

## **The Crime of Aggression After Kampala: Success or Burden for the Future?**

Robert Heinsch\*

### Table of Contents

Abstract .....	715
A. Introduction.....	715
B. The Process Leading to the Kampala Conference .....	717
C. The Results Reached in Kampala .....	719
I. The Definition of Aggression: Art. 8 <i>bis</i> and the Respective Elements of Crimes .....	720
1. The Structure of Article 8 <i>bis</i> .....	720
2. The Acts of Commission: Planning, Preparation, Initiation or Execution.....	721
3. Limited Group of Perpetrators: “Leadership Crime” .....	721
4. The Circumstance Requirement: “Act of Aggression” .....	723

\* Dr. Robert Heinsch LL.M. is Assistant Professor of Public International Law at the Grotius Centre for International Legal Studies, Leiden University, and member of the German Working Group on International Criminal Law. He worked formerly as a Legal Officer in the Trial Division and the Presidency of the International Criminal Court in The Hague and as a Legal Advisor in the International Law Department of the Red Cross Headquarters in Berlin. The author would like to express his gratitude to Professor Niels Blokker for various conversations on the Kampala conference and to Dr. Freya Baetens for helpful comments on an earlier draft of this article. The views expressed in this article are the author’s alone and cannot be attributed to any of the organizations or persons mentioned above.

5.	The Qualifier: “Which, by its Character, Gravity and Scale, Constitutes a Manifest Violation” .....	726
6.	Mental Requirements for the Crime of Aggression .....	732
7.	Individual Criminal Responsibility: the Amendment of Article 25.....	733
II.	The Exercise of Jurisdiction Over the Crime of Aggression .....	734
1.	The Two-Tiered Approach of Article 15 <i>bis</i> and 15 <i>ter</i> .....	734
2.	The Entry into Force of the Definition of the Crime of Aggression .....	735
3.	The Opt-Out Clause Contained in Article 15 <i>bis</i> , Paragraph 4.....	738
4.	The Exercise of Jurisdiction for State Referrals and <i>proprio motu</i> Investigations .....	740
5.	The Exercise of Jurisdiction for Security Council Referrals: Article 15 <i>ter</i> .....	741
D.	Conclusion .....	742

## Abstract

The article provides a first evaluation of the results achieved in Kampala. The author focuses on the resolution dealing with the crime of aggression which was adopted by consensus. Apart from providing a detailed analysis of the new Article 8bis of the Rome Statute which defines the crime of aggression, he also gives an overview of the provisions foreseen for the exercise of jurisdiction over this crime contained in Articles 15bis and 15ter. This includes also the difficult relationship between the ICC and the Security Council with regard to the exercise of jurisdiction. In the author's view the resolution must already be characterized as yet another remarkable achievement in the field of international criminal law, even though there are some hurdles to cross before the respective amendment will enter into force.

## A. Introduction

In the night from 11 to 12 June 2010, the States Parties to the Rome Statute for an International Criminal Court (ICC) adopted at the 13<sup>th</sup> plenary meeting of the Kampala Review Conference Resolution RC/Res. 6 by consensus. By doing so, they not only agreed on the new Article 8bis defining the crime of aggression, but also on Articles 15bis and 15ter dealing with the exercise of jurisdiction over this crime.<sup>1</sup> This is another milestone in the development of international criminal law.<sup>2</sup> Those who had thought that, after the rapid development of this discipline in the 1990s with the establishment of the ICTY, the ICTR, various mixed tribunals and finally the permanent International Criminal Court, the first Review Conference of the ICC would end without a satisfactory outcome were mistaken. The agreement on a definition of aggression, envisaged already in 1998 in Article 5 (2) of the Rome Statute, is a landmark in the history of international criminal law.

Although it will take time until the necessary 30 Member States have ratified or accepted the respective amendments, and the Court's exercise of jurisdiction over the crime of aggression is still subject to a decision to be

<sup>1</sup> This is the current enumeration of the Resolution; for the English version of the resolution see the ICC website at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) (last visited on 27 August 2010).

<sup>2</sup> For an overview of this development and a critical evaluation from a philosophical perspective cf. L. May, *Aggression and Crimes against Peace* (2008).

taken by the Member States after 1 January 2017,<sup>3</sup> most people will see the outcome of the Kampala conference as a success – at least at first glance.<sup>4</sup> Almost 100 years after the German Kaiser Wilhelm II was supposed to face charges according to Article 227 of the Treaty of Versailles, being accused of committing the “supreme offence against international morality and the sanctity of treaties” during World War I, and 65 years after the “crime against peace” was included in the Charter of the International Military Tribunal (IMT) in Nuremberg,<sup>5</sup> the Member States of the ICC finally agreed on a definition of the crime of aggression also for this first permanent international criminal judicial body.

The definition of the crime of aggression was not the supreme problem during the conference in Kampala.<sup>6</sup> For many observers, the main issue which made it unrealistic to ever reach an agreement on this matter was the exercise of jurisdiction, including especially the relationship between the ICC and the Security Council which according to Article 39 of the UN Charter has a monopoly on stating whether a situation represents an act of aggression.<sup>7</sup> Because of the latter problem, but also because

<sup>3</sup> See Arts 15bis (2), (3) and 15ter; the decision by the Member States has to be taken by the same majority which is required for the adoption of an amendment of the Statute, see Arts 15bis(3) and 15ter, respectively.

<sup>4</sup> For a very first impression of the discussion which has now started among academics see the respective discussion on EJIL Talk! at <http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited on 27 August 2010); for a first evaluation from participants of the conference see also N. Blokker & C. Kress, ‘A Consensus Agreement on the Crime of Aggression – Impressions from Kampala’ 24 *Leiden Journal of International Law* (forthcoming 2011) and D. Scheffer, ‘The Complex Crime of Aggression under the Rome Statute’, 24 *Leiden Journal of International Law* (forthcoming 2011).

<sup>5</sup> See Article 6 (a) of the Charter for the International Military Tribunal.

<sup>6</sup> See for an account of the negotiations during the Rome Conference especially the contributions by J. Harrington, ‘The Aggression Negotiations at the ICC Review Conference’, EJIL Talk, at <http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/> (last visited 27 August 2010); *cf.* also <http://www.iccuganda2010.ug/> (last visited 27 August 2010); <http://www.iccnw.org/?mod=review> (last visited 27 August 2010) and <http://iccreviewconference.blogspot.com/> (last visited 27 August 2010).

<sup>7</sup> For an overview of the discussion before the Review Conference, see the symposium in 20 *European Journal of International Law* (2009) 4, 1101-1156 including A. Paulus, ‘Introduction to the Symposium’, 20 *European Journal of International Law* (2009) 4, 1101-1102; R. S. Clark, ‘Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction over it’, 20 *European Journal of International Law* (2009) 4, 1103-1115; A. Paulus, ‘Second

aggression has always been very controversial and political,<sup>8</sup> there were a few commentators before Kampala who were sceptical about the chances that an agreement on the crime of aggression could be found and whether it would be clever to actually come to a conclusion.<sup>9</sup> Some statements also indicated that it might not be advisable to agree on a reduced version of the crime of aggression with possible effects on the prohibition of the use of force.<sup>10</sup> However, despite all objections and reluctance, the States Parties were finally able to agree not only on a definition, but also on the conditions to the exercise of jurisdiction over this crime.

The following comments will provide a first evaluation of the results achieved in Kampala.<sup>11</sup> As only short time has elapsed since the actual adoption of the respective resolution, the description and evaluation will be cursory in nature. Only the most important aspects of the resolution dealing with the crime of aggression will be highlighted. Special focus will be given to the definition of aggression, while the contribution by Astrid Reisinger Coracini contained in this issue will deal more extensively with the exercise of jurisdiction.<sup>12</sup>

## B. The Process Leading to the Kampala Conference

The resolution adopted in Kampala was preceded by a 12 year process, the definition of aggression being one of the “leftovers” from the

Thoughts on the Crime of Aggression’, 20 *European Journal of International Law* (2009) 4, 1117-1128; C. Kress, ‘Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus’, 20 *European Journal of International Law* (2009) 4, 1129-1146; S. Murphy, ‘Aggression, Legitimacy and the International Criminal Court’, 20 *European Journal of International Law* (2009) 4, 1147-1156.

<sup>8</sup> A history of this discussion is depicted by M. J. Glennon, ‘The Blank-Prosed Crime of Aggression’, 35 *Yale Journal of International Law* (2010) 1, 71-114.

<sup>9</sup> Paulus, ‘Crime of Aggression’, *supra* note 7, 1126-1127.

<sup>10</sup> *Id.*, 1126-1127.

<sup>11</sup> This has already been done during a discussion round at Chatham House, see [http://www.chathamhouse.org.uk/files/16935\\_il240610summary.pdf](http://www.chathamhouse.org.uk/files/16935_il240610summary.pdf) (last visited 27 August 2010).

<sup>12</sup> A. Reisinger, ‘The International Criminal Court’s Exercise of Jurisdiction over the Crime of Aggression – at last ... in reach ... over some’, 2 *Goettingen Journal of International Law* (2010) 2, 745 in this issue; see also her first remarks on the conference results in A. Reisinger Coracini, ‘More Thoughts on “What Exactly was Agreed in Kampala on the Crime of Aggression”’, available at <http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited 27 August 2010).

Rome Conference in 1998. Although this process has been described on numerous occasions elsewhere,<sup>13</sup> a short overview seems necessary to grasp the whole impact of the results in Kampala. When drafting the Rome Statute the State Parties were not able to agree on a definition, but it was nevertheless stated in Article 5 (2) of the Statute that the crime of aggression belongs to the jurisdiction of the Court. However, Article 5 (2) made clear that this crime was still a “sleeping beauty”:

“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”.

Therefore, the Final Act of the Rome Conference<sup>14</sup> asked the Preparatory Commission of the Court (“PrepCom”), which was taking over business from the Rome Conference, to “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime”.<sup>15</sup> However, the PrepCom was not able to finish this task until 2002. They had drafted a Discussion Paper which had been proposed by the last Coordinator of the Working Group of the PrepCom.<sup>16</sup> Apart from an initial text with a number of options, the decisive part was the proposal to create a “Special Working Group on the Crime of Aggression” (SWGCA) which would take over the task of preparing a proposal for a definition of the crime of aggression. The SWGCA met between 2003 and 2009 at least once a year, and had its final meeting in 2009 at which a “Proposal for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression” was

<sup>13</sup> A. Zimmermann, ‘Article 5’, in O. Triffterer (ed.), *Commentary on the Rome Statute*, 2nd ed. (2008), mn. 16-41; R.S. Clark, ‘The crime of aggression’, in C. Stahn & G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009), 709-723.

<sup>14</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, U.N. Doc. A/CONF.183/10, 17 July 1998, para. 7 [Final Act of the Rome Conference].

<sup>15</sup> Resolution F of the Final Act of the Rome Conference.

<sup>16</sup> See Clark, *supra* note 13.

presented.<sup>17</sup> The remarkable achievement of the Special Working Group was that it was able to agree on a proposed Article 8*bis*, with a definition of aggression which did not contain any brackets or open issues.<sup>18</sup> However, they were not able to present a similarly undisputed proposal for the exercise of jurisdiction over the crime of aggression. The respective Article 15*bis* had two alternatives. The first alternative dealt with the case where the Security Council would not give a determination of an act of aggression at all; the second alternative dealt with the situation where the Security Council had not made such a determination within six months and consisted of four options giving, among others, the Pre-Trial Chamber (PTC), the General Assembly (UNGA), or the International Court of Justice (ICJ) different roles in either authorizing the Prosecutor to investigate the crime, or to determine whether there was an act of aggression.<sup>19</sup>

### C. The Results Reached in Kampala

The results reached in Kampala will be described in two distinct sections: (I) The definition of the crime of aggression contained in Article 8*bis* and the respective amendments to the Elements of Crimes, including the mental requirements and special issues of individual criminal responsibility; and (II) the conditions for the exercise of jurisdiction over the crime of aggression contained in Article 15*bis* and Article 15*ter*. While dealing with these issues, the comments will not only relate to the respective Articles, but also to the newly drafted Elements of Crimes and the “Understandings” attached to Resolution RC/Res. 6.

<sup>17</sup> All the documents elaborated by the Special Working Group can be found on the ICC homepage at: <http://www.icc-cpi.int/Menus/ASP/Crime+of+Aggression/> (last visited 27 August 2010); it is also compiled in S. Barriga, W. Danspeckgruber & C. Wenaweser, *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (2009).

<sup>18</sup> See Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add. 1, Appendix I, at 30.

<sup>19</sup> Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add. 1, Appendix I, at 31-32; for further discussion of these options, see N. Blokker, ‘The Crime of Aggression and the United Nations Security Council’, 20 *Leiden Journal of International Law* (2007) 4, 867-894; see also C. Kress, ‘The Crime of Aggression before the First Review of the ICC Statute’, 20 *Leiden Journal of International Law* (2007) 4, 851, 859-863.

## I. The Definition of Aggression: Art. 8*bis* and the Respective Elements of Crimes

As mentioned before, the definition of the crime of aggression as adopted in Kampala as such was not controversially discussed anymore during the conference. In fact, the proposal prepared and adopted by the Special Working Group in February 2009 was taken over by the Review conference without any changes. Only the respective Elements of Crimes were added.<sup>20</sup> Nevertheless, the fact that for the first time we now have a definition of the crime of aggression in an international treaty warrants a discussion about whether the definition agreed upon is one that will withstand the test of time.<sup>21</sup>

### 1. The Structure of Article 8*bis*

The definition of the crime of aggression as adopted by the States Parties in Kampala consists of two paragraphs; paragraph 1 dealing with the “crime of aggression”, and in that regard building the basis for the individual criminal responsibility of possible perpetrators; and paragraph 2 defining the “act of aggression” which lists a number of acts which until now were usually associated with the responsibility of a State, but now might give the opportunity to prosecute an individual for acts of aggression.<sup>22</sup>

According to the adopted text of Article 8*bis*(1), this is the first part of the crime of aggression:

“1. For the purpose of this Statute, “crime of aggression” means 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,

<sup>20</sup> Resolution RC/Res.6, Annex II, Amendments to the Elements of Crimes; see also the Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, para. 42.

<sup>21</sup> Heavily doubting this: M. J. Glennon, ‘The Blank-Porse Crime of Aggression’, *supra* note 8, 109; also very critical towards this definition: A. Paulus, ‘Crime of Aggression’, *supra* note 7, 1122-1123.

<sup>22</sup> Dealing with the relationship between the State responsibility for aggression and individual criminal responsibility: A. Cassese, ‘On Some Problematical Aspects of the Crime of Aggression’, 20 *Leiden Journal of International Law* (2007) 4, 841-849.

gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

This paragraph which lists the modalities necessary to establish individual criminal responsibility can be broken down into four parts.

## 2. The Acts of Commission: Planning, Preparation, Initiation or Execution

First, Article 8*bis* (1) states four acts of commission of the principal perpetrator, namely the “planning, preparation, initiation or execution” of an act of aggression. Concerning the first three acts, the definition picks up on the language of Article 6 (a) of the Nuremberg Charter only substituting the “waging of a war” in the IMT Charter by “execution”.<sup>23</sup> However, listing these acts of commission does not mean that other modes of participation are excluded from the start. The discussion within the Special Working Group concerning the acts of commission and especially their relationship with Article 25 of the Rome Statute circled for a while around two different approaches: the “monistic approach” and the “differentiated approach”. The latter represents the “legal recognition of all different forms of individual participation in the crime of aggression,<sup>24</sup> while the first one “excluded the application of the general part on complicity applicable to other crimes.”<sup>25</sup> As will be discussed further below, the final outcome supports the differentiated approach. This becomes evident through the new paragraph 3*bis* to be inserted in Article 25 stating that the provisions of this article in principle also apply to the crime of aggression.<sup>26</sup>

## 3. Limited group of perpetrators: “leadership crime”

Article 8*bis* (1) goes on to state that this crime can only be committed by a “person in a position effectively to exercise control over or to direct the

<sup>23</sup> Compare Article 6 (a) Statute of the International Military Tribunal, available e.g. at <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited 27 August 2010).

<sup>24</sup> Cf. Kress, *supra* note 19, 855, especially footnote 21 referring to Kress’ own distinction in ‘Discussion Paper I: The Crime of Aggression and Article 25(3), of the Statute’, ICC-ASP/4/32, 376.

<sup>25</sup> R.S. Clark, ‘The Crime of Aggression’, in C. Stahn & G. Sluiter (eds), *The Emerging Practice of the ICC* (2008), 709, 718.

<sup>26</sup> A more detailed analysis you find below at C I 7.

political or military action of a State”, making this crime clearly a so-called “leadership crime”.<sup>27</sup> In this regard, the crime of aggression will be different from the other three crimes covered by the Rome Statute, because war crimes, crimes against humanity, and genocide do not share this limitation concerning the group of people who are able to commit the crime.<sup>28</sup> This focus on top political and military leaders evolved during the drafting process in the Special Working Group, and pays tribute to the fact that because of its inherent nature the crime of aggression has different features compared to the other three core crimes.<sup>29</sup> While the protected legal value of these other three crimes is focused on the protection of the individual, be it as part of a group in the case of genocide, or as a part of an army or a civilian population in the context of war crimes, the crime of aggression’s focus lies on protection from the use of force against the sovereignty, territorial integrity or political independence of another State. Since this usually presupposes the action of one State against another State, it is logical to reduce the possible actors of this crime to the leaders of the State. In the end, the possible group of people who fall under the envisaged category will encompass heads of States and governments, such as presidents and prime ministers, but also military leaders like ministers of defence or generals commanding the armed forces.

The current definition as included in the Resolution of Kampala nevertheless gives rise to some questions about as to whether it excessively limits the circle of possible perpetrators. The valid question is whether it was necessary to limit it to people who direct the “political or military” actions of a State. We know that since the war crimes trials against German industrialists after World War II it has been accepted that people with economic power are able to support, or help to prepare an aggressive war.<sup>30</sup> And nowadays one might think of religious leaders who also have substantial influence on the actions of a State. The reason behind limiting

<sup>27</sup> Clark, *supra* note 7, 1105; see for the problematic issues arising from this definition: Kress, *supra* note 7, 1134, replying to Paulus’ concerns raised in Paulus, ‘Crime of Aggression’, *supra* note 7, 1120-1121.

<sup>28</sup> Rather to the contrary, these three crimes know a limitation to the possible group of victims of the crime, like e.g. “protected persons” for war crimes, the “civilian population” for the crimes against humanity, or a national, ethnical, racial or religious group for the crime of genocide.

<sup>29</sup> For a detailed discussion of this special character, see L. May, *Aggression and Crimes against Peace* (2008).

<sup>30</sup> R.S. Clark, ‘The Crime of Aggression’, in C. Stahn & G. Sluiter (eds), *The emerging practice of the ICC* (2008), 709, 715.

the circle of perpetrators to those who can direct the political or military actions can be explained by reference to the definition of the “act of aggression” presented in paragraph 2: here it is necessary to use “armed force” which usually is mainly guided by the political or military leaders of a country. In that regard, the definition actually does not exclude *stricto sensu* religious or industrial leaders from its scope of application, as long as they actually can *influence* the political or military actions of the respective State.

#### 4. The Circumstance Requirement: “Act of Aggression”

The third aspect of paragraph 1 requires that an “act of aggression” has been planned, prepared, initiated or executed. What this act of aggression consists of is legally defined in Art. 8*bis* (2). It is probably the most disputed part of the definition of the crime of aggression and therefore warrants special attention.<sup>31</sup> According to this paragraph, an “[...], ‘act of aggression’ means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of a war, shall in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression”. It then reproduces the list of possible acts of aggression listed in Article 3 of the said General Assembly Resolution 3314, commonly also known as the “Definition of Aggression” Resolution. Since the first part of the definition in Article 8*bis* (1) is a verbatim reproduction of Article 1 of Resolution 3314, it becomes obvious that the main authority for defining aggression under the Rome Statute will be this Resolution from 1974 which was not drafted to be applied in cases dealing with individual criminal liability.<sup>32</sup>

This last aspect has also been one of the most criticised features of the definition of aggression contained in Article 8*bis*. Questions have been raised whether it makes sense to rely on a definition which was originally

<sup>31</sup> Just as one example for the criticism, see Paulus, ‘Crime of Aggression’, *supra* note 7, 1120.

<sup>32</sup> For more background on Resolution 3314, especially the drafting history, see: T. Bruha, *Die Definition der Aggression* (1980), 211-216; B. Ferencz, *Defining International Aggression. The Search for World Peace. A Documentary History and Analysis*, Volume II (1975), 43-45; see also S. Sayapin, ‘A Great Unknown: The Definition of Aggression Revisited’, 17 *Michigan State Journal of International Law* (2008-2009), 377.

created to deal with *State* responsibility for the violation of the prohibition on the use of force.<sup>33</sup> One of the first issues which will be surely discussed *in extenso* once the amendment enters into force is whether the list in paragraph 2 is exhaustive. This question is especially pertinent because Article 8*bis* explicitly states that the act of aggression has to be determined “in accordance” with Resolution 3314; Article 4 of which provides that “[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter”. From a criminal law perspective, this is problematic because the principle of legality, at least in national law, would require that the list of punishable actions is clearly defined and not open to interpretation (or amendment) by the judges. In this regard, it is interesting to note that during the drafting process in the Special Working Group there were movements which suggested a more clearly defined description of the actions punishable as a crime of aggression. For example, a German proposal was in favour of a more “autonomous and generic” definition of the crime of aggression,<sup>34</sup> willing to find a more precise definition which would limit the criminality to “military occupation or annexation.”<sup>35</sup> However, in the end there was no majority within the working group in favour of deviating from the approach to use Resolution 3314.

One can surely discuss whether basing the definition of aggression on Resolution 3314 was a sensible step in view of the problems which might arise from a criminal law angle. However, the principle of legality is not as strongly developed in international law as in national law, and it only has a core scope of application on the international level.<sup>36</sup> For example, Article 3

<sup>33</sup> Paulus, ‘Crime of Aggression’, *supra* note 7, 1120.

<sup>34</sup> Kress, *supra* note 7, 1136.

<sup>35</sup> Paulus, ‘Crime of Aggression’, *supra* note 7, 1123, referring also to ‘Compilation of proposals on the crime of Aggression’, Preparatory Commission for the ICC, 2 August 1999, UN Doc. PCNICC/1999/INF/2 (1999), 20 and H. P. Kaul, ‘Definitional Options for the Way Forward’, in M. Politi & G. Nesi (eds) *The International Criminal Court and the Crime of Aggression* (2004), 97-108.

<sup>36</sup> This is still the majority opinion today, see R. Heinsch, *Die Weiterentwicklung des humanitären Völkerrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda* (2007), 312; see also O. Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts nach Nürnberg* (1966), 124-125; O. Triffterer, ‘Bestandsaufnahme zum Völkerstrafrecht’, in G. Hankel & G. Stuby (eds), *Strafgerichte gegen Menschheitsverbrechen* (1995), 218; M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression - Historische Entwicklung, Geltung und Definition im Hinblick auf das Statut des Internationalen Strafgerichtshofes* (2001), 38; G. Dahm, *Zur Problematik des Völkerstrafrechts* (1956), 65; A. Bruer-

of the ICTY Statute states that the tribunal has jurisdiction over violations of the laws or customs of war. Following this sentence, we have a list of possible violations, introduced by the phrase: “Such violations shall include, *but not be limited to*”<sup>37</sup>. In a similar way, the Rome Statute already has a comparable “open” clause which would be quite problematic under a national interpretation of the principle of legality. Article 7(1)(k) speaks of “*Other inhumane acts* of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. This is a norm which is far from specific, at least if one applies the principle of legality as known from national legal systems.

In this regard, it seems of course regrettable that the new definition of aggression opens the possibility for discussion with regard to its specificity; however, the reason for taking recourse to Resolution 3314 is obvious. Already during the drafting of the Rome Statute, the States Parties had the ambition to codify existing customary law – as far as possible – when defining the crimes falling under the jurisdiction of the Court.<sup>38</sup> Since the crime of aggression has not been codified on the international level since the Nuremberg and Tokyo trials (with a small exception in the Statute of the Iraqi Special Tribunal),<sup>39</sup> the members of the Special Working Group were obviously determined to use a definition which has at least some support on the international level. From this author’s perspective, this is the correct approach. International criminal law has to deal constantly with the tension between the two components of its discipline: the strict application of national criminal law principles and the sometimes “broader” approach of

Schäfer, *Der internationale Strafgerichtshof. Die internationale Strafgerichtsbarkeit im Spannungsfeld von Recht und Politik* (2001), 92-93 and C. Hollweg, *Vom Jugoslawientribunal der UNO zum allgemeinen Internationalen Strafgerichtshof?*, *SchwZStrR* (1994) 3, 251, 264.

<sup>37</sup> Emphasis added by author.

<sup>38</sup> Kress, *supra* note 7, 1140, who, however, admits that it can be argued that the proposed (and now accepted definition) “goes slightly beyond existing customary international law”.

<sup>39</sup> Art. 14 (c) of the Statute for the Iraqi Special Tribunal stated a very limited scope of application for a situation which could be covering an act of aggression; it stated that “The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law: [...] The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.”

public international law.<sup>40</sup> In this regard, it seems sensible to rely on a text which for more than 35 years has been accepted by States, international courts, and scholars as an authoritative definition of the act of aggression.<sup>41</sup>

##### 5. The Qualifier: “Which, by its Character, Gravity and Scale, Constitutes a Manifest Violation”

The fourth condition required by Article 8bis (1) is that the act of aggression as defined in paragraph 2 “by its character, gravity and scale, constitutes a manifest violation” of the Charter of the United Nations. This incorporates a threshold for the use of force which can be found neither in the UN Charter nor in Resolution 3314 on the Definition of Aggression between States. In a way, it is similar to the approach the International Court of Justice took in the *Nicaragua* and *Oil Platforms* cases concerning the requirement that there be a certain *level* of armed attack before force as self-defence was justified.<sup>42</sup> One could also find similar language in the recent *Case Concerning Armed Activities on the Territory of the Congo*.<sup>43</sup> But the term “manifest violation” in the context of aggression as such is new, and the meaning is not completely clear. Therefore, the qualifier has been criticized by a couple of commentators especially for its vagueness.<sup>44</sup> Since there is no comparable precedent in the history of the prosecution of the crime of aggression, it has been stated that reducing the crime to only manifest violations could have severe effects on the prohibition of the use of force because this would give a *carte blanche* to all incidents of aggression which are not manifest.<sup>45</sup> Also, it is not clear what kind of “manifest” violations one should envisage. Was the attack of the United States against

<sup>40</sup> As one of the “fathers” of the discipline, O. Triffterer described it in his doctoral thesis: international criminal law has a “double nature”, cf. Triffterer, *supra* note 36, 22, 28-29, 92.

<sup>41</sup> It is obvious that this is a not a completely undisputed position.

<sup>42</sup> See for this argument also Chatham House, *The International Criminal Court: Reviewing the Review Conference*, 24 June 2010, Summary of an International Law Meeting, 5 available at [www.chathamhouse.org.uk](http://www.chathamhouse.org.uk) (last visited 27 August 2010).

<sup>43</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 227, para. 165 where the Court speaks of a military intervention “of such magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Art. 2(4) of the Charter”.

<sup>44</sup> E.g., Paulus, *supra* note 7, 1121; see also Murphy, *supra* note 7, 1150-1151.

<sup>45</sup> Paulus, *supra* note 7, 1122.

Iraq a manifest violation of the UN Charter? What about the NATO attacks against Yugoslavia in the context of the Kosovo war? Was this a manifest violation since the NATO Members involved acted without the explicit authorisation of the UN Security Council? What about those situations when States take action on foreign territory to protect/save their own nationals? Would this be a manifest violation?

In the end, this definitely is an issue which will need further elaboration by the Court when dealing with such cases. The Amendments to the Elements of Crimes for Article 8*bis* merely clarify in paragraph 3 of the introduction that “[t]he term ‘manifest’ is an objective qualification.” This tries to illustrate that the interpretation of the term is independent from subjective opinions and not dependent on the opinion of the actors involved.

Furthermore, a qualifier limiting a crime to very serious violations is not completely unknown to international law. One could even say that the “grave breaches” regime of the Geneva Conventions is a classical example for this approach. Not all violations of international humanitarian law entail individual criminal responsibility but only those listed in the respective articles of the Geneva Conventions or Additional Protocol I.<sup>46</sup> Of course, one could argue that this has created two kinds of norms and that the non-criminalized part of international humanitarian law might be less respected. However, this does not mean that either the other violations of international humanitarian law or the not-manifest violations of the UN Charter in the context of the crime of aggression are put into oblivion, since the normal Chapter VII mechanism stays in place in order to deal with these violations from the perspective of State responsibility. It is just that the International Criminal Court will not have jurisdiction for it.

The only difference one could see when comparing the manifest violations of the crime of aggression to the grave breaches regime in the area of international humanitarian law is that the Geneva Conventions actually provide us with a distinct list of these “grave breaches”, while prospective Article 8*bis* of the Rome Statute does not do the same.

<sup>46</sup> See Art. 49 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12. August 1949, 75 U.N.T.S. 31, Art. 50 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, 12. August 1949, 75 U.N.T.S. 85, Art. 129 Geneva Convention relative to the Treatment of Prisoners of War, 12. August 1949, 75 U.N.T.S. 135, Art. 146 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12. August 1949, 75 U.N.T.S. 287, and Art. 85 Protocoll Additional to the Geneva Conventions of 12 August 1949, 12. December 1977, 1125 U.N.T.S. 3.

Paragraph 2 of the said article does not give a list of manifest violations but just a list of possible acts of aggression and the structure of Article 8*bis* indicates that these are not meant to be “manifest” by definition. In that regard we have a two-step approach: first we have to determine whether there is an “act of aggression” using the guidance given by paragraph 2, before we decide whether there is a “crime of aggression”, which can only be accepted in cases of a “manifest” violation of the Charter of the United Nations.

One problem in this context which will be in need of clarification by the judges of the Court is the question of how the act of aggression can “by its character, gravity and scale” be a manifest violation of the UN Charter.<sup>47</sup> The drafting history indicates that this qualifier was inserted “to exclude some borderline cases”.<sup>48</sup> Number 6 of the “Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression” (the Understandings) states in this regard that

“it is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.”

The last sentence, especially, begs the question whether two of those components can already be enough to constitute a manifest violation.<sup>49</sup> In that regard the Understandings seem to be an example where confusion is added to a provision, which actually might have been more easily interpreted without them. If one chooses a textual approach<sup>50</sup> to interpret the sentence “an aggression which, by its *character, gravity and scale*,

<sup>47</sup> Paulus, *supra* note 7, 1121 states that “it remains unclear what precisely renders an act of aggression a crime.”

<sup>48</sup> Informal inter-sessional meeting 2006 of the Special Working Group on the Crime of Aggression, 8-11 June 2006, in Assembly of State Parties, 5<sup>th</sup> session 2006, Doc ICC-ASP/5/SWGCA/INF.1 (2006), para. 19.

<sup>49</sup> This question was also raised during the Chatham House International Law Meeting: The International Criminal Court: Reviewing the Review Conference, 24 June 2010, at 6, available at [http://www.chathamhouse.org.uk/files/16935\\_il240610summary.pdf](http://www.chathamhouse.org.uk/files/16935_il240610summary.pdf) (last visited 27 August 2010)

<sup>50</sup> In line with the prescribed order by the Vienna Convention on Law of the Treaties, *cf.* Arts 31 and 32 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

constitutes a manifest violation” one would come to the conclusion that the “and” rather indicates that all three of the components have to be fulfilled. This is also supported by the first sentence of Understanding 7 which states:

“7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination.”

However, if we look at the second sentence of this Understanding (“No one component...”) one would rather be inclined to conclude that two of those components are already sufficient. The interpretation is not made easier by the Understanding 6 which says:

“It is understood that aggression is the most serious and dangerous form of the illegal use of force, and that the determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts and their consequences, in accordance with the Charter of the United Nations”.

Here one component (the “gravity”) is highlighted and put into a pair together with the “consequences”, a component which does not appear in the original definition of the crime of aggression in Article 8*bis*. But since this part of the Understandings is not explicitly referring to “manifest” violations, one can just assume that this refers to an additional consideration of all the circumstances. In a way, it seems partly redundant to the requirement that the violation has to be manifest, because when examining the character, gravity and scale one would probably always look at the acts and the consequences. If not, this Understanding makes clear that one should. Whether this “clarification” is really helpful is highly doubtful.

An interesting question which will probably require more attention is the legal relevance of these Understandings. While with regard to the “Elements of Crimes” Article 9 of the Rome Statute clearly states that they “shall assist the Court in the interpretation and application of Articles 6, 7 and 8”<sup>51</sup> as well as Article 21 which lists them in paragraph 1 (a) after the Statute in the law which the Court shall apply, Understandings were not known until the Review Conference. The Understandings are also not explicitly referred to by the amendments contained in the Resolution of the Review Conference. Rather, paragraph 6 of the Resolution is supposed to amend Article 9 (1) of the Rome Statute by replacing the original sentence

<sup>51</sup> See also E. Gadirov, ‘Article 9’, in O. Triffterer, *Commentary on the Rome Statute*, 2nd ed. (2008), 505-529.

with the new formulation: “Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7, 8, or 8bis.” The Understandings were a reaction to the United States’ original demand to change the definition contained in Article 8bis.<sup>52</sup> Understandings to a treaty text are of course not unheard of, but pose an additional problem in international criminal law due to the principle of legality. According to the guidelines concerning treaty law interpretation under Article 31 (2) of the Vienna Convention on the Law of the Treaties (VCLT), it is allowed to consider the “context” when the wording of the provision is unclear, including agreements reached by the parties. Although this might be a normal way of interpreting a provision for a public international lawyer, from a national criminal law perspective and against the background of the principle of legality this is problematic to say the least, since the definition of an international crime ought to be clear enough for the affected people to know whether or not they are committing a crime. However, as has been elaborated quite extensively elsewhere, international criminal law does not have the same strict requirements towards the specificity of the crime as national law.<sup>53</sup> In that regard, the Understandings were a means to accommodate concerns from affected States – especially in the case of the permanent members of the Security Council.

If one has a look at the *travaux préparatoires*, it becomes clear that the idea behind this qualifier is to exclude all violations of the prohibition of the use of force which are controversial and thereby not “manifest” violations of the UN Charter.<sup>54</sup> Possible cases which come to mind in this context are so-called situations of “humanitarian intervention”, for example, in the Kosovo-War. Also included are probably cases of anticipatory self-defence in which the attacker seems to have evidence of an imminent attack, but in the end this evidence turns out to be unreliable after the “defensive” action against another country has taken place. While these examples are mainly falling under the aspect of “character”, one could also think of the

<sup>52</sup> J. Harrington, ‘The Aggression Negotiations at the ICC Review Conference’, June 8, 2010, available at EJIL Talk, <http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/> (last visited 27 August 2010).

<sup>53</sup> See O. Triffterer, *Dogmatische Untersuchungen* (1966), *supra* note 36, 124-125.; for the most recent status of the principle of legality, see B. Broomhall, ‘Article 22’, in O. Triffterer (ed.), *Commentary on the Rome Statute* (2008), 714-729 and W. A. Schabas, ‘Article 23’, *id.*, 731-734.

<sup>54</sup> Informal inter-sessional meeting 2006 of the Special Working Group on the Crime of Aggression, 8-11 June 2006, in Assembly of State Parties, 5<sup>th</sup> session 2006, Doc ICC-ASP/5/SWGCA/INF.1 (2006), para. 19.

mere exchange of fire after a border incident or a short-term violation of the territorial sovereignty when referring to the “gravity and scale” of the manifest violation.<sup>55</sup> However, one should keep in mind that some commentators already question whether these “low scale” violations of the prohibition of the use of force fall under the original definition of aggression.

Summing up the discussion on the possible benefit of a qualified “manifest violation” of the UN Charter, one feels inclined to see this as part of a necessary compromise to be able to come to an agreement on the definition as such. Although the use of the term “manifest” gives more room for questions than the grave breaches regime of the Geneva Conventions, both approaches are in principle comparable. Although the grave breaches system of the Geneva Conventions actually took some time to become operable – some would even say that before it was included in the ICTY Statute as part of the jurisdiction of the tribunal, this regime had not much practical relevance<sup>56</sup> – it is reasonable to have a norm which penalises a certain serious violation of a prohibitory norm. There is no danger that the prohibition of the use of force laid down in Article 2 (4) of the UN Charter will be undermined by this construction. Rather, any kind of penalisation of only a certain (manifest) form of aggression will in the long run strengthen the general norm as well. Comparing it again with the grave breaches regime in the area of international humanitarian law, the experience from the last 15 years of international criminal law jurisprudence shows that the prosecution of grave breaches of international humanitarian law has strengthened the obedience towards general international humanitarian law (i.e. also those rules which are not included in the grave breaches regime) as well.<sup>57</sup> Without being able to predict whether at any place in time we will

<sup>55</sup> For a list of possible cases which fall below the threshold of “manifest violations” see Kress, *supra* note 7, 1140-1141, referring among others to E. Wilmschurst, ‘Aggression’, in Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure*, 2nd ed. (2010), 262-280; C. Gray, *International Law and the Use of Force*, 3rd ed. (2008); R. Kolb, *Ius Contra Bellum. Le droit international relative au maintien de la paix* (2003); and T. Franck, *Recourse to Force* (2002).

<sup>56</sup> See e.g. for a depiction of the grave breaches regime: N. Wagner, ‘The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the Former Yugoslavia’, 850 *International Review of the Red Cross* (2003) 351-385.

<sup>57</sup> For an interesting study on the system of grave breaches in relation to the concept of war crimes, see M. D. Öberg, ‘The absorption of grave breaches into war crimes law’, 873 *International Review of the Red Cross* (2009) 163-183.

see the same amount of cases before the ICC dealing with aggression, it is nevertheless an important signal to have criminalized this international act which for such a long time has been dealt with very carefully because of the many political implications. Of course, it will pose an additional challenge to the judges of the ICC to come up with a sensible interpretation of the respective qualifier. But one could even say that one more challenge does not really make a difference in this regard.

## 6. Mental Requirements for the Crime of Aggression

Article 8*bis* does not contain any special requirement concerning the mental elements which have to be fulfilled. Therefore, there is no special intent like that required for the crime of genocide, and instead reference has to be made to the general clause contained in Article 30 of the Rome Statute.<sup>58</sup>

However, the Elements of Crimes contain some clarifications which can be important when determining either the mental element or questions of mistake of fact or mistake of law (Article 32 Rome Statute). Paragraph 2 of the Introduction of the newly drafted Elements of Crimes (EoC Introduction) for Article 8*bis* states that “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations”. In the same way, paragraph 2 of the EoC Introduction clarifies that “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.” This stands in line with Article 32 (2) of the Rome Statute laying down that “[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility”.<sup>59</sup> Insofar, one could say that the respective paragraphs in the Elements of Crimes are just stating what should already be obvious from the general part of the Rome Statute. However, this redundancy is not new to the wording of the Elements of Crimes, and results from the concerns of some Member States that certain aspects should be made so clear that they cannot be misunderstood. In that regard, it is not surprising that the actual Elements further clarify that not the legal

<sup>58</sup> For the relation between the definition of aggression and the general provisions of the Rome Statute and especially Article 30, see Clark, *supra* note 7, 1109-1110.

<sup>59</sup> See also O. Triffterer, ‘Article 32’, in: O. Triffterer, *Commentary on the Rome Statute*, 2nd ed. (2008), 895-914.

evaluation, but the knowledge of the factual circumstances is decisive. Paragraph 4 of the Elements states that “The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations”, while paragraph 6 clarifies that “[t]he perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations”. Again, all this should already be clear from Article 30 which requires the perpetration of a crime with “intent and knowledge”, the latter being defined in paragraph 3 as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>60</sup> Insofar, the Elements of Crimes do not add anything to the mental element of the crime of aggression, but clarify the interpretation of the respective articles – which is the objective of the Elements of Crimes in the first place.

## 7. Individual Criminal Responsibility: the Amendment of Article 25

One of the main systemic problems created by the new definition of the crime of aggression as a leadership crime is the relationship to Article 25 of the Rome Statute dealing with individual criminal responsibility. The sub-paragraphs (a) to (d) were questioned as to whether they would be suitable to apply in cases of aggression. There were times when it was suggested to exclude any residual effect of those provisions.<sup>61</sup> The solution which was presented at the Rome Conference, and which was finally adopted by the Member States, inserts in Article 25 a new paragraph 3*bis* with the following wording:

“3*bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.”

This solution enables the judges to use the general provisions dealing with individual criminal responsibility, but at the same time ensures that the

<sup>60</sup> It would lead too far here to discuss the “clarity” of this Article which in the end can actually be coined as not being the best drafted article of the Statute. For more details see D.K. Piragoff, ‘Article 30’, in O. Triffterer (ed.), *Commentary on the Rome Statute*, 2nd ed. (2008), 849-861.

<sup>61</sup> R. S. Clark, ‘The Crime of aggression’, in C. Stahn & G. Sluiter, *The emerging practice of the International Criminal Court* (2009), 709, 718.

crime of aggression stays a leadership crime.<sup>62</sup> It is thereby prevented that through the “backdoor” of accessory responsibility perpetrators who are not in a position of control foreseen by Article 8*bis* would become liable.

## II. The Exercise of Jurisdiction Over the Crime of Aggression

As stated at the beginning of this paper, the open question before Kampala was whether the Member States would find agreement on the trigger mechanism for the exercise of jurisdiction over the crime of aggression. The proposal by the Special Working Group presented in February 2009 suggested an Article 15*bis* with two alternatives and various options giving the Security Council (and other bodies like the ICJ and the General Assembly) either the power to determine whether there was an act of aggression or giving the Prosecutor the possibility to start an investigation with or without authorization by the Security Council.<sup>63</sup> Before Kampala the exercise of jurisdiction was seen as the crucial point which could bear the brunt of the blame if there was no agreement at the Review Conference.

### 1. The Two-Tiered Approach of Article 15*bis* and Article 15*ter*

To the surprise of most of the observers, the Member States not only adopted a definition of aggression, but also came up with a solution to the jurisdiction problem. The key to the success seems partly to have been to split up the provisions dealing with the jurisdiction in two different provisions, Article 15*bis* dealing with the exercise of jurisdiction over the crime of aggression in the case of State referrals as well as *proprio motu* investigations on the one side, and Article 15*ter* dealing with the exercise of jurisdiction in cases of Security Council referrals. This splitting-up into two

<sup>62</sup> See Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, para. 25 which also stresses that this “provision was sufficiently broad to include persons with effective control over the political or military action of a State but who are not formally part of the relevant government, such as industrialists”; *cf.* also K. Ambos, ‘Strafrecht und Krieg: strafbare Beteiligung der Bundesregierung am Irak-Krieg?’ in J. Arnold, B. Burkhardt, and W. Gropp (eds), *Menschengerechtes Strafrecht, Festschrift für Albin Eser* (2005), 671, 677 who already emphasised before the definition found in Kampala that aggression is a leadership crime.

<sup>63</sup> On the relationship between Security Council and ICC with regard to the crime of aggression see e.g. N. Blokker, *supra* note 19.

articles came up during the Review Conference, originally trying to accommodate other concerns, but worked out to be the decisive step in order to reach agreement on the crime of the jurisdiction.<sup>64</sup> The main difference between these two provisions is the fact that in a case of a Security Council referral, there is no need for the determination of an act of aggression, nor does the Prosecutor have to wait for a determination. For the cases of State referrals and *proprio motu* investigations a special procedure was developed in which the prosecutor has first to ascertain whether a determination of an act of aggression has been made<sup>65</sup> by the Security Council, and if not, has to wait six months before he may proceed with the investigation provided that the Pre-Trial Division has authorized the commencement of the investigation.<sup>66</sup>

Whether it was good to come up with two different procedures for the exercise of jurisdiction with regard to the crime of aggression, remains to be seen in the future. However, at first glance, this distinction makes sense, since in the case of a Security Council referral there seems to be no need to get a separate determination of an act of aggression from this organ because this is the one situation in which there should be no question of conflicting competences.

## 2. The Entry into Force of the Definition of the Crime of Aggression

What is striking concerning both respective articles is the fact that although at first glance they claim to deal mainly with the exercise of jurisdiction, both Article 15*bis* (3) and Article 15*ter* respectively address something completely different as well: provisions which appear to modify the amendment procedure concerning the crime of aggression. This is new because originally the necessary article dealing with the amendment procedure, Article 121, could be found in part 13 of the Rome Statute entitled “Final Clauses”. In fact, before the Review Conference in Kampala, there was a rather vivid discussion within the Special Working Group about

<sup>64</sup> See for a description of the events and the presentation of the President of the ASAP’s non-paper with the respective new structure J. Harrington, ‘The President’s Non-paper on the Crime of Aggression (Updated)’, 10 June 2010, available at <http://www.ejiltalk.org/the-presidents-non-paper-on-the-crime-of-aggression/> (last visited 27. August 2010)

<sup>65</sup> Art. 15*bis* (6), Resolution RC/Res.6, Annex I.

<sup>66</sup> Art. 15*bis* (8), *supra* note 65.

the question as to which was the correct paragraph to be applied to the amendment concerning the crime of aggression.<sup>67</sup> While some assumed that Article 121 (5) should be applied, which explicitly said that “[a]ny amendment of Articles 5, 6, 7 and 8 of this shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance”, others would argue that *stricto sensu* there was no “amendment” to Article 5, therefore the procedure laid down in Article 121 (4) requiring seven-eighths of the States Parties to deposit their instrument of ratification.<sup>68</sup> Yet others believed that because of Article 5 (2) there was no ratification process needed at all, just a respective decision by the Review Conference. Turning to operative paragraph 1 of the Adopting Resolution, this provides now that the Review Conference:

“[d]ecides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court [...] the amendments to the Statute contained in annex 1 of the present resolution, which are subject to ratification or acceptance and shall enter into force *in accordance with article 121, paragraph 5*; and notes that any Party may lodge a declaration referred to in Article 15*bis* prior to ratification or acceptance”.<sup>69</sup>

The Member States hereby make a clear statement in favour of the Article 121(5) procedure, which should solve all problems raised before the conference. But does it really? First of all, it seems questionable whether it is up to the States Parties which procedure to choose. Second of all, in the respective resolution they even go one step further. They lay down *additional conditions* which have to be fulfilled in order for the Court to be able to exercise its jurisdiction. Paragraph 2 of both Article 15*bis* and

<sup>67</sup> See, e.g. Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 June 10 June 2009, ICC-ASP/8/INF.2, (2009), at 21, Annex IV, para. 9-14.; see also Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, paras 32-43; for an analysis of this problem, see D.M. Ferencz, ‘Bringing the Crime of Aggression within the Active Jurisdiction of the ICC’, 42 *Case Western Reserve Journal of International Law* (2009) 1&2, 531-542.

<sup>68</sup> See also in general on the amendment procedure, R.S. Clark, ‘Article 121’, in: O. Triffterer (ed.), *Commentary on the Rome Statute*, 1751.

<sup>69</sup> Emphasis added by author.

Article 15*ter* add a first additional condition by requiring that “[t]he Court may exercise jurisdiction only with respect to crimes of aggression committed *one year after the ratification or acceptance* of the amendments by *thirty States Parties*”.<sup>70</sup> Furthermore, paragraph 3 of both articles demands that “the Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute”. Therefore, it seems that in addition to the requirements of Article 121 (5), two additional conditions have been inserted. However, there even seems to be the view among some commentators that already with the fulfilment of these additional conditions (i.e. the ratification of 30 Member States and the 2/3-majority decision to be taken after 1 January 2017), the amendments enter into force for *all* Member States. It is currently under discussion whether this is actually possible, and whether this is not an implied amendment of Article 121 (5).<sup>71</sup> Although this debate might be interesting from a law of treaties point of view, in a certain way the discussion is moot. Since the Resolution was adopted by consensus it appears to be the clear will of the Member States to proceed in this way.<sup>72</sup> In principle, the decision to proceed according to Article 121 (5) can only be welcomed. It seemed rather construed to apply Article 121 (4) in the first place, since it was much more persuasive to argue that Article 121 (5) provides the procedure for amendments which deal with the substantive crimes laid down in Articles 5, 6, 7 and 8. The fact that, even if the necessary 30 ratifications have been deposited, we will have to wait at least until 1 January 2017 before the Court is able to exercise its respective jurisdiction is something which has to be accepted, giving in to concerns of

<sup>70</sup> Emphasis added by author; this idea was already presented in Report of the Special Working Group, ICC-ASP/7/20/ Add.1, para. 30; interestingly the Special Working Group concluded that “No support was expressed for such a possibility, in particular as a number of delegations preferred that the Court’s subject-matter jurisdiction over the crime of aggression be activated upon the adoption of the amendments on aggression by the Review Conference. The point was also made that such a minimum number of ratifications was inconsistent with the wording of Article 121 (5) of the Rome Statute.”

<sup>71</sup> See D. Akande, ‘What Exactly was Agreed in Kampala on the Crime of Aggression’, 21 June 2010, available at <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited 27 August 2010).

<sup>72</sup> Even Japan, being the State which was very much opposed to this approach and seemed to have preferred the article 121 (4) procedure did not object to the consensus in the end.

some States. The argument that the amendments would enter into force without the additional decision by the Member States might of course also be put forward. In the end it does not make a difference, since the Court would not be able to exercise its jurisdiction before the respective decision is taken (in 2017 or even later). This “delayed” start for the jurisdiction over aggression seems to be beneficial for all. Against the background of the principle of complementarity, the States Parties now have time to bring their national legal system in accordance with the requirements of the new definition. But it also gives the Court some more time to establish itself as the permanent Court dealing with international crimes. By then the first final judgments will have been rendered in the cases already before the Court.<sup>73</sup> It might have been too much for this young international organisation to face another challenge and to deal with this new jurisdiction over the crime of aggression too soon.

### 3. The Opt-Out Clause Contained in Article 15*bis*, Paragraph 4

One of the most interesting results of the Review Conference with regard to the crime of aggression is the clause contained in paragraph 4 of Article 15*bis* dealing with the possibility for States Parties to opt-out from the jurisdiction over the crime of aggression by lodging a respective declaration with the registrar. This provision was put forward during the final days of the Conference.<sup>74</sup> However, it is not completely clear what exactly the scope of application is for this provision. While this kind of provision would have made sense in case the amendment procedure was to be determined by Article 121 (4), and then a State which is belonging to the minority that did not ratify the amendment had a chance to exclude the jurisdiction over its nationals, this argument *prima facie* can not be raised now that States Parties have settled for the Article 121 (5) procedure. According to the second sentence of this provision, it is clear that “[i]n respect of a State Party which has *not* accepted the amendment, the Court

<sup>73</sup> Although it will probably still take some time until the first final judgment has been rendered, having in mind that in July 2010 Trial Chamber I again stopped the proceedings in the *Lubanga* case, *cf.* ICC Press release of 8 July 2010, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr555> (last visited 27. August 2010).

<sup>74</sup> *Cf.* J. Harrington, ‘The President’s Non-paper on the Crime of Aggression (Updated)’, 10 June 2010, available at <http://www.ejiltalk.org/the-presidents-non-paper-on-the-crime-of-aggression/> (last visited 27 August 2010).

shall not exercise its jurisdiction regarding a crime covered by the amendment.”

Therefore, one can think of a couple of questions which follow from this paragraph: why would a State Party which has accepted the amendment afterwards want to opt-out of the regime again? Would it then not be more sensible not to ratify the amendment in the first place? Furthermore, why would a State Party which has not accepted the amendment lodge a declaration of opting out, since Article 121 (5) makes it crystal clear that the Court would not be able to exercise its jurisdiction regarding that crime? There are some answers which come to mind, which are however, not completely persuasive.<sup>75</sup> First, it might be that a State Party wants the Security Council referral mechanism for the crime of aggression to be enacted, therefore ratifies the amendment, but does not want the Article 15*bis* system to be operative for itself. The answer to the second question could be that even though a State Party has not ratified the amendment, it wants to ensure that it definitely will not be subject to the jurisdiction of the Court with respect to the crime of aggression. Some commentators seem to think that all States Parties are bound to the amendments – i.e. even though they have not accepted or ratified them – unless they opt out.<sup>76</sup> This latter interpretation definitely would explain the need for an opt-out clause. However, although this approach might be understandable from a political standpoint, legally it is not completely persuasive. In the end, one could get the impression that paragraph 4 has been hastily inserted in Article 15*bis* without bringing it completely in coherence with the articles dealing with the amendment procedure.

<sup>75</sup> Giving a first overview over the discussion which is at the moment mainly taking place on international law blogs, see D. Akande, ‘What Exactly was Agreed in Kampala on the Crime of Aggression’, 21 June 2010, , available at <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited on 27 August 2010); see also W.A. Schabas, ‘The Kampala Review Conference: A Brief Assessment’, at <http://humanrightsdoctorate.blogspot.com/2010/06/kampala-review-conference-brief.html> (last visited on 27 August 2010); and K. J. Heller, ‘The Sadly Neutered Crime of Aggression’, at <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/> (last visited on 27 August 2010).

<sup>76</sup> E.g. W. A. Schabas, *supra* note 75.

#### 4. The Exercise of Jurisdiction for State Referrals and *proprio motu* Investigations

In order to summarise the further procedure contained in Article 15*bis* for the exercise of jurisdiction for State referrals and *proprio motu* investigations, a short overview will be given over the remaining paragraphs. Paragraph 5 is especially important with regard to non-States Parties because it makes clear that “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory”. This provision was necessary because under the conditions of Article 12 it theoretically would have been possible for the Court to exercise its jurisdiction with respect to the crime of aggression over non-State Parties.<sup>77</sup> However, in order not to further alienate States like the United States, Russia or China from the Court, it was agreed to make an exception from the principles contained in Article 12.

Finally, paragraphs 6 to 8 highlight the procedure the Prosecutor has to follow in cases of State referral or investigations *proprio motu*: when he has concluded that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, “he shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.” He shall also notify the UN Secretary General accordingly (paragraph 6). If the Security Council has already made such a determination, the Prosecutor can proceed with the investigation (paragraph 7). In case no such determination has been made by the Security Council after six months, and provided the Pre-Trial Division has authorized the investigation in accordance with Article 15, the Prosecutor can also proceed with the investigation (paragraph 8). The possibility of the Prosecutor to investigate crimes of aggression without an explicit determination by the Security Council definitely comes as a surprise, considering the fact that there were options in the original proposal of the Special Working Group which would not have allowed for this.<sup>78</sup> In this context, one has to keep in mind that with France and the United Kingdom we have two of the five permanent Security Council members among the ICC Member States.

<sup>77</sup> In general on the mechanism laid down in Article 12 see S. A. Williams, ‘Article 12’, in O. Triffterer, *Commentary on the Rome Statute*, 547-561.

<sup>78</sup> See proposed Article 15*bis* (4), alternative 1, option 1 in the Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, Appendix I.

However, Article 15*bis* foresees various safeguards to ensure the special position of the Security Council with regard to acts of aggression: the last half-sentence of paragraph 8 makes clear that the Prosecutor is only allowed to proceed with his investigations “provided [...] the Security Council has not decided otherwise in accordance with Article 16”. This shows that even in case there is no express determination by the Security Council, the organ with the primary responsibility for international peace and security can defer an investigation under Article 16. Again, this did not need to be expressly re-stated, since Article 16 from its ambit applies to all investigations of the Prosecutor, but probably this was necessary to ensure the agreement of the P-2 (France and the United Kingdom).

Paragraph 9 and 10 finally contain two clarifications: First, it is stated that “[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute”. This provision is important since it ensures that in cases where the Security Council, which in the end is a political organ, has made a respective determination, the Court is independent to come to another conclusion. Second, since Article 15*bis* contains quite a number of special regulations for the exercise of jurisdiction over the crime of aggression, there should be no misunderstanding about the fact that “[t]his Article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5”. Both paragraphs have been taken over from the Special Group’s proposal from February 2009.

## 5. The Exercise of Jurisdiction for Security Council Referrals: Article 15*ter*

Concerning the exercise of jurisdiction over the crime of aggression with respect to Security Council referrals the most important elements have already been mentioned above. The procedure envisaged in Article 15*ter* is much simpler than the one of Article 15*bis*: the most important provision is paragraph 1 which states that “[t]he Court may exercise jurisdiction over the crime of aggression in accordance with Article 13(b), subject to the provisions of this article”. This means that the same procedure has to be complied with which is already known from the Security Council referral with respect to the three other crimes. It follows that there does *not* have to be an explicit determination by the Security Council with regard to the existence of an act of aggression. The only factor which has to be kept in mind is that the same restrictions concerning the exercise of jurisdiction (paragraph 2: one year after 30 ratifications) and the prerequisite of a

decision by the States Parties subject to certain conditions after 1 January 2017 (paragraph 3) remain in place. Paragraphs 4 and 5 are identical to paragraphs 9 and 10 of Article 15*bis* described above. This underlines that the more complicated procedure is contained in Article 15*bis*.

## D. Conclusion

Before the Review Conference in Kampala, commentators were divided whether it would be the right time to come to an agreement on the crime of aggression.<sup>79</sup> Many people – including the present author – were also sceptical whether it would be good for the Court in the long run to be faced with the politically charged crime of aggression, and whether it would ever be possible to reach consent on this difficult matter. Against this background, the Resolution which was adopted by consensus in Kampala defining the crime of aggression and providing a solution for the difficult relationship between the ICC and the Security Council with regard to the exercise of jurisdiction, must already be characterised as yet another revolution in the field of international criminal law, even though there still are some hurdles to cross before the respective amendment will enter into force.

Of course, if one examines the definition of the crime of aggression in Article 8*bis*, one may conclude that – especially from a criminal law perspective – the chosen solution is far from perfect. Yes, Article 8*bis* would not withstand a strict application of the principle of legality in national criminal law. But, if we are honest, few of the substantial provisions contained in the statutes of international criminal tribunals do. The reason is simply that this principle is not so strictly applied in international law. Despite the incorporation of the principle of legality in Articles 22 and 23 of the ICC Statute, one has to take into account that international criminal law is still a young and slowly developing discipline. The definition of Article 8*bis* is another step towards a strengthening of a core of four commonly accepted international crimes: aggression, genocide, crimes against humanity and war crimes. The judges of the ICC will bear

<sup>79</sup> The present author actually doubted whether it would not be too much of a burden for this young institution to carry, expressing this opinion during the Conference on the Crime of Aggression organized by the German Red Cross and the German Association for the United Nations in Berlin on 3 May 2010, see for more information <http://www.dgvn.de> (last visited 1 August 2010).

some responsibility in further defining this crime, once the amendment has entered into force.

More remarkable are the provisions contained in Articles 15*bis* and 15*ter*. These have established a system to exercise jurisdiction over the crime of aggression, thereby attempting successfully to accommodate most of the concerns raised by Member States and also non-Member States. However, due to the time pressure in the “heat of the moment” during the Conference, the articles are far from perfect. Especially the provisions dealing with the entry into force of the amendments as well as the opt-out provisions are problematic because instead of creating legal certainty, they will fuel intense discussion “[o]n what was actually agreed in Kampala on the Crime of Aggression?”<sup>80</sup> No doubt, these results will stimulate academic debate for the years to come. One might be afraid that this will constitute a stumbling block to the entry into force of the amendments concerning the crime of aggression. However, now that the Member States have agreed on a regime for including the crime of aggression into the Rome Statute, it will in due time be operable as well. Academics as well as practitioners have enough time to ensure the gaps are filled.

<sup>80</sup> See the discussion which has already been cited numerous times: D. Akande, ‘What Exactly was Agreed in Kampala on the Crime of Aggression?’, 21 June 2010, available at <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited on 27 August 2010).