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# Aggression, Legitimacy and the International Criminal Court

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## Abstract

*The late Thomas Franck postulated that the legitimacy of international norms and institutions rested in large part upon certain important factors, notably whether the norm or institutional process was validated through commonly accepted means, whether it was clearly understood by those upon whom it operated, whether it cohered with other norms and institutions, and whether it was well-grounded in secondary rules of international law concerning law formation. This article argues that the proposed draft amendment to the Rome Statute on the crime of aggression does not fare well under these criteria, casting into doubt the long-term prospects for the legitimacy of the definition of the crime and of the institutional structures charged with administering it. Choices made at the ICC Review Conference in 2010 to finalize an amendment to the Rome Statute may help alleviate or aggravate these concerns.*

## 1 Introduction

The Rome Statute establishing the International Criminal Court (ICC)<sup>1</sup> entered into force in 2002; as of mid-2009, there are 110 states parties out of 192 UN member states. Though Article 5(1)(d) of the Rome Statute includes the 'crime of aggression' as one of the crimes under the jurisdiction of the International Criminal Court,<sup>2</sup> the actual exercise of that jurisdiction is conditioned upon further action by the states parties. According to Article 5(2), the Court shall exercise jurisdiction over the crime of aggression only once amendments to the Rome Statute are adopted, which would define the crime and set out the conditions under which the Court can exercise its jurisdiction in this regard.<sup>3</sup>

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<sup>1</sup> Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (hereinafter Rome Statute).

<sup>2</sup> See *ibid.*, Art. 5(1)(d).

<sup>3</sup> *Ibid.*, Art. 5(2); see Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 93 AJIL (1999) 2, at 10 (discussing the treatment of the crime of aggression in the negotiation of the Rome Statute).

The Assembly of States Parties, formed after the entry into force of the Rome Statute, may vote at its Review Conference in Uganda on whether to amend the Rome Statute so as to allow the ICC to exercise jurisdiction over this crime.

The current draft amendment developed by a Special Working Group<sup>4</sup> is a valiant attempt to overcome difficult issues, yet there are several unresolved problems which may undermine the initiative. One prism for considering those problems is to consider the effect on the development of the *jus ad bellum* in having an international institution charged with opining on the legality of particular acts of coercion, such as the rescue abroad of a state's nationals who are in peril or the use of force to protect another state's nationals from their own government.<sup>5</sup> A different prism for considering this issue might focus on the process for establishing and implementing the crime – to ask whether a norm of this kind and its operation will be viewed as 'legitimate' by the relevant actors operating within international law's domain. That issue is important, given that the ICC (and its half-sibling *ad hoc* international criminal tribunals) depends heavily on the perception of its authority to galvanize the support of states and non-state actors. Without that support, the ability of the ICC to investigate suspects, to take into custody indictees, and to issue authoritative decisions will be severely inhibited, if not crippled.

The late Thomas Franck posited that the greater the degree of legitimacy enjoyed by a rule or institution, the greater the degree of compliance that rule or institution would command.<sup>6</sup> Where an international rule or institution lacked legitimacy, its 'compliance pull' would be very weak. Franck identified four indicators – symbolic validation, determinacy, coherence, and adherence – as central for understanding whether a particular rule or institution would be regarded as legitimate. While this short article is not the place for a detailed discussion of either Franck's theory or its application to the ICC's possible crime of aggression, the following briefly suggests why aspects of the currently proposed amendments to the Rome Statute may not bode well for its success.

## 2 Problems of Pedigree

Legitimacy turns in part on whether the international rule has been 'symbolically validated' by those upon whom it operates.<sup>7</sup> Certain rituals are undertaken in international law for the creation of a new rule, such as through ratification of a treaty. Whenever the ritual is performed, it provides an important community validation that a new rule is established which binds those upon which it operates. Remarkably, for an issue of the magnitude of creating an international crime of aggression, and moreover for one arising within a fully-established multilateral treaty regime, the process for adopting the ICC's amendment on the crime of aggression is unclear and confusing. Consider the following two points.

<sup>4</sup> See International Criminal Court, Assembly of States Parties, *Report of the Special Working Group*, 7th Session (second resumption), at para. 10, ICC Doc ICC-ASP/7/SWGCA/2 (20 Feb. 2009) (hereinafter 2009 Special Working Group Report).

<sup>5</sup> See, e.g., Murphy, 'Criminalizing Humanitarian Intervention', 41 *Case Western Reserve J Int'l L* (2009) 241.

<sup>6</sup> T. Franck, *The Power of Legitimacy Among Nations* (1990).

<sup>7</sup> See *ibid.*, at 91.

First, it seems generally accepted that, for a change to occur, the Assembly of States Parties has to vote by a two-thirds majority to amend the Rome Statute.<sup>8</sup> There is dispute, however, as to whether that vote *alone* is sufficient for the change to occur. Some delegations participating in the Special Working Group have argued that Article 5(2) of the Rome Statute *only* requires adoption of the crime at the Review Conference, with no further need for ratification by states parties.<sup>9</sup> Such a view is attractive to those states which wish to remove a significant hurdle to the activation of the crime of aggression. Other states, however, maintain that once the Review Conference votes favorably, it is thereafter necessary for seven-eighths of the existing states parties to ratify or otherwise to accept the amendment. Only once that happens will the amendment enter into force (after the passage of one year).<sup>10</sup> This approach would present a significant hurdle, in that at least 97 states parties would need to ratify or accept any amendment, a process which could take many years and conceivably might not be achieved.

Secondly, regardless of how the amendment enters into force, there is further uncertainty about which states parties would then be bound by the amendment. Once it enters into force, an amendment of the Rome Statute normally binds all states parties, even those which have not yet ratified it.<sup>11</sup> In this case, however, since the amendment is expected to alter Article 5 of the Rome Statute, there is a special provision in the Rome Statute which results in the amendment binding only those states which have in fact ratified or accepted the amendment.<sup>12</sup> As such, it is generally thought that any state party (including those most likely to use military force abroad, such as France or the United Kingdom) may avoid exercise of the Court's new jurisdiction, with respect to acts committed by its nationals or on its territory, by not ratifying or accepting.<sup>13</sup> This anomaly has led to extensive discussion in the negotiations over alternative possibilities for entry into force, which would preclude states parties from opting out of the Court's jurisdiction over this crime,<sup>14</sup> notwithstanding what appears to be a relatively clear provision to the contrary.

Regardless of how these or other issues are resolved, the lack of clarity as to the process for adopting the crime of aggression may undermine the new crime's 'pedigree'. This pedigree might be strengthened by interpreting the amendment processes as requiring the highest degree of consent by states parties that a reasonable interpretation of the Rome Statute would sustain, and further by permitting states parties to avoid the new jurisdiction if they have not ratified or accepted the amendment. By hewing closely to the traditional notion of binding only states which have consented to the norm, validation of the norm will be at its strongest. Otherwise, by being built upon shifting sands, the foundation of the new rule may prove unstable and its validation by those upon whom it operates open to question.

<sup>8</sup> Rome Statute, *supra* note 1, Art. 121(3).

<sup>9</sup> See 2009 Special Working Group Report, *supra* note 4, at para. 10.

<sup>10</sup> Rome Statute, *supra* note 1, Art. 121(4).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, Art. 121(5).

<sup>13</sup> Once seven-eighths of the states parties ratify or accept the amendment, any party who has not accepted it may also withdraw completely from the Rome Statute: *ibid.*, Art 121(6).

<sup>14</sup> See 2009 Special Working Group Report, *supra* note 4, at paras 6–9.

### 3 Problems of Determinacy

The legitimacy of a rule also turns upon its ‘determinacy’, meaning whether the rule will be clearly understood by those upon whom it will operate.<sup>15</sup> Again, the current proposal for an ICC crime of aggression lacks this quality, which may be demonstrated by reference to certain aspects of the core definition currently under discussion. That core definition provides, in its first paragraph, that the ‘crime of aggression’ means the ‘*planning, preparation, initiation or execution*, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an *act of aggression* which, *by its character, gravity and scale*, constitutes a *manifest* violation of the Charter of the United Nations’.<sup>16</sup> The second paragraph then essentially equates ‘aggression’ with ‘use of armed force’ as identified in UN Charter Article 2(4), though without inclusion of a ‘threat’ to use force.<sup>17</sup>

On the one hand, this definition appears to focus upon an actual ‘act of aggression’ rather than a ‘threat’ to commit an act of aggression, since the term ‘threat’ is not present. As such, it might be thought that an actual invasion or other use of force must occur before a crime of aggression has been committed. On the other hand, the definition covers not just the ‘initiation’ or ‘execution’ of the act of aggression, but separately ‘planning’ or ‘preparation’ to commit an act of aggression (the disjunctive ‘or’ is used rather than ‘and’). Further, the proposed amendments leave untouched a provision in the Rome Statute which extends any crime to include an ‘attempt’ to commit a crime ‘that commences its execution by means of a substantial step’, so long as ‘the crime does not occur because of circumstances independent of the person’s intentions’.<sup>18</sup>

As such, it is unclear whether the definition criminalizes preliminary steps which fall short of actually completing the act. Imagine that an extensive conspiracy to commit aggression is developed by high-ranking officials of one state against a neighbouring state, which is forestalled only at the last moment by an internal coup. Can the plotters be prosecuted at the ICC under the new crime? Suppose instead that no coup occurs, but that the aggressor state pressurizes and threatens the neighbouring state into some form of capitulation without firing a shot (e.g., Nazi Germany’s *Anschluß* with Austria in March 1938). Has a crime of aggression occurred? The proposed definition is clear in covering egregious forms of aggression once they occur (e.g., Iraq’s invasion, occupation, and attempted annexation of Kuwait in August 1990), but is far less determinate in identifying whether it covers preliminary acts and threats.

Further, the proposed definition does not criminalize all acts of aggression; it criminalizes only those acts which, by their ‘character, gravity and scale’, constitute ‘manifest’ violations of the UN Charter. Again, there is little clarity in the line being drawn here between aggressive acts which are criminal and those which are not. Given that the UN Charter appears to place all ‘aggression’ at the high end of coercive

<sup>15</sup> See Franck, *supra* note 5, at 84.

<sup>16</sup> See 2009 Special Working Group Report, *supra* note 4, at 11, Art. 8bis(1) (emphasis added).

<sup>17</sup> See *ibid.*, Art. 8bis(2).

<sup>18</sup> Rome Statute, *supra* note 1, Art. 25(3)(f). This provision, however, does not clarify or narrow the content of the crime itself. Thus, if it is a crime to plan or prepare an act of aggression, there is no need to rely on a theory of ‘attempt’ to commit the aggression; it is sufficient to prove acts in the form of planning and preparing to commit the act.

behaviour,<sup>19</sup> it is somewhat perplexing to find that an act of 'aggression' may not be a 'manifest' violation of the Charter.<sup>20</sup> This confusion arises from equating 'aggression' with 'use of armed force' in the core definition's second paragraph,<sup>21</sup> a step which was also taken in the UN General Assembly's 1974 Definition of Aggression.<sup>22</sup> The General Assembly took that approach to avoid the difficulty of actually distinguishing aggression from lesser uses of force; now the proposed ICC crime also avoids truly defining aggression (by still equating it with all uses of force), yet the definition then seeks to delineate non-criminal aggression from criminal aggression.

But what acts of aggression are 'manifest' violations of the UN Charter? What acts of aggression are not 'grave' enough or of a 'scale' which makes them criminal? Was the temporary movement of Israeli troops into Lebanon in 2006 to attack Hezbollah criminal or non-criminal aggression? What about the movement of Colombian troops into Ecuador in 2008 to seize narco-terrorists? Was it criminal to move Soviet troops into Afghanistan in 1979 at the 'invitation' of a puppet government? If so, what about the movement of Nigerian troops into the Bokassa peninsula in the 1980s–1990s? The proposed definition provides no real guideposts for what 'character, gravity and scale' of aggression is criminal, and hence suffers from considerable indeterminacy on a central issue.

One answer to the problem of indeterminacy is to argue that such matters can be resolved by the prosecutor and judges of the ICC over time; that is, to avoid costly *ex ante* bargaining now among the states parties in favour of a sophisticated dispute resolution process which will resolve matters in the future. Such an approach has been taken in certain regimes, though often the dispute resolution process remains one over which states have considerable control (such as deciding which disputes to bring to the international tribunal).<sup>23</sup> Leaving the 'contract' incomplete may be attractive to member states which engage in a short-term cost/benefit analysis, but in the longer term normative and institutional legitimacy may suffer. While a norm which lacks determinacy on the margins might be left for adjudication through institutional processes, a norm which lacks core determinacy is problematic, for there is no obvious basis upon which institutional structures can reach principled determinations about the meaning of the norm. Further, reliance on those structures necessarily raises questions about the legitimacy of the structures themselves, which in turn invites inquiry into the pedigree, determinacy, coherence, and adherence of the institution. Space precludes extensive discussion of this issue, but the uncertainty within the current proposal about the 'triggering' mechanism

<sup>19</sup> See UN Charter, 59 Stat. 1031, TS 993, Art. 39 (calling upon the Security Council to address 'any threat to the peace, breach of the peace, or act of aggression'); see also *ibid.*, Arts 1, 53.

<sup>20</sup> The term 'manifest' might be construed as addressing not a type of aggression but, rather, whether the aggression at issue is sufficiently proven in a given case. If that is the reason for 'manifest', then the definition is conflating the jurisdiction of the ICC with an evidentiary standard which would normally apply at a later stage in a process of prosecution. Such a notion introduces further confusion as to the definition of the crime. See Paulus, 'Second Thoughts on the Crime of Aggression', in this vol.

<sup>21</sup> See 2009 Special Working Group Report, *supra* note 4, at 11, Art. 8bis(2).

<sup>22</sup> GA Res 3314 (XXIX) (1974).

<sup>23</sup> See, e.g., Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard Int'l LJ* (1999) 333, at 344–354.

for the investigation of a crime of aggression (i.e., whether it may be done by the prosecutor on his/her own initiative, by the prosecutor in conjunction with ICC judges, or by the prosecutor after a decision by the Security Council, General Assembly, or International Court of Justice) does not bode well for a generally-accepted institutional process for validating the contours of a norm shaped over time. Thus, if ultimately the prosecutor (perhaps in conjunction with a few judges) alone can launch prosecutions and shape the contours of what is deemed to be aggression, then the norm-refinement will occur under the auspices of a relatively discrete group of decision-makers who are not directly representing states, as part of a process in which states largely do not participate – a form of international law-making quite distant from traditional processes.

#### 4 Problems of Coherence

Even assuming that issues of determinacy might be resolved – that relatively bright lines can be drawn to make sense out of the distinctions in this proposed crime of aggression – there remain important problems of coherence. ‘Coherence’ is concerned with whether the rule or standard at issue is being applied consistently; in other words, whether there is an ‘unequal or illusory application of standards’.<sup>24</sup> For instance, assuming that the ICC’s jurisdiction does not reach threats to use force and does not reach acts of aggression of a ‘lesser scale’, a natural question is: why not? Article 2(4) of the UN Charter is regarded by many, including the International Court of Justice, as expressing perhaps the most important norm in international law, one which even qualifies as *jus cogens*.<sup>25</sup> That norm prohibits not just uses of force, but threats as well.<sup>26</sup> Why is it conceptually coherent for the ICC to regard such threats as not being criminal? Similarly, if a massive conspiracy of senior officials to commit large-scale aggression is uncovered and thwarted at the last minute, why should that conduct not be regarded as criminal? Perhaps the concern is that an unconsummated act is more difficult to prove, but that is an evidentiary issue, not a principled basis for defining the crime. If an act of aggression is consummated, but involves only the seizure of an uninhabited island or the blockade of goods, why is such ‘lesser’ conduct not criminal in nature? Does the lack of criminal sanction in some sense condone lower levels of aggression and, if so, does that cohere with the traditional *jus ad bellum*?

Part of the problem of coherence is likely to derive from the difficult gradations which already exist in the *jus ad bellum*, exemplified by the disconnect between violations of UN Charter Article 2(4) and permissible responses in self-defence under Article 51.<sup>27</sup>

<sup>24</sup> See Franck, *supra* note 5, at 138.

<sup>25</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* [1986] ICJ Rep 14, at 100, para. 190.

<sup>26</sup> UN Charter, *supra* note 18, Art. 2(4) (‘All Members shall refrain in their international relations from the threat or use of force . . .’).

<sup>27</sup> In *Nicaragua v. US*, *supra* note 24, at 103–104, the ICJ concluded that certain acts in violation of Art. 2(4) might not rise to the level of being an ‘armed attack’ for the purposes of Art. 51, and therefore could not be responded to through the exercise of self-defence. The lack of symmetry between Arts 2(4) and 51 is well grounded textually in the Charter but – in a system which relies heavily on self-help measures for enforcement of norms – arguably encourages coercive behaviour which falls short of ‘armed attack’.

Type of coercive act	Violates Article 2(4)?	Allows for a response under Article 51?	Constitutes a crime of aggression?	Example
A total or near-total ban on trade with another state.	No	No	No	US Cuban Democracy Act; <sup>28</sup> US Sudan Accountability & Divestment Act <sup>29</sup>
A threat to use armed force.	Yes	No	No	A coast guard vessel orders an oil rig to leave a disputed maritime area 'or the consequences will be yours'. <sup>30</sup>
A use of armed force which does not rise to a level of 'armed attack'.	Yes	No	No	A 'frontier incident' involving a brief forcible crossing of a border by a few soldiers. <sup>31</sup>
A use of armed force which does not rise to the level of an 'armed attack' but, by its character, gravity, and scale is a 'manifest' violation of the UN Charter.	Yes	No	Yes	The armed blockade of a major port of another state to secure trade concessions.
A use of armed force which constitutes an 'armed attack' but by its character, gravity, and scale is not a 'manifest' violation of the UN Charter.	Yes	Yes	No	A single aerial attack on a naval vessel, causing some death and property damage. <sup>32</sup>
A use of armed force which constitutes an 'armed attack' and by its character, gravity, and scale is a 'manifest' violation of the UN Charter.	Yes	Yes	Yes	The invasion of a state. <sup>33</sup>

<sup>28</sup> 22 USC §§ 6001–6010 (2000) (imposing comprehensive sanctions on Cuba).

<sup>29</sup> 47 ILM (2008) 130.

<sup>30</sup> See, e.g., *Award of the Arbitral Tribunal (Guyana v. Suriname)* (17 Sept. 2007), 47 ILM (2008) 166, at para. 445 (involving an oil rig which had been authorized by Guyana to engage in exploratory drilling on a part of the continental shelf in dispute between the two states).

<sup>31</sup> See, e.g., *Partial Award on the Jus ad Bellum*, 45 ILM (2006) 430, Ethiopia's Claims 1–8, paras 11–12 (Eritrea–Ethiopia Claims Comm., 19 Dec. 2005).

<sup>32</sup> See, e.g., Iraq's May 1987 attack, using two air-to-surface missiles, upon the *USS Stark* in the Persian Gulf, or Israel's June 1967 attack, using jet fighter planes and motor torpedo boats, upon the *USS Liberty* north of the Sinai Peninsula. For accounts of those incidents, see J.L. Levinson and R.L. Edwards, *Missile Inbound* (1997); J. Scott, *The Attack on the Liberty: The Untold Story of Israel's Deadly 1967 Assault on a U.S. Spy Ship* (2009).

<sup>33</sup> See, e.g., Iraq's Aug. 1990 invasion of Kuwait, though the UN Security Council did not actually classify that conduct as 'aggression': see SC Res 660 (2 Aug. 1990) (characterizing Iraq's conduct as 'a breach of international peace and security').

Introduction of the proposed crime of aggression may lead to a further disconnect in this area; if ultimately the distinctions being drawn in the crime of aggression are perceived as highly incoherent, then the norm may fail to be accepted as legitimate. The chart on the previous page suggests one possible way of piecing together the *jus ad bellum* puzzle under such a crime, but leaves it for the reader to decide whether such an approach is conceptually coherent.

## 5 Problems of Adherence

Finally, legitimacy of the new norm will turn in part on how well the creation of the norm ‘adheres’ to secondary rules of international law concerned with law formation.<sup>34</sup> Though somewhat related to the idea of ‘symbolic validation’ (discussed above), here the issue is of a more fundamental nature: is the norm being generated through a uniformly accepted rule of recognition about the proper sources of international law? Normally, international law looks to state consent in the form of acceptance of a customary practice as law or the ratifying of treaties, including treaties which accord to an international organization power to make or alter norms binding upon the state.

With respect to the crime of aggression, the principal concern of this kind probably relates to how this new crime will affect the 82 states which have not yet ratified the Rome Statute, including major military powers such as China, Russia, and the United States. The proposed crime of aggression is uniquely calculated to address acts and decisions taken at the highest level of government, since it is limited to persons ‘in a position effectively to exercise control over or to direct the political or military action of a State’.<sup>35</sup> Because of that, the proposed crime principally targets acts and decisions of individuals which are taken in their home state and not in the territory where the harm occurs – senior leaders who arguably engage in aggression conduct their affairs in places like the White House, the Pentagon, or the Kremlin, and not ‘in the field’. Further, the proposed crime appears to encompass squarely the acts and decisions of senior leaders of a *non-party*, so long as those acts and decisions (1) are directed against or have effects upon the territory of a state party or a non-party which *ad hoc* accepts ICC jurisdiction over the situation (or when there is a referral to the ICC by the Security Council). A key question is whether such acts and decisions of senior leaders, taken in their home country, are regarded as ‘conduct’ which ‘occurred’<sup>36</sup> in the state which was the target of the aggression; if so, then the acts and decisions can fall within the scope of the ICC’s jurisdiction. In sum, the proposed crime seems to portend a ‘perfect storm’ for uprooting primary rules from secondary rules: senior leaders of a state taking decisions in their own territory are exposed to criminal liability before a international institution created by a treaty which the state has not accepted.

<sup>34</sup> See Franck, *supra* note 5, at 183.

<sup>35</sup> See 2009 Special Working Group Report, *supra* note 4, at 11, Art. 8bis(1).

<sup>36</sup> See *ibid.*, Art. 12(2)(a).



It might be argued that this situation is no different than the one which already exists at the ICC. Current jurisdiction under the Rome Statute can ensnare the senior leadership of non-parties if those leaders order their military or covert forces to commit major crimes (genocide, crimes against humanity, war crimes) on the territory of another state (where that state is a state party or is a non-party which has accepted ICC jurisdiction *ad hoc*, or where the Security Council referred the matter to the ICC). Just as Slobodan Milošević was indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) for ordering acts in Bosnia-Herzegovina and Croatia, the ICC could indict senior leadership of a non-party for massive crimes perpetrated against a neighbouring state.<sup>37</sup> However, ICC prosecutions to date have concerned themselves with harmful conduct by individuals taken within their own country, arising in situations where that state has either itself accepted the ICC's jurisdiction (Central African Republic, the Democratic Republic of the Congo, and Uganda) or the matter has been referred to the ICC by the Security Council (Sudan).<sup>38</sup> In such situations, there are fewer problems in the adherence of primary rules to secondary rules of international law, given that states (even non-parties) have either expressly consented to ICC scrutiny of conduct in their territory or consented by virtue of their acceptance of the Chapter VII authority of the Security Council.

The current draft amendment does not expressly address the issue of whether conduct of senior leaders in their own territory 'occurs' in another state when aggression is unleashed. To the extent that some controversy already exists with respect to existing ICC jurisdiction over nationals of non-parties (where those nationals are physically present and undertake proscribed acts in another state), this approach with respect to the crime of aggression is likely to exacerbate that controversy. The central question is whether international law can be formed in such a manner – by certain states regulating the conduct of leaders of other states for the effects of their actions, and doing so in a manner which exposes those leaders to the criminal jurisdiction of an international tribunal. The victors in an armed conflict have certainly done so with respect to defeated states (demonstrated by the Nuremberg and Tokyo tribunals), as has the Security Council (demonstrated by the Yugoslav and Rwandan tribunals). Yet the Nuremberg/Tokyo precedents were not without controversy, and the ability of a group of states to take such steps in peacetime as against another group of states is far less clear. If such regulation is widely seen as a natural development in the way secondary rules of international law may operate, then legitimacy will be present; if not, then acceptance of and compliance with the new normative system will suffer.

The concerns already expressed by the United States with respect to the treatment of non-parties under the Rome Statute are well-known.<sup>39</sup> Under the current Obama Administration (and even in the latter half of the Bush Administration), there are

<sup>37</sup> See Rome Statute, *supra* note 1, Arts 25(3)(b) (imposing responsibility for ordering a crime), 27 (denying any official immunity), and 28 (addressing superior and command authority).

<sup>38</sup> See [www.icc-cpi.int/Menus/ICC/Situations+and+Cases/](http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/).

<sup>39</sup> For a recounting of the US relationship with the ICC by President Bush's second-term State Department Legal Adviser see Bellinger III, 'A Global Court Quandary for the President', *Washington Post*, 10 Aug. 2009, at A13.

some signs of greater US support for, if not adherence to, the ICC.<sup>40</sup> Adoption of a new crime of aggression by states parties to the Rome Statute which purports to regulate decision-making by senior US officials undertaken in Washington, DC, is likely to increase the difficulty for the United States in *rapprochement* with the ICC. Crafting the crime so as not to regulate such conduct, or alternatively to provide an exclusive ‘trigger’ to the UN Security Council where the United States can wield a veto, would avoid such difficulties, and increase the likelihood of support by the United States for the ICC (through sharing of intelligence, favourable action at the Security Council, and possibly apprehension of indictees). Having said that, in the short term it remains unlikely, no matter what emerges from the 2010 Review Conference, that the United States will ratify the Rome Statute.

## 6 Conclusion

The ICC already has a certain degree of legitimacy, due to its origins in a major multi-lateral treaty, crafted after many negotiating sessions involving a wide range of states. Those states drew heavily on the past practice of international criminal tribunals and international criminal law, extracting norms and methods which were thought appropriate for pursuing the most heinous of crimes in the future. The Rome Statute produced from those negotiations is a lengthy, detailed, and thorough treatment of the substantive crimes falling within ICC jurisdiction, and of the procedures and institutions charged with investigating, prosecuting, and adjudicating on those crimes. So far 110 states have ratified the Rome Statute, a large (but not overwhelming) majority of states worldwide. Because of the attention to process and substance, the ICC has a certain stature in the pantheon of international institutions.

Yet its legitimacy has also been questioned. The ICC’s indictments to date exclusively relate to conflicts in Africa, a fact which has not gone unnoticed. The paucity of indictees actually in custody suggests an inability to marshal sufficient political support from states.<sup>41</sup> And the pretension to jurisdiction over nationals of non-parties continues to evoke claims of overreach. In crafting a further major component of work for the ICC in the crime of aggression, serious attention should be paid to the long-term prospects for the legitimacy of the definition of the crime and of the institutional structures charged with administering it. For the reasons stated above, the current process and drafts under consideration raise serious doubts about those prospects.

<sup>40</sup> See Report of an Independent Task Force Convened by the American Society of International Law, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (2009), available at: [www.asil.org](http://www.asil.org).

<sup>41</sup> E.g., in the aftermath of his indictment, Sudan President Bashir attended an Arab League summit in Qatar, receiving support from several Arab states. See ‘Unity of a Kind’, *The Economist*, 2 Apr. 2009 (‘Delegates denounced the court for picking on Arab and Muslim leaders while ignoring the alleged crimes of Israel. Syria’s president, Bashar Assad, said the court had no right to interfere in countries’ sovereign affairs – an understandable complaint, as a UN tribunal is investigating Syria’s likely involvement in a series of political murders in Lebanon’).