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The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression'

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On 11 June 2010, the first Review Conference of the International Criminal Court (ICC) adopted Resolution RC/Res. 6 on the 'Crime of Aggression' by consensus,[1] after years of debates and negotiations in the framework of the Preparatory Commission for the International Criminal Court and the Special Working Group on the Crime of Aggression.[2] The resolution includes a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime, while making the actual exercise of jurisdiction 'subject to a decision to be taken after 1 January 2017' by states parties.[3] This outcome has triggered a broad variety of reactions. The UN praised it as a 'historic agreement' and a significant step towards a new 'age of accountability'.[4] Some non-governmental organizations (NGOs) have expressed concerns that the compromise deepens the gaps between states and leaves accountability loopholes.[5] US legal advisor Harold Koh qualified the compromise as an opportunity for further constructive dialogue and positive engagement with the ICC.[6]

1. The exceptional nature of the crime of aggression

The content of the resolution and the process leading to its adoption reflect the exceptional nature of the crime of aggression. Aggression differs from the other core crimes in the Statute. Due to its direct link to *jus ad bellum* ('manifest violation of the Charter of the United Nations'[7]) and its nexus to the responsibilities of the Security Council under Article 39 of the UN Charter,[8] it is embedded in peace

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1 Resolution RC/Res. 6, available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

2 For a survey of documents, see Assembly of States Parties, Crime of Aggression, at www.icc-cpi.int/Menus/ASP/Crime+of+Aggression/Special+Working+Group+on+the+Crime+of+Aggression.htm.

3 Art. 15 *ter*(3).

4 Secretary-General, Statement Attributable to the Spokesperson for the Secretary-General on the Outcome of the ICC Review Conference in Kampala, 14 June 2010, available at www.un.org/apps/sg/sgstats.asp?nid=4617.

5 Citizens for Global Solutions, 'ICC Conference in Kampala Takes Steps to End Aggression', available at www.globalsolutions.org/press_releases/icc_conference_takes_steps_end_aggression.

6 US Department of State, 'US Engagement with the International Criminal Court and the Outcome of the Recently Concluded Review Conference', 15 June 2010, at www.state.gov/s/wci/us_releases/remarks/143178.htm.

7 Art. 8 *bis*(1).

8 This is reflected in the last sentence of Art. 5(2) of the Statute.

maintenance even more deeply than the other core crimes.[9] The status of aggression as a 'leadership' crime[10] is intentionally reflected in the definition[11] and modes of liability,[12] and more articulated than in the context of Nuremberg and Tokyo's definition of 'crimes against peace'.[13] Perpetration includes a wide range of acts (i.e. planning, preparing, initiating, or executing), but is limited to persons who are 'in a position effectively to exercise control over or to direct the political or military action of a State'.[14]

The Kampala definition reflects shades of modernity, but remains 'conservative' at the same time. It extends individual criminal responsibility from the traditional concept of 'war of aggression'[15] to 'acts of aggression' listed in Article 8 *bis*. But the very concept of aggression remains centred on interstate violence. This is reflected in the nexus of the leadership requirement to state action[16] and the definition of the term 'act of aggression' ('use of armed force by a State').[17] Voices to extend the criminalization of aggression to 'aggressive acts *by non-state entities* (such as terrorist armed groups, organized insurgents, liberation movements, and the like) against a state'[18] have not been accommodated. The list of acts is taken verbatim from General Assembly Resolution 3314 (XXIX). It will be for the Court to interpret whether the wording of Article 8 *bis* (2) leaves room for the extension of aggression to other acts of aggression.[19]

2. The context

The main promise of Kampala lies in its systemic impact. The prospect of the exercise of ICC jurisdiction over the crime removes aggression partly from the realm of policy, and places it more firmly on the 'radar screen' of domestic legislators, prosecutors, and judges. This is a fundamental step towards greater accountability of political and military elites and compliance (i.e. by threat and internalization), and entails a seismic shift in international criminal justice. The Kampala definition

9 This rationale is reflected in para. 3 of the preamble of the Rome Statute, which recognizes that 'such grave crimes threaten the peace, security and well being of the world', and the Court's special relationship to the United Nations. Art. 2 of the Rome Statute.

10 See also House of Lords, *Jones et al.* (2006), Opinion of Lord Bingham, para. 16 ('as was held at Nuremberg and other post-war trials, . . . aggression is a leadership crime: it cannot be committed by minions and foot soldiers').

11 Art. 8 *bis*(1).

12 See proposed amendment of Art. 25(3) of the Statute.

13 For a study of the 'shape' and 'influence' test v. the 'direction' and 'control' test see K. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', (2007) 18 EJIL 477.

14 Art. 8 *bis*(1) and the Elements make it clear that this 'leadership' requirement applies to perpetrators. The proposed Article 25(3) *bis* extends it to other modes of liability.

15 See para. of GA Resolution.

16 Art. 8 *bis*(1) (action of a state).

17 Art. 8 *bis*(2).

18 A. Cassese, 'On Some Problematic Aspects of the Crime of Aggression', (2007) 20 LJIL 841, at 846 (emphasis in original).

19 Resolution 3314 is open-ended. Art. 8 *bis*(2) uses deliberately ambiguous language, noting that '*any of the following acts* . . . shall in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, *qualify* as an act of aggression' (emphasis added). See also Elements of Crimes, Article 8 *bis* Introduction. Direct parallels to Art. 7(1)(k) ('other inhumane acts') were invoked in the negotiations, but rejected in the light of the principle of legality (Art. 22(2)).

extends criminalization from its current focus on gross human rights violations and victims' rights to interstate relations, the protection of state interests ('sovereignty', 'territorial integrity', 'political independence'), and the preservation of peace – that is, the absence of the unlawful use of armed force. This strengthens the international justice system, in particular its application to and impact on politics. The ICC may act in tandem with the UN system, and facilitate the work of the Security Council. But it also serves as a complement to collective security by providing independent checks and balances. This dualism is reflected in the Kampala resolution. The Prosecutor is mandated to 'ascertain' the determination of an 'act of aggression' by the Security Council.[20] The requirement to notify a situation under examination to the Secretary-General and the corresponding sharing of 'information and documents' may facilitate the work of UN bodies.[21] But the ICC maintains independent decision-making authority in the light of its nature as a judicial institution,[22] and is ultimately empowered to proceed with investigations and prosecution, even in the absence of a Security Council determination.[23] This may ultimately reshape the working methods of the collective security system, where aggression has long remained a sleeping beauty.[24]

The outcome of Kampala is undoubtedly a victory for the independence of the ICC. The success lies to a large extent in the silence or omissions of the resolution – that is, in what it does not say, rather than in what it says. The most important reflection of this development is the absence of a provision requiring a prior determination by the Security Council as a prerequisite to the exercise of jurisdiction, which would have strangled the ICC's jurisdiction at birth. The independence of the ICC and its mandate ('fair and effective investigations and prosecutions[25]) is further significantly strengthened by the fact that Article 15 *bis* foresees no other external filter – that is, the absence of a reference to a prior determination of an act of aggression by the General Assembly ('political' filter) or the International Court of Justice (ICJ). This outcome is remarkable, given the nature of discussions (which involved states parties and non-state parties), the limited 'lobbying' by NGOs for the crime of aggression,[26] and the state of debate prior to Kampala, in particular in relation to conditions to the exercise of jurisdiction.[27] The risks of a 'jurisdiction à la carte' are mitigated by the specification of an 'opt-out' option, rather than the

20 Art. 15 *bis*(6), first sentence.
21 Ibid.
22 Art. 15 *bis*(9) and 15 *ter*(4).
23 Art. 15 *bis*(8).
24 For a survey, see N. Blokker, 'The Crime of Aggression and the United Nations Security Council', (2007) 20 LJIL 867. See also the critique by Judge Simma in ICJ, *Congo v. Uganda*, Separate Opinion: '[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter". So, why not call a spade a spade?'
25 Para. 4 of the preamble and Art. 54(1)(b) of the Statute.
26 See e.g. the position of the Coalition for the International Criminal Court on the crime of aggression, at www.iccnow.org/?mod=aggression ('The CICC as a whole did not take a position concerning the adoption of specific provisions on the crime of aggression at Kampala. This was because CICC members developed varying positions concerning the complex discussions on the crime').
27 See, e.g., Discussion Paper on the Crime of Aggression proposed by the Chairman (Revision of January 2009), ICC-ASP/7/SWGCA/INF.1., 19 February 2009.

adoption of a separate 'opt-in' requirement for aggression. The 'opt-out' logic is more consistent with the spirit of the Statute, and less detrimental to the goal of ICC jurisdiction than the 'opt-in' model, since it requires express declaration and political justification.

3. The price of consensus

But the 'consensus' came at a price. First, in the case of a state referral or *proprio motu* proceedings under Article 15, the ICC cannot not exercise jurisdiction over persons of states which are not party to the Rome Statute or have not accepted the aggression amendment. In these circumstances, exercise of jurisdiction over aggression is tied to the prospect of a Security Council referral.[28] This creates an 'imbalance' in relation to other crimes.[29] States parties who are victims of aggressive conduct lose protection by virtue of Article 15 *bis* (4) and (5). Nationals of states parties which have opted out under Article 15 *bis* (4) are barred from ICC investigation and prosecution if they commit aggression against another state party, although they enjoy corresponding protection from aggression by states parties which have opted in. This 'asymmetry' is inherent in the modalities of the amendment procedure under Article 121(5).[30] But according to its wording, this provision applies to states parties which failed to 'accept . . . the amendment' as a whole, rather than envisaging the effect of an opt-out declaration.[31] The new formula is thus a very 'creative development' of Article 121(5),[32] which is specific to aggression. It treats aggression essentially as a 'new crime', rather than a crime that is already under the jurisdiction of the Court (Art. 5(1)) and subject to automatic jurisdiction (Art. 12 (1)).[33]

The second specificity relates to the territorial jurisdiction of the ICC. Under Article 15 *bis*(5), states parties do not enjoy protection by the ICC against crimes of aggression committed by non-state-parties against them (i.e. on their territory), although they enjoy such protection under Article 12(2) of the Statute for other categories of crimes. This limitation of territorial jurisdiction over the crime of aggression is not mandated by Article 121(5).[34] It is a negotiated concession to non-state parties, which might otherwise be subject to greater accountability than

28 This follows from a comparison of Art. 15 *bis* and Art. 15 *ter*, which contains no opt-out option, nor the exclusion in relation to non-state parties. See also para. 2 of the Understanding on 'Referrals by the Security Council', which states, 'It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute, irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.'

29 For a defence see D. Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', Working Paper, Oxford Institute for Ethics, Law and Armed Conflict, May 2010, at www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf.

30 It reads, 'In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.'

31 Note that para. 1 of Res. RC/Res. 6 mentions Art. 121(5) in relation to entry into force of amendments.

32 The opt-out effect might potentially be justified *a majore ad minus*, i.e. if a state is entitled to decline the amendment, the right to accept with opt-out (which is subject to review) might be a lesser included measure.

33 The opt-out mechanism stands in contrast to Art. 12(1) which is mentioned in the preamble of Res. RC/Res. 6. For a full examination see R. Manson, 'Identifying the Rough Edges of the Kampala Compromise', (2010) *Criminal Law Forum* (forthcoming).

34 Art. 121(5) only speaks of 'States Parties'.

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states parties, in the light of the absence of an 'opt-out' option.[35] This particularity is specific to the jurisdictional regime of the ICC. It should not be understood as limiting the exercise of domestic jurisdiction by the 'victim' state.[36]

In the light of these two restrictions, ICC jurisdiction is likely to be highly fragmented. Some states might not ratify the amendment at all, while others might do so with or without opt-out. There are limited incentives to accept the amendments unconditionally. Some states might simply prefer to focus the exercise of jurisdiction on referrals by the Security Council. Others might argue that they are sufficiently protected against aggressive conduct by others by the entry into force of the amendment.

Second, as a result of the absence of a mandatory predetermination of an act of aggression, the ICC (i.e. the Prosecutor and judges) will bear a greater burden in evaluating the legality of state action under international law. Evaluating state conduct is nothing new for the ICC. The Court is mandated to examine state 'policy' in the context of crimes against humanity,[37] and a 'plan or policy' in the context of war crimes.[38] But the examination of the justification of the use of force, coupled with its substantive qualifier ('manifest violation of the Charter of the United Nations'), will pose new challenges to the ICC. The 'Understandings' of Kampala are designed to provide further guidance – that is, to enable the court to dismiss frivolous, or politically motivated, allegations of aggression and to protect military missions based on self-defence, humanitarian intervention, or other legitimate purposes consistent with the UN Charter. But it is unclear what legal value they have, and by what benchmarks criteria such as 'the most serious and dangerous form of the illegal use of force',[39] or 'character, gravity and scale'[40] of the violation should be judged. The downside of this complex (i.e. quantitative and qualitative) threshold is that it relies on fine differentiations that are hardly made in existing state practice.[41] There is a risk that instances in which the ICC does not act are likely to be perceived as less 'grave' violations or even as lawful uses of force.

In the negotiations on definitional issues, several alternative concepts have been discussed in order to exclude borderline cases from the scope of aggression, namely the relevance of a special object or objective of aggression,[42] such as military occupation or annexation. These proposals were finally not retained.

35 Note that Art. 15 *bis*(4) is limited to states parties ('unless that State Party has previously declared'). A similar objection has been formulated in relation to the opt-out mechanism for war crimes under Art. 124.
36 See also para. 4 of the Understandings ('Domestic jurisdiction over the crime of aggression').
37 Art. 7(2).
38 Art. 8(1).
39 Para. 6 of the Understandings.
40 Art. 8 *bis*(1) and para. 7 of the Understandings.
41 One exception may be *jus cogens*. But its scope remains controversial, particularly in the context of the use of force. Both the ICC and defendants will need thorough advice by public international lawyers and advisers to judge and litigate whether armed force meets this threshold. The Elements specify that there is no requirement to prove that the perpetrator has made a legal evaluation as to the 'illegality' of the use of force under the UN Charter or the 'manifest' nature of the violation. See Elements of Crimes, Art. 8 *bis*, Introduction.
42 For a defence of aggression as a 'special intent' crime, see Cassese, *supra* note 18, at 848.

4. Challenges

Is the glass half-full or half-empty? Kampala marks a unique and unexpected success. But it is in some ways a blessing that there is more time.

Both domestic implementation and some of the procedural elements of the criminalization of aggression under the Statute will require further consideration. The opt-out and restriction of the exercise of jurisdiction over non-states parties under Article 15 *bis* may have to be reconciled with the regime of declarations of acceptance of jurisdictions under Article 12(3). It is unclear how Article 15 *bis* would operate in the context of a 12(3) declaration by a non-state party. Would such a declaration suffice to entail direct acceptance of aggression? Is there a possibility for the author of the declaration to opt out of aggression despite the wording of Rule 44, which states that 'the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation'?[43]

Second, the issues of complementarity and implementation will need to be addressed by states.[44] At present, the prospects of domestic investigation and prosecution of aggression are limited. Due to the character of aggression as a leadership crime, state immunity has significant relevance in the exercise of domestic jurisdiction. Jurisdictional immunities recognized by the ICJ in the *Arrest Warrant* case[45] limit the potential scope of investigations and prosecutions by the 'victim state' or 'bystander' states. At the same time, many domestic legal systems are 'unable' to investigate and prosecute aggression in the light of the 'unavailability' of their 'national judicial system'.[46] The crime of aggression is absent in many domestic penal codes, and in cases where it is codified, it is often still defined by reference to 'war of aggression', rather than the 'acts of aggression' listed in GA Resolution 3314.[47] If complementarity is meant to function as intended with respect to the crime of aggression – that is, as a catalyst for domestic jurisdiction – new implementing legislation will have to be adopted.[48] Otherwise the ICC will simply form the principal point of entry by necessity for years to come.

Third, aggression raises fresh issues with respect to victim participation under the Statute. The definition of victims under Rule 85 is tied to atrocity crimes against individuals or protected property and objects of specific organizations and institutions.[49] However, in the context of many acts of aggression, the typical victim is a 'state'. What does this mean for victim participation? Are the interests of the 'victim' states

43 Rule 44, sub-rule 2.

44 For a discussion see N. Strapatsas, 'Complementrity and Aggression: A Ticking Time Bomb?', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (2009), 450.

45 *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Merits, [2002] ICJ Rep. 25, para. 58.

46 Art. 17(3) of the Statute.

47 A. Reisinger Coracini, 'Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime', in C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court* (2009), 725.

48 See, however, the cautious Understanding 5 ('It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State').

49 Rule 85 of the Rules of Procedure and Evidence.

sufficiently taken into account by ordinary forms of state participation in proceedings (e.g. Rule 103)? Extending victim participation to state representatives in the context of aggression would give the reparations regime a completely new direction. It would introduce a surrogate forum for interstate reparation through criminal proceedings before the ICC. This may ultimately run against the purpose and mandate of the court.

Finally, it is questionable whether the ICC is ripe to take on the exercise of jurisdiction over aggression at this early stage of its existence. In the light of its current docket, its record of proceedings in the first cases, and unresolved issues (e.g. the treatment of the 12(3) declaration by the Palestinian Authority), one may assume that officials inside the institution are not particularly unhappy that the exercise of jurisdiction over the crime of aggression is not an immediate reality after Kampala.

5. Major voices on past, present, and future

This symposium provides different perspectives on the Kampala compromise. It brings together major voices who have shaped the compromise, and without whose contribution the law on aggression would not be what it is today.

The opening comments are made by Ambassador Christian Wenaweser, the president of the Assembly of States Parties, who has chaired the work of the Special Working Group on the Crime of Aggression (SWGCA) and served as president of the Review Conference. Wenaweser presents the sequence of proposals, events, and steps in the negotiations that have paved the way for consensus in Kampala. His reflections trace the unique conditions and concessions that have facilitated the compromise and the success of the Review Conference.

The symposium continues with a review of the process and results of Kampala by two leading academics and voices on aggression, namely Niels Blokker (member of the Netherlands delegation to the Review Conference) and Claus Kress (member of the German delegation, former subgroup co-ordinator of the SWGCA and facilitator of the Kampala 'Understandings'). They analyse the compromise from a negotiator's perspective. They argue that the consensus at Kampala marks a 'historic achievement', which is likely to face criticism from different interest groups, but represents a breakthrough for international criminal justice and international security law.

David Scheffer, former US war crimes ambassador and negotiator at the Rome Conference, takes a closer look at some of the critical points and open ends of the substantive provisions on the crime of aggression. He offers fresh thoughts relating to four areas: (i) the 'magnitude test', (ii) Security Council determinations, (iii) temporal jurisdiction, and (iv) the scope of ICC jurisdiction. He argues that the jurisdictional division resulting from the Kampala compromise is 'a slap at the equality of states', but concedes that 'most major shifts in the international system begin that way'.

The final reflections are provided by Donald M. Ferencz, who has been an active supporter of the definition of aggression as director of the Planethood Foundation and member of the NGO delegation to the SWGCA. He places developments in

Kampala in perspective in relation to 'the promise of Nuremberg' and the dynamics of power politics. He argues that the Kampala compromise treated aggression as a 'patient' who has been put 'in a medically induced coma in order to save its life'.

Taken as a whole, these contributions send a signal of 'cautious optimism'. Kampala is neither 'the end', nor the 'beginning of the end', but a fresh impulse for the continuing journey towards the criminalization of aggression.[50]

50 See also H. P. Kaul, 'From Nuremberg to Kampala – Reflections on the Crime of Aggression', 30 August 2010, available at www.icc-cpi.int/NR/rdonlyres/6756D8C1-98A1-47D3-BC13-EA8D8AA860F1/282450/03092010_IHLDialogs_Chautauqua_Speech1.pdf.