

The Review Conference on the *Rome Statute of the International Criminal Court*, Kampala, Uganda, 31 May–11 June 2010

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Abstract

Article 123 of the *Rome Statute of the International Criminal Court* mandated a Review Conference, seven years after the Statute came into force, to ‘consider any amendments to the Statute’. This article focuses on the three potential amendments that were forwarded by the governing body of the Court to the Review Conference scheduled in Kampala, Uganda, 31 May to 11 June 2010. These were: (a) whether to delete article 124 of the *Rome Statute* (which permits a ratifying or acceding State to opt out of the application of the war crimes provisions of the Statute for actions on its territory or by its nationals); (b) how to activate the Court’s jurisdiction over the crime of aggression (by concluding a definition of the crime and setting out the conditions for the exercise of jurisdiction; and (c) the question of extending prohibition of the use of certain weapons (poisons, asphyxiating gases and expanding bullets) from international armed conflict into non-international armed conflict. The Conference is also expected to engage in a wide-ranging stocktaking of the Court’s successes and failures. Proposed amendments that were not forwarded to Kampala will be the subject of a new working group to be established late in 2010.

Introduction

Article 123 of the *Rome Statute of the International Criminal Court* (‘*Rome Statute*’) provides that, seven years after the entry into effect of the *Rome Statute*, the Secretary-General of the United Nations is to ‘convene’ a Review Conference ‘to consider any amendments to the Statute’.¹ It adds that ‘[s]uch review may include, but is not limited to, the list of crimes contained in article 5 [of the *Rome Statute*]’.² When this provision was being negotiated in Rome (mostly during the third and fourth weeks of a five-week Diplomatic Conference to conclude the *Rome Statute*), ‘article 5’ encompassed what finally became articles 5 to 8 of the *Rome Statute*. Thus, it included what became the article 5 statement of the crimes within the subject-matter jurisdiction of the International Criminal Court (‘ICC’): genocide, crimes

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¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 123(1).

² *Rome Statute* art 123(1).

against humanity, war crimes and ‘the crime of aggression’, as well as the detailed definitions of genocide in article 6, crimes against humanity in article 7 and war crimes in article 8. Aggression, as we shall explain shortly, was included ambiguously in the *Rome Statute* as one of the four crimes over which the ICC has jurisdiction, but the crime needed to be defined later, as a precondition for the ‘exercise’ of that jurisdiction.

The group negotiating article 123 in Rome was, in fact, somewhat in the dark about what might finally be in the *Rome Statute* as a matter of substance. Some members of the group were concerned about the importance of eventually including such crimes as aggression, terrorism and serious drug crimes, which seemed likely to be excluded from the jurisdiction of the ICC in the short term. The latter two crimes were in fact excluded from the *Rome Statute* as adopted in Rome. Others were more concerned that it might not be possible to include the use of nuclear weapons and other weapons of mass destruction in the war crime provisions of the *Rome Statute* from the beginning; thus, it ought to be possible to consider adding them later. Others wanted to encourage the potential assimilation of the rules relating to non-international armed conflict with those pertaining to international conflict.³ Some were more concerned with the possibility that difficulties might arise in the application of the *Rome Statute*, having more to do with its machinery provisions than with substantive criminal law, which would need to be addressed by an amendment.⁴ Hence, there is a reference to what the agenda of a review conference could include, but while the emphasis is on potential amendments to the *Rome Statute*, the precise subject matter is left open-ended. It should be noted also that no agreement could be had about holding regularly scheduled meetings at, say, five-yearly intervals.⁵ Thus, article 123 provides for one mandatory Review Conference⁶ and later ones when deemed appropriate by the ICC’s governing body, the Assembly of States Parties (‘ASP’).⁷ The current disposition at the ASP seems to be to hold further review conferences, but the time between them has not even been considered.

³ When art 123 was being negotiated, no one had in mind art 124 (see below nn 10–11); art 124 was added well after work on art 123 was completed. On the negotiation of these and other articles in the Final Clauses of the *Rome Statute*, which (aside from art 124) was coordinated by the Samoan delegation, see Tuiloma Neroni Slade and Roger S Clark, ‘Preamble and Final Clauses’, in Roy Lee (ed), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International: 1999) 421.

⁴ Pursuant to arts 121 and 123 of the *Rome Statute*, most amendments require acceptance at a Review Conference or by the Assembly of States Parties (‘ASP’) of the International Criminal Court (‘ICC’), and then acceptance by the parties. See below nn 67–81. A special procedure was included in art 122 of the Statute that would make ‘technical’ amendments possible merely by a decision of the Review Conference by a two-thirds majority, without the need for subsequent ratification or acceptance by States Parties. No such amendments have been made; nor have any been included on the agenda for the first Review Conference. On arts 121, 122 and 123 in general, see the relevant entries in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (Hart Publishing: 2nd ed, 2008); Alain Pellet, ‘Entry into Force and Amendment of the Statute’ in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP: 2002) Vol I, 145.

⁵ As is the case, for instance, with the *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

⁶ *Rome Statute* art 123(1).

⁷ *Rome Statute* art 123(2) provides that at any time after the first Review Conference, at the request of a State Party, and for the same purposes, ‘the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference’.

Not everyone was enthusiastic about the prospect of future amendments and the *Rome Statute* precluded change for the period of seven years. It also contained provisions designed to make amendment difficult. The machinery provisions dealing with amendments will be touched on later.⁸

The *Rome Statute* came into force on 1 July 2002. In accordance with article 123, the United Nations Secretary-General wrote to all States in August 2009 inviting them to participate in the first Review Conference, to take place in Kampala, Uganda, beginning on 31 May 2010.⁹ At its meeting held in The Hague in November 2009, the ASP finalised the agenda for Kampala. In a media release at the end of the Assembly's session, it was announced that:

The Assembly decided that the Review Conference would be held in Kampala, Uganda, from 31 May to 11 June 2010, for a period of 10 working days, to consider:

- a) The possible deletion of article 124 of the Statute, which allows a new State Party to opt for excluding from the Court's jurisdiction war crimes allegedly committed by its nationals or on its territory for a period of seven years;
- b) The definition of the crime of aggression, the conditions for the exercise of jurisdiction by the Court, as well as draft elements of the crime;
- c) The inclusion of the employment of certain poisonous weapons and expanding bullets in the definition of war crimes [in non-international armed conflict] in article 8 of the Statute.

Furthermore, the Review Conference would conduct a stocktaking of international criminal justice focusing on four topics: complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice.

The Assembly also decided to establish a working group for the purpose of considering the remaining proposals for amendments as from its ninth session in 2010.¹⁰

The next section of this article examines each of the agenda items for the Review Conference. This article also notes briefly some matters that did not make it to Kampala, but which are candidates for the agenda of the working group mentioned in the last paragraph of the media release.

One wild card relating to what follows, and to Kampala in general, is the attitude of the United States (US). During the (George W) Bush years, the US did not attend ICC

⁸ See below nn 67–81.

⁹ Letter dated 7 August 2009 from the Secretary-General of the United Nations. Only the States Parties are able to vote at the ASP or a Review Conference, but the *Rules of Procedure of the Assembly of States Parties* ('ASP Rules of Procedure') contemplate invitations to participate addressed to all States, even those which did not attend Rome in 1998. Those States, like the United States, who signed either the *Final Act of Rome* (see below n 13) or the *Rome Statute* are designated 'Observers' under art 112(1) of the *Rome Statute*. Others are called 'states not having observer status' in *ASP Rules of Procedure* r 94.

¹⁰ ASP, 'Assembly of States Parties concludes its eighth session' (Media Release ICC-ASP-20091126-PR481, 27 November 2009) <<http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202009/assembly%20of%20states%20parties%20concludes%20its%20eighth%20session>>. See also ASP to the *Rome Statute* of the ICC, 8th plen mtg, UN Doc ICC-ASP/8/20 (18–26 November 2009) ('ASP Eighth Session Records').

meetings, including those of the Special Working Group on the Crime of Aggression and the ASP. The former was open to all States and, although it is not a party to the *Rome Statute*, the US is entitled to attend (and speak at, but not vote at) meetings of the ASP as an Observer because of its participation in Rome. That the Obama Administration is taking a fresh approach to the ICC was demonstrated dramatically by the presence of a fifteen-person US delegation at the November 2009 meeting of the ASP – by far the largest delegation present. It was led by Legal Adviser Harold Koh and Ambassador for War Crimes Stephen Rapp. The delegation, which consulted widely, insisted that it was there to learn. While the US, as a non-party to the *Rome Statute*, would not have a vote in Kampala, its attitude to such issues as the definition of aggression could be of some significance.

I. Possible deletion of article 124 of the Rome Statute

Article 124 of the *Rome Statute* is the only provision in the Statute that specifically requires its own inclusion on the agenda of the first Review Conference. It provides that, upon becoming a party to the *Rome 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;¹¹ yet article 124, 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 *Rome Statute*. Of the 110 existing parties to the *Rome 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 provides, in its own terms, that it ‘shall be reviewed at the [first] Review Conference’.

The procedural stance of the matter going into Kampala is that the 2009 ASP forwarded a bracketed proposal for the deletion of the article – indicating that the matter is controversial.¹² In the course of the ASP’s meeting, a clear majority of those taking the floor spoke in favour of its deletion – although France, along with two States that are non-parties to the *Rome Statute*, 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 11 years). Many of those opposed to keeping it emphasised that it detracted from the general policy of the *Rome Statute* against reservations and did not appear to have played a significant role in achieving the goal of universality; that is, of encouraging all 190 or so States to ratify or accede to the *Rome Statute*. If there is no substantial consensus in Kampala for removing it, ‘review’ in this case may mean simply deciding to do nothing.

¹¹ *Rome Statute* art 120: ‘No reservations may be made to this Statute’.

¹² See ASP Eighth Session Records, above n 10, Vol I Annex I.

2. The crime of aggression

Aggression is the most important piece of unfinished business from the Rome Diplomatic Conference in 1998. Article 5(1) of the *Rome Statute* lists ‘the crime of aggression’ (along with the crime of genocide, crimes against humanity and war crimes) as one of the four items currently within the subject-matter jurisdiction of the ICC. Article 5(2) adds, however, that:

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.

Building on article 5, the Final Act of the Rome Conference instructed the Preparatory Commission for the ICC 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’.¹³ ‘Definition’ here seems to refer to the relevant substantive criminal law issues; ‘conditions’ requires consideration of whether some organ of the United Nations (including the Security Council) may be able – or even required – to participate in the process as well as the ICC. The task not having been completed by the end of the life of the Preparatory Commission,¹⁴ the ICC’s ASP 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.

The Group’s ultimate effort on provisions and conditions is contained in its final Report to the Assembly in February 2009,¹⁵ which will be in front of the Review Conference. Indeed, consideration of the SWGCA’s proposals is destined to comprise the main work of the Conference. The essence of its draft comprises two articles for addition

¹³ *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/10 (17 July 1998) (‘Final Act of Rome’), Annex I, Resolution F, para 7, 89.

¹⁴ The last draft on the table at the Preparatory Commission was a Discussion Paper proposed by the Coordinator on the Crime of Aggression (‘2002 Coordinator’s Paper’): *Report of the Preparatory Commission for the International Criminal Court, Addendum Part II Proposals for a provision on the crime of aggression*, UN Doc PCNICC/2002/2/Add.2 (24 July 2002), 3. See discussion in Roger S Clark, ‘Rethinking Aggression as Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court’ (2002) 15 *Leiden Journal of International Law* 859.

¹⁵ *Report of the Special Working Group on the Crime of Aggression*, Assembly of State Parties, 7th sess (2nd resumption), UN Doc ICC-ASP/7/SWGCA/2 (20 February 2009) (‘2009 Report’). The proposed amendments and the proposed ‘Elements’ (see below n 16) are also contained in Resolution ICC-ASP/8/Res. 6, Annex II of UN Doc ICC-ASP/8/20, above n 10, Part II (*Resolutions adopted by the Assembly of States Parties*). Concerning the provisions on aggression in general, see Noah Weisbord, ‘Prosecuting Aggression’ (2008) 49 *Harvard International Law Journal* 161; Stefan Barriga, ‘Against the Odds: The Results of the Special Working Group on the Crime of Aggression’ in G Roberto Bellelli (ed), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate: 2010); ‘Symposium: The Codification of the Crime of Aggression’ (2009) 20(4), *European Journal of International Law*. Not all the contributors to the Symposium are true believers. Another who is sceptical of the whole exercise is Gerry Simpson, ‘“Stop Calling it Aggression”: War as Crime’ (2008) 61 *Current Legal Problems* 191. The bulk of the Special Working Group’s substantive work was done at inter-sessional meetings held at the Liechtenstein Institute on Self-Determination at Princeton University. The SWGCA’s materials are usefully collected in Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (Lynne Rienner Publishers: 2009).

to the *Rome Statute*: ‘article 8bis’, which contains the definition; and ‘article 15bis’, which deals with the conditions for exercise. Article 8bis does not contain any alternatives, representing a shaky consensus, although not everyone at the Working Group was entirely happy with everything; article 15bis offers 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 ICC. Draft Elements of Crimes were also produced, apparently with substantial agreement, at an informal inter-sessional meeting of the Assembly held in June of the same year.¹⁶

The following is a discussion of what this author views as the most significant drafting choices that were made and, in a few cases (especially involving draft article 15bis),¹⁷ some that were postponed until Kampala.

A. The basic structure of article 8bis

A major intellectual 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, ‘[c]rimes 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’.¹⁸ As the context of the Tribunal’s discussion made plain, this is not to deny that there is still state responsibility as well. Accordingly, draft article 8bis 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’.¹⁹ This language, based on the *Charter of the United Nations* (*‘UN Charter’*), is followed, in the second paragraph of the draft 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 an act of

¹⁶ Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, 8–10 June 2009, 8th sess, UN Doc ICC-ASP/8/INF.2 (25 June 2009), Appendix I (Draft Elements of Crimes). There is a useful explanatory note on the elements in Annex II of the meeting report (Non-paper by the Chairman on the Elements of Crimes). Article 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. It is apparently not intended that the Elements of aggression will be formally approved as part of a package in Kampala. But delegates to the Review Conference will have the Elements documents in front of them and will no doubt examine them carefully for the light they throw on draft art 8bis. Elements emphasise, in more detail than the *Rome 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, 8 and, now, 8bis) and the ‘general principles’ contained in *Rome Statute* pt III. See generally, discussion of *Rome Statute* art 9 (Elements of Crimes) in Otto Triffterer (ed), above n 4, 505.

¹⁷ Especially the alternatives for the proposition that a ‘precondition’ decision of some sort may need to be made by a United Nations organ – primarily the Security Council, but perhaps the General Assembly or the International Court of Justice.

¹⁸ Judicial Decisions, ‘International Military Tribunal (Nuremberg), Judgment and Sentences’ (1947) 41 *American Journal of International Law* 172, 221.

¹⁹ Draft art 8bis(2).

aggression'.²⁰ *Resolution 3314* 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.²¹ 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. So, utilising it was a challenge. The ultimate drafting of article 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 legality²² must be under more restraint, so the open-textured aspects of *Resolution 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 *Rome 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'.²³

The crime of aggression is, thus, a 'leadership' crime, a proposition captured by the element that the perpetrator has to be in a position effectively to exercise control over or to direct the political or military action of a State. There was considerable discussion in the SWGCA about how this applies to someone like an industrialist who is closely involved with the organisation of the State, but not formally part of its structure.²⁴ Some support was shown for clarifying the matter by choosing language closer to that used in the US Military Tribunals at Nuremberg; namely 'shape and influence', rather than 'exercise control over or to direct'.²⁵ American and French prosecutions at the end of World War II

²⁰ Ibid. 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.

²¹ *Resolution on the Definition of Aggression*, GA Res 3314 (XXIX), 29 UN GAOR, Supp. (No 31), 24th sess, 2319th plen mtg, UN Doc A/9631 (14 December 1974), 24.

²² *Rome Statute* art 22: 'Nullem crimen sine lege'.

²³ Draft art 8bis (1).

²⁴ See Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 *European Journal of International Law* 477.

²⁵ See Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, 11–14 June 2007, UN Doc ICC-ASP/6/SWGCA/INF.1 (25 July 2007), 3. This preparatory work seems to support the proposition that industrialists are potentially covered by the draft amendments.

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 *UN Charter*.²⁶ The need for such a limitation was strongly debated,²⁷ but most participants finally accepted that they could live with it in return for removal of any requirement that there be a ‘war of aggression’²⁸ or that the list of acts in the definition of ‘act of aggression’ be more limited than the list in General Assembly *Resolution 3314*.²⁹ Some speakers thought it might help in analysing a (rare) case of principled humanitarian intervention or a case, more generally, where the legality of the action was definitely in doubt.³⁰

B. The structure of article 15bis

The Special Working Group has been less successful in resolving the issue of conditions than that of definition. The second sentence of the *Rome Statute* article 5(2), 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’.³¹ By and large, the permanent members of the Security Council have taken the position that article 39 of the *UN Charter* confers on them the ‘exclusive’ power to make determinations of the existence of an act of aggression and, thus, a Security Council pre-

²⁶ Above n 23. The Introduction to the Draft Elements of Crimes for aggression, above n 16, states that: ‘The term “manifest” is an objective qualification’. There is a comment in the Report of the 2009 Inter-sessional meeting, above n 16, at 6, 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 art 33 of the Rome Statute’. The phrase ‘character, gravity and scale’ provides a framework for forging such an objective standard.

²⁷ See eg, 2009 Report, above n 15, 3:

‘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 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’.

²⁸ The *Nuremberg Charter* had a puzzling requirement of a ‘war of aggression’, which prompted the International Military Tribunal to draw an unclear 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: United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* (8 August 1945) (*Nuremberg Charter*). Control Council Law No. 10 had language broad enough to treat Austria and Czechoslovakia as criminal aggressions. See generally, Roger S Clark, ‘Nuremberg and the Crime against Peace’ (2007) 6 *Washington University Global Studies Law Review* 527.

²⁹ Above n 21. Cf 2002 Coordinator’s Paper, above n 14, containing an alternative that would modify the *Resolution 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’.

³⁰ The Working Group’s Draft, 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 analysed by the ICC under the general part of the Statute, and, in particular, under art 31 thereof. The requirement that a breach be ‘manifest’ provides an alternative route to analyse some of the ‘defences’.

³¹ *Rome Statute* art 5(2), second sentence.

determination of aggression is an essential precondition to exercise of the ICC's jurisdiction. Most other States point out that article 24 of the *UN Charter* confers 'primary' power on the Council in respect of the maintenance of international peace and justice and that primary is not exclusive. They add that the General Assembly has made several findings of aggression and that the US, the United Kingdom (UK) and France were co-sponsors of the 1950 *Uniting for Peace Resolution*, which recognises the Assembly's powers;³² and that all five permanent members of the Security Council have voted pursuant to that Resolution when it suited them. Non-permanent members tend to add that the International Court of Justice ('ICJ') has addressed issues where aggression is in play.³³ Like the Security Council, however, the ICJ has been wary of actually using the word 'aggression'.

The major achievement in this part of the negotiation since 2003 has been to decouple 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' that was binding on the ICC.³⁴ Not only would this subvert the power of the ICC 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 be probably unbearable weight placed on the mental element provisions of article 30 of the *Rome Statute*,³⁵ the mistake provisions of article 32³⁶ or on the 'manifest' threshold.³⁷ This has now been avoided in the Special Working Group's

³² *Resolution on Uniting for Peace*, GA Res 377A, 1st Comm, 5th sess, 302nd plen mtg (3 November 1950). The relevant provision reads (in part):

[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.

³³ Most recently in *Armed Activities on the Territory of the Congo (DR Congo v Uganda) (Judgment)* [2005] (ICJ), 19 December 2005).

³⁴ As had been the case in the 2002 Coordinator's Paper, above n 14. This was the effect of the words 'which has been determined to have been committed by the State concerned' in para 2 of the definition. The whole context made it clear that someone other than the ICC would make the determination.

³⁵ *Rome Statute* art 30 has a general rule that the crimes in the Statute must be accompanied by 'intent and knowledge'.

³⁶ In the structure of the *Rome 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 ICC 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 defence 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 draft Elements work a finesse that is commonly applied to Elements of the crimes under *Rome Statute* art 8 by redirecting 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'.

³⁷ See above nn 26–30.

draft. Any determination elsewhere is only of a preliminary nature, although it may have some evidentiary value.³⁸ This opens the way for the various options now 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.³⁹ There is, 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.⁴⁰ If the States constituting the permanent members of the Security Council (or at least the two who are parties to the *Rome Statute* and, thus, possessed of a vote in Kampala, France and the UK) do not shift their position and agree to some compromise on this, the success of Kampala probably turns on whether the majority is prepared to force the matter to a vote and plunge ahead.

3. Forbidden weapons in the Rome 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 absolutely forbidden, no matter what the circumstances or consequences.⁴¹ 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 non-international and non-international armed conflict are slowly disappearing.⁴² Thus, the non-international armed conflict parts of the *Rome Statute* include a number of rules taken, for example, from the 1907 *Hague Convention respecting the Laws and Customs of War on Land* 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 the *Rome Statute* article 8(2)(b), which deals with ‘[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law’ and refers to:

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices;

³⁸ Draft art 15bis(5) provides: ‘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’.

³⁹ Draft art 15bis(2)–(4).

⁴⁰ Draft art 15bis(4), Alternative 2, Option 1.

⁴¹ For the International Committee of the Red Cross, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press: 2005) Vol 1, 243 (examples of weapons causing unnecessary suffering, beginning with barbed lances and barbed spears) and 249 (examples of indiscriminate weapons).

⁴² See James G Stewart, ‘Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict’ (2003) 85 *International Review of the Red Cross* 313; Lindsay Moir, ‘Grave Breaches and Internal Armed Conflicts’ (2009) 7 *Journal of International Criminal Justice* 763.

(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 *Rome 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. The draft amendment forwarded to the Review Conference contains a proposal originally put forward informally by Belgium early in 2009 and later co-sponsored by several other States Parties, which would include the same language in paragraph (2)(e) as is contained in paragraph 2(b).⁴³ The principle that weapons that are not permissible in international conflict are equally not permissible in civil wars would be reiterated in the *Rome Statute*.

This will be an important, if modest, addition to the *Rome Statute*. Belgium, again supported by various groups of co-sponsors, had also put before the ASP several proposals for the addition of other weapons to the lists of those prohibited both in international and non-international armed conflict. These included chemical weapons,⁴⁴ biological weapons,⁴⁵ anti-personnel land mines,⁴⁶ non-detectable fragments,⁴⁷ blinding laser weapons⁴⁸ and

⁴³ This and other proposals for amendment that got as far as the November meeting of the ASP are contained in *Report of the Bureau on the Review Conference*, UN Doc ICC-ASP/8/43/Add.1 (10 November 2009) and in *Report of the Working Group on the Review Conference*, ASP Eighth Session Records, above n 10, Vol I Annex II. At the November meeting, the International Committee of the Red Cross commented in a statement to the ASP (on file with the author) 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.

⁴⁴ Such weapons are banned by the *Convention on the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997). Most chemical weapons appear to be banned in warfare under the 1925 *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, opened for signature 17 June 1925, 94 LNTS 65 ('1925 Geneva Protocol'), which is reiterated in the *Rome Statute* art 8(2)(b)(xviii), 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.

⁴⁵ Biological weapons are prohibited under the 1925 *Geneva Protocol*, *ibid*, along with asphyxiating and poisonous gases. There are further regime-articulating provisions dealing with them in the 1972 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction*, opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 17 March 1975). Biological weapons were deleted from the draft of the *Rome Statute*, along with chemical weapons; there is no reference to them at all in the final *Rome Statute*.

⁴⁶ Anti-personnel mines are prohibited under the 1997 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, opened for signature 18 September 1997, UNTS (entered into force 1 March 1999) ('*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.

⁴⁷ 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*, opened for signature 10 October 1980, 1324 UNTS 137 (entered into force 2 December 1983) ('1980 Convention').

⁴⁸ Protocol IV to the 1980 Convention on Blinding Laser Weapons, *ibid*, was adopted in 1995, UN Doc CCW/CONF.I/16 Part I (13 October 1995).

cluster munitions.⁴⁹ 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 *Rome Statute*.⁵⁰ Nonetheless, the ASP agreed to establish a Working Group, as from its ninth session late in 2010, for the purpose of considering these remaining proposals for amendments.

4. Other proposals for amendment not forwarded to Kampala

The Working Group to be created later in 2010 will no doubt consider the other weapons amendments put forward by Belgium and the proposal by Mexico to include nuclear weapons in the *Rome Statute* which was also not forwarded to Kampala. It will also have on its agenda two other proposals put forward for additions to the *Rome Statute* that were not sent on to Kampala: terrorism and drug trafficking; the former put forward by The Netherlands,⁵¹ the latter by Trinidad and Tobago supported by Belize.⁵² 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 organisation should not be too ambitious in its early jurisdictional net.⁵³ In fact, most of the larger powers were — and continue to be — happy with the way the current criminalisation 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 beyond Kampala.

An unrelated amendment proposed by the African Union in The Hague garnered little enthusiasm and was not forwarded to Kampala.⁵⁴ It related to the ICC's overall procedures, rather than to the substantive law of crimes. It would have added two additional paragraphs to article 16 of the *Rome Statute*. Article 16 is the highly controversial

⁴⁹ See Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Dublin, 19–30 May 2008, *Convention on Cluster Munitions*, UN Doc CCM/77 (30 May 2008) <<http://www.clusterconvention.org/>>. Arguably, this Convention is not ripe enough for inclusion in the *Rome Statute*. Given the current rate of ratification, it should come into force some time in 2010.

⁵⁰ See UN Doc ICC-ASP/8/43/Add. 1, above n 43, 9 (Annex III); UN Doc ICC-ASP/8/20, Vol I, Annex II, above n 43, 64 (Appendix II).

⁵¹ Ibid, UN Doc ICC-ASP/8/43/Add. 1, 12 (Annex IV); UN Doc ICC-ASP/8/20, Vol I, 65 (Appendix III).

⁵² Ibid, UN Doc ICC-ASP/8/43/Add. 1, 16 (Annex VI); UN Doc ICC-ASP/8/20, Vol I, 67 (Appendix IV).

⁵³ The additional argument that terrorism should not be included in the *Rome 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, above n 52, would authorise 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.

⁵⁴ Circulated as an unnumbered document at the ASP and contained in the proceedings of the Session, UN Doc ICC-ASP/8/20, above n 43, Vol I, 70 (Appendix VI).

provision that permits the Security Council to put a hold on investigations or prosecutions for successive periods of 12 months. It provides:

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.

The African Union proposal, apparently a reaction to the ICC's warrant for the arrest of President Bashir of Sudan, would have renumbered this as paragraph 1 and added two further paragraphs to article 16. The first would perhaps have made it procedurally easier to bring a request for deferral to the Council.⁵⁵ It would have provided that '[a] State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided for in (1) above'.⁵⁶ The second additional paragraph would have provided that '[w]here the Security Council fails to decide on the request by the State concerned within six (6) months of the receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377 (V) of the UN General Assembly'.⁵⁷ The view was widely expressed that the ability of the Security Council to wreak mischief with the ICC's proceedings under the existing text of article 16 of the *Rome Statute* is already anomalous and should not be extended to another political organ.⁵⁸

Finally, Norway proposed an amendment that also had to do with the workings of the ICC, rather than with crimes within the jurisdiction. The proposal concerned article 103 of the *Rome Statute*, which deals with enforcement of sentences of imprisonment.⁵⁹ Norway was concerned that only a limited number of States have so far agreed to accept sentenced persons for enforcement purposes. Norway believed that there should be scope in the *Rome Statute* for States whose prison systems might not yet be up to international standards to conclude international or regional arrangements enabling them to qualify for assistance in order to do so, including through the receipt of voluntary financial contributions or other technical assistance. Doubts were expressed about whether a treaty amendment was really required to achieve this undoubtedly laudable goal and whether States would actually

⁵⁵ Article 16 currently contains no particular procedure for seizing the Security Council of a request for deferral. It perhaps assumes that a member of the Council will generate a request. The Provisional Rules of Procedure of the Security Council, UN SCOR, UN Doc S/96/Rev. 7, contain at least three relevant Rules. Rule 2 states that '[t]he President [of the Council] shall call a meeting of the Security Council at the request of any member of the Security Council'. Rule 6 states that '[t]he Secretary-General shall immediately bring to the attention of all representatives on the Security Council all communications from States, organs of the United Nations or the Secretary-General concerning any matter for the consideration of the Council in accordance with the provisions of the Charter'. Rule 7 deals with the provisional agenda for each meeting. It includes a statement that '[o]nly items brought to the attention of the representatives on the Security Council in accordance with rule 6, items covered by rule 10 [those whose consideration had not been completed at a previous meeting], or matters which the Security Council had previously decided to defer, may be included in the provisional agenda'.

⁵⁶ UN Doc ICC-ASP/8/20, above n 54.

⁵⁷ *Ibid.*

⁵⁸ There were also some doubts about how the drafting fits with the *Resolution on Uniting for Peace*, above n 32.

⁵⁹ UN Doc ICC-ASP/8/43/Add. 1, above n 43, at 14 (Annex V); UN Doc ICC-ASP/8/20, above n 10, at 69 (Appendix V).

make the effort to ratify or otherwise accept such an amendment. It, too, was not forwarded to Kampala, but no doubt another method will be found to give effect to its objectives.⁶⁰

5. Stocktaking

Article 123 can be said to emphasise substantive matters concerning the crimes within the subject matter of the *Rome Statute* for this first Review, but nonetheless leaves the possibility of addressing other matters open. Indeed, the diplomatic mind being creative, a consensus has emerged that the Review Conference will also address itself to a stocktaking of the ICC and its successes and failures in its first few years. The rationale seems to be that a 'Review Conference', by the very nature of the term 'review', can re-examine general issues as well as specific amendments. A wide-ranging debate had been taking place prior to the ASP meeting in November 2009 about which subjects were most ripe for intensive (and preferably high-level) discussion in Kampala. Japan had taken the lead in producing a contribution paper about what might be on the agenda. Numerous States and members of civil society contributed to the discussion. As noted earlier,⁶¹ four topics were settled on: complementarity,⁶² cooperation,⁶³ the impact of the *Rome Statute* system on victims and

⁶⁰ On 18 December 2009, Norway circulated a draft 'Decision on the enforcement of sentences' for adoption by the Review Conference. Under this proposal, the Conference would 'decide', inter alia, that '[a] sentence of imprisonment can also be served in a prison facility made available to the designated States by an international or regional organization, arrangement or agency'. This seems like a sensible way to deal with the problem, giving the proposal the imprimatur of the Review Conference, but without the cumbersome procedure of obtaining the necessary seven-eighths acceptance of an amendment.

⁶¹ See above n 10.

⁶² 'Complementarity', as lodged in the *Rome Statute*, is the proposition that States should have the first opportunity to prosecute for crimes within the (concurrent) jurisdiction of the ICC. It is only when States are unable or unwilling that the ICC should step in. Denmark and South Africa have taken the labouring oar on this topic for Kampala, with a discussion paper that addresses 'positive complementarity' in particular. By positive complementarity, they understand 'all actions and activities aimed at supporting national jurisdictions in meeting their obligations under the *Rome Statute*, including related activities aimed at strengthening the rule of law'. While noting that the ICC is first and foremost a judicial institution and not a development agency, they nevertheless see a role for the Court in assisting States to strengthen domestic systems and perhaps acting as a broker helping to bridge the gap between donors and potential partner countries.

⁶³ A 'Report of the Court on International Cooperation and Assistance' (advance version, 29 October 2009) contains the following that is germane to the Kampala debate:

An analysis of past experience shows that cooperation with the Court has been generally forthcoming. Nevertheless, the Prosecutor has called the UN Security Council's attention to the lack of cooperation of the Government of Sudan in the Darfur case. More generally, efforts continue to ensure that adequate cooperation is forthcoming in the future.

In particular, public and diplomatic support remains priority in the galvanization of arrest efforts. With respect to the protection of victims and witnesses, the enforcement of sentences, and interim release, more agreements are needed to provide cooperation and increased cooperation in this respect also remains a priority.

Further, the analysis of responses to cooperation requests has indicated two general trends which states may consider addressing. First, a considerable number of requests of the Registry to States are not met with a response. In limited circumstances, the Registry's notification of cooperation requests has even been rejected. Second, a number of States have indicated a lack of available procedures under national law to provide the requested cooperation. Pursuant to Article 88 of the *Rome Statute*, there is an obligation to ensure such procedures are available.

[footnote continued on the next page]

affected communities,⁶⁴ and peace and justice.⁶⁵ One surprising omission from the list, which had been widely suggested, was a discussion of how best to achieve ‘universalisation’ of the *Rome Statute*. Currently, there are 110 parties – a sizeable turnout that is, 11 years later, frankly beyond this author’s wildest dreams in 1998. Nevertheless, the parties, exuding the zeal of the committed, would like more company. A number of existing acceptances occurred because of bilateral and regional efforts to obtain new parties – to say nothing of extensive networking by non-governmental organisations (NGOs). There could well have been scope to consider strategies to gain more converts as one of the specifically-listed topics in Kampala, but there was apparently not enough support for doing.⁶⁶ Nevertheless, there are significant efforts afoot, by such entities as the Commonwealth Secretariat, the Commission of the European Union, the International Committee of the Red Cross and Parliamentarians for Global Action. There will be other opportunities to compare notes.

6. Giving effect to the proposed amendments

Article 123 of the *Rome Statute* on ‘Review of the Statute’ incorporates, by reference, article 121 concerning ‘Amendments’. The relevant paragraphs of article 121 read as follows:

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.

Lack of cooperation and assistance or delays may bear a cost. They may lead to delays in the proceedings pending before the Court, thereby affecting the Court’s efficiency and a consequent increase in running costs. These delays may also affect the integrity of the proceedings. It should also not be forgotten that requests for cooperation that do not meet with a response need to be reiterated by the Court, thereby generating additional costs, notably in terms of human resources.

⁶⁴ A Report of the Court on the strategy in relation to victims, prepared for the 2009 ASP Session, notes that ‘[t]he Rome Statute establishes a framework for recognition of victims as actors within the international justice scheme greater than any previous international criminal tribunal’: UN Doc ICC-ASP/8/45 (10 November 2009), para 1. Paragraph 1 continues:

The relevant units of the Office of the Prosecutor (OTP) and the Registry, the Secretariat of the Trust Fund for Victims (TFV) and the Offices of Public Counsel for Victims (OPCV) and for the Defence (OPCD), with a representative of the Presidency as observer, have now come together to set out a broad common vision that will provide a common framework and serve as a guide for the development of specific objectives and work plans. The ICC Strategy in relation to Victims (the Strategy) is the result of that process, but is also intended to provide a basis for further development in the future.

There is much in the strategy document on which the focal points on victims for the Review (Chile and Finland) will no doubt build.

⁶⁵ The tension between the obligation to punish those guilty of the most serious crimes and the alleged need to grant impunity in some cases in the interest of a cessation of hostilities is a constant theme in discussions of the role of the ICC. It is unlikely that the Kampala discussion will resolve anything. Your author is firmly in the camp that believes that one can have both peace and justice. Argentina, Democratic Republic of the Congo and Switzerland are the focal points for the Kampala discussion of this issue.

⁶⁶ The Assembly’s Resolution on the Review Conference, UN Doc ICC-ASP/8/Res. 6, above n 10, which contains the list of four topics for the Kampala stocktaking in its Annex IV, asserts, however, that the Assembly decides to forward these items, ‘taking into account the need to include aspects of universality, implementation, and lessons learned, in order to enhance the work of the Court.’ Implementation by appropriate legislation is clearly an aspect of complementarity — a State which has, for example, no legislation criminalising the crimes in the Statute can hardly say it is able to carry out prosecutions itself. Regrettably, fewer than half of the States Parties have adequate legislation to give effect to the cooperation and criminalisation requirements of the Statute.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.⁶⁷

Deleting article 124 from the *Rome Statute*,⁶⁸ appears to require simple application of paragraph 3 of article 121 (consensus or a two-thirds majority at the Review Conference for 'adoption'), followed by 'ratification or acceptance' by seven-eighths of the parties – in application of paragraph 4, the general rule for amendments. Thereupon, the deletion would be binding on all parties and future parties.

There is, however, a fundamental ambiguity in the *Rome Statute* on how the aggression amendment is to be done. In this instance, article 121 has to be read along with article 5. Article 5(2) says 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 that crime'. Seizing on the word 'adopt' used here and in article 121(3),⁶⁹ the author has in the past espoused the position that all that is needed is approval by the Review Conference.⁷⁰ This view is in a decided minority and the author's scars run deep. 'Adopt' in article 5(2), it is said by the majority, must mean both to approve the text and to get subsequent ratification – in accordance with standard multilateral practice. 'Adopt' in article 121(3) is used differently; it means (only) approving the text.⁷¹ This then shifts the argument to whether paragraph 4 or paragraph 5 of article 121 applies to what happens after adoption pursuant to paragraph 3. Paragraph 4 is the general rule on amendments. It asserts that, 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

⁶⁷ *Rome Statute* art 121.

⁶⁸ See above nn 10–11.

⁶⁹ *Rome Statute* 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'.

⁷⁰ Roger S Clark, 'Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute' (2009) 41 *Case Western Reserve Journal of International Law*, 413, 416–8. In that article, many of the issues touched on in this section of the present article are addressed in greater depth. There is a careful examination of the ambiguities in Astrid Reisinger Coracini, "'Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (2008) 21 *Leiden Journal of International Law* 699.

⁷¹ It is fair to add that many of the negotiators accept that the ICC will have competence to receive Security Council referrals once the text is adopted – even in the absence of any individual formal acceptances. See *Report of the Special Working Group on the Crime of Aggression*, 7th plen mtg, UN Doc ICC-ASP/7/20 (November 2008), Annex III, para 38; 2009 Report, above n 15, 7.

with the Secretary-General of the United Nations'.⁷² No one is bound until everyone is bound. Paragraph 5, it will be recalled, provides that:

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 the crime covered by the amendment when committed by that State Party's nationals or on its territory.⁷³

The issue of interpretation is fairly stark. Completing the definition and conditions of aggression hardly requires an amendment 'to' the literal language of article 5, since aggression is within the jurisdiction of the ICC and is not being added to it – only the 'exercise' of jurisdiction is being executed. On the other hand, is the aggression provision functionally⁷⁴ an amendment 'to' article 5 – in that it removes an existing state of affairs such that the ICC cannot currently 'exercise jurisdiction' over one of the four crimes listed as within its jurisdiction in article 5(1)? If this is the case, then the amendment applies only to those who accept it. Or is Article 5(2), as this author believes more likely, a facilitative clause that provides a mechanism for completing the work of the Rome Conference? On this reasoning, the amendment is to the *Rome Statute in general*, rather than 'to' article 5, and the seven-eighths rule applies. Neither view is entirely persuasive, although the author leans to the latter interpretation, conceding, nonetheless, that getting seven-eighths to ratify may take a long time.⁷⁵ There seems, however, at this stage of the game, to be a majority in favour of treating the proposed amendments as amendments 'to' article 5 and thus applicable only to those who specifically accept.⁷⁶

As forwarded to Kampala, the weapons additions are drafted on the assumption that they represent an amendment 'to' article 8(2)(e) of the *Rome Statute*, which deals with non-international armed conflict. Thus, the understanding is that the additions will apply, pursuant to article 121(5), only to those States that accept them.

The previous incarnations of the Belgian amendments, however, raised some interesting questions about whether provisions on forbidden weapons, at least in respect of

⁷² *Rome Statute* art 121(4).

⁷³ *Rome Statute* art 121(5) (emphasis added).

⁷⁴ Formally, the proposed amendments insert new arts 8bis and 15bis in the *Rome Statute* and make changes in arts 9, 20(3) and 25(3). It takes some mental gymnastics to characterise them literally as amendments 'to article 5'. Hence, the need for a 'functional' or 'teleological' approach that takes some liberties with the actual language. While art 5(2) is said, in the SWGCA's 2009 proposals, to be 'deleted' this hardly seems necessary on any interpretation of it. Deletion is, formally at least, much more like an amendment to the article than the addition to two articles to the *Rome Statute* and small amendments to at least three other articles.

⁷⁵ Waiting while decent States slowly agree one by one to accept the obligations unilaterally in application of art 121(5) is not a cheerful prospect either. Those most able and willing to use force will not likely be in the vanguard of ratification, whatever method is adopted.

⁷⁶ But see Security Council referrals, above n 71. There are also several possibilities in the air for 'opting-in' or 'opting-out' of the aggression provisions, over and above any necessary agreement. These include requirements that the alleged aggressor State have agreed to the jurisdiction in advance. See Informal inter-sessional meeting on the Crime of Aggression, above n 16, at paras 32–43. 'Opting-out' invokes the good and bad connotations of art 124. Proponents think opt-out a good thing for enabling more States to become parties. Opponents believe that the *Rome Statute* should apply to all alike and see it as another assault on the 'integrity of the Statute'.

international armed conflict, could be applied to all parties through the paragraph 4 seven-eighths procedure. The problem arises because of article 8(2)(b), which includes the following in the material on serious violations of the laws and customs of war applicable in international armed conflict:

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123[.]⁷⁷

This would suggest a possible exception to the rule in paragraph 5 of article 121 that amendments to article 8 can be made applicable only to those who agree to them. Is it, like article 5(2), designed to complete something that had to be left over from the Rome Conference and to which special rules apply, culminating in application of the seven-eighths rule?⁷⁸ Is subparagraph (xx) and its purely notional ‘annex’ something outside article 8, so that paragraph 4 of article 121 applies on the theory that actually creating or adding to the annex is not an amendment to article 8?⁷⁹ Or is it simply meaningless verbiage, cynically added to give the appearance that something special was being done about the likes of nuclear, biological and chemical weapons, when the reality was quite different? The problem would have been seen most starkly if the original Belgian on biological and chemical weapons had proceeded, for they raised the annex possibility.⁸⁰ The whole set of issues will no doubt be talked about post-Kampala in the Working Group being created to continue dialogue.⁸¹

For the moment, however, the Belgian proposal, modest in substance, is to be applied with equal modesty only to those who agree to it.

⁷⁷ *Rome Statute* art 8(2)(b)(xx). Some of the ramifications of this provision, in material mostly written before the emergence of the Belgian proposals, are explored in Roger S Clark, ‘Building on Article 8(2)(b)(xx) of the Rome Statute: Weapons and Methods of Warfare’ (2009) 12 *New Criminal Law Review* 366.

⁷⁸ Note that art 8(2)(b)(xx) does not use the verb ‘adopt’ as in art 5(2) (or any other verb). The relevant phrase reads ‘by an amendment in accordance with the relevant provisions set forth in articles 121 and 123’. Thus, it is harder to make the argument that only para 3 of art 121 applies; the choice must be between paras 4 and 5.

⁷⁹ Subparagraph (xx) is located in the part of art 8 dealing with international conflict. Is there a different rule for adding non-international prohibitions to an annex? If this is so, it is probably just fortuitous – with the removal of all weapons prohibitions from the non-international parts of art 8, the issue just dropped off the radar screen.

⁸⁰ See above nn 44–49. Some tentative thoughts on the early Belgian proposals were offered in Roger S Clark, ‘The “Weapons Provision” and its Annex: The Belgian Proposals’ in G Roberto Bellilli (ed), above n 15. Belgium apparently concluded along the way that: (a) it did not want to fight the para 4/para 5 battle; and (b) the art 8(2)(b)(xx) annex procedures perhaps apply only to international armed conflict.

⁸¹ See above n 10.

Postscript

The Review Conference proceeded by consensus — no votes were taken. There was a rich debate in the ‘stocktaking’ part of the agenda.

The discussion of possible deletion or amendment of article 124 tracked the earlier discussion in November 2009. At the insistence of several large powers (some of them non-parties), it was agreed that the article would be retained ‘in its current form’ for now and that it would be the subject of a further ‘review’ in 2015.

The amendment — sponsored by Belgium and 19 other States — to extend the prohibition on the use of poison, poisoned weapons, asphyxiating gases and expanding bullets to the provisions on non-international armed conflict (and the accompanying elements) was adopted successfully. Language was added in Kampala to the preamble to this amendment to deal with a matter that had emerged during the drafting of the elements of the same crime in international conflict. Unlike the other weapons, the prohibition of which is absolute, expanding bullets may be used in a very narrow range of circumstances. These involve, in particular, hostage rescues where there is a danger that normal bullets will pass through the hostage-taker and into the hostage. The preamble makes the point that ‘the crime is committed only if the perpetrator employs bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets’.

There was a successful resolution of the matter of aggression. The definition of the crime of aggression, its elements, and the necessary consequential amendments to the *Rome Statute* were adopted exactly in the form discussed in the body of this article. The terms for resolving the matter of the ‘conditions’ represent a more complicated story, to which it is not possible to do total justice in a brief synopsis. Suffice it to say, that, while agreement was reached on making the jurisdiction over aggression operative, this will not happen until there are both: (a) 30 ratifications of the amendments; and (b) a further resolution by the States Parties taken after 1 January 2017. The consensus, achieved after midnight on the final day (after the clocks had been removed), was facilitated by having separate regimes for referrals by the UN Security Council, on the one hand, and by States Parties or by the Prosecutor *proprio motu*, on the other. In the case of the latter types of referral, the Prosecutor may proceed, with the authorisation of the Pre-Trial Division of the Court, when the Security Council fails to act. Some ‘understandings’ were added to the adopting resolution to allay fears of some major players. In particular, there is an insistence that ‘aggression is the most serious and dangerous form of the illegal use of force’ (a redundant statement in this author’s view), and some language aimed at discouraging the use of universal jurisdiction at the domestic level (more controversial).

The Conference thus ended with considerable euphoria.