

Kampala June 2010 – A First Review of the ICC Review Conference

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Abstract

In the years and months before the ICC Review Conference, which took place in Kampala, Uganda from 31 May to 11 June 2010, there were, from the perspective of the International Criminal Court (ICC), quite a number of important if not crucial questions: What would be the course and what would be the outcome of the Review Conference? How would it affect the Review Conference that it would be held not only in Africa, but in an African situation country? Would there be only a narrow, maybe inappropriately narrow, examination of the institution of the Court? Or would there be a review of the entire ICC system as established by the Rome Statute? What about the stocktaking with regard to the four critical themes chosen for this Review Conference, namely cooperation, complementarity, impact on victims and affected communities, and the important question of the relationship between peace and justice? Which amendments to the Statute would be considered or adopted? Above all, would there be any progress or maybe even a breakthrough with regard to the very difficult, unresolved issues concerning the crime of aggression as referred to in Article 5(1)(d) of the Statute? It is against this background of questions, hopes and expectations that this contribution tries to briefly assess the Review Conference. The first part of this introductory comment (A) reflects the author's hopes and expectations prior to the Review Conference. It is based on a speech delivered by the author in May 2010.¹ The second part of this comment (B), is a first analysis and review of the course and outcome of the Review Conference. The author hopes that this comparative approach may be an informative and interesting manner to provide in this Article a first summary of what was expected, what happened and what was actually achieved in Kampala.

A. Before Kampala: Hopes and Expectations of the ICC

This comment on the Review Conference will deliberately introduce a particular perspective: the perspective of a Judge of the International

¹ Part (A) corresponds largely to a speech delivered by Judge Hans-Peter Kaul on 3 May 2010 in Berlin at the symposium "Das Verbrechen der Aggression - Die Weiterentwicklung des IStGH-Statuts" organized by the German Red Cross and the German Society for the United Nations (DGVN). The form of the speech as effectively delivered is maintained throughout the text.

Criminal Court who is at the same time a member of the Presidency. Naturally, we have been giving a lot of thought to Kampala beforehand. I would like to focus on two kinds of questions:

First: What is the subject and what is the task of the Review Conference, and what should be the role of the Court and its representatives?

Secondly: What are the hopes and expectations that one can have for Kampala from the perspective of the Court?

Clearly, when speaking of hopes, there is also always some sort of fear that these hopes might be disappointed. But for now we should concentrate on the hopes.

I am aware of the fact that the main issue of this symposium is the crime of aggression - in the wording of the German constitution, the “Grundgesetz”, the crime of the so-called “Angriffskrieg”. At the end of my presentation, I will make some personal remarks on this topic but - and I would like to emphasize this - I do not intend to make these remarks as a judge of the criminal court but as an average German citizen, who is reasonably conscious of recent history, including the unspeakable suffering that Hitler’s aggressive wars have brought to the world, as well as to Germany.

I. Important Aspects and Hopes for the Review Conference

As you know, the first sentence of Article 123 paragraph 1 of the Rome Statute states that seven years after the entry into force, the Secretary-General of the United Nations “*shall convene a Review Conference to consider any amendments to this Statute*”.

Like many others, I believe, that it is actually too early for a real review conference. To really be able to judge the work and functioning of the Court, around three to four cycles of criminal proceedings should be fully completed. Until now we only have two - soon to be three - trials at different stages in the proceedings.

Furthermore, in the past years I have stressed over and over at every possible occasion that changes, proposals for such changes and so on should be treated with utmost precaution. Moreover, I have emphasized that only amendments should be proposed on which it is likely that a broad consensus can be reached.

This caution results from the fact that the Rome Statute as a whole is a very precarious and precious compromise. The interests of the entire

international community had to be taken into account to reach a quite meticulous balance. This balance should not be put at risk inconsiderately. In addition, there is a risk of an improvement for the worse that might affect the acceptance of our Statute.

Moreover, making relevant amendments to a treaty that have not been adopted by consensus always creates the risk of differing contractual obligations for different States. But to have and to maintain a coherent and uniform treaty regime that applies to all States Parties in equal measure is a significant good.

As you know, the States Parties will discuss the following points in Kampala: an amendment to Article 8 on war crimes (the war crime of employing poison or poisoned weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices as well as bullets which expand or flatten easily in the human body, which is so far only criminalized in international armed conflicts, will be extended to armed conflicts not of an international character); a possible deletion of Article 124 (transitional provision on war crimes); and finally the crime of aggression as referred to in Article 5(1)(d) of the Statute.

I would like to make two remarks with regard to the above:

First: These discussions are a matter for the States Parties alone. The Court as well as its highest representatives do not take any position and cannot take part in these discussions. I myself took part in the decision-making of the highest levels of the Court to determine this basic position.

Second: I now come to something more gratifying, bringing about a positive perspective. In my opinion, the amendments mentioned above do not bear the risk of an "improvement" of our basic treaty for the worse. They do not raise concerns that the Rome Statute might be endangered or affected by potentially damaging or controversial amendment proposals (as for example with regard to nuclear weapons or to Article 16 of the Statute). Fortunately, the States have been wise enough to postpone the discussions on these already suggested but complex or controversial proposals to sometime after Kampala.

The other main task in Kampala will be to take stock of and assessing four central issues:

- (1) Cooperation (of States Parties with the Court);
- (2) Complementarity;
- (3) Impact of the Rome Statute system on victims and affected communities

(4) Peace and Justice.

When it comes to these topics, I believe it to be legitimate for the Court to actively take part in the debate and to present its view. These debates will not be a mere survey of the Court, the Court itself being only the object of such a survey, comparable to the audit of a business company. It is rather the whole ICC system that is put to test, not only the Court but also the States Parties, the United Nations, as well as civil society.

That the whole ICC system and not only the Court has to be the subject of the stocktaking exercise at Kampala is in my view a crucial and absolutely fundamental point. It is important to really have a common understanding of that. Let me explain why the ICC system is composed of all these different actors.

Why are States Parties part of the ICC system? This is because they are not only the founders but also the stake-holders of the Court, its guarantors. Their cooperation is absolutely essential to the good functioning of the Court.

Why are even non-States Parties de facto part of the ICC system? This is particularly because the comprehensive codification of genocide, crimes against humanity and war crimes in articles 6, 7 and 8 of the Rome Statute has established value standards which are absolutely binding. It is generally recognized that also non-States Parties have to observe these standards and they have already recognized them - as is the case for example with the United States.

Moreover, the jurisdiction of the ICC can also have a great impact on non-States Parties. This is particularly due to two kinds of mechanisms: firstly, in case of a referral of a situation by the Security Council of the UN, as it happened with regard to the situation in Darfur/Sudan by S/RES 1593, and secondly if nationals of non-States Parties commit international crimes, such as war crimes or crimes against humanity, on the territory of a State Party. In this case, the ICC can have complementary jurisdiction according to the principle of territoriality laid down in Article 12(2)(a) of the Rome Statute.

And why are the Security Council and the United Nations part of the ICC system?

Because the Security Council has been assigned a very significant role in particular in articles 13(b) and 16 and also in Article 5(2) of the Statute

concerning the crime of aggression.² And furthermore, because the United Nations is not only a “mother” to the ICC, but also an extremely important, indispensable partner of the Court. The latter is evidenced by the special Relationship Agreement between these two institutions.

And finally: why is civil society - meaning civil society in all States - part of the ICC system? Because civil society is not only a Godmother to the Court, but also because without its support and understanding, the Court can never be successful.

This is why during the last months we gave a lot of thought to the positions and messages the representatives of the Court should plead in Kampala. This also concerns the hopes and expectations that we have towards the States Parties. Some of these expectations are briefly recapitulated below.

Our first hope is that Kampala will not only bring about good speeches and resolutions. It should also generate concrete pledges, affirmations of support in word and deed, including the assignment of more resources for the ICC system where such resources are needed for the good functioning of the Court. In such a short presentation it is impossible to cover all issues related to the four themes of stocktaking mentioned above. Nonetheless, it may be appropriate to mention a few of the most important topics with regard to these four themes.

When it comes to the topic of cooperation, one should keep in mind the following: as you know, the Court is one hundred percent dependant on effective criminal cooperation. This is our lifeblood as well as our Achilles’ heel: the Court can only be as strong as the States Parties’ cooperation makes it. This is the case especially with regard to the question of arrests and surrenders to The Hague. As it is, only four out of 14 warrants of arrest have been executed. Actually, the matter is simple: no arrests, no trials.

Moreover, recently, on 26 April 2010, Prosecutor Ocampo has again reiterated four concerns that have been reaffirmed consistently:

- (1) The necessity of public and diplomatic support for the enforcement of warrants of arrest;
- (2) No unnecessary contact with individuals who are subject to a warrant of arrest;

² See also A. Reisinger-Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at last ... in reach ...', 2 *Goettingen Journal of International Law* (2010) 2, 763, in this issue.

- (3) The necessity of freezing financial and other resources of such individuals;
- (4) Concrete support for the enforcement of warrants of arrest including the provision of well-trained special forces.

Furthermore, the second topic of stocktaking, complementarity, has a positive aspect that needs to be supported. Especially situation countries, like the Democratic Republic of Congo, Uganda, the Central African Republic and finally Kenya need to be enabled by means of concrete support for their criminal justice systems to prosecute and punish grave crimes themselves. This means to support capacity-building - a task that is not within the Court's scope of activities - since the ICC is not an organization which provides development aid.

With regard to the stocktaking issue of the impact on victims and affected communities, one should mention one crucial point. The International Criminal Court has had a great deal of success and has done pioneer work in this area which is very difficult in practice. Nevertheless, we are persuaded that further achievements regarding the work with victims, or the protection of victims and witnesses, or more outreach activities can only be attained if more resources are provided.

And finally, the very contentious issue of the relationship between peace and justice: it is well known that even among States Parties, some see these objectives as alternatives and sometimes ask directly or indirectly for justice and for the Court to step back. This issue is of great importance to me. I have substantiated my view in a speech I gave in Dresden in November 2009, giving concrete examples as to how the work of the Court may contribute both to peace and justice. It should be clarified in Kampala that these two important objectives, peace and justice, indeed strengthen one another if they both are pursued emphatically both in the same way and with the same vigor.

All things considered: Kampala can and hopefully will be a success. Although, one should not have too high expectations. Dramatic things and dramatic improvements are not to be expected - this however is more of a sign for maturity and consolidation. The resolutions to be adopted should have a concrete follow-up and should open new avenues to strengthen the ICC system.

II. Some Remarks on the Crime of Aggression

As I said at the beginning, I would like to finish my presentation by talking about the crime of aggression. I stick to the Court's policy not to comment on the discussion in Kampala on the crime of aggression. This is up to the States Parties only. However, I would like to make some personal remarks as a German national who was born during the Second World War and who knows Article 26 of our constitution, the "Grundgesetz", which contains a prohibition of aggressive wars.³

It seems essential to me, and it would be wonderful, if Kampala would bring about real progress and a breakthrough for the outlawing and penalization of the crime of aggression.

It is common knowledge that without Germany, the crime of aggression would not have been incorporated in Article 5 of the Rome Statute. The German proposal, which was the last one discussed in Rome, at least made sure that the crime of aggression was recognized as an international crime once and for all in Article 5 of the Statute.

In my personal opinion, I feel very close to two American pioneers for the proscription of the crime of aggression, both US prosecutors in Nuremberg. I am referring to Whitney Harris, who passed away on 21 April 2010 in St. Louis and who was an IMT prosecutor in the case against Kaltenbrunner, the Head of the Nazi secret police, the Gestapo. And I also refer to Benjamin Ferencz, prosecutor in the so-called "Einsatzgruppenprozess", the trial against leading officers of the SS. Professor Ferencz will travel to Kampala to attend the discussions on the crime of aggression there, with tremendous energy and charisma despite his advanced age of 91 years.

Whitney Harris, my fatherly friend, who supported the German Ministry of Foreign Affairs with regard to my re-election as a judge in 2005, wrote a book in 1999, called the "Tragedy of War". I would like to cite a single phrase out of the Epilogue of this book:

³ Article 26(1) of the "Grundgesetz" reads: "Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.", For an English translation see <https://www.btg-bestellservice.de/pdf/80201000.pdf> (last visited 23 August 2010).

“The crime of aggressive war must be recognized, defined and punished when it occurs for war is the greatest threat to the survival of civilization.”⁴

Benjamin Ferencz was just awarded with the Erasmus Prize in The Hague’s Royal Palace for his lifelong work. The headline of his website reads: “Law not War”.⁵ Both Harris and Ferencz basically agree on the following: the common task is about repressing, preventing and banning the waging of aggressive wars.

History teaches that war, the evil of war itself, usually leads to numerous war crimes and crimes against humanity. To put it more candidly and also harder, as hard as the reality of war itself is: war crimes are the excrements of war, inevitable and heinous.

Furthermore, another issue should be mentioned. In the past years I have been asked time and again, whether it might not overwhelm the judges at the ICC to judge crimes of aggression.

This is a very serious question. But it also creates a huge responsibility to judicially analyze and ascertain the truth in cases of genocide, crimes against humanity and large scale war crimes. I believe that my fellow judges as well as I myself will approach the issue of the crime of aggression with the same utmost seriousness, objectivity and impartiality. And I further believe that they will reject every attempt to politically instrumentalize the Court.

I might be proven wrong, but at the present stage I am convinced that the judges at our Court will be able to assess whether a crime against peace has been committed or not, just as the judges at Nuremberg have been in 1946.

Like Whitney Harris and Benjamin Ferencz, I maintain the following: all forces of good will have to stand up persistently for the crime of aggression to finally be penalized. They have to do so even if powerful States keep on objecting for all sorts of reasons. War is evil par excellence. It might remain impossible to completely prevent future wars. Nevertheless, the inhibition threshold should be raised as much as possible by establishing a criminal prohibition of this crime of aggression that generally triggers so many other crimes.

⁴ W.R.Harris *The Tragedy of War* (2004).

⁵ <http://www.benferencz.org/> (last visited 23 August 2010).

B. After Kampala: A Successful Review Conference – A Summary

On 11 June 2010 an event has come to an end in Kampala, Uganda that one may call quite significant – the Review Conference of the International Criminal Court's founding treaty. Despite the critiques that will no doubt arise, this first Review Conference of the Rome Statute has been a success for the Court, as well as for the entire system of international criminal justice. Most importantly: the waging of war will become triable after all. But it was only after a long and often difficult debate that this conference ended early in the morning of 12 June 2010 with an affirmative decision on the crime of aggression.

This last intense night was preceded by a two week long conference with a full agenda. Around 4,600 representatives of States as well as of intergovernmental and non-governmental organizations (NGOs) met in Kampala to both discuss amendments to the Rome Statute and take stock of achievements and weaknesses in the system governing the International Criminal Court. The representatives of 87 States Parties and a considerable number of non-States Parties, present as observers, took part in two weeks of plenary discussions as well as formal and informal smaller multilateral and bilateral negotiations. Two heads of States⁶ were present and numerous delegations were represented at the ministerial level.

One outcome could already be presented half way through the conference: the result of the pledges. Prior to the conference, States had the possibility to formally pledge to make various contributions thus showing their commitment to the ICC and the Rome Statute. At the pledging ceremony on the second day of the Conference, the co-focal points for pledges announced that they had received 112 pledges from 37 States - including some non-States Parties - and regional organizations, representing all regions of the world. These pledges concerned such matters as financial contributions, especially to the Trust Fund for Victims, enforcement of sentences agreements, agreements on privileges and immunities or the relocation of witnesses.

Furthermore, the stocktaking process provided an important opportunity for the various actors within the ICC system to consider the

⁶ Yoweri Museveni, Republic of Uganda and Jakaya Kikwete, United Republic of Tanzania, see <http://www.icc-cpi.int/NR/exeres/93D88DCD-C4AE-4432-89FA-3D15146B67FE.htm> (last visited 23 August 2010).

impact of the Rome Statute to date. All of the four key themes of stocktaking – namely: complementarity, peace and justice, the impact of the Rome Statute system on victims and affected communities and finally cooperation - were already addressed in the first resolution of the Conference, the Kampala Declaration, which was adopted at the close of the general debate on the second day.⁷ The declaration reflects the continuing commitment of States Parties to the Rome Statute's historic initiative to end impunity for the gravest crimes of concern to the international community as a whole. It addresses the principle of complementarity by expressing the resolve of States to continue and strengthen the domestic implementation of the Rome Statute and to enhance the capacity of national jurisdictions to prosecute core crimes themselves.⁸ Additionally, it emphasizes that justice is a fundamental building block of sustainable peace⁹ and indicates that the States Parties are determined to continue and strengthen their efforts to promote victims' rights under the Rome Statute.¹⁰ Finally, the declaration embraces what this author has previously called both the Court's lifeblood and its Achilles' heel: the cooperation of States Parties. Regarding this crucial issue, the States Parties declare their resolve to strengthen their efforts to ensure cooperation.¹¹

More concrete outcomes with regard to these four issues can be found in the results of the discussions of the panels devoted to each of the stocktaking topics. Some points shall be addressed here and compared with the author's expectations prior to the Conference:

In relation to complementarity, the discussions focused on practical opportunities that are available to States in order to strengthen and enable other States' capabilities. An emphasis was placed on the duty of actors at the national level to undertake capacity-building, the Court having, at most, a limited role as facilitator in information sharing. Better communication between the different actors, though, proved to be of crucial importance as the need to improve coordination between the different actors was consistently highlighted in the discussions. The resolution finally adopted

⁷ Kampala Declaration, RC/Decl.1, adopted at the 4th plenary meeting, on 1 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf (last visited 23 August 2010).

⁸ Kampala Declaration, para. 5.

⁹ Kampala Declaration, para. 3.

¹⁰ Kampala Declaration, para. 4.

¹¹ Kampala Declaration, para. 7.

thus requests the Secretariat of the Assembly of States Parties “to facilitate the exchange of information” so as to synergize efforts globally.¹²

No resolution was adopted as a result of the discussion on the relationship between peace and justice. This is not surprising given how highly complex or even controversial the matter is. There is still the argument that justice should step back in some cases to promote peace processes and that negotiators in particular should be able to use the promise of impunity in exchange for an agreement to lay down arms. Altogether, the term ‘paradigm shift’ can best be used to describe the evolution of views in recent years, beginning with the foundation of the Court. All actors are still aware that a tension between peace and justice continues to exist. But it is a promising result that while previously, the debate was deemed “peace versus justice”, the predominant view now is one of peace and justice as allies which sustain one another. It may seem that amnesties are no longer considered an option to deal with the most serious crimes as enshrined in the Rome Statute.

The issue concerning the impact of the Rome Statute on victims and affected communities was less contentious. However, embracing this topic at the Review Conference was meant to remind the participating States of how important the ICC system is for victims as stakeholders partaking in this system, and as its direct and indirect beneficiaries with specific rights. The resolution adopted with regard to this issue recognizes these rights, in particular the right to equal and effective access to justice, support and protection, as well as to reparation. It also underlines the need to further optimize outreach activities.¹³

As stated previously, outreach activities require a considerable amount of resources. In relation to this, the pledging process might be seen as a new start. However, more than half of the States Parties did not submit any pledges and thus did not even use the publicity of the Conference as an incentive for further financial contributions. Moreover, some States Parties could not use their voting rights at the Conference due to the fact that they had not paid their contributions as required by the Statute. The awareness among States as to how important material support is for the work with

¹² Para. 9, Resolution RC/Res.1, adopted at the 9th plenary meeting, on 8 June 2010, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf (last visited: 23 August 2010).

¹³ Resolution RC/Res.2, adopted at the 9th plenary meeting, on 8 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf (last visited on 23 August 2010).

victims thus needs to be continually promoted. The debate at the Conference has hopefully been able to boost State efforts.

The lack of pledges by many States Parties might also be seen as an indication of the continuous need to remind States Parties of the importance of their cooperation with the Court. The whole success of the ICC rests on the level of cooperation that the Court and States Parties achieve. Still, many States Parties have refrained from coming to Kampala with pledges in hand. There is still substantial need to improve the means of “vertical” cooperation and judicial assistance between the Court and national authorities. This was consistently highlighted in the debate related to this stocktaking issue. Particularly emphasized - in the debate, as well as in the declaration adopted subsequently¹⁴ - was the crucial role that national authorities play in the execution of arrest warrants. The actors of the ICC system are well aware of the significance their support has for the Court. This was especially evidenced through requests by many speakers in the debate that the Assembly of States Parties should include cooperation as a standing item on the agenda. In any event, there will be a future need for the Assembly to consider how they can best use political and diplomatic tools to bring about cooperation. Such cooperation is a legal obligation of the States Parties while the Court itself has no means to enforce it.

More tangible outcomes of the Conference have been achieved with regard to the amendment proposals. As underlined before, the Court had made the decision not to take part in the discussions on amendments. Likewise, it is not up to the Court, including its judges, to assess the resolutions adopted. Nevertheless, it seems appropriate to give a short overview of their content, of the process leading to them, as well as of the impact they may have on the Court’s future work.

Among the three proposals for amendments, two issues were matters with minor consequences.

The first proposal concerned Article 8 of the Rome Statute that criminalizes different forms of war crimes. So far, the use of certain weapons such as poisonous or poisoned weapons, asphyxiating or poisonous gases, and all analogous liquids, materials and devices as well as expanding bullets were prohibited under the Rome Statute only in the context of armed conflicts of an international character. The resolution adopted in Kampala amends Article 8 of the Statute to the effect that the use of such weapons

¹⁴ Resolution RC/Decl.2, adopted at the 9th plenary meeting, on 8 June 2010 available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf, para. 5 (last visited on 23 August 2010).

also falls under the jurisdiction of the Court in the context of non-international armed conflicts.¹⁵

The amendment was not controversial in any way. It is merely symbolic since no real impunity gap previously existed for the use of such weapons during non-international conflicts. There have, to date, never been any prosecutions before the ICC for the use of these kinds of weapons; but theoretically, prior to the amendment, such atrocities could also have been prosecuted as crimes against humanity or as genocide.

Furthermore, the States Parties have agreed to retain Article 124 of the Statute in its current form, which allows new States Parties to opt out of the Court's jurisdiction over war crimes allegedly committed by their nationals or on their territory for a period of seven years. The resolution contains an agreement for a further review during the fourteenth session of the Assembly of States Parties in 2015.¹⁶

Many NGOs have been very keen on deleting Article 124 of the Statute, stating that the provision as such was incompatible with the purpose of the Rome Statute. At the Review Conference, however, some of the participating States have argued that upholding the provision might provide an incentive for new States to join the Statute. In the end, the latter view prevailed. This, however, is not likely to have great impact on the Court's work or future jurisdiction. So far, only two States, France and Columbia, have availed themselves of this option, with France withdrawing its opt-out declaration in 2008. Hence, one may not expect a frequent use of this provision in the future.

The most important, most awaited but also most controversial amendment on the agenda of the Conference was without doubt the possible adoption of detailed provisions for the crime of aggression. Until this amendment was decided upon, the three Chairmen of the proceedings - Prince Zeid of Jordan, the Convenor of the Special Working Group on the Crime of Aggression, Christian Wenaweser, the President of the Assembly of States Parties and Stefan Barriga, legal adviser to the UN Mission of Liechtenstein - had a difficult task in promoting a compromise among divergent States and non-States Parties. The political stakes of criminalizing

¹⁵ Resolution RC/Res.5, adopted at the 12th plenary meeting, on 10 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf (last visited on 23 August 2010).

¹⁶ Resolution RC/Res.4, adopted at the 11th plenary meeting, on 10 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf (last visited on 23 August 2010).

the waging of war were high and self-evident. But finally, a resolution was adopted that will allow in the future to try what the International Military Tribunal at Nuremberg has described as the “supreme international crime” which “contains the accumulated evil” of all other war crimes¹⁷.

However, an emphasis must be put on “in the future” since the Court will only be able to exercise its jurisdiction in seven years at the earliest. Moreover, its jurisdiction will be limited by several constraints. These limitations reflect a difficult and complex compromise that was needed to appease all sides of the debate.

There was a relatively robust consensus regarding the definition of the crime of aggression. This definition emerged more than a year ago as a result of the work of the Special Working Group on the Crime of Aggression that was established in 2003 to fulfill the mandate emanating from Article 5(2) of the Statute. It is based on the non-binding definition of resolution 3314 that the General Assembly of the United Nations has agreed upon in 1974¹⁸. The text now adopted in Kampala is twofold: in the first paragraph of new Article 8bis of the Statute, a *crime of aggression*, meaning an individual criminal conduct, has been defined as

“the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations”.¹⁹

In contrast to the individual criminal conduct defined in paragraph 1, paragraph 2 of new Article 8bis of the Statute deals with an *act of aggression* by “the use of armed force by a State” against another State²⁰ as a pre-condition of such crime.

The real debate was on three related issues regarding the exercise of jurisdiction by the Court. First, the possible triggers for referrals to the ICC

¹⁷ France et al. v. Göring et al. in Egbert, Lawrence, 'Judicial Decisions – International Military Tribunal (Nuremberg), Judgement and Sentences', 41 *American Journal of International Law* (1947), 172, 186.

¹⁸ GA RES 3314 (XXIX), 14 December 1974.

¹⁹ For a report on the date of discussion, on the definition of aggression which existed around the years 2000 to 2002, see H.-P.Kaul, 'The Crime of Aggression: Definitional Options for the Way Forward', in M.Politi & G.Nesi (eds), *The International Criminal Court and the Crime of Aggression*, (2004), 97- 104.

²⁰ Annex I, Art. 8bis, Resolution RC/Res.6, adopted at the 13th plenary meeting, on 11 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited 23 August 2010).

and in particular the relationship that should exist between the ICC and the Security Council. Second, the question of whether the amendment should also be applicable to States Parties, that have not accepted it, and to non-States Parties alike. And finally, the conditions under which the Court may start to exercise its jurisdiction with respect to the crime of aggression.

Regarding the first question, the debate focused on what some have defined as the primacy or prerogative of the Security Council. This refers to the power vested in the Security Council by Article 39 of the Charter of the United Nations to determine the existence of an act of aggression. This has led to the argument that, as opposed to the other core crimes under the jurisdiction of the ICC, the Security Council should be the only trigger for the prosecution of a crime of aggression. Unsurprisingly, this view was emphasized again and again in particular by the five permanent members of the Security Council, amongst them two States Parties, the United Kingdom and France.

The majority of the States, however, insisted on limiting the involvement of the Security Council. This issue even led many NGOs, such as Human Rights Watch or Amnesty International, to refrain from supporting an amendment on the crime of aggression, fearing that too close a relationship between the ICC and the Security Council, as a political organ, might undermine the independence and impartiality of the Court²¹.

The compromise reached attempts to reconcile both views. As for the other core crimes, there are three scenarios for the triggering of an investigation. Firstly, the Security Council has the right to refer a situation to the Court after making a determination under Chapter VII of the Charter of the United Nations of an unlawful use of force. Secondly, the States Parties have agreed to authorize the Prosecutor to initiate an investigation in relation to the crime of aggression on his own initiative or - thirdly - upon a request from a State Party. With regard to the last two trigger mechanisms, however, the Prosecutor might initiate an investigation only after having previously consulted the Security Council. The Security Council will therefore remain the principal body in determining an act of aggression. In the event that the Council fails to act within six months, the Prosecutor may

²¹ Human Rights Watch, *Letter to Foreign Ministers of States Parties to the International Criminal Court*, 12 April 2010, available at <http://www.hrw.org/en/news/2010/04/12/april-12-2010-letter-international-criminal-court-states-parties-review-conference-r> (last visited 23 August 2010); 'From Rome to Kampala: Negotiations on the Crime of Aggression', 40 *The Monitor, Journal of the Coalition of the International Criminal Court* (2010), 8.

nevertheless proceed with the investigation. Where the Prosecutor acts in that way, without a prior determination of an act of aggression by the Security Council, he additionally has to obtain prior authorization not only from one of the Pre-Trial Chambers, but from the entire Pre-Trial Division. Having the Pre-Trial Division act as an adjudicating body is a totally new system which will entail some organizational challenges for the judicial divisions of the Court.

The second controversial question addressed above, namely the extent to which the Court may exercise its jurisdiction, was a very serious issue given its relation to the most anxiously guarded value of nation States: State sovereignty. Given this situation, it is not surprising that the result is not revolutionary. Non-States Parties have been excluded from the Court's jurisdiction. In contrast to the other core crimes, this exclusion also applies if an act that could be classified as a crime of aggression under the new Article 8*bis* of the Statute has been committed by nationals of a non-State Party on the territory of a State Party. In such a case, it is not sufficient that the attacked State is party to the Rome Statute if the aggressor State is not.²² Furthermore, States Parties may lodge a declaration stating that they do not accept the jurisdiction of the Court with regard to the crime of aggression. All those States Parties which remain silent will ultimately be bound by the amendment. Naturally, both non-States Parties and States Parties that have made such a declaration still fall under the jurisdiction of the Court in the event that the Security Council has referred a situation to the Court. In this case, the Security Council simply exercises its powers already attributed to it by the Charter of the United Nations.

With regard to the other two trigger mechanisms, and in spite of the fact that some States Parties may lodge such an opt-out declaration, massive restrictions on the Court's jurisdiction are unlikely to occur. Governments which consider making such a declaration will probably have to pay a high political price that many may not be willing to pay.

Finally, with regard to the last of the issues mentioned above, the resolution contains further conditions for the exercise of the Court's jurisdiction. For one, the actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 with the same majority that would be needed for any another amendment of the Statute. Moreover, the amendment must be ratified or accepted by at least thirty States Parties. Thus, it will take quite some time before the Court may have operational

²² Annex I, Art. 15*bis* (5), Resolution RC/Res.6, *supra* note 16.

jurisdiction with regard to the crime of aggression, and even more before the judges will actually be confronted with a crime of aggression for the first time.

The significance of these limitations should not be overestimated. They most probably have increased the viability and acceptance of the compromise. At the same time, their impact seems to be rather limited. It is quite likely that the 30 ratifications will be at hand by 1 January 2017. Comparing this prerequisite with the 60 ratifications needed for the entry into force of the Rome Statute, this is a small number and a lot of political pressure on national governments to ratify is to be expected by civil society, especially by NGOs. Furthermore, the delayed entry into force should be considered in a long term perspective. Given the decades that it took from the first steps in Nuremberg to the criminalization of the waging of war permanently, the delay to be expected until the crime of aggression will actually be activated for purposes of investigations and prosecution should be acceptable to those keen on the aggression issue.

A candid assessment of the amendment on aggression must acknowledge that hard work lies ahead and that the debate on aggression has not been concluded altogether. New challenges may arise. Some may try to reassess the compromise when States Parties take their decision in 2017. But one should not make the mistake of overlooking the achievement of incorporating the crime of aggression in the Rome Statute. It was probably a giant step forward in the *jus ad bellum* domain.

In sum, the Review Conference has been a success. Those who predicted that Kampala would only be a rather formal event with minor consequences for the future of international criminal law have been proven wrong. At the Conference, States Parties have reaffirmed their commitment to the Court they founded eight years ago. They have explicitly expressed this commitment in the main resolution of the Conference, the Kampala Declaration. But Kampala has not only produced resolutions, it has also been an occasion for State representatives, members of NGOs and civil society to meet, discuss and deepen their understanding of the ICC system. Even though the result could have been more substantial, the Conference also had a very real outcome with pledges made by States Parties and a considerable number of non-States Parties supporting the Court by means of material contributions and agreements to cooperate with the ICC in order to make it more effective.

But most importantly, bearing in mind all the widespread skepticism prior to the Conference, States Parties have achieved a breakthrough in a discussion that has lasted for decades. They have – by consensus – agreed

on both a definition of the crime of aggression and the conditions under which the Court may exercise its jurisdiction related thereto. There is now an increasing likelihood that in the years to come the ICC will be able to prosecute perpetrators for the crime of aggression, not like in Nuremberg by means of law created *ex post facto*, but on a strong legal basis created by the common will of States before the commission of the crime.

Lastly, there is another reason why this Conference has been a success: its African venue.²³ Having such a meeting in one of the Court's situation countries was in itself significant. It has underlined and clarified the important role African States play in the ICC system. Moreover, it has brought the Court much closer to the victims. And finally, it has confronted many non-African participants for the first time with the reality of a situation country, making discussions on the ICC and international justice much less abstract.

²³ Cf. S. Klein, 'Uganda and the International Criminal Court Review Conference - Some Observations of the Conference's Impact in the Situation Country Uganda', 2 *Goettingen Journal of International Law* (2010) 2, 687, in this issue.