

# The First Review Conference of the International Criminal Court

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*From 31 May until 11 June 2010, the first Review Conference of the International Criminal Court (ICC) took place in Kampala, Uganda. Eight years after the entry into force of the Rome Statute, states, organisations and civil society discussed amendments and took stock of key aspects of the implementation of the Rome Statute system. In particular, a compromise was achieved on the Conference's most controversial topic – the crime of aggression. The article intends to give a brief outline of the discussions and outcomes of the Review Conference, taking into account the impact it might have on the future work of the ICC.*

## I. Introduction

From 31 May until 11 June 2010, the first Review Conference of the International Criminal Court (ICC) took place in Kampala, Uganda.<sup>1</sup> Eight years after the entry into force of the Rome Statute,<sup>2</sup> the ICC's founding treaty, states parties together with non-states parties, international, regional and non-governmental organisations discussed amendments and took stock of key aspects of the implementation of the Rome Statute system.<sup>3</sup> This article intends to give a brief outline of the discussions and outcomes of the Review Conference, taking into account the impact it might have on the future work of the ICC.

The crime of aggression, referred to as the “supreme international crime,”<sup>4</sup> was the paramount topic of the Review

Conference. Since Rome, the Court has already been competent to try crimes against humanity, war crimes, and genocide; but back then political parameters had not allowed for an agreement on a definition of the crime of aggression and rules for its exercise of jurisdiction. After years of negotiations, Kampala offered the opportunity to settle this dispute. It was not until the last night of the Conference that a consensus could be achieved on this contentious issue.

Overall, the Review Conference provided a unique forum to engage in a dialogue on the progress made and the challenges still lying ahead in the fight against impunity for the most serious crimes of international concern. It became clear that the Statute enjoys strong support from its member states<sup>5</sup> as a “*very solid treaty*”<sup>6</sup> which was also reflected in the relatively small number of amendments on the negotiation table. In the Kampala Declaration,<sup>7</sup> all states parties reaffirmed their commitment to the Rome Statute and the pursuit of international criminal justice.

## II. The Review Conference

While the first week of the Conference was mainly dedicated to a general debate and the stocktaking exercise, the second week put the focus on the crime of aggression.

### 1. High-level Segment and General Debate

On 31 May 2010, the President of the Assembly of States Parties (ASP), *Christian Wenaweser* of Liechtenstein, opened the Review Conference by reminding states of its historical dimension, hence appealing to their willingness to compromise with regard to the crime of aggression.

Ushering a “*new age of accountability*”<sup>8</sup> by “*clo[s]ing the door on the era of impunity*”<sup>9</sup> was the appeal of UN Secretary-General *Ban Ki-Moon* to the Conference. In this spirit, the President of the ICC, Judge *Sang-Hyun Song*, stressed the importance of state cooperation with the Court. Only fair and credible domestic proceedings would impede the gap of im-

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ceedings of the International Military Tribunal sitting at Nuremberg, Germany”, Part 22 (22<sup>nd</sup> August to 1<sup>st</sup> October, 1946), p. 421.

<sup>5</sup> At the time of the Conference, 111 states have ratified the Rome Statute, 139 states are signatories.

<sup>6</sup> *Wenaweser*, “Opening remarks by the President of the Assembly, Ambassador Christian Wenaweser,” 30 May 2010, p. 1, [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-statements-ChristianWenaweser-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-ChristianWenaweser-ENG.pdf) (accessed 23 June 2010).

<sup>7</sup> Review Conference, RC/Decl.1, 1 June 2010.

<sup>8</sup> *Ban Ki-Moon*, “‘An Age of Accountability,’ Address to the Review Conference on the International Criminal Court,” 31 May 2010, p. 6,

[http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-statements-BanKi-moon-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-BanKi-moon-ENG.pdf) (accessed 23 June 2010).

<sup>9</sup> *Ibid.*

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<sup>1</sup> Pursuant to art. 123(1) of the Rome Statute, the UN Secretary-General shall convene a Review Conference seven years after entry into force of the Statute.

<sup>2</sup> Today the Court has become fully operational: As of June 2010, the Prosecutor is conducting five investigations, which all relate to Africa: three of them were self-referrals by the Democratic Republic of the Congo (DRC), Uganda, and the Central African Republic, respectively. The situation of Darfur, Sudan was referred by the UN Security Council and the situation of Kenya was initiated by the Prosecutor based on his proprio motu powers and pursuant to an authorisation by the Pre-Trial Chamber. Several other situations on different continents are consistently being analysed by the Office of the Prosecutor, including Colombia, Afghanistan, and Georgia.

<sup>3</sup> In total, about 4,600 representatives attended the Conference; see <http://www.kampala.icc-cpi.info/> (accessed 23 June 2010).

<sup>4</sup> International Military Tribunal, judgment of 1 October 1946, in “The Trial of German Major War Criminals, Pro-

punity to grow.<sup>10</sup> The ICC Prosecutor, *Luis Moreno-Ocampo*, gave an overview of the Court's investigations and stressed the importance of the arrest warrants to be executed by states parties as no shielding from justice should be possible.<sup>11</sup> Former UN Secretary-General *Kofi Annan* referred to the relationship of African states with the ICC. He emphasised the contribution most African states have made to the ICC since 1998 in spite of the African Union's resistance vis-à-vis the Court – an opposition mainly linked to the arrest warrant issued against President *al-Bashir* of Sudan.<sup>12</sup>

After the opening high-level segment the Conference proceeded with the general debate on 31 May and 1 June 2010 in which states and non-states parties, international organisations as well as non-governmental organisations participated.<sup>13</sup> In this context, *Markus Löning*, the German Federal Government Commissioner for Human Rights Policy and Humanitarian Aid, reaffirmed Germany's commitment to the Rome Statute, which he referred to as a "milestone [...] of international law."<sup>14</sup> He stressed the historically significant opportunity for the Conference to "reach sufficient common ground to [...] place the crime of aggression within reach of Court action."<sup>15</sup>

In a short pledging ceremony, 37 states reaffirmed, inter alia, their commitment to cooperate with the ICC, to implement the Rome Statute on the domestic level, and to assist other states parties in their implementation efforts.<sup>16</sup>

## 2. Stocktaking

<sup>10</sup> See *Song*, "Opening Remarks to the Review Conference," 31 May 2010, p. 4, [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-statements-JudgeSong-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-JudgeSong-ENG.pdf) (accessed 27 June 2010).

<sup>11</sup> See *Moreno-Ocampo*, "Review Conference – General Debate," 31 May 2010, p. 4, [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-statements-LuisMorenoOcampo-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-LuisMorenoOcampo-ENG.pdf) (accessed 27 June 2010).

<sup>12</sup> See *Annan*, "Address by H.E. Mr. Kofi Annan. Review Conference of the Assembly of States Parties to the Rome Statute of the International Criminal Court," 31 May 2010, p. 3 et seq., [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-statements-KofiAnnan-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-KofiAnnan-ENG.pdf) (accessed 27 June 2010).

<sup>13</sup> Regrettably, most European countries did not send high-level representatives to Kampala. In contrast, many African states were represented by ministers. Most speeches can be found at: <http://www.icc-cpi.int/Menus/ASP/ReviewConference/GENERAL+DEBATE+Review+Conference.htm> (accessed 27 June 2010).

<sup>14</sup> *Löning*, "Statement on behalf of Germany," 1 June 2010, p. 2, [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-gendeba-Germany-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Germany-ENG.pdf) (accessed 23 June 2010).

<sup>15</sup> *Ibid.*, p. 3.

<sup>16</sup> See Review Conference, Draft Report RC/L.1 (Draft Report of the Review Conference of the International Criminal Court), 11 June 2010, p. 7.

The stocktaking exercise, which was the main emphasis of the first week with formal debates being conducted alongside numerous events and debates organised by civil society, focused on the following four dimensions: peace and justice; cooperation; complementarity; as well as the impact of the Rome Statute system on victims and affected communities.

On the impact of the Rome Statute system on victims and affected communities, the Conference held a panel discussion on 2 June 2010.<sup>17</sup> Recognising its punitive *and* restorative dimension,<sup>18</sup> the Rome Statute attributes to victims a role as witnesses, participants in the judicial proceedings, and beneficiaries of reparations.<sup>19</sup> As it was emphasised by *Radhika Coomaraswamy*, Special Representative of the UN Secretary-General for Children and Armed Conflict, this role is innovative in international criminal law.<sup>20</sup> Main features and challenges were then addressed in the panel discussion: victim participation and reparations, including victim protection, as well as the role of outreach and the role of the Trust Fund for Victims. States also adopted a resolution on "[t]he impact of the Rome Statute system on victims and affected communities," recognising among other things the rights of victims to equal and effective access to justice, protection and support.<sup>21</sup> A second formal panel discussion on 2 June 2010 focused on the topic of peace and justice. Following presentations by the panellists, states, international organisations and civil society had the opportunity to join the debate. The discussion made clear that a paradigm shift has taken place: despite remaining tensions peace and justice should now be seen as complementary. At the core of the debate were the sequencing of justice endeavours; alternative justice mechanisms; the deterrent effect of international criminal justice; and the role of amnesties.<sup>22</sup>

The ICC's complementary nature to domestic jurisdictions in "bridging the impunity gap" was assessed by a panel on 4 June 2010.<sup>23</sup> According to the principle of complemen-

<sup>17</sup> Review Conference, RC/Res.2, 8 June 2010.

<sup>18</sup> See Assembly of States Parties, Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/45, 10 November 2009, p. 1, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-45-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf) (accessed 28 June 2010).

<sup>19</sup> See *Stover/Crittenden/Koenig/Peskin/Gurd*, "The impact of the Rome Statute system on victims and affected communities. A discussion paper," 28 April 2010, p. 1.

<sup>20</sup> See also *Werle*, Principles of International Criminal Law, 2<sup>nd</sup> ed. 2009, paras. 247, 257.

<sup>21</sup> Review Conference, RC/Res.2, 8 June 2010.

<sup>22</sup> See Review Conference, Moderator's Summary RC/ST/PJ/1/Rev.1, 22 June 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-ST-PJ-1-Rev.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-PJ-1-Rev.1-ENG.pdf) (accessed 27 June 2010).

<sup>23</sup> See Review Conference, Informal Summary RC/ST/CM/1 Advance version (Taking stock of the principle of complementarity: bridging the impunity gap, [Draft] informal summary by the focal points), 22 June 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-ST-CM-1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-CM-1-ENG.pdf) (accessed 27 June 2010).

tarity (often referred to as the “cornerstone” of the Rome Statute system) states bear the main responsibility to prosecute international crimes. The ICC is only supposed to step in as a court of last resort if states are unwilling or unable to genuinely prosecute. Experts and states representatives considered the application of the principle of complementarity in practice: They shared experiences on the national implementation of the Rome Statute and on the efforts made in assisting states to build up capacities for domestic prosecution.<sup>24</sup> In particular, the concept of “positive complementarity” gave rise to debate.<sup>25</sup> In the words of ICC Prosecutor *Luis Moreno-Ocampo*, “[p]ositive complementarity is about [s]tates assisting one another, receiving additional support from the International Criminal Court itself as well as from civil society to meet Rome Statute obligations.”<sup>26</sup>

The last stocktaking exercise on cooperation *inter alia* addressed the following topics: supplementary agreements; domestic legislation implementing the ICC Statute; cooperation with the UN; and challenges for states parties in the execution of requests for cooperation.<sup>27</sup> The Conference adopted a declaration highlighting the obligation of all states parties to cooperate with the Court.<sup>28</sup> Specifically, the execution of arrest warrants was stressed as being crucial for ensuring the ICC’s effectiveness.

### 3. Amendments to the Rome Statute

Discussions on three amendment proposals were on the agenda for the second week: states debated the revision of article 124 and an amendment to article 8.<sup>29</sup> The main em-

phasis, however, clearly lied on the most complex issue of the Conference, the crime of aggression.

#### a) *The Crime of Aggression*

Alongside with crimes against humanity, war crimes and genocide, article 5 of the Rome Statute lists the crime of aggression as one of the core crimes under the Court’s jurisdiction. Having been prosecuted for the first time by the Nuremberg and Tokyo Tribunals, the crime of aggression slumbered for almost 50 years. Its pretended wake-up call came in 1998 in Rome but effectively it was only put on hold. Even though the Court got jurisdiction over the crime it still had to wait for the definition and the rules of jurisdiction to be determined.

The discussion on the crime of aggression in Kampala built upon many years of preparatory work,<sup>30</sup> but the question remained if there would be enough political momentum for a consensus in 2010.<sup>31</sup> Mindful of its own past, Germany stated that international criminal justice would be incomplete without the crime of aggression. But states were severely divided. The U.S. even suggested deferring any discussion on the crime of aggression.<sup>32</sup> In the end, it all boiled down to France and the UK, both permanent UN Security Council members as well as states parties to the Rome Statute, to give up their position on imperative Security Council pre-determination of an act of aggression.

#### aa) *The Definition*

The definition of the crime of aggression proved to be rather uncontroversial. In two paragraphs, the newly added article 8bis defines the individual crime (paragraph 1) and the pre-requisite state act of aggression (paragraph 2). Pursuant to

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encouraged to indicate their willingness to accept persons who were convicted by the ICC in their prison facilities.

<sup>30</sup> By the Preparatory Committee for the Establishment of the ICC (prior to 1998), the Working Group on the Crime of Aggression (1999-2002), and the Special Working Group on the Crime of Aggression (2002-2009). On the so-called Princeton process, see Barriga/Danspeckgruber/Wenaweser (eds.), *The Princeton Process on the Crime of Aggression*, Liechtenstein Institute on Self-Determination at Princeton University, 2009.

<sup>31</sup> *Ben Ferencz*, former prosecutor in the Nuremberg Einsatzgruppen Trial and active participant at the Kampala Conference put it this way: “Nuremberg was a triumph of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason.” See *Ferencz*, “Ending Impunity for the Crime of Aggression,” 2009, <http://www.benferencz.org/index.php?id=4&article=1> (accessed 25 June 2010).

<sup>32</sup> As stated by *Koh*, “Statement by Harold Hongju Koh, Legal Adviser. U.S. Department of State. Review Conference of the International Criminal Court,” 4 June 2010, p. 6: “Finishing the unfinished business of Rome does not mean rushing into a premature conclusion on institution-transforming amendments [without] genuine consensus.”

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<sup>24</sup> See Review Conference, Draft Report RC/L.1 (Draft Report of the Review Conference of the International Criminal Court), 11 June 2010, p. 6. In a resolution adopted on 8 June 2010, states further stressed their commitment to enhance domestic judicial capacities and international assistance for the prosecution of international crimes; see Review Conference, Resolution RC/Res.1, 8 June 2010.

<sup>25</sup> While many countries were in favour of the concept of positive complementarity, some states were hesitant on its scope and possible impact. They were mainly concerned that complementarity as laid down in article 17 would then be understood in a negative way and that the possible creation of new institutions on the topic within the framework of the Rome Statute would only bloat bureaucracy. In contrast, likely synergy effects were pointed out and that savings in avoiding overlapping efforts would offset the costs.

<sup>26</sup> ICC Press Release ICC-CPI-20100603-PR537, 3 June 2010.

<sup>27</sup> See Review Conference, Draft Report RC/L.1 (Draft Report of the Review Conference of the International Criminal Court), 11 June 2010, p. 6; and Review Conference, RC/ST/CP/1 (Draft Summary of the Roundtable Discussion), 8 June 2010.

<sup>28</sup> See Review Conference, RC/Decl.2, 8 June 2010.

<sup>29</sup> Moreover, in a resolution on the strengthening of the enforcement of sentences (Review Conference, RC/Res.3), adopted on 8 June following a Norwegian proposal, states are

article 8bis(1), the crime of aggression means “*the planning, preparation, initiation or execution*” of an act of aggression by a person in a leadership position.<sup>33</sup> It further contains a threshold requirement, meaning that only manifest violations of the UN Charter amount to an act of aggression. Referring to UN General Assembly Resolution 3314 (XXIX) of 14 December 1974, an act of aggression is the use of armed force by one state against another state, which is not justified by acting in self-defence or pursuant to an authorisation by the UN Security Council. Thereby, only clear cases of aggression are covered.<sup>34</sup> Being the product of many years of negotiations, this definition had been generally accepted by many states prior to the Conference. But the U.S. delegation questioned whether “*genuine consensus*”<sup>35</sup> was reached on the “*meaning of the proposed definition*”<sup>36</sup>. Arguing that the definition contained considerable deficits,<sup>37</sup> the U.S., which – unlike Russia and China – had deliberately not participated in previous negotiations during the so-called Princeton process, proposed supplementary “*understandings*” on its interpretation.<sup>38</sup> However, following informal discussions moderated by the German focal point, the six U.S. proposals could be defused and depleted into three additional understandings: (1) a clarification that any amendment solely impacts the Rome Statute, (2) the assessment of an act of aggression must respect the UN Charter, and (3) the threshold required for a “*manifest*” violation of the UN Charter.<sup>39</sup>

#### *bb) The Exercise of Jurisdiction*

As had been expected, the regime for the exercise of jurisdiction over the crime of aggression was the most contentious issue. Whilst the permanent members of the Security Council strongly argued that the Security Council must have the exclusive power to refer a situation of aggression to the ICC, many states favoured a trigger mechanism allowing the ICC Prosecutor to investigate upon authorisation by the Pre-Trial Chamber and thereby independently from the Security Council.<sup>40</sup> In addition, particularly the European states (with the

exception of Switzerland and Greece) required the consent of the aggressor state, whereas mainly Africa, Latin America and the Caribbean strongly opposed this demand. Interrelated with the question of an eventual consent by the aggressor state to the jurisdiction, was the issue of the appropriate amendment procedure outlined in article 121(4)/(5).

#### *(1) The Negotiations*

In the course of the negotiations, the different camps introduced new proposals, which in part were taken on by an updated conference room paper of the Chair of the Special Working Group, Prince *Zeid Ra'ad Zeid Al-Hussein* of Jordan.<sup>41</sup> The first move was made by Argentina, Brazil and Switzerland (so-called “*ABS proposal*”). Their proposal set forth successive modalities for the entry into force of the amendment: one year after the ratification by a specified number of states parties, the Court would have immediate jurisdiction for Security Council referrals. Once the barrier of 7/8 state party ratifications was taken, also state referrals and proprio motu investigations would be possible (delayed jurisdiction). With this proposal, the “*states of the south*” made a big concession as they accepted to a certain extent a primary role of the Security Council. In contrast, the European states and Canada conceded only sparsely:<sup>42</sup> the “*Canadian proposal*” explicitly made the consent of both the victim and the aggressor state a prerequisite for exercise of jurisdiction. As regards the different trigger mechanisms, the proposal advanced a “*menu approach*”. Slovenia further presented a proposal, which tried to complement the ABS proposal and build a bridge to the Canadian one.

Altogether, the regional diversions persisted in the discussions of 8 June 2010 and no compromise seemed within eyeshot. While the plenary took over from the Special Working Group on the Crime of Aggression, there was a question mark over whether consensus would still be a realistic option.<sup>43</sup> After a series of “*informal informal*” meetings between state delegations and *Christian Wenaweser* or Prince *Zeid*, the President of the ASP issued two updated “*non-papers*” on 10 and 11 June. And finally, fronts had shifted. The remaining unresolved matter was whether in absence of a determination of an act of aggression by the Security Council, the Prosecutor could proceed with an investigation.<sup>44</sup> The main question was therefore if the permanent Security Council members UK and France would concede. During hours of waiting time, several adjournments of the plenary and much bargaining in the hotel lobby and on a bi-/multilateral basis, drafting progressed. At 10:30 p.m. on 11 June 2010, *We-*

<sup>33</sup> The person must exercise effective control over or direct the political or military action of a state.

<sup>34</sup> Left out are for instance humanitarian interventions.

<sup>35</sup> *Koh*, supra note 32, p. 3.

<sup>36</sup> *Ibid.*

<sup>37</sup> See *ibid.*, pp. 3 et seq. In the view of the U.S., certain uses of force would remain both lawful and necessary and the proposed definition did not truly reflect customary international law. Furthermore, *Koh* criticised the risk of unjustified domestic prosecutions as too little attention had been paid on the application of the principle of complementarity and that the dependence of the definition on the trigger mechanism was not sufficiently addressed.

<sup>38</sup> See also *Trahan*, “The new agreement on the definition of the crime of aggression,” 2010, p. 2, <http://blogs.ubc.ca/ligi/files/2010/06/aggression-Kampala-op-ed.trahan.pdf> (accessed 27 June 2010).

<sup>39</sup> See understandings 6 and 7 of the Resolution RC/Res.6, 11 June 2010, p. 6.

<sup>40</sup> See *Trahan*, supra note 38, p. 2.

<sup>41</sup> For detailed daily summaries see the blog of *Schabas*, “The ICC Review Conference: Kampala 2010,” 2010, <http://iccreviewconference.blogspot.com/> (accessed 27 June 2010).

<sup>42</sup> See also *Schabas*, “Kampala Diary 8/6/10,” 9 June 2010, <http://iccreviewconference.blogspot.com/2010/06/kampala-diary-8610.html> (accessed 27 June 2010).

<sup>43</sup> Even an adjournment to the next ASP session was discussed (albeit on the quiet).

<sup>44</sup> For more detail, see *Schabas*, supra note 42.

*naweser* reconvened the Conference for the last round. The ultimate draft resolution included both mechanisms for exercise of jurisdiction in two separate articles (15bis: state referral and proprio motu; and 15ter: Security Council referral). When *Wenaweser* shortly after midnight put up the motion for consensus, the “*moment of highest drama in the conference*”<sup>45</sup> followed: neither France nor the UK asked for the floor, but Japan stating that it had “*serious doubts on the legal integrity of the amendment*.”<sup>46</sup> However, at the very last moment of its intervention, Japan declared that it would not stand in the way of consensus and – at last – the resolution on the crime of aggression could be adopted by all states parties present.<sup>47</sup>

(2) *What Does the Final Compromise Entail?*

The compromise provides for different regimes regarding the exercise of jurisdiction, depending on whether it is triggered (1) by the Security Council, or (2) by a state referral/the Prosecutor (*proprio motu*).<sup>48</sup>

According to a new article 15ter, the Security Council may refer situations involving an act of aggression to the Prosecutor, who would then need no further authorisation.

Yet, in case of a state or prosecutorial referral, the Prosecutor could, after six months of inaction by the Security Council, seek the authorisation of the Pre-Trial Division (article 15bis) to commence an investigation. Thus, even in the absence of a Security Council determination the ICC could prosecute alleged perpetrators of the crime of aggression as long as member states are involved. For the permanent members of the Security Council not to oppose this second trigger regime represents indeed a big move from their interpretation of article 39 of the UN Charter. Moreover, the Canadian menu approach was rejected.

But article 15bis also includes limitations, which substantially reduce the scope of the Court’s jurisdiction: Crimes committed on the territory or by nationals of a non-state party are explicitly excluded from any prosecution.<sup>49</sup> More strikingly, even states parties can declare their opt-out from the jurisdiction for the crime of aggression “*prior to ratification or acceptance*”<sup>50, 51</sup>. Such an opt-out declaration might well be withdrawn at any time and requires a review within 3 years,

but it does not expire automatically. It must be hoped that political pressure prevents states to make use thereof.

Yet even more significant in the short term are two thresholds set for the Court’s exercise of jurisdiction: First, *ratione temporis*, the ICC may start investigations only one year after ratification or acceptance of the amendment by 30 states parties.<sup>52</sup> Second, a 2/3-majority of the ASP must activate the exercise of jurisdiction over the crime of aggression in 2017 or thereafter.<sup>53</sup> This second limitation was the last compromise requisite to acquire consensus and arguably for the near future is the most decisive one. In fact, at least for the 7 years to come, the ICC will be unable to carry out any prosecution with regard to the crime of aggression. If no majority authorises the ICC after 1 January 2017, the compromise in Kampala could turn out to be a definition only. However, even as long as there is only the definition, international actors and states can take it as an important point of reference in the assessment of aggressive use of force.<sup>54</sup> It remains to be seen if the amendment will dispose of a deterrent effect significant enough to create an incentive for non-member states to ratify the treaty.

b) *Article 8*

The Rome Statute was amended for the very first time on 10 June 2010. Following a proposal from Belgium<sup>55</sup>, the jurisdiction of the ICC was extended to cover the use of the following three categories of weapons in non-international armed conflicts: (1) poison or poisoned weapons; (2) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (3) bullets that expand or flatten easily in the human body (so called “*dum dum bullets*”). The use of these weapons is already incriminated in relation to conflicts of an international character (article 8(2)(b)(xvii)). The proposal aimed at extending the prohibition to non-international armed conflicts, thus bringing it in line with customary international humanitarian law. Pursuant to the amendment procedure set forth in article 121(5), the ICC can only exercise its jurisdiction with regard to states having ratified the amendment. Upon intervention from some states, the following issues were accentuated to reach a consensual compromise on the proposed resolution: (1) The use of these weapons did not constitute a war crime if the conduct is not associated with an armed conflict, thus excluding situations of law enforcement; (2) the prohibition of the use of “*dum dum bullets*” as a war crime requires a specific mental element of wilfully inflicting or aggravating superfluous suffering.

<sup>45</sup> *Manson*, “Smoothing out the rough edges of the Kampala compromise,” 18 June 2010, p. 6, <http://blogs.ubc.ca/li-gi/files/2010/06/Post-Kampala-Articlemanson.pdf> (accessed 27 June 2010).

<sup>46</sup> *Ibid.*

<sup>47</sup> Review Conference, Resolution RC/Res.6, 11 June 2010, which in addition to the definition and the exercise of jurisdiction entails understandings and amendments to the Elements of Crimes regarding the crime of aggression.

<sup>48</sup> These trigger mechanisms, i.e. referral by a state, the UN Security Council or by the Prosecutor (*proprio motu*), already apply for the other crimes under the jurisdiction of the Court, see art. 13(a)-(c) of the Rome Statute.

<sup>49</sup> See art. 15bis(5).

<sup>50</sup> Review Conference, RC/Res.6, preamble operative para. 1.

<sup>51</sup> See art. 15bis(4).

<sup>52</sup> See art. 15bis(2) and art. 15ter(2).

<sup>53</sup> See art. 15bis(3) and art. 15ter(3) (also referred to as a deferral or delay of the new jurisdiction).

<sup>54</sup> See *Trahan*, supra note 38, p. 2.

<sup>55</sup> At the 8th session of the ASP, the proposal was supported by further 18 states.

c) *Article 124*

According to article 124, a state, on becoming a party to the Rome Statute, may declare that for a period of seven years after ratification, it does not accept the Court's jurisdiction with regard to war crimes allegedly committed by that state's nationals or on its territory. Article 124 was designed as a transitional provision to facilitate ratification of the Rome Statute and provided for a mandatory review.<sup>56</sup> During the debates in the Working Group and in the plenary, some states preferred the retention of the provision to promote the Court's universality, while other delegations perceived it to contravene the spirit and integrity of the Statute<sup>57</sup> and therefore favoured its deletion. After extensive discussions, no consensus could be reached for either the deletion or the retention, and the Venezuelan proposal of a "sunset clause" did not gather enough support. Therefore, as a compromise, the Conference decided to retain article 124 in its current form, but with a mandatory review to be effected by the ASP at its 14<sup>th</sup> session in 2015.

### III. Conclusions

Kampala offered a historic opportunity for codifying the crime of aggression. The results achieved are only a first, but nevertheless crucial step. U.S. delegates underlined the complex exercise of making international criminal law for "the real world."<sup>58</sup> In 2017, the states parties will finally have to prove their determination. At the Review Conference, non-states parties, in particular the Security Council members influenced heavily the dynamics of the negotiations. This might be different in seven years when only a 2/3 majority of states parties will be sufficient to activate the jurisdiction. The adoption of a definition of the crime of aggression was clearly an important step. It forms a point of reference – with the "juridical sword of Damocles" not being purely theoretical anymore. One might criticise the resolution about letting the crime in limbo until 2017 or wonder about the opt-out clause. A realistic observer would concede that this was the price that had to be paid to reach a consensual solution in the given political circumstances. To mention in the passing, the *Obama* administration has chosen to participate in the following process until 2017, which is no u-turn but a new attitude, hopefully for the sake of the ICC, after all.

From a broader perspective, it became apparent that the International Criminal Court has taken on a new vitality. The stocktaking of Kampala is, of course, not the final round of the process, but will hopefully provide a new impulse to ensure that commitments made in Kampala and beforehand result in concrete actions.

In this complex multi-levelled field the Rome Statute remains a solid basis. In spite of much pragmatism required, the Review Conference nevertheless came to a successful end, which was far from what could have been expected before and at some points during the Conference. Speaking with the words of UN Secretary-General *Ban Ki-Moon*: it is about time "to turn up the volume"<sup>59</sup> for accountability. In Kampala the voice of international criminal justice has clearly got louder.

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<sup>56</sup> Until 2010 only two states parties, France and Colombia, have made use of article 124. However, France withdrew its declaration in 2008 and the Colombian declaration expired on 1 November 2009.

<sup>57</sup> The representative of Amnesty International even spoke of a "licence to kill"-provision.

<sup>58</sup> *Koh*, supra note 32, p. 1.

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<sup>59</sup> *Ban Ki-Moon*, supra note 8, p. 6.