable France to accept the Statute.<sup>5</sup> Of the 111 existing parties to the Statute, only France and Colombia have availed themselves of it. France, in fact, withdrew its declaration after about six years and Colombia’s seven years have now passed. Article 124 provided, in its own terms, that it “shall be reviewed at the [first] Review Conference.” “Shall be reviewed” amounts to a promise of consideration but not to a promise that a particular – or any – result should be reached.

The procedural stance of the matter going into Kampala was that the 2009 Assembly of States Parties forwarded a bracketed proposal for the

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deletion of Art. 124, was required to be on the agenda by the article’s own terms; aggression had been the subject of extensive preparatory work since 1998 and it was inconceivable that it would not be considered, even if it was not strictly *required* to be so; there was wide agreement on the weapons provision by late 2009, but a number of other potential additions to Art. 8 did not proceed to Kampala in the absence of a fairly clear consensus on them. *See infra* at notes 71-77. So too, proposals relating to addition of crimes of terrorism and serious drug crimes to the subject-matter of the Statute were left over to future meetings of the Assembly of States Parties, and indeed, potentially, to later Review Conferences. *See infra* at notes 78-80. (Art. 123 empowers the ASP to call future Review Conferences, but does not indicate any particular time frame. There seems to be a widespread disposition to have reviews on a regular basis, perhaps on a seven-year cycle.)

<sup>4</sup> Rome Statute, *supra* note 1, Art. 120: “No reservations may be made to this Statute.”

<sup>5</sup> Apparently the permanent Five members of the Security Council had agreed a day or two earlier that their bottom line was that there should be a ten-year opt-out period in respect of both war crimes (Art. 8) and crimes against humanity (Art. 7), but the United Kingdom and France opted out of that agreement.

deletion of the Article – the brackets indicating that the matter was controversial.<sup>6</sup> In the course of the Review Conference, an overwhelming majority of those taking the floor spoke in favor of its deletion, although France, along with some States that are non-parties to the Rome Statute, notably Iran and China, supported its retention. Iran and China suggested that it might be helpful in enabling them to come aboard (although it has not done the trick in the past eleven years). Many of those opposed to keeping it emphasized that it detracted from the general policy of the Statute against reservations. Moreover, it did not appear to have played a significant role in achieving the goal of universality, that is, of encouraging all hundred and ninety-odd States to ratify or accede to the Statute. In the event, the Conference adopted a resolution<sup>7</sup> touching on the various points of view by referring to “the need to ensure the integrity of the Rome Statute”, “the importance of the universality of the founding instrument of the International Criminal Court”, and the “transitional nature of Article 124, as decided by the Rome Conference”. It then asserted that, having reviewed the provisions of Article 124, it “*Decides* to retain Article 124 in its current form” and also decides to “further review the provisions of Article 124 during the fourteenth session of the Assembly of States Parties to the Rome Statute,” that is in 2015.

There is, of course, no guarantee that the review by the ASP in 2015 will result in any other conclusion than to leave “well” alone. This episode in Kampala is a good example of what can happen in a consensus negotiation – a few adamant states (some of them not even parties to the treaty) were able to block what was desired by a very large majority. As will be seen, the minority (many of the same states) chose not to stand in the way of a consensus on the other two amending items on the Kampala agenda.

### C. The Crime of Aggression

Activating the Court’s jurisdiction over the crime of aggression was the most important piece of unfinished business from the Rome Diplomatic Conference in 1998. The vast majority of the participants in Kampala, whether they wished the item to succeed or to fail, regarded it as the most significant item at the Review Conference and the one to which they

<sup>6</sup> See Resolution ICC-ASP/8/Res. 6, 26. November 2009, Annex I.

<sup>7</sup> Art. 124 ICC Statute, RC/Res.4 (2010).

devoted most of their efforts. Those efforts were fulfilled by adoption of a comprehensive resolution which aspired to resolve all the outstanding issues.<sup>8</sup>

Article 5 (1) of the Statute lists “the crime of aggression” (along with the crime of genocide, crimes against humanity and war crimes) as one of the four items within the subject-matter jurisdiction of the Court.<sup>9</sup> Paragraph 2 of Article 5 adds, however, that “[t]he 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”.<sup>10</sup> Building on Article 5, the Final Act of the Rome Conference instructed the Preparatory Commission for the Court to “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of Aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime”.<sup>11</sup> “Definition” here has been understood to refer to the relevant substantive criminal law issues; “conditions” requires consideration of whether some organ of the United Nations (in particular the Security Council) may be able – or even required – to participate in the process alongside the Court. The drafting task not having been completed by the end of the life of the Preparatory Commission,<sup>12</sup> the Court’s Assembly of States Parties created the Special Working Group on the Crime of Aggression (“SWGCA”) to carry forward the task. The SWGCA was open to participation by all States, members of the ICC and non-members alike.

<sup>8</sup> The Crime of Aggression, RC/Res. 6 (2010).

<sup>9</sup> Rome Statute, *supra* note 1, Art. 5 (1).

<sup>10</sup> *Id.*, Art. 5 (2).

<sup>11</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, para. 7, U.N. Doc. A/CONF.183/10, 17 July 1998, at 8-9 [Resolution F].

<sup>12</sup> The last draft on the table at the Preparatory Commission was a Discussion Paper proposed by the Coordinator on the Crime of Aggression, U.N. Doc. PCNICC/2002/2/Add.2 [Discussion Paper], discussed in R. S. Clark, ‘Rethinking Aggression as Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court’, 15 *Leiden Law Journal* (2002) 4, 859.

The Group's ultimate effort on provisions and conditions was contained in its final Report to the Assembly in February 2009,<sup>13</sup> which was in front of the Review Conference. It was accompanied by some later suggestions which had been generated at a subsequent informal meeting of the ASP and by the last Chair of the Working Group.

The essence of the SWGCA's draft comprised two articles for addition to the Statute: "Article 8bis" which contained the definition, and "Article 15bis" which dealt with the conditions for exercise. Article 8bis did not contain any alternatives, representing a consensus that held in Kampala, although not everyone at the Working Group was entirely happy with everything. Nonetheless, the SWGCA's work on Article 8bis was adopted verbatim in Kampala. Article 15bis, on the other hand, offered many alternatives – notably variations on the theme of involvement *vel non* of the Security Council in the process by which a specific case would come before the Court. This Article was where most of the debate took place in Kampala. That debate resulted in the emergence of two Articles, 15bis and 15ter, covering the matters in the SWGCA's draft. The Conference considered that Committee's work and a number of new proposals made in Kampala, making some hard political decisions between the alternatives.

Draft Elements of Crimes had also been produced before Kampala, at an informal inter-sessional meeting of the Assembly held in June of 2009.<sup>14</sup>

<sup>13</sup> Report of the Special Working Group on the Crime of Aggression, Doc. ICC-ASP/7/SWGCA/2 (2009) [2009 Report]. The proposed amendments and the proposed "Elements" (*see next note*) are also contained in Annex II to Resolution ICC-ASP/8/Res. 6, *supra* note 6. Concerning the provisions on aggression in general, *see* N. Weisbord, 'Prosecuting Aggression', 49 *Harvard International Law Journal* (2008) 1, 161; S. Barriga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression', in G. R. Bellilli ed., *International Criminal Justice* (2010); 'Symposium: The Codification of the Crime of Aggression', 20 *European Journal of International Law* (2009) 4, 1103. Not all the contributors to the *European Journal* symposium are true believers. Another who is skeptical of the whole exercise is G. Simpson, "'Stop Calling it Aggression": War as Crime', 61 *Current Legal Problems* (2008), 191. The bulk of the Special Working Group's substantive work was done at intercessional meetings held at the Liechtenstein Institute on Self-Determination at Princeton University. The SWGCA's materials are usefully collected in S. Barriga, W. Danspeckgruber & C. Wenaweser (eds.), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (2009).

<sup>14</sup> Informal intercessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009, Doc. ICC-ASP/8/INF.2 (2009), Appendix I [Draft Elements of Crimes]. There is a useful explanatory note on the

While there was some doubt at the time whether these Elements would be formally approved in Kampala, that was what in fact occurred.<sup>15</sup>

In what follows, I discuss what seemed to me to be the most significant drafting choices that were made in respect of the definition and the conditions for exercise of jurisdiction.

## I. The Basic Structure of Article 8*bis* –the Definition

A major intellectual and juridical contribution of the Nuremberg and Tokyo trials was to take what in the past had been thought of essentially as a question of state responsibility and add to it an enforcement measure based on individual criminal responsibility. As the Nuremberg Tribunal said in a famous quotation, “Crimes are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.<sup>16</sup> As the context of the Tribunal’s discussion made plain, this is not to deny that there is still state responsibility as well. Accordingly, Article 8*bis* uses a drafting convention that builds on this combination of state and individual responsibility. It distinguishes between an “act of aggression” (what a State does) and the “crime of aggression” (what a leader does). “Act of aggression” is defined 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”.<sup>17</sup> This language, based on the United Nations Charter, is followed, in the second paragraph of the Article, by a reference to a list of “acts” that “shall, in accordance with General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as

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elements in Annex II of the Report (“Non-paper by the Chairman on the Elements of Crimes”). Art. 9 of the Rome Statute required the production of Elements for genocide, crimes against humanity and war crimes. Resolution F required them for aggression; the SWGCA recommended an amendment to Art. 9 to make clear that aggression, too, requires its Elements. Elements emphasize, in more detail than the Statute, what the prosecution must prove in order to show that there was a crime; they also make some of the connections between the definitions in the “special part” of the Statute (Arts 6, 7 and 8, and now 8*bis*) and the “general principles” contained in Part III of the Statute. *See generally*, discussion of Art. 9 of the Statute (“Elements of Crimes”) in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2<sup>nd</sup> ed. (2008), 505.

<sup>15</sup> Res. 6, *supra* note 8, annex II.

<sup>16</sup> ‘International Military Tribunal (Nuremberg), Judgment and Sentences’, 41 *American Journal of International Law* (1947) 1, 172, 221.

<sup>17</sup> Article 8*bis* (2), *supra* note 8, Annex I.

an act of aggression.”<sup>18</sup> Resolution 3314<sup>19</sup> is the well-known 1974 effort of the General Assembly to define aggression so as to assist the Security Council in doing its work for the maintenance of peace and security. The resolution deals with state responsibility, but there was considerable support in the SWGCA for using it as the basis for a definition in the present context. Utilizing it was a challenge. The ultimate drafting of *8bis* is aimed at avoiding the open-ended nature of Resolution 3314 which says, essentially, that the Security Council may decide that something that meets the definition is nonetheless not aggression and, on the other hand, that acts other than those on the list may be regarded by the Security Council as aggression. As a political body, the Security Council may act in a completely unprincipled and arbitrary manner. A criminal Court constrained by the principle of legality<sup>20</sup> must be under more restraint, so the open-textured aspects of 3314 needed some pruning and the Security Council’s determination needed to be removed from the mix. The result is fairly precise. The list of “acts” in Article *8bis* (2), taken verbatim from Resolution 3314, may be open-ended to the extent that it does not say that no *other* acts can amount to aggression. However, any other potential candidates must surely be interpreted narrowly and *ejusdem generis* with the existing list.

“Crime of aggression”, for the purpose of the Statute, “means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”<sup>21</sup>

The crime of aggression is thus a “leadership” crime, a proposition captured by the element that the perpetrator has to be in a position

<sup>18</sup> *Id.* The list of acts that “qualify as an act of aggression” is: invasion, annexation, bombardment, blockade, attack on the armed forces of another State, using forces that are in a State by consent in contravention of the terms of their presence, allowing a State’s territory to be used for the purposes of aggression by another, and 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.

<sup>19</sup> G.A. Res. 3314 (XXIX), 14. December 1974, 29 U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 31, U.N. Doc. A/9631, at 142.

<sup>20</sup> Rome Statute, *supra* note 1, Art. 22 – “Nullum crimen sine lege”.

<sup>21</sup> Art. *8bis* (1), *supra* note 8, Annex I.



effectively to exercise control over or to direct the political or military action of a State.<sup>22</sup> There was considerable discussion in the SWGCA about how this applies to someone like an industrialist who is closely involved with the organization of the State but not formally part of its structure.<sup>23</sup> Some support was shown for clarifying the matter by choosing language closer to that used in the United States Military Tribunals at Nuremberg, namely “shape and influence” rather than “exercise control over or to direct”.<sup>24</sup>

American and French prosecutions at the end the Second World War had made it clear that industrial leaders could potentially be responsible for the crime of aggression, although none were ultimately convicted.

Note should also be taken at this point of the “threshold” clause at the end of the definition of “crime of aggression”, indicating that not every act of aggression is the basis for criminal responsibility. It is only those which by their character, gravity and scale, constitute a “manifest” violation of the Charter.<sup>25</sup> The need for such a limitation was strongly debated<sup>26</sup> but

<sup>22</sup> As well as the leadership language contained in Art. 8*bis* (5) of the amendments adopted in Kampala (in an apparent abundance of caution) adds a para. 3*bis* to Art. 25 (3) of the Statute which deals with individual responsibility:

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

<sup>23</sup> See K. J. Heller, ‘Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression’, 18 *European Journal of International Law* (2007) 3, 477.

<sup>24</sup> See Informal intercessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, from 11 to 14 June 2007, Doc. ICC-ASP/6/SWGCA/INF.1 (2007) at 3, para. 12. This preparatory work seems to support the proposition that industrialists are potentially covered by the amendments, although no formal language to that effect was added.

<sup>25</sup> *Supra* note 21. The Introduction to the Draft Elements of Crimes for aggression, *supra* note 14, stated that: “The term ‘manifest’ is an objective qualification.” There is a comment in the Report of the 2009 Intercessional meeting on the crime of aggression, *supra* note 14, at 6, para. 25, that “the Court would apply the standard of the ‘reasonable leader’, similar to the standard of the ‘reasonable soldier’ which was embedded in the concept of manifestly unlawful orders in article 33 of the Rome Statute.” The phrase “character, gravity and scale” provides a framework for forging such an objective standard. The best analysis of this threshold is J. Potter, *The Threshold in the Proposed Definition of the Crime of Aggression*, 6 N.Z. Y.B. INT’L L. (2008), 155. See also understanding adopted in Kampala, *infra* note 32.

<sup>26</sup> See e.g., 2009 SWGCA Report, *supra* note 13 at 3, para. 13: “It was argued that the clause was unnecessary because any act of aggression would constitute a manifest violation of the Charter ... and that the definition should not exclude any acts of

most participants finally accepted that they could live with it in return for removal of any requirement that there be a “war of aggression”<sup>27</sup> or that the list of acts in the definition of “act of aggression” be more limited than the list in General Assembly Resolution 3314.<sup>28</sup> Some speakers thought it might help in analyzing a (rare) case of principled humanitarian intervention or a case more generally where the legality of the action was definitely in doubt.<sup>29</sup> In a speech to the Conference on 4 June 2010, the Legal Adviser to the U.S. Department of State insisted, tendentiously, that:

“If Article 8*bis* were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide – the very crimes the Rome Statute was designed to deter – do not commit “manifest” violations of the U.N. Charter within the meaning of Article 8*bis*. Regardless of how states may view the legality of such efforts, those who plan them are not

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aggression. ... Other delegations expressed support for the threshold clause which would provide important guidance for the Court, and in particular prevent the Court from addressing borderline cases.” Some speakers thought it might help in analyzing a (rare) case of principled humanitarian intervention or a case more generally where the legality of the action was definitely in doubt.

<sup>27</sup> The Nuremberg Charter had a puzzling requirement of a “war of aggression” which prompted the International Military Tribunal to draw a *de facto* distinction between the conquests of Austria and Czechoslovakia (achieved without actual fighting) on the one hand, and the invasions of Poland and others (achieved with considerable fighting) on the other. The former were classified as “acts of aggression” (and not yet “criminal”), the latter as “wars of aggression” and proscribed under the Charter. Control Council Law No. 10, under which subsequent prosecutions were brought, had language broad enough to treat Austria and Czechoslovakia as criminal aggressions. *See generally*, R. S. Clark, ‘Nuremberg and the Crime against Peace’, 6 *Washington University Global Studies Law Review* (2007) 3, 527.

<sup>28</sup> *Supra* note 19. *Cf.* 2002 Discussion Paper, *supra* note 12 (containing alternative which would modify the Res. 3314 list by requiring that the act of aggression be one that “amounts to a war or aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”).

<sup>29</sup> Art. 8*bis*, following the drafting style of the other substantive articles in the Statute, does not address specifically grounds of justification or excuse. Such matters, called “grounds for the exclusion of responsibility”, fall to be analyzed by the Court under the general part of the Statute, and, in particular, under article 31 thereof. The requirement that a breach be “manifest” provides an alternative route to analyze some of the “defences”. Obviously, that state is acting in self-defence as understood under the UN Charter, or as authorized by the Security Council, means that there is no act of aggression, without getting to the “manifest” issue. Other cases may be more difficult.

committing the “crime of aggression” and should not run the risk of prosecution.”<sup>30</sup>

Two paragraphs of “understandings” annexed to the Review Conference’s resolution adopting the amendments on the Crime of Aggression<sup>31</sup> address these matters, apparently giving comfort to the United States:

It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

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.<sup>32</sup>

## II. Structure of Articles 15*bis* and 15*ter* – Conditions for Exercise of Jurisdiction

The Special Working Group was less successful in resolving the issue of conditions than that of definition. The second sentence of Article 5, paragraph 2 of the Statute, added without public debate in the last days of the Rome Conference, states that the provision on aggression “shall be consistent with the relevant provisions of the Charter of the United Nations”<sup>33</sup>. By and large, the Permanent Members of the Security Council took the position in the negotiations that Article 39 of the Charter confers on them the “exclusive” power to make determinations of the existence of an act of aggression, and thus a Security Council pre-determination of aggression is an essential precondition to exercise of the ICC’s jurisdiction. Most other States pointed out that Article 24 of the Charter confers “primary” power on the Council in respect of the maintenance of international peace and justice and that “primary” does not mean

<sup>30</sup> Statement by Harold Koh to the Conference, 4 June 2010, available at <http://www.state.gov/s/l/releases/remarks/142665.htm> (last visited 19 August 2010).

<sup>31</sup> *Supra* note 8, annex III.

<sup>32</sup> Paragraph 7 here underscores the “and” in the phrase “character, gravity and scale”.

<sup>33</sup> Rome Statute, *supra* note 1, Art. 5 (2), second sentence.

“exclusive”. They added that the General Assembly has made several findings of aggression and that the United States, the United Kingdom and France were co-sponsors of the 1950 Uniting for Peace resolution which recognizes the Assembly’s powers<sup>34</sup> and that all five of the Permanent Members have voted pursuant to that resolution when it suited them. Non-permanent members tend to add that the International Court of Justice has addressed issues where aggression is in play.<sup>35</sup> Like the Security Council, however, the ICJ has been leery of actually using the word “aggression”. The draft sent to Kampala included the General Assembly and the International Court of Justice as alternative “filters” for the crime of aggression in the absence of Security Council action, but these were deleted in Kampala.

The major achievement in this part of the negotiation in the period of the Special Working Group was to de-couple the definition from the conditions. In the version of the definition and conditions for aggression that was on the table at the end of the life of the Preparatory Commission, the Security Council (or possibly the General Assembly or the ICJ) would make a definitive decision on the existence of the element of “act of aggression” which was binding on the ICC.<sup>36</sup> Not only would this subvert the power of the Court to decide itself on the existence or otherwise of all the elements of the crime, but it would make it extremely difficult to build a criminal offence around a structure where one of the key elements was decided elsewhere and potentially on the basis of totally political considerations. In such circumstances, there would probably be unbearable weight placed on

<sup>34</sup> G.A. Res. 377(V) A, 3. November 1950. The relevant provision reads:  
[The General Assembly] “Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.”.

<sup>35</sup> Most recently in *Armed Activities on the Territory of the Congo (DR Congo v. Uganda)*, Jurisdiction of the Court, Judgment, ICJ Reports 2005.

<sup>36</sup> See the 2002 Coordinator’s Paper, *supra* note 12. This was the effect of the words “which has been determined to have been committed by the State concerned” which appeared then in paragraph 2 of the definition. The whole context made it clear that someone other than the Court would make the determination.

the mental element provisions of Article 30 of the Statute,<sup>37</sup> the mistake provisions of Article 32<sup>38</sup> or on the “manifest” threshold.<sup>39</sup> This was removed in the Special Working Group’s draft and in the ultimate language adopted in Kampala. Any determination elsewhere is of a preliminary nature, although it may have some evidentiary value.<sup>40</sup> This opened the way for focusing on the various options put before the Review Conference of giving the Security Council (or other United Nations organ) a “filter” role, providing either a “green light” (permission to go forward) or a “red light” (denial of right to go forward) to the ICC’s proceedings.<sup>41</sup> There was, however, a solid group of states strongly behind the proposition that the Prosecutor should be able to proceed even in the absence of action by someone else.<sup>42</sup>

The resolution of these divergent positions in Kampala was facilitated by a move to split the SWGCA’s draft Article 15*bis* into two parts, one dealing with state referrals and referrals made by the prosecutor *proprio motu*, and the other dealing with Security Council referrals. These became, respectively, Article 15*bis* and 15*ter*. Article 15*ter* referrals are the most simple to describe and it will thus be helpful to discuss them first.

<sup>37</sup> Rome Statute, *supra* note 1, Art. 30, has a general rule that the crimes in the Statute must be accompanied by “intent and knowledge”.

<sup>38</sup> In the structure of the Statute, a mistake is the obverse of knowledge or intent – it negates a mental element of a crime. Rome Statute Art. 32 says that a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. It continues that a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. Finally, it adds that a mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or in certain cases of superior orders. A defense that “I made a mistake about the legality of the conduct later held to be aggression” might be potentially open to one charged with the crime of aggression. The Elements of the crime of aggression work a finesse that is commonly applied to Elements of the war crimes under Art. 8 of the Statute by re-directing the enquiry in the direction of the facts. The relevant Element is thus: “The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.”

<sup>39</sup> *Supra* notes 25-32.

<sup>40</sup> Draft Art. 15*bis* (5) of the 2009 Report, *supra* note 13, provided: “A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.”

<sup>41</sup> *Id.* Draft Art. 15*bis*, paras 2-4.

<sup>42</sup> *Id.* Draft Art. 15*bis*, para. 4, Alternative 2, Option 1.

Paragraph 1 of Article 15*ter* is the basic provision authorizing the Court to exercise its jurisdiction under the Statute in respect of the crime of aggression, when a referral is made by the Security Council:

The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this Article.<sup>43</sup>

Then follow two paragraphs of the Article designed to provide a set of conditions and a time frame for paragraph 1 to come into play. Paragraph 2 says that the Court “may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of amendments by thirty States Parties”<sup>44</sup>. Paragraph 3 says that the Court “shall exercise jurisdiction over the crime of aggression in accordance with this Article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.”<sup>45</sup> The required majority at this later date is thus two-thirds of all the States Parties at the relevant time.<sup>46</sup> Accordingly, the earliest date on which these provisions can become operative is the date on which the decision is made by the ASP after 1 January 2017. If the 30 ratifications have been received by then (or at least a year before then), all is well; otherwise there will be a further delay until one year after the 30 ratifications are obtained.<sup>47</sup>

It should be noted that the requirement of 30 ratifications here is a “procedural” hurdle to the *entry into force* of the amendment.<sup>48</sup> It does not mean that the Security Council is limited to making referrals only in respect

<sup>43</sup> Art. 15*ter*, *supra* note 8, para. 1, Article 13 (b) of the Rome Statute, *supra* note 1, permits Security Council referrals to the Court.

<sup>44</sup> Art. 15*ter*, *supra* note 8, para. 2.

<sup>45</sup> *Id.*, para. 3.

<sup>46</sup> Rome Statute, *supra* note 1, Art. 121 (3).

<sup>47</sup> *And see* Understandings, *supra* note 8, annex III, para. 1.

It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with Art. 13 (b) of the Statute only with respect to crimes of aggression committed after a decision in accordance with Art. 15*ter* (3) is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Note also Resolution 6 itself, *supra* note 8, in para. 4 of which the Review Conference decided “to review the amendments on the crime of aggression seven years after the beginning of the Court’s exercise of jurisdiction.”

<sup>48</sup> The Conference presumably found power to impose conditions such as these under the general reference in Art. 5 (2) ICC Statute to “setting out the conditions” for the exercise of jurisdiction over aggression.

of those states that have ratified the amendment (or the Statute itself, for that matter). The nationals of *any* states may be the subject of a referral once the timing and ratification requirements are met.<sup>49</sup>

Paragraph 4 adds the important principle<sup>50</sup> that “[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.” Including this language in the Article dealing with Security Council referrals underscores the way the negotiation has developed towards making the Court master of its own decisions in respect of the elements of a particular (alleged) crime of aggression.<sup>51</sup>

So much for Security Council referrals. Article 15*bis*, as finally adopted, deals with the exercise of jurisdiction over the crime of aggression in the case of State referrals and referrals by the Prosecutor *proprio motu*. The Court is authorized to exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraphs (a) and (c), subject to the other provisions of the Article.<sup>52</sup> Once again, there is the requirement of ratification or acceptance by 30 States Parties,<sup>53</sup> the passage of a year after that, and the further vote after 1 January 2017.<sup>54</sup> Then follows a strange “opt-out” provision that reads:

The Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The

<sup>49</sup> This is the general rule on Security Council referrals (as exercised in the case of Sudan and Darfur, Sudan not being a party to the Statute). The “preconditions” for a Security Council referral in Art. 12 of the ICC Statute do not include the requirement, as in the case of state and *proprio motu* referrals, that either the state of territoriality or the state of nationality be party to the Statute. See also Understandings, *supra* note 8, annex III, para. 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 Art. 13 (b) of the Statute, irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.

<sup>50</sup> *Supra* note 13 and 40, derived from the SWGCA draft. Note, however, that a referral by the Security Council does not necessarily entail a determination that an act of aggression has occurred, although it may. The Council may simply conclude that there is a *prima facie* case, but leave the rest to the Court.

<sup>51</sup> See references in fn. 36, 37.

<sup>52</sup> Res. 6, *supra* note 8, Art.15*bis* para. 1.

<sup>53</sup> *Id.*, para. 2.

<sup>54</sup> *Id.*, para. 3.

withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.<sup>55</sup>

The careful reader will have noted the language: “exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party.” “State Party” must mean State Party to the Rome Statute. There is no suggestion here that the Court’s jurisdiction is limited to those States that have ratified the amendment. A State which has not done so, can, on the plain language of the amendment, protect its people from the jurisdiction by utilizing the opt-out provision. Indeed, the opt-out language, on *its* face, seems to be coherent only on the possibility that *any* State Party may want to opt out!

The effect of the language also seems to be that a State Party may ratify the amendment and constitute one of the 30 states necessary to bring it into force, but block the application of state or *proprio motu* triggers of the jurisdiction with respect to itself. (Like all other States, it apparently cannot protect its nationals from being the subject of a Security Council referral.) It would take some nerve to help make up the thirty and then opt out, but one

<sup>55</sup> *Id.*, para. 4. Prior to Kampala, there had been some discussion of the appropriate modalities for adoption and ratification or acceptance of the provisions making the jurisdiction over aggression effective. This took the form of attempts to interpret Art. 121 (3), (4) and (5) of the Rome Statute, the article on amendment. The correct analysis of language that became confusing in the last few days of the Rome Conference could perhaps never be ascertained with certainty. I interpret Art. 15*bis* (4) as a finesse of that whole issue, done by consensus of the Parties. Objecting Parties have their opt-out rights, something not entirely satisfactory to all, but the trade-off is that the provisions can become operative in a reasonable time and with intelligible procedural hurdles. There is, perhaps, a (less-than-convincing) counter-argument in para. 1 of Resolution 6, *supra* note 8, in which the Review Conference:

“1. *Decides* to adopt, in accordance with Article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with Art. 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in Art.15 *bis* prior to ratification or acceptance.”

I think this must just be referring to the time frame for the ratification to become effective, thus setting up the requirement of entry into force a year after the 30 are obtained. If all State Parties are not to be bound, the opt-out option makes no sense. Compare the resolution on weapons, *infra* note 70, which makes clear the application of the amendments only to those who specifically accept them. Notice that an opt-out declaration may be made at any time, even before the necessary passage of seven years or the receipt of thirty ratifications.



should never underestimate the acrobatic ability of the diplomatic mind in construing the national interest!

Paragraph 5 addresses the non-State party problem. It was of particular significance for the three Permanent members of the Security Council who have not become party to the Rome Statute - China, the Russian Federation and the United States - and for other non-parties who are wont to use force outside their own territories. It provides that “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”<sup>56</sup>

In the negotiations leading up to Kampala, there was widespread support for the proposition that where an aggression occurs against a State Party to the Statute, the Article 12 precondition of ratification by the state of territoriality should be sufficient for the Court’s jurisdiction. Article 12 requires that either the state of territoriality or the state of nationality be a party. An aggression, so the argument goes, can, as a matter of territoriality, take place both in the state where the aggression is plotted, and in the place where it is executed (the “victim state”). This is in accordance with the normal rules on “effects” or “objective territorial” jurisdiction and seems to be the case with genocide, crimes against humanity and war crimes. Thus, a citizen of a non-state party who commits genocide, war crimes or crimes against humanity on the territory (or having effect on the territory) of a State Party is subject to ICC jurisdiction.

The present provision is aimed at upsetting this implication, specifically in respect of aggression, and preventing jurisdiction over aggression in such cases. It is probably another example of a small but powerful minority protecting its own position in a consensus negotiation.<sup>57</sup>

Paragraphs 6, 7 and 8 resolve the various Security Council “red light” and “green light” options concerning state and *proprio motu* referrals

<sup>56</sup> Res. 6, *supra* note 8, Art. 15*bis* (5). The argument is that, whatever one might think about jurisdiction over genocide and the other crimes so far as non-parties acting on the territory of parties, aggression is of a different political and juridical dimension and should be treated differently.

<sup>57</sup> See also the related point made in Understanding 5, *supra* note 8, annex III, that “the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.” Customary law on universal jurisdiction over aggression (and perhaps even victim state jurisdiction) may not be as developed as it is in relation to other international crimes, and this language is at least neutral, and perhaps discouraging, of developments in custom in this area. Is aggression different?

that had been considered intensively but inconclusively before Kampala. (Note that this is now in the context of cases where the Security Council has not made a referral to the Court and may, or may not, have adopted a resolution in respect of actions by a State in respect of a situation coming before the Court.)

Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, *proprio motu* or following a state referral, he is required to first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor is to notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.<sup>58</sup> If, in fact, the Security Council has made a determination of an act of aggression, the Prosecutor may proceed with the investigation.<sup>59</sup> Then comes the crunch issue: what if the Security Council has not acted, and does not now act? The consensus in Kampala represented a strong resolution of an issue that had bedeviled the earlier negotiations. The relevant language reads:

Where 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 has not decided otherwise in accordance with Article 16.<sup>60</sup>

The “filter” in the ordinary case is not the Security Council, but the Pre-Trial Division, that is to say, a majority of all six members of that Division sitting together *en banc*. If the Security Council wishes to enter the fray, it must put up its stop-light. But notice that, consistent with the existing Rome compromise, contained in Article 16 of the Statute, a dissenting member of the Permanent Five members of the Security Council cannot stop the process by exercising a veto. It is only where the five are agreed (and obtain the other necessary votes) that proceedings may be stopped in their tracks.

Obtaining such a comprehensive consensus was no mean feat!

<sup>58</sup> Res. 6, *supra* note 8, Art. 15*bis* (6).

<sup>59</sup> *Id.*, Art. 15*bis* (7).

<sup>60</sup> *Id.*, Art 15*bis* (8). This is followed by the statement also found in 15ter (4), *supra* note 13 and 50, that “[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute”.

## D. Forbidden Weapons in the Statute

It has long been understood in the laws of armed conflict that some weaponry is regarded as so barbaric or so incapable of distinguishing between soldiers and civilians that its use is forbidden.<sup>61</sup> These prohibitions applied originally to international armed conflict but, during the last century, some of the prohibitions were extended, primarily by custom but occasionally by treaty, to their use in non-international armed conflict. The distinctions between rules of all kinds applicable in international and non-international armed conflict are slowly disappearing.<sup>62</sup> Thus, the non-international armed conflict parts of the Rome Statute include a number of rules taken, for example, from the Hague Convention of 1907 that applied originally only to international armed conflict. Nevertheless, the rules on forbidden weaponry contained in the Rome Statute apply only in the international variety. They are found in Article 8 (2) (b) of the Statute, which deals with “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”<sup>63</sup>. They provide as follows:

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

Article 8 (2) (e) of the Statute, which deals with “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law,” contains no such provisions. A draft amendment forwarded to the

<sup>61</sup> See J.-M. Henckaerts, & L. Doswald-Beck, for International Committee of the Red Cross, *Customary International Humanitarian Law* Volume I: Rules, 243 (examples of weapons causing unnecessary suffering, beginning with barbed lances and barbed spears), 249 (examples of indiscriminate weapons).

<sup>62</sup> See J. G. Stewart, ‘Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict,’ 85 *International Review of the Red Cross* (2003) 313; L. Moir, ‘Grave Breaches and Internal Armed Conflicts’, 7 *Journal of International Criminal Justice* (2009) 4, 763.

<sup>63</sup> Rome Statute, *supra* note 1, Art. 8 (2) (b).

Review Conference contained a proposal originally put forward informally by Belgium early in 2009 and later co-sponsored by nineteen other States Parties. It aimed at including the same language in paragraph (2) (e) of Article 8 as is contained in paragraph 2 (b).<sup>64</sup> The principle that weapons that are not permissible in international conflict are equally not permissible in civil wars would be enshrined in the Rome Statute.

This amendment and the accompanying Elements of Crimes, based on the similar crimes in international armed conflict, were duly adopted in Kampala.<sup>65</sup> The way the negotiation developed, however, it was thought necessary to address a matter in the preamble of the adopting resolution that had previously found a solution in the relevant Elements of Crimes adopted by the Preparatory Commission for the Court in respect of the original weapons prohibitions applicable in international armed conflict. Expanding bullets, unlike the other weapons in the Rome Statute, are said not to be absolutely banned, even in armed conflict.<sup>66</sup> They may have a legitimate use in a narrow range of circumstance, even in the context of an armed conflict. This is particularly the case when troops are endeavouring to rescue hostages taken in the conflict, without killing the hostages. A regular bullet may go through a participant and hit an innocent person. Thus, expanding bullets that remain in the person at whom they are aimed, may be used.<sup>67</sup> The matter was addressed in Kampala, in part as it had been addressed

<sup>64</sup> This and other proposals for amendment that got as far as the November meeting of the Assembly of States Parties are contained in Report of the Bureau on the Review Conference, Doc. ICC-ASP/8/43/Add.1, dated 10 November 2009 and in Report of the Working Group on the Review Conference, Annex II to Vol. I, Official Records of the Eighth Session of the Assembly of States Parties. Doc. ICC-ASP/8/20 (2009). At the November meeting, the International Committee of the Red Cross commented in a statement that “[t]he prohibitions of poison or poisoned weapons, asphyxiating, poisonous or other gases as well as bullets which expand or flatten easily in the body, are well-established under customary international law applicable in all armed conflicts and are an expression of the prohibition of weapons that are of a nature to cause superfluous injury or unnecessary suffering or are by nature indiscriminate. Conduct in violation of these prohibitions should therefore be criminalized in all armed conflicts.” (Statement by ICRC to Assembly of States Parties, on file with author.).

<sup>65</sup> Amendments to Art. 8 of the Rome Statute, RC/Res. 5 (2010).

<sup>66</sup> They also have an arguably legitimate role in domestic police work, where there is a danger to such persons as hostages, dignitaries, other police officers or bystanders if bullets aimed at criminals go through them and hit someone else.

<sup>67</sup> Representatives of several armed forces assured the author in Kampala that their troops are armed with a very limited supply of such bullets, carefully kept aside for such events and used sparingly. Belgium, it appears, manufactures such ammunition.

previously in the Elements for international armed conflict<sup>68</sup> and in part in the preamble to the adopting resolution. The latter insists on an “understanding that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law”<sup>69</sup>.

This is an important,<sup>70</sup> if modest, addition to the Statute. It establishes the principle that if weapons are prohibited in international armed conflict, they are also prohibited in the non-international variety.

More might perhaps have been achieved if the stars had been differently aligned. Belgium, again supported by various groups of co-sponsors, had also put before the Assembly several proposals for the addition of other weapons to the lists of those prohibited both in international and in non-international armed conflict. These included chemical weapons,<sup>71</sup> biological weapons,<sup>72</sup> anti-personnel land mines,<sup>73</sup>

<sup>68</sup> The relevant Element of the war crime of employing prohibited bullets adopted in Kampala for non-international armed conflict mirrors precisely that for international armed conflict: “The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.”

<sup>69</sup> Weapons adopting resolution, *supra* note 65, preambular paragraph 9, 2.

<sup>70</sup> In accordance with Art. 121 (5) of the Rome Statute, *supra* note 1, this amendment to Art. 8 will apply only to those States Parties to the Statute who specifically ratify or accept it. This is specifically acknowledged in preambular paragraph 2, 1 of the resolution adopting the weapons amendment, *supra* note 65. Compare the finesse of the issue in the aggression amendment, *supra* note 55.

<sup>71</sup> Such weapons are banned by the *Convention on the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, 3 September 1992, 1974 U.N.T.S. 45. Most chemical weapons appear to be banned in warfare under the *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, 17 June 1925, 94 L.N.T.S. 65 [Geneva Protocol], which is reiterated in Art. 8 (2) (b) (xviii) of the Rome Statute, but this is not free from doubt; thus there should probably be express references in the Rome Statute to the later treaty. Drafts on the table in Rome until a very late stage included chemical weapons but the reference to such weapons was deleted in the last few days of the conference.

<sup>72</sup> Biological weapons are prohibited under the 1925 Geneva Protocol, *supra* note 71, along with asphyxiating and poisonous gases. There are further regime-articulating provisions dealing with them in the *Convention on the Prohibition of the Development, production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction*, 10. April 1972, 1015 U.N.T.S. 163. Biological weapons were deleted from the draft of the Statute along with chemical weapons; there is no reference to them at all in the final Statute.

<sup>73</sup> Anti-personnel mines are prohibited under the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their*

non-detectable fragments,<sup>74</sup> blinding laser weapons<sup>75</sup> and cluster munitions.<sup>76</sup> It was not possible to forge a consensus to send these on to the Review Conference. Nor was Mexico able to muster substantial support for its proposal to include nuclear weapons amongst those forbidden by the Statute.<sup>77</sup> Nonetheless, the Assembly agreed to establish a Working Group as from its ninth session late in 2010 for the purpose of considering these remaining proposals for amendments.

The Working Group to be created later in 2010 will also have on its agenda two other proposals put forward for additions to the Statute that were not sent on to Kampala, terrorism and drug trafficking, the former put forward by The Netherlands,<sup>78</sup> the latter by Trinidad and Tobago supported by Belize.<sup>79</sup> Earlier versions of both of these proposals had been considered and deferred at Rome, largely on the basis of the argument that a new and untested organization should not be too ambitious in its early jurisdictional net.<sup>80</sup> In fact, most of the larger powers were – and continue to be – happy

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*Destruction*, 18 September 1997, 2056 U.N.T.S. 211 [the “Ottawa Convention”]. At the time of Rome, the ink was barely dry on this Convention and it had not yet come into force. It is now widely ratified, having 156 parties by mind-2010. There are still some major powers, like the United States, that have not come aboard.

<sup>74</sup> Such weapons are prohibited in Protocol I (Non-Detectable Fragments) to the 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, 10 October 1980, 1342 U.N.T.S. 137.

<sup>75</sup> Protocol IV to the 1980 Convention, *supra* note 74, on Blinding Laser Weapons, 13 October 1995, 2024 U.N.T.S. 163, 167 (Doc. No. CCW/CONF.I/16 Part I).

<sup>76</sup> See Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Dublin, May 19-30, 2008, *Convention on Cluster Munitions*, Doc. No. CCM/77 (30 May 2008), available at [http://www.clusterconvention.org/downloadablefiles/ccm77\\_english.pdf](http://www.clusterconvention.org/downloadablefiles/ccm77_english.pdf) (last visited 17 August 2010). Arguably, this Convention is not ripe enough for inclusion in the Rome Statute since it is not yet overwhelmingly adopted. It came into force on 1 August 2010, six months after receipt of 30 ratifications.

<sup>77</sup> See Doc. ICC-ASP/8/43/Add. 1, *supra* note 64 (Annex III), at 9; Doc. ICC-ASP/8/20, Vol. I, *supra* note 64 (Annex II, Appendix II), at 64.

<sup>78</sup> *Id.*, 8/43/Add. 1 (Annex IV), at 12; 8/20, Vol. I (Appendix III) at 65.

<sup>79</sup> *Id.*, 8/43/Add. 1 (Annex VI) at 16; 8/20, Vol. I (Appendix IV) at 67.

<sup>80</sup> The additional argument that terrorism should not be included in the Statute because it is not yet defined is something of a red herring. There is a widely agreed list of suppression treaties that deal with many of the cases of terrorism. It would be easy enough to include such a list as an interim “definition” to be supplemented should the General Assembly ever complete its work on a “general” terrorism convention. Which are the most serious drug crimes and thus appropriate for international jurisdiction is a fair question. The Trinidad and Tobago/Belize draft approached this in a creative manner that certainly provides a basis for further discussion. Their draft in the Report

with the way the current criminalization regime operates in these areas, namely with a suppression obligation in the relevant treaties and prosecution at the domestic level. Since they have the resources to devote to such efforts, the larger powers are comfortable with those modalities. Small states, on the other hand, would often be happy to have an international instance to which they could refer such cases, thereby avoiding having their own resources overwhelmed. The debate will surely continue.

## E. Conclusion

The Kampala Conference ended in the early hours of the morning in a mood of euphoria, nearly as great, in the writer's view, as that in Rome in 1998. While the effort to remove Article 124 failed, the principle that if a weapon is forbidden in international conflict it is equally forbidden in a civil war was strongly asserted. The achievement of consensus on the crime of aggression, activating the Court's jurisdiction – albeit with some delay – constituted a remarkable achievement and a great source of satisfaction to those who have laboured for it these many years.

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of the Bureau on the Review Conference, *supra* note 64, (at 16) would authorize ICC jurisdiction over assorted breaches of the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, “but only when they pose a threat to the peace, order and security of a State or region.” There is thus a strong threshold element that would have to be proved by the prosecution.