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INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE KAMPALA, UGANDA MAY 31–JUNE 11, 2010

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LETTER OF TRANSMITTAL

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC, September 2, 2010.

DEAR COLLEAGUES: In May 2010, we directed two members of the Foreign Relations Committee staff, Minority Chief Counsel Michael Mattler and Majority Deputy Chief Counsel Andrew Keller, to observe U.S. participation at the Review Conference of the Rome Statute of the International Criminal Court (ICC), which took place in Kampala, Uganda, from May 31–June 11, 2010. The conference represented the first time parties to the ICC considered amendments to the Rome Statute since it entered into force in 2002. We thank the co-heads of the U.S. delegation, State Department Legal Adviser Harold Koh and Ambassador at Large for War Crimes Issues Stephen Rapp, along with their colleagues from the Departments of State, Defense, and Justice, for including Mr. Mattler and Mr. Keller as part of the U.S. delegation.

The United States is not a party to the ICC, and is unlikely to become a party anytime soon. Nonetheless, the United States had interests at stake in the discussions at Kampala. The principal focus of the Kampala Conference was consideration of proposals to add to the ICC's jurisdiction a new crime of aggression, some of which could have seriously affected uses of military force by the United States and its allies. The United States also had an interest in better understanding the state of the ICC's work generally, and its prospects for making an effective contribution to promoting accountability for genocide, war crimes, and crimes against humanity. In this regard, the United States, under both the George W. Bush and Obama administrations, has supported the ICC's investigation of such crimes in Darfur, pursuant to a 2005 referral by the U.N. Security Council.

As this report highlights, the Kampala Conference adopted a complicated decision that envisions the future addition of a crime of aggression to the ICC's jurisdiction. The proposed aggression regime is flawed in several respects, but nonetheless contains important protections for U.S. interests. Most significantly, U.S. persons, including U.S. officials and military members, could not be investigated or prosecuted for aggression by the ICC without the consent of the United States. The proposed regime will not enter into force for at least seven years, and will do so only after a further decision by the ICC's parties to bring it into force. U.S. participation at the Kampala Conference played an important role in securing these protections.

The report also observes that, with the Conference's focus on adding a new crime to the ICC's mandate, ICC parties spent comparatively little energy at the Conference addressing a range of operational challenges currently faced by the Court. Eight years after entering into force, the ICC has yet to complete its first trial and is encountering a variety of practical obstacles to its effectiveness. Absent greater focus on addressing such difficulties in the ICC's operations, the court may continue to struggle in carrying out its basic judicial functions.

We hope you find this report useful and informative. We welcome any comments you may have on it.

Sincerely,

JOHN F. KERRY,
Chairman.
RICHARD G. LUGAR,
Ranking Minority Member.

INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE KAMPALA, UGANDA, MAY 31–JUNE 11, 2010

BACKGROUND

The International Criminal Court was established in 1998. Under the treaty establishing the ICC, known as the Rome Statute, the Court has jurisdiction to investigate and prosecute cases of genocide, war crimes, and crimes against humanity. The treaty entered into force in 2002 and currently has 113 states parties. The United States is not a party to the ICC.

On May 31, 2010, the parties to the ICC convened a 2-week conference to assess the work of the ICC since its inception and to consider amendments to the Rome Statute. The United States sent a delegation to the conference and participated as an observer.

The principal issue before the conference was whether to amend the Rome Statute to add a new crime—aggression—to the ICC's jurisdiction. The conference also considered two more technical amendments to the statute, and held a series of moderated discussions to take stock of elements of the ICC's performance to date. The stocktaking discussions addressed the relationship between the court's work and broader efforts to resolve conflict and restore peace, the impact of the court's work on victims of crimes, the extent of cooperation with the court by states, and efforts by states to establish accountability for serious crimes at the national level. This report addresses the Conference's discussions and decisions related to the crime of aggression.

PRE-CONFERENCE DISCUSSIONS OF AGGRESSION

As adopted in 1998, the Rome Statute gave the ICC jurisdiction over three crimes: genocide, war crimes, and crimes against humanity. At the Rome Conference, negotiators discussed giving the court jurisdiction over the additional crime of aggression, but were unable to agree on a definition of the crime or on the conditions under which the ICC might exercise jurisdiction over it. As a compromise, the Rome Statute provided that the ICC could exercise jurisdiction over aggression in the future if the statute were amended to address these issues.

Following the Rome Conference, the ICC's Assembly of States Parties established a special working group on the crime of aggression. The working group met between 2003 and 2009 and developed proposals on both a definition of the crime aggression and on conditions under which the ICC might exercise jurisdiction over it. The United States did not participate in the working group. The working group's proposals are described briefly below.

Definition of Aggression—In contrast to the other crimes within the ICC's jurisdiction, aggression has not previously been widely employed as a criminal law concept in domestic or international law. In the aftermath of World War II, the International Military Tribunals in Nuremburg and Tokyo prosecuted a few German and Japanese officials for "crimes against peace," though there was no widely agreed definition of this concept prior to the war. Following the war, the U.N. Charter gave the Security Council the authority to determine when a state had committed an "act of aggression" and to decide on measures to be taken to restore international peace and security. But the Charter's treatment of aggression does not provide for criminal liability on the part of individuals.

The working group recommended a definition based largely on a 1974 U.N. General Assembly resolution, which was adopted for the purpose of providing guidance to the U.N. Security Council's use in determining whether a state had committed aggression for the purposes of the U.N. Charter. The working group's definition reads as follows:

ARTICLE 8 BIS—CRIME OF AGGRESSION

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

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

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

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

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

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Three key elements are at the core of the proposed definition:

First, aggression is a crime committed by political or military leaders—such as heads of state or senior military officials—who, on behalf of a state, plan or direct acts of aggression carried out by others. Aggression is not committed by officials or soldiers carrying out the decisions of others.

Second, aggression involves the use of force in violation of the U.N. Charter. Under the U.N. Charter, states are prohibited from using force against the territorial integrity or political independence of another state except in self-defense from an armed attack or if authorized by the U.N. Security Council.

Third, aggression arises only in the case of "manifest" violations of the U.N. Charter, meaning that the character, gravity, and scale of the violation are clearly established.

Conditions for the Exercise of Jurisdiction Over Aggression—The working group was unable to arrive at a consensus recommendation regarding the conditions under which the ICC might exercise jurisdiction over aggression. Delegations fell broadly into two camps on this issue.

Permanent members of the U.N. Security Council took the position that the ICC should exercise jurisdiction over aggression only in cases in which the U.N. Security Council had specifically asked it to do so. The U.N. Charter vests the Security Council with the responsibility for determining the existence of an act of aggression, and measures to be taken to maintain or restore international peace and security. An independent role for the ICC in investigating and prosecuting aggression could prejudice the Council's efforts to resolve situations involving potential aggression and create the risk of broader conflict.

Most other countries supported some authority for the ICC to exercise jurisdiction over aggression independently of the U.N. Security Council. These countries were concerned that a deadlock in the Security Council over a particular case would prevent the ICC from being able to address a case of aggression. They also argued that the Security Council's involvement in deciding whether cases could proceed would inject political considerations into judicial matters and undermine the integrity of the ICC's proceedings.

HISTORICAL U.S. POSITION ON AGGRESSION

While the United States did not participate in the work of the Assembly of States Parties' special working group on aggression, the United States has historically expressed concerns about proposals to include aggression within the ICC's jurisdiction.

In 1998 testimony before the Senate Foreign Relations Committee, the Clinton administration's chief negotiator at the Rome Conference, David Scheffer, expressed the following set of concerns about the treatment of aggression in the original Rome Statute:

> We are disappointed with the treatment of the crime of aggression. We and others had long argued that such a crime had not been defined under customary international law for purposes of individual criminal responsibility. We also insisted, as did the International Law Commission in 1994, that there had to be a direct linkage between a prior Security Council decision that a state had committed aggression and the conduct of an individual of that state. The statute of the court now includes a crime of aggression, but leaves it to be defined by a subsequent amendment to be adopted 7 years after entry into force. There is no guarantee that the vital linkage with a prior decision by the

> Security Council will be required by the definition that emerges, if in fact a broadly acceptable definition can be achieved. We will do all we can to ensure that such linkage survives.[1]

This statement reflected two principal concerns at the heart of the U.S. position:

First, the United States has expressed concerns that aggression has not been sufficiently defined to form an appropriate basis for criminal prosecutions. Prosecutions based on a definition of aggression that does not reflect customary international law would create the risk that individuals could face criminal penalties for uses of force that have not traditionally been considered unlawful by the international community. This could serve to discourage a wider range of uses of force than are prohibited under existing customary international law, including some that may be necessary to protect the security interests of the United States and its allies. In addition, in the absence of a clear and accepted definition of the crime, potential defendants would not have clear guidance about what actions are prohibited, raising fundamental questions of fairness and due process in any criminal proceedings.

Second, the United States has expressed concerns about the potential impact of an ICC crime of aggression on the role and authority of the U.N. Security Council. As a permanent member of the Security Council, the United States has an interest in ensuring that actions by the ICC in relation to alleged cases of aggression do not interfere with the Council's own efforts to address matters of international peace and security.

In addition to these considerations, U.S. policy has also stressed a strong interest in protecting U.S. persons, including U.S. officials and members of the armed forces, against potential ICC investigations or prosecutions for aggression, which may be unfounded or politically motivated. As a nonparty to the ICC, the United States has long objected to any efforts by the ICC to assert jurisdiction over Americans with respect to its core crimes of genocide, war crimes, and crimes against humanity. Securing protections against such assertions of jurisdiction by the ICC was a core objective of the American Servicemembers' Protection Act, passed by Congress in 2002.[2] Concerns about U.S. exposure to an ICC regime for aggression would be especially acute, given that aggression cases would involve potential criminal prosecution of the President and other senior political and military leaders for their decisions and actions related to matters of U.S. national security.

THE OBAMA ADMINISTRATION'S APPROACH TO THE KAMPALA CONFERENCE

The administration's decision to attend the Kampala Conference as an observer reflected two principal considerations. First, the administration sought to address U.S. concerns and protect U.S. interests with respect to the proposed ICC aggression regime, including those discussed above. Second, the administration sought to ex-

[1] Statement of David Scheffer, Ambassador at Large for War Crimes Issues, to the U.S. Senate Committee on Foreign Relations, July 23, 1998.

[2] 22 U.S.C. § 7421 et seq.

press and reinforce longstanding U.S. support for efforts to promote accountability for international crimes such as genocide, crimes against humanity, and war crimes. This included exploring ways in which the United States, as a nonparty to the ICC, could work with ICC members to advance shared objectives in this area.

Consistent with these objectives, the United States delegation in Kampala raised a series of concerns in connection with the conference's consideration of the crime of aggression. These concerns fell into four main categories:

Concerns With the Content of the Definition—The U.S. delegation observed that the proposed aggression definition was vague in a number of respects, creating uncertainty on several important issues. They noted that the proposed definition applied to "acts of aggression" rather than "wars of aggression" that were the subject of prosecution at Nuremburg, leaving unclear the scope of the crime. They also noted that it was unclear how the term "manifest" in the definition would apply, including whether it must be shown that a state was "manifestly" not acting in self-defense or with the consent of the state where force was used. It was also unclear how the "manifest" standard would apply in cases where force was used for the purpose of preventing serious crimes such as genocide, war crimes, and crimes against humanity. The U.S. delegation also noted ways in which the definition departed from existing customary international law, as well as from the General Assembly Resolution on which the definition was based. These included the definition's failure to specify that only the most serious and dangerous forms of illegal uses of force constitute aggression, with the determination whether an act of aggression has occurred requiring careful consideration of the circumstances of each particular case, including the purpose for which force was used.

Concerns With the Conditions for the Exercise of Jurisdiction Over Aggression—Consistent with the historical U.S. position, the U.S. delegation took the position that a prior decision of the U.N. Security Council that aggression had occurred should be a precondition to the ICC's exercise of jurisdiction over the crime of aggression in any case. The delegation opposed proposals for alternative jurisdictional schemes in which the ICC could exercise jurisdiction over aggression without prior Security Council approval, including proposals in which the ICC Prosecutor could proceed with cases after a period of notice to the Security Council unless the Council affirmatively decided that the case should not proceed. The U.S. delegation also stressed longstanding U.S. concerns about any effort to subject states to ICC jurisdiction over aggression without their consent, except in cases of referral by the U.N. Security Council.

Concerns With the Impact of the ICC's Aggression Regime for National Justice Systems—The U.S. delegation expressed concern that adding aggression to the Rome Statute could lead to efforts by individual states to prosecute leaders of other countries for aggression through their national courts. This risk arises because, under the Rome Statute, the ICC is a court of last resort and may exercise jurisdiction over a crime only where relevant states are unwilling or unable to investigate and prosecute them through their national justice systems. Under this system, states are encouraged to pros-

ecute crimes domestically rather than requiring recourse to the ICC. The U.S. delegation expressed concerns that encouraging domestic prosecutions of aggression, which could involve two countries to a conflict each trying to prosecute the other's leaders in its own courts, could exacerbate tensions and undermine international peace and security.

Concerns With the Process for Making Decisions About Aggression—In light of the divergent views over the circumstances in which the ICC might exercise jurisdiction over aggression, the U.S. delegation also stressed the importance that any decisions be based on a consensus among ICC members (which would necessarily include the United Kingdom and France, which are permanent members of the U.N. Security Council). The U.S. delegation observed that all prior Rome Statute crimes had been adopted by consensus and that adoption of a regime for the politically charged crime of aggression over the objections of some countries would undermine the legitimacy of both the crime and the ICC itself.

DISCUSSIONS ON AGGRESSION AT THE KAMPALA CONFERENCE

The negotiations at the Kampala Conference focused on four principal issues: the content of the definition of aggression, the conditions for the exercise of jurisdiction over aggression, whether the aggression regime would apply to states that had not consented to it, and the process for adopting amendments to the Rome Statute regarding aggression.

Content of the Definition—In spite of U.S. criticism of the definition of the crime of aggression proposed by the Assembly of States Parties' special working group, the definition itself was widely supported at the conference, including by U.S. allies such as the United Kingdom and France. This support did not appear to be based on substantive disagreement with the questions raised by the United States about the definition. Instead, it seemed to reflect concern that reopening the definition would delay the process of reaching a final decision on aggression (to which many countries were firmly committed) and that other compromises that had been made in arriving at the proposed definition might be revisited if the text were reconsidered.

While the Conference was accordingly unwilling to entertain changes to the definition's text, delegations were willing to discuss adopting "understandings" addressing elements of the definition. Such understandings were viewed as a means of providing authoritative guidance to the ICC Prosecutor and judges on interpretive issues related to the definition. The United States proposed a series of understandings to address concerns it had raised about the definition. These included understandings designed to provide greater clarity about the meaning of a "manifest" violation of the U.N. Charter as used in the definition, to specify that an ICC aggression regime would not create the right or obligation for states to exercise domestic jurisdiction over alleged acts of aggression by other states, and to provide greater specificity about the level of gravity required to establish the existence of aggression.

Conditions for the Exercise of Jurisdiction—This represented the most contentious issue of the conference. Most delegations opposed the position of the five permanent members of the Security Council

that the ICC Prosecutor should have authority to investigate and prosecute aggression only in cases where the Council had previously determined that a state had committed an act of aggression. This majority view reflected a concern that the ICC's judicial role required it to operate independently from political constraints. It also reflected deep dissatisfaction with the Security Council among developing countries, and concern that Security Council decisions would reflect the interests of the five permanent members rather than the interests of the international community as a whole.

Most delegations proposed giving the Security Council at most a fixed period of time to determine whether a state had committed aggression in connection with a situation in which the ICC Prosecutor wished to investigate or prosecute an individual for aggression. In the absence of a determination by the Security Council by the end of the time period, these countries urged that the Prosecutor have the authority to move forward with the case on his own initiative.

Consent Requirement—Delegations differed over whether a state must have consented to the ICC's aggression jurisdiction in order for its nationals to be subject to investigation and prosecution for aggression by the ICC. States were more divided on this question than on the question related to the role of the Security Council. In general most countries, particularly those in the developing world, opposed a requirement that a state consent before an aggression regime would apply to its nationals. They argued that prosecutions for aggression would be less likely, and the deterrent created by the regime less effective, if it applied only to states that had consented. A sizeable minority, including a number of European countries, supported a consent requirement, arguing that such consent is a basic requirement to bind a state under international law. All delegations agreed that no state consent would be required where the ICC was prosecuting aggression at the request of the U.N. Security Council, which has the authority to bind U.N. member states pursuant to the U.N. Charter.

Process for Adopting Amendments Related to Aggression—Delegations also differed over the correct process for amending the Rome Statute to address aggression. At issue in the debate were two alternative methods provided for under the Rome Statute for adopting amendments. Under the first method, contained in Article 121, paragraph 4, amendments are binding on all Rome Statute parties once they have been approved by 7/8 of the states parties. Under the second method, contained in Article 121, paragraph 5, amendments are binding only on those states that have accepted them.

Delegations' positions on these procedural questions often mirrored their positions on whether state consent should be required for the ICC to have jurisdiction over the state's nationals. States opposed to a consent requirement tended to favor an amendment process that would bind all states so that an aggression regime could apply universally even if a minority of states objected to it and declined to ratify it. Supporters of a consent requirement generally supported an amendment process in which amendments would apply only to those states that ratified them, so that non-

ratifying states could avoid being bound by a regime that was adopted over their objections.

OUTCOME

Discussions at the Kampala Conference were unable to fully resolve the most contentious issues related to the proposed aggression regime. The Conference adopted a complicated decision that reflected compromises on several key issues. The decision provides that the envisioned aggression regime will not become operational for at least seven years, and even then only after a further decision by the ICC's Assembly of States Parties to bring it into effect. The text of the decision is attached as an annex to this report. Below is a summary of the key provisions of the decision:

Definition of Aggression—The Conference adopted the definition of aggression proposed by the Working Group without any amendment. In an effort to address concerns raised by the U.S. delegation about lack of clarity in aspects of the definition, the Conference adopted a series of interpretive understandings relating to aspects of the definition. Among the approved understandings were:

- An understanding specifying that, in assessing whether an act of aggression constitutes a "manifest" violation of the U.N. Charter, the character, gravity, and scale of the act must all be considered, and that no one of these elements by itself can satisfy the "manifest" standard;
- An understanding specifying that only the most serious and dangerous forms of the illegal use of force constitute aggression, and that determinations of aggression require considering all the relevant circumstances of each case, including the gravity of the acts and their consequences; and
- Two understandings specifying that the amendments address the crime of aggression only for the purpose of the Rome Statute, and that they shall not be interpreted as creating the right or obligation for states to exercise domestic jurisdiction over alleged acts of aggression by other states.

Conditions for the Exercise of Jurisdiction Over Aggression—The Conference adopted two separate procedures for the ICC to exercise jurisdiction over aggression. Under the first, the Court could exercise jurisdiction in cases specifically referred to the ICC by the U.N. Security Council. Under the second, the Court could exercise jurisdiction when requested by a state in which aggression is alleged to have occurred, or when the ICC Prosecutor decides on his own initiative to pursue a case. In the latter two cases, before an investigation may commence, the ICC Prosecutor must consult the U.N. Security Council and may only proceed if the Council either determines that the case involves a situation in which a state has committed aggression or fails to make any determination on this question. Where the Council makes no determination, the Prosecutor must receive authorization from a Pre-Trial Chamber of ICC Judges before he may commence an investigation. Where the Prosecutor proceeds with an investigation in the absence of an affirmative Security Council determination that aggression has occurred, the Council may pass a resolution suspending the investigation for 1 year, and may renew such a suspension for subsequent periods.

Consent Requirement—The decision adopted by the Conference allows states parties to the ICC to decline to accept the ICC's jurisdiction over aggression in cases that have not been referred by the U.N. Security Council. Similarly, the decision also specifies that the ICC shall not exercise jurisdiction in respect of alleged aggression committed by the nationals or on the territories of states that are not parties to the ICC, except where referred by the U.N. Security Council. All states would be subject to the ICC's aggression jurisdiction in cases referred by the Security Council.

Procedure for Adopting Amendments and Entry into Force—The decision adopted by the Conference provides for the relevant amendments to the Rome Statute to be adopted under Article 121(5) of the Rome Statute, meaning that the amendments will apply only to those states parties to the Rome Statute that approve them and not to those that decline to ratify. In addition, the amendments establish two additional requirements before they may enter into force. First, they will apply only to acts of aggression committed one year after 30 states have ratified them. Second, the ICC won't exercise jurisdiction over aggression until a decision is taken by the ICC parties, no earlier than January 1, 2017, to bring the ICC's aggression regime into effect.

ANALYSIS OF OUTCOME

The Kampala Conference's outcome on aggression has implications for both the United States and the ICC. These are discussed below.

Implications for the United States

1. *Exemption for Non-States Parties*—The most significant aspect of the outcome for the United States is its elimination of any risk that U.S. officials will be subject to prosecution for aggression by the ICC absent U.S. consent. The decision of the Assembly of States Parties exempts from key aspects of the ICC's aggression jurisdiction actions committed by the nationals or on the territories of countries, including the United States, that are not parties to the ICC. Such nonparties could only be prosecuted by the ICC for aggression in cases referred by the U.N. Security Council; they could not be prosecuted solely at the request of another country or by the ICC Prosecutor on his own initiative. Because the United States is a permanent member of the U.N. Security Council and has a veto over its decisions, the Council could not refer an aggression case involving U.S. officials to the ICC over the objection of the United States.

With respect to other crimes in the ICC's jurisdiction—genocide, war crimes, and crimes against humanity—the Rome Statute purports to give the ICC authority to prosecute nationals of countries that are not parties to the ICC without approval of the Security Council. As a nonparty, the United States has strenuously objected to this claim, and it has been a source of significant friction between the United States and the ICC. The ICC's decision not to repeat its claim of jurisdiction over nationals of nonparties when designing its aggression regime avoids a reigniting of this contentious issue.

2. *Potential Impact on Coalition Activities*—Because many U.S. allies, including all NATO members except Turkey, are parties to the ICC, they would be potentially subject to the ICC's aggression jurisdiction once it is brought into effect. This could make some U.S. allies more hesitant to join with the United States in uses of force without clear U.N. Security Council approval, as was the case with the 1999 NATO military actions in Kosovo and the 2003 military action in Iraq.

Two elements of the outcome adopted could mitigate such risks. First, under the decision adopted, states parties to the ICC can opt out of the ICC's aggression jurisdiction for cases not referred by the U.N. Security Council. If U.S. allies exercised this right, they would not incur any greater risk of prosecution for aggression by the ICC than would the United States. Second, understandings adopted in connection with the definition seek to underscore that aggression constitutes only the most serious and dangerous forms of the illegal use of force, and applies only when the character, gravity, and scale of the illegal use of force is manifest. These understandings arguably narrow the circumstances in which the ICC might bring an aggression case, and may reduce the likelihood that coalition military activities would be considered aggression, particularly when undertaken to address threats to civilian populations or to regional or international peace and security.

3. *Potential Adverse Development in Law Relating to Use of Force*—The definition of the crime of aggression adopted by the Conference establishes vague standards that would govern important questions relating to the use of military force by states subject to the ICC's aggression regime. As noted by the U.S. delegation in Kampala, the definition adopted deviates from existing customary international law in a number of respects, and may serve inappropriately to discourage lawful uses of force. Interpretive understandings adopted in connection with the definition serve to mitigate some of its deficiencies, but the definition remains an unsound basis for addressing these issues. Were the definition to influence the future development of international law outside the context of the ICC, future U.S. leaders could face increased criticism in connection with some decisions regarding the use of force, including claims that their decisions amount to criminal conduct.

4. *Potential Impact on the U.N. Security Council*—The regime adopted by the Conference, if made operational and subscribed to by a large number of states, would provide the ICC with authority to investigate and prosecute cases of aggression without the affirmative approval of the Security Council. In particular cases, the ICC's pursuit of an aggression case against a head of state or other senior government official could complicate the Security Council's efforts to address an ongoing threat to peace and security. Accordingly, there is some potential that the proposed aggression regime could reduce the effectiveness of the Council's mechanisms for addressing situations that may be of concern to the United States.

5. *Additional time to work for improvements*—Because the aggression regime will not go into effect for at least seven years, the United States will have opportunities to further address concerns not resolved by the outcome. It could seek greater clarity in the definition of aggression, either through changes to the definition or

the elements of crimes accompanying it, or through further understandings. It will also have the opportunity to consult with allies and to develop plans to mitigate risks an ICC aggression regime might pose to the ability to plan and carry out coalition military operations.

Implications for the ICC

1. *Potential Politicization*—The crime of aggression has a significant political character to it, involving judgments about the legitimacy of decisions by state leaders to use force in situations affecting their security interests. This subjective political aspect of the crime is compounded by the vagueness of aspects of the definition of aggression. The outcome, if brought into effect, will place the ICC Prosecutor at the center of such political questions by giving him the mandate to investigate and prosecute aggression on his own initiative or at the request of a state. There is a risk that the Prosecutor will be drawn into disputes between states, and that the Prosecutor's decisions to pursue—or not pursue—particular cases will be seen as taking sides in such disputes. Such perceptions could undermine the perceived objectivity and legitimacy of the ICC as a judicial institution.

2. *Potential Overstretch*—The ICC is currently struggling to carry out its current mandate of pursuing cases of genocide, war crimes, and crimes against humanity. Eight years after the Rome Statute entered into force, the ICC has gained custody of fewer than half of the 15 individuals against whom it has brought public charges for the core crimes of genocide, war crimes, and crimes against humanity, and it has yet to complete its first trial. Though the ICC will have at least 7 years to further build its capacities before an aggression regime could take effect, there nonetheless remains the risk that adding aggression to the Court's mandate will divert resources from core tasks and make the ICC less effective as an institution.

FURTHER OBSERVATIONS ON THE NEGOTIATION PROCESS

In addition to these issues specific to the outcome at Kampala, several other developments at the Conference may be of interest to the Foreign Relations Committee and to the Senate more generally:

1. *Widespread Dissatisfaction with the U.N. Security Council*—Much of the discussion at the conference focused on whether the ICC Prosecutor should be given the authority to initiate aggression investigations and prosecutions independently from the U.N. Security Council. Discussion on this issue in both formal and informal settings suggested widespread dissatisfaction with the Security Council, particularly among delegations from developing countries. These delegations appeared to perceive the Council as an unrepresentative body that does not regularly act in the interests of the international community as a whole. For some delegations, pursuing outcomes that appeared to challenge the Security Council's primacy in addressing aggression appeared to be an independent objective in the negotiations, separate from the goal of pursuing decisions that would strengthen the ICC or international justice. Should such challenges to the Security Council's role and authority

become more widespread and arise in other contexts, the Council's effectiveness as an institution could be diminished.

2. *Disparate Views Among NATO Members*—While a potential ICC aggression regime could impact NATO military operations, NATO delegations at the conference were not unified in their substantive views or in their approach to the negotiations. NATO members also differed in their views on the importance of giving the ICC jurisdiction over aggression at all, with some being vigorous supporters and others skeptical at best. Some NATO delegations were among the chief proponents of an ICC role for aggression independent of the U.N. Security Council, while others felt strongly that the ICC should act on aggression only when asked by the Security Council. It did not appear from the negotiations that NATO members, as a group, had a common understanding about the potential implications of various proposals on their operations. Because of the relationship of the crime of aggression to decisions to use force that are often taken collectively, better NATO coordination on these issues in the future would be prudent.

3. *Effectiveness of U.S. Participation*—U.S. participation at the conference was well-received, had a significant impact on the outcome and served to protect important U.S. interests. While there has been significant past friction between the United States and the ICC, and while the Obama administration has made clear that it does not support the United States becoming a party to the ICC, ICC parties nonetheless are welcoming of increased U.S. engagement with the ICC. Absent U.S. participation and engagement before and during the Kampala Conference, it is unlikely that the conference would have specifically exempted non-ICC parties from key portions of the proposed aggression regime. It is also unlikely that the conference would have adopted understandings to address ambiguities in aspects of the definition of aggression. While there were limits to the lengths ICC parties were willing to go to address U.S. concerns and interests—there was no willingness, for example, to consider revising the definition of aggression itself—ICC parties did accommodate United States concerns in important respects.

4. *ICC Priorities*—The Kampala Conference was the first high-level meeting of the ICC Assembly of States Parties since the Rome Statute was adopted in 1998. It is notable that the parties were concerned primarily with expanding the ICC's jurisdiction to cover an additional crime rather than with considering ways of improving its ability to address effectively the crimes currently in the Court's mandate. The Conference gave only passing consideration to important practical obstacles currently faced by the ICC, including securing cooperation from states with ICC orders, gaining custody of persons charged with crimes, protecting victims and witnesses, facilitating evidence sharing and other legal assistance from states, and improving the efficiency of trial proceedings. The choice by the ICC parties to focus on aggression rather than on developing solutions to these challenges suggests that the parties were more concerned with the symbol of adopting an aggression regime than with the substance of building an effective institution. Absent greater focus on addressing these operational difficulties, the ICC may continue to struggle in carrying out its basic judicial functions.

ANNEX—ICC REVIEW CONFERENCE DECISION ON AGGRESSION

Resolution RC/Res.6

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

RC/Res.6
The Crime of Aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible,

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 article 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

3. *Also decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;

4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;

5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

Annex I

Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

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

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

Article 8 *bis*
Crime of aggression

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

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

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

b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

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

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

e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

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

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. 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.

4. 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 withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. 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.

9. 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.

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

4. *The following text is inserted after article 15 bis of the Statute:*

Article 15 *ter*
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. 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.

4. 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.

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

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

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

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

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

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

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

Annex II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

4. 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.

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

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

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[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Annex III

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

Referrals by the Security Council

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

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood 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.

Other understandings

6. 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.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

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