BARGAINING PRACTICES: NEGOTIATING THE KAMPALA COMPROMISE FOR THE INTERNATIONAL CRIMINAL COURT

NOAH WEISBORD*

I
INTRODUCTION

The common view, at least since Machiavelli, is that insincerity is the norm in high politics, where sophisticated diplomats engage with each other over issues of ultimate security. This view has become a key element in various international-relations theories, including the promising "international practices" framework, which defines international practices as "competent performances."[1] Yet the idea that the diplomatic practices surrounding the multiyear negotiations over the crime of aggression were merely competent performances does not capture a key experience of many of the participants: a sincere commitment to their own beliefs. In the terminology of qualitative theorists Glaser and Strauss, the concept of performances does not optimally "fit" or "work."[2]

My contention is that sincerity, which I define as communicative truthfulness about an internal state such as a feeling, value, or belief, was an essential ingredient in the successful consensus outcome realized at the ICC Review Conference in 2010. At this gathering, the International Criminal Court's (ICC) Assembly of States Parties (ASP) agreed upon a definition of the crime of aggression, jurisdictional conditions, and a mechanism for its entry into force (the "Kampala Compromise").[3] These amendments give the ICC

Copyright © 2014 by Noah Weisbord.

This article is also available at http://lcp.law.duke.edu/.

* B.Sc. (McGill), B.S.W. (McGill), LL.B. (McGill), B.C.L. (McGill), M.S.W. (McGill), LL.M. Program (Harvard), S.J.D. (Harvard), Associate Professor of Law, Florida International University College of Law. The author was an independent expert delegate on the Special Working Group on the Crime of Aggression (SWGCA) and at the ICC Review Conference. He would like to thank Jonathan Graham (for his research and editing), Jens Meierhenrich, Alana Klein, and Marisol Floren at the FIU College of Law Library.

1. *See* Emanuel Adler & Vincent Pouliot, *International Practices*, 3 INT'L THEORY 1, 1–6 (2011). For an example of a realist account of insincerity in international politics, see JOHN MEARSHEIMER, WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS 12–14 (2011).

2. BARNEY G. GLASER & ANSELM L. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH 3 (1967).

3. Int'l Criminal Court, Assembly of State Parties, May 31–June 11, 2010, *Resolution RC/Res.6*, U.N. Doc. RC/Res.6 (June 11, 2010) [hereinafter Int'l Criminal Court, *Kampala Outcome*], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (resolution adopting

jurisdiction to prosecute political and military leaders of states for planning, preparing, initiating, or executing illegal wars, beginning as early as January 2017. In this article, I explain the bargaining practices of the diplomats that gave rise to this historic development in international law. I argue that the international-practices framework, as currently conceived, does not adequately capture the role sincerity played in the negotiations. Sincerity was an international practice, but not a performance. It follows that the international-practices framework should be adjusted to accommodate the decisive role of sincerity, a special nonperformative international practice, in the face-to-face interactions of international politics and diplomacy.

The ICC and the crime of aggression are legacies of the Nuremberg Trials. The Kampala Compromise is the culmination of approximately seventy years of on-and-off multilateral negotiations in which states attempted to create an international criminal court based on the International Military Tribunal at Nuremberg, where German leaders were tried for war crimes, crimes against humanity, and the crime against peace after World War II.[4] The evolution of the crime against peace, later renamed the crime of aggression, was obstructed by the conflict between the Soviet Union and the United States.[5] The development of the Court and crime became live issues again in the 1990s with the end of the Cold War.[6] In 1998, the Rome Statute was created and the crime of aggression, the most contentious topic at the diplomatic conference establishing the Statute, was included alongside genocide, crimes against humanity, and war crimes.[7] The controversy surrounding the definition of the crime of aggression at the 1998 diplomatic conference in Rome (the "Rome Conference") resulted in the crime being included in the Statute without a definition. Instead, the conference assigned a Preparatory Commission (Prepcomm)[8] to draft proposals to be considered at a future Review Conference, to be convened no earlier than seven years after the entry into

aggression amendments to the Rome Statute); *see also* Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 85 (2011) [hereinafter Weisbord, *Judging Aggression*].

4. For a compilation of key documents, see *Part III: Historical Documents*, *in* CRIME OF AGGRESSION LIBRARY: THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 109, 109–195 (Stefan Barriga & Claus Kreß eds., 2012) [hereinafter CRIME OF AGGRESSION LIBRARY]. For historical accounts, see Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 162–76, nn. 6, 12 (2008) [hereinafter Weisbord, *Prosecuting Aggression*], and see also OSCAR SOLERA, DEFINING THE CRIME OF AGGRESSION (2007) (providing a study of states' efforts to agree on a definition of the crime of aggression in international law).

5. Weisbord, *Prosecuting Aggression*, *supra* note 4, at 167.

6. *See generally* Noah Weisbord, *The 1990s and the Use of Force: Anxiety, Realignment and New Justifications*, 22 GLOBAL CHANGE, PEACE & SEC. 129 (2010).

7. Rome Statute of the Int'l Criminal Court arts. 5(2), 121 & 123, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

8. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, Rome, It., June 15–July 17, 1998, *Rome Statute of the International Criminal Court and the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [with an annex containing the resolutions adopted by the Conference]*, U.N. Doc. A/CONF.183/13 (Vol. I) (July 17, 1998).

force of the Rome Statute.[9] The negotiations over the crime of aggression gained unanticipated traction in 2002 when the Prepcomm delegated the issue to a Special Working Group on the Crime of Aggression (SWGCA). This group was composed of ICC States Parties, interested nonparty states,[10] a number of representatives of nongovernmental organizations (NGOs), and a handful of independent experts.[11] It met formally at UN Headquarters and in The Hague, and informally at Princeton University to comb through the details. The Review Conference took place in Kampala in June 2010, where the SWGCA's draft definition was adopted without changes and the ASP reached a consensus compromise over the laden issues of jurisdiction and the entry into force of the amendments.[12]

There is a growing body of scholarship on the diplomatic negotiations that led to the Kampala Compromise.[13] Scholars, however, have not yet considered the negotiations from an international-practices perspective. This perspective analyzes socially meaningful patterns of action that pertain to world politics, with the goal of better understanding strategic international actions.[14] The international-practices perspective is a theoretical framework optimally suited to face-to-face interactions because of the emphasis given to intentions and beliefs of individual agents in the bargaining process.[15] It has the potential to reveal interesting facets of the multilateral negotiations leading to the Kampala Compromise (the "aggression negotiations"). The aggression negotiations, in turn, provide new examples of bargaining practices in action that can help develop the international-practices framework as it applies to diplomacy. In this article I consider the place of sincerity as a bargaining practice in Kampala.

It is a consistent finding in the scholarly literature on negotiation that trust among the parties is a key factor in many successful negotiations.[16] As Harvard

---

9. Rome Statute, *supra* note 7, at art. 123.

10. Most of the members of the ASP sent delegations to the SWGCA, as well as many nonparty states including China, Iran, Russia, and India, to name a few.

11. For the records of these meetings, 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) [hereinafter THE PRINCETON PROCESS].

12. *See* Frances Anggadi, Greg French & James Potter, *Negotiating the Elements of the Crime of Aggression*, *in* CRIME OF AGGRESSION LIBRARY, *supra* note 4, at 58–59.

13. *See, e.g.*, Michael Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71 (2010); Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1186 (2010); Jennifer Trahan, *A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon*, 33 U. PA. J. INT'L L. 907 (2012); Beth van Schaack, *Negotiating at the Interface of Power & Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 519–24 (2011); Weisbord, *Judging Aggression*, *supra* note 3.

14. Adler & Pouliot, *supra* note 1.

15. *Id.* at 16–17, 20.

16. *See, e.g.*, R. FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 14 (1981); William Ross & Jessica LaCroix, *Multiple Meanings of Trust in Negotiation Theory and Research: A Literature Review and Integrative Model*, 7 INT'L J. CONFLICT MGMT. 314, 315, 324, 336, 346–47 (1996); Food & Agri. Org. of the UN, *Negotiation Theory and Practice: A Review of the Literature*, 20 (Jan. 2008) [hereinafter Food & Agri. Org. of the UN, *Negotiation Theory and Practice*], *available at* http://www.fao.org/docs/up/easypol/550/4-5_negotiation_background_paper_179en.pdf.

Business School negotiation professor Deepak Malhotra points out, "When profit, security, or peace depend upon the motives and actions of another party, trust becomes essential."[17] Yet, as organizational psychologists William Ross and Jessica LaCroix demonstrate in their literature review, there are multiple meanings of trust in negotiation theory and research.[18] In this article I focus on the particular aspect of trustworthiness conventionally called sincerity: that is, communicative truthfulness about a subjective internal state (a concept discussed in more detail later). Sincerity is important because it is directly related to the affective dimension of trust, goodwill, and the cognitive dimension, predictability. Both goodwill and predictability are invaluable assets in negotiations, and the aggression negotiations were no exception.[19] Sincerity is especially interesting because it pertains to the subjective internal states of individuals (not concrete facts per se), a topic of potential significance in diplomacy that has received little treatment in the international-practices literature.

Sincerity was central to the design of the aggression negotiations and important to the outcome. The chairman of the SWGCA deliberately structured the negotiations to encourage sincere engagement by the delegates.[20] For example, he convened regular meetings over five years at an informal venue and asked delegates to participate in a personal capacity rather than as state representatives. At these meetings, diplomats were faced with decisions about how sincere they wished to be in their interactions with their counterparts. As a diplomatic practice, most opted to maximize sincerity and minimize gamesmanship. This turned out to be a wise decision. It was ultimately sincere commitment on the part of a group of effective diplomats, in the face of self-interested diplomatic gamesmanship by others, that brought the negotiations to a successful conclusion.

Insincerity, meanwhile, was more often an annoying hindrance, entangling those diplomats who sought to make use of it and undermining their effectiveness. Nonetheless, deception and duplicity were familiar features of the aggression negotiations.[21] Some diplomats would use legal arguments as a

17. Deepak Malhotra, *Risky Business: Trust in Negotiations*, NEGOTIATION, Feb. 1, 2004, at 7, *available at* http://www.pon.harvard.edu/wp-content/uploads/images/posts/N0402Af2.pdf.

18. These meanings of trust surveyed in the literature range from such diverse concepts as a party's willingness to risk increasing vulnerability to a counterpart, to the degree that a party cooperates or competes, to more simplistic notions of faith and reliance on persons or things without careful investigation. In fact, there are probably as many definitions of trust as there are scholars researching the issue. Ross and LaCroix identify three main species of trust from the literature: trust as a state of goodwill and cooperation, trust as a pattern of predicable behavior, and trust as a readiness to take risks and engage in problem-solving behaviors. *See* Ross & LaCroix, *supra* note 16, at 314–15, 317, 349.

19. *See id.* at 325–26 (noting research recommending that "negotiators act in predictable, cooperative ways to establish or rebuild trust"); *see also* DAVID DE CREMER & MADAN M. PILLUTLA, MAKING NEGOTIATIONS PREDICTABLE: WHAT SCIENCE TELLS US 101–17 (2012).

20. *See infra* Part IV.A.

21. For examples, see *infra* Part II.

pretext for political positions—lawfare writ large.[22] By camouflaging narrow strategic ends as principled legal arguments, diplomats engaging in this practice were being insincere. Counterparts that failed to catch the dissonance between that diplomat's interpersonal communications and his true internal state were destined to be ineffectual negotiators. In a related way, some diplomats would feign cooperation in order to glean a competitive advantage. This international practice has received some scholarly treatment, though with a different focus, by international-relations theorists Emanuel Adler and Patricia Greve.[23] At a still more personal level, deceptive delegates would build a relationship of trust with counterparts from other nations only to betray it. As John Mearsheimer points out in *Why Leaders Lie*,[24] "lying is parasitic on a community of trust; it is most effective and therefore most rampant where it is least anticipated."[25] This article considers the place of sincerity in diplomacy by scrutinizing the negotiating framework and delving into specific examples from my experiences as a participant.

At first glance, this may seem like a naïve analysis, particularly in the context of diplomacy. Furthermore, sincerity, as an explanatory factor in international politics, appears ill defined, at best, and ill conceived, at worst. Nevertheless, it became apparent to me that the growing group of true believers who drove the process forward were not performers. They were genuinely motivated by a shared set of values: the belief that everyone deserves to live free from fear of an unjustified attack, a commitment to the Nuremberg legacy, and compassion for the innocent victims of illegal wars planned, prepared, initiated, and executed by political and military leaders for self-serving ends. It was around these values that diplomats from various nations—Argentina, Botswana, Brazil, Canada, Germany, Italy, Liechtenstein, Sierra Leone, South Africa, Switzerland, Uruguay, and Uganda, just to name a few—built what is best described as a social movement dedicated to the criminalization of aggressive war.[26]

It was apparent when listening to the general debate at the Review Conference and rereading the speeches afterward that most delegations were committed to certain fundamentals.[27] They wanted the broadest agreement

22. "Lawfare" is the continuation of warfare through legal rather than military means. Michael P. Scharf & Shannon Pagano, *Lawfare!*, 43 CASE W. RES. J. INT'L L. 1, 2–3 (2010).

23. Emanuel Adler & Patricia Greve, *When Security Community Meets Balance of Power: Overlapping Regional Mechanisms of Security Governance*, 35 REV. INT'L STUD. 59, 69 (2009).

24. MEARSHEIMER, *supra* note 1.

25. Alexander Barker, *International Deceit*, OXONIAN REV., Oct. 17, 2011, *available at* http://www.oxonianreview.org/wp/international-deceit (book review).

26. For a discussion of how civil-society groups' participation at Kampala led to the development of the social movement there, *see* Noah Weisbord, Civil Society and the Crime of Aggression (2014) (unpublished manuscript) (on file with author).

27. For a compilation of the speeches, see *ICC – General Debate – Review Conference*, INT'L CRIM. COURT, (Jul. 30, 2010), http://www.icccpi.int/en_menus/asp/reviewconference/Pages/general%20debate%20_%20review%20conference.aspx [hereinafter *ICC – General Debate – Review Conference*, INT'L CRIM. COURT] (listing speeches made during the conference).

possible, and ideally a consensus. They wanted the new aggression provision to hew closely to traditional notions of due process such as the presumption of innocence and the right of the accused to answer every aspect of the charges against him.[28] They wanted the ICC to remain an independent and impartial judicial institution. Furthermore, they wanted the ICC to be effective in prosecuting and punishing aggressors as well as a credible deterrent going forward. Although each state and interested party had somewhat different goals and varying perspectives on the negotiations, the discourse employed by the speakers shared many of these common values.[29] The goal of balancing these sometimes divergent aims was complicated enough without deceptive delegates attempting to collapse the negotiations for narrow strategic ends.

Just as committed religious communities can often tell a true believer from an imposter, these diplomats learned to distinguish delegates loyal to the cause from those seeking to hijack the aggression negotiations and advance narrow political ends. The language used by a particular delegate was one indication, but equally important was the way a statement was delivered. Those delegates who had participated in the SWGCA and genuinely wrestled with the drafting issues with the goal of achieving a negotiated outcome spoke in a way that signaled their involvement. Because some militarily powerful states had an interest in collapsing the negotiations to avoid increased international regulation of their military operations and some smaller states sought to use the negotiations to conduct realpolitik as usual, the question of sincerity became a central theme.

The remainder of this article is organized as follows. I lay out the international-practices framework and explain the place of performances within

28. *See, e.g.*, Betty Mould-Iddrisu, Attorney-Gen. and Minister of Justice of the Republic of Ghana, Address at the Review Conference of the Rome Statute of Int'l Criminal Court (June 1, 2010) (transcript available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-GenDeba-Ghana-ENG.pdf) ("In all situations, my delegation will be guided by the principle that the Court be independent, and be capable of fulfilling its mandate independently through the application of internationally accepted judicial standards."); Amos Wako, Attorney General of Kenya on behalf of the African States Parties, Address at the Review Conference of the Rome Statute of Int'l Criminal Court (May 31, 2010) (transcript available at http://www.icc-cpi.int/ iccdocs/asp_docs/RC2010/ Statements/ICC-RC-gendeba-Kenya-on-AU-ENG.pdf)(discussing in optimistic terms the continuation of the legacy of the Rome Conference and further developments in the Rome Statute).

29. Many speakers used terms such as consensus, independence of the court, effectiveness and credibility, and cooperation. *See* H.E. Aurelia Frick, Minister of Foreign Affairs of Liechtenstein, Address at the Review Conference of the Rome Statute of Int'l Criminal Court (May 31, 2010) (transcript available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Liechtenstein-ENG.pdf) (mentioning independence and credibility of the court, due process, and cooperation); María Jesús Figa López-Palop, Undersecretary of Foreign Affairs of Spain on behalf of the European Union, Address at the Review Conference of the Rome Statute of Int'l Criminal Court (May 31, 2010) (transcript available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-GenDeba-European%20Union-SPA-ENG-FRA.pdf) (mentioning consensus and effectiveness of the court); Minister of Justice of Ecuador on behalf of the South American Union of Nations, Address at the Review Conference of the Rome Statute of Int'l Criminal Court (May 31, 2010) (transcript available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-UNASUR-ENG.pdf) (mentioning consensus, independence of the court, and rights).

it. I then introduce the concept of sincerity as a social practice. My argument is that sincerity in the face of diplomatic gamesmanship was an important factor in achieving a successful outcome to the aggression negotiations. In the second half of the article, I discuss some ways that sincerity played a role in the negotiations. I conclude that sincerity is a special kind of international practice: It cannot be a performance, but it can be an international practice, and an effective one at that.

II
THE INTERNATIONAL-PRACTICES FRAMEWORK AND DIPLOMACY AS A PERFORMANCE

A central assumption in the international-practices literature—arguably the central assumption—is that practices are a set of competent performances.[30] Practices are made up of actions and actions are made of behaviors. Adler and Pouliot explain that "action is behavior imbued with meaning" and practices are patterned action that takes place in socially organized contexts.[31] In their explanatory example, running the streets aimlessly is mere behavior, running after a thief is an action endowed with meaning, and the act of police squads chasing down criminal gangs is a practice.[32] Police squads chasing down criminal gangs is a practice because it is socially structured and reiterated.[33]

Diplomacy is the paradigmatic international practice. It is patterned action embedded in an organizational context.[34] Every behavior and action that a diplomat performs derives meaning from the structured context in which it takes place. Background knowledge, both of the history between state actors as well as facts surrounding a particular issue, is vitally important to a diplomat.[35] Diplomacy is the practice that makes up world politics. The international-practices framework is especially useful for researchers who are participant–observers. This framework allows the participant–observer to capture and meaningfully organize patterns of interpersonal interaction and to generalize from these with the aim of explaining a particular outcome and predicting future outcomes.

Adler and Pouliot explain, "the notion of performance implies that of a public, of an audience able to appraise the practice," which can be done more or less competently.[36] The idea of a practice as a competent performance comes

30. Adler & Pouliot, *supra* note 1, at 4–6.

31. *Id.* at 5; *see also* Iver B. Neumann, *Returning Practice to the Linguistic Turn: The Case of Diplomacy*, 31 J. INT'L STUD. 627, 628–29 (2002) ("Practices are 'socially recognized forms of activity, done on the basis of what members learn from others, and capable of being done well or badly, correctly or incorrectly.'").

32. Adler & Pouliot, *supra* note 1, at 5.

33. *Id.*

34. *Id.*

35. *Id.* at 7 ("[P]ractice rests on *background knowledge*, which is embodies, enacts, and reifies all at once.").

36. *Id.*

primarily from the work of the sociologist Erving Goffman.[37] In *The Presentation of Self in Everyday Life*, Goffman builds from Shakespeare's metaphor in *As You Like It*, "All the world's a stage."[38] Here, Goffman explores the many ways that people in everyday life, like actors on the stage, engage in performances in an attempt to guide and control the impressions others form of them.[39] The "arts of impression management" include regulating settings, clothing, words, and nonverbal behaviors.[40] There are a myriad of motives for trying to control the impression others receive of a situation. Goffman is more concerned "with the participant's dramaturgical problems of presenting the activity before others."[41] He exposes how people in various social situations, from a doctor with a patient to a college student on a date, put on a "front"[42] while onstage and let it down with "teammates"[43] or in private. International-practices scholars studying diplomacy have found a rich source of insights pertaining to the practice of global politics in Goffman's dramaturgical perspective.[44]

III
SINCERITY AS SOCIAL PRACTICE

Placing the concept of sincerity within the international-practices framework is a less-than-comfortable task. This is because the idea that a person can competently perform sincerity is a contradiction in terms. As everyone knows, acting sincere is not the same as being sincere. Yet sincerity, an aspect of trustworthiness with direct bearing on both affective and cognitive dimensions of interpersonal interactions, was an important factor in achieving a negotiated outcome in Kampala. In this part, I seek to explore the concept of sincerity in more detail with the aim of reconciling it with the international-practices framework. My conclusion is that, though sincerity cannot be a performance, it is a bona fide international practice in its own right.

Though sincerity is important for trust building in negotiations, the concept itself is far from settled. Philosophers debate whether sincerity is an internal mental state or an aspect of communication: Can you be insincere with yourself,

37. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 8–19 (1959).

38. WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2 sc. 7.

39. GOFFMAN, *supra* note 37, at xi. His theatrical performance metaphor has become part of our everyday thinking, especially in terms of playing a role. *See* Richard Walsh-Bowers, *A Theatre Acting Perspective on the Dramaturgical Metaphor and the Postmodern Self*, 16 THEORY & PSYCH. 661, 662 (2006).

40. GOFFMAN, *supra* note 37, at 208.

41. *Id.* at 15.

42. *See id.* at 22 (defining a "front" as "that part of the individual's performance which regularly functions in a general and fixed fashion to define the situation for those who observe the performance").

43. *Id.* at 77.

44. *See, e.g.*, Adler & Pouliot, *supra* note 1, at 6, 16; Frank Schimmelfennig, *Goffman Meets IR: Dramaturgical Action in International Community*, 12 INT'L REV. SOC. 417, 417 (2002).

or only with others?[45] Literary theorist Lionel Trilling argues that the idea of sincerity has changed in stages over time.[46] Research psychologists have conducted experiments on test subjects for decades, hoping to discover reliable indicators of sincerity in flickering facial expressions that are barely detectable.[47] Sociologists comparing cross-cultural communication point out that not all groups attribute sincerity to the same indicators.[48] Looking someone in the eyes, for example, may be an indicator of sincerity in one culture and of disrespect in another.[49] Sincerity is an important concept in many areas of human interaction, including bargaining, but it remains poorly theorized and understood.

For the sake of this article, sincerity is communicative truthfulness about a subjective internal mental state. The concept of sincerity is narrower than truthfulness in that "a man's sincerity depend[s] upon whether his utterances correspond or fail to correspond to his 'state of mind' (where 'state of mind' covers beliefs, feelings, attitudes, and the like)."[50] This definition, put forth by the philosopher A. D. M. Walker, temporarily brackets two problems so that we can focus on the project at hand: giving an international-practices account of the diplomacy surrounding the aggression negotiations. The first is the problem of single-mindedness and the question whether one can be insincere with oneself, by, for example, pretending to yourself that you like your counterpart in another diplomatic delegation because you will need to work closely with him on numerous projects. The working definition of sincerity used in this article excludes this phenomenon from the discussion since it is not, ipso facto, a problem of sincerity, but of something else. The second is the problem of change over time. This static definition is ahistorical and does not require us to engage too deeply with Trilling's argument that the meaning of the term has transformed—and, presumably, will continue to do so.

This understanding of sincerity as communicative truthfulness about a subjective internal state is often understood as having arisen in Europe in the sixteenth century.[51] Earlier notions and usages of the word sincerity did not really apply to people.[52] The term was first used to describe pure liquids and

---

45. *See* GOFFMAN, *supra* note 37, at 81 (discussing "self-distantiation," an intricate maneuver of self-delusion by which a person comes to feel estranged from himself); Stuart Hampshire, *Sincerity and Single-Mindedness*, *in* FREEDOM OF MIND & OTHER ESSAYS 232, 232–56 (1972); A.D.M. Walker, *The Ideal of Sincerity*, 87 MIND 481, 481–97 (1978).

46. LIONEL TRILLING, SINCERITY AND AUTHENTICITY 1–25 (1971).

47. Paul Ekman, *Facial Expressions of Emotion: An Old Controversy and New Findings*, 335 PHIL. TRANS. R. SOC. LOND. B, Jan. 29, 1992, at 63, 63–69.

48. *See, e.g.*, R.K. Aune & L.L. Waters, *Cultural Differences in Deception: Motivations to Deceive in Samoan and North Americans*, 18 INT'L J. INTERCULTURAL REL. 159, 159–72 (1994).

49. *Id.*

50. Walker, *supra* note 45, at 481–82.

51. *See* Jane Taylor, *Why Do You Tear Me from Myself? Torture, Truth and the Arts of the Counter-Reformation*, *in* THE RHETORIC OF SINCERITY 19, 25 (Ernst van Alphen, Mieke Bal & Carel Smith eds., 2009); TRILLING, *supra* note 46, at ch. 1.

52. R. JAY MAGILL, JR., SINCERITY 29 (2012); TRILLING, *supra* note 46, at 12.

objects.[53] One spoke of sincere wine and sincere urine. This meant that they were pure and had not been "sophisticated."[54] For example, to speak of sincere religion meant it was uncorrupted.[55] The word "sincere" was first used to refer to people in the sixteenth century, at the time of two important European developments: the rise of the theater in England and the heresy trials.[56] With the rise of the theater in England, a new technology was born. Audiences became captivated by the dialogue between the inner self and its external representation and the possibility of "personating."[57] The villain–dissembler—the wolf in sheep's clothing—fascinates the moral imagination at this time.[58] His evil nature is apparent to the audience but concealed from the other characters in the play. In an era of trial by ordeal, still awaiting the invention of modern notions of evidence and proof, the heresy trials made the concept of sincerity central to European thought. The possibility of the villain–dissembler stoked fears that a social interaction could be made into a farce by somebody faking their beliefs. The logic of the heresy trial was that a person could not hide their true beliefs under torture.

Toward the end of the sixteenth century and early seventeenth, European concepts of the self began a historic transformation.[59] Audiences became less interested in the hypocrite–villain, the wolf in sheep's clothing who sought to rise above the station of his birth and violate his social identity.[60] It became established doctrine that villains are not true to life. Rather, people were seen to be a mixture of good and bad with much of that bad attributed to circumstances and social systems.[61] A person's social station or vocation (actor, waiter, diplomat) might require him to act a part, that is, to be insincere. Artists were producing autobiographies and self-portraits en masse, endeavoring to discover within themselves something genuine and true beyond the impersonations demanded in social existence.[62] Two new concepts arose, the individual and society. As man developed a deeper sense of his own subjectivity, he became a character in his own play with society as the

53. TRILLING, *supra* note 46, at 13. Although the origin of the term is uncertain, one story has it that prior to entering English, the term originated from the Latin *sine cera*, "without wax," which was used by Roman quarrymen to advertise high-quality rock to sculptors, who had no need for the use of wax to cover cracks and imperfections. MAGILL, *supra* note 52, at 28–29.

54. TRILLING, *supra* note 46, at 13.

55. *Id.*

56. *See* TRILLING, *supra* note 46, at ch. 1; Taylor, *supra* note 51. Reformation-era tracts, sermons, and poems also played a role in introducing the words "sincere" and "sincerity" to the English language. MAGILL, *supra* note 52, at 30.

57. Taylor, *supra* note 51, at 25.

58. TRILLING, *supra* note 46, at 14.

59. *Id.* at 19 (describing shift in European understanding of the self as "a mutation in human nature").

60. *Id.*

61. *Id.* at 15–16.

62. *Id.* at 23.

audience.[63]

Nothing captures this transformation better than Diderot's subversive dialogue, *Le Neveu de Rameau*,[64] which Trilling saw as summing up the intellectual life of Europe for a century.[65] *Le Neveu de Rameau* "lays bare the principle of insincerity upon which society is based and demonstrates the loss of personal integrity and dignity that the impersonations of social existence entail."[66] Rameau's ne'er-do-well nephew demonstrates that everyone in society, without exception, acts a part, even the king himself, "who takes a position before his mistress and God: he dances his pantomime steps."[67] Hegel greets *Le Neveu de Rameau* with "hierophantic glee," finding within it the next phase of the development of the spirit, a phase transcending virtue and vice.[68] Freud cites *Le Neveu de Rameau* multiple times and bases psychoanalysis on the idea of a disintegrated self, made up of id, ego, and, later, the superego.[69] Goffman's seminal works, including *The Presentation of Self*[70] and *Strategic Interaction*[71] were written pursuant to a similar understanding of the self. It is in this understanding of the self that international practices, through the central concept of diplomacy as a competent performance, finds its theoretical roots.

Trilling's historical account of sincerity[72] and Goffman's microsociological analysis[73] may, however, go too far in pressing the argument that the self is now seen as disintegrated in contemporary intellectual life.[74] Though many of us acknowledge that we perform different roles going through our day—husband, friend, colleague, diplomat—most of us still feel that we possess a real self that is not a performance.[75] Indeed, we have devised and rely heavily on a number of microsociological heuristics to help discern when someone is being fake or hypocritical.[76] Because high politics were at stake in the aggression negotiations

---

63. *See id.* at 25 ("The subject of an autobiography is . . . bent . . . on demonstrating his sincerity.").

64. DENIS DIDEROT, RAMEAU'S NEPHEW AND OTHER WORKS (Jacques Barzun & Ralph H. Bowen trans., 2001).

65. TRILLING, *supra* note 46, at 27.

66. *Id.* at 31.

67. DIDEROT, *supra* note 64, at 83.

68. TRILLING, *supra* note 46, at 34.

69. *See* DANIEL T. O'HARA, LIONEL TRILLING: THE WORK OF LIBERATION 71 (1988).

70. GOFFMAN, *supra* note 37.

71. ERVING GOFFMAN, STRATEGIC INTERACTION 100–01 (1969).

72. TRILLING, *supra* note 46, at 26–50.

73. GOFFMAN, *supra* note 37, at 17–21.

74. For a recent take on the limitations of Goffman's dramaturgical metaphor, see Walsh-Bowers, *supra* note 39.

75. *Id.* at 682 (noting that despite the social science view of the self as a social construction, merely an arena for performance, there nevertheless exists a quotidian Western view in which "we presume that we are free and self-contained selves," through a "modern notion of the individualistic, masterful self that is not directly observable but that gives expression to a person's social roles").

76. Researchers have identified seven basic codes of nonverbal behavior, which humans perceive and evaluate to determine sincerity. These include kinesics (body movements), physical appearance, vocalic (the sound of a speaker's voice), haptics (how a speaker touches someone), proxemics (the use of physical space), environment and artifacts (how a speaker uses instruments, props, and the environment), and chronemics (how a speaker uses time). *See* Michael J. Higdon, *Oral Argument and*

and there was a great deal to gain—and lose—from subterfuge, the diplomats, more than people in most contexts, relied heavily on these heuristics in their interactions.

The most obvious way that we gauge whether a person is being truthful about a subjective state of mind is by considering the content of their utterances. Here, we look primarily for consistency. Does what he is saying now about his internal state coincide with what he has said in the past? Are his utterances stable across contexts and audiences? Can what he is saying now be reconciled with other views that he has expressed? An attentive diplomat will also test a colleague's presentation of self against that colleague's political or strategic interests. If they do not coincide, it is a clue that the counterpart may not be speaking sincerely.

A person's character is an additional factor in evaluating sincerity. Has he been deceptive in the past? Having a character and reputation for trustworthiness can be valuable for a negotiator. Aside from the obvious benefit of being well regarded by counterparts, a party's reputation of trustworthiness can have a larger benefit to a negotiation in general because that party's positive reputation can constrain the temptation to engage in opportunistic, self-serving behavior.[77] A party without a reputation on the line has a greater incentive to be deceptive in order to achieve short-term strategic gains. Machiavelli, who celebrated deceptiveness in the dealings between princes, squandered an important asset in political intercourse by claiming that a prince's internal mental state need not coincide with his actions and deeds.[78]

Whether deliberately or not, we also rely on nonverbal clues, especially facial expressions.[79] The assumption is that a person's face reveals, at times involuntarily, some truth about their subjective internal experience from moment to moment.[80] Paul Ekman's psychological research is a systematic

---

Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience, 57 U. KAN. L. REV. 631, 636–38 (2009).

77. *See* Todd H. Chiles & John F. McMackin, *Integrating Variable Risk Preferences, Trust, and Transaction Cost Economics*, 21 ACAD. MGMT. REV. 73, 87 (1996) ("Parties possessing such reputational assets would be willing to forego desirable short-term outcomes obtainable through opportunistic behavior in order to protect their valued reputation and the long-term benefits it provides.").

78. NICCOLO MACHIAVELLI, THE PRINCE 69–72 (Luigi Ricci trans., 1903); MAGILL, *supra* note 52, at 41–43 (discussing Machiavelli's philosophy of practicing calculation and deceit in achieving the ends of the state). Machiavelli's legacy famously led to the identification of "Machiavellianism," a term used to describe the personality trait of employing cunning and duplicity in statecraft or in general conduct. *See* ALDERT VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 45–46 (2008).

79. Only in the past half-century has this fact been recognized in the literature. Earlier psychological works viewed the face as a meager source of mostly inaccurate, culture-specific, stereotypical information. *See* J.S. Bruner & R. Tagiuri, *The Perception of People*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 634, 634–54 (G. Lindzey ed., 1954).

80. *See* Ekman, *supra* note 47, at 64 (discussing the emphasis emotion theorists place on the involuntary nature of emotional experience).

attempt to discern liars from truth tellers based on facial expressions.[81] This research reinforces the view that there is a true self behind the masks that social existence requires. We also assess the truth of a person's internal state from their body language. When we say that someone has his back up, this may be literal as well as figurative.[82] In assessing sincerity, we also look to see whether the utterance is consistent with other nonverbal cues, such as facial expressions and body language.[83] None of these techniques is completely reliable on its own but, taken together, they help us assess whether an individual is being sincere (that is, whether what he is communicating coincides with his subjective mental state).[84]

It is well documented that lying is cognitively demanding and takes more effort than truth telling, although the required effort varies based on factors such as personality, verbal skills, and intelligence.[85] Because people are generally aware that their demeanor can betray a lie, persons engaged in lying have the simultaneous tasks of keeping the lie straight and monitoring their own behavior and body language.[86] Since no one can completely monitor and control his body language, unintentional body language signals can often provide insight into a person's sincerity and truthfulness.

Researchers have identified numerous benefits that trust brings to negotiations,[87] including increased likelihood of cooperation,[88] increased likelihood of reaching creative solutions that provide optimal outcomes for all parties,[89] and increased efficiency of negotiations, thereby requiring less time and other resources.[90] Parties who trust each other will generally take less time to come to an agreement, while distrusting parties will scrutinize every word of a proposal carefully, always on the lookout for an angle to use to the counterpart's disadvantage. When a negotiator believes his counterpart's stated

---

81. *See, e.g.*, PAUL EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE 16–24 (2009); Paul Ekman, *Why Lies Fail and What Behaviors Betray a Lie*, *in* CREDIBILITY ASSESSMENT 71, 71–81 (J.C. Yuille ed., 1989).

82. Animals' hackles tend to rise when they sense they are in a confrontation.

83. Some of these cues and body language include gestures, posture, eye contact, vocal pitch, loudness, tempo, proximity, touching, physical attractiveness, dress, grooming, among many other things. *See* JUDEE K. BURGOON ET AL., NONVERBAL COMMUNICATION: THE UNSPOKEN DIALOGUE 402 (1996); Higdon, *supra* note 76, at 636.

84. *See* VRIJ, *supra* note 78, at 66, 396.

85. *See id.* at 45.

86. *Id.*

87. *See* WILLIAM I. ZARTMAN & MAUREEN R. BERMAN, THE PRACTICAL NEGOTIATOR 27–41 (1982); Nicole Deitelhoff & Harald Müller, *Theoretical Paradise – Empirically Lost? Arguing with Habermas*, 31 REV. INT'L STUD. 167, 168 (2005) ("[R]esearch on international negotiations has demonstrated that trust, fairness and social learning impact significantly on negotiations.").

88. *See* Ross & LaCroix, *supra* note 16, at 317 (discussing the linkage between the concepts of trust and cooperation).

89. *See* Ross & LaCroix, *supra* note 16, at 329 (discussing one perspective from research on trust that argues that if parties trust each other, they are more likely to search for creative solutions which provide optimal outcomes for all parties).

90. *See id.* at 347.

motivations and intentions are truthful, that is, when he trusts the counterpart, he can be confident in taking action in reliance on those representations without fear of personal loss.[91] Research has shown that people with cooperative rather than competitive negotiating tendencies are more trusting, and that cooperative behavior tends to be contagious and influence non-cooperative counterparts to engage in cooperative behaviors.[92] Violations of trust, meanwhile, can lead to uncertainty as to how a counterpart will behave and can create instability and negative effects in a relationship.[93] Finally, the durability of an agreement is enhanced if the parties maintain an ongoing trusting relationship after the conclusion of negotiations. This is because future issues and disputes can be handled within the framework established by the agreement, without resorting to extraordinary remedies outside the scope of the original negotiated agreement.[94] Diplomats who are sincere can form coalitions on the basis of trust, even when the interests of their nations are at odds. Thomas Schelling advises that small successes can build a foundation of trust that may facilitate the resolution of larger issues.[95] This trust quickly evaporates in long-running and insular negotiations when rumors spread that one delegate has double-crossed another.[96]

Over time, sincere bargaining became the dominant social practice in the aggression negotiations. There are a number of explanations. The SWGCA chairman was aware of the benefits of sincerity in protracted ongoing negotiations and sought to make use of this knowledge as he planned the "Princeton process."[97] The paradigmatic example, discussed in more detail the next part of this article, is that the Princeton process was designed to create a

91. J.B. Barney & M.H. Hansen, *Trustworthiness as a Source of Competitive Advantage*, 15 STRATEGIC MGMT. J. 175, 176 (1994) (discussing trust as confidence that one's vulnerabilities will not be exploited); Ross & LaCroix, *supra* note 16, at 315.

92. W.B.G. Liebrand et al., *Value Orientation and Conformity: A Study Using Three Types of Social Dilemma Games*, 30 J. CONFLICT RESOLUTION 77, 83 (1986); *see* Ross & LaCroix at 317, 346.

93. Ross & LaCroix, *supra* note 16, at 333.

94. *See id.* at 347–48 (discussing how parties who do not trust each other during negotiations are likely to seek an agreement with an escape route to leave the relationship, if necessary).

95. R.E. WALTON & R.B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 170–71 (1965) (discussing the mediation strategy of having parties first cooperate on minor issues to build momentum for dealing with larger issues); Thomas Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 300–301 (1956) ("What makes many agreements enforceable is only the recognition of future opportunities for agreement that will be eliminated if mutual trust is not created and maintained, and whose value outweighs the momentary gain from cheating in the present instance."); *see also* Ross & LaCroix, *supra* note 16, at 347.

96. Food & Agri. Org. of the UN, *Negotiation Theory and Practice*, *supra* note 16, at 20 ("[T]rust in relationships is slow to build and easy to destroy."); Ross & LaCroix, *supra* note 16, at 325; H. Charles Spring, Building New Organizational Alliances and the Role of Trust (1994) (presented at the annual proceedings of the Industrial Relations Research Association) ("[P]ersonal trust among bargainers is a very fragile element in relationships taking years to establish and only moments to destroy.").

97. Stefan Barriga, *Negotiating the Amendments on the Crime of Aggression*, *in* CRIME OF AGGRESSION LIBRARY, *supra* note 4, at 15.

culture of sincerity.[98] For instance, the expectation in the SWGCA was that individuals would interact with others in their personal capacity rather than playing the role of diplomat.[99] The Chairman's plan worked. Before the Review Conference was over, delegates were discussing how the goodwill generated in the aggression negotiations might be harnessed to accomplish other community aims.

Even without explicit instructions by the Chairman of the SWGCA on this issue, it is likely that sincerity would have nonetheless emerged as the dominant bargaining practice. After years of negotiations, the diplomats were well aware of one another's strategic interests, making it difficult for them to dissimulate without being caught. What is more, as the negotiations proceeded, the strategic implications of seemingly technical drafting proposals became increasingly apparent. Everyone knew, for example, that the Russian delegates would resist any amendments lacking a Security Council trigger for ICC jurisdiction over aggression cases due to the Russian Federation's veto in the UN Security Council and its globally deployed military. Similarly, the United States' closest allies could usually be expected to support positions of strategic benefit to the United States, such as raising the threshold on prosecutable acts so that the gravity, character, and scale of an attack must each surpass the "manifest" threshold.

Furthermore, outright lying and insincerity, a subset of lying, were risky practices. In part IV of this article, a number of illustrative examples are discussed in detail. At best, the duplicitous diplomat's proposal, if identified by the group as insincere, would simply be ignored. This was the case with a proposal by the head Iranian delegate pertaining to his expansive and self-serving interpretation of occupation as an act of aggression, discussed below.[100] At worst, insincerity would produce a backlash where delegates who felt duped would resort to a range of interpersonal countermeasures with implications for the duplicitous diplomat's state or organization. These included withholding information, excluding the offending diplomat from important informal meetings, building coalitions dedicated to undermining that diplomat's interests, and manipulating them to advance another agenda.[101] Essentially, an

98. *See infra* Part IV.

99. CRIME OF AGGRESSION LIBRARY, *supra* note 4, at 16; Int'l Criminal Court, Assembly of State Parties, Inter-Sess., June 21–23, 2004, *Informal Inter-Sessional Meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, from 21 to 23 June 2004*, ¶ 3, ICC Doc. ICC-ASP/3/SWGCA/INF.1 (Aug. 13, 2004) [hereinafter Int'l Criminal Court, *2004 Princeton Report*], *available at* http://crimeofaggression.info/documents//6/2004_Princeton.pdf; Int'l Criminal Court, Assembly of State Parties, Inter-Sess., June 13–15, 2005, *Informal Inter-Sessional Meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, from 13 to 15 June 2005*, ¶ 3, ICC Doc. ICC-ASP/32 [hereinafter Int'l Criminal Court, *2005 Princeton Report*], *available at* http://crimeofaggression.info/documents//6/2005_Princeton.pdf.

100. *See infra* Part IV.B.1.

101. *See infra* Part IV.B.1.

insincere delegate risked squandering the benefits that accrue when counterparts in a negotiation have built a community of trust.[102]

In short, sincerity emerged as an effective international practice in the aggression negotiations because it engendered trust and all of its benefits. Gamesmanship was discouraged within the culture of the SWGCA and it became increasingly risky and costly to be duplicitous. Diplomats were well attuned to each other's strategic interests and were keen observers of each other's verbal and nonverbal cues, making it difficult to mislead others. In these protracted negotiations, it would have been exhausting to maintain a facade and the benefits were uncertain. Moreover, the participants in the aggression negotiations would regularly encounter each other in the Sixth (legal) Committee of the UN and in other venues, so they avoided sullying their reputations in one negotiation, lest it undermine their credibility in another. The conclusion of most delegates, so far as I could tell from my interactions with them, was that sincerity, not deception, was the sensible practice.

IV
BARGAINING PRACTICES IN THE AGGRESSION NEGOTIATIONS

The question of sincerity permeated the aggression negotiations. Does this individual really intend to compromise, as she claims, or will she continue to hold firm? Is that delegation pandering to both sides? Did that friendly diplomat really speak frankly over coffee together or is he just working to advance strategic objectives? Perhaps it is both. Sincere fondness—or animosity—between diplomats could mean the difference between a long-term cooperative relationship and an exhaustingly competitive one. The aggression negotiations were replete with examples of negotiated breakthroughs built on rapport and deadlocks triggered by suspicion.

A. "Princeton Practices"

Sincerity was central to the design of the aggression negotiations. SWGCA Chairman Christian Wenaweser of Liechtenstein deliberately structured the negotiations to encourage sincere engagement by the delegates.[103] He held informal intersessional meetings of the working group at the Woodrow Wilson School at Princeton University where he could set the tone and structure the discussions. According to Barriga, "[T]he spirit of Princeton that infused the work of the Special Working Group remained a constant companion until the

102. For further research on trust in negotiations, see ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE 107 (1988) (suggesting that trust is "the single most important element of a good working relationship"); John K. Butler, Jr., *Behaviors, Trust, and Goal Achievement in a Win-Win Negotiating Role Play*, 20 GRP. & ORG. MGMT. 486, 486–88 (1995); Roy J. Lewicki, *Trust and Distrust*, *in* THE NEGOTIATOR'S FIELDBOOK 191, 191–93 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

103. *See* Kreß & Holtzendorff, *supra* note 13, at 1201.

conclusion of the Group's work in 2009."[104] In the final analysis, almost all of the major breakthroughs in the aggression negotiations were made at Princeton.[105] This experience in Princeton was consistent with the findings of international relations scholars that the presence of institutional settings as a context for negotiations can lead to generating shared experiences and understandings. Nicole Deitelhoff's research, for instance, predicts that diplomats working in subject areas not already characterized by dense institutionalization (such as the crime of aggression pre-Kampala) would consciously construct features such as common norms, principles, and methods of decision making.[106] This is precisely what the Chairman did, and with great success.

Barriga correctly describes Princeton as a constructive work environment, away from the usual negotiating venues that signal business as usual: "[T]he informal setting helped to relieve the tension stemming from the underlying political issues."[107] According to German diplomat and legal scholar Claus Kreß, "Step by step, the Liechtenstein team created the widespread feeling that, despite the numerous obstacles that lay ahead, the SWGCA had a realistic chance of fulfilling its mission."[108] The delegates were invited to participate in their personal capacity, with the understanding that what they said did not necessarily represent the views of their government. This noticeably relaxed the discussion.[109] The names and states of delegates advancing positions in Princeton were not recorded in the Chairman's reports.

Nonetheless, this understanding sometimes placed a diplomat in a difficult position from the perspective of sincerity when his personal views ran counter to the views of the government he had committed to represent. The braver delegates took the invitation to participate in a personal capacity to heart, while it was more difficult to distinguish the views of the more timid delegates from the instructions they received from their capitals. One strategy that diplomats used in order to remain sincere was to distinguish comments made in their personal capacity from those made as a representative of a state: "My instructions are X, but my personal position is Y, and I think my capital is prepared to move a little on this, but not much."

The summer camp atmosphere at Princeton, where delegates would eat together, drink together, and, one surreal evening, sing together, managed to create a shared sense of camaraderie that was, in my view, a key explanation for

---

104. Barriga, *supra* note 97, at 16.

105. There were five meetings at Princeton, between 2004 and 2009, hosted by the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School. The results are published in THE PRINCETON PROCESS, *supra* note 11.

106. *See* Deitelhoff & Müller, *supra* note 87, at 174. For the view that repetition and socialization of persuasive messages is a social interaction and practice, which serves to institutionalize and develop shared norms, see Rodger A. Payne, *Persuasion, Frames, and Norm Construction*, 7 EUR. J. INT'L REL. 37, 42 (2001).

107. Barriga, *supra* note 97, at 16.

108. Kreß & Holtzendorff, *supra* note 13, at 1186.

109. Int'l Criminal Court, *2004 Princeton Report*, *supra* note 99; Int'l Criminal Court, *2005 Princeton Report*, *supra* note 99.

the unexpected success of the Review Conference in Kampala.[110] The Princeton meetings provided delegates five years of face-to-face interactions to get to know their negotiating partners and, ultimately, to gauge their sincerity. Princeton also increased the stakes of dishonesty and betrayal: As Mearsheimer argues, insincerity based on a foundation of trust may be most effective, but, when detected, it stings worse and is more destructive to relationships.[111]

Barriga also attributes the success of the Princeton process, in part, to the "thematic, focused approach."[112] His characterization is certainly correct, though somewhat of a diplomatic understatement. It fails to capture the degree to which Chairman Wenaweser, with the collaboration of a number of ambitious proponents of the incorporation of the crime from various diplomatic delegations, determinedly guided the process to port.[113] In particular, Wenaweser early on signaled his sincere commitment to an outcome by adopting the successful strategy of Fernández de Gurmendi, coordinator of the Prepcomm, and focusing the group on small technical challenges susceptible to resolution.[114] Wenaweser's decision to hold informal intersessional meetings at a venue away from UN Headquarters also conveyed his determination to achieve an outcome. Wenaweser's resolve was obvious in the efforts he took, both professionally and personally, to make the crime of aggression prosecutable at the ICC.

According to Barriga, the early meetings in Princeton depoliticized the discussion, helped delegates to imagine how the crime of aggression might be integrated into the Rome Statute, reaped progress on a number of ancillary issues, and sharpened the discussion of core issues down the line.[115] The early meetings also acculturated the group, teaching the delegates what kinds of interventions were appropriate and which were not. For example, an anti-imperialist tirade by the head of an important African delegation in Princeton in 2006 was met with eye rolls. It barely even distracted the group from the complex "technical" question of Security Council involvement in the jurisdictional regime of the crime of aggression that had, by this stage, been broken down into myriad grey-area compromise proposals.[116] Because the

110. Unfortunately, international-relations scholars thus far lack methodological tools to grasp and analyze these types of socialization practices as ways of facilitating influence in diplomacy. *See* Rebecca Adler-Nissen, *Diplomacy as Impression Management: Strategic Face-Work and Post-Colonial Embarrassment* 11 (Ctr. For Int'l Peace & Sec. Stud., Working Paper No. 38, 2012).

111. MEARSHEIMER, *supra* note 1, at 44.

112. Barriga, *supra* note 97, at 17.

113. *See* Kreß & Holtzendorf, *supra* note 13, at 1186 ("Wenaweser guided the negotiations in a skilled manner, displaying just the right combination of authority, expertise, patience and good humour. Step by step, the Liechtenstein team created the widespread feeling that, despite the numerous obstacles that lay ahead, the SWGCA had a realistic chance of fulfilling its mission.").

114. For example, whether there could be an "attempt" to commit the crime of aggression. *2005 Princeton Report*, *supra* note 99, at 455.

115. Barriga, *supra* note 97, at 17.

116. Int'l Criminal Court, Assembly of State Parties, Inter-Sess., June 8–11, 2006, *Informal inter-Sessional Meeting on the Crime of Aggression, Hosted by the Liechtenstein Institute on Self-*

Chairman compiled the SWGCA reports of the proceedings—the draft *travaux préparatoires*—on the last night of the meeting, interventions of this sort that interrupted the "technical" work of the group did not even make it into the published reports. The reports were hastily reviewed and adopted by the delegations, paragraph by paragraph, on the morning everyone was leaving Princeton.[117] According to Barriga, these reports "helped newcomers to the negotiations to assess the status of the negotiations and to prevent the reopening of issues that had been conclusively discussed in the past."[118] It was this acculturation and documentation process that, for example, prevented the United States' legality challenge of the draft definition on the basis of vagueness from making it onto the agenda in Kampala.[119] The problem had already been thoroughly discussed and dealt with by the SWGCA, and nobody was willing to reopen it.[120]

The Chairman also firmly guided the negotiations by discouraging national proposals that might polarize the SWGCA. There was no doubt that he was, through and through, committed to a consensus. Instead of inviting delegations to provide position papers, a standard diplomatic practice, he appointed three facilitators who submitted questionnaires on the core technical issues to delegates of the SWGCA and instructed these facilitators to compile the answers and suggest ways to advance the negotiations.[121] The facilitators were experienced diplomats who were, like the Chairman, sincerely committed to achieving a broadly supported outcome. The German delegate Claus Kreß prepared the discussion paper on article 25(3) of the statute, which examined the ways that the modes of individual criminal responsibility applicable to all ICC crimes would apply to the crime of aggression.[122] Pål Wrange, from Sweden, was in charge of the thorny discussion paper on conditions for the exercise of jurisdiction. This was an issue of primary importance to the five permanent members of the Security Council, who sought to make ICC jurisdiction over

---

Determination, *Woodrow Wilson School, at Princeton University, New Jersey, from 8 to 11 June 2006*, ICC Doc. ICC-ASP/5/SWGCA/INF.1 (Sep. 5, 2006), *available at* http://crimeofaggression.info/documents//6/2006_Princeton.pdf (commonly referred to as the *2006 Princeton Report*).

117. Barriga, *supra* note 97, at 17.

118. *Id.*

119. *See* Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Address at the Review Conference of the Rome Statute of Int'l Criminal Court (June 1, 2010) (transcript available at http://www.state.gov/j/gcj/us_releases/remarks/2010/142520.htm) ("[A] fundamental principle of legality is that individuals must know whether conduct crosses the line into that which is forbidden before they act and not learn the answer in the crucible of trial."); *see also* Kreß & Holtzendorff, *supra* note 13, at 1204–05 (discussing a proposal introduced by the American delegation at a late hour in the negotiations despite solid consensus on the issue).

120. To indicate the degree to which the American delegation's legality argument was dated, by the time of the 2010 Review Conference, the subject of legality had already been written on by several authors. *See* Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 EUR. J. INT'L L. 1129, 1144–46 (2009) (responding to criticisms raised by Andreas Paulus, *Second Thoughts on the Crime of Aggression*, 20 EUR. J. INT'L L. 1117, 1119–21 (2009)).

121. Barriga, *supra* note 97, at 17–18.

122. *2005 Discussion Paper 1*, *in* CRIME OF AGGRESSION LIBRARY, *supra* note 4, at 471.

aggression dependent on a Security Council trigger, thereby insulating their political and military leaders from prosecution.[123] Phani Dascalopoulou-Livada, a veteran Greek diplomat, was charged with compiling the discussion paper on the definition of the crime itself.[124] Responses deemed unhelpful were rejected by the facilitators or the Chairman and left by the wayside. Here, Barriga, who was deeply involved in what he called "difficult balancing acts,"[125] describes the process candidly: "Over the course of time, this technique allowed delegations to identify an 'emerging consensus' on various issues, and it made it more difficult for delegations to bring up proposals that deviated from the thrust of the Chairman's papers."[126]

Another practice of the SWGCA of relevance to this discussion of sincerity involved former Nuremberg Prosecutor Benjamin Ferencz, a member of the delegation of experts invited by the ASP to participate in the negotiations. Ferencz, who was in his nineties, had spent much of his career after Nuremberg working to criminalize aggressive war. He was asked to contribute historical and legal context, as well as serve as a source of continuity in the SWGCA. When the discussions in Princeton, New York, or The Hague got bogged down in minutia, the parties began to harden their positions, or important delegations began to dissemble, Chairman Wenaweser would call on Ferencz to speak. Ferencz would deliver a short speech, from the heart, and outside of the context or the lingo of the technical discussion. In these speeches, Ferencz would remind the diplomats of the importance of the Nuremberg legacy, of these negotiations in the history of international law, and of the overall goal of replacing the rule of force with the rule of law in international affairs.[127] At times, his frustration with the dissembling of the diplomats was palpable. Ferencz was deeply respected among the diplomats and his speeches signaled to them that no progress would be made unless they worked steadfastly to reach a consensus on the definition and jurisdictional conditions of the crime.

Between the first meeting of the SWGCA in 2003 and the Review Conference in 2010, in the lingo of Erving Goffman,[128] Chairman Wenaweser firmly yet tactfully framed the aggression negotiations as a technical exercise

123. *2005 Discussion Paper 2*, *in* CRIME OF AGGRESSION LIBRARY, *supra* note 4, at 482.

124. *2005 Discussion Paper 3*, *in* CRIME OF AGGRESSION LIBRARY, *supra* note 4, at 485.

125. Barriga, *supra* note 97, at 17.

126. *Id.* at 18.

127. For an example, see Benjamin B. Ferencz, Impromptu Remarks to the UN Assembly of State Parties Regarding Jurisdiction of the ICC over the Crime of Aggression (June 2008) (transcript available at http://www.benferencz.org/index.php?id=4&article=8). Though the remarks of specific delegates to the SWGCA were not recorded in order to allow individuals to speak more freely, Ferencz published this speech on the internet of his own accord.

128. *See* ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE 10–11 (1974) (Goffman's definition of frames: "I assume that definitions of a situation are built up in accordance with principals of organization which govern events—at least social ones—and our subjective involvement in them; frame is the word I use to refer to such of these basic elements as I am able to identify."). In other words, there are many things going on in a given situation and the participant will tend to focus on one dimension at the expense of others, for example, the technical dimension rather than the political.

hindered by reactionary political grandstanding, amenable to a rational negotiated solution. Through the Princeton process, he inculcated a group mentality based on shared experiences and accumulated cultural knowledge. Outsiders or newcomers unfamiliar with the terms of the discussion or its implicit rules were at an utter disadvantage, unable to influence outcomes or even have their views taken seriously. Everyone was invited to speak, but in order to be heard and taken seriously, a delegate would need to understand where the SWGCA was in discussing the technical details, the level of abstraction of the discussion, the intricacies of the alternatives on the table, those that had already been rejected and why, the political implications of each for key states, and a range of other substantive and procedural matters. In spite of attempts by powerful delegations, including the United States, to reopen the discussion, the SWGCA's draft definition was adopted without changes at the Review Conference, and "the Princeton spirit" allowed the ASP to reach a consensus compromise over the politics-laden issues of jurisdiction and the mechanism for the entry into force of the amendments.

B. (In)Sincerity in the Aggression Negotiations

The question of sincere motives permeated the negotiations. When dissimulation was revealed, it harmed relations between colleagues and, at times, between their nations. Insincerity undermined the personal reputations of diplomats and, consequently, their effectiveness. The SWGCA Chairman had deliberately framed the negotiations as a cooperative endeavor[129] in the lead up to Kampala, and strategic dishonesty, while sometimes acceptable in other diplomatic contexts, was not part of the SWGCA culture.

The central sincerity problem in diplomacy is whether a diplomat representing his nation or interacting with others in a personal capacity, such as over a cigarette, is taking a position because it benefits the community, whether global or regional, or because it presents a strategic advantage to his nation. Did that diplomat support a particular aspect of the Kampala amendments in order to build a more effective and just security community[130] or simply to hem in a competitor? A diplomat's outward behavior and actions may be the same in both cases, but the sincerity of his motives is a key consideration for a counterpart from another nation deciding how to proceed with the interaction. Sincerity in this context, after all, is what distinguishes humanitarianism from

129. CORNELIA ULBERT ET AL., ARGUING AND BARGAINING IN MULTILATERAL NEGOTIATIONS 33 (2004), *available at* http://kms1.isn.ethz.ch/serviceengine/Files/ISN/27150/ipublicationdocument_singledocument/5fe09c13-28a2-4cd7-889a-d19b6b1ac6a0/en/11_ulbert_risse_mueller-04.pdf (discussing how the process of framing and reframing issues results in "changing the 'common knowledge' of actors and, thus, the situation structure from one in which there is little zone of agreement to one in which a negotiated or bargaining compromise becomes possible.").

130. For a discussion of security communities in international relations, see Emanuel Adler & Patricia Greve, *When Security Community Meets Balance of Power: Overlapping Regional Mechanisms of Security Governance*, 35 REV. INT'L STUDIES 59, 69 (2009).

lawfare.[131]

In negotiation contexts where gamesmanship is expected, a certain amount of insincerity is tolerated. International relations theorists Emmanuel Adler and Patricia Greve, in a 2009 article, describe how analytically distinct structures of security orders give rise to different international practices.[132] In their account, diplomats who think in terms of balance of power will undertake certain practices while those working to build a security community like the ICC will take up and be attuned to others.[133] For example, competitive practices recognized as competent performances by diplomats functioning in a balance of power framework will be considered unproductive in the context of a security community, where progress toward collective security is based primarily on cooperative practices. Meanwhile, realists negotiating a strategically significant arms-control treaty will see a cooperative approach to high politics as hopelessly naïve. Adler and Greve's 2009 article explores how the "overlap of security governance systems may have important theoretical and empirical consequences."[134]

One theme not explored by Adler and Greve in their analysis of overlapping security orders is sincerity. The question of sincerity is important from an international-practices standpoint because a diplomat may glean a strategic advantage by leading others to believe he is operating within one set of international practices when he is, in fact, attempting to advance his interests via another. The question of sincere motives came up in various ways and can be illustrated by evaluating the practices of delegates from Iran, Germany, the United States, and Amnesty International. Sincerity ultimately had an important place at the turning point of the negotiations.

1. Iran

Rarely did the theme of sincerity surface more lucidly than when Iran put forward a novel proposal at one of the intersessional meetings of the SWGCA in Princeton.[135] Under article 3(a) of the 1974 UN General Assembly's definition of aggression, up for discussion in the SWGCA as the potential basis of the collective act of aggression,[136] military occupation resulting from an invasion or an attack, however temporary, amounts to an act of aggression.[137]

131. Scharf & Pagano, *supra* note 22.

132. Adler & Greve, *supra* note 130, at 59 ("[O]ur argument sees 'balance of power' and 'security community' not only as analytically distinct structures of security orders, but focuses on them specifically as mechanisms based on a distinct mixture of practices.").

133. *Id.* at 65 ("The balance of power and security community are two distinct mechanisms of security governance. They rest on different notions of power, different ideas on the role of war in creating order, and different views on alliances/alignments. Derived from this are different repertoires of practices.").

134. *Id.* at 59.

135. *See* Weisbord, *Prosecuting Aggression*, *supra* note 4, at 187–88.

136. A key component of the crime of aggression.

137. G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974) ("Article 3: Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions

Iran's proposal was that the ICC should consider every day of an illegal occupation to be a separate and new act of aggression. This was a novel and expansive interpretation of the provision. While almost everyone in the room would have agreed that military occupation should be condemned as an act of aggression, the Iranian delegate's sincerity in putting forward this broad interpretation of article 3(a) was highly suspect. While purporting to draft a just criminal law with general applicability, the Iranian diplomat was acting primarily—and transparently—to advance his nation's longstanding vendetta with Israel. Had the SWGCA and the Review Conference adopted his proposal, the ICC could potentially prosecute current Israeli political and military leaders for the occupation of land seized in the 1967 war.

The Iranian delegate's intervention was sophisticated in that it employed the language of the community and related directly and at the correct level of abstraction to the issue on the table, the state act of aggression. Having participated in the SWGCA for some time, the Iranian delegate had become acculturated in the norms of the group. Nevertheless, the SWGCA did not take up the proposal nor is it reflected in the Chairman's report. A likely explanation is that the SWGCA viewed the proposal as insincere, a self-interested attempt to advance one state's strategic interests under the guise of the collective good. Under this explanation, the SWGCA opted to avoid a polarizing political debate conducted in technical lingo about the legality of Israel's 1967 borders.

2. Germany

The sincerity of the German delegates, in contrast, was difficult to impeach. The crime against peace was tested at Nuremberg against German leaders who had brought their country to war and eventually total defeat. Germany's reckoning with its Nazi past after World War II had been thorough. With the end of the Cold War, Germany had chosen to invest its diplomatic capital primarily in overlapping security communities including the European Union, the United Nations, the North Atlatic Treaty Organization, and the ICC.

Without Germany's initiative at the Rome Conference, the crime of aggression would not have been included in the ICC treaty.[138] German delegates had played an essential role in drafting the Prepcomm's 2002 discussion paper on the crime of aggression.[139] In the SWGCA, Claus Kreß had been in charge of compiling the discussion paper on article 25(3) of the statute.[140] This paper examined the ways that the modes of individual criminal responsibility

of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.").

138. Hans-Peter Kaul, Judge, Int'l Crim. Ct., Lecture in Honor of Whitney R. Harris Former Nuremberg Prosecutor at The Int'l Criminal Court at Ten Conference: The Nuremburg Legacy and the Int'l Criminal Court 3 (Nov. 11, 2012).

139. Barriga, *supra* note 97, at 9.

140. THE PRINCETON PROCESS, *supra* note 11, at 184.

applicable to all ICC crimes would apply to the crime of aggression.[141] In Kampala, Kreß and the German delegation helped broker the consensus outcome. There was no vacillating among the German delegates; their commitment to the Nuremberg legacy and belief in the project to criminalize aggressive war was evident across time and context.

It would have been inaccurate to call German diplomacy surrounding the aggression negotiations a mere performance. Kreß, for example, was a paradigmatic study in the microsociological aspects of sincerity in diplomacy. He was open, earnest, and invested in his interactions with others. These qualities are among those identified in the negotiations literature as traits of trustworthiness.[142] This was not sincerity for its own sake but a byproduct of a subjective internal state expressing itself materially. Kreß had no need to squander energy on subterfuge. His positions were coherent and, in the rare instance that they changed, as they did in discussions of the threshold clause, he explained why. In his personal capacity, Kreß wrote academic articles attempting to resolve technical and conceptual issues with the crime of aggression and defending it against critics.[143] After years of interacting with him over the aggression drafts, I had the personal sense that he would stand by his positions. If Berlin gave him contradictory instructions, I expected that Kreß would attempt to bring his political masters around to the position he felt was correct. Kreß was able to single-mindedly labor toward a just outcome because his values aligned with Germany's policy and its long-term interests. Without vying commitments, Kreß could press efficiently toward an outcome.

The only way to describe Kreß's interactions as a performance would be to imagine, as Goffman does when explaining the spectrum of performances underlying the concept of sincerity, that Kreß was deceiving even himself.[144] Such depiction, in my view, would stretch the concept of sincerity too far and fail to properly explain the interactions I observed. It was the diplomacy of people like Kreß, who acted with sincere commitment to the project, that must be credited with achieving a successful outcome. They pressed inexorably for what they considered to be a reasonable result, making compromises when necessary (with regard to the jurisdictional regime, for example), but only within the limits of what they considered to be fair. Without being undermined by competing commitments and exhausted by their own impersonations, Kreß and other sincere diplomats[145] brought the negotiations to a successful close.

---

141. *2005 Discussion Paper 1*, *supra* note 122.

142. *See* Ross & LaCroix, *supra* note 16, at 344–46.

143. *See* Kreß, *supra* note 120.

144. GOFFMAN, *supra* note 37, at 17–21 (he was "fully taken in by his own act").

145. Another diplomat worth mentioning in this discussion was the Swiss delegate Jürg Lindenmann. Lindenmann was an important player throughout the Princeton process, hosted the Montreux meeting where the elements of the crime were drafted, and was one of the drafters of the ABS proposal that, along with the Canadian proposal, makes up most of the Kampala outcome. (The ABS was an important bloc led by Argentina, Brazil, and Switzerland.)

This account of Kreß's diplomacy has implications for the international-practices framework. The use of terminology grounded primarily in Goffman's dramaturgical perspective limits the analysis and leaves little room to account for the possibility of a bargaining practice that is not a performance.[146] A performance is, by definition, insincere.[147] In advancing Germany's position, it is not accurate to say that Kreß was performing. He was being true to his own beliefs and ideals and this was, at least in part, what made him so effective. Kreß's sincerity was, however, a socially meaningful pattern of action that pertains to world politics and could, thus, be characterized as an international practice.[148]

One remaining question of central relevance to this sincerity analysis is whether the international practice that made Kreß such an effective diplomat in the negotiations was deliberate or not. In other words, can a deliberate socially meaningful pattern of action that pertains to world politics be sincere? If the definition of sincerity is communicative truthfulness about a subjective internal state, the answer is yes—so long as the subjective desire to communicate the truth of one's internal state is communicated as well. This seems to me to be what Kreß was doing. Through his body language, facial expressions, voice intonation, and personal and professional efforts to operationalize the crime of aggression, he deliberately communicated his single-minded commitment to achieving a successful outcome.

There are, of course, limits to sincerity as an international practice. When gamesmanship is the norm in a negotiation, a diplomat who reveals too much about his internal state—like an expressive poker player—may be at a strategic disadvantage. When the subject matter being negotiated is primarily logistical and does not engage beliefs, emotions, or ideals, such as establishing international protocols for air-traffic controllers, a diplomat's subjective internal state may be of little relevance. Nonetheless, it seems plausible that there are affective dimensions of sincerity pertaining to goodwill that accrue when a diplomat is as truthful as reasonably possible over time.

3. The United States

A memorable moment in the aggression negotiations germane to the discussion of sincerity in diplomacy was when Harold Koh, the highest ranking official in the U.S. delegation in Kampala, delivered his June 4th statement to the Review Conference.[149] Even though everyone knew, at least in general

146. *See* Robert E. Brown, *Acting Presidential: The Dramaturgy of Bush Versus Kerry*, 49 AM. BEHAV. SCIENTIST 78, 89 (2005) (discussing the absence of authenticity in the dramaturgical self).

147. *See supra* Parts II–III.

148. Adler & Pouliot, *supra* note 1, at 1–6.

149. Harold Koh, Legal Advisor, U.S. Dep't of State, Address at the Review Conference of the Rome Statute of Int'l Criminal Court (June 4, 2010) [hereinafter Koh, Address at the Review Conference] (transcript available at http://www.state.gov/s/l/releases/remarks/142665.htm); *see also* Stephen Rapp, Ambassador-at-Large for War Crime Issues, Address at the Review Conference of the Rome Statute of Int'l Criminal Court (June 1, 2010) (transcript available at http://www.state.gov/

terms, what Koh was going to say—the U.S. delegation had been holding many bilateral and small group meetings before and during the Review Conference to advance the U.S. position—the conference room fell silent when he took the floor. This was high theater as much as it was high politics, and nowhere in these negotiations was the dramaturgical perspective more relevant. The room was listening to how Koh would present the U.S. position and whether he would be sincere.

Most people in the room knew something about Koh's background and personal commitments. He was a renowned international-law scholar dedicated to human rights. Koh had been dean of Yale Law School before being appointed Legal Advisor to the State Department by President Obama. He had written thoughtfully about American exceptionalism[150] and favorably about international criminal justice.[151] Some also knew that, since his appointment to the State Department, Koh had spoken out in support of the United States' targeted-killing program in Pakistan, Yemen, and other foreign countries where the United States had identified an Al Qaeda, Taliban, or associated presence, and had constructed the legal justification for these controversial attacks.[152] The audience was wondering whether Koh, in his official position, had found a way to remain true to his personal commitments, whether his commitments had changed, and whether any changes they might detect in his speech could be explained and justified. In short, people were at least as interested in Koh's sincerity as they were in the American position he was tasked to present.

As an observer state, the United States was invited to deliver a statement after the ICC's States Parties had finished theirs. In his statement, Koh made several arguments to the ASP against defining and activating the crime of aggression in the Rome Statute. Neither he nor any other official U.S. representative had been present at the Princeton meetings. Under President

---

j/gcj/us_releases/remarks/2010/142520.htm).

150. He has also identified positive aspects. *See* Harold Hongju Koh, *America's Jekyll-and-Hyde Exceptionalism*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 111, 118–19 (Michael Ignatieff ed., 2005); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480–87 (2003); Harold Hongju Koh, *On America's Double Standard: The Good and Bad Faces of Am. Exceptionalism*, AM. PROSPECT, Oct. 1, 2004, at A16.

151. *See, e.g.*, Harold Hongju Koh, *A U.S. Human Rights Policy for the 21st Century*, 46 ST. LOUIS. U. L.J. 293, 311–312 (2002); Harold Hongju Koh, *Preface* to BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS, at i (Jaya Ramji & Beth van Schaack eds., 2005).

152. Op-Ed., *A Defense of Drones*, WALL ST. J., Apr. 2, 2010, at A16; Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 6, 2010, at A12; Michael D. Shear & Scott Shane, *Congress to Get Classified Memo on Drone Strike*, N.Y. TIMES, Feb. 6, 2013, at A1; Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at http://www.state.gov/s/l/releases/remarks/139119.htm); Renee Dopplick, *ASIL Keynote Highlight: U.S. Legal Adviser Harold Koh Asserts Drone Warfare Is Lawful Self-Defense Under Int'l Law*, INSIDE JUSTICE (Mar. 26, 2010), http://www.insidejustice.com/law/index.php/intl/2010/03/26/p254; Tara McKelvey, *Interview with Harold Koh, Obama's Defender of Drone Strikes*, DAILY BEAST (Apr. 8, 2012, 4:45 AM), http://www.thedailybeast.com/articles/2012/04/08/interview-with-harold-koh-obama-s-defender-of-drone-strikes.html.

Obama, the United States had begun to formally engage with the ASP over the aggression issue late in the game, and it was clear that they were playing catch-up. His argument, for example, that the definition of aggression (article 8 *bis* of the draft definition of aggression) "does not truly reflect customary international law"[153] was largely disregarded. The SWGCA constructed article 8 *bis* to capture only the most "manifest" violations of the UN Charter and the view of the group was that the definition was deliberately kept well within the confines of customary international law. Koh seemed unaware that the elements of the crime of aggression had been thoroughly negotiated and were now uncontroversial[154]: "Nor have we heard any consensus that the elements of the crime, which have been little discussed, should be completed here in Kampala."[155] Ultimately, neither the SWGCA's draft definition of the crime nor of the elements was reopened for discussion during the Review Conference. Both were adopted without changes. In his statement, Koh also expressed doubts about the procedure to be used to amend the Rome Statute[156] and about the jurisdictional conditions of the crime.[157] In both critiques, he emphasized that consensus had not been reached on the appropriate course of action[158] and that the Review Conference should only amend the Statute to include the crime of aggression if there was a consensus on every aspect.[159]

Koh's remarks seemed designed to undermine the draft crime of aggression and its jurisdictional conditions at every opportunity with the overall aim of keeping it out of the Rome Statute however possible. His technical critiques, couched in terms of international law, nonetheless came across as pretexts for the longstanding American position that the United States will resist the rule of

153. Koh, Address at the Review Conference, *supra* note 149.

154. *2009 Chairman's Non-Paper on the Elements of Crimes, in* CRIME OF AGGRESSION LIBRARY, *supra* note 4, at 677; *2009 Montreux Draft Elements of Crimes*, *in* CRIME OF AGGRESSION LIBRARY, *supra* note 4, at 669; Int'l Criminal Court, Assembly of State Parties, Inter-Sess., June 8–10, 2009, *Informal Inter-Sessional Meeting on the Crime of Aggression, Hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009*, ICC Doc. ICC-ASP/3/SWGCA/INF.1 (Jul. 10, 2009), *available at* http://crimeofaggression.info/documents//6/2009_Princeton.pdf (commonly referred to as the *2009 Princeton Report*).

155. Koh, Address at the Review Conference, *supra* note 149.

156. *Id.* ("The first question is what is the legitimate way to adopt amendments that add crimes to the Rome Statute? . . . [W]e have heard disagreements over whether proposed amendments should be adopted under Article 121(4), Article 121(5), or some combination thereof.").

157. *Id.* ("A third question is what jurisdictional conditions—filters or triggers—must be satisfied before the ICC could exercise jurisdiction over the crime of aggression? Although the Princeton Process addressed this issue at length, it was unable to bridge very significant differences of views among states on these issues.").

158. *Id.* ("For something as fundamental to this Court as its core crimes, a rule of amendment by consensus is both necessary and appropriate;" "Based on this striking diversity of views, we can only conclude that no consensus has emerged for a jurisdictional filter that could operationalize this crime, and that more work on this issue still needs to be done.").

159. *Id.* ("The Princeton Process repeatedly reaffirmed that nothing is agreed until everything is agreed. If the issue of filters and triggers is decided separately from the definition itself, it should be clearly understood that the definition might need to be revisited upon future consideration of the filter and other related issues.").

law in international affairs pertaining to the use of force lest it constrain its own discretion. In short, the remarks came across to many as insincere.

At the end of Koh's speech at the Review Conference, the audience was left wondering whether he really believed the claims he was making or whether he was just using international law to advance American interests in the most efficient way possible. His June 15th State Department briefing on *U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference* did not assuage these concerns:

> We think that with respect to the two new crimes, the outcome protected our vital interests. The court cannot exercise jurisdiction over the crime of aggression without a further decision to take place sometime after January 1st, 2017. The prosecutor cannot charge nationals of non-state parties, including U.S. nationals, with a crime of aggression. No U.S. national can be prosecuted for aggression so long as the U.S. remains a non-state party. And if we were to become a state party, we'd still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.[160]

Like the villain–dissembler in Shakespeare's plays, Koh had concealed his mental state from the other characters in the play, his counterparts at the Review Conference, while revealing that mental state to the audience at the State Department briefing.

Perhaps Koh would have been better advised to candidly admit to the Review Conference from the outset that the United States has the most globally deployed military in the world and that the American people would be unwilling to accept the possible prosecution of their political and military leaders if the use of armed force were criminalized. Koh's apparent quid pro quo offer of increased U.S. engagement with and assistance to the ICC in prosecuting the other crimes, and his lack of candor in explaining the United States' true position unfortunately threatened the credibility of this renowned international lawyer and squandered some of the goodwill that he and his delegation had worked to build at the Review Conference.

4. Amnesty International

Another example of a problematic performance from the perspective of sincerity was Amnesty International's statement concerning the crime of aggression amendments in the final moments of the Review Conference.

The argument put forward by a number of influential non-governmental organizations was that the international use of force is not a human rights issue. Amnesty International justified its nonposition on pragmatic grounds. Essentially, the organization remains neutral on the question of the legality of the conflict so that it is seen as impartial when it addresses violations of human rights and humanitarian law by all sides to the conflict.[161] Amnesty was imitating

160. Press Release, Harold Hongju Koh, Legal Advisor, U.S. Dep't of State & Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010), *available at* http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm).

161. *Id.*; *see also* Leonie von Braun & Annelen Micus, *Judicial Independence at Risk*, 10 J. INT'L

the long-held stance of the International Committee of the Red Cross in relation to armed conflict. The position, as explained in one International Committee of the Red Cross document is that "[i]t is precisely because the feelings we have towards the suffering of those we seek to assist are not 'neutral' that we must adhere to political, religious and ideological neutrality—for that is what enables us to gain access to them."[162] This approach taken by Amnesty—mimicking the stance of the International Committee of the Red Cross—is a bargaining technique regularly used by NGOs.[163] Because they lack the bargaining weight of major powers, NGOs often gain traction by framing the issues within negotiations and attempting to make their arguments resonate with prior principles or norms.[164] Although this is a valid technique for such an organization to use when advancing its position, it nonetheless comes across as insincere when the mimicked position does not align with the organization's core mandate.

There are a number of problems with the principle of neutrality that are relevant when evaluating the stance of Amnesty International regarding the crime of aggression. The International Committee of the Red Cross relies on its ideological neutrality to gain reciprocal access to prisoners of war on all sides of a conflict.[165] Amnesty International does not perform the same function. Rather, it is the core mandate of this organization to criticize governments and hold them accountable for a wide variety of actions that undermine human rights.[166] Another consideration is that the nonposition of Amnesty International is, in reality, a political position because it was made on the basis of a political calculation and has a political impact.[167] By opting not to weigh in on the aggression debate, Amnesty International was allowing the outcome to tip in a particular direction.[168] In the context of a negotiation, a party that remains on the sidelines and forfeits its say in the outcome arguably has the same effect as siding with the majority or the strongest faction in the negotiation.

CRIM. JUST. 111, 118 (2012).

162. Marion Harroff-Tavel, *Principles Under Fire: Does it Still Make Sense to be Neutral?*, INT'L COMM. RED CROSS (Dec. 31, 2003), http://www.icrc.org/eng/resources/documents/article/other/5vueea.htm.

163. Nicole Deitelhoff, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, 63 INT'L ORG. 33, 44 (2009).

164. *Id.*; *see also* ULBERT ET AL., *supra* note 129, at 31 (discussing research by constructivist international relations scholars pointing out that to be persuasive, arguments must resonate with prior knowledge, principles, norms, and commonly held worldviews).

165. Barbara Ann Rieffer-Flanagan, *Is Neutral Humanitarianism Dead? Red Cross Neutrality: Walking the Tightrope of Neutral Humanitarianism*, 31 HUM. RTS. Q. 888, 895 (2009).

166. *About Amnesty International*, AMNESTY INT'L, http://www.amnestyusa.org/about-us (last accessed Mar. 29, 2013) ("Amnesty International is a global movement of people fighting injustice and promoting human rights. We work to protect people wherever justice, freedom, truth and dignity are denied.").

167. Haroff-Tavel, *supra* note 162, at 2; *see also* Antonio Donini et al., *Between Cooptation and Irrelevance*, 17 J. REFUGEE STUDIES 260, 263 (2004) (discussing "politicized humanitarism").

168. *See* von Braun, *supra* note 161, at 118–20.

In an important sense, maintaining neutrality in Kampala was tantamount to a surrender of principle. It is inconsistent for an organization committed to human rights to ignore the systematic violations of human rights, including, of course, the right to life, that occasion any large-scale and illegal use of armed force.[169] Furthermore, there are certain wars—and perhaps certain types of wars—that ought to be condemned by any reasonable humanitarian. Wars of conquest and expansion, the bases of the crime against peace charges at Nuremberg, are the most obvious examples. In the final analysis, the position of neutrality taken by Amnesty International appeared more fainthearted than principled.

Amnesty International nonetheless abandoned its position of neutrality in its statement in the final hours of the Review Conference and reacted strongly against the painstakingly negotiated jurisdictional regime.[170] Christopher Hall, Senior Legal Adviser at Amnesty International set out the organization's view in a June 15, 2010 news briefing: "Governments have effectively created a two-tier system of international justice where they can choose to stand above the law, retreating from the principles established in Rome twelve years ago."[171] In fact, a two-tier system of States Parties and Non-Party States already existed in the Rome Statute, as well as special powers for the Security Council under article 16.[172] Had Amnesty International's all-or-nothing position on jurisdiction been taken up by more progressive states in Kampala,[173] it would have blocked a compromise and achieved the result that the five permanent members of the Security Council were pushing for.

Three of the leading civil-society groups—Amnesty International, The International Federation for Human Rights, and Citizens for Global Solutions—would have preferred that the ICC's existing jurisdictional regime be applied to the new crime of aggression.[174] But while The International Federation for Human Rights and Citizens for Global Solutions explicitly weighed the outcome against the existing political realities, Amnesty International took a perfectionist stance without acknowledging the repercussions of their position: that it would collapse the negotiations.

---

169. *See* Trahan, *supra* note 13, at 912.

170. Int'l Criminal Court, *Kampala Outcome*, *supra* note 3, at art. 15 *bis*, para. 4.

171. *Opt Out System Risks Undermining ICC*, AMNESTY INTERNATIONAL (June 15, 2010), http://www.amnesty.org/en/news-and-updates/opt-out-system-risks-undermining-icc-2010-06-15.

172. Rome Statute, *supra* note 7, at art. 16.

173. The so-called ABS group, for example, was, as previously noted, an important bloc led by Argentina, Brazil, and Switzerland.

174. Press Release, Citizens for Global Solutions, ICC Conference Takes Steps to End Aggression (June 14, 2010), *available at* http://archive2.globalsolutions.org/press_releases/icc_conference_takes_steps_end_aggression ("The final outcome is the result of a difficult compromise. FIDH reiterates its call for States Parties and the Security Council to ensure that they will not use this amendment in a way that would establish double-standards in the pursuit of justice."); Amnesty International, *supra* note 171; *ICC Conference Takes Steps to End Aggression*, FIDH (June 14, 2010), http://www.fidh.org/Conclusion-of-landmark-ICC-Review;

The delegations of progressive states that had collaborated closely with Amnesty International to get the most robust jurisdictional regime attainable felt duped. Amnesty International had participated in the SWGCA and knew that the outcome in Kampala was closer to their preferred position than most insiders thought likely.[175] The other realistic alternatives most insiders saw going into Kampala had been a collapse of the negotiations, a definition of aggression with no jurisdictional regime to accompany it, or an opt-in regime. Indeed, striving for perfect jurisdictional coverage was a commendable goal. However, by rejecting the Kampala compromise on perfectionist grounds, then angrily criticizing the delegates for the consensus outcome in the closing moments of the Review Conference, Amnesty International came across as insincere.

5. The Role of Sincerity at the Turning Point of the Negotiations

The turning point in the negotiations came in 2006, well before the Review Conference took place, and the sincerity of the delegates advocating for the competing positions was a key factor in the outcome.[176]

The drafting issue under discussion concerned the proper role of the Security Council in triggering ICC jurisdiction over the crime of aggression. An early International Law Commission (ILC) draft of the Rome Statute had suggested making ICC jurisdiction over the crime of aggression contingent on a prior determination by the Security Council that an act of aggression had occurred.[177] Unsurprisingly, this was the position advocated by the P5[178] since it would, in effect, allow them to deploy their veto to shield their own or allied political and military leaders from any ICC aggression case. In support of their position, the P5 argued that the UN Charter, under article 39, gave the Security Council a monopoly over aggression determinations.[179] The argument was insincere in that it justified a self-interested strategic position while using the language of broader community interests.

---

175. *See* William Schabas, *An Assessment of Kampala: The Final Blog*, THE ICC REVIEW CONFERENCE 2010 (June 17, 2010), http://iccreviewconference.blogspot.com/2010/06/assessment-of-kampala-final-blog.html ("Then, the result will be much better than had the Conference to what many thought was the appropriate amending process. Because the amendment will apply to all States parties, and not those who have ratified it, provided of course they have not made an opt-out declaration. There may be some of these, but there is no cause for pessimism here. There will be a high political price to pay for any government that considers making an opt-out declaration. It is a price that many will prefer not to pay.").

176. *See* COAL. FOR THE INT'L CRIM. COURT, REPORT OF THE CICC TEAM ON AGGRESSION (2006), *available at* http://www.iccnow.org/documents/TeamReportOnIntersessionalMeeting_26Aug06.pdf; Weisbord, *Prosecuting Aggression*, *supra* note 4, at 206.

177. *See* M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INT'L CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE 130 (2005); Kreß & Holtzendorff, *supra* note 13, at 1194.

178. The five permanent members of the UN Security Council.

179. U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

The vast majority of delegates to the SWGCA rejected the P5's contention on principled grounds. First, it would introduce an unacceptable level of inequality within the Rome Statute because nationals of the P5 and their allies would be above the law. Second, and relatedly, it was likely to dissuade many states from joining or supporting the ICC because the Court would be perceived as a tool of the powerful states. Finally, and perhaps as importantly to the discussions, granting the Security Council the power to determine that aggression had occurred would prejudice the rights of the accused in a number of unacceptable ways. Most conspicuously, a Security Council determination binding the Court would violate the presumption of innocence and isolate an essential aspect of the case from challenge by the defendant.[180]

The ILC proposal ran against fundamental values held by most states and their representatives. Meanwhile, the legal argument that article 39 of the UN Charter gives the Security Council a monopoly on determinations pertaining to the illegal use of armed force came across as an insincere pretext to advance the interests of a handful of powerful states. In 2006, the SWGCA determined that, whatever the place of the Security Council in an aggression case, its determination must not be prejudicial on the Court.[181] In 2010, no other issue provoked as decisive a reaction in Kampala by so many states.[182] The fact that pretextual legal arguments were being deployed to undermine sincerely held views about the requirements of justice is certainly part of the explanation. One broad lesson that can be drawn is that raw power politics do not explain everything in international affairs. Values shape outcomes as well, as do interpersonal dynamics, including sincerity.

V
CONCLUSION

Sincerity was central to the design of the aggression negotiations and important to the outcome. Effective diplomats like Christian Wenaweser and Claus Kreß, who were successful in shaping the consensus outcome in Kampala, were sincerely committed to the project and favored cooperative practices over gamesmanship and deception. Insincerity was more often an annoying hindrance, a performance easily laid bare, undermining the credibility of those who were discovered making use of it.

It is nonetheless difficult to assess the degree to which the sincerity of particular diplomats impacted the final outcome of the negotiations. It may be

180. For a more detailed discussion of the question of the role of the Security Council, see Int'l Criminal Court, June 11–14, 2007, *Report of the CICC Team on Aggression*, at 9, 10, 13, 44, 48–49, *available at* http://www.coalitionfortheicc.org/documents/CICC_Princeton_Team_Report_2007.pdf. *See also* Weisbord, *Prosecuting Aggression*, *supra* note 4, at 196–208.

181. COAL. FOR THE INT'L CRIM. COURT, *supra* note 176; Weisbord, *Prosecuting Aggression*, *supra* note 4.

182. This is incontrovertible when reading the speeches of delegates delivered in the general debate in Kampala. For a collection, see *ICC – General Debate – Review Conference*, INT'L CRIM. COURT, *supra* note 27.

coincidence that neither the Iranian delegation, the U.S. delegation, nor the delegation representing Amnesty International managed to successfully advance their agendas, while the representatives from Liechtenstein and Germany, who were putting forward sincere arguments, did. Or it may be that Liechtenstein, Germany, and the other true believers managed to attract the vast majority of states to their position because it was a reasonable compromise that furthered compelling community interests without unduly provoking the great powers. Nonetheless, it is my contention that the sincerity of the true believers impacted the outcome in an appreciable way. At a minimum, it helped convince undecided states that the Kampala outcome would be implemented in a reasonable, honest, and predictable fashion. In the wake of Kampala, there was a great deal of excited talk about a new coalition of states, led by the rising middle powers who had managed to broker the Kampala amendments, dedicated to the cooperative resolution of community challenges.

Sincerity, best understood through the lens of current scholarship, is a special example of an international practice that is not a performance. It is a mode of interacting with others, honestly and without duplicity. The presence of sincerity among negotiators and diplomats can build a community of trust that results in goodwill and predictability. The presence of trust in a negotiation has numerous benefits, including benefits to a negotiation in general because a party's positive reputation can constrain temptations to engage in opportunistic, self-serving behavior; the lack of fear of being vulnerable to others or of being exploited; the increased likelihood of cooperation among parties; the increased likelihood of searching for creative solutions providing optimal outcomes for all parties; the increased efficiency of negotiations, using less time and other resources; the enhanced durability of an agreement if the parties maintain an ongoing trusting relationship after the conclusion of negotiations; and the possibility of forming coalitions on the basis of trust, even when the interests of their nations are at odds. Sincerity has many advantages over mere gamesmanship as an international practice.

The diplomacy surrounding the crime of aggression is far from over. The Kampala compromise has, rather, ushered in a new phase. We are currently in the midst of a ratification and implementation campaign where activists of all stripes—parliamentarians, civil-society leaders, diplomats, and others—are pressing states to ratify the Kampala amendments and incorporate them into domestic law. Others are keen to prevent this from happening. If the aggression negotiations have taught us anything, it is that a small group of decision makers who are sincerely committed to the cause can direct the discussion, reframe the issues, and change international law. What remains to be seen is whether this group of true believers will continue to expand and gain momentum, plateau, or be met with dedicated resistance by a new group intent on the collapse of the Kampala compromise.