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## A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon

Jennifer Trahan

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## A MEANINGFUL DEFINITION OF THE CRIME OF AGGRESSION: A RESPONSE TO MICHAEL GLENNON

JENNIFER TRAHAN\*

### ABSTRACT

In his article *The Blank Prose Crime of Aggression*, Michael Glennon argues that the International Criminal Court's newly adopted definition of the crime of aggression is so vague and overbroad that prosecutions under it would violate the prohibition on retroactive or *ex post facto* laws. His arguments rest on an incorrect construction of the definition, ignorance of the extensive negotiating history and *travaux préparatoires* that exist vis-à-vis the crime, and failure to consult the elements of the crime. His argument that the fact that past U.S. military action would be covered by the definition shows the definition's infirmity is similarly flawed—again resting on fallacious interpretation of the definition, as well as questionable logic. Many of his arguments are also unduly alarmist because it is now clear that U.S. actions will *not* be subject to ICC crime of aggression jurisdiction if and when it is activated after January 1, 2017, because non-States Parties to the Rome Statute (such as the U.S.) will be exempt from such jurisdiction. Finally, his concerns about the role of the

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Security Council vis-à-vis aggression adjudications have now largely been proven moot by the agreement reached at the International Criminal Court's Review Conference in Kampala, Uganda. While Glennon's article does raise interesting questions about how the U.S. should view the finalization of the definition and potential activation of jurisdiction, his failure to get more of the details right obscures the discussion.

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In his article, *The Blank-Prose Crime of Aggression*,<sup>1</sup> Michael Glennon sounds unduly dire warning bells about what he perceives are the defects of the International Criminal Court's newly adopted definition of the "crime of aggression." While Glennon claims that the definition violates the legal principle of *nullum crimen sine lege* because it is impermissibly vague and its imposition would thereby violate the prohibition on retroactive or *ex post facto* laws, neither of these conclusions is correct. Glennon's protests are apparently disagreed with by at least eighty-four delegations of legal advisors and experts from States Parties to the Rome Statute<sup>2</sup> of the International Criminal Court ("ICC"),<sup>3</sup> including many of the United States' closest allies, who adopted that definition of "crime of aggression" in Kampala, Uganda, at the International Criminal Court's first Review Conference ("Review Conference").<sup>4</sup> Many of Glennon's arguments are based on false

<sup>1</sup> Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 72 (2010) ("[T]he proposed definition [of the crime of aggression] would constitute a *crime in blank prose*—one that would run afoul of basic international human rights norms and domestic guarantees of due process in its disregard of the international principle of legality and related U.S. constitutional prohibitions against vague and retroactive criminal punishment.") (emphasis added). For another article critical of Glennon's article, see Ian Hurd, *How Not to Argue Against the Crime of Aggression: A Response to Michael Glennon* 1, 6 (Buffett Ctr. for Int'l & Comparative Studies, Working Paper No. 10-001, 2010), available at [http://www.cics.northwestern.edu/documents/workingpapers/Buffett\\_10-001\\_Hurd.pdf](http://www.cics.northwestern.edu/documents/workingpapers/Buffett_10-001_Hurd.pdf) (arguing that Glennon fails to answer some basic questions in his article, including whether "aggression [should] be a crime in international law or not" or whether it should "be subject to individual criminal prosecution or not" and concluding that "none of the difficulties that [Glennon] raises provides a defensible argument against the project of criminalizing aggression").

<sup>2</sup> See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>3</sup> An estimated eighty-four States Parties attended. See Review Conference of the Rome Statute, Kampala, Uganda, May 31–June 11, 2010, *Delegations to the Review Conference of the Rome Statute of the International Criminal Court*, RC/INF.1 (Aug. 26, 2010), available at [www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-INF.1-reissued-ENG-FRA-SPA.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-INF.1-reissued-ENG-FRA-SPA.pdf) (listing the names of delegates from eighty-four States Parties and thirty-two non-States Parties attending the Review Conference).

<sup>4</sup> See Review Conference of the Rome Statute, *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Resolution RC/Res.6, Annex I, RC/Res.6 (June 11, 2010) [hereinafter New Def.]. Article 123 of the Rome Statute requests the U.N. Secretary-General to convene a Review Conference to consider amendments to the Statute seven years after its entry into force. See

assumptions, errors of construction, or ignorance of the actual extensive negotiating history regarding the ICC crime of aggression. Other criticisms—for example, that “consensus” is not possible as to the definition and conditions for ICC exercise of jurisdiction over the crime<sup>5</sup>—have now been proven false by the agreement reached to amend the Rome Statute at the Review Conference in Kampala.

Glennon also appears to suggest that because past U.S. military interventions, when measured against this definition, could constitute the crime of aggression,<sup>6</sup> there must be something wrong with the definition. First, this logic is questionable. Second, various situations Glennon examines (involving collective self-defense, Chapter VII enforcement actions authorized by the Security Council, or humanitarian interventions) would not be covered by the definition. Third, his fear-mongering<sup>7</sup> is based on purely hypothetical arguments because past U.S. actions will not be measured against the current definition, which will not apply retroactively.<sup>8</sup> Glennon’s concerns vis-à-vis the United States will not come to pass for a fourth reason: when States Parties to the Rome Statute (“States Parties”) reached agreement on the conditions for the exercise of aggression jurisdiction, a clear exemption from jurisdiction regarding crimes committed in the territory of, or by nationals of, non-States Parties (including the

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Rome Statute, *supra* note 2, art. 123, ¶ 1 (indicating that the conference would be open to participants in the Assembly of States Parties, and review would include, but would not be limited to, crimes under Rome Statute Article 5).

<sup>5</sup> See Glennon, *supra* note 1, at 98 (describing that a lack of consensus amongst the Special Working Group on the Crime of Aggression resulted in leaving the decision of what the crime covered to the prosecutor and judges of the ICC and, perhaps, the Security Council, *only* after the defendant’s conduct has occurred).

<sup>6</sup> *Id.* at 90–94 (including the U.S. invasions in Iraq in 2003, in Afghanistan in 2001, in Panama in 1989, in Grenada in 1983, and in the Dominican Republic in 1965, and the use of force in Cambodia in 1970).

<sup>7</sup> An example of such fear-mongering is the statement that “every U.S. President since John F. Kennedy, hundreds of U.S. legislators and military leaders . . . could have been subject to prosecution.” Glennon, *supra* note 1, at 73. As explained below, the crime of aggression definition will not apply to past (or future) U.S. leaders, and Glennon clearly over-construes the scope of the crime when he suggests that hundreds of individuals would be covered. See *infra* note 195.

<sup>8</sup> See Rome Statute, *supra* note 2, art. 24, ¶ 1 (providing that no individual will be criminally responsible under the Rome Statute for conduct prior to the entry into force of the Statute).

United States) was also agreed upon.<sup>9</sup> Thus, U.S. nationals will be exempt from aggression jurisdiction, even when it commences at the earliest in 2017.<sup>10</sup> Fifth, even if the United States were to become a party to the Rome Statute (generally not considered likely at the present time), its nationals could still avoid ICC aggression jurisdiction if the United States exercises an “opt out” declaration—another mechanism agreed upon at the Review Conference.<sup>11</sup> Therefore, the likelihood of Glennon’s fears coming to pass vis-à-vis the United States and ICC prosecutions are extremely remote.

Overall, Glennon’s article—while raising some interesting questions—completely ignores any positive aspects of what was to be accomplished at the Review Conference. The agreement reached follows sound historical precedent set, *inter alia*, by the 1928 Kellogg-Briand Pact<sup>12</sup> and 1945 U.N. Charter<sup>13</sup> that there shall

<sup>9</sup> See New Def., *supra* note 4, art. 15 *bis*, ¶ 5 (excluding ICC jurisdiction over the crime of aggression if committed by a national of or on the territory of a state that is not a party to the Statute). Glennon states that “U.S. military and political leaders could still be prosecuted for the crime of aggression even if the United States maintains its position [of] refusing to join.” Glennon, *supra* note 1, at 73. This is simply not the case. The only (unlikely) scenario where U.S. military or political leaders could be prosecuted before the ICC for the crime of aggression would be if the United States were to permit such a referral by the U.N. Security Council—something the United States could easily avoid by exercising its veto power. See New Def., *supra* note 4, art. 15 *ter* (permitting Security Council referrals).

<sup>10</sup> As explained *infra* note 50 and accompanying text, for the crime of aggression to be prosecuted before the ICC, thirty States Parties would need to ratify or accept the aggression amendment, one year would need to pass after the thirtieth ratification, and an activation vote after January 1, 2017 “by the same majority of States Parties as is required for the adoption of an amendment to the Statute” must be taken. New Def., *supra* note 4, art. 15 *bis*, ¶¶ 2–3 & art. 15 *ter*, ¶¶ 2–3. See also Rome Statute, *supra* note 2, art. 121, ¶ 3 (providing that amendments to the Rome Statute may be passed by consensus or by two-thirds majority vote of States Parties in either a meeting of the Assembly of States Parties or a Review Conference called by the Assembly).

<sup>11</sup> See New Def., *supra* note 4, art. 15 *bis*, ¶ 4. The author is not advocating that course of conduct. It would be far preferable if the nationals of States Parties do not commit acts that could be considered aggression and thus would have no need to exercise opt out declarations.

<sup>12</sup> The “Kellogg-Briand Pact” refers to the August 27, 1928 General Treaty for the Renunciation of War, more generally known as the Pact of Paris or the Kellogg-Briand Pact. The Pact condemned “recourse to war for the solution of international controversies.” See General Treaty for the Renunciation of War art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. For discussion of additional precedent, see *infra* note 60.

not be aggressive use of force by states. Additionally, it follows the historical precedent set in large part by the United States, along with other World War II allies, at the International Military Tribunal for Nuremberg and the International Military Tribunal for the Far East (Tokyo),<sup>14</sup> where “crimes against peace” were prosecuted.<sup>15</sup> One should not lose sight of what is at issue here: attempting to deter aggressive use of force by states that is outside the parameters of permissible action under the U.N. Charter, with the goal of preventing the often massive death tolls and human rights abuses that all too often ensue.<sup>16</sup> States Parties in Kampala

<sup>13</sup> See U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

<sup>14</sup> The Tokyo Tribunal was dominated by the United States. The Nuremberg Tribunal was originally established by the United States, United Kingdom, France, and the Soviet Union by the London Charter of the International Military Tribunal in 1945. See Charter of the International Military Tribunal art. 1, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter] (establishing the laws and procedures for the Nuremberg Tribunal). The Nuremberg Tribunal’s findings were more broadly endorsed. See Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95 (I), U.N. Doc. A/RES/95(I) (Dec. 11, 1946) (affirming “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.”); *Report of the International Law Commission to the General Assembly*, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316, at 11 [¶¶ 97-127] (1950), reprinted in [1950] 2 Y.B. Int’l Law Comm’n 374, 374-78, U.N. Doc. A/CN.4/34 (summarizing the principals recognized in the charter and judgment of the Nuremberg Tribunal).

<sup>15</sup> See INT’L MILITARY TRIBUNAL, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 10, 29, 42 (1947), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf) (last visited, Mar. 31, 2012) (describing various claims of crimes against peace brought at the Nuremberg Tribunal). Such prosecutions also occurred pursuant to Control Council Law No. 10. See Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945) [hereinafter Control Council Law No. 10], 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 1946, at 50.

<sup>16</sup> Given the massive human rights violations that almost inevitably accompany aggressive use of force, as discussed by this author more extensively elsewhere, it is particularly regrettable that key human rights organizations such as Human Rights Watch and Amnesty International did not play a more positive role in the outcome of the Review Conference negotiations. See Jennifer Trahan, *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala*

created a historic achievement, advancing the rule of law, when they reached agreement on the definition of the crime of aggression and conditions by which the ICC may in the future, subject to certain procedural prerequisites, exercise jurisdiction over the crime.

Section 1 of this Article provides a brief background on the negotiations of the crime of aggression and an overview of the agreement reached at the Review Conference.<sup>17</sup> Section 2 then examines Glennon's arguments in depth. Specifically, Section 2.1. examines his claims that application of the definition would violate the principle of legality and the ban on retroactive application of the laws; the Article concludes that the current definition shares none of the flaws of the definitions used at the Nuremberg and Tokyo Tribunals, where such criticisms have often been leveled. Section 2.2 examines Glennon's claims that the fact that various past military actions by the United States and other states could fall within the definition suggests the definition is overbroad; the argument rests on fallacious logic and various incorrect applications of the definition.

Section 2.3 examines Glennon's arguments about the role of the Security Council—namely, his claim that involving the Security Council in determining whether a prior state act of aggression has occurred would be problematic, but not involving the Security Council could violate the U.N. Charter.<sup>18</sup> States Parties resolved this once seemingly vexing problem at the Review Conference

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*Review Conference* 11 INT'L CRIM. L. REV. 49, 51 n.15 (2011) [hereinafter *Kampala Negotiations*]; see also Hans-Peter Kaul, *Is It Possible to Prevent or Punish Future Aggressive War-Making?* at 1, 12-13 (Forum Int'l Criminal & Humanitarian Law Occasional Paper Series No. 1, 2011), available at [http://www.fichl.org/fileadmin/fichl/documents/FICHL\\_OPS/FICHL\\_OPS\\_1\\_Kaul.pdf](http://www.fichl.org/fileadmin/fichl/documents/FICHL_OPS/FICHL_OPS_1_Kaul.pdf) (calling on human rights organizations such as Human Rights Watch and Amnesty International to reconsider their positions); Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 OXFORD J. INT'L CRIM. JUSTICE, issue 5, 1179, 1186 n.27 (2010) (calling for increased support from the NGO community for the Kampala compromise).

<sup>17</sup> For a more extensive background on the negotiations prior to the Review Conference, see generally THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION (Stefan Barriga et al. eds., Liechtenstein Inst. on Self-Determination & Princeton U. 2009) [hereinafter THE PRINCETON PROCESS]. For a summary of the earlier negotiations and a detailed description of the Review Conference negotiations, see generally Trahan, *Kampala Negotiations*, *supra* note 16.

<sup>18</sup> Glennon *supra* note 1, at 102.



when they agreed on the conditions for the ICC's exercise of jurisdiction over the crime of aggression. The Security Council will have the first option to make a determination that a state act of aggression has occurred (or make a more generic referral of the situation to the ICC);<sup>19</sup> the ICC, however, will also be able to act on its own—after referral by a State Party or the Prosecutor's *proprio motu* action and approval by the ICC Pre-Trial Division.<sup>20</sup> This solution, one that expert delegations from eighty-four States Parties to the Rome Statute approved at the Review Conference, is generally seen both to preserve the ICC's independence and recognize the important role of the Security Council. Finally, Section 3 offers some concluding remarks about the successful incorporation of the ICC definition of the crime of aggression into the pantheon of crimes that the ICC, subject to additional procedural hurdles being met, will be able to adjudicate in 2017.

# 1. A BRIEF BACKGROUND ON THE CRIME OF AGGRESSION AND THE SUCCESSFUL CONCLUSION OF NEGOTIATIONS AT THE REVIEW CONFERENCE

## 1.1. Historical Background

As suggested above, the idea of prosecuting the crime of aggression is not a new concept.<sup>21</sup> "Crimes against peace" were prosecuted before the Nuremberg<sup>22</sup> and Tokyo Tribunals,<sup>23</sup> as well

<sup>19</sup> New Def., *supra* note 4, art. 15 *ter*.

<sup>20</sup> *Id.*, art. 15 *bis*. The Pre-Trial Division would consist of an expanded Pre-Trial Chamber. Compare Rome Statute, *supra* note 2, art. 39, ¶ 1 ("the Pre-Trial Division [shall be composed] of not less than six judges"), with Rome Statute, *supra* note 2, art. 39, ¶ 2(iii) ("The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division . . .").

<sup>21</sup> This Article only offers a brief summary of the background on the crime of aggression negotiations, which are more extensively discussed elsewhere. See, e.g., THE PRINCETON PROCESS, *supra* note 17; Trahan, *Kampala Negotiations*, *supra* note 16.

<sup>22</sup> The Nuremberg Tribunal was created by the four Allied Powers, and only judges from those powers adjudicated cases. The Tribunal tried a total of twenty-two defendants, of whom nineteen were convicted, twelve of whom were sentenced to death. For background on the Nuremberg Tribunal, see generally MICHAEL R. MARRUS, THE NUREMBERG WAR CRIMES TRIAL 1945-46: A DOCUMENTARY HISTORY (1997).

<sup>23</sup> The Tokyo Tribunal was created by Special Proclamation of U.S. General Douglas MacArthur. See Elizabeth S. Kopelman, *Ideology and International Law*:

as under Control Council Law No. 10.<sup>24</sup> The Nuremberg Tribunal deemed such crimes to be “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”<sup>25</sup> Indeed, the primary focus of the Nuremberg Tribunal prosecutions was upon the crime of aggressive war.<sup>26</sup> While the U.N. Charter has as a core foundational provision on the prohibition of aggressive use of force, enshrined in Article 2(4),<sup>27</sup> it does not define aggression to be a crime. The Charter system of course envisioned replacing a system of unilateral decisionmaking as to recourse to war with a collective system,<sup>28</sup> whereby armed force may only be used in self-

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*The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT’L L. & POL. 373, 387–88 (1991). The judges hailed from eleven countries. See R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 27 (1995) (contrasting the composition of the court in the Tokyo Trial to the court in the Nuremberg Trial). The Tokyo Tribunal tried twenty-eight defendants, of whom seven were sentenced to death and eighteen to prison terms; two died during trial and one was found mentally incompetent. See Maria Hsia Chang & Robert P. Baker, *Victor’s Justice & Japan’s Amnesia: The Tokyo War Crimes Trial Reconsidered*, in *THE SEARCH FOR JUSTICE: JAPANESE WAR CRIMES* 33, 37–38 (Peter Li ed., 2003) (describing the results of the Tokyo Tribunal).

<sup>24</sup> The Nuremberg (London) Charter defines “crimes against peace” as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” London Charter, *supra* note 4, art. 6(a). See also Charter of the International Military Tribunal for the Far East (Tokyo) art. 5(a), Aug. 8, 1945 (adding that war could be declared or undeclared); Control Council Law No. 10, *supra* note 15, art. II, ¶ 1(a) (covering “initiation of invasions” but not limiting the forms of responsibility to planning, preparation, initiation, or waging of hostilities).

<sup>25</sup> INT’L MILITARY TRIBUNAL, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 427 (1948), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-XXII.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf) (last visited Mar. 31, 2012).

<sup>26</sup> “America aimed mostly at prosecuting the Nazis for the crime of aggressive war.” GARY J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 174 (2000). “Justice Jackson was intent on penalizing the Germans for their war of aggression, and suggested that the United States might refuse to participate in the trial unless the crime of aggressive war was included within the Nuremberg Charter.” Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT’L L. 1, 24 (1991), (citing Minutes of Conference Session (July 25, 1945), reprinted in REPORT OF ROBERT H. JACKSON, REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 384 (1945)).

<sup>27</sup> See U.N. Charter art. 2, ¶ 4.

<sup>28</sup> U.N. Charter art. 1, ¶ 1 lists the U.N.’s purposes and principles as follows:

defense or pursuant to Security Council authorization.<sup>29</sup> After Nuremberg, prosecuting the crime of aggression admittedly fell into disuse;<sup>30</sup> multilateral Security Council action became largely impossible due to the Cold War, and despite the occurrences of numerous mass atrocities,<sup>31</sup> no tribunals of the Nuremberg variety were created during this time-period. The most one sees is the U.N. General Assembly, in 1974, adopting a resolution defining aggression for the purposes of providing guidance to the Security Council.<sup>32</sup> However, the resolution had no binding effect as such.<sup>33</sup>

An extremely significant development, however, occurred in June-July 1998, when the Rome Statute was finalized. States included aggression as one of the crimes over which the ICC *would* have jurisdiction.<sup>34</sup> They essentially left a placeholder, however, that the crime would first need to be defined and conditions for the

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To maintain international peace and security, and to that end: to take effective *collective measures* for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . . .

(emphasis added).

<sup>29</sup> See U.N. Charter ch. VII, arts. 42, 51. A third potential use of force that might be implicitly permissible under the Charter would be humanitarian intervention. Recent formulations of the "responsibility to protect" doctrine, however, suggest that forceful humanitarian intervention still needs to receive Security Council authorization. See, e.g., 2005 World Summit Outcome, G.A. Res. 60/1, at 30 [¶¶ 138-39], U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

<sup>30</sup> See Michael Walzer, *The Crime of Aggressive War*, 6 WASH. U. GLOB. STUD. L. REV. 635, 635 (2007) ("Since Nuremberg [and Tokyo], no government officials have actually been taken to court and charged with aggressive war.").

<sup>31</sup> Such mass atrocities would include, but not be limited to, those perpetrated under Idi Amin in Uganda, and under the Khmer Rouge in Cambodia.

<sup>32</sup> See Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

<sup>33</sup> All or part of a General Assembly resolution may come to have binding effect if it morphs into customary international law.

<sup>34</sup> See Rome Statute, *supra* note 2, art. 5, ¶ 1 ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) [t]he crime of genocide; (b) [c]rimes against humanity; (c) [w]ar crimes; [and] (d) [t]he crime of aggression.").

exercise of jurisdiction agreed upon.<sup>35</sup> (Many perhaps assumed that no such agreement would ever be reached.) After conclusion of the Rome Statute, such drafting work commenced,<sup>36</sup> taking more than *ten years*—Glennon’s article implies there were only five years of negotiations<sup>37</sup>—first during sessions of the Preparatory Commission for the ICC held from 1999–2002,<sup>38</sup> then through meetings of the Special Working Group on the Crime of Aggression (“SWGCA”) from 2003–2009, and, finally, during ICC Assembly of States Parties (“ASP”) meetings in 2009–2010.<sup>39</sup>

Final agreement<sup>40</sup> to amend the Rome Statute to add the definition and conditions for the exercise of jurisdiction was reached by consensus vote (that is, any single State Party could have blocked it) at the first ICC Review Conference,<sup>41</sup> negotiations that the U.S. delegation attended and in which it participated.<sup>42</sup>

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<sup>35</sup> Article 5, ¶ 2 of the Rome Statute stated: “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.” Rome Statute, *supra* note 2, art. 5, ¶ 2.

<sup>36</sup> Certain drafting work also occurred before and in Rome, with a number of state proposals and a working group just prior to the Rome Conference. E-mail from Jutta Bertram-Nothnagel, Director of the Relations with Intergovernmental Organizations, Union Internationale des Avocats, to author (May 24, 2011, 9:50 PM) (on file with author) [hereinafter E-mail from Jutta Bertram-Nothnagel].

<sup>37</sup> Glennon, *supra* note 1, at 81.

<sup>38</sup> See Preparatory Commission for the International Criminal Court, Rome Statute of the International Criminal Court, *available at* <http://untreaty.un.org/cod/icc/prepcomm/prepfra.htm>. The Preparatory Commission was created by Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998, U.N. Doc. A/CONF.183/10.

<sup>39</sup> Once the Special Working Group’s mandate ended, discussion on the crime continued at the Eighth Session of the Assembly of States Parties (held in November 2009 in The Hague) and at the Resumed Eighth Session (held in March 2010 at the U.N.).

<sup>40</sup> It is not the focus of this Article to trace the work accomplished during these many years of negotiations, which has been extensively chronicled elsewhere. See THE PRINCETON PROCESS, *supra* note 17; Trahan, *Kampala Negotiations*, *supra* note 16.

<sup>41</sup> New Def., *supra* note 4.

<sup>42</sup> The U.S. negotiation team was headed by U.S. State Department Legal Advisor Harold H. Koh, U.S. War Crimes Ambassador Stephen J. Rapp, Deputy, Office of War Crimes Issues, Diane F. Orentlicher, and Deputy Assistant Secretary of Defense for Detainee Policy William K. Lietzau. The United States, under the

The U.S. delegation also attended the eighth ASP meeting in November 2009 and its resumed session in March 2010, participating in the aggression discussions during the latter meeting. The United States, however, had declined (under the prior administration) to participate in the years of negotiations in the SWGCA, thereby missing the opportunity to play a role in shaping the definition.

### 1.2. Overview of the Agreement Reached at the Review Conference

The definition of the crime of aggression consists of two parts, namely, a definition of an “act of state” of aggression (the act the state commits), and the definition of the “crime of aggression” (the act the individual commits). These provisions, located in a new Article 8 *bis* to the Rome Statute, will be discussed in detail below, while examining Glennon’s critiques of the definition.

As to conditions for the exercise of jurisdiction, as noted above, States Parties agreed to two different procedures by which ICC aggression cases may commence. With the first route, embodied in a new Article 15 *ter*, the Security Council is given an initial six months to act and refer a situation of suspected aggression to the ICC.<sup>43</sup> This method is similar to the one currently available as to the ICC’s other crimes (genocide, war crimes, and crimes against humanity), which also may be referred to the ICC by the Security Council,<sup>44</sup> as occurred when the Security Council referred the situations in Darfur<sup>45</sup> and Libya.<sup>46</sup> The second route, embodied in

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George W. Bush administration, chose *not* to attend meetings of the Special Working Group, but began participating, under the Obama Administration, at the Eighth Assembly of States Parties meeting in November 2009. This late entry into negotiations certainly minimized, almost entirely, the United States’ ability to shape the definition’s text, although the United States participated extensively in negotiations as to jurisdiction, and also proposed various “Understandings” to accompany the definition, some of which were adopted. For discussion of the Understandings proposed by the United States and those adopted, see Trahan, *Kampala Negotiations*, *supra* note 16, at 73-78. For an interesting discussion of the legal effect of the Understandings, see generally Kevin Jon Heller, *The Uncertain Legal Status of the Aggression Understandings*, 10 J. Int’l Crim. Just. 229 (2012).

<sup>43</sup> New Def., *supra* note 4, art. 15 *ter*. As noted above, the referral might be of a “situation” generally or the Security Council might be more specific and find that an act of aggression had occurred.

<sup>44</sup> See Rome Statute, *supra* note 2, art. 13(b).

<sup>45</sup> See S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

<sup>46</sup> See S. C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

a new Article 15 *bis* to the Rome Statute, provides that if a State Party has referred the case or the ICC Prosecutor has initiated it *proprio motu*, and the Security Council has not made a determination within six months after notification, the ICC Pre-Trial Division may authorize the commencement of the investigation.<sup>47</sup> This second method is similar to the method currently available vis-à-vis other ICC crimes, which also may be triggered by State Party referral or Prosecutor initiation, although for other crimes there is no waiting period and no Pre-Trial Division involvement.<sup>48</sup> Details as to the jurisdictional regime agreed upon are discussed more fully below.<sup>49</sup>

Finally, as noted above, ICC jurisdiction over the crime of aggression will only commence in the future, because States Parties agreed upon a delay mechanism at the Review Conference. First there must be: (a) ratification or acceptance by thirty States Parties of the aggression amendment; (b) the passage of one year after the thirtieth ratification; and (c) a vote by two-thirds of States Parties or consensus after January 1, 2017.<sup>50</sup> Thus, aggression jurisdiction, even when these requirements are met, will not commence until January 2, 2017, at the earliest.

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<sup>47</sup> New Def, *supra* note 4, art. 15 *ter*, ¶ 8 (“Where no such [Security Council] determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.”).

<sup>48</sup> Rome Statute, *supra* note 2, art. 13(a) (referral by a State Party) & 13(c) (Prosecutor initiation of an investigation). A State Party referral would not require authorization by the Pre-Trial Chamber while a referral by the Prosecutor would. *Compare id.*, art. 14 (referral of a situation by a State Party), *with id.*, art. 15 (as to Prosecutor initiated investigations, the Prosecutor “shall submit to the Pre-Trial Chamber a request for authorization of an investigation”).

<sup>49</sup> See *infra* Section 2.3.

<sup>50</sup> New Def., *supra* note 4, art. 15 *bis*, ¶¶ 2-3 & art. 15 *ter*, ¶¶ 2-3 (providing such procedures for both State Parties and Security Council referrals, respectively).

## 2. A RESPONSE TO MICHAEL GLENNON: THE DEFINITION DOES NOT CONSTITUTE "BLANK" PROSE

Glennon's concerns about the crime of aggression can be grouped into three broad categories: (1) concerns with the definition in light of issues raised by prosecutions of "crimes against peace" before the Nuremberg and Tokyo Tribunals, as well as additional concerns as to vagueness;<sup>51</sup> (2) concerns with the definition's scope when measured against past military action by the United States and other states;<sup>52</sup> and (3) concerns about the relationship of the ICC and the Security Council with respect to aggression adjudications.<sup>53</sup> This Article will address each concern in turn. It should be noted that Glennon's article was written when the definition was merely a proposed definition; however, the text of the definition Glennon discussed is identical to the definition adopted at the Review Conference. Agreement on the conditions for the exercise of ICC jurisdiction over the crime of aggression and the introduction of the delay mechanism were only reached at the Review Conference, after Glennon's article was published.

### 2.1. *Any Infirmities of the Nuremberg Prosecutions are Absent from the Current Crime of Aggression Definition*

Glennon's article commences with an examination of various criticisms leveled against the Nuremberg and Tokyo Tribunal prosecutions of "crimes against peace," including (a) vagueness, (b) retroactivity, and (c) the one-sided nature of the prosecutions solely against the leaders of Axis countries. These are not new arguments. The link that Glennon fails to establish, however, is how any infirmities with the Nuremberg and Tokyo prosecutions would carry over to the present ICC definition.

The London Charter establishing the Nuremberg Tribunal defined "*crimes against peace*" as: "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in

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<sup>51</sup> See Glennon, *supra* note 1, at 74-77, 96-102.

<sup>52</sup> See *id.* at 90-96.

<sup>53</sup> See *id.* at 102-09.

a common plan or conspiracy for the accomplishment of any of the foregoing.”<sup>54</sup>

This definition is quite incomplete and also circular. It basically states that “crimes against peace” are a “war of aggression,” but does not define what constitutes a “war of aggression.”<sup>55</sup> Perhaps, in the context of World War II, this seemed unnecessary and obvious.<sup>56</sup>

In light of the many possible forms that trans-border uses of armed force by states may take, the current ICC definition, by contrast, is far more detailed, and not in the least bit circular. It states:

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:

<sup>54</sup> London Charter, *supra* note 14, art. 6(a) (emphasis added).

<sup>55</sup> Roger Clark writes: “One wonder[s] why some nagging person at the London Conference did not ask what a *war* was.” See Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOB. STUD. L. REV. 527, 535 (2007) (discussing the drafting history of the London Charter).

<sup>56</sup> *Id.* at 535–36. As Roger Clark points out, it was not, however, so obvious how to treat an “invasion” that did not require shooting, such as the annexations of Austria and Czechoslovakia. The Tribunal ultimately characterized these events as “acts of aggression,” as opposed to the invasion of Poland and other countries, which were found to constitute aggressive war. *Id.*



- 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.<sup>57</sup>

Therefore, none of the criticisms of the Nuremberg definition necessarily applies to the current definition. First, criticism that the Nuremberg definition was too vague hardly demonstrates

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<sup>57</sup> New Def., *supra* note 4, art. 8 *bis*.

anything about the current, far more detailed, definition.<sup>58</sup> It is worth noting that the definition is also a great deal more extensive than the definition of the crime of genocide—an extremely serious crime that has been successfully adjudicated many times before international tribunals.<sup>59</sup>

Second, in terms of retroactivity, the relevant timing should be considered. “Crimes against peace” as defined in the London Charter creating the Nuremberg Tribunal was defined *after* the crimes at issue were committed.<sup>60</sup> Just the opposite will be true for

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<sup>58</sup> Specific additional vagueness arguments of Glennon are addressed below. See *infra* Section 2.2.

<sup>59</sup> The definition of the crime of “genocide” is “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” followed by a list of underlying crimes. See, e.g., Rome Statute, *supra* note 2, art. 6. For discussion of the case law on genocide, see JENNIFER TRAHAN, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 144–92 (2006) [hereinafter TRAHAN, ICTY DIGEST] (describing the International Criminal Tribunal for the Former Yugoslavia’s case law on genocide); JENNIFER TRAHAN, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 15–82 (2010) [hereinafter TRAHAN, ICTR DIGEST] (discussing the International Criminal Tribunal for Rwanda’s case law on genocide).

<sup>60</sup> There was precedent, however, even for the Nuremberg prosecutions. The 1899 Hague Convention and 1907 Convention for the Pacific Settlement of Disputes committed states to use mediation before an appeal to arms. See Trial of the Major War Criminals before the International Military Tribunal (Nuremberg), Judgment, *reprinted in* INTERNATIONAL LAW AND THE USE OF FORCE 146, 149 (Mary Ellen O’Connell ed., 2004) (noting precedents). The 1923 draft Treaty of Mutual Assistance sponsored by the League of Nations declared “that aggressive war is an international crime.” It was submitted to twenty-nine states, about half of whom were in favor of adopting it. Others had concerns with the definition, rather than any doubt as to the criminality of aggression. *Id.* at 152. The Preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes declared that “a war of aggression constitutes . . . an international crime.” *Id.* at 152–53 (noting that the Protocol was signed but not ratified). At the meeting of the Assembly of the League of Nations on September 24, 1927, all the delegations then present (including Germany, Italy, and Japan) unanimously adopted a declaration concerning wars of aggression. The preamble stated: “[A] war of aggression can never serve as a means of settling international disputes, and is in consequences an international crime.” *Id.* at 153. Finally, the Kellogg-Briand Pact was signed, *inter alia*, by Germany, the United States, Belgium, France, Great Britain, Italy, Japan, Poland, and the Czechoslovak Republic outlawing “recourse to war for the solution of international controversies.” See Kellogg-Briand Pact, *supra* note 12, art. 1.

the ICC. The ICC may not apply jurisdiction retroactively.<sup>61</sup> Thus, the ICC may not prosecute genocide, war crimes, or crimes against humanity prior to entry into force of the Rome Statute (July 1, 2002, and later for later-ratifying countries).<sup>62</sup> When the ICC does adjudicate these crimes, it uses the definitions agreed on in 1998. Similarly, the ICC will not prosecute the crime of aggression until after aggression jurisdiction is fully activated (in 2017 at the earliest),<sup>63</sup> and when it does, it will use the definition adopted in the summer of 2010 at the Review Conference. Thus, none of the retroactivity problems associated with the Nuremberg prosecutions are applicable vis-à-vis the ICC.<sup>64</sup> (Glennon appears to concede as much, suggesting that the reason the current definition would violate the ban on retroactive application of the

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<sup>61</sup> See Rome Statute, *supra* note 2, art. 24, ¶ 1 (“non-retroactivity *ratione personae*” meaning that “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute”).

<sup>62</sup> Sixty ratifications were necessary for the Rome Statute to enter into force. See *id.* art. 126, ¶ 1. That number was reached when the final instruments of ratification were simultaneously deposited on March 11, 2002, bringing total ratifications to 66. For later ratifying states, the date of entry into force is calculated by adding sixty days to the date of that state’s ratification, and then proceeding to the first day of the next month. See *id.* art. 126, ¶ 2. The ICC may exercise jurisdiction with regard to situations in a state’s territory or involving a state’s citizens before ratification if there has been a Security Council referral or if the requirements of Articles 12, ¶¶ 2 or 3 are otherwise met. See *id.* arts. 12–13.

<sup>63</sup> For discussion of the procedural requirements necessary for jurisdiction to commence, see *supra* note 10.

<sup>64</sup> See Hurd, *supra* note 1, at 4 (critiquing Glennon’s retroactivity arguments as “irrelevant . . . since no one is suggesting that the ICC should claim retroactive jurisdiction over aggression”). One reason that Glennon’s position appears so alarmist is that he appears to be writing from a very different viewpoint than most international lawyers. Glennon does not appear to believe that the crime of aggression is a crime under customary international law (a minority view) and seems to even question whether the prohibition on the use of force enshrined in the U.N. Charter is a rule of international law (a very uncommon view). See Glennon, *supra* note 1, at 101 n.165 and text accompanying. These views mean that his criticisms are not just ones of drafting, but that his notice problems are really about what he views as the creation of a *new* rule of international law, contrary to how many international lawyers would view the issue. See E-mail from Pål Wrange, Associate Professor of Public International Law, Stockholm University, to author (June 15, 2011, 4:41 PM) (on file with author) [hereinafter E-mail from Pål Wrange].

laws is due to vagueness,<sup>65</sup> thereby collapsing his “retroactivity” argument into his “vagueness” argument).

Third, in terms of the criticism that Nuremberg imposed only “victor’s justice” and thus was a politicized use of justice solely against Axis leaders,<sup>66</sup> this situation is not present vis-à-vis the ICC, which may prosecute genocide, war crimes and crimes against humanity in three situations: (a) when the crimes have been committed in the territory of a State Party;<sup>67</sup> (b) when they have been committed by the national of a State Party;<sup>68</sup> or (c) when referred by the U.N. Security Council under its Chapter VII powers.<sup>69</sup> The same will be true for the crime of aggression, with certain added exceptions.<sup>70</sup> Thus, it is whether a country has *ratified* the Rome Statute that is the most significant issue in determining whether jurisdiction exists. (As to the crime of aggression, whether a State Party files an “opt out” declaration will also be significant.<sup>71</sup>) Obviously, not all states have ratified the Rome Statute (particularly some very powerful ones),<sup>72</sup> so ICC jurisdiction is not universal, but this is a matter of choice by states,

<sup>65</sup> See Glennon, *supra* note 1, at 88 (arguing that the definition does not provide sufficient notice to defendants as to what is proscribed).

<sup>66</sup> See *id.* at 75–76 (noting Chief Justice Harlan Fiske Stone’s concern “I wonder how some of those who preside at the trials would justify some of the acts of their own governments if they were placed in the status of the accused,” and Supreme Court Justice (and Nuremberg Prosecutor) Robert Jackson’s reflection upon the “hypocrisy of the charge in light of the actions of the Soviet Union”). Indeed, the London Charter only gave the tribunal “the power to try and punish persons . . . [who committed crimes while] acting in the interests of the European Axis countries.” London Charter, *supra* note 14, art. 6.

<sup>67</sup> Rome Statute, *supra* note 2, art. 12, ¶ 2(a).

<sup>68</sup> *Id.* art. 12, ¶ 2(b).

<sup>69</sup> *Id.* art. 13(b).

<sup>70</sup> As to State Party referrals or cases triggered by *proprio motu* initiation: (i) nationals of non-States Parties will not be subject to prosecution for aggression even if it occurs in the territory of a State Party; (ii) nationals of States Parties cannot be prosecuted for aggression if it occurs in the territory of a non-State Party; and (iii) States Parties will be able to file “opt out” declarations, avoiding ICC aggression jurisdiction. New Def., *supra* note 4, art. 15 *bis*, ¶¶ 4–5.

<sup>71</sup> As noted *supra* note 70, States Parties will be able to file “opt out” declarations, avoiding State Party referral and Prosecutor initiation of aggression cases. *Id.*

<sup>72</sup> Neither Russia, China, nor the United States has ratified the Rome Statute.

and not a politicized use of the tribunal.<sup>73</sup> Thus, none of these criticisms of the Nuremberg Tribunal's prosecutions can necessarily be leveled in the current situation.

## 2.2. *The Definition of the Crime Does Not Suffer From Overbreadth or Vagueness*

Glennon then presents additional arguments why the text of the current definition purportedly suffers from "overbreadth and vagueness," concluding that it fails to "provide sufficient notice to potential defendants as to what conduct is permitted and what is proscribed."<sup>74</sup> In making these arguments, Glennon examines the definition of an "act of aggression," the definition of the "crime of aggression," and the breadth of those definitions when measured against past military actions of the United States and other states. While Glennon raises some interesting questions, many of his arguments rest on illogical application of the definition's language, a failure to read the first and second paragraphs of the definition in conjunction, and ignorance of the actual, very extensive, negotiating history.<sup>75</sup>

<sup>73</sup> Whether or not a State Party files an opt out declaration will also be a matter of choice. Undoubtedly, some "politicization" enters the picture because the Security Council may refer situations to the ICC and may also "defer" them. See Rome Statute, *supra* note 2, arts. 13(b), 16. While involvement of the Security Council, a political body, in the work of a judicial institution may not appear ideal (although the Security Council's referral of the Darfur situation (*see supra* note 45) was commendable, and the Libya referral (*see supra* note 46) may prove so as well), the role of the Security Council represented a compromise agreed upon at Rome that would both accommodate those concerned with the peace/justice tension (through Article 16), and those anxious about the ICC's limitations by allowing the Security Council to use its Chapter VII authority to broaden the range of cases the ICC could take (through Article 13). E-mail from John Washburn, Convener, American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), to author (March 3, 2012) (on file with author).

<sup>74</sup> Glennon, *supra* note 1, at 88. This author does not challenge Glennon's arguments that the principle of legality and prohibition on retroactive lawmaking, *id.* at 82-86, are applicable standards.

<sup>75</sup> It is a bit amazing that, despite more than 10 years of negotiations, which generated ample *travaux préparatoires*, Glennon's article contains *not a single cite* to these negotiations. It is worth noting, however, that the most comprehensive compilation of that material may not have been published when Glennon drafted his article. See THE PRINCETON PROCESS, *supra* note 17. Glennon's article also completely ignores the existence of elements of the crime of aggression, which were also in existence prior to the Review Conference.

### 2.2.1. *Glennon's Distortion of What Constitutes an "Act of Aggression"*

As noted above, the current ICC definition consists of the definition of an "act of aggression" (in paragraph 2), which is the act the state would commit, and the "crime of aggression" (in paragraph 1), which describes the individual's involvement. Glennon first attacks the breadth of the definition of "act of aggression."

His first argument is that "act of aggression" – defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations"<sup>76</sup> – is too broadly worded because it would cover action undertaken by a state in self-defense or pursuant to Security Council approval.<sup>77</sup> That is a nonsensical reading of the text. Actions taken by a state in a legitimate exercise of individual or collective self-defense or pursuant to U.N. Security Council authorization are clearly permissible under Article 51 and Chapter VII of the U.N. Charter,<sup>78</sup> and thus are uses of armed force *consistent* with the U.N. Charter, and clearly *not* acts of aggression.<sup>79</sup>

Glennon argues, for example, that coalition use of force against Iraq in 1990 would fall within the definition of "act of aggression."<sup>80</sup> Because coalition use of force against Iraq in 1990 was both undertaken in collective self-defense of Kuwait, and thus permissible under Article 51 of the U.N. Charter, *and* pursuant to

<sup>76</sup> New Def., *supra* note 4, art. 8 bis, ¶ 2.

<sup>77</sup> Glennon, *supra* note 1, at 88.

<sup>78</sup> See U.N. Charter chapter VII, arts. 39–42, 51.

<sup>79</sup> In such instances, there is no aggression, so one does not need to reach the issue that there is also no "manifest" Charter violation. See Roger S. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May–11 June 2010*, 2 GOETTINGEN J. INT'L L. 689, 698 n.29 (2010) (suggesting that one might also rely on Article 31 of the Rome Statute, entitled "Grounds for excluding criminal responsibility"). Self-defense could presumably include anticipatory self-defense, but, to the extent allowed, it would require a threat of an imminent attack. See JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHT?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 44 n.83 (2006) (citing authorities).

<sup>80</sup> Glennon, *supra* note 1, at 88–89.

Security Council authorization,<sup>81</sup> and therefore permissible under Chapter VII, it clearly was *not* an act of aggression.<sup>82</sup> At heart, Glennon's concern may be—although he does not state it so plainly—that the “or” in the definition of “act of aggression” should be read as an “and” (that is, there must both be “armed force . . . against the sovereignty, territorial integrity or political independence of another State” *and* it must be “inconsistent with the Charter”).<sup>83</sup> If that is his point, this is something the ICC judges will be perfectly capable of ruling on as a matter of statutory construction. The *ad hoc* tribunal judges had to resolve just such a question of statutory construction as to command responsibility, where a certain “or” in the *ad hoc* tribunals' statutes is in some situations read as an “and.”<sup>84</sup> Another construction is also possible: that action taken by a state in individual or collective self-defense or pursuant to Security Council authorization is not armed force “*against* the sovereignty, territorial integrity or

<sup>81</sup> See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing “all necessary means” to restore international peace and security in the area).

<sup>82</sup> Glennon's wording is strange: he later concedes “[a]cts of aggression that are carried out in self-defense and those authorized by the Security Council are permissible.” Glennon, *supra* note 1, at 89. The point is correct; the language is not. Action carried out in self-defense or pursuant to Security Council authorization is not an “act of aggression.” It constitutes the exercise of self-defense, or an authorized enforcement action.

<sup>83</sup> Glennon is also inconsistent here. At one point he writes that the Charter “implies” that use of force is allowed if not directed against the territorial integrity or political independence of a state, Glennon, *supra* note 1, at 96, but elsewhere appears to also require a contravention of the purposes of the UN.

<sup>84</sup> The ICTY and ICTR Statutes on command responsibility state:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Statute of the International Criminal Tribunal for Rwanda art. 6, ¶ 3, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 6, 1994) (emphasis added). The final clause clearly has an “or” in it. Case law, however, states that these are not options. A superior does not have a choice whether to prevent or whether to punish; if prevention fails, then there must be punishment. So if prevention succeeded, one would not reach the issue of punishment (and “or” might be considered appropriate), but if prevention failed, there is an obligation to punish (in that instance, the “or” is being read as an “and”). See TRAHAN, ICTY DIGEST, *supra* note 59, at 484 n.51; TRAHAN, ICTR DIGEST, *supra* note 59, at 233 n.55.

political independence of another State” because it is self-defense or an enforcement action.

Furthermore, the language Glennon takes issue with is practically a quote of Article 2(4) of the U.N. Charter<sup>85</sup>—language clearly *not* read to preclude action taken in self-defense or pursuant to Security Council authorization. In fact, States Parties at the Review Conference were essentially *precluded* from changing this construction, because under Article 103 of the U.N. Charter, any treaty provision contrary to the Charter would be void.<sup>86</sup> Thus, Glennon’s examples that the bombing of Baghdad in 1991 would be an act of aggression, as would the overthrow of the Taliban government in Afghanistan in 2001,<sup>87</sup> completely miss the mark.<sup>88</sup> Both were recognized as actions taken in self-defense and authorized by the Security Council. (Gulf War I was recognized as collective self-defense of Kuwait, and the Security Council’s authorization covered not only use of force to expel Iraqi forces from Kuwait, but was also more broadly worded, thus permitting targeting within Iraq.<sup>89</sup> Coalition forces in Afghanistan were responding to the 9/11 attack, which the Security Council indirectly recognized as triggering a right by the United States to self-defense.<sup>90</sup>)

<sup>85</sup> See *supra* note 13 (quoting Article 2(4) of the U.N. Charter).

<sup>86</sup> See U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

<sup>87</sup> Glennon, *supra* note 1, at 89.

<sup>88</sup> Indeed, Glennon essentially later admits as much when he states that “acts of aggression authorized by the Security Council or carried out for self defense under Article 51 are not prosecutable.” Glennon, *supra* note 1, at 98.

<sup>89</sup> S.C. Res. 678, *supra* note 81 (authorizing “all necessary means” to uphold and implement Resolution 660 and “to restore international peace and security in the area”).

<sup>90</sup> The Security Council “in its first resolutions on the events of September 11, ‘recogniz[ed] the inherent right of individual or collective self-defence in accordance with the Charter.’” Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM J. INT’L L. 905, 909 (2002) (quoting S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001)). See S.C. Res. 1368, *supra*; S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (recognizing and reaffirming, respectively, “the inherent right of individual or collective self-defence”); see also J.M. Spector, *Beyond the Rubicon: Presidential Leadership, International Law & The Use of Force in the Long Hard Slog*, 22 CONN. J. INT’L L. 47, 64 (2006) (observing that the U.N. Security Council “resolution recognized and affirmed the right of self-defense, thereby



### 2.2.2. *Glennon's Inaccurate Applications of the Definition to Various Past U.S. Military Actions*

The definition of the act of aggression continues with a second sentence: "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 . . . ."<sup>91</sup> It then lists various uses of force that would constitute acts of aggression, deriving the list from U.N. General Assembly Resolution 3314.<sup>92</sup> Glennon suggests that because certain U.S. past actions would fall within that list, there must be an overbreadth problem with the definition. Not only is that not necessarily the case,<sup>93</sup> but it erroneously suggests that past U.S.

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further cloaking (at least indirectly) the U.S. response with international legitimacy"). The Security Council might have questioned whether self-defense permitted action against both Al Qaeda (perpetrators of the 9/11 attacks) and the Taliban (who harbored them), and whether the response was proportionate to the scope of the armed attack. *See, e.g.,* Ratner, *supra* (taking a critical look at the international law foundation for proceeding against the Taliban); *see also* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993 (2001). The Security Council, however, appears not to have made such a distinction. *See* Spectar, *supra*, at 64 ("While the Council did not specifically authorize the use of force against the Taliban, it was not opposed to it either."). The Security Council additionally issued no resolution condemning the scope of the intervention in Afghanistan, which might constitute implied acceptance. The Security Council also issued resolutions endorsing the Bonn transitional process in Afghanistan, *see* S.C. Res. 1383, U.N. Doc. S/RES/1383 (Dec. 6, 2001), and authorizing an international force presence (ISAF) in Afghanistan, *see* S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001), both of which actions suggest an after-the-fact acceptance of the Taliban's ouster.

<sup>91</sup> New Def., *supra* note 4, art. 8 bis, ¶ 2.

<sup>92</sup> "[T]he General Assembly's 1974 Definition of Aggression [was] conceived as a guide to the Security Council in carrying out its functions under the Charter . . . ." Ratner, *supra* note 90, at 907.

<sup>93</sup> Glennon, *supra* note 1, at 90-94. Glennon's argument has been rebutted by another scholar this way:

The key unanswered question is whether Glennon's goal here is to say something about American foreign policy or about the construction of the [definition of the crime of aggression]. If we assume from the start that US foreign policy by definition cannot possibly be aggressive, then these cases would indeed suggest that the rule is badly written. Without such an assumption, however, is Glennon trying to point out that US leaders have at times used force aggressively [and] in violation of Article 2(4) of the UN Charter? [Or is he] showing that Americans are at times the perpetrators of aggression but that they do not deserve to be prosecuted[?].

actions will be judged by the current definition (which they will not, given the ban on retroactivity),<sup>94</sup> fails to reflect that the United States is exempt from aggression jurisdiction as a non-State Party to the Rome Statute<sup>95</sup> (an exemption admittedly negotiated after Glennon wrote his article), and also ignores the threshold language in paragraph 1 (requiring a “manifest” violation of the U.N. Charter), that would also need to apply to any of the acts listed in paragraph 2 for there to be a crime of aggression.<sup>96</sup>

Glennon’s logic appears at its weakest when he implies that because U.S. commencement of Gulf War II might fall within the first sub-paragraph 2(a) “invasion or attack,” there is something wrong with considering an “invasion or attack” as an act of aggression.<sup>97</sup> Indeed, an “invasion or attack” that is neither a legitimate exercise of self-defense, authorized by the U.N. Security Council, nor humanitarian in nature would seem to be a *classic example of what should be covered* as an act of aggression. Because the legal reasoning supporting the argument that Gulf War II was authorized under prior Security Council resolutions rests upon an attenuated reading of open-ended resolutions pertaining to Gulf War I and the subsequent disarmament and inspections regime, and clearly received no express Security Council authorization,<sup>98</sup> many states, commentators, and scholars *do* view the commencement of Gulf War II as the unauthorized use of force.<sup>99</sup>

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Hurd, *supra* note 1, at 5.

<sup>94</sup> See Rome Statute, *supra* note 2, art. 24.

<sup>95</sup> New Def., *supra* note 4, art. 15 *bis*, ¶ 5. As noted above, Security Council referral of aggression committed by a U.S. national or on U.S. territory, while theoretically possible, would be subject to U.S. exercise of its veto power. See *supra*, note 9.

<sup>96</sup> New Def., *supra* note 4, art. 8 *bis*, ¶¶ 1, 2.

<sup>97</sup> Glennon, *supra* note 1, at 90–92.

<sup>98</sup> One can possibly combine Security Council Resolutions 678, 686, 687, and 1441 to argue that open-ended language found in the authorization of Gulf War I and subsequent resolutions pertaining to its resolution and subsequent imposition of a weapons inspection regime provided authorization for Gulf War II. However, the United States clearly sought an additional resolution from the Security Council expressly authorizing Gulf War II and did not obtain it, yet nonetheless commenced Gulf War II.

<sup>99</sup> See, e.g., Spectar, *supra* note 90 (critiquing U.S. use of force in Gulf War II). Spectar states:

The Bush Administration showed great disdain for the Charter prohibition against the use of force in international relations by: (a)

The argument that Gulf War II constituted humanitarian intervention is no more plausible. Mass atrocities were committed by the Iraqi Government under Saddam Hussein's leadership. For example, in Iraq in 1988, atrocities were committed against the Iraqi Kurds during the notorious "Anfal campaign" and in 1991 against the Shi'a. But these crimes were too temporally remote to justify intervention in 2003. Any kind of anticipatory or pre-emptive self-defense argument (on the theory that the U.S. believed the Iraqi regime to possess weapons of mass destruction) is also generally considered weak, since most scholars would consider anticipatory or pre-emptive self-defense (if permissible at all) to require some form of "imminent" risk of attack,<sup>100</sup> and arguments that Iraq had an active weapons of mass destruction ("WMD") program appear to have been based on "outdated, hyped, unrepresentative, expedient, and poorly analyzed" information from "questionable sources."<sup>101</sup> Glennon's argument that the United Kingdom also supported Gulf War II<sup>102</sup> fails to bolster his position significantly, given there is an inquiry pending in the U.K. as to why the U.K. participated in Gulf War II.<sup>103</sup>

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electing to launch a preemptive invasion and occupation of Iraq in the absence of substantial legal justification; [and] (b) proceeding with the military option in the absence of UN approval and without the support of the international community . . . .

*Id.* at 49. See also *id.* at 84 ("Many international lawyers maintain the Administration's hyper-technical reading of prior resolutions to justify the [GW II] invasion is 'weak and transparent' and unpersuasive."); Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621, 626 (2003) ("In 2003 . . . many observers detected an attitude on the part of the [Bush] administration of open defiance of the Charter system. . . ."); Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom,"* 95 CAL. L. REV. 2295, 2315-16 (2007) ("Since the U.N. never officially authorized the invasion of Iraq, the international community saw the invasion as an illegal foreign military intervention.").

<sup>100</sup> See Spectar, *supra* note 90, at 84 ("[T]he Article 51 exception for use of force in cases of self-defense does not apply . . . in the absence of an imminent and exist[ing] threat."). Under the oft-quoted 1837 Caroline test, self-defense must be demonstrated by its "necessity . . . [as] instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Ratner, *supra* note 90, at 907 (citing Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), quoted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906)).

<sup>101</sup> Spectar, *supra* note 90, at 87.

<sup>102</sup> Glennon, *supra* note 1, at 90.

<sup>103</sup> There is currently an Iraq Inquiry in the U.K., mandated to examine the U.K.'s involvement in Gulf War II, including the way decisions were made and

Glennon's arguments are also unduly alarmist. Not only are past U.S. actions not covered by the current definition because of the ban on retroactivity,<sup>104</sup> but *future* U.S. actions will most likely not be covered either. Admittedly *after* Glennon's article was published, States Parties at the Review Conference agreed on an exemption from aggression jurisdiction for non-States Parties: "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.*"<sup>105</sup>

This exemption would apply to investigations triggered by State Party referral or *proprio motu* action of the Prosecutor.<sup>106</sup> While Security Council referrals as to aggression committed in the territory of, or by a national of, a non-State Party would still be possible, given that the United States holds a permanent seat on the U.N. Security Council and has veto power over substantive votes, the United States could clearly veto any such attempted referral. If the United States were someday to ratify the ICC Statute, it would then have the option of "opting out" of aggression jurisdiction (something also agreed upon after Glennon's article was published).<sup>107</sup> Thus, regardless of how one feels about whether or not U.S. leaders *should be* completely exempt from ICC aggression jurisdiction, it is hard to imagine how they could be subject to it, even when jurisdiction commences in 2017 or

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actions taken, to establish as accurately and reliably as possible what happened, and to identify lessons that can be learned. The U.K. Prime Minister appointed the members of the inquiry committee. See *About the Inquiry*, IRAQ INQUIRY, <http://www.iraqinquiry.org.uk/about.aspx> (detailing the United Kingdom's inquiry process into the lessons that can be learned from the Iraq conflict).

<sup>104</sup> See Rome Statute, *supra* note 2, art. 24, ¶ 1 ("No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.").

<sup>105</sup> New Def., *supra* note 4, art. 15 bis, ¶ 5 (emphasis added).

<sup>106</sup> Compare *id.* (dealing with state referrals and *proprio motu* action), with New Def., *supra* note 4, art. 15 ter (relating to Security Council referrals).

<sup>107</sup> At the Review Conference, agreement was reached that "[t]he 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.*" New Def., *supra* note 4, art. 15 bis, ¶ 4 (emphasis added). As noted above, an unlikely exception would exist if the United States permitted an aggression referral by the Security Council, choosing not to exercise its veto power. See *supra* note 9 (discussing potential scenarios in which U.S. officials could be brought before the Court).

thereafter.<sup>108</sup> To the extent that the existence of the definition might cause increased U.S. *circumspection* about future uses of military force, and perhaps contribute moral weight to ensuring that future U.S. interventions are either authorized by the Security Council, legitimate exercises of individual or collective self-defense, or humanitarian in nature, some might consider that a good outcome.<sup>109</sup>

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<sup>108</sup> See *supra* note 10 and accompanying text (explaining the process required for activation of the crime of aggression).

<sup>109</sup> Increased circumspection will also be warranted because the United States' closest European allies are ICC State Parties, so the existence of the crime of aggression may impact their calculations more directly (particularly after activation), making it harder for the United States to obtain coalition partners for any interventions of questionable legality. (Of course, those coalition partners will still have the option of exercising opt out declarations.)

Additionally, circumspection is also warranted because now that a definition has been adopted, States Parties may incorporate it into their national laws (theoretically, even before 2017). Non-States Parties could do so as well. Indeed, some states already criminalize the crime of aggression in their domestic criminal codes. See Astrid Reisinger Coracini, *National Legislation on Individual Responsibility for Conduct Amounting to Aggression*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 547, 551 n.29 (Roberto Bellelli ed., 2010) (citing crime of aggression laws in Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina (criminal codes of the Federation, Brcko District and Republika Srpska), Bulgaria, Croatia, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Macedonia, Moldova, Mongolia, Montenegro, Poland, Russian Federation, Serbia, Slovakia, Slovenia, Tajikistan, Ukraine, and Uzbekistan).

Domestic law incorporation of the crime of aggression has the potential to create aggression jurisdiction over U.S. nationals before domestic courts either through territorial exercise of jurisdiction or perhaps even through universal jurisdiction. This Author has elsewhere suggested that further consideration should be given to whether the ICC should have a relationship of "primacy" to such national court prosecutions (so that such national court prosecutions might be adjudicated before the ICC), rather than the current relationship of "complementarity" established under the Rome Statute. See Rome Statute, *supra* note 2, art. 17 (establishing a regime whereby national court jurisdiction can render ICC cases inadmissible); see Trahan *Kampala Negotiations*, *supra* note 16, at 89 n.158 (expressing concern about the complementarity regime and the crime of aggression); see also Jennifer Trahan, *Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?*, CORNELL INT'L L.J. (forthcoming 2012); Beth Van Schaack, *Par In Parem Imperium Non Habet: Complementarity and the Crime of Aggression*, 10(1) J. INT'L CRIM. JUST. (2012). Understanding 5 states: "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." Review Conference of the Rome Statute, *Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Resolution RC/Res.6, Annex III,

Glennon also nowhere considers that many of his examples are from the Cold War era, a time when collective Security Council action was generally blocked by Soviet-U.S. rivalry, and “each superpower in varying ways and to varying degrees slipped the Charter’s normative harness.”<sup>110</sup> During the Cold War “the two superpowers rather openly defied the Charter where it conflicted with their will to maintain ideological hegemony in their spheres of influence.”<sup>111</sup> By contrast, we are now in a “new era of international cooperation in the post Cold War world,”<sup>112</sup> which “widen[s] the potential occasions for the [Security Council to agree on] the legitimate use of force.”<sup>113</sup> Thus, action that the United States might have taken unilaterally in the past may now be much more readily approved by the Security Council. For example, the agreement the Security Council reached in authorizing intervention in Libya<sup>114</sup> would probably have been unimaginable during the Cold War era. Thus, looking at past practice from the Cold War era is not necessarily indicative of whether states might view aggressive, unilateral use of force as necessary or desirable in the post-Cold War period.

Finally, in his discussion of the various subparts of paragraph 2, Glennon ignores that for there to be a crime of aggression, there are certain thresholds that need to be met under the language of paragraph 1. He simply fails to read paragraph 2 of the definition *after* paragraph 1—a violation of the basic rule of good faith in treaty construction.<sup>115</sup> Thus, it is not just any “invasion or attack”

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RC/Res.6 (June 11, 2010) [hereinafter New Def. Understandings], ¶ 5. That Understanding does not necessarily impact a state’s decision to exercise domestic jurisdiction over the crime of aggression; it merely states that the amendment shall not create such “right or obligation.” On the other hand, if a State Party wants to avail itself of the complementarity provisions of the Rome Statute, it presumably would want to incorporate the crime into its domestic criminal code. See Rome Statute, *supra* note 2, art. 17 (laying out complementarity).

<sup>110</sup> Farer, *supra* note 99, at 623.

<sup>111</sup> *Id.*

<sup>112</sup> Spectar, *supra* note 90, at 50.

<sup>113</sup> Farer, *supra* note 99, at 624.

<sup>114</sup> See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

<sup>115</sup> See Vienna Convention on the Law of Treaties art. 31, ¶ 1, done May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

or “bombardment,” etc., that is covered; paragraph 1 also requires that any act of state of aggression must necessarily “by its character, gravity and scale constitutes a *manifest violation* of the Charter of the United Nations”<sup>116</sup> in order for there to be the crime of aggression. In none of his discussion of the various subparagraphs of paragraph 2 does Glennon consider this threshold requirement, or that the ICC (with only limited capacity to investigate and try cases) is mandated only to consider the most serious situations.<sup>117</sup> An understanding (also agreed upon in Kampala, and thus admittedly after Glennon published his article) that “aggression is the most serious and dangerous form of the illegal use of force”<sup>118</sup> further reinforces that the ICC will only adjudicate the most serious situations.

The threshold requirement of a “manifest” Charter violation is designed to ensure that the crime of aggression is not prosecuted in any “borderline cases”<sup>119</sup> or those “falling within a grey area.”<sup>120</sup> To understand what is a “manifest” violation, the definition makes clear that one must assess the “character, gravity *and* scale” of the use of force.<sup>121</sup> Thus, factually weaker cases, such as minimal border incursions, would be excluded, because the act of state would not meet the “gravity” or “scale” requirements.<sup>122</sup> Legally

<sup>116</sup> New Def., *supra* note 4, art. 8 bis, ¶ 1 (emphasis added).

<sup>117</sup> See Rome Statute, *supra* note 2, pmbl. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and . . . Determined . . . to establish an independent permanent International Criminal Court . . . with jurisdiction over the most serious crimes of concern to the international community as a whole . . .”).

<sup>118</sup> New Def. Understandings, *supra* note 109, ¶ 6. *But see* Heller, *supra* note 42, at 2–3 (questioning whether an Understanding can add anything that is not already in the text of the amendment).

<sup>119</sup> February 2009 SWGCA Meeting, in THE PRINCETON PROCESS, *supra* note 17, at 51, ¶ 13.

<sup>120</sup> June 2008 SWGCA Meeting, in THE PRINCETON PROCESS, *supra* note 17, at 87, ¶ 68.

<sup>121</sup> New Def., *supra* note 4, art. 8 bis, ¶ 1 (emphasis added). The requirement of examining all three criteria (and that no single criterion could suffice) is further emphasized by Understanding 7 that “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.” New Def. Understandings, *supra* note 109, ¶ 7.

<sup>122</sup> Thus, for example, “the requirement that the character, gravity, and scale of an act of aggression amount to a manifest violation of the Charter would ensure that a minor border skirmish would not be a matter for the Court to take up.”

debatable cases would be excluded, because the act of state would not have the right “character” to constitute a manifest violation of the Charter.<sup>123</sup> Excluding legally debatable cases means that humanitarian intervention is not covered by the crime of aggression.<sup>124</sup> Accordingly, Glennon’s argument that the 1999 NATO bombing operations against Yugoslavia amounted to “bombardment” as an act of aggression<sup>125</sup> is misleading. Humanitarian intervention would not constitute a “manifest” violation of the U.N. Charter, but a “grey area” case that would be excluded.<sup>126</sup> Glennon’s suggestion, that because U.S. arming of the Contras in Nicaragua in the 1980s might be covered under paragraph 2(g) there must be something wrong with paragraph 2(g),<sup>127</sup> is similarly unpersuasive.<sup>128</sup>

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Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, in *THE PRINCETON PROCESS*, *supra* note 17, at 8. The International Court of Justice appears to have taken such a look at the issue of scale in the *Nicaragua* case when it stated that sending armed bands amounted to an armed attack only if “because of its *scale and effects*” it would be more than a “mere frontier incident,” or if it were “on a significant scale”. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 14, ¶ 195 (June 27) (emphasis added). See also Ratner, *supra* note 90, at 907 (noting the International Court of Justice’s *Nicaragua* holdings).

<sup>123</sup> See *supra* Section 2.2.2.

<sup>124</sup> See Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 EUR. J. INT’L L. 1129, 1140 (2009) (“[T]he international legality of a genuine humanitarian intervention, such as the 1999 NATO air campaign in Kosovo, is also open to genuine debate, and is thus excluded from the scope of [then] draft Article 8 *bis* of the ICC Statute.”); see also ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 268 (2007) (“[T]here is controversy over whether there is also an exception for humanitarian intervention.”). Additional provisions in the Rome Statute that protect against bringing legally borderline cases include: (i) the exclusion of criminal responsibility if conduct is permissible under applicable law; (ii) the inclusion of principles and rules of international law; (iii) the requirement of proof beyond a reasonable doubt, and (iv) the principle *in dubio pro reo* (a defendant may not be convicted when doubts about guilt remain). Rome Statute, *supra* note 2, arts. 31, ¶ 3; 21 & 66.

<sup>125</sup> Glennon, *supra* note 1, at 92.

<sup>126</sup> See Pål Wrange, *Of Power and Justice*, 4 GERMAN L.J. 935, 947 (2003) (“In Kosovo, the humanitarian goal was evident and prevalent . . .”).

<sup>127</sup> Glennon, *supra* note 1, at 94 (“The International Court of Justice found that the principle articulated in the paragraph 2(g) provision represented customary international law and that the United States was in breach of the prohibition.”).

<sup>128</sup> First, the International Court of Justice ruled against U.S. actions in that case. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 14, ¶¶ 238–245 (June 27). Second, even then, paragraph 2(g)



Glennon's point, that "the truth is that in most of those and other instances, a person of common intelligence would necessarily have to guess which side violated the Charter,"<sup>129</sup> also fails. Decisions on the use of force should not be made by persons of "common intelligence," but by the best and brightest with objective advice from first-rate lawyers and eventually reviewed by qualified jurists, if it comes to that.<sup>130</sup> While there will be some grey area cases, there will nevertheless be many cases that are clear-cut to impartial lawyers and other observers, and both the wording of the relevant provisions and the instinct for institutional self-preservation will ensure that the ICC stays away from issues that are genuinely controversial and unclear.<sup>131</sup>

*2.2.3. Glennon's Applications of the Definition to Military Actions  
by Other States*

Glennon then points to various uses of military force by other states, again as if to suggest that coverage of such acts shows infirmity of the definition.<sup>132</sup> First, he cites the sheer number of uses of force by states from 1945 to 1989, as if to suggest overbreadth as to the current definition or a misconception as to why aggressive uses of force should be a crime.<sup>133</sup> In fact, that aggressive use of force has often been resorted to could suggest that the prohibition on aggressive use of force in Article 2(4) of the U.N. Charter—which is supposed to be treated as the highest level

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would still need to be read in conjunction with the requirement of a "manifest" violation. To the extent that "manifest" is read in light of the Understanding that "aggression is the most serious and dangerous form of the illegal use of force," not all sending of "armed bands, groups, irregulars or mercenaries" would necessarily be covered. New Def., *supra* note 4, art. 8 *bis*, ¶ 2(g); New Def. Understandings, *supra* note 109, ¶ 6.

<sup>129</sup> Glennon, *supra* note 1, at 101 (emphasis added).

<sup>130</sup> E-mail from Pål Wrange, *supra* note 64.

<sup>131</sup> See *id.* As noted elsewhere, reasons for conservatism include the "manifest" qualifier, the text of Understanding 6, as well as other provisions of the Rome Statute. See New Def. Understandings, *supra* note 109, ¶ 6 (explaining that determining whether an act of aggression has occurred "requires consideration of all the circumstances of each particular case . . .").

<sup>132</sup> See Glennon, *supra* note 1, at 94–95 (arguing that a multitude of states have engaged in conduct that would satisfy the definition).

<sup>133</sup> *Id.* at 94 ("By one count . . . from 1945 to 1989 force was employed 200 times, and by another count, 680 times.") (internal quotation marks omitted).

of international law (a *jus cogens* or peremptory norm)<sup>134</sup>—has not sufficiently succeeded in deterring it,<sup>135</sup> and that additional deterrence (ICC jurisdiction) is sorely needed. Glennon simply fails to convince one why aggressive use of armed force that constitutes a manifest Charter violation, often resulting in massive loss of life, should not constitute a crime. Why should war crimes be prosecuted before the ICC, but going to war be perfectly acceptable as a matter of international criminal law? Such arguments are arguably relics of an earlier era, when it was acceptable for states to resolve their grievances through recourse to arms.<sup>136</sup> The fact that aggressive use of force has been committed in the past is no reason why it should necessarily continue indefinitely, undeterred, for future generations.

Glennon cites Russia's invasions of Georgia in 2008, the Soviet invasion of Afghanistan in 1979, and North Vietnamese military actions against South Vietnam from 1960 through 1975 to bolster his position,<sup>137</sup> but such uses of force could also bolster the contrary

<sup>134</sup> See Cassese, *supra* note 90, at 1000 ("Article 2(4) of the UN Charter . . . has by now become a peremptory norm of international law (*jus cogens*)."); see also Ratner, *supra* note 90, at 914 ("[T]he Charter provisions on the use of force are typically regarded as not merely hard [law] but *jus cogens*.") (citing, *inter alia*, Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), Second Phase, 1970 I.C.J. 4, 32 (Feb. 5); Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 50, ¶ 1(a), in Report of the Int'l Law Comm'n, 53d sess., Apr. 23–June 1, 2001 & July 2–August 10, 2001, 43, 337, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter ILC Draft Articles on State Responsibility]); Spectar, *supra* note 90, at 47–48 ("At the heart of the post World War II order, Article 2 paragraph 4 has been recognized as a peremptory norm *jus cogens* by many international scholars."); JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 59 (2d ed. 2006) ("[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.") (quoting the International Law Commission's commentary on the final draft of Article 53 of the Vienna Convention on the Law of Treaties). See Kreß, *supra* note 124, at 1130–33 nn. 7–12 (collecting a long list of sources).

<sup>135</sup> The lack of deterrence was perhaps particularly apparent during the Cold War when Security Council voting to condemn aggressive use of force was subject to U.S. and Soviet veto.

<sup>136</sup> See DUNOFF ET AL., *supra* note 134, at 877 ("Prior to the 1920s, states viewed war as a lawful means to redress grievances and alter legal relations between states.").

<sup>137</sup> Glennon, *supra* note 1, at 95–96.

argument. Massive fatalities occurred during the Vietnam War,<sup>138</sup> and an estimated 1.25 million Afghan fatalities (nine percent of the population) resulted from the Soviet military intervention in Afghanistan.<sup>139</sup> Does Glennon really mean to defend these uses of force? Arguments regarding past uses of force by both the U.S.S.R./Russia and Vietnam are also hypothetical. Not only will the crime of aggression not apply retroactively, but, like U.S. leaders, Russian or Vietnamese leaders will not be covered by ICC aggression jurisdiction because Russia and Vietnam are non-States Parties to the Rome Statute, and at least Russia is in a position to veto any Security Council aggression referral related to its nationals or crimes committed on its territory. These limitations, if anything, illustrate both the conservative nature of, and a potential weakness in, the jurisdictional regime agreed upon at the Review Conference. Earlier humanitarian interventions in Uganda, Cambodia, and East Pakistan<sup>140</sup> invoked by Glennon similarly miss the mark, because, as noted above, the definition will not apply retroactively<sup>141</sup> and humanitarian intervention will not be covered.<sup>142</sup>

#### 2.2.4. Glennon's Additional Perceived Ambiguities as to the Definition of "Act of Aggression"

Glennon next offers critiques of the particular wording of the definition of "act of aggression," which he finds vague.<sup>143</sup> His

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<sup>138</sup> Fatality figures for the Vietnam War vary widely, but some median estimates are: 224,000 South Vietnamese military; 666,000–1,000,000 North Vietnamese military and Viet Cong; 300,000–1,500,000 South Vietnamese civilians; 65,000 North Vietnamese civilians and 58,000 Americans. Median estimates of total casualties for the entire conflict range between 2,850,000–3,000,000. See Matthew White, *Death Tolls for the Major Wars and Atrocities of the Twentieth Century*, NECROMETRICS.COM, <http://necrometrics.com/20c1m.htm#Vietnam>, (last updated June 2011).

<sup>139</sup> GREGORY FEIFER, *THE GREAT GAMBLE: THE SOVIET WAR IN AFGHANISTAN* 4 (2009) (estimating 1.25 million Afghan deaths; also estimating between 15,000 and 75,000 Soviet deaths). See also White, *supra* note 138 (mean estimate of fatality figures of 1.5 million for the Soviet phase and immediate aftermath).

<sup>140</sup> Glennon, *supra* note 1, at 95.

<sup>141</sup> See *supra* note 61 and accompanying text.

<sup>142</sup> See *supra* note 124. Additionally, Pakistan is not a State Party to the Rome Statute, so actions by its nationals or on its territory could not be the subject of State Party referral or *proprio motu* action.

<sup>143</sup> Glennon, *supra* note 1, at 96–98.

critiques concern: (1) why only “armed force” is covered rather than “force”; (2) why “sovereignty” is protected; (3) the relationship between the definition and other provisions of U.N. General Assembly Resolution 3314 not expressly incorporated; and (4) why “armed force” was covered but not a “war” of aggression.<sup>144</sup> This Article addresses each question in turn.

First, Glennon (correctly) notes that the definition covers “armed force” and not “force.”<sup>145</sup> He questions why this is, suggesting, for instance, that it might improperly exclude cyber-attacks, or the use of chemical or biological weapons.<sup>146</sup> He also questions why it covers armed force “by a state” and not by non-state actors.<sup>147</sup> These are interesting questions—but ones that were debated by states that participated in the extensive negotiations on the definition over the years. Because, as noted above in Section 1.1, the United States (under the Bush Administration) chose not to attend these negotiations (which were open to non-States Parties—Russia and China, for example, attended and participated),<sup>148</sup> the United States did not participate in shaping the definition. Perhaps there would be a stronger definition had the United States participated.

As to why only “armed” force is covered, admittedly the definition is somewhat conservative. A decision was made to utilize the list of acts of aggression covered in G.A. Resolution 3314 rather than open what some described as a “proverbial can of worms” and try to define such acts anew.<sup>149</sup> Today, an argument might be made for including cyber-attacks, but the definition is more conservative, and admittedly somewhat backward-looking in utilizing a list of acts of aggression agreed on in 1974. Similarly, the definition covers “state” acts of aggression, not acts of non-state actors. This definition is also somewhat conservative, but it does not mean that non-state actors may commit trans-border uses of force without criminal consequences because such actions might well constitute the crime of terrorism, war crimes, or crimes against

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 96.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Observations as to past negotiations otherwise not specifically attributed are based on the author’s recollection of meetings the author attended.

<sup>149</sup> See THE PRINCETON PROCESS, *supra* note 17, at 9–10.

humanity.<sup>150</sup> As to the use of chemical or biological weapons (which Glennon claims would be excluded),<sup>151</sup> to the extent they would be launched by a conventional weapons system, they would constitute "armed force" and would be covered.<sup>152</sup> Use of chemical or biological weapons also constitutes a war crime.<sup>153</sup>

Second, the word "sovereignty" in the definition, which covers armed force "against the *sovereignty*, territorial integrity or political independence of another State," hardly seems controversial. "Sovereignty" is another word used to describe the protection of states' territorial integrity and political independence.<sup>154</sup>

<sup>150</sup> Thus, Al Qaeda's attack on the United States would not fall within the definition of "act of aggression" because it was not committed by a state. However it most certainly constituted the crime of terrorism, various war crimes (such as targeting civilians and civilian objects), and arguably also a crime against humanity. See Cassese, *supra* note 90, at 994-95 (arguing that the 9/11 attack constituted a crime against humanity). Also, given a sufficient connection between a non-state actor and a state, it might be possible to impute acts of the non-state actor to the state. See, e.g., ILC Draft Articles on State Responsibility, *supra* note 134, art. 8 (covering conduct directed or controlled by a state); *id.* art. 9 (covering conduct carried out in the absence or default of the official authorities); *id.* art. 11 (covering conduct acknowledged and adopted by a state as its own).

<sup>151</sup> See Glennon, *supra* note 1, at 96.

<sup>152</sup> There are "a variety of technologies that can be used to weaponize toxic chemical agents. Munitions include bombs, submunitions, projectiles, warheads, and spray tanks." *Chemical Weapon Delivery*, <http://www.globalsecurity.org/wmd/intro/cw-deliver.htm> (last modified July 24, 2011) (describing self-contained munitions like projectiles, cartridges, mines and rockets, as well as aircraft-delivered munitions, both of which are weaponized).

<sup>153</sup> See, e.g., Rome Statute, *supra* note 2, art. 8, ¶ 2(b)(xviii) (including employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices as a war crime in international armed conflict); *id.* art. 8, ¶ 2(b)(xvii) (including employing poison or poisoned weapons as a war crime in international armed conflict); see also *id.* art. 8, ¶ 2(b)(xx) (including indiscriminate weapons use as a war crime in international armed conflict). At the Review Conference, it was also agreed to amend Rome Statute Article 8, ¶ 2(e)(xvii)-(xviii) to add as war crimes in non-international armed conflict "employing poison or poisoned weapons" and "employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices." See Review Conference of the Rome Statute, *Amendments to Article 8 of the Rome Statute*, Resolution RC/Res.5, RC/Res.5 (June 10, 2010) (also amending Article 8, ¶ 2(e)(xv)).

<sup>154</sup> The International Court of Justice has defined sovereignty as "the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States." *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 39, 43 (Apr. 9) (separate opinion of Judge Alvarez); but see LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES*, 8-10 (1995) (explaining that sovereignty should be relegated to the "shelf of history as a relic from an earlier era"). The protection of "sovereignty" hardly seems to raise

Third, as to the relationship of language in the definition taken from G.A. Resolution 3314 and whether other parts of that resolution are incorporated,<sup>155</sup> again, this topic was extensively discussed at negotiations, and much *travaux préparatoires* can be found.<sup>156</sup> For example, there was extensive discussion whether the entirety of Resolution 3314 should be incorporated into the amendment's text or referenced, or whether only specific portions should be incorporated or referenced.<sup>157</sup> Some states were specifically concerned about the language in Article 2 of Resolution 3314 suggesting extensive leeway for the Security Council to determine that an act is not aggression,<sup>158</sup> and Article 4, which makes clear that the list of covered acts in Resolution 3314 was open-ended, and could be expanded upon by the Security Council.<sup>159</sup> Accordingly, a decision was made to utilize only specific portions of Resolution 3314—as reflected in the second sentence of Article 8 *bis*, paragraph 2, and the list that follows. Thus, to answer Glennon's question: "[i]s [all of] Resolution 3314

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difficult issues, and was not much debated at least at meetings of the Special Working Group. There was some earlier debate in the Preparatory Commission about the term, as not all proposals incorporated it. See, e.g., *Proposal submitted by Guatemala on document PCNICC/2001/WGCA/DP.2*, Working Group on the Crime of Aggression, Preparatory Commission for the International Criminal Court, Feb. 26–Mar. 9, 2001 & Sept. 24–Oct. 5, 2001, PCNICC/2001/WGCA/DP.3 (Sept. 26, 2001); *Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania*, Working Group on the Crime of Aggression, Preparatory Commission for the International Criminal Court, Sept. 24–Oct. 5, 2001, PCNICC/2001/WGCA/DP.2/Add.1 (Aug. 27, 2001); see also, e.g., E-mail from Jutta Bertram-Nothnagel, *supra* note 36.

<sup>155</sup> See Glennon, *supra* note 1, at 97–98 (discussing the consequences of incorporating or not incorporating Resolution 3314).

<sup>156</sup> See generally THE PRINCETON PROCESS, *supra* note 17.

<sup>157</sup> See, e.g., *id.* at 10; see also *id.* at 101, ¶¶ 14–16; *id.* at 116, ¶¶ 38–43.

<sup>158</sup> Article 2 states:

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

G.A. Res. 3314 (XXIX), art. 2, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

<sup>159</sup> Article 4 states: "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter." *Id.* art. 4.

in effect incorporated by reference?"<sup>160</sup>—the clearest answer is: most likely no.<sup>161</sup>

Furthermore, as to Glennon's statement that "the Security Council may determine that other acts constitute aggression under the provisions of the Charter,"<sup>162</sup> frankly, the Assembly of States Parties cannot tell the Security Council what is or is not aggression; it does not have that competence. The Security Council's power emanates from the U.N. Charter.<sup>163</sup> Thus, the Security Council may in the future determine that other acts constitute aggression—perhaps it will deem a cyber-attack to constitute aggression; however, if it were to make a referral to the ICC on that basis, the issue would be subject to *de novo* ICC review,<sup>164</sup> which likely would result in a more conservative ruling that a cyber-attack is not "armed force" and/or is not a "manifest" Charter violation, and therefore cannot be the basis for a crime of aggression conviction under the Rome Statute.

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<sup>160</sup> Glennon, *supra* note 1, at 97.

<sup>161</sup> Some earlier draft language suggested the entire Resolution would be incorporated. This ran into heavy opposition because Article 4 would have made the definition possibly dependent on retroactive post-crime Security Council determinations. The opposition died down when the reference moved to the second sentence of the paragraph, because (a) it could be interpreted as a mere reference, and (b) because the first sentence served as a sufficiently clear limitation. But the reference to Resolution 3314 was also an accommodation to those who did not want, or claimed not to want, a partial use of Resolution 3314. See E-mail from Jutta Bertram-Nothnagel, *supra* note 36. Some might still argue that Article 8 *bis* should be interpreted in light of the whole of Resolution 3314, but, given that 8 *bis* will be a provision of criminal law, any interpretation (particularly of paragraph 4 of Resolution 3314) would need to keep that in mind. See E-mail from Pål Wrange, *supra* note 64.

<sup>162</sup> Glennon, *supra* note 1, at 97.

<sup>163</sup> U.N. Charter art. 39.

<sup>164</sup> The definition is quite explicit that the ICC will make an independent evaluation. The amendment states: "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." New Def., *supra* note 4, art. 15 *ter*, ¶ 4. This provision was seen as extremely important for preserving the ICC's judicial independence, and protecting the rights of the accused by maintaining the presumption of innocence and the burden of proof upon the prosecution. See, e.g., June 2006 Princeton Meeting, THE PRINCETON PROCESS, *supra* note 17, at 151, ¶ 71 ("Many participants voiced a strong preference for a determination [by an outside organ] that was open for review by the Court . . . to safeguard the defendant's right to due process. The Prosecutor would bear the burden of proof regarding all elements of the crime, including the existence of an act of aggression . . .").

As to Glennon's assertion that the current definition is "identical to coverage of the definition included in the Charter,"<sup>165</sup> that is incorrect. He quotes language from G.A. Resolution 3314 that "nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter . . . ."<sup>166</sup> That is necessarily the case; the General Assembly has no power to change the scope of the U.N. Charter. But that does not mean the current definition is identical to what is covered by the Charter. The current definition is for purposes of the ICC; the Security Council makes determinations of what constitutes a "threat to the peace, breach of peace or act of aggression" under Article 39 of the U.N. Charter. Again, State Parties have no ability to tell the Security Council what criteria to use in making its determinations, and whatever definition is contained in the Rome Statute cannot change the U.N. Charter.<sup>167</sup>

Glennon also contradicts himself when he first describes the list of acts in paragraphs 2(a) through (g) as "exhaustive,"<sup>168</sup> but later states "[o]ne can only guess" if the list is exhaustive.<sup>169</sup> Again, there was much debate on this topic (the author remembers it occurring at both the U.N. and Princeton) as to whether the list of acts in paragraph 2 would be considered "open-ended" or "closed-ended," and much *travaux préparatoires* may be found.<sup>170</sup> (Under the Vienna Convention on the Law of Treaties, the judges would only consider this *travaux* if they find the treaty language to be "ambiguous or obscure" or "leads to a result which is manifestly

<sup>165</sup> Glennon, *supra* note 1, at 97.

<sup>166</sup> *Id.*

<sup>167</sup> This is not in contradiction with the argument in Section 2.1.1 that the definition of the crime of aggression should be interpreted in a manner consistent with the U.N. Charter. See *supra* note 86 and accompanying text. This is so in order to avoid conflicts between the Rome Statute and the Charter. In the case of such a conflict, it is the Charter that would prevail. Thus, the crime of aggression cannot alter the U.N. Charter, and if it were seen as inconsistent with the Charter, it is the Charter that would prevail. See U.N. Charter art. 103.

<sup>168</sup> Glennon, *supra* note 1, at 97.

<sup>169</sup> *Id.* at 98.

<sup>170</sup> With an "open list," the acts listed in subsections (a)-(g) would be illustrative of acts of aggression, and "sufficiently open to cover future forms of aggression." See June 2008 SWGCA Meeting, in THE PRINCETON PROCESS, *supra* note 17, at 89, ¶ 75. Those who favored a "closed list" expressed concerns that the principle of legality or *nullum crimen sine lege* could be violated by an open list. See THE PRINCETON PROCESS, *supra* note 17, at 8, 10-11.



absurd or unreasonable.”)<sup>171</sup> Ultimately, it was resolved to consider the list “semi-open” or “semi-closed”<sup>172</sup> in that it is not closed, but any other act would need to meet the other qualifiers in the definition, which effectively “closes” the list. Whereas a fully “open” list would be problematic as providing insufficient notice of what other acts might be covered, a semi-open list (with a chapeau that closes it) should not be.<sup>173</sup> Ultimately, these issues will become ones of construction for the ICC judges, based on statutory language, aided by *travaux préparatoires*, if they choose.<sup>174</sup> At minimum, there should be no notice problems as to the acts enumerated in subparagraphs (a)-(g), which should cover most situations. The possibility of “competing interpretations” as to language simply does not mean that something cannot be a crime.<sup>175</sup>

Finally, Glennon takes issue that an “act” of aggression and not a “war” of aggression was covered.<sup>176</sup> That issue was also

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<sup>171</sup> Vienna Convention on the Law of Treaties, *supra* note 115, art. 32 (supplementary means of interpretation).

<sup>172</sup> See THE PRINCETON PROCESS, *supra* note 17, at 11.

<sup>173</sup> It is worth noting that the crime against humanity of “other inhumane acts” has been upheld many times at the international level without any express statutory articulation of what these other acts might be. See Trahan, ICTR Digest, *supra* note 59, at 142-46 (citing cases). As explained by the International Criminal Tribunal for Rwanda:

The crime of ‘other inhumane acts’ encompasses acts not specifically listed as crimes against humanity, but which are nevertheless of comparable nature, character, gravity and seriousness to the enumerated acts in sub-articles (a) to (h) of Article 3. The inclusion of a residual category of crimes in Article 3 recognizes the difficulty in creating an exhaustive list of criminal conduct and the need for flexibility in the law’s response.

Trahan, ICTR Digest *supra* note 59, at 142 (citing Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgment, ¶ 527 (Sept. 12, 2006)). See also *id.* (citing Prosecutor v. Kamuhanda, Case No. ICTR-99-54A, Judgment, ¶ 716 (Jan. 22, 2004)) (similar); *id.* (citing Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment, ¶ 931 (Dec. 1, 2003)) (similar).

<sup>174</sup> If a definition were really in conflict with the principle of legality, such a problem could not be overcome by juridical interpretation. That does not appear to be the situation here.

<sup>175</sup> See Hurd, *supra* note 1, at 3 (arguing that Glennon “seems to be saying that any definition of aggression would be open to competing interpretations,” but if that were the proper criteria “all definitions are naturally flawed.”).

<sup>176</sup> See Glennon, *supra* note 1, at 98.

extensively debated during the years of negotiations<sup>177</sup>—negotiations that the U.S. (probably unwisely) chose not to attend. Many states believed that if only full-scale war were covered, that would set too high a threshold; most expressed the view that the definition should cover uses of armed force short of full-scale war.<sup>178</sup> Thus, it was decided that the definition would cover state “acts” of aggression, but with a threshold that any such “act” would still needed to constitute a “manifest” violation of the Charter to be the crime of aggression.<sup>179</sup> Glennon’s citing the fear that any “use of force” will be covered<sup>180</sup> is misplaced; only acts meeting all of the statutory language would be covered, including satisfying the “manifest” qualifier.<sup>181</sup>

#### 2.2.5. *Glennon’s Perceived Ambiguities in the Definition of “Crime of Aggression”*

Glennon’s final critiques of the definition concern wording in paragraph 1 of Article 8*bis*, the “crime of aggression.” He criticizes: (1) the alleged vagueness and overbreadth of the words “planning” and “preparation”; and (2) the alleged vagueness of what constitutes a “manifest” Charter violation.<sup>182</sup> Again, the “crime of aggression” is defined as the “*planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*”<sup>183</sup>

<sup>177</sup> See, e.g., June 2006 SWGCA meeting, in *THE PRINCETON PROCESS*, *supra* note 17, at 144, ¶¶ 21–24.

<sup>178</sup> See, e.g., *id.* (reflecting the issue of whether only a full-scale “war” or lesser forms of aggression should be covered). The latter approach was agreed upon.

<sup>179</sup> See *supra* Section 2.2.2 (discussing the “manifest” qualifier).

<sup>180</sup> Glennon, *supra* note 1, at 98.

<sup>181</sup> In addition, Understanding 6 now also states that aggression covers only “the most serious and dangerous form of the illegal use of force.” See New Def. Understandings, *supra* note 109, ¶ 6.

<sup>182</sup> See Glennon, *supra* note 1, at 98–102 (articulating the discrepancies, inconsistencies, and major issues concerning the alleged inadequate definition for the crime of aggression).

<sup>183</sup> New Def., *supra* note 4, art. 8 *bis*, ¶ 1 (emphasis added).

Glennon correctly notes that the crime of aggression “can only be committed by political and military leaders”<sup>184</sup>—namely, leaders “in a position effectively to exercise control over or to direct the political or military action of a State.”<sup>185</sup> He then argues that the words “planning” and “preparation” are too broad in that they “encompass a wide range of political and military activity.”<sup>186</sup> Yet, these words do not appear in isolation. “Planning” and “preparation” would only be covered when committed: (i) by someone “in a position effectively to exercise control over or to direct the political or military action of a State”; (ii) as to a state act of aggression that actually occurs; and (iii) which constitutes a “manifest” Charter violation. So when Glennon argues that “preparation” would cover procurement of “healthcare, housing, retirement, and social services for military personnel and their families,”<sup>187</sup> he totally misses the mark. Such activities hardly constitute “preparation” for an act of aggression, and are unlikely to be done by someone “in a position effectively to exercise control over or to direct the political or military action of a State.”<sup>188</sup> Furthermore, such activities would not satisfy the *mens rea*

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<sup>184</sup> Glennon, *supra* note 1, at 98.

<sup>185</sup> New Def., *supra* note 4, art. 8 *bis*, ¶ 1. Article 25, ¶ 3 is also being amended to add: “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.” See *id.* ¶ 5.

<sup>186</sup> Glennon, *supra* note 1, at 98.

<sup>187</sup> *Id.* at 99.

<sup>188</sup> Glennon additionally suggests that personnel from defense intelligence agencies could be covered. See *id.* (asserting that “diplomats,” “legislators,” and “intelligence agencies” all play a role in initiating armed conflict). Few such personnel are likely to constitute persons “in a position effectively to exercise control over or to direct the political or military action of a State.” Even then, there would also need to be an actual state act of aggression, which also constitutes a “manifest” Charter violation. But it is also unclear why individuals involved in providing intelligence should necessarily be insulated from criminal exposure if all the other elements are met. Cf. Jennifer Trahan, *A Critical Guide to the Iraqi High Tribunal’s Anfal Judgment: Genocide Against the Kurds*, 30 MICH. J. INT’L L. 305 (2009) (discussing the cases against Sabir Abd al-Aziz al-Douri and Farhan Mutlaq al-Jaburi, who were directors in Iraq’s Military Intelligence Service, and were convicted for involvement in the chemical and conventional weapons bombardment of the Iraqi Kurds in the 1988 Anfal campaign, which some estimate caused 180,000 fatalities).

requirements of the Rome Statute,<sup>189</sup> nor Element 4 of the elements of the crime of aggression.<sup>190</sup>

Similarly, Glennon discusses the drawing up of plans for possible invasions and contingency plans, for instance, responding to the launch of intercontinental ballistic missiles (“ICBM”) by the Soviet Union or “plans to bomb Baghdad prior to the Iraqi invasion of Kuwait,” as if they might be covered.<sup>191</sup> First, the elements of the crime of aggression,<sup>192</sup> as well as the existence of paragraph 2 (requiring an act of state of aggression), make it fairly

<sup>189</sup> See Rome Statute, *supra* note 2, art. 30 (requiring intent and knowledge for responsibility); see also *id.* art. 32 (excluding responsibility for a mistake of fact or mistake of law if it negates the mental elements required by the crime).

<sup>190</sup> The elements of the crime of aggression were also agreed upon at the Kampala Review Conference. See Review Conference of the Rome Statute, *Amendments to the Elements of Crimes*, Resolution RC/Res.6, Annex II, RC/Res.6 (June 11, 2010) [hereinafter New Def. Elements], art. 8 *bis*, Elements, ¶ 3.

A more interesting question that Roger Clark poses is whether industrialists could be covered. Although it was proposed that the definition cover those who “shape and influence,” rather than those who “exercise control over or . . . direct” the political or military action of a State—which might have clarified the matter—that more expansive formulation was not adopted. Roger S. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court*, 2 GOETTINGEN J. OF INT’L L. 689, 697 (2010).

<sup>191</sup> Glennon, *supra* note 1, at 99.

<sup>192</sup> The elements of the crime of aggression are as follows:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
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.

New Def. Elements, *supra* note 190, art. 8 *bis*, Elements, ¶¶ 1–6.

clear that an act of aggression must actually *occur* for there to be the crime of aggression.<sup>193</sup> Thus, contingency planning for an attack that *does not occur* (responding to a Soviet launch of ICBMs), would *not* be covered. Contingency planning for *self-defense* to ICBM strikes, or *collective self-defense* of Kuwait, furthermore, would constitute planning for self-defense and not the crime of aggression.<sup>194</sup> Glennon is again creating red-herrings.

Finally, he argues that the line-drawing for the number of military and political leaders to be covered is “anything but bright.”<sup>195</sup> Is there such bright line-drawing for other ICC crimes, or crimes adjudicated by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) or the International Criminal Tribunal for Rwanda (“ICTR”)? For command responsibility, is there advanced clarity as to precisely which or how many superiors will be covered? For individual responsibility for “ordering” crimes, is there precise clarity which superiors might issue such orders or how many will be prosecuted? Is there

<sup>193</sup> There was extensive debate during negotiations as to whether there had to be an actual act of aggression. During discussion of the Elements of the Crime it became very clear that states wanted to include only crimes where the act by the state had actually been committed. E-mail from Jutta Bertram-Nothnagel, *supra* note 36. While the text of the elements is not necessarily determinative, there are a number of reasons that point away from covering “attempted” state acts of aggression: (i) the threshold requirement of a “manifest” Charter violation; (ii) paragraph 4 of Article 15 *bis* (the Court may . . . exercise jurisdiction over a crime of aggression, arising from an act of aggression *committed* by a State Party”) (emphasis added); (iii) the text of the Elements; (iv) the *travaux préparatoires*; and (v) that inclusion of “attempt” as a form of individual criminal responsibility refers to the individual accused’s role and not “attempt” by the state. See Rome Statute, *supra* note 2, art. 25 (individual criminal responsibility); E-mail from Jutta Bertram-Nothnagel, *supra* note 36.

<sup>194</sup> See *supra* Section 2.2.1 (explaining that self-defense, which is permitted under U.N. Charter Article 51, is not covered by the crime of aggression). Furthermore, the definition will of course not apply retroactively to any of these situations. The Rome Statute’s *mens rea* requirements as well as Element 3 of the Elements of the Crime of Aggression are also unlikely to be met. See Rome Statute, *supra* note 2, art. 30 (requiring intent and knowledge); New Def. Elements, *supra* note 190, art. 8 *bis*, Elements, ¶ 3.

<sup>195</sup> Glennon, *supra* note 1, at 99. Glennon’s suggestion that “hundreds of U.S. legislators and military leaders” could hypothetically be covered, *id.* at 73, totally misconstrues how the leadership clause is designed to operate. Delegations *never* expressed intent to cover hundreds of individuals; the understanding was quite to the contrary: only a few individuals would be covered at the top leadership level. Such an understanding is also in line with the ICC’s capacity and practice, which to date has involved issuance of only a few warrants in each situation country.

absolute precision how extensive the parameters of “participation” in a “joint criminal enterprise” are? No, the ICC, ICTY and ICTR Statutes do not answer these questions. The elements of what constitute superior responsibility, ordering and “participation” in a “joint criminal enterprise” have, however, been fully articulated by the ICTY and ICTR judges through case law.<sup>196</sup> So too here; there will be some issues left to the ICC judges. There is no reason that they cannot construe and develop coherent case law on the parameters of “preparation” and “planning,” and what precisely is required to show whether a leader is “in a position effectively to exercise control over or to direct the political or military action of a State.” Of course, the judges will not be writing on a blank slate either; the judges will have Nuremberg, Tokyo and Control Council Law No. 10 jurisprudence to draw upon, as well as ICTY and ICTR jurisprudence.<sup>197</sup>

Finally, Glennon—who in earlier discussion disregarded the “manifest” requirement<sup>198</sup>—argues that it is too unclear to be used

<sup>196</sup> Trahan, ICTR Digest, *supra* note 59, at Chapters IV–V (setting forth ICTR case law on individual and command responsibility); *see id.* at Chapters V–VI (setting forth ICTY case law on individual and command responsibility).

<sup>197</sup> There is ICTY and ICTR jurisprudence as to what constitutes “planning.” Under ICTR jurisprudence, for example: “The *actus reus* of ‘planning’ requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.” *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgement, ¶ 479 (Nov. 28, 2007). The individual’s involvement must substantially contribute to the crime. “It is sufficient to demonstrate that the planning was a factor substantially contributing to [the] criminal conduct. The *mens rea* for [planning] entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.” *Id.* (citations omitted). Similar requirements can be found under ICTY case law. *See* Trahan, ICTY Digest, *supra* note 59, at 353–55 (for ICTY case law on the elements of “planning”).

Glennon also argues that the definition is too vague because it has not defined terms such as “annexation” or “force.” Glennon, *supra* note 1, at 110. First, as he noted, the relevant term is “armed force” not “force,” so it is that term the judges will construe. No doubt, absurd and academic hypotheticals could be crafted, but to this author, what constitutes “armed force,” would seem rather obvious; to the extent there are “grey areas,” they would not qualify, as that would not constitute a “manifest” Charter violation. *See* Section 2.2.2 *supra* (discussing the “manifest” qualifier which would exclude grey areas); *see also supra* note 124 (discussing additional reasons for jurisprudential caution in unclear cases). Similarly, “annexation” appears to be a fairly straightforward concept, as in Iraq’s 1991 annexation of Kuwait. To the extent a state is in doubt as to whether its actions constitute “annexation,” it could attempt to obtain Security Council authorization for its actions.

in making determinations as to the crime of aggression.<sup>199</sup> What the manifest requirement does, as explained above, is set a threshold.<sup>200</sup> Other ICC crimes have similar thresholds: genocide is only committed when there is intent to destroy in whole or in part a *substantial* part of a national, ethnical, racial or religious group.<sup>201</sup> Crimes against humanity are only committed when there is a *widespread* or *systematic* attack against the civilian population.<sup>202</sup> War crimes before the ICC will be prosecuted “particularly when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>203</sup> The parameters of these thresholds are not found in statutory language, but in the case law.<sup>204</sup>

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As to the precise parameters of such terms, one should also keep in mind that when the ICTY and ICTR started adjudicating cases of genocide, they had little guidance, but had to develop case law on what is (1) “intent” (2) to “destroy” (3) “in whole or in part” (4) a “national, ethnical, racial or religious group” (5) “as such,” and (6) the components of the underlying crimes of genocide, and (7) the parameters of all the forms of individual and command responsibility. See, e.g., Hurd, *supra* note 1, at 4 (“The law against genocide is equally vague [as the aggression definition] and yet it has been successfully prosecuted by international tribunals.”). There is, of course, now, robust case law on the elements of genocide. See Trahan, ICTY Digest, *supra* note 59, at 144–92 (ICTY case law on genocide); Trahan, ICTR Digest, *supra* note 59, at 15–82 (ICTR case law on genocide). But when the *ad hoc* tribunals commenced their work, this did not exist. So too with the crime of aggression: perhaps we do not have a complete understanding of the precise parameters of “armed force” or “annexation,” but some work necessarily must be left to the judges. If it were to become apparent to the ASP in the future that certain terms within the aggression definition need to be further defined, States Parties could achieve that by further statutory amendment or amendment to the elements of the crime. (This Article does not discuss each situation Glennon mentions in his article; the failure by this author to discuss a particular situation does not imply this author’s acceptance of his arguments.)

<sup>198</sup> See *supra* Section 2.2.2.

<sup>199</sup> Glennon, *supra* note 1, at 100–02.

<sup>200</sup> See *supra* Section 2.2.2.

<sup>201</sup> See Trahan, ICTR Digest, *supra* note 59, at 27–28 (describing ICTR cases applying the substantial part requirement); Trahan, ICTY Digest, *supra* note 59, at 158–59 (describing ICTY cases applying the substantial part requirement).

<sup>202</sup> See Statute of the International Criminal Tribunal for Rwanda, *supra* note 84, art. 3; Rome Statute, *supra* note 2, art. 7, ¶ 1.

<sup>203</sup> Rome Statute, *supra* note 2, art. 8, ¶ 1.

<sup>204</sup> See Trahan, ICTR Digest, *supra* note 59, at 27–28 (describing ICTR cases on the substantial part requirement); Trahan, ICTY Digest, *supra* note 59, at 158–59 (describing ICTY cases on the substantial part requirement); Trahan, ICTR Digest, *supra* note 59, at 83–92 (describing ICTR cases on “widespread” and “systematic”); Trahan, ICTY Digest, *supra* note 59, at 213–221 (describing ICTY cases on “widespread” and “systematic”).

International criminal law does not require *absolute precision of all parameters* for something to be a crime. For example, several ICC war crimes apply to the targeting of “civilians,”<sup>205</sup> but that term is not defined in the Rome Statute or the elements of crimes, even though, in the context of armed conflict, it is not always apparent who is a “civilian.”<sup>206</sup> Clearly the existence of ambiguities in terminology does not prevent the targeting of civilians from being a war crime. Some wording must necessarily be interpreted by the judges.<sup>207</sup>

Glennon also discusses several complicated situations where the United States has responded to terrorist attacks, or against countries suspected of harboring terrorists, through the use of force, such as U.S. bombing of targets in Libya in response to the bombing of a Berlin nightclub in 1986.<sup>208</sup> These indeed are difficult scenarios because the question implicated is quite profound: is military force a proper response to terrorism or should such

<sup>205</sup> See, e.g., Rome Statute, *supra* note 2, art. 8, ¶ 2(b)(i) (listing “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” as a war crime in an international armed conflict); *id.* art. 8, ¶ 2 (e)(i) (listing “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” as a war crime in a non-international armed conflict).

<sup>206</sup> Someone who initially was a civilian may become a combatant by taking up arms and engaging in hostilities. Likewise, someone who was a combatant could retire or become incapacitated (*hors de combat*) and lose combatant status. When armed conflict involves persons fighting out of uniform, making these distinctions becomes even more complex.

<sup>207</sup> Furthermore, as explained above, the judges have express guidance here: The requirement of a “manifest violation” has to consider the “character, gravity and scale” of the incursion. This mandates examination of at least two very different criteria: (a) gravity and scale go to the size of the trans-border incursion, and (b) “character” goes to why armed force is used. See *supra* Section 2.2.2. Significantly, the definition connects these words with an “and,” so one would need to consider both the size of the incursion as well as its character. The importance of all three criteria (character, gravity and scale) is further emphasized by Understanding 7 (proposed and negotiated by the U.S. at Kampala). New Def. Understandings, *supra* note 109, ¶ 7 (emphasizing that the three criteria must be sufficient to justify the “manifest” determination).

<sup>208</sup> Glennon, *supra* note 1, at 101. Other examples Glennon raises are U.S. drone missile attacks against targets in Pakistan; U.S. air strikes against Afghanistan and Sudan following the attacks on U.S. embassies in Kenya and Tanzania; and surprise air attacks in 1998 by the U.S. under the Clinton Administration against six sites in Afghanistan and one in Sudan. *Id.* at 92.



incidents be treated as the crime of terrorism?<sup>209</sup> Vast numbers of articles have been written by legal scholars on this complex subject.<sup>210</sup> While the international legal community is grappling with the proper legal framework for responding to terrorism (whether under the laws of war or as an international crime), this author will suggest that such examples, which again are hypothetical because the definition will not apply retroactively or to U.S. actions, would most likely *not* constitute “manifest” Charter violations.<sup>211</sup> As noted above, the word “manifest” is designed to

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<sup>209</sup> Prior to the attacks of 9/11 (and to some extent, afterwards), most such incidents were treated under the criminal law framework, with warrants issued, arrests made, and prosecutions (at least within the U.S.) before federal courts. See RICHARD ZABEL & JAMES BENJAMIN, JR., *HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS* (2008), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf> (discussing the ability of U.S. courts to try international terrorism cases); Jennifer Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, 8 NEW ENG. J. OF INT'L & COMP. L. Ann. 215 (2002) (surveying and discussing international terrorism conventions).

Subsequent to 9/11, the Security Council implicitly recognized the right of the United States to utilize self-defense. See S.C. Res. 1368, *supra* note 90; S.C. Res. 1373, *supra* note 90. Thus, primarily a military framework has been used by the United States in countries including Afghanistan, Pakistan and Yemen, with utilization of the Geneva Conventions (or parts of them) and use of military commission trials at the U.S. naval base in Guantanamo Bay, Cuba. See Jennifer Trahan, *Procedures for Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?*, 30 FORDHAM INT'L L. J. 780 (2007) (discussing some of the concerns with such military commission trials).

<sup>210</sup> See, e.g., Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435 (2005) (addressing whether the United States is, or was, fighting a Global War on Terror); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the War on Terror*, 27 FLETCHER F. WORLD AFF. 55 (2003) (arguing that international humanitarian law should be applied in situations of armed conflict). Some of the questions at issue include: “If this is a legitimate ‘war’ [against terror], who is the enemy? When did such a war commence—on September 11, 2001, or prior thereto? And when will such a war cease—or will it continue indefinitely, allowing the United States to apprehend suspected terrorists worldwide indefinitely?” Trahan, *Terrorism Conventions*, *supra* note 209, at 790. But see, e.g., John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 209-15 (2004) (asserting that the U.S. conflict with Al Qaeda qualifies as war, which justifies American use of military force).

<sup>211</sup> This author, however, does not imply that all responses to terrorism should necessarily be deemed acceptable under the U.N. Charter or beyond the scope of legal scrutiny.

exclude “borderline cases”<sup>212</sup> or those “falling within a grey area.”<sup>213</sup> Because of the legal uncertainty as to the parameters of what some have referred to as the “Global War on Terror” (“GWOT”) and whether the laws of war may properly apply beyond what appears to be a conventional battlefield—or whether beyond a conventional battlefield, criminal law should apply<sup>214</sup>—we are probably in a legal “grey” area, which suggests against prosecution.<sup>215</sup> This again illustrates the somewhat conservative nature of the definition of the crime.

*2.3. The Agreement on the Conditions for the Exercise of Jurisdiction over the Crime of Aggression Successfully Resolves the Role of the U.N. Security Council as to the Crime*

Glennon’s final major concern pertains to the role of the U.N. Security Council vis-à-vis ICC adjudications of the crime of aggression.<sup>216</sup> At the time he was writing, there were two major competing positions: (1) that the Security Council necessarily must be involved in determining whether a state had committed an “act of aggression” before the ICC could adjudicate the crime of aggression; and (2) a quite different view that to have the Security Council (a political body) play such an exclusive role would undermine the independence of the ICC (a judicial institution), and that the ICC is quite capable of determining for itself whether a state has committed an “act of aggression” in the course of adjudicating the crime of aggression. These issues had been contentiously debated over the years of the negotiations. (Other proposals, since rejected, included involving the International Court of Justice or the U.N. General Assembly in the initial

<sup>212</sup> February 2009 SWGCA Meeting, in *THE PRINCETON PROCESS*, *supra* note 17, at 51, ¶ 13.

<sup>213</sup> June 2008 SWGCA Meeting in *THE PRINCETON PROCESS*, *supra* note 17, at 87, ¶ 68.

<sup>214</sup> This author would primarily endorse the latter approach and reject the approach that the entire world may properly be considered a “battlefield” in responding to terrorism. It might be possible, however, to apply the laws of war not only to traditional battlefields (parts of Afghanistan and Pakistan), but also to members of Al Qaeda or the Taliban acting elsewhere who play a role in directing hostilities or have a “nexus” with them.

<sup>215</sup> Additional reasons against prosecution in debatable cases are discussed above. See *supra* note 124 and accompanying text.

<sup>216</sup> Glennon, *supra* note 1, at 102.

determination of whether a state had committed an act of aggression).<sup>217</sup>

Glennon presents various concerns about the dangers of including the Security Council in making aggression referrals (although, here, his concerns are not in fact ones states' delegations expressed during actual negotiations), and various concerns about excluding the Security Council (concerns delegations did in fact articulate).<sup>218</sup> Most of his arguments are moot, because neither situation has fully come to pass. As noted above, States Parties at the ICC Review Conference (subsequent to the publication of Glennon's article) reached a compromise regarding the conditions under which the ICC may exercise jurisdiction over the crime of aggression that permits, but does not mandate, Security Council involvement.<sup>219</sup> This compromise resolves or obviates most problems Glennon raises.

### 2.3.1. *The Perceived Danger of Including the Security Council in Making Aggression Referrals*

Glennon starts by raising concerns with having the Security Council be the exclusive entity that would initiate a case by either making a determination that an act of aggression had occurred, or making a more generic referral to the ICC.<sup>220</sup> Glennon argues that because the Security Council cannot be bound by the ICC definition, its referral would be "ex post facto," resting purely on a "policy judgment,"<sup>221</sup> and amount to a "political roulette wheel."<sup>222</sup> He argues that a "Security Council prosecutorial predicate would make a person *criminally responsible* under the Statute even though the conduct in question constitutes . . . a crime that is not within the jurisdiction of the court."<sup>223</sup> (While Glennon is assuming in this scenario that "only" the Security Council could make such referrals—an assumption now moot because the amendment does

<sup>217</sup> The various competing positions on jurisdiction are described in depth in THE PRINCETON PROCESS, *supra* note 17, and in Trahan, *Kampala Negotiations*, *supra* note 16.

<sup>218</sup> Glennon, *supra* note 1, at 102.

<sup>219</sup> See *supra* Section 1.2.

<sup>220</sup> Glennon, *supra* note 1, at 102.

<sup>221</sup> *Id.* at 103.

<sup>222</sup> *Id.* at 73.

<sup>223</sup> *Id.* at 104 (emphasis added).

not exclusively utilize Security Council referrals—this Article will nonetheless examine his concerns because the Security Council, under the jurisdictional regime agreed upon, still has the option of making a referral under the new Article 15 *ter*.)<sup>224</sup>

When Glennon argues that a “Security Council prosecutorial predicate would make a person *criminally responsible*,”<sup>225</sup> Glennon is confusing the “referral” by the Security Council and the substantive merits determination by the ICC. Assume the Security Council acts in some totally arbitrary way and makes an absurd aggression referral; whether an act of aggression was committed would be subject to full *de novo* review by the ICC.<sup>226</sup> No conviction results merely from the referral. In fact, as noted above, the Security Council determination will in no way bind the ICC.<sup>227</sup> Thus, if the Security Council is making a “policy judgment” in making its referral, it would neither bind the ICC nor “make a person criminally responsible.”<sup>228</sup> Furthermore, because Security Council referrals will be only one path by which an aggression case may commence—the ICC may also initiate cases after State Party referral or *proprio motu* action<sup>229</sup>—concerns of having a political body play such a role regarding a judicial institution (a concern expressed during negotiations) are certainly lessened.

To the extent Glennon suggests that the Security Council might make a referral in one case (case A) and not another (case B), when both situations appear to involve similar acts of aggression, and the decision would be “arbitrary” or “discriminatory,”<sup>230</sup> the problem is minimized because an aggression case may be triggered by two other methods—State Party referral or prosecutor initiation.<sup>231</sup> If

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<sup>224</sup> See *supra* Section 1.2.

<sup>225</sup> Glennon, *supra* note 1, at 104 (emphasis added).

<sup>226</sup> See *supra* note 164.

<sup>227</sup> *Id.*

<sup>228</sup> Glennon, *supra* note 1, at 104.

<sup>229</sup> See *supra* Section 1.2.

<sup>230</sup> See Glennon, *supra* note 1, at 103 (noting the Council’s broad leeway to render decisions and arguing that the Council’s decisions are ultimate *policy* judgments based on an ad hoc and subjective basis).

<sup>231</sup> Furthermore, there are other cases in which an intervening decision has to be taken before a prosecution may begin; for instance, a diplomat can be prosecuted if there is a waiver of immunity, and such waiver is discretionary. See E-mail from Pål Wrange, *supra* note 64. Thus, the fact of an intervening decision (even one that is discretionary) hardly shows procedural infirmity.

Glennon is really troubled by the Security Council's discretion to act in some situations and not others, would he condemn the Security Council's referral of the Darfur and Libya situations<sup>232</sup> because other referrals have not have been made?<sup>233</sup> The Security Council's referral ability, of course, was enshrined in the original Rome Statute,<sup>234</sup> and not the Kampala amendment.<sup>235</sup>

Admittedly, the field of international justice is not fully a level playing field. Why did the Security Council create an international tribunal for crimes committed in Rwanda (the ICTR), but not in the Democratic Republic of Congo ("DRC")? Why is there a hybrid tribunal for crimes committed in Cambodia (the Extraordinary Chambers in the Courts of Cambodia ("ECCC")),<sup>236</sup> but not in Afghanistan? One might argue that this situation is "arbitrary" or "discriminatory" (this author would argue it is political), but this kind of unequal enforcement of international criminal law presently exists.<sup>237</sup> This situation, however, does not suggest there should be no ICTR and ECCC prosecutions because there are no corollary tribunals for the DRC or Afghanistan. Nor does it suggest that there was anything wrong with the Security Council's two ICC referrals. Rather, it suggests the need for more

<sup>232</sup> See S/RES/1593 (2005), *supra* note 45, ¶ 1 (resolving to refer the situation in Darfur since July 2002 to the ICC Prosecutor); see also S/RES/1970 (2011), *supra* note 46, ¶ 4 (referring the situation in the Libyan Arab Jamahiriya since February 2011 to the ICC Prosecutor).

<sup>233</sup> For example, the Security Council has not made an ICC referral of the situation in Syria, despite high estimates of protesters being killed. See Khaled Yacoub Oweis, *Assad Forces Fire on Protesters Across Syria*, REUTERS, Aug. 2, 2011, available at <http://www.reuters.com/article/2011/08/02/us-syria-idUSTRE76T02020110802> (reporting on the lack of agreement amongst the Security Council regarding a resolution on the Syria uprising).

<sup>234</sup> See Rome Statute, *supra* note 2, art. 13(b) (granting ICC jurisdiction where the Security Council refers a situation involving a relevant crime to the ICC Prosecutor).

<sup>235</sup> See *supra* note 73 and accompanying text.

<sup>236</sup> The ECCC was created by agreement between the U.N. and the Government of Cambodia. See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. 41723.

<sup>237</sup> Parallels exist in the field of human rights, which has three regional human rights courts (the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court for Human and Peoples' Rights), but no human rights courts in other regions and no global human rights court.

internationalized judicial institutions, such as international or hybrid tribunals, and more focus on the rebuilding of national judiciaries to enable additional prosecutions. At the ICC level, it suggests one should strive for universal ratification of the Rome Statute, and, absent universal ratification, vigilant Security Council action to refer all appropriate situations to the ICC.

2.3.2. *The Perceived Danger of Excluding the Security Council in Making Aggression Referrals*

Glennon next argues that excluding the Security Council entirely from making aggression referrals—another possible option when he wrote his article, but one that is now moot—would also be problematic, because it would run afoul of the U.N. Charter.<sup>238</sup> Glennon (correctly) notes that under Article 39 of the Charter, the Security Council is authorized to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>239</sup> This led some states to argue that the Security Council necessarily had to be involved, or be the only body involved, in the determination of an “act of aggression,” but other states have argued that Article 39 concerns Chapter VII enforcement actions and does not necessarily apply in the context of criminal adjudications.<sup>240</sup>

To a fair degree, these issues are moot. Whereas it might have been possible to exclude the Security Council from playing any role in aggression referrals, for instance, under the theory that its powers are for purposes of Chapter VII enforcement and not criminal adjudication, such exclusion certainly ran a risk that the Rome Statute would be seen as contradicting the U.N. Charter. As noted above, in the event of contradiction, Article 103 of the Charter provides that the Charter would prevail.<sup>241</sup> Moreover,

<sup>238</sup> See Glennon, *supra* note 1, at 104 (arguing that there are three possible ways to interpret Article 39, none of which provide for the exclusion of the Security Council’s role).

<sup>239</sup> U.N. Charter art. 39.

<sup>240</sup> Glennon has labeled the various approaches “concurrent,” “preemptive” and “plenary” Security Council power to determine the existence of aggression, but this terminology was not used in the actual negotiations and will not be adopted here. Glennon, *supra* note 1, at 104–05.

<sup>241</sup> See *supra* note 86 and accompanying text. States may also have chosen to include a role for the Security Council out of more pragmatic, and not purely legal, considerations. See E-mail from Jutta Bertram-Nothnagel, *supra* note 36.

States Parties to the Rome Statute have not made Security Council determinations a necessary pre-requisite for ICC adjudication, which was seen to risk undermining the ICC's independence by giving a political body too much control over the docket of a judicial institution. The result reached—that the Security Council is one possible route to trigger ICC cases but there are other routes—was generally perceived as both respecting the Security Council's role and preserving the ICC's independence, and appears the best possible solution.

Glennon also raises the concern that the ICC and Security Council might come to opposite conclusions, suggesting this would lead to aspersions on the fact-finding or law-finding competence of the other institution.<sup>242</sup> First, because different bodies within the international system *do* have different competences, the potential for inconsistent determinations within the international legal system in fact already exists. The ICTY and ICC have jurisdiction over the crime of genocide, but the International Court of Justice ("ICJ") may adjudicate claims of genocide between states in civil cases; yet, there is no mechanism to harmonize these determinations. The same potential for conflict exists between the ICJ and Security Council, which both may examine boundary disputes.<sup>243</sup> Inconsistencies are a consequence of the diffuse nature of the international legal system, which involves various international bodies, with no overall appellate mechanism to harmonize results. Yet, the potential for inconsistent rulings has never been seen as reason for these institutions not to exercise jurisdiction.<sup>244</sup>

<sup>242</sup> Glennon, *supra* note 1, at 106 (arguing about the danger of contradictory findings).

<sup>243</sup> See, e.g., Case Concerning the Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 6 (Feb. 3) (adjudicating territorial claims between Chad and Libya over the Ouzou strip).

<sup>244</sup> The Security Council can also minimize such potentials for inconsistency by (i) making general referrals that do not mention the state act of aggression; (ii) utilizing the term "threat to the peace" to trigger Chapter VII action without opining on whether there has been an act of aggression in legal terms; and (iii) if there is ambiguity as to which state has committed an act of aggression, making a referral that does not specify which state is the aggressor state. E-mail from Pål Wrange, *supra* note 64. An alternative view might be that the quite distant danger that a Security Council determination would be reviewed by a judicial institution could be a good thing. *Id.* This author views the issue slightly differently; the

Second, the potential for conflict appears overstated: the ICC and Security Council will conduct different evaluations. The ICC will adjudicate the crime of aggression using the definition agreed upon at the Review Conference. The Security Council will act under its competence as to international peace and security, applying Article 39 for purposes of taking action under Chapter VII of the U.N. Charter. As to Glennon's suggestion that inconsistencies between the bodies would lead to aspersions on "the fact-finding or law-finding competence of the other," the Security Council does not conduct express fact-finding or law-finding in the way a judicial body does. Its resolutions are far less detailed than a criminal judgment, and, as explained above, the Security Council will not necessarily apply the ICC definition. The Security Council has historically rarely determined that an act of aggression has actually occurred,<sup>245</sup> and even if it makes an ICC aggression referral, it certainly has the option of making the referral without expressly finding that aggression occurred.<sup>246</sup>

Finally, Glennon concludes that an appropriate solution is only achievable with a U.N. Charter amendment<sup>247</sup>—a concern this author does not recollect being articulated over the more than ten years of aggression negotiations. Glennon is concerned both that the ICC could "get the jump" on the Security Council, and that the Security Council could make a determination opposite one earlier

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Security Council and ICC will be making different determinations, and thus the ICC will not sit in review of the Security Council.

<sup>245</sup> See *id.*

<sup>246</sup> Article 15 *ter* specifies no requirement that the Security Council make any express finding that there has been a state act of aggression. See New Def., *supra* note 4, art. 15 *ter*, ¶ 1 (providing that the Security Council may make a referral pursuant to Rome Statute art. 13(b)—which permits it to refer a "situation" to the court). See also Rome Statute, *supra* note 2, art. 13(b) (allowing the Security Council to refer "situations" to the Prosecutor and giving the International Criminal Court jurisdiction over those matters).

<sup>247</sup> See Glennon, *supra* note 1, at 107. Glennon also seems to confuse the amendment procedures, suggesting that Rome Statute Articles 121(4) and 121(5) would both be utilized simultaneously. See *id.* at 113. In fact, virtually every proposal (and the ultimate Amendment) used one provision or the other, but not both. Here again, Glennon's lack of attention to the actual negotiations is telling. While the so-called ABS Proposal (by Argentina, Brazil and Switzerland) made at the Review Conference did involve using both provisions, they would have pertained to different Rome Statute amendments. For the text of the ABS Proposal, see Trahan, *supra* note 16, at Appendix A.



made by the ICC.<sup>248</sup> He concludes that the Security Council would need a given period when it exclusively could act, but that would require a Charter amendment. First, the Review Conference outcome gives the Security Council the first opportunity to act in making a referral for an exclusive six month period,<sup>249</sup> yet that has been achieved by an amendment to the Rome Statute, not a Charter amendment. In terms of the Security Council making a determination opposite one earlier made by the ICC, it is true that the Security Council could stop an ICC aggression case that was proceeding, under Article 16 of the Rome Statute.<sup>250</sup> Yet an Article 16 decision by the Security Council could indicate that it viewed the proceedings as jeopardizing international peace and security, and not necessarily indicate a determination in substance contrary to the ICC's view on whether a state act of aggression had occurred. Furthermore, the ability of the Security Council to defer a proceeding was something agreed upon in Rome, not Kampala.<sup>251</sup> Lastly, Glennon worries that the ICC could go ahead with a prosecution despite an "implicit or explicit finding by the Security Council that no aggression had occurred."<sup>252</sup> This probably would be difficult because the Prosecutor would have to show a reasonable basis to proceed with the investigation, and the Court might not find that burden met in the wake of a Security Council determination that aggression did not occur—which the Court could consider, although it is not binding.<sup>253</sup> Moreover, if that were to occur, the Security Council would always have the option of using its deferral powers and stop the ICC from proceeding.<sup>254</sup>

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<sup>248</sup> See Glennon, *supra* note 1, at 107.

<sup>249</sup> See New Def., *supra* note 4, art. 15 *bis*, ¶¶ 6–8 (stating that a Prosecutor can only proceed in investigating a crime of aggression six months after the Prosecutor notifies the Security Council of plans to investigate).

<sup>250</sup> See Rome Statute, *supra* note 2, art. 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council . . . has requested the Court to that effect . . .").

<sup>251</sup> See *supra* text accompanying note 73.

<sup>252</sup> Glennon, *supra* note 1, at 109.

<sup>253</sup> See *supra* note 164 and accompanying text.

<sup>254</sup> In fact, a Security Council finding that no aggression has occurred, if it cites Rome Statute Article 16, would probably constitute a pre-emptive deferral that would stop the Court from acting in the first place. See *supra* note 250 and accompanying text.

Thus, Glennon's concerns about the role of the Security Council, which generally assume the Security Council has no role or an exclusive role in aggression referrals, are to a fair extent moot. The agreement reached, which will permit a Security Council role but not mandate one, has created a solution that is both consistent with the U.N. Charter and preserves the ICC's independence.

### 3. WHY THE AGREEMENT HAS NOT FAILED

At least eighty-four delegations from States Parties to the Rome Statute, who ultimately agreed by consensus vote at the Review Conference to the amendment on the crime of aggression, clearly view the amendment as a success. As Glennon admits, there is no reason why aggression "or any other crime, cannot be defined with sufficient specificity . . . ." <sup>255</sup> This final Section addresses Glennon's final arguments why agreement on the definition has purportedly failed.

Glennon argues that the reason agreement on the crime of aggression has proven elusive is "cultural and political," in that the world sees itself in terms of states "that see themselves historically as victims of aggression" and "states that do not see themselves as historic victims of aggression," and the views of these basic groups conflict making the "zone of potential agreement" between them "miniscule." <sup>256</sup> Since Glennon wrote his article, *that agreement was reached*, thereby mooting the crux of his argument. Glennon, however, is probably right to say that states see themselves either as potential victims of aggression or as potential aggressor states, but this diversity of views did not prevent agreement from being reached. How states view themselves may impact: (a) whether a State Party ratifies the aggression amendment (States Parties that see themselves as potential victim states, or as strong proponents of the rule of law and supporters of the ICC can be expected to ratify); (b) whether a State Party exercises an opt out declaration (States Parties that see themselves as potential aggressor states might be tempted to do so); or (c) whether a state continues to

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<sup>255</sup> Glennon, *supra* note 1, at 109. This statement contradicts Glennon's earlier criticism of those who "believe the crime of aggression is perforce capable of being defined." *Id.* at 72.

<sup>256</sup> Glennon, *supra* note 1, at 111.

remain outside the Rome Statute system, and is able to utilize the complete aggression jurisdiction exemption for non-States Parties (again, states that see themselves as potential aggressor states might be tempted to do so).<sup>257</sup> The jurisdictional agreement reached does not create a level playing field and uniform application of the rule of law (but neither did the original Rome Statute, whereby States Parties and non-States Parties are treated quite differently in terms of jurisdiction), but it was probably the best jurisdictional regime that could be negotiated under the circumstances.

Glennon's final lament is that the ICC risks developing into a potentially powerful international force "with interests antithetical to those of the United States."<sup>258</sup> The core focus of the ICC to date has been the prosecution of genocide, war crimes and crimes against humanity where the worst mass crimes occur.<sup>259</sup> This country should have no trouble supporting such prosecutions. Indeed, statements by U.S. War Crimes Ambassador Stephen J. Rapp suggest that is the case.<sup>260</sup> The United States should not view

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<sup>257</sup> This analysis assumes states are primarily concerned about the protection of their leaders from prosecution. One could envision a very different scenario where the state is concerned about becoming an aggressor state and therefore ratifies the amendment without an opt-out declaration to prevent aggression by its future leaders. E-mail from Jutta Bertram-Nothnagel, *supra* note 36.

<sup>258</sup> Glennon, *supra* note 1, at 112.

<sup>259</sup> The ICC, for example, is focusing its cases on atrocity crime situations such as large-scale use of child soldiers and horrific gender crimes of mass sexual violence. See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 12 (Jan. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> (proceeding against Lubanga, a former rebel leader in the Democratic Republic of Congo, tried for conscripting, enlisting, and using child soldiers); Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Confirmation of Charges, ¶¶ 71-72 & 210-212 (June 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (trying Bemba, alleged President and Commander in Chief of the MLC, for crimes against humanity and war crimes, including rape).

<sup>260</sup> Ambassador Rapp has stated:

[W]e recognized in March [2010] when we participated in the Assembly of States Parties in New York, *it's in our interest to support those [ICC] prosecutions*—not at this time as a member of the ICC, but in kind with assistance as long as it's consistent with our law. And at the same time that we support those prosecutions, also work on the whole of the international justice system, the key part of which is that that is below the level of the international system, the massive amount of work that needs to be done at the national level.

developments regarding the crime of aggression as “antithetical” to its interests; no country should have an interest in aggressive use of force. Nonetheless, this argument is largely academic because, as explained above, the United States, as a non-State Party, will be exempt from aggression jurisdiction.<sup>261</sup> Glennon concludes (as if approvingly) that “senior U.S. officials will nonetheless be safe because the United States is not a party to the Rome Statute,” characterizing the ICC as having the potential to be a “ruinous train wreck.”<sup>262</sup> Is it really praiseworthy that U.S. officials should be exempt from violating a core foundational norm of the U.N. system—Article 2(4)’s prohibition on the aggressive use of force? Is the ICC, with skilled judges selected by 121 States Parties (including some close U.S. allies) and a plethora of procedural protections to ensure fair trials,<sup>263</sup> really a potentially

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Special Briefing at U.S. Dep’t of State with Harold H. Koh, Legal Advisor, U.S. Dep’t of State, and Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State, *U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference*, in D.C. (June 15, 2010), transcript available at [http://www.state.gov/j/gcj/us\\_releases/remarks/143178.htm](http://www.state.gov/j/gcj/us_releases/remarks/143178.htm) (emphasis added).

<sup>261</sup> See *supra* notes 9–11 and accompanying text.

<sup>262</sup> Glennon, *supra* note 1, at 112–113.

<sup>263</sup> The Rome Statute requires the following comprehensive fair trial protections, including all the due process protections of the U.S. Bill of Rights, except for trial by jury:

- (i) the right to remain silent or to not testify against oneself (art. 67, ¶ 1(g));
- (ii) the right against self-incrimination (arts. 54, ¶ 1(a); 67, ¶ 1(g));
- (iii) the right to cross-examine witnesses (art. 67, ¶ 1(e));
- (iv) the right to be tried without undue delay (art. 67);
- (v) the protection against double jeopardy (art. 20);
- (vi) the right to be present at trial (arts. 63; 67, ¶ 1; 67, ¶ 1(c));
- (vii) the presumption of innocence (art. 66);
- (viii) the right to assistance of counsel (art. 67; ¶ 1(b), (d));
- (ix) the right to a written statement of charges (art. 61, ¶ 3);
- (x) the right to have compulsory process to obtain witnesses (art. 67, ¶ 1(e));
- (xi) the prohibition against ex post facto crimes (art. 22);
- (xii) the freedom from warrantless arrest and search (arts. 57, ¶ 3; 58);
- (xiii) the ability to exclude illegally obtained evidence (art. 69, ¶ 7).

“ruinous train wreck”? Why does Glennon suggest the ICC is dominated “by interests antithetical to those of the United States”?<sup>264</sup> Can he possibly mean to imply that the United States has more in common with non-States Parties such as China, Russia, Myanmar, and Iran rather than States Parties such as Canada, the U.K., Australia, and Japan? This author sees things very differently. The Assembly of States Parties should be commended for their historic accomplishment, which with time has the potential to change the international landscape by discouraging unnecessary uses of force and bringing the international community one step closer to full utilization of the collective system of international peace and security envisioned under the U.N. Charter.

#### 4. CONCLUSION

Despite technical errors and ignorance of the extensive negotiating history of the crime of aggression, Glennon in his article is asking interesting questions, ones that should have been debated within U.S. Government and academic circles long before now. That they were not debated appears largely to have been a result of the Bush Administration’s decision not to attend the negotiations of the Special Working Group on the Crime of Aggression—a squandered opportunity to shape the definition on a very significant issue. That more attention was not paid perhaps stemmed from an erroneous assumption that the negotiations would not be successful; indeed, for a while, the negotiations appeared squarely mired down in the conditions for the exercise of jurisdiction, while progress was still being made on the definition. Those who did not take the work of the Special Working Group seriously made a miscalculation. By the time the U.S. delegation (under the Obama Administration) started attending the negotiations,<sup>265</sup> the definition and elements of the crime were

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The above-listed fair trial rights compilation is found in AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT’L CRIMINAL COURT, SAFEGUARDS IN THE ROME STATUTE AGAINST ABUSE OF THE COURT TO HARASS AMERICAN SERVICEMEMBERS AND CIVILIAN OFFICIALS, 7 (2001), available at <http://www.amicc.org/docs/Safeguards.pdf> (last visited Apr. 1, 2012).

<sup>264</sup> Glennon, *supra* note 1, at 112.

<sup>265</sup> This author urged the United States to attend such negotiations. See Letter from Am. Branch of the Int’l Law Assn. Int’l Criminal Court Comm. to Harold H.

essentially complete, leaving the United States with no real role to play in their drafting.<sup>266</sup>

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Koh, Legal Advisor, U.S. Dep't of State, and Stephen J. Rapp, Ambassador-at-Large for War Crimes, U.S. Dep't of State (Mar. 19, 2010), *available at* [http://ila-americanbranch.org/reports/2010-03-19\\_ICC\\_Letter.pdf](http://ila-americanbranch.org/reports/2010-03-19_ICC_Letter.pdf) (last visited Apr. 1, 2012) (detailing the negotiations on the crime of aggression and differentiating between closed issues where it appeared too late for the United States to play an active role in negotiations and open issues on which the United States still had room to engage).

<sup>266</sup> The best the United States could achieve under the circumstances was what it did—concentrate on adding “Understandings” to the definition, four of which were adopted at the Review Conference, and engage in negotiations as to the conditions for the exercise of jurisdiction. The Understandings that the United States endorsed and which were adopted provide:

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.

New Def. Understandings, *supra* note 109. The Understandings in paragraphs 4–5 were already included in the proposed Understandings in an earlier Conference Room paper. See Review Conference of the Rome Statute, [Draft] *Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.1, Annex III, ¶ 4 *bis* (June 10, 2010).

Yet, while Glennon is asking provocative and interesting questions, it is also important to get the technical details correct. There is no point in reading paragraph 2 of the definition without the context of paragraph 1 (as he does), or ignoring the negotiating history with respect to the definition of the crime. Nor do his arguments that “planning” social security for military members might be the crime of aggression<sup>267</sup> help the debate, since they so obviously miss the mark. His arguments that self-defense and Chapter VII authorized enforcement actions fall within the term “act of aggression” also completely fail since they are authorized under the U.N. Charter and certainly permissible.<sup>268</sup> Finally, the fear-mongering aspect of his article has to be dispelled: (i) past U.S. actions will not be covered because the definition is not retroactive; (ii) future U.S. actions will not be covered while the United States is a non-State Party; (iii) even if the United States were to join the Rome Statute for purposes of the crimes of genocide, war crimes and crimes against humanity, it could still exercise an “opt out” declaration and avoid ICC aggression referrals triggered by State Party or *proprio motu* action; and (iv) as a permanent member of the Security Council, the United States already is in a position to ensure there is no Security Council aggression (or other) referral as to action on its territory or by its nationals. One can debate whether this ironclad exclusion of the United States from ICC aggression jurisdiction is a good thing or not—some states no doubt view it as reprehensible in placing the United States above the rule of law as to this crime—but this is how the amendment is structured.<sup>269</sup> It is time to accurately and

<sup>267</sup> Glennon, *supra* note 1, at 99.

<sup>268</sup> See *supra* Section 2.2.1 (discussing Glennon’s distortion of what constitutes an act of aggression).

<sup>269</sup> The U.S. delegation in Kampala, in its closing remarks delivered by State Dep’t Legal Adviser Harold H. Koh, made some suggestion of wanting to revisit some of the issues concluded at the Review Conference. Harold H. Koh, Legal Advisor, U.S. Dep’t of State, Closing Intervention at the Review Conference of the International Criminal Court (June 11, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/143218.htm>. Yet, in terms of avoiding ICC jurisdiction over U.S. nationals (assuming that was a major goal of the delegation), the United States clearly achieved that result. See Wrangle, *Of Power and Justice*, *supra* note 126, at 946 (stating that “a reluctance to submit its armed forces to international criminal law scrutiny may not be far-fetched for a country with wide exposure”).

If the United States is truly still concerned with aggression exposure, the real risk is arguably not from the ICC, but the possibility of national court aggression

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soberly assess the achievements of the ICC definition of the crime of aggression and the strengths (and weaknesses) of the conditions for the exercise of jurisdiction agreed upon at the ICC Review Conference. Glennon's article, while raising interesting questions, does not accomplish this.

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prosecutions. If that is the case, the United States might consider whether to advocate that in future amendments a primacy regime be created for the crime of aggression, so that national court aggression prosecutions might at least be tried before the ICC, which, with all its checks and balances and protection of defendants' fair trial rights, could well be the preferable forum for such adjudications. *See* Trahan, *supra* note 109 (discussing concerns with complementarity and the crime of aggression).