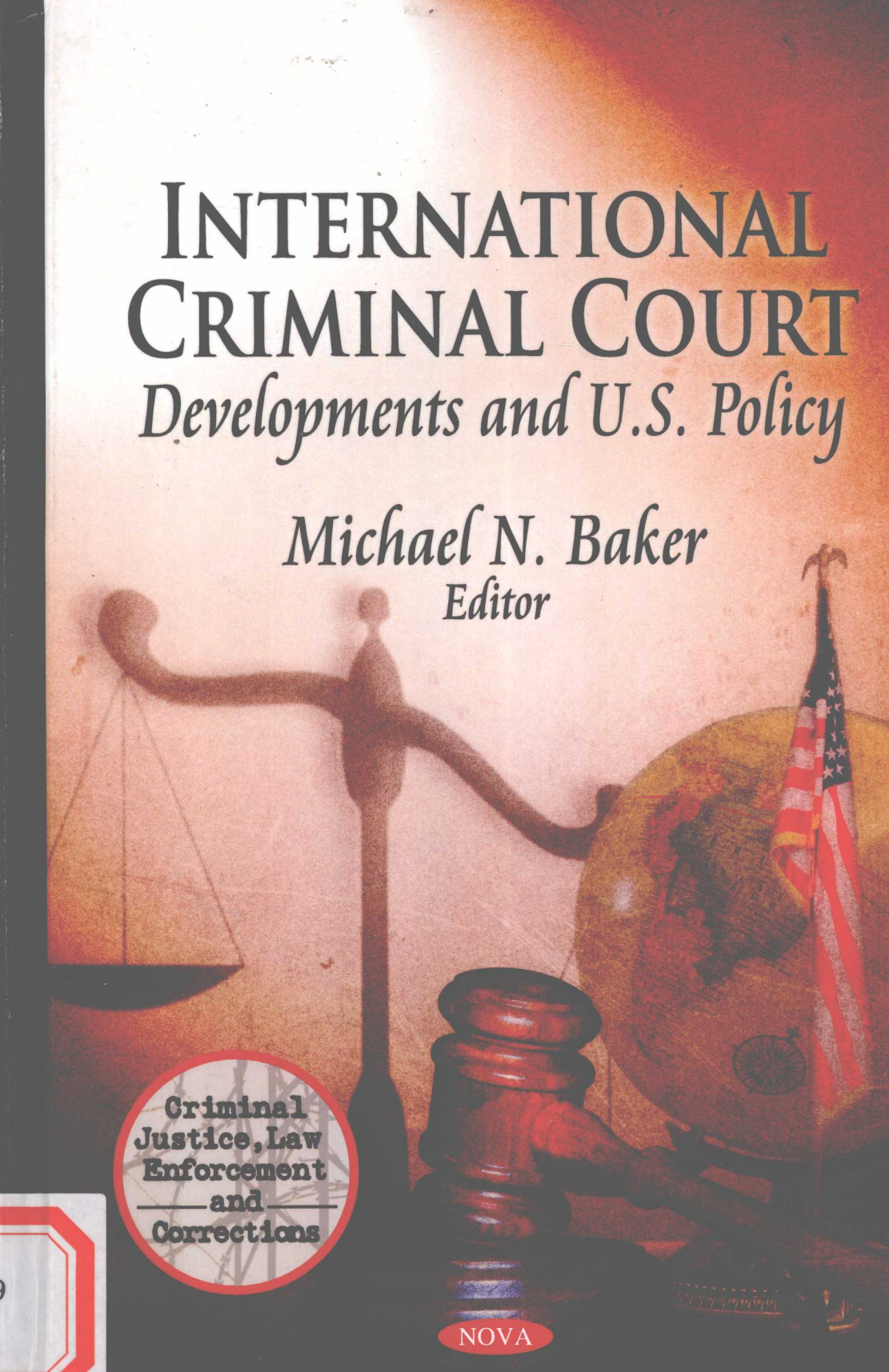


INTERNATIONAL CRIMINAL COURT

Developments and U.S. Policy

Michael N. Baker
Editor



**Criminal
Justice, Law
Enforcement
and
Corrections**

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CRIMINAL JUSTICE, LAW ENFORCEMENT AND CORRECTIONS

INTERNATIONAL CRIMINAL COURT: DEVELOPMENTS AND U.S. POLICY

MICHAEL N. BAKER
EDITOR



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PREFACE

The International Criminal Court (ICC) is the first permanent international court with jurisdiction to prosecute individuals for "the most serious crimes of concern to the international community." While the U.S. executive branch initially supported the idea of creating an international criminal court, the U.S. ultimately voted against the Statute of the ICC and informed the United Nations that the U.S. did not intend to become a State Party to the Rome Statute. The United States' primary objection to the treaty has been the potential for the ICC to assert jurisdiction over U.S. civilian policymakers and U.S. soldiers charged with "war crimes." This book focuses on the jurisdiction, extradition and U.S. policy of the International Criminal Court.

Chapter 1- The International Criminal Court (ICC, or Court) was established in 2002 as the first permanent court to prosecute war crimes, crimes against humanity, and genocide (together, "ICC crimes"). Pursuant to a provision in the Statute of the International Criminal Court ("Rome Statute" or "Statute"), the States Parties to the Rome Statute agreed to review the Court's activities seven years after its establishment. In compliance with this provision, the States Parties convened a Review Conference in Kampala, Uganda, May 31–June 11, 2010.

After declining to officially participate in the activities of the ICC or in the sessions of the Rome Statute's Assembly of States Parties (ASP) since the Court was established in 2002, the United States shifted its stance and began attending ASP meetings as an observer in November 2009, signaling a new policy of engagement with the ICC. At the Review Conference, the United States participated fully as an observer.

Chapter 2- The International Criminal Court (ICC) has, to date, opened cases exclusively in Sub-Saharan Africa. Twenty-two cases are currently before the ICC, all of them pertaining to crimes allegedly committed in five African states: Kenya, Sudan (Darfur), Uganda (the Lord's Resistance Army, LRA), the Democratic Republic of Congo, and the Central African Republic. The ICC Prosecutor has yet to secure any convictions. In addition, the Prosecutor has opened an investigation in Libya as well as preliminary examinations in Guinea, Nigeria, Côte d'Ivoire, and several countries outside of Africa, such as Afghanistan, Colombia, Georgia, Honduras, and the Republic of Korea. Although ICC prosecutions have been praised by human rights advocates, the perception that the Court has focused on Africa and the ICC Prosecutor's choice of cases have been controversial among leaders and commentators on the continent.

The Statute of the ICC, also known as the Rome Statute, entered into force on July 1, 2002, and established a permanent, independent Court to investigate and bring to justice individuals who commit war crimes, crimes against humanity, and genocide. As of October 2010, 114 countries—including 31 African countries, the largest regional block—were parties to the Statute. The United States is not a party.

Chapter 3- The International Criminal Court (ICC) is the first permanent international court with jurisdiction to prosecute individuals for “the most serious crimes of concern to the international community.” Currently, 110 countries are States Parties to the ICC. Since its inception in 2002, the ICC has received three referrals for investigations by States Parties and one referral from the United Nations Security Council.

Chapter 4- The United States is not a party to the ICC, and is unlikely to become a party anytime soon. Nonetheless, the United States had interests at stake in the discussions at Kampala. The principal focus of the Kampala Conference was consideration of proposals to add to the ICC's jurisdiction a new crime of aggression, some of which could have seriously affected uses of military force by the United States and its allies. The United States also had an interest in better understanding the state of the ICC's work generally, and its prospects for making an effective contribution to promoting accountability for genocide, war crimes, and crimes against humanity. In this regard, the United States, under both the George W. Bush and Obama administrations, has supported the ICC's investigation of such crimes in Darfur, pursuant to a 2005 referral by the U.N. Security Council.

Chapter 5- As my colleague Ambassador Stephen Rapp noted earlier this week, the United States comes to this Conference in the spirit of renewed

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engagement, with the aims of supporting a constructive outcome that is based on consensus, that strengthens the Court as an institution, and that advances the cause of human rights and international criminal justice. We are engaged in a complex exercise of making international criminal law for the real world. To be a success, this Review Conference must promote a principled, workable system of international criminal justice that is consistent with existing international law and institutions and fair both to victims of abuse and to individuals who may eventually be prosecuted for the crime of aggression. We cannot credibly claim success if we produce an unworkable and divisive compromise that weakens the Court, diverts it from its core human rights mission, or undermines our multilateral system of peace and security.

Chapter 6- The conference completed three main tasks. It endorsed and supported the court's core work with respect to the traditional crimes of genocide, war crimes, and crimes against humanity, and highlighted issues of state cooperation, peace and justice, stocktaking, and participation of victims, about which Ambassador Rapp will say more. It also adopted two new crimes, prohibition and non-international armed conflict of certain weapons, the so-called Belgian amendment, and a crime of aggression whose elements will be reconsidered and affirmatively considered after seven more years.

CONTENTS

Preface		vii
Chapter 1	International Criminal Court and the Rome Statute: 2010 Review Conference <i>Matthew C. Weed</i>	1
Chapter 2	International Criminal Court Cases in Africa: Status and Policy Issues <i>Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Matthew C. Weed</i>	35
Chapter 3	The International Criminal Court (ICC): Jurisdiction, Extradition and U.S. Policy <i>Emily C. Barbour and Matthew C. Weed</i>	69
Chapter 4	International Criminal Court Review Conference Kampala, Uganda <i>Committee on Foreign Relations, U.S. Senate</i>	109
Chapter 5	Statement of Harold Hongju Koh, Legal Adviser, U.S. Department of State at the Review Conference of the International Criminal Court	135
Chapter 6	Special Briefing- Harold Hongju Koh- Legal Advisor, U.S. Department of State and Stephen J. Rapp- Ambassador-at-Large for War Crimes Issues	141
Index		155

Chapter 1

**INTERNATIONAL CRIMINAL COURT
AND THE ROME STATUTE:
2010 REVIEW CONFERENCE***

Matthew C. Weed

SUMMARY

ICC Review Conference and U.S. Engagement

The International Criminal Court (ICC, or Court) was established in 2002 as the first permanent court to prosecute war crimes, crimes against humanity, and genocide (together, “ICC crimes”). Pursuant to a provision in the Statute of the International Criminal Court (“Rome Statute” or “Statute”), the States Parties to the Rome Statute agreed to review the Court’s activities seven years after its establishment. In compliance with this provision, the States Parties convened a Review Conference in Kampala, Uganda, May 31–June 11, 2010.

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2009, signaling a new policy of engagement with the ICC. At the Review Conference, the United States participated fully as an observer.

Issues Considered at the 2010 ICC Review Conference

Proposals in the Review Conference's agenda had broad possible ramifications for U.S. interests, and provided an opportunity for the United States to assess its policy toward the Court. Review Conference participants considered adding the crime of aggression to the ICC's jurisdiction, which would allow prosecution of state officials for using armed force against another state. The United States opposed this proposal for a number of reasons, including the possibility that U.S. officials might be prosecuted for their decisions. These concerns parallel the U.S. concerns over the possible prosecution of U.S. officials and servicemembers for the other ICC crimes. The question of ICC aggression jurisdiction was the most contentious for the Review Conference. States Parties argued over two central issues for activation of ICC aggression jurisdiction:

- whether both aggressor and victim state consent would be necessary to grant ICC jurisdiction over an instance of alleged criminal aggression; and
- the extent to which the U.N. Security Council should control the Court's exercise of aggression jurisdiction.

The States Parties adopted new jurisdiction provisions after several compromises, including delayed implementation and restricted application of the Court's aggression jurisdiction, and allowing states to opt out of ICC aggression jurisdiction.

The Review Conference agenda also included a number of discussions assessing the effect of the ICC on international criminal justice, especially with regard to crime victims and affected communities, and States Parties' cooperation with the ICC. During the Conference, the U.S. delegation demonstrated its new policy of engagement, pledging in-kind support for existing ICC cases and investigations, and for the development of States Parties' judicial-system capacity to prosecute ICC crimes. U.S. officials have since expressed support for the ICC, stating that it is now the global focal point for international criminal justice.

Possible Congressional Actions Concerning the New U.S.-ICC Policy

U.S. officials have asserted that this new policy of engagement with the ICC complies with U.S. law concerning the U.S.-ICC relationship, including the American Servicemembers' Protection Act of 2002 (ASPA), which was broadly intended to limit U.S. cooperation with and prohibit U.S. funding for the Court. In light of existing law and new ICC engagement, Congress may opt to take certain actions, including

- conducting hearings to better inform Members of Congress about
- the possibility of the United States becoming party to the Rome Statute in the wake of the changes to the Statute made at Kampala;
- the implications for U.S. interests, especially U.S.-servicemember security, of the adoption of ICC aggression jurisdiction;
- the new U.S.-ICC relationship; and
- executive branch compliance with the ASPA and other legislation;
- adding executive-branch reporting requirements on U.S. cooperation with the ICC and its basis in U.S. law, as well as developments in ICC practice related to changes in the Rome Statute adopted by the Review Conference; and
- amending existing legislation to direct the U.S.-ICC relationship, including dealing with ICC aggression jurisdiction and other changes to the Rome Statute.

BACKGROUND

U.S. Policy Toward the ICC¹

The International Criminal Court ("ICC" or "Court") is a permanent international court that currently has jurisdiction to prosecute individuals for war crimes, crimes against humanity, and genocide (together, "ICC crimes"). Cases may be referred to the Court by States Parties or by the U.N. Security Council, and the ICC prosecutor may on his own initiative request authorization to investigate possible ICC crimes. The ICC was created upon entry into force of the Statute of the International Criminal Court ("Rome Statute" or "Statute"), on July 1, 2002. One hundred and fourteen countries are States Parties to the Statute.² The United States, however, is not a party to the Statute.

The United States was an initial supporter of the creation of the ICC and played a major role at the international conference that negotiated and finalized the Rome Statute in 1998. President William J. Clinton signed the Rome Statute in 2000 but stated that he would not transmit it to the Senate requesting its advice and consent due to a number of U.S. concerns, primarily the potential for the ICC to assert jurisdiction over U.S. officials and members of the U.S. Armed Forces, even if the United States was not a Party to the Rome Statute. In May 2002, President George W. Bush notified the United Nations that the United States did not intend to become Party to the Rome Statute. The United States also concluded bilateral immunity agreements (BIAs) with approximately 100 countries. These BIAs were intended to fall within the provisions of Article 98 of the Statute, which exempts a state from surrendering individuals to the ICC if such actions would violate the international treaty obligations of that state.³

Congress passed legislation restricting U.S. cooperation with the ICC. On August 2, 2002, President George W. Bush signed the American Servicemembers' Protection Act of 2002 (ASPA).⁴ It generally prohibits U.S. government cooperation with the ICC by

- restricting the use of appropriated funds to assist the ICC;
- restricting U.S. participation in certain U.N. peacekeeping operations due to possible ICC prosecution; and
- authorizing the President to free members of the U.S. Armed Forces and other individuals detained or imprisoned by or on behalf of the ICC.

Section 2015 of the act creates an exception from the prohibition on assisting the ICC in order to bring to justice foreign nationals accused of ICC crimes.⁵

The U.S. stance toward the Court seemed to soften during President George W. Bush's second term, as the United States began to treat the ICC as a potentially effective tool for international criminal justice. In 2008, for instance, the United States did not prevent adoption by veto of a U.N. Security Council resolution referring a war crimes case to the ICC prosecutor for investigation into atrocities in the Darfur region of Sudan.⁶ Under the Obama Administration, U.S. officials have been generally supportive of the ICC, while cautioning that the United States maintains its concerns about the threat the Court poses to U.S. officials and members of the Armed Forces, and that U.S. ratification of the Statute is not currently an option. In November 2009,

the United States for the first time attended a meeting of the Assembly of States Parties (ASP) of the International Criminal Court as an observer. Upon announcement of U.S. participation, Stephen Rapp, U.S. ambassador-at-large for war crimes issues, stated that “[the U.S.] government has now made the decision that Americans will return to engagement with the ICC.”⁷ At the November ASP meeting, Ambassador Rapp stated that the United States would also participate in the ICC Review Conference scheduled to take place in 2010.⁸

ICC Review Conference Planning and Agenda

Paragraph 1 of Article 123 of the Rome Statute requires the convening of a review conference:

Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5 [the crime of genocide; crimes against humanity; war crimes; and the crime of aggression]. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

Soon after the creation of the ICC, the ASP created a Working Group of the Review Conference to evaluate various issues, amendments, and potential agenda items for the required review conference. Several years of the Working Group’s meetings and work provided guidance for the ASP’s decision making concerning the Review Conference’s agenda and the content of the proposed resolutions and other Review Conference agenda items. On November 21, 2008, the ASP adopted a resolution approving an application from the government of Uganda to hold the Conference in Uganda’s capital, Kampala.⁹ In two resolutions adopted November 26, 2009, and March 25, 2010, respectively, the ASP resolved to convene the Review Conference and determined the primary elements of the Review Conference’s agenda.¹⁰

The agenda for the Review Conference included a number of issues and proposals slated for action by the States Parties, including making amendments to the Rome Statute. The central agenda item was consideration of new provisions to define and activate ICC jurisdiction over the crime of aggression, which involves actions of a state official or leader that cause the

use of armed force against another state. The Review Conference would also consider a proposal to remove Article 124 from the Statute, which allowed a new State Party to exempt itself from ICC jurisdiction for the first seven years after becoming party to the Statute. In addition, there was a proposal to include within the definition of war crimes the use of certain poisonous or asphyxiating substances as well as certain types of bullets in non-international conflicts.¹¹ Finally, the agenda called for the Conference to convene discussions to take stock of the work of the ICC to date and its effects on international justice and other issues. These so-called “stocktaking” exercises included sessions on

- the obligations of States Parties to cooperate with the ICC and each other to effect international criminal justice;
- the efforts to improve States Parties’ national judicial systems’ respective capacity to prosecute individuals for war crimes, crimes against humanity, and genocide under the principle of “complementarity”;¹²
- the effect of the Rome Statute system on victims of and communities affected by crimes under the ICC’s jurisdiction; and
- the relationship between engaging in peace processes and pursuing international criminal justice.

CRIME OF AGGRESSION

The central issue considered by the Review Conference was the proposed adoption of the crime of aggression into the jurisdiction of the Court. This section reviews the primary issues and points of contention concerning the ICC’s proposed aggression jurisdiction. It includes

- an overview of different states’ and other stakeholders’ positions on the Court’s aggression jurisdiction;
- a discussion of the proposed and adopted definition of the crime of aggression and the issues surrounding such definition; and
- a discussion of the provisions that set out the Court’s jurisdiction over aggression, including the provisions as proposed, the main issues of contention for the Review Conference, and the jurisdictional provisions as they were ultimately adopted by the Conference.

During negotiations to finalize the Rome Statute in 1998, some countries' delegations to the conference wished to include aggression as one of the crimes under the ICC's jurisdiction in order to empower the ICC to end impunity for waging aggressive war in violation of international law generally and the U.N. Charter in particular. The participants could not agree on the definition and jurisdiction provisions of aggression, however, and thus included aggression as a crime included in the Rome Statute but not yet defined or activated. Article 5, paragraph 1 of the Rome Statute, lists the international crimes within the Court's jurisdiction: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Paragraph 2 of Article 5 states that the Court will exercise jurisdiction over aggression after it has adopted a provision defining the crime and setting conditions for the exercise of jurisdiction over the crime. Article 123 states that such an addition to the Rome Statute must be considered and adopted at a Review Conference.

In anticipation of the Review Conference mandated by the Rome Statute, the ASP created a Special Working Group on the Crime of Aggression (SWG) in 2002. The SWG was tasked with creating working proposals for amendments to the Rome Statute defining the crime of aggression and the Court's exercise of jurisdiction over the crime. The context within which the SWG undertook its work presented a number of challenges. First, the Court's three operative crimes (war crimes, crimes against humanity, and genocide) had been prosecuted in numerous cases before ad hoc international criminal tribunals and national courts in the decades prior to their inclusion in the Rome Statute. Aggression jurisprudence, on the other hand, has been frozen since the late 1940s, when several German and Japanese officials were prosecuted under the crime of aggressive war. Since the advent of the Cold War, no aggression prosecutions have been undertaken. The SWG, therefore, had no clear and current international practice on which to rely with respect to defining and exercising jurisdiction over the crime of aggression when compared with the three more established crimes. Second, since the end of the Cold War, international recognition has expanded for certain uses of force, including foreign military action to stop atrocities taking place within the borders of a country. Overall, U.N.-mandated peacekeeping operations have greatly increased in number since 1991. Any consideration of prosecuting illegal uses of force is complicated by the growing acceptance of military action considered acceptable by the international community. Third, while war crimes, crimes against humanity, and genocide are *jus in bello* crimes, that is, crimes committed during an armed conflict, aggression is a *jus ad bellum* crime, involving a determination of the legality of the decision to initiate the

armed conflict itself. Fitting a *jus ad bellum* crime into the established procedures and jurisdictional practice of three *jus in bello* crimes might prove difficult.

A number of observers and governments, including the United States, have voiced opinions over the perceived benefits and risks of including the crime of aggression in the ICC's jurisdiction, and the possible effect on the operation of the ICC overall. Leading up to and during the Review Conference, several States Parties, as well as the United States as observer, opposed adoption of jurisdictional provisions for aggression if consensus among States Parties could not be achieved.¹³ Any decision taken without consensus, they argued, might result in permanent discord among States Parties and reduced State Party cooperation with the Court. There was sentiment among some participants that the Review Conference would be the last opportunity to activate aggression as an ICC crime; these participants believed that consensus was less important than adopting the provisions activating the aggression crime to reduce illegal military action as soon as possible. Analysts have also argued that the addition of a new crime at this point in the ICC's development might cause the Court to be overburdened with a set of new cases when it still has not completed a trial. In addition, some argued that adopting aggression might prevent the ICC from meeting the goal of universal acceptance of its jurisdiction, as several major powers, including the United States, China, Russia, and India, already had concerns about ICC jurisdiction over the crime. Activating aggression may cause one or more of these countries to foreclose the possibility of becoming States Parties to the Rome Statute. In addition, many, including State Department Legal Adviser Harold Koh, have argued that any determination over the propriety of military action is inherently political, and that the ICC would weaken its reputation as an impartial judicial body if it embroiled itself in political disputes between parties to armed conflict.¹⁴

In addition, U.S. officials have expressed concerns about the ICC's jurisdiction over aggression that are specific to the interests of the United States. These officials have pointed to the special position that the United States occupies as the "sole global superpower," and the fact that the United States is expected to use its military more frequently than other countries because in many instances it is uniquely capable of meeting international security challenges. If the ICC gains the ability to prosecute government officials for their decisions to take military action, they have argued, U.S. decision makers would be disproportionately at risk of prosecution, possibly for political reasons. U.S. officials and some analysts have asserted that with

the ICC's activation of the crime of aggression, U.S. officials charged with making national and international security decisions might hesitate to initiate military action for fear of later ICC prosecution and punishment. Also, as with the three crimes currently operative under the Rome Statute, the Department of Defense has remained concerned over the possibility that the ICC will prosecute members of the U.S. Armed Forces for carrying out military operations abroad. Ambassador Rapp has stated that if these concerns are not properly addressed prior to adoption of new aggression provisions, the chances for universal acceptance of ICC jurisdiction by all countries, a primary goal of the ICC and its supporters, will be diminished.¹⁵ Commentators have interpreted this to mean that the United States would not become party to the Rome Statute if aggression provisions are adopted that are not acceptable to the United States.¹⁶

During the Review Conference, the States Parties to the Rome Statute reached consensus on proposed amendments both to define the crime of aggression and to set out the circumstances and procedures under which the ICC may exercise jurisdiction over the crime. The following two sections evaluate the amendments as adopted in relation to arguments made and concerns expressed about such amendments, and the extent to which such concerns, especially those of the United States, were addressed by the Review Conference.

Definition of the Crime of Aggression

Over several years, the SWG developed the definition of the crime of aggression eventually proposed at the Review Conference, with the input of not only States Parties but also other stakeholders such as observer nations and relevant non-governmental organizations (NGOs). The definition of the act of aggression, which makes up part of the overall definition of the crime of aggression within the amendment, as well as a list of examples of uses of armed force constituting an act of aggression, are based on a U.N. General Assembly resolution adopted by consensus in 1974 with the general support of the United States.¹⁷ It was widely accepted among observers that the SWG had succeeded in producing consensus among States Parties for the definition as proposed prior to the Review Conference, and the amendment was adopted at the Conference without changes.