

JULIE VEROFF

Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward

ABSTRACT. In June 2010, after more than a decade of negotiation, the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC) agreed on a definition of the crime of aggression. But the Assembly failed to address a critical issue: whether and how prosecutions for aggression fit within the ICC's complementarity regime. That regime positions the ICC as a court of last resort; domestic prosecutions are preferred except in a very narrow set of circumstances. Thus, an aggressed state could conceivably prosecute, in its own courts, the nationals of an aggressor state. This Note argues that the crime of aggression is a poor fit with the general complementarity regime, creating major tensions. Policymakers have so far overlooked the problem, despite its potential implications for international peace and security, as well as the ICC's legitimacy. On the one hand, domestic prosecutions of the crime of aggression pose serious risks to international political stability. At the same time, bringing aggression prosecutions only at the ICC would create its own difficulties, such as incomplete concurrence between proceedings at the domestic level and proceedings at the ICC. Because the aggression amendments to the Rome Statute will take effect in 2017, policymakers must address the complementarity question, and soon. After diagnosing the dilemma, this Note offers several recommendations for a way forward.

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INTRODUCTION

In 2010, the Assembly of States Parties (ASP)¹ to the Rome Statute of the International Criminal Court (ICC) finally agreed on a definition for the crime of aggression after years of deliberations.² The ASP adopted the Rome Statute, the treaty creating the ICC, in 1998, but the crime of aggression proved too contentious. The ASP failed to reach a consensus on its definition or jurisdictional regime. Rather than allow that division to derail the entire treaty, the ASP punted on the issue of aggression by writing a promise into the Rome Statute that it would eventually return to it.³ Until that time, the ICC could exercise jurisdiction only over war crimes, crimes against humanity, and genocide.⁴ More than a decade passed before the ASP, meeting in Kampala, Uganda, fulfilled its promise and amended the Rome Statute to define the crime of aggression and the conditions for the ICC's jurisdiction over it.

The Kampala Amendments to the Rome Statute defined the crime of aggression as “the planning, preparation, initiation or execution” by a high-level official “of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”⁵ When committed by the armed forces of one state against another state, examples of acts that would qualify as “aggression” include invasion or attack, bombardment, blockade of ports or coasts, and sending mercenaries to carry out acts of armed force.⁶ The ASP also agreed to jurisdictional rules governing the crime and adopted a set of Understandings⁷ touching on Security Council

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1. The ASP is a legislative body composed of representatives of the states that have ratified and acceded to the Rome Statute. It is responsible for managing and overseeing the ICC. *Assembly of States Parties*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx [<http://perma.cc/A7JX-V3ZN>].
 2. Assembly of States Parties Res. RC/Res.6, annex III (June 11, 2010) [hereinafter *Kampala Amendments*], http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [<http://perma.cc/98GE-75NN>].
 3. Rome Statute of the International Criminal Court art. 5(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*] (“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.”).
 4. *Id.* art. 5(1).
 5. *Kampala Amendments*, *supra* note 2, annex I.2.
 6. *Id.*
 7. For a discussion of the legal status of the seven Understandings adopted at Kampala, see generally Kevin Jon Heller, *The Uncertain Legal Status of the Aggression Understandings*, 10 J. INT'L CRIM. JUST. 229 (2012).

referrals, temporal jurisdiction, domestic jurisdiction, and the nature of an aggression determination.⁸

There were many difficult issues on the table in Kampala, as one might expect from a gathering that followed more than twelve years of debate. Yet the ASP devoted scant attention to a critically important issue: whether and how aggression fits within the ICC's complementarity regime. Complementarity positions the ICC as a court of last resort. Domestic prosecutions are strongly preferred over ICC prosecutions in all but a very narrow set of circumstances.

The crime of aggression could give rise to three types of domestic prosecutions. First, a state could prosecute its own nationals, such as the principals of a former regime. This type of prosecution is unlikely to provoke the concerns that animate this Note. Second, a state with no real connection to an act of aggression could prosecute under extraordinary bases of jurisdiction, such as universal jurisdiction. This type of prosecution has the potential to cause acute political problems, but is unlikely to occur given evidentiary and procedural barriers. Finally, an aggressed state could prosecute the nationals of an aggressor state. This last type of prosecution—in which one state accuses another state of aggression—will likely prompt the most international debate and warrants concern. Such prosecutions could destabilize conflict management and resolution efforts, deter states from undertaking certain military forms of humanitarian intervention, and even undermine the ICC's legitimacy and stability.⁹

At the same time, deviating from the standard complementarity framework for the crime of aggression by discouraging domestic prosecutions would create its own set of problems, such as incomplete concurrence between domestic and ICC proceedings. Moreover, the victim state's ability to prosecute the nationals of an aggressor state may be critical to deterring aggression. Relying primarily or solely on the ICC to prosecute aggression would likely result in fewer prosecutions than would take place if states could also prosecute. By extension, the deterrent power created by the crime's inclusion in

8. See Kampala Amendments, *supra* note 2, annex III.

9. See Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257, 277 (2015) ("Imagine two states at war, each making accusations of aggression against the other: it is all too predictable how an aggression case would come out. The leader of one state would likely be held criminally liable in the domestic courts of the other. But would the interests of the international community in either peace or justice be promoted by establishing a norm that promotes such cases or domestic prosecutions in third states?"); Sarah Sewall, Under Sec'y for Civilian Sec., Democracy, & Human Rights, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The ICC Crime of Aggression and the Changing International Security Landscape (Apr. 9, 2015), <http://www.state.gov/j/remarks/240579.htm> [<http://perma.cc/DJ9H-8C68>].

the Rome Statute might be weakened and the uptake of an international antiaggression norm slowed.

In sum, the ASP faces a difficult choice laden with tradeoffs: if it situates the crime of aggression within the ICC's longstanding complementarity regime, it risks destabilization and threats to the ICC's legitimacy. But if the ASP rejects complementarity for the crime of aggression and limits or bans domestic prosecutions in favor of ICC prosecutions, it might spark complicated procedural issues and weaken the crime's deterrent effect and normative power.

The other Rome Statute crimes—genocide, war crimes, and crimes against humanity—do not pose similar challenges vis-à-vis complementarity. Individuals may be held liable for these atrocity crimes without formally implicating the state. In contrast, the crime of aggression inextricably intertwines individual liability with state action.¹⁰ First, by definition, only high-level leaders can commit aggression.¹¹ Second, the crime necessarily involves at least two states.¹² Finally, liability for aggression hinges on a finding that a state committed an act of aggression. These conditions dramatically raise the political stakes of a domestic prosecution for aggression, but need not be present for atrocity prosecutions.¹³

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10. See Edoardo Greppi, *State Responsibility for Acts of Aggression Under the United Nations Charter: A Review of Cases*, in *INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW* 499, 499 (Roberto Bellelli ed., 2010) (“[T]here cannot be individual responsibility for the crime of aggression unless the state concerned has international responsibility for aggression.”); Nidal Nabil Jurdi, *The Domestic Prosecution of the Crime of Aggression After the International Criminal Court Review Conference: Possibilities and Alternatives*, 14 *MELB. J. INT’L L.* 1, 3 (2013) (noting that the crime of aggression requires “an act of aggression, which was historically inextricably linked to acts of state”).
 11. Kampala Amendments, *supra* note 2, annex I (limiting crimes of aggression to conduct by “person[s] in a position effectively to exercise control over or to direct the political or military action of a State”); see also Greppi, *supra* note 10, at 499 (“[T]he crime of aggression is a leadership crime, the result of acts committed by state officials, in particular by those who are in a position of high political and/or military responsibility, putting them in a position of authority in the decision-making process.”).
 12. See Jennifer Trahan, *Is Complementarity the Right Approach for the International Criminal Court’s Crime of Aggression? Considering the Problem of “Overzealous” National Court Prosecutions*, 45 *CORNELL INT’L L.J.* 569, 587 (2012). Though it is possible that charges of genocide, war crimes, or crimes against humanity could implicate conduct between two or more states, the majority of the ICC’s cases to date have involved “crimes committed by someone within one country against nationals of that country.” *Id.* at 588.
 13. Genocide is defined as one or more of several enumerated acts—including killing, causing serious bodily or mental harm, and deliberately inflicting life conditions calculated to bring about a group’s destruction—“committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Rome Statute, *supra* note 3, art. 6. A crime against humanity is defined as one or more of several enumerated acts “when committed as

The unique tension between aggression and complementarity demands the international community's attention. In 2004, the Special Working Group on the Crime of Aggression¹⁴ advised the ASP that the question of fit between aggression and complementarity "merited being revisited" once the ASP agreed on a definition of aggression and the conditions for the ICC's exercise of jurisdiction.¹⁵ The ASP, however, has failed to heed this call. Even after the Kampala Review Conference, the important and complex issues surrounding complementarity and the crime of aggression have remained undertheorized and underdiscussed.

The Kampala Amendments are scheduled to come into force in 2017.¹⁶ The tensions between the crime of aggression and complementarity are therefore

part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." *Id.* art. 7. War crimes are, inter alia, "[g]rave breaches of the Geneva Conventions of 12 August 1949" and "[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law." *Id.* art. 8.

14. The Special Working Group on the Crime of Aggression was created by the ASP at its first meeting. Roger S. Clark, *The Crime of Aggression*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 709, 710 (Carsten Stahn & Göran Sluiter eds., 2009). For its reports and related materials, see *History of the Special Working Group on the Crime of Aggression*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/crime%20of%20aggression/Pages/History-CoA.aspx [<https://perma.cc/2L6M-QANE>].
15. 2004 Princeton Report, reprinted in *THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION* 429, 434 (Stefan Barriga & Claus Kreß eds., 2012).
16. Article 15 *bis* and Article 15 *ter* provide that the ICC shall only exercise jurisdiction over the crime of aggression once at least thirty States Parties have ratified or accepted the amendments and that same majority of States Parties agree to activate the ICC's jurisdiction after January 1, 2017. Kampala Amendments, *supra* note 2, annexes I.3 & I.4. To date, twenty-four States Parties have ratified the amendments (Andorra, Austria, Belgium, Botswana, Costa Rica, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Germany, Latvia, Liechtenstein, Luxembourg, Malta, Poland, Samoa, San Marino, Slovakia, Slovenia, Spain, Switzerland, Trinidad and Tobago, and Uruguay). United Nations Treaty Collection, Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court 1 (Sept. 11, 2015), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10-b.en.pdf> [<https://perma.cc/S2QK-NJTA>]. Thirty-three additional countries are reported to be actively working on ratification (Albania, Argentina, Australia, Bolivia, Brazil, Bulgaria, Burundi, Chile, Dominican Republic, Ecuador, El Salvador, Finland, Greece, Honduras, Hungary, Iceland, Italy, Lesotho, Lithuania, Macedonia, Madagascar, Mongolia, Montenegro, the Netherlands, New Zealand, Panama, Paraguay, Peru, Portugal, Romania, Senegal, Serbia, and Venezuela), and eight are in the early stages of doing so (Ghana, Guatemala, Ireland, Japan, Mexico, Moldova, Republic of Korea, and Tunisia). See *Status of Ratification and Implementation*, GLOBAL CAMPAIGN FOR RATIFICATION & IMPLEMENTATION KAMPALA AMENDMENTS ON CRIME AGGRESSION (June 26, 2015), <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation> [<http://perma.cc/4NXM-GRFK>]. For the purposes of this Note, I assume that thirty states will ratify by 2017.

not front of mind for government lawyers and policymakers. But the States Parties should not delay. Without more sustained attention to the crime of aggression's fit with complementarity, we risk deeply concerning prosecutions by domestic courts and bewildering procedural questions at the ICC. These prosecutions could significantly affect international peace and security, the prevention of mass atrocities, conflict resolution, and the legitimacy of the ICC. The future of the United States' relationship with the ICC is also at stake. The relationship is sufficiently fragile that even one badly managed aggression prosecution could undo the slow and steady improvements to the ICC-U.S. relationship made under the Obama Administration.¹⁷ The tensions between complementarity and aggression are not easily reconciled and require attention now.

This Note's objectives are twofold. First, it aims to assist U.S. policymakers by articulating a sensible system of complementarity vis-à-vis the crime of aggression. Second, it seeks to spark dialogue on this relatively unacknowledged problem *before* 2017.

The Note proceeds in four Parts. Part I describes the history and values underpinning complementarity to frame the subsequent analysis of how complementarity should apply to the crime of aggression. Part II draws on the official records on the adoption of the crime of aggression—the *travaux préparatoires*—to illustrate how the International Law Commission (ILC), the Special Working Group on the Crime of Aggression, and delegations at Kampala paid little attention to the complementarity issue.

Part III discusses the stakes involved. It argues that the States Parties face a genuine and acute dilemma in navigating complementarity's application to the crime of aggression. If the States Parties *do* domestically incorporate and prosecute for aggression, they could jeopardize international political stability. But if the States Parties *do not* domestically incorporate the crime of aggression, they will be unable to prosecute for aggression, and the ICC may have to navigate incomplete concurrence between proceedings in domestic courts and proceedings at the ICC.

Part IV offers a way forward. It proposes four possible interventions and assesses their political viability and potential impact. The States Parties should (1) establish exclusive ICC jurisdiction or primacy over the crime of aggression; (2) urge the ICC's Chief Prosecutor to issue an official statement discouraging domestic incorporation; (3) encourage domestic prosecutions for ordinary crimes instead of aggression; and (4) generate a multifactor list to guide domestic prosecutions to avoid the most problematic prosecutions and mitigate the associated harms. I recommend that a coalition of States Parties

17. See Koh & Buchwald, *supra* note 9, at 261-62.

debate these four interventions at an intersessional meeting, similar to the meetings held during the Princeton Process.¹⁸

Before turning to Part I, however, I want to make clear that this Note does not argue that the ICC and the international community would be better off without the crime of aggression in the Rome Statute, nor do I suggest that aggression prosecutions should be avoided. Aggression is a serious crime with significant harms. We should endeavor to deter it and to punish those who perpetrate it. But we must do so with thoughtful attention to the technical details. Failing to do so could destabilize the ICC, undermine promising diplomatic negotiations aimed at deescalating or ending future conflicts, or otherwise jeopardize the pursuit of international peace, justice, and political stability. This Note seeks to shine a light on the tough practicalities inherent in efforts to end impunity for international crimes; it does not promote abandoning the fight altogether.

I. THE HISTORY AND FUNCTION OF COMPLEMENTARITY

Although the term “complementarity” does not appear in the Rome Statute, it is routinely used to describe the relationship between the ICC and domestic courts.¹⁹ That relationship cements a preference for domestic prosecutions, and positions the ICC as a court of last resort.

The concept of complementarity finds expression in the Rome Statute’s Preamble and Article 1. The Preamble states that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”²⁰ Article 1 provides, “[The ICC] . . . shall be complementary to national criminal jurisdictions.”²¹ In turn, Article 17 sets out

18. The phrase “Princeton Process” refers to a series of informal meetings hosted by the Liechtenstein Institute on Self-Determination at Princeton University, as well as the formal meetings of the Special Working Group, held between 2003 and 2009. For all of the reports and materials pertaining to these negotiations, see *THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003-2009* (Stefan Barriga et al. eds., 2009).

Because the United States is not a party to the Rome Statute and has a unique stake in these issues, it is not best positioned to convene this gathering. Instead, the United States should lead from behind, reach out to other concerned states, and encourage them to serve as conveners.

19. Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 *MAX PLANCK Y.B. UNITED NATIONS L.* 591, 592 (2003).

20. Rome Statute, *supra* note 3, pmb1.

21. *Id.* art. 1.

the mechanics of complementarity, providing that a case is presumptively inadmissible before the ICC if it “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”²² The complementarity framework does not allow for double jeopardy: a person tried by another court for conduct proscribed by the Rome Statute may not also be tried by the ICC for the same conduct.²³

The idea of complementarity arose early on during the preparatory negotiation phase for the ICC,²⁴ but was not based on past practice.²⁵ Instead, the framework emerged from States Parties’ desire to balance two interests: (1) respecting state sovereignty and, in particular, states’ rights and duties to exercise criminal jurisdiction over international crimes; and (2) ensuring that serious international crimes do not go unpunished.²⁶

Practical considerations also counseled in favor of positioning the ICC as a court of last resort. First, the ICC has limited resources and cannot feasibly prosecute all instances of serious international crimes.²⁷ National authorities,

22. *Id.* art. 17.

23. Article 20 of the Rome Statute reads as follows:

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
 - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
 - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Id. art. 20.

24. Katherine L. Doherty & Timothy L.H. McCormack, “Complementarity” as a Catalyst for *Comprehensive Domestic Penal Legislation*, 5 U.C. DAVIS J. INT’L L. & POL’Y 147, 149 (1999).

25. Interview with Molly Warlow, Dir. of Int’l Affairs, U.S. Dep’t of Justice, in D.C. (Apr. 11, 2014).

26. See Benzing, *supra* note 19, at 595-97; John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 41, 73-74 (Roy S. Lee ed., 1999).

27. See Benzing, *supra* note 19, at 599-600. Of course, complementarity also assumes that national jurisdictions have sufficient resources, though this is not always the case. This often

by virtue of their proximity to the scene of the crime, are often better equipped to interview witnesses, collect evidence, and prepare strong cases.²⁸ Second, complementarity comports with the customary international-law principle favoring the exhaustion of “available and effective domestic remedies” before international organs may exercise jurisdiction.²⁹

The decision to adopt a complementarity framework for the ICC was uncontroversial. The debate over complementarity during the Rome negotiations focused “not on its merits or appropriateness, but on perfecting the most agreeable textual approach that would gain state consensus.”³⁰

overlooked issue is a current area of focus for the ASP. See Assembly of States Parties Res. ICC-ASP/10/Res.5, para. 58 (Dec. 21, 2011), http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf [<http://perma.cc/GQ4G-XTVW>] (resolving “to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity”).

28. See Fatou Bensouda, *Challenges Related to Investigation and Prosecution at the International Criminal Court*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW, *supra* note 10, at 131, 134.
29. JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY 226 (2008) (quoting African Charter on Human and Peoples’ Rights art. 50, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights art. 46(2), Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 41(1)(c), Dec. 19, 1966, 999 U.N.T.S. 171; and European Convention on Human Rights art. 26, Nov. 4, 1950, 213 U.N.T.S. 222).

There are five recognized exceptions to the exhaustion of local remedies rule. These exceptions were articulated by the Inter-American Court of Human Rights in its 1988 judgment in *Velásquez Rodríguez v. Honduras*: (1) where “the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated”; (2) where “the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them”; (3) where “there has been unwarranted delay in rendering a final judgment under the aforementioned remedies”; (4) where the proposed remedy is inadequate to address the alleged violation; or (5) where the remedy is ineffective and thus not “capable of producing the result for which it was designed.” Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 58-66 (July 29, 1988).

These exceptions are similar to, though perhaps more limited than, the Rome Statute’s “unwilling or unable” test. Both complementarity and the exhaustion of local remedies assume that an international court is competent to assess the domestic jurisdiction’s prosecutorial capacity and readiness. Both allocate the primary responsibility for delivering justice to states. Finally, both principles seek to balance the preservation of state sovereignty with the protection of human rights. STIGEN, *supra*, at 226-28.

30. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 47 (2001).

Commentators have since lauded complementarity as a critically important feature of the ICC's design and acceptance.³¹

Under the complementarity framework, the ICC plays two roles: passive and proactive. The first assumes that complementarity serves a gatekeeping function such that the ICC acts only where states are unable or unwilling to do so. The second suggests that the ICC can play an active role in inspiring and encouraging states to investigate and prosecute serious international crimes.³² For instance, many commentators believe that complementarity strongly incentivizes states to incorporate the substantive provisions of the atrocity crimes into their domestic penal codes to ensure the ability to exercise jurisdiction.³³ Indeed, since the Rome Statute was adopted in 1998, national laws establishing universal jurisdiction over the atrocity crimes have proliferated.³⁴

In contrast to the atrocity crimes, far fewer countries have incorporated the crime of aggression. Prior to the 2010 Review Conference in Kampala, the vast majority of states did not include the crime of aggression in their domestic penal codes, and most domestic courts lacked jurisdiction over the crime under any basis.³⁵ A 2009 survey of ninety national criminal codes revealed that only

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31. See, e.g., Hans-Peter Kaul, *The International Criminal Court—Its Relationship to Domestic Jurisdictions*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 14, at 31, 33 (calling complementarity “the decisive basis for the entire ICC system”).
 32. Christopher Keith Hall, *Developing and Implementing an Effective Positive Complementarity Prosecution Strategy*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 14, at 219, 219-20.
 33. See Roberto Bellelli, *The Establishment of the System of International Criminal Justice*, in *INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW*, *supra* note 10, at 5, 58; Astrid Reisinger Coracini, *Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute’s Complementarity Regime*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 14, at 725, 732-33.
 34. See Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 *HARV. INT’L L.J.* 358, 364 (2012). At least 142 countries have included war crimes under their domestic law and at least 136 countries have provided for universal jurisdiction. At least ninety-two countries have included at least one crime against humanity under their domestic law and at least eighty countries have provided for universal jurisdiction. At least 118 countries have included genocide under their domestic law and at least ninety-four countries have provided for universal jurisdiction. Amnesty Int’l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World—2012 Update*, Index: IOR 53/019/2012 12-13 (2012), <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf> [<https://perma.cc/7BNX-MFU3>]. Although the ICC’s complementarity regime may also inspire more states to incorporate the crime of aggression into their domestic penal codes, this has concomitant risks, as discussed *infra* Part III, some of which could be mitigated by the proposals put forth *infra* Part IV.
 35. Beth Van Schaack, *Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression*, 10 *J. INT’L CRIM. JUST.* 133, 141-44 (2012).

twenty-four countries, mostly in Eastern Europe and Central Asia, had statutes containing some provisions relating to the crime of aggression.³⁶ These statutes were largely “rudimentary,”³⁷ “broadly worded, and lack[ing] precision as to the elements of the crime.”³⁸

If a state does not incorporate the crime of aggression into its domestic penal code, it cannot prosecute for aggression, unless it is one of the very few states allowed to exercise universal jurisdiction over the crime.³⁹ Except for the period immediately following World War II, when the Allies held a handful of trials for acts of aggression,⁴⁰ there have been virtually no domestic criminal prosecutions for the crime of aggression or crimes against the peace.⁴¹ Under the proactive theory of complementarity, the ICC’s complementarity regime may inspire more states over time to incorporate the crime of aggression into their domestic penal codes.

This Note is concerned with the challenges that could emerge if many states do in fact domestically incorporate the crime of aggression. Before discussing those challenges, however, it first traces the minimal attention devoted to aggression’s fit with complementarity during the negotiations leading up to the 2010 Kampala Review Conference and at Kampala itself.

36. Coracini, *supra* note 33, at 734 & n.57. These countries were Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Cuba, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Montenegro, Poland, Portugal, Russian Federation, Serbia, Slovenia, Tajikistan, Ukraine, and Uzbekistan. *Id.*

37. *Id.* at 752.

38. Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 13 INT’L CRIM. L. REV. 829, 834 (2013). Section 80 of the German Criminal Code, for example, provided that anyone who “prepares a war of aggression . . . in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.” *Id.* at 834 n.21.

39. Van Schaack, *supra* note 35, at 142 & n.42, 143 & nn.43-44.

40. These trials were held pursuant to Control Council Law No. 10. Issued by the Allied Control Council on December 20, 1945, Control Council Law No. 10 permitted the occupying authorities, within their Zones of Occupation, to try persons suspected of committing crimes against peace, war crimes, or crimes against humanity. Control Council Law No. 10 (Dec. 20, 1945), reprinted in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, at xvi (photo. reprint 1998) (1949).

41. Van Schaack, *supra* note 35, at 137-38.

II. COMPLEMENTARITY AND THE CRIME OF AGGRESSION: THE LEAD UP TO KAMPALA

The negotiations that preceded the 2010 Kampala Review Conference reveal a persistent trend: States Parties have repeatedly recognized the potential tension between the crime of aggression and complementarity, but have failed to meaningfully engage with that tension and forge a workable resolution. States Parties did not deviate from this trend during the Review Conference. Most delegations paid little attention to the thorny issues inherent in applying a complementarity framework to the crime of aggression.

According to Beth Van Schaack, a public member of the U.S. interagency delegation to the 2010 Kampala Review Conference, issue inundation and apathy explain the dearth of discussion about complementarity. First, the States Parties needed to resolve many open questions going into Kampala. States were still dissatisfied with the crime's definition and significant jurisdictional issues demanded attention.⁴² Delegates also had to devote attention to a stocktaking exercise wholly separate from the crime of aggression.⁴³ Many delegations therefore felt unable to add the complementarity problem to their plate. Second, some delegations were simply uninterested in delving into the logistics of how an aggression prosecution would work in practice. To them, including the crime of aggression in the Rome Statute was an important step in realizing the legacy of Nuremberg. They therefore focused their attention on the crime's symbolic value, not ground-level implementation.⁴⁴

Delegations' inadequate time and insufficient interest in the mechanics help explain why they failed to explore tough questions surrounding complementarity at Kampala. This Part details this failure and its origins. It first outlines the pre-Kampala negotiations and describes the Kampala Review Conference itself. It highlights how the States Parties at Kampala adopted Understanding 5, which subtly discourages domestic incorporation of the crime of aggression. The Note then offers a current snapshot of trends in domestic incorporation of the crime of aggression. These trends provide the

42. Telephone Interview with Beth Van Schaack, Deputy to the Ambassador-at-Large for War Crimes Issues, Office of Glob. Criminal Justice, U.S. Dep't of State (Apr. 23, 2014).

43. *Id.* This exercise focused on the Rome Statute's impact to date and involved discussions of victims and affected communities, complementarity (unrelated to aggression), cooperation among external actors, and the balance between the ICC's dual goals of peace and justice. *Stocktaking*, COALITION FOR INT'L CRIM. CT., <http://www.iccnw.org/?mod=stocktaking> [<http://perma.cc/3G5Z-2863>].

44. Telephone Interview with Beth Van Schaack, *supra* note 42.

necessary context for Parts III and IV, which identify present tensions and propose ways forward.

A. *Pre-Kampala Aggression Negotiations*

1. *Deliberations on the Draft International Law Commission Statute (1995)*

Concerns about the fit between complementarity and the crime of aggression extend back at least to 1995. That year, delegates to the newly created United Nations Ad Hoc Committee on the Establishment of an International Criminal Court assembled to review and report on a draft United Nations ILC statute.⁴⁵ The draft provided that the soon-to-be-created ICC should not prosecute aggression unless the Security Council determined that a state had committed an act of aggression.⁴⁶ Some delegates were skeptical about extending the ICC's jurisdiction to aggression because few domestic penal codes encompassed the crime.⁴⁷ Other delegates, however, argued that there was limited domestic legislation on aggression because no international definition existed, and including the crime of aggression within the ICC's jurisdiction would incentivize states to incorporate and prosecute the crime domestically.⁴⁸ Despite acknowledging the complementarity problem, the delegates did not meaningfully grapple with or resolve their disagreement.

2. *Draft International Law Commission Code of Crimes (1996)*

The issue reemerged when the 1996 ILC Draft Code of Crimes offered the strongest anticomplementarity position taken in the negotiations leading up to Rome and Kampala. The draft assigned the ICC exclusive jurisdiction over the crime of aggression and provided for a system of concurrent jurisdiction between States Parties and the ICC over genocide, war crimes, and crimes against humanity.⁴⁹

45. 1995 Ad Hoc Committee Report, *as in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 15, at 205.

46. Int'l Law Comm'n, Draft Statute for an International Criminal Court, art. 23(2) (1994), http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf [<http://perma.cc/K24Z-4UNB>].

47. 1995 Ad Hoc Committee Report, *supra* note 45, at 206 para. 65.

48. *Id.*

49. 1996 ILC Draft Code of Crimes, with Commentary (Article 8), *as in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 15, at 195, 195. This grant of exclusive jurisdiction was subject to a limited exception. *See infra* text accompanying notes 56-57.

The draft recommended exclusive jurisdiction for the crime of aggression because of the crime's "unique character . . . in the sense that . . . a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State."⁵⁰ Asking the national court of one state to sit in judgment of another state "would be contrary to the fundamental principle of international law *par in pare[m] imperium non habet*."⁵¹ This Latin phrase means that an equal has no authority over an equal. It expresses the public international law principle that a sovereign power is equal to and independent of another sovereign power. It is the basis for the act of state doctrine and sovereign immunity,⁵² and has been called the most "fundamental" and "universally accepted" international law principle.⁵³ Inviting the national court of one state to conclude whether another state has committed aggression would violate this principle. Such violations, in turn, "would have serious implications for international relations and international peace and security."⁵⁴ Alain Pellet, an ILC member, explained, "If . . . national courts could try a person for the crime of aggression without a prior filtration process, the Court of Assize of Benghazi, say, could decide that Luxembourg had committed an act of aggression against Mali: [a]n inconceivable and surrealistic situation."⁵⁵

The 1996 ILC Draft Code of Crimes did make one exception to the exclusive jurisdiction regime: a state could try its own nationals for the crime of aggression. The logic behind this exception was twofold. First, prosecuting one's own nationals does not require assessing the actions of another state and thus does not carry the same risks to international political stability.⁵⁶ Second,

50. 1996 ILC Draft Code of Crimes, with Commentary (Article 8), *supra* note 49, at 196.

51. *Id.*

52. See Sean D. Murphy, *Does International Law Obligate States To Open Their National Courts to Persons for the Invocation of Treaty Norms that Protect or Benefit Persons?*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 61, 72 (David Sloss ed., 2009). For a brief discussion of the act of state doctrine, see 2005 Princeton Annotated Agenda, *reprinted in* *THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION*, *supra* note 15, at 447.

53. Archibald King, *Sitting in Judgment on the Acts of Another Government*, 42 AM. J. INT'L L. 811, 818 (1948).

54. 1996 ILC Draft Code of Crimes, with Commentary (Article 8), *supra* note 49, at 196.

55. Nicolaos Strapatsas, *Complementarity and Aggression: A Ticking Time Bomb?*, in *FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* 450, 452 (Carsten Stahn & Larissa van den Herik eds., 2010) (quoting *Summary Records of the 2384th Meeting*, [1995] 1 Y.B. Int'l L. Comm'n 34, U.N. Doc. A/CN.4/SER.A/1995).

56. 1996 ILC Draft Code of Crimes, with Commentary (Article 8), *supra* note 49, at 196-97.

such a prosecution might actually be “essential to a process of national reconciliation.”⁵⁷

3. *Initial Deliberations on the Rome Statute (1998)*

The Rome Statute drafters ultimately rejected the ILC’s framework. Instead of exclusive jurisdiction for aggression and concurrent jurisdiction for the atrocity crimes, the Rome Statute provides only for a complementarity regime.⁵⁸ Because the ASP did not immediately agree on the crime of aggression’s definition, however, the States Parties could still explore whether and how the complementarity regime should apply to aggression.⁵⁹

When the ASP adopted the Rome Statute in 1998, it passed a resolution to create the Preparatory Commission for the Establishment of an International Criminal Court. The Commission was charged with “prepar[ing] proposals for practical arrangements for the establishment and coming into operation of the Court,” as well as “prepar[ing] proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime.”⁶⁰ The Commission was to present its proposals to the ASP at a Review Conference, “with a view to arriving at an acceptable provision on the crime of aggression for inclusion in [the Rome] Statute.”⁶¹

Despite its express mandate, the Commission devoted scant attention to complementarity during its ten sessions, spread out over roughly twenty weeks.⁶² The Commission did not even mention complementarity as it related to aggression until its fourth session in March 2000. The Preparatory Commission issued a “Preliminary List of Possible Issues Relating to the Crime of Aggression” that included complementarity. The list asked, “How would the provisions of the Statute on complementarity (admissibility, challenges to the

57. *Id.* at 197.

58. Rome Statute, *supra* note 3, pmb. & art. 1.

59. *Id.* art. 5(2).

60. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶¶ 5, 7, U.N. Doc. A/CONF.183/10, annex I (July 17, 1998).

61. *Id.* ¶ 7.

62. See *History of the ICC: Preparatory Commission*, COALITION FOR INT’L CRIM. CT., <http://www.iccnw.org/?mod=prepcommission> [<http://perma.cc/ACD2-9GL2>].

Court's jurisdiction) be applicable to the crime of aggression[?]"⁶³ It then noted that the Rome Statute's provisions regarding international cooperation and judicial assistance "may require further consideration depending upon the applicability of the principle of complementarity to the crime of aggression."⁶⁴ The Italy delegation urged the other states to tackle the issue, questioning whether and how complementarity would operate if national legislation defined aggression differently from the Rome Statute.⁶⁵

No delegation actually addressed Italy's questions until the Sixth Session. Certain delegations asked how complementarity would work in practice, and whether the Security Council would play a role.⁶⁶ Delegations voiced similar concerns during the Ninth Session.⁶⁷ Unfortunately, the discussion never moved beyond simple acknowledgments that a problem might exist.

4. Meeting of the Special Working Group on the Crime of Aggression (2004)

The complementarity problem received a similarly cursory treatment during the first intersessional meeting of the Special Working Group on the Crime of Aggression, an arm of the ASP. The Group held its meeting at Princeton University in June 2004 and discussed whether the Rome Statute's provisions on complementarity should apply to the crime of aggression. According to the meeting report, "[t]here was general agreement that no problems seemed to arise from the current provisions [of complementarity] being applicable to the crime of aggression," but that the issue "merited being

63. 2000 List of Issues, *reprinted in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 15, at 361-62.

64. *Id.* at 363. The list was reprinted verbatim in Preparatory Comm'n for the Int'l Criminal Court, *Proceedings of the Preparatory Commission at Its Fifth Session (12-30 June 2000)*, UNITED NATIONS (2000), http://www.iccnw.org/documents/Proceedings_l3rev1e%204.pdf [<http://perma.cc/8XLN-F226>]; and Preparatory Comm'n for the Int'l Criminal Court, *Proceedings of the Preparatory Commission at Its Ninth Session (8-9 April 2002)*, UNITED NATIONS (2002), http://www.iccnw.org/documents/Proceedpnicc_2002_l1_rev1e.pdf [<http://perma.cc/8CFV-DYNX>].

65. 2000 Proposal by Italy (oral), *reprinted in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 15, at 357, 359.

66. Jennifer Schense, *Draft Report on the Sixth Session of the Preparatory Commission*, COALITION FOR INT'L CRIM. CT. 3-4 (2000), <http://www.iccnw.org/documents/6thPrepComReportCICC.pdf> [<http://perma.cc/WLW3-9XVZ>].

67. Jennifer Schense, *Draft Report on the Ninth Session of the Preparatory Commission*, COALITION FOR INT'L CRIM. CT. 11 (2002), <http://www.iccnw.org/documents/9thPrepComReportCICC.pdf> [<http://perma.cc/G3Q5-7K3X>] (reporting that some delegations "questioned how the requirement of a Security Council determination of an act of aggression would affect . . . the application of complementarity").

revisited” once a definition of aggression and conditions for the ICC’s exercise of jurisdiction were agreed upon.⁶⁸

B. The 2010 Kampala Review Conference

Against this backdrop of repeated failures to engage with complementarity’s application to aggression, the United States increased its involvement with the ASP as the 2010 Kampala Review Conference approached. The United States had not participated in the negotiations around the crime of aggression during the Bush Administration, but the Obama Administration worked to reengage with the ICC.⁶⁹ As part of this effort, the United States identified several issues it thought important to tackle before Kampala, including complementarity. In March 2010, U.S. State Department Legal Adviser Harold Koh addressed the topic in his statement at the Resumed Eighth Session of the ASP in New York. Koh posed a series of questions about the mechanics and political viability of situating the crime of aggression within the complementarity framework, suggesting that domestic aggression prosecutions might undermine “state cooperation with the [ICC]” and the ICC’s acceptance in the international community.⁷⁰

Despite the United States’ increased involvement, the Kampala Review Conference continued the long trend of acknowledging the difficulties that complementarity poses but avoiding any deeper consideration of how to address those difficulties. That the delegates discussed the issue at all was

68. 2004 Princeton Report, *supra* note 15, at 433-34. The 2005 Special Working Group reiterated this conclusion. 2005 Princeton Annotated Agenda, *supra* note 52, at 448; *accord* Strapatsas, *supra* note 55, at 450 (noting the Special Working Group’s mentions of complementarity in its 2004 and 2005 reports).

69. E-mail from Beth Van Schaack, Deputy to the Ambassador-at-Large for War Crimes Issues, Office of Glob. Criminal Justice, U.S. Dep’t of State, to author (July 14, 2014, 04:45 EST) (on file with author).

70. The key portion of the statement was as follows:

[W]ith respect to complementarity, do we want national courts to pass judgment on public acts of foreign states that are elements of the crime of aggression? Would adding at this time a crime that would run against heads of state and senior leaders enhance or obstruct the prospects for state cooperation with the Court? And will the States Parties enhance the prospects for universality of the Court by moving to adopt this politicized crime at a time when there is genuine disagreement on such issues?

Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Statement Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court (Mar. 23, 2010), <http://usun.state.gov/remarks/4646> [<https://perma.cc/PP4F-U5PW>].

largely due to the questions that the United States raised at the ASP meetings.⁷¹ The Conference Chair, Christian Wenaweser of Liechtenstein, responded to those questions in a non-paper that sought to address whether the Kampala Amendments required—or only encouraged—States Parties to domestically incorporate and exercise jurisdiction over the crime of aggression.⁷²

Legal Adviser Koh, speaking on behalf of the U.S. delegation, lauded the non-paper as “a valuable contribution” and expressed support for using understandings to minimize the risk of “unjustified domestic prosecutions.”⁷³ Koh then rearticulated many of the complementarity-related concerns he had expressed in New York less than three months earlier. He observed that domestic aggression prosecutions “would ask the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security.”⁷⁴

With these concerns in mind, the United States proposed small but significant changes to the Chair’s draft. The non-paper, with the United States’ additions represented with underlines and deletions represented with strikethroughs, stood as follows:

71. See Claus Kreß et al., *Negotiating the Understandings on the Crime of Aggression*, in THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, supra note 15, at 81, 91 (“Understandings 4 to 7 did not emanate from discussions in the Special Working Group but from concerns expressed by the US delegation at the November 2009 and March 2010 ASP meetings.”).

72. Review Conference of the Rome Statute, *Non-Paper by the Chair: Further Elements for a Solution on the Crime of Aggression*, INT’L CRIM. CT. para. 4 (May 25, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-WGCA-2-ENG.pdf [<http://perma.cc/827Z-XYPQ>].

73. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Statement at the Review Conference of the International Criminal Court (June 4, 2010), <http://www.state.gov/s/l/releases/remarks/142665.htm> [<http://perma.cc/63AW-83QB>].

74. *Id.* Many national courts apply the act of state doctrine precisely to prevent one nation’s courts from sitting in judgment on the public acts of another nation. The act of state doctrine extends back at least as far as 1674. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (citing *Blad v. Bamfield* (1674) 36 Eng. Rep. 992 (Ch)). The doctrine was given clear expression by the U.S. Supreme Court in *Underhill v. Hernandez*, in which Chief Justice Fuller wrote for a unanimous Court:

Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

168 U.S. 250, 252 (1897). In *Banco Nacional de Cuba v. Sabbatino*, the U.S. Supreme Court reaffirmed and applied the act of state doctrine, even though Cuba had likely violated international law. The Court noted that while the doctrine is not constitutionally required, it is rooted in separation-of-powers concerns. 376 U.S. at 423.

It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime 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, and shall not be interpreted as constituting a statement of the definition of “crime of aggression” or “act of aggression” under customary international law.

It is understood that tThe amendments shall ~~therefore~~ not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.⁷⁵

The changes to the first paragraph reflected the disagreement among the States Parties whether the definitions of “crime of aggression” and “act of aggression” accurately expressed customary international law.⁷⁶ The proposed change was intended to stress that the amendments pertained only to prosecutions under the Rome Statute.⁷⁷

The second paragraph had been the final sentence of the first and only paragraph in the Chair’s draft. The United States reframed it as a separate understanding to distinguish more clearly “issues of definition versus jurisdictional competency” and to emphasize “that ratification or acceptance of the amendments will not empower or oblige states to incorporate the crime of aggression into their domestic codes or to launch domestic prosecutions for the crime.”⁷⁸

Over the next two days, Claus Kreß of the German delegation facilitated bilateral, regional, and open informal consultations on the U.S. draft to assess whether it could achieve a consensus.⁷⁹ The United States’ proposed changes “met with little public discussion or resistance, except insofar as the words

75. Compare Review Conference of the Rome Statute, *supra* note 72, with Van Schaack, *supra* note 35, at 159-60 (describing the United States’ proposed changes).

76. Van Schaack, *supra* note 35, at 160 (referencing William Lietzau, Deputy Assistant Sec’y, U.S. Dep’t of Def., Remarks at the Kampala Review Conference of the Rome Statute (June 7, 2010)).

77. *Id.*

78. *Id.*

79. *Id.*

‘customary international law’ were ultimately not included in the final text.”⁸⁰ The final text comprised two Understandings:

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.⁸¹

On its face, Understanding 5 appears obvious, since the Rome Statute “is generally not designed to create rights or obligations of States Parties with respect to domestic legislation and adjudication.”⁸² But reading Understanding 5 in light of the United States’ articulated concerns reveals what Van Schaack has called a “subtle preference” *against* domestic incorporation and prosecution.⁸³ Taken in context, Understanding 5 captures and attempts to respond to the reticence that some delegations at Kampala felt about domestic aggression prosecutions.⁸⁴

C. Post-Kampala Developments

Since the 2010 Review Conference, commentators have encouraged states to incorporate aggression into their domestic criminal codes.⁸⁵ Thus far, only

⁸⁰. *Id.*

⁸¹. Kampala Amendments, *supra* note 2, annex III.

⁸². Claus Kieß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1216 (2010).

⁸³. Van Schaack, *supra* note 35, at 135.

⁸⁴. Teresa McHenry, *Complementarity Issues*, 105 AM. SOC’Y INT’L L. PROC. 157, 158 (2011).

⁸⁵. For example, the Liechtenstein Institute on Self-Determination at Princeton University has published a handbook on the ratification and implementation of the crime of aggression that includes reasons and options for incorporating the Kampala Amendments via domestic legislation. LIECH. INST. ON SELF-DETERMINATION, HANDBOOK: RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS TO THE ROME STATUTE OF THE ICC (2013), <http://crimeofaggression.info/documents/1/handbook.pdf> [<http://perma.cc/NXX5-JWHA>]. Parliamentarians for Global Action has issued sample legislation that legislatures might use to incorporate aggression domestically. David Donat Cattin, *Campaign for the Effectiveness and Universality of the Rome Statute System*, PARLIAMENTARIANS FOR GLOBAL

six countries—Croatia, the Czech Republic, Ecuador, Luxembourg, Slovenia, and Samoa⁸⁶—have passed domestic legislation implementing the Kampala Amendments. But others may soon follow. The Dominican Republic approved the text, and the law will enter into force after the president enacts it. Macedonia, New Zealand, Peru, and Venezuela are considering draft criminal code bills containing the crime of aggression as defined at Kampala.⁸⁷ South Africa also appears likely to incorporate.⁸⁸ The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression reports that it expects fifteen other countries to consider incorporating the crime into domestic law.⁸⁹

Whether a meaningful number of States Parties will actually incorporate the crime into their domestic law remains unclear. Certainly, there is evidence of momentum in that direction. Such momentum, fueled by advocacy from

ACTION (2011), http://crimeofaggression.info/documents/4/PGA_Implementing_legislation-drafting_assistance.pdf [<http://perma.cc/B7AT-N8FY>]. In addition, the International Center for Transitional Justice held a two-day retreat in October 2010 called Complementarity after Kampala: The Way Forward. The event brought together more than sixty representatives from state and nonstate parties, the ICC, development agencies, United Nations agencies, and nongovernmental organizations, and focused on how best to strengthen the capacity of states to investigate and prosecute the Rome Statute crimes. One suggestion that emerged out of the meeting was that the development community should push donors to place domestic incorporation of the Rome Statute on their agendas. *Meeting Summary of the Retreat on “Complementarity after Kampala: The Way Forward,”* INT’L CTR. FOR TRANSITIONAL JUST. (2010), <http://ictj.org/sites/default/files/ICTJ-Global-Complementarity-Greentree-2010-English.pdf> [<https://perma.cc/DQJ6-FLXW>].

86. *Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression*, GLOBAL CAMPAIGN FOR RATIFICATION & IMPLEMENTATION KAMPALA AMENDMENTS ON CRIME AGGRESSION 6 (2015), http://crimeofaggression.info/documents//1/Status_Report-ENG.pdf [<http://perma.cc/3MVC-83NB>].

87. *Id.*

88. The country’s Deputy Minister of Justice and Constitutional Development recently made the following statement at a workshop on the ratification and implementation of the Kampala Amendments: “South Africa was one of the first countries to enact legislation domesticating and implementing the Rome Statute We also support the domestication of the Kampala amendments in line with the Principle of Complementarity.” Andries Niel, Deputy Minister of Justice & Constitutional Dev., Republic of S. Afr., Statement on the Occasion of the Workshop on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC, Botswana, April 15-16, 2013 (Apr. 15, 2013), http://www.justice.gov.za/m_speeches/2013/20130415-dm-icc.html [<http://perma.cc/4EMH-7JEN>].

89. Those countries are Argentina, Austria, Belgium, Botswana, Costa Rica, Germany, Greece, Guatemala, Honduras, Liechtenstein, Madagascar, the Netherlands, Switzerland, Trinidad and Tobago, and Uruguay. GLOBAL CAMPAIGN FOR RATIFICATION & IMPLEMENTATION KAMPALA AMENDMENTS ON CRIME AGGRESSION, *supra* note 86, at 7.

civil society groups, may only increase after the Amendments come into force in 2017.

III. TENSIONS BETWEEN COMPLEMENTARITY AND THE CRIME OF AGGRESSION

The remainder of this Note aims to articulate what remained unsaid at Kampala. First, I identify the core tensions, problems, and pitfalls associated with applying the existing complementarity framework to the crime of aggression. In Section III.A, I analyze the potential risks if states heed the implied message of Understanding 5 and do not domestically incorporate the crime of aggression. Conversely, Section III.B explores the problems that might occur if states *do* domestically incorporate and prosecute the crime of aggression. Finally, in Part IV, I identify and analyze various interventions that could address these problems.

A. *Problems if States Do Not Incorporate*

If States Parties choose not to incorporate the crime of aggression into their domestic criminal codes, the ICC would be the primary forum for aggression prosecutions. This approach could produce two notable problems: (1) incomplete concurrence between proceedings at the domestic level and proceedings at the ICC; and (2) diminished uptake of an antiaggression norm.

1. *Incomplete Concurrence*

First, if States Parties do not incorporate the crime, they risk incomplete concurrence between proceedings at the domestic level and proceedings at the ICC.⁹⁰ To understand this problem, imagine a series of events that could give rise to charges for both the crime of aggression and an atrocity crime, such as genocide. Most domestic courts, having incorporated the atrocity crimes into their penal codes but not the crime of aggression, could prosecute only the atrocity crime and not aggression. Imagine, then, that the domestic court decided to prosecute the atrocity crime. Because the domestic court would be unavailable to prosecute for aggression, the ICC could then assert jurisdiction pursuant to Article 17(3) of the Rome Statute, and indict and prosecute for the crime of aggression.

⁹⁰ Van Schaack first identified and explicated the problem of incomplete concurrence. This Section of the Note draws heavily on her work. See Van Schaack, *supra* note 35.

To date, the Pre-Trial Chamber of the ICC has used a “same person/same conduct test” to interpret the complementarity principle. In other words, “the Court will stay its hand if a domestic court is prosecuting the same suspect for the same impugned conduct, regardless of how the crime is legally characterized.”⁹¹ As noted above, the atrocity crimes and the crime of aggression generally proscribe different conduct.⁹² Because the conduct giving rise to the domestic court’s atrocity prosecution would differ from the conduct subject to an aggression charge, a prosecution by the ICC for aggression would be fair game, even though both charges stemmed from the same series of events.

Yet even if legally permissible, these parallel prosecutions—a domestic prosecution for an atrocity crime and an ICC prosecution for aggression—would put the domestic court and the ICC in difficult situations. First, tough procedural questions would emerge: Should the domestic and ICC prosecutions move forward at the same time, or would they need to be sequenced? If the prosecutions proceed concurrently, which system would have custody over the defendant? If the ICC ordered the defendant to be transferred to The Hague, it would effectively divest the domestic court of its jurisdiction over the alleged perpetrator. How would “overlapping or potentially contradictory witnesses and evidence” be handled?⁹³ If the prosecutions were sequenced, which jurisdiction would prosecute first? How would Article 20’s commitment to *ne bis in idem*, its double jeopardy provision, apply?⁹⁴

Second, institutional considerations would have to be weighed. The ICC’s decision to step in and prosecute for aggression could fuel hostility toward the international tribunal. The prosecution might be understood to undermine the domestic jurisdiction’s sovereignty. It could also discourage the domestic atrocity prosecution, thus subverting the core purpose of complementarity. Alternatively, if the ICC chose *not* to step in and prosecute for aggression, that decision might undermine its moral role as a bulwark against impunity for serious international crimes.

In sorting through these complicated questions, the ASP will have to consider how best to balance the pursuit of the ICC’s multiple goals: encouraging states to exercise their duty to domestically punish serious international crimes, deterring genuine acts of aggression, ending impunity, and maintaining positive and productive relationships with States Parties. The

91. *Id.* at 134.

92. *See supra* text accompanying note 13.

93. McHenry, *supra* note 84, at 159.

94. Rome Statute, *supra* note 3, art. 20.

answers will bear directly on the ICC's legitimacy and viability as an enduring tribunal.

2. *Diminished Uptake of an International Antiaggression Norm*

By choosing not to incorporate the crime of aggression, States Parties could stunt the development and broad uptake of an antiaggression norm.⁹⁵ Resource constraints will prevent the ICC from investigating and prosecuting all acts of aggression.⁹⁶ Without domestic prosecutions, many acts of aggression could go unpunished, undercutting the deterrent effect that originally motivated the ASP to include aggression in the Rome Statute.⁹⁷ The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression has even argued that failing to incorporate is antithetical to the principles underlying the Rome Statute. Indeed, the statute's preamble provides "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."⁹⁸

95. Van Schaack, *supra* note 35, at 137.

96. See, e.g., Margaret M. deGuzman, *Choosing To Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 280, 285-87 (2012) (noting that the ICC must selectively prosecute, in part because of its limited resources). That resource constraints would limit the ICC's scope for action was also one of the primary bases for adopting the complementarity principle. See Benzing, *supra* note 19, at 599.

97. Strapatsas, *supra* note 55, at 473.

98. *Why and How To Implement the Amendments*, GLOBAL CAMPAIGN FOR RATIFICATION & IMPLEMENTATION KAMPALA AMENDMENTS ON CRIME AGGRESSION, (quoting Rome Statute, *supra* note 3, pmb.), <http://crimeofaggression.info/the-role-of-states/why-and-how-to-implement-the-amendments> [<http://perma.cc/8KV2-WSY7>].

The Campaign is a joint effort of the Mission of Liechtenstein to the United Nations and the Global Institute for the Prevention of Aggression, a civil society organization established by a former chief prosecutor at the Nuremberg Trials. It champions domestic incorporation as critical to deterring the illegal use of force and bringing violators to justice. See *The Campaign*, GLOBAL CAMPAIGN FOR RATIFICATION & IMPLEMENTATION KAMPALA AMENDMENTS ON CRIME AGGRESSION, <http://crimeofaggression.info/the-campaign> [<http://perma.cc/6HRB-JLBR>]; *The Global Institute for the Prevention of Aggression*, GLOBAL CAMPAIGN FOR RATIFICATION & IMPLEMENTATION KAMPALA AMENDMENTS ON CRIME AGGRESSION, <http://crimeofaggression.info/the-campaign/the-global-institute-for-the-prevention-of-aggression> [<http://perma.cc/9MYF-QVMX>]; *Why and How To Implement the Amendments*, GLOBAL CAMPAIGN FOR RATIFICATION & IMPLEMENTATION KAMPALA AMENDMENTS ON CRIME AGGRESSION, <http://crimeofaggression.info/the-role-of-states/why-and-how-to-implement-the-amendments> [<http://perma.cc/8KV2-WSY7>].

B. *Problems if States Do Incorporate*

Notwithstanding the difficulties that may arise, Understanding 5 expresses a subtle preference against domestic incorporation of the crime of aggression. Of course, states need not heed this call. Instead, they may choose to follow the path of Croatia, the Czech Republic, Ecuador, Luxembourg, Slovenia, and Samoa, and incorporate the Kampala Amendments into their domestic penal codes. Countries might incorporate the crime to preserve sovereign control over aggression prosecutions—particularly of their own nationals—and preempt the ICC from asserting jurisdiction. They might also seek to promote an antiaggression norm. But serious practical impediments may complicate these good intentions. Domestic prosecutions could exacerbate diplomatic relations and jeopardize international peace and stability.

1. *Justiciability, Evidentiary, and Other Jurisprudential Roadblocks to Prosecutions*

Domestic prosecutions for aggression could encounter justiciability, evidentiary, immunity, and other legal roadblocks. Theresa McHenry, the Chief of Human Rights and Special Prosecutions at the U.S. Department of Justice and a member of the U.S. Delegation at Kampala, described several such roadblocks shortly after the Review Conference concluded. In many countries, she noted, the crime of aggression will almost certainly implicate questions within the purview of the political branches, such as “the executive’s commander-in-chief authority or congressional power to declare war.”⁹⁹ Domestic aggression prosecutions might run afoul of various states’ political-question doctrines.¹⁰⁰

In addition to justiciability issues, prosecuting states will likely face evidentiary hurdles. To prove that a state action constitutes aggression, the prosecution might need to access information that is classified, governed by executive privilege¹⁰¹ or state secrets, or otherwise controlled by the putative aggressor state. States may also have divergent approaches to the burden of

99. McHenry, *supra* note 84, at 159.

100. Several countries have a variant of the political question doctrine. See, e.g., *Tanada v. Cuenco*, G.R. No. L-10520, 103 Phil. 1051 (S.C., Feb. 28, 1957) (en banc) (discussing the doctrine in the Philippines); *Uganda v. Comm’r of Prisons, Ex parte Matovu* (1966) E.A. 514 (Uganda) (presenting for the first time Uganda’s political-question doctrine).

101. McHenry, *supra* note 84, at 159.

proof on issues such as whether the prosecution must show that an alleged act of aggression was not self-defense.¹⁰²

Moreover, domestic efforts to prosecute will likely trigger a range of substantive and procedural immunity arguments, including head-of-state immunity and foreign official immunity.¹⁰³ Yet the act of state doctrine—which provides “that one sovereign should not sit in judgment of another [sovereign]”—is unlikely to bar a domestic court’s prosecution of a nonnational for aggression.¹⁰⁴ The doctrine applies only to acts fully executed within the sovereign’s own state. Aggression is, by definition, unlikely to satisfy that requisite. Furthermore, in the United States, the doctrine has generally not served as a bar to proceedings for “international crimes or breaches of *jus cogens*.”¹⁰⁵

Finally, it is highly unlikely that a victim state could, in practice, exercise physical custody over the aggressor state’s leaders.¹⁰⁶ Assuming that a victim state’s aggression prosecution depends on having physical custody of the aggressors, this fact alone will doom most prosecutions.

Complementarity might not rescue domestic prosecutions from these practical complications. Should one of these procedural issues impede a domestic prosecution, the ICC may not necessarily have jurisdiction. Article 17 of the Rome Statute provides that the ICC may assume jurisdiction over a case where a state with jurisdiction is unable or unwilling to prosecute.¹⁰⁷ But

102. *Id.*

103. Pål Wrangé, *The Crime of Aggression and Complementarity*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW, *supra* note 10, at 591, 593-94.

104. *Id.* at 595.

105. *Id.* For more on foreign sovereign immunity, see, for example, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 1 (Feb. 14), which held that an arrest warrant issued against the Democratic Republic of Congo’s Minister of Foreign Affairs failed to respect his immunity from criminal jurisdiction under international law.

106. See Strapatsas, *supra* note 55, at 473 (noting that, while aggressed states were able to acquire physical custody over the leaders of the aggressor state for crimes against peace prosecutions after World War II, “it is uncertain that every act of aggression in the future will always justify the complete overthrow of the aggressor-state’s regime,” making the acquisition of physical custody unlikely in most cases).

107. The “unable or unwilling” standard is also used where State *A* is attacked by a nonstate group based in State *B* and decides that force is required to suppress the threat. State *A* must assess whether State *B* is willing and able to respond. If State *B* is unable or unwilling to address the threat, then State *A* may use force in State *B* to suppress the threat posed by the nonstate group. However, as Ashley Deeks has argued in a recent article, “[T]here has been virtually no discussion, either by states or scholars, of what [the ‘unwilling or unable’] standard means.” Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for*

“inability” and “unwillingness,” according to the ICC Chief Prosecutor Bensouda, do not encompass a situation in which a state attempts to prosecute but is stymied by legitimate legal roadblocks. Unwillingness, Bensouda states, “arises if a country lacks the political will to try its own leaders, conducts sham trials in order to let the guilty go free, allows an unjustifiable delay in bringing perpetrators to justice, or does not conduct judicial proceedings independently or impartially.”¹⁰⁸ Inability “arises, for example, when the judicial system of a country has collapsed, rendering the state unable to arrest perpetrators or gather evidence.”¹⁰⁹ Consequently, if a state initiates an aggression investigation or prosecution that then fails due to justiciability, evidentiary, immunity, or other issues, the ICC may not be able to then step in and assume jurisdiction unless the state self-refers the situation to the ICC. Without a referral, the aggressor would effectively be immune from prosecution.

2. *Threats to International Political Stability, Conflict Resolution, and Humanitarian Intervention*

Procedural and practical hurdles will likely prevent most domestic aggression prosecutions from reaching a judgment on the merits. Even if domestic prosecutions could surmount these hurdles, they may undermine international political stability. Scholars and practitioners agree on this point. Richard Goldstone, the first chief prosecutor at the International Criminal Tribunal for the former Yugoslavia, asserts that investigating and prosecuting the crime of aggression requires a court to examine what “is inherently a profoundly political decision.”¹¹⁰ Because of the political nature of the crime,

Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483, 486 (2012). To fill this gap, Deeks offers a set of normative factors to guide the “unwilling or unable” inquiry:

These principles include requirements that the victim state: (1) prioritize consent or cooperation with the territorial state over unilateral uses of force, (2) ask the territorial state to address the threat and provide adequate time for the latter to respond, (3) reasonably assess the territorial state’s control and capacity in the relevant region, (4) reasonably assess the territorial state’s proposed means to suppress the threat, and (5) evaluate its prior interactions with the territorial state.

Id. at 490. Though Deeks does not explicitly extend these factors to the “unwilling or unable” test as it is used in the Rome Statute, there are clear similarities beyond her analysis and Chief Prosecutor Fatou Bensouda’s articulation of the test. See *infra* notes 108-109 and accompanying text. Deeks’s factors may therefore help inform the ICC’s decision to assume jurisdiction over a case.

108. Bensouda, *supra* note 28, at 133-34.

109. *Id.* at 134.

110. Richard Goldstone, *Prosecuting Aggression*, N.Y. TIMES (May 26, 2010), <http://www.nytimes.com/2010/05/27/opinion/27iht-edpoint.html> [<http://perma.cc/B8C3-KUG8>].

Van Schaack warns that a domestic aggression charge “will inevitably generate intense charges of politicization from within and outside the prosecuting state,” “exacerbate relations” between the implicated states, and prompt other states to “inevitably take sides.”¹¹¹ Similarly, Michael Scharf argues that aggression prosecutions in domestic courts “may be so politically sensitive that they cannot be fairly tried and the attempt to do so would undermine efforts at restoring or maintaining international peace.”¹¹² National court indictments – particularly if employed as a form of “lawfare” to “intimidate and harass another state or its officials” – might interfere with diplomatic negotiations and frustrate efforts at conflict resolution.¹¹³

Even the mere specter of an aggression indictment could impede warring parties from negotiating a peace agreement. The risk increases if a state’s prosecutorial bodies are independent from its diplomats, preventing the negotiators from ruling out an aggression prosecution.¹¹⁴ The possibility of domestic prosecution may also chill a state’s willingness to undertake, or cooperate with, humanitarian intervention to stop the commission of atrocities.¹¹⁵ Nicolaos Strapatsas even speculates that the desire and ability to domestically prosecute for aggression could motivate an aggressed state to prolong an armed conflict to ensure the overthrow or removal of the aggressor state’s leader from power.¹¹⁶ This would make it more feasible to obtain physical custody over and prosecute the leader.¹¹⁷

111. Van Schaack, *supra* note 35, at 150; *see also* Beth Van Schaack, *In Advance of Activating the Crime of Aggression*, JUST SECURITY (July 18, 2014, 4:21 PM), <https://www.justsecurity.org/13059/advance-activating-crime-aggression> [<https://perma.cc/MH66-VMAF>] (urging states to codify the crime of aggression in a way that “brings states together under the umbrella of international justice rather than drives them apart”).

112. Scharf, *supra* note 34, at 381.

113. *Id.*

114. E-mail from Beth Van Schaack, Deputy to the Ambassador-at-Large for War Crimes Issues, Office of Glob. Criminal Justice, U.S. Dep’t of State, to author (July 14, 2014, 16:45 PST) (on file with author).

115. Sewall, *supra* note 9; *see also* Beth Van Schaack, *The ICC Crime of Aggression and the Changing International Security Landscape*, AM. SOC’Y INT’L L.: ASIL CABLES (Apr. 16, 2015, 2:43 PM), <http://www.asil.org/blogs/icc-crime-aggression-and-changing-international-security-landscape> [<http://perma.cc/DRX4-3JJY>] (summarizing remarks from Christine Hansen of the Danish Ministry of Foreign Affairs about the “desired and undesired chilling effects” of activating jurisdiction over the crime of aggression, including “the chilling effect that the [Kampala] amendments may exert on potentially beneficial uses of force”).

116. Strapatsas, *supra* note 55, at 473.

117. *Id.* Although trials that truly cannot be “conducted independently or impartially” may render the case admissible under the ICC’s jurisdiction, *see* Rome Statute, *supra* note 3, art. 17(2)(c), this will not compensate for the damage to peace negotiations and political stability wrought by a flawed and politicized domestic prosecution attempt. Article 17’s “unwilling or

3. *Domestic Alterations to the Definition of Aggression*

If states incorporate the crime of aggression, they might deviate from the carefully calibrated definition of aggression in the Kampala Amendments. The definition and elements of the crime of aggression, as agreed upon in Kampala, are products of long and challenging consensus negotiations. States could jeopardize the legitimacy of the ASP's decision to include the crime under the Rome Statute—and the legitimacy of the ICC itself—by creating and prosecuting under a fragmented and incoherent patchwork of aggression variants.

States might adopt narrower or broader versions of the aggression amendments, define aggression differently, or ignore the carefully negotiated protections in the Understandings. For example, a state could fail to incorporate the crime's leadership requirement. This would expand the range of potential defendants far beyond the scope contemplated by the ASP. A state might limit or exclude "the threshold qualifier 'manifest,' which is meant to prevent the ICC from pursuing cases that are not sufficiently grave or that involve state conduct whose illegality under the UN Charter framework is uncertain."¹¹⁸ A domestic statute might lessen the prosecution's burden of persuasion from beyond a reasonable doubt. Or a state's statute could permit "prosecutions for attempted aggression" or could encompass non-state actors.¹¹⁹

To avoid such situations, the ASP should strongly encourage states that do incorporate to use the verbatim text of the Kampala Amendments, including the stipulations contained within the Understandings.¹²⁰

States face a genuine dilemma with high stakes and strong arguments on both sides. On balance, however, the subtle preference against incorporation, as expressed in Understanding 5, is the prudent approach. Incorporation risks flawed domestic prosecutions that foreclose ICC jurisdiction, international

unable" provisions may also not encompass overzealous prosecutions. See Trahan, *supra* note 12, at 583-86.

118. Van Schaack, *supra* note 35, at 152.

119. *Id.* The Kampala Amendments contemplate aggression only as defined in terms of state action.

120. See *id.* at 153. The *Handbook on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC*, a document put out by civil society champions of the Kampala Amendments, recommends "verbatim implementation." LIECH. INST. ON SELF-DETERMINATION, *supra* note 85, at 15.

political destabilization and disruptions to conflict resolution efforts, and definitional fragmentation that could permit prosecutions far beyond what the ASP envisioned and endorsed. In contrast, the problems if states do not incorporate and prosecute—limited to incomplete concurrence and a slower antiaggression normative uptake—pose relatively less cause for concern. The drawbacks to nonincorporation are also more amenable to productive countermeasures than are the serious potential harms from domestic incorporation and prosecutions.

IV. A WAY FORWARD

The Special Working Group on the Crime of Aggression agreed nearly a decade ago that the issues surrounding aggression and complementarity “merited being revisited once agreement had been reached on the definition of aggression and the conditions for exercise of the Court’s jurisdiction.”¹²¹ Nonetheless, the uneasy fit between complementarity and the crime of aggression was inadequately addressed in the lead up to the 2010 Kampala Review Conference. Difficult questions persist, and the ASP must address them now, before the Kampala Amendments enter into force in 2017. This Part offers a roadmap for the ASP: it identifies four potential interventions to resolve the tensions between aggression and complementarity, and suggests the means by which the States Parties could engage with those interventions.

A. The Substance: Four Possible Interventions

The ASP must seek solutions to the challenges that will result if states do or do not incorporate and prosecute the crime of aggression. I recommend that the States Parties consider four possible interventions: (1) establish exclusive ICC jurisdiction or primacy over the crime of aggression; (2) supplement Understanding 5 with an official statement from the Chief Prosecutor discouraging domestic incorporation; (3) encourage prosecutions for ordinary crimes instead of aggression; and (4) generate a multifactor list to guide domestic prosecutions.

The first and second interventions limit or discourage domestic incorporation and prosecution. The third intervention provides an alternative, less politicized way for states to punish certain acts of aggression. The fourth intervention seeks to mitigate the harms of domestic aggression prosecutions. Although the first intervention is the cleanest, its adoption is unlikely. I therefore recommend that the States Parties focus instead on mobilizing

121. 2004 Princeton Report, *supra* note 15, at 434.

support for the second, third, and fourth interventions, which are mutually reinforcing and will work best in concert. I further argue that the States Parties should devote the greatest attention to the fourth intervention, the most nuanced and potentially effective intervention of the set.

1. *Establish Exclusive ICC Jurisdiction or Primacy over the Crime of Aggression*

First, the ASP should consider amending the Rome Statute to establish exclusive jurisdiction for the ICC over the crime of aggression or, alternatively, to establish a primacy framework. Neither approach would affect the jurisdictional regime applied to genocide, crimes against humanity, or war crimes, which would continue to be situated within a complementarity framework.

As described in Part II, the ILC contemplated an exclusive jurisdiction regime for the crime of aggression in its 1996 Draft Code of Crimes.¹²² Under such a regime, only the ICC could prosecute the crime of aggression. This approach would be consistent with the principle of *par in parem imperium non habet*, as one sovereign state would not sit in judgment of another. A possible exception to exclusive jurisdiction, also suggested in the 1996 Draft Code of Crimes, would be to permit a state to try its own nationals for the crime of aggression.

Primacy is similar to, but not as absolute as, exclusive jurisdiction. Under a primacy framework, an international tribunal need not defer to domestic prosecutions; rather, it has the right to trump domestic proceedings.¹²³ The ICTY, ICTR, the Special Court for Sierra Leone, and the Special Tribunal for

122. See *supra* text accompanying notes 49-57.

123. For example, Article 9 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute states:

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal

Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, UNITED NATIONS art. 9 (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_septo9_en.pdf [<http://perma.cc/MEQ5-FALD>]. The International Criminal Tribunal for Rwanda (ICTR) Statute contains a parallel provision. *Statute of the International Criminal Tribunal for Rwanda*, UNITED NATIONS art. 8 (Jan. 31, 2010), http://www.unicttr.org/sites/unicttr.org/files/legal-library/100131_Statute_en_fr_o.pdf [<http://perma.cc/HCS3-BWN6>].

Lebanon have all adopted a primacy regime.¹²⁴ For the ICTY, primacy was instituted in response to concerns about the “effectiveness and impartiality” of domestic courts.¹²⁵ For the ICTR, the concern was less that Rwanda’s courts would try to shield perpetrators from justice, and more that they were too weakened by the genocide to capably prosecute the genocidaires.¹²⁶ The Security Council established each ad hoc tribunal’s primacy regime under its Chapter VII authority to determine the measures required to “restore ‘international peace and security.’”¹²⁷ The ICC, of course, does not enjoy Chapter VII provenance. It was created via a multilateral treaty, and is intended to be an enduring, forward-looking institution, rather than responsive to a specific set of atrocities. As such, its design offers more deference to national prerogatives.¹²⁸

Enabling the ICC to assert exclusive jurisdiction over the crime of aggression, or giving it the opportunity to trump national prosecutions, would avoid the political, legal, and procedural problems associated with domestic aggression prosecutions and described in Section III.B. However, many states would likely view such power as an illicit incursion on their sovereignty. States might also perceive these frameworks as disrupting the delicate balance between preserving national sovereignty and combating impunity for international crimes. This balance, which complementarity aims to strike, has been key to the ICC’s acceptance and legitimacy in the international community.¹²⁹ Exclusive jurisdiction or primacy might also force the ICC to choose between two undesirable options: overburdening itself with cases or declining to pursue most potential prosecutions. Either choice could hinder the development of a strong antiaggression norm, as discussed in Section III.A.2.

It would also be politically difficult to establish exclusive jurisdiction or primacy. Doing so would require amending Article 17 of the Rome Statute, as well as Article 15 *bis* and Article 15 *ter*. To amend the Rome Statute, a State Party must propose the amendment, a majority of those present at the next meeting of the ASP must vote to consider the proposal, and a two-thirds

124. Trahan, *supra* note 12, at 573.

125. *Id.* at 574 (quoting RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 66 (2004)).

126. *Id.* at 576-77.

127. *Id.* at 573 (quoting U.N. Charter art. 39).

128. The limitations of the ad hoc tribunals had also become apparent by the time of the ICC’s creation, and many states likely recognized that greater national participation in atrocity prosecutions was required to realize the promises of international justice. See E-mail from Beth Van Schaack to author, *supra* note 69.

129. See STIGEN, *supra* note 29, at 252-53.

majority of States Parties must then vote to adopt it.¹³⁰ It took twelve years for the ASP to agree to the aggression amendments, and there is already widespread fatigue following Kampala. It is thus unlikely that there will be much appetite for another amendment in the near future. So, although this proposal would provide the cleanest solution to the challenges posed by domestic aggression prosecutions, it is almost certainly politically infeasible.

2. *Supplement Understanding 5 with a Diplomatic Overture from the Chief Prosecutor To Discourage Domestic Incorporation*

A softer, more feasible approach to discouraging domestic incorporation would be to petition ICC Chief Prosecutor Bensouda to make a diplomatic overture toward States Parties. Bensouda could urge States Parties to give more space to the ICC to take the lead on aggression prosecutions and generally refrain from bringing such prosecutions domestically. In so doing, she could promote the notion that a state can respect its international obligations regarding serious crimes like aggression by *not* acting when ICC prosecution would be more appropriate and effective.¹³¹

This approach shares the same goal as the first proposal—limiting domestic incorporation and prosecution—but does not require the ASP to surmount any procedural hurdles or formally reconfigure the sovereignty-impunity balance that complementarity aims to strike.

That strength, however, is also a weakness. A diplomatic overture from the chief prosecutor is merely that—an overture. Whether a State Party pays it any heed will depend on how much respect the state has for the chief prosecutor, how much faith the state has in the ICC's ability to prosecute the crime of aggression, and how important it is to the state—for symbolic, dignitary, political, or other reasons—to conduct its own prosecution. A diplomatic overture is an important part of the shifting norms and expectations on how the crime of aggression is best prosecuted, but is not a sufficient solution in itself. States Parties should concurrently pursue the third and fourth proposals.¹³²

Before discussing those proposals, however, it is important to acknowledge the major drawback to my first and second proposals. If the ASP adopts a

130. Rome Statute, *supra* note 3, art. 121(1)-(3).

131. See William A. Schabas, 'Complementarity in Practice': *Some Uncomplimentary Thoughts*, 19 CRIM. L.F. 5, 6 (2008) (discussing models of complementarity as a constructive or antagonistic relationship between international and domestic justice).

132. See *infra* Sections IV.A.3, IV.A.4.

system of ICC exclusive jurisdiction or primacy,¹³³ or if States Parties heed the chief prosecutor's recommendation not to domestically incorporate the crime of aggression, the ICC may have to contend with the problems of incomplete concurrence between ICC and domestic prosecutions.

Van Schaack has given this potential problem significant attention and offers one possible solution: before the aggression amendments enter into force in 2017, the Chief Prosecutor should "announce . . . the intention to stay . . . her hand in the event that genuine domestic prosecutions are going forward on the basis of charges of genocide, crimes against humanity, or war crimes, even if domestic aggression charges are not available, are legally barred, or are not forthcoming."¹³⁴ The sole exception would arise in cases "in which the crime of aggression is the primary or central charge to arise out of a particular situation such that atrocity crimes are non-existent or largely peripheral."¹³⁵

Van Schaack's proposal would allow the ICC to maintain "de facto exclusivity over the crime of aggression," thus obviating some of the problems associated with domestic incorporation and prosecution.¹³⁶ Yet it would also empower national courts "to take the lead on prosecuting atrocity crimes" and therefore avoid encumbering the ICC with a massive caseload.¹³⁷ This is a smart and practical approach to promoting anti-atrocity norms, encouraging states to fulfill their duty to prosecute international crimes, combating impunity, and conserving the ICC's limited resources. It avoids the practical coordination challenges of concurrently prosecuting the same individual for different crimes arising out of the same events. Furthermore, it establishes a default position of avoiding politically volatile aggression prosecutions while leaving space for the ICC to intervene where aggression truly warrants prosecution.¹³⁸

3. *Prosecute for Violations of Ordinary Criminal Law, Not the Rome Statute*

The ASP can further guard against worrisome domestic prosecutions by encouraging national courts to prosecute an aggressor under ordinary criminal law. Though the defendant's conduct could trigger an aggression indictment, the state would apply its ordinary domestic criminal code instead. This would

133. See *supra* Section IV.A.1.

134. Van Schaack, *supra* note 35, at 133.

135. *Id.* at 136.

136. *Id.*

137. *Id.*

138. *Id.* at 136-37.

avoid the *par in parem imperium non habet* problem of states judging the conduct of other states. Ordinary criminal prosecutions would not require a finding that a state had committed an act of aggression, and would instead target individual acts.¹³⁹

But, ordinary criminal law prosecutions will not always be possible. Whether a domestic analogue to aggression exists will require a case-by-case determination. For example, cross-border terrorism or using weapons of mass destruction would constitute aggression under the Kampala Amendments, and would violate U.S. law.¹⁴⁰ Yet these examples are rare. Because Article 8 *bis* includes a leadership element and requires that an act of aggression have the “character, gravity and scale” to constitute “a manifest violation of the Charter of the United Nations,” the likelihood that a domestic analogue to the crime of aggression will be available is slim.¹⁴¹

Assuming that a state could find an analogous ordinary crime, the benefit to this approach is clear. The state could convict and punish the perpetrators for their harmful actions. In turn, the state would avoid charges of politicization and threats to political stability and conflict resolution that would flow from an aggression prosecution.¹⁴² Because of the Rome Statute’s double-jeopardy provision, prosecuting a defendant for ordinary crimes instead of aggression in a national court would preclude a subsequent aggression prosecution by the ICC.¹⁴³ This approach therefore captures the very values that motivated the adoption of the complementarity framework: respecting

139. E-mail from Beth Van Schaack to author, *supra* note 69.

140. See 18 U.S.C. § 2332a(b) (2012) (providing for the prosecution of U.S. nationals who use a weapon of mass destruction outside the United States); *id.* § 2332b (applying to acts of international terrorism committed against any person or property within the United States).

141. Kampala Amendments, *supra* note 2, annex I.2, art. 8(1) *bis*.

142. See *supra* Section III.B.2.

143. Article 20(3) of the Rome Statute provides that “[n]o person who has been tried by another court for conduct also proscribed under articles 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct.” Kampala Amendments, *supra* note 2, annex I.7. The emphasis on conduct means that, irrespective of how the crime is named or characterized, the ICC will not step in if the domestic court is prosecuting the same person for the same conduct as would constitute aggression under Article 8 *bis*. See Van Schaack, *supra* note 35, at 155-57. The ICC’s double-jeopardy provisions provide more protection than is available in the United States under *Blockburger v. United States*, which forecloses prosecutions only where two crimes share the same elements. 284 U.S. 299, 304 (1932). That is, double jeopardy does not apply if each provision violated “requires proof of an additional fact which the other does not.” *Id.* Under Article 17(1)(c) of the Rome Statute, double jeopardy bars a subsequent prosecution where “[t]he person concerned has already been tried for conduct which is the subject of the complaint.” Rome Statute, *supra* note 3, art. 17(1)(c).

state sovereignty and ensuring that serious international crimes not go unpunished.

The drawback of this approach is that prosecuting an act of aggression as an ordinary crime instead of as a crime of aggression will carry less expressive value.¹⁴⁴ As a result, prosecuting ordinary crimes may do less to contribute to the spread of an antiaggression norm.¹⁴⁵ This limitation, however, is outweighed by the benefit of avoiding the potentially destabilizing ramifications of a domestic aggression prosecution.

4. *Generate a Multifactor List To Guide Domestic Prosecutions*

Realistically, a diplomatic overture from the ICC Chief Prosecutor will not deter all States Parties from domestically incorporating the crime of aggression. Moreover, ordinary criminal-law prosecutions in lieu of aggression prosecutions will not always be feasible or desirable. At least some States Parties will proceed with domestic incorporation, particularly after the Kampala Amendments come into force in 2017. The ASP should therefore focus primarily on developing guidance to help domestic jurisdictions decide whether and when to indict and prosecute for aggression.

In particular, the ASP should create a multifactor list to target and prevent the riskiest domestic prosecutions. Its audience should be domestic decision makers who choose when to investigate, indict, and try criminal cases, such as Ministries of Justice and high-level public prosecutors. The ASP should aim to reach those prosecutors who are especially likely to pursue, or have a demonstrated history of pursuing, politically sensitive cases with little regard for the repercussions. These bellicose prosecutors, however, are also most likely to ignore the need for caution. Accordingly, the ASP should model the tone of the list on Understanding 5 and its “subtle preference” against domestic incorporation and prosecution.¹⁴⁶ The ASP should tactfully but clearly convey that the international community will disfavor prosecutions undertaken with relative insensitivity to political reverberations—particularly those prosecutions that might undermine conflict resolution efforts in response to mass atrocities

144. See Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT’L L.J. 85, 131 (2012); Dawn Sedman, *Should the Prosecution of Ordinary Crimes in Domestic Jurisdictions Satisfy the Complementarity Principle?*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE, *supra* note 55, at 259, 265 (questioning whether an ordinary criminal law prosecution will be able “to represent adequately . . . the context and nature of the crime”).

145. See *supra* Section III.A.2.

146. Van Schaack, *supra* note 35, at 135.

and human rights violations—and that prosecutors who undertake such actions risk reputational harm.

The list would not bind the States Parties, as it would not formally amend the Rome Statute. The ASP, however, could champion the list via diplomatic outreach and strongly recommend it as a tool to Ministries of Justice and public prosecutors' offices. To enhance the list's credibility, States Parties should publicly announce their commitment to it. Through widespread expressions of support and consistent application, the list could gradually become part of customary international law. G. John Ikenberry wrote of the Princeton Principles on Universal Jurisdiction that "[a]t the very least," the list would serve as "a gold standard" and make egregious conduct "harder to get away with."¹⁴⁷

The first factor on the list should be whether the United Nations Security Council has determined that a state committed an act of aggression.¹⁴⁸ The factor should be understood as dispositive—a threshold precondition for a domestic aggression prosecution. Determining whether an act of aggression has occurred "is one of the Council's core Charter functions,"¹⁴⁹ and relying on a United Nations Security Council determination will lend greater legitimacy to the state's indictment. A Security Council determination would also relieve the prosecuting state from a highly politicized assessment of whether the putative aggressor state in fact committed an act of aggression. For these same reasons, a Security Council determination was central to the ILC's approach in its draft statute for an international criminal court.¹⁵⁰

147. G. John Ikenberry, *Princeton Principles on Universal Jurisdiction*, FOREIGN AFF., Jan.-Feb. 2002, at 207 (reviewing PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001)), <https://www.foreignaffairs.com/reviews/capsule-review/2002-01-01/princeton-principles-universal-jurisdiction> [https://perma.cc/VDH2-D4TX].

148. See Van Schaack, *supra* note 111 (recommending that domestic legislators consider "limiting prosecutions to those situations in which the Security Council has declared the commission of an act of aggression," but not arguing that a Security Council determination should be dispositive); see also Koh & Buchwald, *supra* note 9, at 262-63 (discussing the benefits of entrusting the United Nations Security Council with the responsibility of determining when a state commits an act of aggression).

149. Van Schaack, *supra* note 115 (summarizing the remarks of Mort Halperin, senior advisor to the Open Society Foundations).

150. See Int'l Law Comm'n, Rep. on the Work of Its Forty-Sixth Session, U.N. Doc. A/49/10, at 44 (1994) ("Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the *Security Council* acting in accordance with Chapter VII of the Charter . . . to make." (emphasis added)); D. Stephen Mathias, Remarks, *The Definition of Aggression and the ICC*, 96 PROC. ANN. MEETING AM. SOC'Y INT'L L. 181, 182 (2002) (noting that Article 23, paragraph 2, of the draft ILC statute provided that the ICC could not exercise

In addition to the first, dispositive factor, the list should contain several discretionary factors, including: (1) whether the state(s) with territorial-based or national-based jurisdiction are unable or unwilling to prosecute (for cases in which the prosecuting state seeks to exercise nonterritorial jurisdiction); (2) whether the prosecution is against a country's own nationals;¹⁵¹ and (3) whether prosecutions for ordinary crimes are infeasible.¹⁵²

Of the four proposals, the multifactor list to guide domestic action has the most nuance and the greatest potential for impact. The list responds to the problems identified in both Sections III.A and III.B. It does not seek to foreclose all domestic prosecutions and vest exclusive or primary jurisdiction in the ICC, and thus does not raise the risk of incomplete concurrence or impede the uptake of an international antiaggression norm.¹⁵³ The list instead recognizes that many states likely will incorporate the crime of aggression into their domestic penal codes and guides those states to refrain from launching prosecutions that could jeopardize political stability and conflict resolution efforts.¹⁵⁴ The multifactor list is the most promising of the four proposals, but is not exclusive of the second and third proposals. Rather, the three proposals are mutually reinforcing and should therefore be pursued simultaneously.

B. The Form: An Intersessional Gathering

It would be unwise for the United States to wait until the 2017 Review Conference to raise these issues with sympathetic partners. There is too much fatigue regarding the crime of aggression, coupled with a sense of *fait accompli*

jurisdiction “unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint” (quoting Int’l Law Comm’n, *supra*, at 84)).

151. In addition to raising this point in the multifactor list, states might be encouraged to adopt domestic legislation limiting jurisdiction over the crime of aggression to charges brought against their own nationals. An example of such a bill was defeated in New Zealand before the Kampala Review Conference. International Non-Aggression and Lawful Use of Force Bill 2009 (62-1), <http://www.legislation.govt.nz/bill/member/2009/0062/latest/DLM2252903.html> [<http://perma.cc/86SD-WLKL>].

152. The list of factors might be packaged in a document much like The Princeton Principles on Universal Jurisdiction. The Princeton Principles, formulated through several working group meetings, aim to “clarify what universal jurisdiction is, and how its reasonable and responsible exercise by national courts can promote greater justice for victims of serious crimes under international law.” Stephen Macedo, *Preface* to PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 11-12 (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf [<https://perma.cc/CUK3-87K8>].

153. See *supra* Section III.A.

154. See *supra* Section III.B.2.

post-Kampala. Some members of the ASP even resist the idea that a 2017 Review Conference is needed at all.¹⁵⁵

I therefore recommend that the United States organize a Chatham-House-style gathering for States Parties to engage in a thoughtful, deliberative process about the practicalities left unexamined in Kampala.¹⁵⁶ The States Parties would wrestle with the implications of situating the crime of aggression inside a complementarity framework and aim to generate a set of best practices. A best practice guide, in turn, could influence concrete action at a 2017 Review Conference or, at a minimum, guide States Parties in their decisions about incorporation and subsequent prosecutions.¹⁵⁷

If the effort to convene a pre-2017 intersessional gathering should fail, interested States Parties could instead focus on the final decision that the ASP must take to activate the Kampala Amendments. Article 15(3) *bis* states, “The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the

155. Telephone Interview with Beth Van Schaack, *supra* note 42.

156. *Id.* As a nonparty to the Rome Statute, however, the United States must lead from behind. The United States should reach out to other concerned states, focusing on strong ICC members who share the United States’ skepticism of the crime of aggression. Denmark and Japan are two prime examples. *Id.*; see also Van Schaack, *supra* note 115 (summarizing the remarks of Hansen of the Danish Ministry of Foreign Affairs on the Danish perspective on ratification).

157. Of course, getting States Parties to attend a deliberative gathering would be challenging. The conveners might encourage attendance by distributing an issue brief clearly describing the ill fit between complementarity and aggression and the political crises that could ensue if there is widespread domestic incorporation and prosecution for the crime of aggression. The issue brief should invoke recent uses of force that could be classified as “aggression” as defined by the Kampala Amendments, for which domestic prosecutions could trigger political instability, jeopardize efforts to restore or maintain peace and security, and threaten the legitimacy of the ICC. Examples of such uses of force include the Russian Federation’s engagement in the Crimea in spring 2014, the United States’ invasion of Iraq in 2003, and Iraq’s invasion of Kuwait in 1990. The issue brief should emphasize that uncritically applying a complementarity framework to the crime of aggression is an insufficiently nuanced approach that may have serious and detrimental impacts. Without the distraction of the many other issues that dominated the agenda in Kampala, a clear and compelling issue brief could help create the urgency necessary to inspire delegations to attend the proposed gathering.

Before any intersessional gathering occurs, though, there must first be an up-to-date count of the States Parties that have already or intend to ratify the Kampala Amendments and those that have already or intend to domestically incorporate the crime of aggression. The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, a civil society organization, tracks and publishes these data. This source should be sufficient, but one of the convening states might also call upon its ambassadors to verify and update the Global Campaign’s data before the collective process begins. Telephone Interview with Beth Van Schaack, *supra* note 42.

same majority of States Parties as is required for the adoption of an amendment to the Statute.”¹⁵⁸ Concerned States Parties could invoke this requirement to raise (and attempt to resolve) some of the difficult questions around complementarity and to put a finer point on the subtle preference against domestic incorporation of the crime of aggression. Still, states should not wait until this decision juncture to engage States Parties in a dialogue about possible interventions. If progress is to be made, a longer-term engagement strategy such as the one proposed here is required.¹⁵⁹

In organizing the proposed gathering, the conveners should aim to replicate the Princeton Process’s informal, intersessional meetings. These meetings generated fruitful, productive discussions, according to Stefan Barriga, who from 2003 to 2010 served as principal legal advisor to the primary negotiators on the crime of aggression.¹⁶⁰ He attributed the success to the following considerations: a “serene environment” that helped inspire a “friendly and constructive atmosphere”; discussions structured around “individual contributions . . . generally understood not to be binding on the government that nominated the respective participant”; the “active involvement of NGO representatives” who offered “great expertise . . . thereby elevating the quality of the exchange”; a “pro-active approach” taken by the Chairman, as demonstrated by his submission of informal non-papers and use of questionnaires to shape the agendas; intermeeting communication over an e-mail list; and a general “sense of camaraderie” that generated “interactive, focused, open and frank” discussions.¹⁶¹

Of course, not everyone agrees with Barriga’s view that the Princeton Process was a resounding success, for it skirted many difficult political issues. Kreß observed that it “focused on legal and technical questions. . . . [R]elatively little time was wasted with rehearsing the divergent and well-entrenched views” on the highly political question of the Security Council’s role.¹⁶² Instead, Kreß explained, “[M]ost intellectual energy was applied to reducing the differences of opinions on a host of other issues of a less politically sensitive nature.”¹⁶³ Koh noted that the Princeton Process was “unable to

158. Kampala Amendments, *supra* note 2, annex I.3, art. 15(3) *bis*.

159. This idea was suggested by Van Schaack. E-mail from Beth Van Schaack to author, *supra* note 69.

160. Barriga now serves as the Deputy Permanent Representative of the Principality of Liechtenstein to the United Nations.

161. Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW, *supra* note 10, at 621, 624.

162. Kreß & Holtzendorff, *supra* note 82, at 1188.

163. *Id.*

bridge very significant differences of views among states” even though the participants addressed “at length” the jurisdictional prerequisites for an ICC prosecution for aggression.¹⁶⁴

Ideally, these drawbacks to the Princeton Process will be less salient at the gathering proposed here, given its singular, explicit focus on the highly political issues surrounding complementarity. Delegations will attend because of their interest in and commitment to resolving these tough questions, creating a rigorous, results-oriented environment.

CONCLUSION

The ASP took twelve years to fulfill the promise it wrote into the Rome Statute: to set out the conditions under which the ICC would exercise jurisdiction over the crime of aggression. During those twelve years, the international community repeatedly confessed that a complicated problem loomed on the horizon, but declined to grapple with its implications. Even at the 2010 Kampala Review Conference, the ASP failed to meaningfully wrestle with the tensions between the Rome Statute’s complementarity framework and the crime of aggression.

This Note diagnosed the problems that could arise if states do or do not incorporate the crime of aggression into their domestic penal codes and charted an agenda around which the United States and concerned States Parties might convene. Admittedly, there is strong inertia against reviving this unfinished conversation post-Kampala. But it would be a shame if States Parties allow that inertia to undermine the global community’s hard-fought effort to define, punish, and deter a serious international crime. Without action to resolve the complementarity question, the aggression amendments could give way to highly politicized or badly managed prosecutions that endanger conflict resolution prospects; flawed domestic prosecutions that bar subsequent ICC intervention; or an incoherent patchwork of domestic aggression variants. In short, the amendments could give rise to prosecutions that endanger, rather than promote, peace and justice. In turn, these risks threaten to undermine the ICC itself and the United States’ relationship with it, both of which are fragile.

Though these issues may not yet feel urgent, they must be addressed before policymakers’ neglect manifests in an acute crisis. Once ratified, the aggression amendments and their concomitant norms will be much harder to change. The United States and other concerned states must enlist States Parties to address these questions and devise an approach *before* 2017 arrives.

¹⁶⁴. Koh, *supra* note 73.