
The Empty U.S. Chair: United States Nonparticipation in the Negotiations on the Definition of Aggression

by Garth Schofield*

INTRODUCTION

THE ADOPTION OF THE ROME STATUTE for the International Criminal Court (ICC) in July 1998 placed four crimes within the jurisdiction of the court — genocide, crimes against humanity, war crimes, and aggression. Of these, the crime of aggression remains inoperative. When negotiations over the definition and jurisdictional conditions for the crime of aggression deadlocked at Rome, the parties chose to table the issue. Aggression was included, but its application is contingent on the adoption of a definition by the states parties.¹ This can happen, at the earliest, during the first Review Conference of the Rome Statute, to be held in 2009 or 2010.

In the intervening years, the Rome Statute has entered force and the court has begun operation. The United States signed the Rome Statute at the last possible moment — December 31, 2000 — and then renounced its signatory status one and one-half years later. Meanwhile, negotiations on the definition of aggression have continued behind the scenes. Since 2002, however, these negotiations have proceeded without the participation or input of the United States. In that time, there has arguably been a shift in the tenor of negotiations away from U.S. positions. Provisions that received only minority support at Rome have now been largely accepted by the parties to the ICC.

For opponents of the court, these developments raise the distinct possibility that the ICC will adopt a definition of aggression that the United States considers unacceptable — an expansive definition without strict control by the Security Council. Yet even for American supporters of the Court, the trend in the negotiations is troubling. Excluding the Security Council from the determination of whether aggression has occurred increases the likelihood of a political clash between the Permanent Five and the ICC that could prove highly damaging to the Court. Lowering the threshold for criminal aggression risks diverting the Court from serious war crimes and crimes against humanity to making a potentially difficult political determination in naming an aggressor. An expansive definition could be formulated to encompass legitimate actions in self-defense and potentially criminalize humanitarian actions.

That adroit diplomatic maneuvering on the part of the United States could have protected its preferences is at least a realistic possibility. The United States was able to significantly influence the negotiations at Rome on issues such as complementarity and specified elements of crimes even though it ultimately failed to join consensus. The emphasis at Rome on restraint and rigorous

definition ultimately proved to the Court's advantage and probably sped the ratification of the Statute.

On the question of aggression, the other permanent members of the Security Council, as well as some other countries, have maintained some of the United States' preferred positions, but have become increasingly isolated. Even allies from the Rome Conference such as Germany have substantially altered their position. Although U.S. participation would have been partially self-interested — limiting the chance that U.S. operations would fall within the definition — it would also have served as a valuable check. Furthermore, the U.S. renunciation of its signature would not have prevented its participation. The ICC still considers the U.S. to be a signatory observer² and in any case, the proceedings of the Special Working Group on the Crime of Aggression are open to all members of the United Nations.³ Other non-parties, such as China, have remained involved.

HISTORICAL BACKGROUND

The criminalization of aggression in international law dates to the International Military Tribunal (IMT) established at Nuremberg following the Second World War, and to its counterpart, the International Military Tribunal for the Far East. Crimes against peace — as aggressive war was charged at Nuremberg — were further developed in Allied Military Tribunals conducted in Germany under Control Council Law 10.⁴ Since then, however, there has been no further jurisprudence, and aggression was excluded from the Statute of the International Criminal Tribunal for the former Yugoslavia.

In establishing the IMT, crimes against peace were included largely out of fear that senior Nazi leaders might otherwise escape punishment. Modern doctrines of command responsibility and joint criminal enterprise had yet to be developed to reach such individuals. Ultimately, the Nuremberg Charter provided for individual responsibility for:

Crimes against peace. Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.⁵

Significantly, this formulation included only *wars* of aggression, which the prosecution argued had already been made criminal by a variety of international instruments from the 1920s.

Because they were conducted against the backdrop of the unquestionable aggression of the Nazi Conquests, the Nuremberg jurisprudence provides only a few principles clearly. A declaration of war was not required, but actual use of force was. Although the IMT considered the occupation of Austria and Czechoslovakia to be “aggressive in character,” they were

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not considered to be instances of criminal aggressive war.⁶ The motives of Germany and Japan — noting the goals of forcibly acquiring territory and securing domination over other states — were relevant. Crimes against peace were leadership crimes and restricted to those at the policy-making level. Mere preparation for war, however, was insufficient, and knowledge that the war was aggressive was required.⁷

After the war, the principles of the Nuremberg Tribunal were immediately recognized as part of international law by the General Assembly of the new United Nations.⁸ The General Assembly also began the process of developing a definition of aggression⁹ and directed the International Law Commission to develop a Draft Code of Offenses Against the Peace and Security of Mankind. These two efforts occupied the majority of the discussion on aggression in subsequent decades, although the International Law Commission’s work never departed significantly from the Nuremberg formula.¹⁰

The General Assembly’s definition of aggression was finally adopted in 1974 and constitutes the most significant alternate touchstone to the Nuremberg precedents.¹¹ It was not intended to provide a basis for individual criminal responsibility, but to provide guidance to the Security Council in determining state responsibility. Although adopted by consensus, the definition left unresolved significant differences relating to the intent behind aggressive uses of force and aggression in wars of liberation. The superpowers and their allies wanted a high threshold and an intent standard to insulate their own military operations, while the developing states of the Nonaligned Movement sought to include any possible use of force against them within its scope. The definition hews very closely to the prohibition on the use of force in the UN Charter, while also providing an illustrative list of acts that would constitute aggression. No threshold of gravity or particular motive is required, implying that any use of force not authorized by the Charter would constitute aggression.

RECENT NEGOTIATIONS AND ISSUES

Negotiations to define aggression for the ICC have taken place in three different fora — at the Rome Conference and its Preparatory Committee; in the Working Group on the Crime of Aggression of the Preparatory Commission on the ICC between

1999 and 2001; and since 2002 in the Special Working Group on the Crime of Aggression established by the Assembly of States Parties. Consistent disagreements have surrounded the role of the Security Council in determining that a state act of aggression had occurred and the scope of the definition and threshold of gravity.

ROME CONFERENCE

At Rome in 1998, negotiations deadlocked over the role of the Security Council. The Permanent Five and a number of supporters insisted that the court should only be able to proceed in the wake of a Security Council determination that a state act of aggression had occurred. Opponents of this position felt that making the court dependent on a political decision by the Security Council would destroy its independence, although a majority favored a compromise if one could be reached. Part of the debate hinged not on whether a Security Council finding of aggression would be necessary for jurisdiction, but whether such a determination would be reviewable at trial.

In debating aggression, the participants at Rome focused on a three-option draft paper prepared by the final Preparatory Committee in 1998.¹² The first option essentially reproduced the definition from the Nuremberg Charter, even maintaining the language of Nuremberg, referring in square brackets to crimes against peace and wars of aggression. The second option was developed from a proposal by Egypt and Italy and adopted the list of aggressive acts from Article 3 of the General Assembly definition.¹³ Whether the list would be merely illustrative or would constitute an exhaustive list of aggressive acts remained under debate. The third option was developed from a German proposal¹⁴ and sought to update the Nuremberg definition while maintaining a high threshold for aggressive acts to become criminal. Dispensing with the words “war of aggression,” the German proposal used the term “armed attack” from Article 51 of the UN Charter.

Although no consensus definition was reached, the majority of states supported the German option. The developing states split, with only Middle Eastern states favoring the General Assembly-inspired second option. Support for the straight incorporation of the Nuremberg definition was minimal. Later in the

conference, the first and second options were dropped and states were asked to support or oppose including the German definition. A majority still favored including the definition if a compromise could be reached on the role of the Security Council.

As the conference drew to a close, the Conference Bureau placed a deadline on the definition of aggression, proposing that it be excluded from the statute if a definition could not be agreed on by the end of the day on July 13. At the time, however, debate was focused on the question of whether jurisdiction over core crimes would be automatic or on an opt-in basis for each crime. Aggression was a less pressing issue and no agreement was reached.

PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT

The task of defining aggression was passed to the Preparatory Commission by Resolution F of the Rome Conference¹⁵ and remained there until the Statute entered force in 2002. The General Assembly-based definition was immediately reintroduced for consideration by a coalition of Middle Eastern

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states,¹⁶ while Germany reintroduced its proposed definition in its original form.¹⁷ Russia brought back the Nuremberg definition.¹⁸ Although attempts were made to integrate General Assembly elements into the German formulation,¹⁹ the doctrinal split among states between those preferring a high threshold for aggression and those preferring an expansive definition remained, as did the split between those favoring general definition and those who preferred an illustrative list of acts.

Germany made a strong effort to defend a high threshold, emphasizing that even the General Assembly definition distinguishes between the crime of aggression and other acts of aggression. Germany’s argument was that past instances of unquestionable aggression share certain characteristics: “a particular magnitude and dimension;”²⁰ serious consequences, such as loss of life and widespread destruction; and objectives unacceptable to the international community, such as annexation, annihilation, and the deportation of populations. A broader definition would draw the court into minor border conflicts and skirmishes where a clear aggressor is difficult to determine. This

position was strongly supported by the United States, but did not achieve a consensus.²¹ A significant number of states continued to support either a General Assembly-based definition, or an alternate low-threshold definition.²²

In 2001, the debate returned to the role of the Security Council. Various proposals were made to allow the Court to proceed if the Security Council failed to act in 12 months, to proceed on the basis of an advisory opinion from the ICJ,²³ or simply to act without recourse to the Security Council.²⁴ The United States and the other permanent members of the Security Council continued to strongly oppose these proposals. The U.S. position was that the Charter power to determine when an act of aggression had occurred was granted exclusively to the Security Council because it fell under Chapter VII, even if other bodies had a role in peace and security generally.²⁵

ASSEMBLY OF STATES PARTIES

No definition was produced by the final session of the Preparatory Commission in July 2002, at which point the United States had already withdrawn from participation in the Court. The first act of the Assembly of States Parties was to establish a Special Working Group to continue the Preparatory Commission’s work on aggression.²⁶

The core debates of the previous efforts have continued, but with a significant shift in the tone of negotiations. The discussions at the Assembly of States Parties have been based on the consolidated definition that incorporates much more of the General Assembly definition than previous consolidated texts.²⁷ Remaining elements of the German proposal were reduced to square brackets, the threshold of gravity for aggression was altered to limit jurisdiction to acts that constitute “flagrant” violations of the Charter, and an act of aggression was defined as “an act referred to in United Nations General Assembly resolution 3314 (XXIX).”²⁸ The revised discussion paper, from January 2007, goes even further — whether the definition recommended to the Assembly will be based on the General Assembly definition is no longer under debate.

In negotiations, the parties continued to disagree about whether the crime of aggression should apply to any “act of aggression” of sufficient gravity, or whether the term “armed attack” should be used. Support for any continued use of the term “war of aggression,” however, was minimal,²⁹ and the majority favored the broadest term of “act of aggression.” Reference to the objectives of aggression — annexing or occupying territory — was first modified to make it merely illustrative and then effectively dropped in favor of referring to manifest violations of the Charter. A number of delegations even opposed limiting the definition to manifest or flagrant breaches of the UN Charter.³⁰

By February 2007, even developed states, including France and China, which had previously opposed using the General Assembly definition, accepted it and were concerned only with whether all or part of the definition would be included. A general reference to the General Assembly resolution raises potential problems as the definition allows the Security Council to designate additional, unspecified acts as aggression. Many developing states wanted to limit the reference to Articles 1 and 3 of the General Assembly definition, which would address the legality concern of allowing the definition to be expanded, but would also excise all references to the Security Council and the

portion of the definition which distinguishes between the crime of aggression and other acts of aggression.³¹

OUTSTANDING ISSUES, TRENDS, AND U.S. PREFERENCES

The trend in negotiations has been clearly away from the formulation of aggression favored by the United States, particularly since the U.S. withdrawal from the Court. The United States strongly favored a guaranteed role for the Security Council. The United States also previously favored defining aggression in part on the basis of the purpose and objectives of the aggressor. During the negotiations in the 1970s on the General Assembly definition, the United States and other European powers argued that aggressive intent was closer to the customary law and the Nuremberg precedents, and a better indication of aggression than the first use of force. Such a focus would avoid introducing the question of criminality in minor incidents and would prevent the definition from applying to most U.S. operations that do not seek to annex territory or seize resources.

None of these objectives has been advanced by the course of negotiations to date. The draft definition supported by the

Although the delegations debated whether the Court should proceed if the Security Council declines or is unable to make a determination, there has been no debate about the weight of a Security Council resolution that aggression has *not* occurred. It is not clear under any of the formulations whether such a resolution would permanently prevent the Court from charging aggression, or if the Court could only be prevented from proceeding through year-by-year resolutions invoking Article 16 of the Rome Statute. Other procedural options, such as requiring a full session of the Pre-Trial Chamber in order to proceed without the Security Council have not been thoroughly discussed.

CONCLUSION

THE ASSEMBLY OF STATES PARTIES may prove no more successful than its predecessors in devising a definition of aggression capable of meeting the demanding standards for amending the statute.³⁴ On the other hand, the role of the Security Council has been the major sticking point in all of the previous attempts. Yet in recent negotiations, less than ten state parties, including the United Kingdom, France, Russia, Australia, Poland and China,

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majority of states has progressively lowered the threshold for the crime of aggression from a war of aggression, to an armed attack aimed at capturing territory, to any act of aggression in manifest violation of the Charter. Any reference to particular aggressive intentions has been all but removed, and the General Assembly definition has been progressively incorporated, while its distinction between criminal aggression and other aggressive acts has been ignored. In a definition based on the General Assembly formula — in particular a definition based only on Articles 1 and 3 — the “manifest violation” requirement is the only provision distinguishing insignificant border conflicts or even legal uses of self-defense from acts of aggression.³² Because the purpose of an action may not be considered, uses of force of questionable legality but not motivated by aggressive intent — humanitarian intervention or anticipatory self-defense — will likely fall under the proposed definition of aggression. This places great weight on how the words “manifest violation” are ultimately interpreted.

While the threshold for aggression has been lowered, developing the rules of procedure and elements of crimes, which was a major U.S. interest at Rome, has not been seriously discussed. The last draft of the elements of the crime of aggression was prepared in 2002 and has not been modified since.³³ These drafts elements require no particular *mens rea* requirement and there has been no discussion of potential procedural and evidentiary issues.

remain insistent on a mandatory Security Council determination. While the Assembly might be loathe to adopt a definition over the votes of the permanent members, this may not be enough to block adoption of an amendment, or even its ratification. There appears to be a strong desire in the Assembly to produce a definition for adoption in 2009 or 2010. The ratification and entry into force of the Rome Statute happened much more quickly than many originally predicted. It is entirely conceivable that the adoption and ratification of an amendment — even over the opposition of the Permanent Five — may also proceed more quickly than might be expected.

Should such a definition be adopted, a lower threshold for aggression could present problems for the Court. The virtue of a high-threshold definition is not that it reflects the international consensus on the limits of the crime of aggression. From the fact that many states have consistently advocated lower limits, many states clearly believe that the crime of aggression extends further. Rather, the virtue of a high-threshold definition is that it would involve the Court in only those cases on which a near consensus exists as to their criminality. A high-threshold definition would keep the Court from being drawn into conflicts where a clear aggressor cannot readily be identified and discourage states from attempting to use aggression charges as leverage in relatively low-level conflicts. It would also minimize the chance of a disagreement between the Court and the Security Council regarding whether a particular case constituted aggres-

sion and would keep debates about the legality of humanitarian or stability operations away from a Court primarily concerned with individual responsibility. The recent disagreement between the ICJ and the Yugoslav Tribunal over the scope of genocide in Bosnia-Herzegovina³⁵ demonstrates the problems that arise when international courts and organizations disagree in their characterization of a conflict.

Without the carrot of potentially joining the Court, the United States would have had significantly less leverage than at Rome, and likely could not have protected a role for the Security Council. On the other hand, the United States could still have significantly influenced negotiations on the margins, pushing for a higher threshold and drawing attention to neglected issues like the elements of the crime of aggression or evidentiary con-

cerns. Returning to the process now, although it would not give the United States a vote on the definition, would still provide a chance to shape opinions, particularly in maintaining a united position among the Permanent Five.

If the Working Group maintains its plan to produce a draft definition in 2008, one year before the Review Conference, the Sixth Session of the Assembly of States Parties will be the last significant chance to influence the definition. Whether it chooses to join the Court or not, the United States will necessarily be involved as a permanent member of the Security Council in determining when aggression has occurred, if the Security Council is allocated that role. Given these circumstances, it should not be on the sidelines while the Court's definition is being prepared. HRB

ENDNOTES: THE EMPTY U.S. CHAIR

1 Rome Statute of the International Criminal Court art. 5, ¶ 2, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002) available at <http://www.un.org/law/icc/statute/romeofra.htm>, (last visited Nov. 20, 2007).

2 International Criminal Court, Assembly of States Parties, *Delegations to the fifth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, ICC-ASP/5/INF.3/Rev.1, December 19, 2006 (listing the United States as an observer state with no delegation present).

3 International Criminal Court, Assembly of States Parties, *Continuity of work in respect of the crime of aggression*, ICC-ASP/1/Res.1, September 9, 2002.

4 Preparatory Commission for the International Criminal Court, *Historical Review of Developments Relating to Aggression*, PCNICC/2002/WGCA/L.1 ¶¶ 1-378 (January 24, 2002) [hereinafter *Historical Review of Aggression*].

5 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)* annex Art. VI (a), Aug 8 1945, 82 U.N.T.S. 280 (1951).

6 *Historical Review of Aggression*, *supra* note 4 at ¶¶ 31, 33, 96, 101. This approach was altered by the U.S. Military Tribunal (USMT) under Control Council Law 10 which provided for jurisdiction over both "invasions of other countries and wars of aggression" (emphasis added) Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, art II, reproduced in III *Trials of War Criminals before the Nuernberg Military Tribunals* p. XVIII (1951). The USMT convicted Wilhelm Keppeler of crimes against peace on the basis of his involvement in the invasions of Austria and Czechoslovakia, *United States of America v. Ernst von Weizsacker et al.*, Judgment, XII *Trials of War Criminals before the Nuernberg Military Tribunals* 387, 389.

7 Ian Brownlie, *International law and the use of force by states*, 167-182 (1963); Preparatory Commission for the International Criminal Court, *Historical Review of Developments Relating to Aggression*, PCNICC/2002/WGCA/L.1 note iv at 196-199 (January 24, 2002) [hereinafter *Historical Review of Aggression*].

8 *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95(1) (1956).

9 *Question of Defining Aggression*, UN Doc A/1858. See also G.A. Res. 897(IX).

10 Draft Code of Crimes Against the Peace and Security of Mankind art. 2 para. 2, *Yearbook of the International Law Commission*, 1996, Vol. II (2), UN Doc A/51/10.

11 G.A. Res. 3314 (XXIX) (1974).

12 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (April 14, 1998).

13 Proposal Submitted by Egypt and Italy on the Definition of Aggression, Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Definition of Crime, UN Doc. A/AC.249/1997/WG.1/DP.6 (Feb. 21, 1997).

14 Proposal by Germany, Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Definitions and Elements of Crime, UN Doc. A/AC.249/1997/WG.1/DP.20 (Dec. 11, 1997).

15 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 15–July 17, 1998, *Final Act*, Annex I, Resolution F (7) UN Doc. A/CONF.183/13(Vol.I) (July 17, 1998).

16 Preparatory Commission for the International Criminal Court, *Proposal Submitted by Bahrain, Iraq, Lebanon, the Libyan Arab Jamahiriya, Oman, Sudan, the Syrian Arab Republic and Yemen*, UN Doc. PCNICC/1999/DP.11 (Feb 26, 1999).

17 Preparatory Commission for the International Criminal Court, *Proposal Submitted by Germany*, UN Doc. PCNICC/1999/DP.13 (July 30, 1999).

18 Preparatory Commission for the International Criminal Court, *Proposal Submitted by the Russian Federation*, UN Doc. PCNICC/1999/DP.12 (July 29, 1999).

19 Preparatory Commission for the International Criminal Court, *Discussion Paper Proposed by the Coordinator*, UN Doc. PCNICC/1999/WGCA/RT.1 (Dec. 9, 1999).

20 Preparatory Commission for the International Criminal Court, *Proposal Submitted by Germany, The Crime of Aggression; A Further Informal Discussion Paper*, UN Doc. PCNICC/2000/WGCA/DP.4, ¶ 10 (Nov. 13, 2000).

21 Preparatory Commission for the International Criminal Court, *Crime of Aggression: Statement by the United States* (Dec. 6,

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2000), available at <http://www.state.gov/documents/organization/16461.pdf>.

22 Preparatory Commission for the International Criminal Court, *Proposal submitted by Greece and Portugal*, UN Doc. PCNICC/2000/WGCA/DP.5, (Nov. 28, 2000).

23 Preparatory Commission for the International Criminal Court, *Proposal Submitted by Bosnia and Herzegovina, New Zealand, and Romania*, UN Doc. PCNICC/2001/WGCA DP.2/Add.1 (Aug. 27, 2001).

24 Preparatory Commission for the International Criminal Court, *Proposal Submitted by Colombia on the Definition of the Crime of Aggression and On Conditions for the Exercise of the Jurisdiction of the Court with Regard to this Crime*, UN Doc. PCNICC/2000/WGCA/DP.1 (Mar. 1, 2000).

25 Preparatory Commission for the International Criminal Court, *Crime of Aggression: Statement by the United States* (Sept. 21, 2001) available at <http://www.state.gov/documents/organization/16461.pdf>.

26 International Criminal Court, Assembly of States Parties, *Continuity of Work in Respect of the Crime of Aggression*, ICC-ASP/1/Res.1, (Sept. 9, 2002).

27 Preparatory Commission for the International Criminal Court, *Discussion Paper Proposed by the Coordinator*, UN Doc. PCNICC/2002/2/Add.2 (July 24, 2002).

28 *Id.* at art. 2.

29 International Criminal Court, Assembly of States Parties, *Special Working Group on the Crime of Aggression, Report of the Special Working Group on the Crime of Aggression*, ¶¶ 14-18, UN Doc. ICC-ASP/5/35 (Feb. 1, 2007).

30 *Id.* at ¶ 17.

31 See Coalition for the International Criminal Court, *Informal and Unofficial Notes for the ASP Plenary Session and Special Working*

Group on the Crime of Aggression, Jan. 29, 2007 (Afternoon Session), http://www.iccnw.org/documents/ASP5ResNotes_FormalSWGCA_AfternoonSession_29Jan07_final.pdf

32 Because Articles 1 and 3 of the General Assembly definition do not invoke either the purposes behind an aggressive act or the Article 51 right to self-defense from the UN Charter, they could conceivably be interpreted to encompass actions undertaken in self-defense that nonetheless threatened the territorial integrity of the other state — responding to an initial attack by crossing the border, for instance — even though this would be legal under the UN Charter. This was addressed in the General Assembly definition by Article 6, which made explicit that the definition not be interpreted as expanding or restricting the scope of the Charter. This Article, however, is excluded from many states' preferred definition for the ICC. While the requirement that aggression be in manifest violation of the Charter performs the same function, it does so in less clear terms.

33 International Criminal Court, Assembly of States Parties, Special Working Group on the Crime of Aggression, *Discussion Paper Proposed by the Chairman*, Annex, UN Doc. ICC-ASP/5/SWGCA/2 (Jan. 16, 2007).

34 Rome Statute art. 121, ¶¶ 3-4 (requiring a two-thirds majority to adopt an amendment and ratification by seven-eighths of states parties for an amendment to enter force).

35 International Court of Justice, *Application of the Convention on the Prevention and Punishment of Genocide* (Bosn. & Herz. v. Serb. & Mont.), Judgment, (Feb. 26, 2007).