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The Role of the Security Council

in connection with

the Crime of Aggression

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I. Introduction

In the first ever Review Conference of the Rome Statute, State Parties of the International Criminal Court (ICC) as well as Observer States and Non-Governmental Organizations convened in Kampala, Uganda to adopt an amendment resolving decades of seemingly hopeless efforts to come up with a compromise laying out the conditions of jurisdiction over the crime of aggression as well as its definition.

As a logical consequence of the prohibition of the use of force recognized as *ius cogens*, individual criminal responsibility for the crime of aggression in the international criminal law realm remained contested.

The negotiated outcome reflects the complex political situation regarding the Permanent Members of the Security Council. The present paper seeks to provide a deeper understanding of the underlying historical difficulties in agreeing on what the Security Council's role should be regarding the prosecution of the crime of aggression to then turn to elaborate on the outcome produced at the conference.

At the time being the delay of the entry into force of the envisaged aggression regime is mirroring the state of the international community that it is not yet ripe to engage in the prosecution of the crime of aggression.

1. The Act of Aggression:

Pursuant to Art 39 of the Charter of the United Nations (the Charter) the Security Council (SC) “[...] shall determine the existence of any threat to the peace, breach of the peace, or an *act of aggression* and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”¹

In the ‘Definition of Aggression Resolution’² the General Assembly of the United Nations (GA) adopted Resolution 3314 (XXIX) which was meant as a guide to the Security Council in its determination of acts of aggression.³

¹ Emphasis added.

² General Assembly Resolution 3314 (XXIX) of 14 December 1974. available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement> (accessed 28.12.2010).

³ Frowein, J./Krisch, N., Article 39, Simma, B. (ed.). The Charter of the United Nations: A Commentary, vol. I. (2002) para. 14 at p. 722.

It is widely acknowledged that an Act of Aggression is limited to the use of armed force (applying a teleological interpretation of Art 2(4) of the Charter) and therefore not including economic and/or political coercion, a notion that is confirmed by the Friendly Relations Declaration (FRD)^{4,5}

Generally, in public international law, it is widely established, as the House of Lords stated in the *Jones*⁶ case that “waging aggressive war is a crime under existing international law. Numerous authoritative statements support this conclusion, from General Assembly and Security Council resolutions to statements of the International Law Commission and the Rome Statute itself, which leaves open the definition of the crime but not the criminality of aggression as such.”⁷

2. Relationship btw Art. 39 Powers of the Security Council and the ICC:

*M. Glennon*⁸ lays out three principal interpretations of the wording of Art. 39 in the light of the supremacy provision of Art. 103 of the Charter:

Firstly, the concurrent power of the Security Council meaning that a determination of aggression with respect to state conduct is only for the “purpose of imposing sanctions under Article 41 or authorizing the use of force under Article 42, thus leaving another international organization such as the ICC free to determine the existence or nonexistence of aggression with respect to individual conduct that would trigger criminal liability.”⁹ And meaning that an Art. 39 determination is a necessary precondition for taking further action under Chapter VII - albeit not always very consistent¹⁰ - meaning that without such determination it cannot be considered a binding decision under Chapter VII of the Charter.¹¹

⁴ Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) of 24 October 1970.

⁵ *De Wet, E.*, The Chapter VII Powers of the United Nations Security Council, Oxford 2004, 145,146.

⁶ *R v. Jones and others* (2006) UKHL 16, (2006) All ER 741, at paras 19 (Lord Bingham), 59 (Lord Hoffmann), 99 (Lord Mance).

⁷ *Paulus, A.*, Second Thoughts on the Crime of Aggression, 20 *European J.I.L.* 4, (2009) at p. 1118.

⁸ Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University; Professeur Invite, University of Paris II, Pantheon-Assas.

⁹ *Glennon, M.*, The Blank-Prose Crime of Aggression, 35 *Yale J. Int'l L.* 71 (2010) at pp. 104-105.

¹⁰ *Schweigman, D.*, The authority of the Security Council under chapter VII of the UN Charter: legal limits and the role of the International Court of Justice, (2001) at p. 184.

¹¹ *Ibid.*, at p. 185.

Following this interpretation, the Security Council's authority to determine existence or nonexistence of an act of aggression is without prejudice to other international organizations for their own, e.g. judicial purposes.¹² Differing findings would therefore be permitted.¹³

Secondly, Art. 39 could be construed as conferring authority upon the Security Council that silence on its part would constitute acquiescence and conflicting findings would not be permitted.¹⁴

Thirdly, the plenary power of the Security Council essentially meaning that no findings concerning aggression, conflicting or not, could be made by another international organization under this interpretation.¹⁵

The author is supporting the concurrent power because of the rationale that the obligations that flow from the different determinations (by either the ICC or the Security Council) are in fact different obligations for different purposes (investigation, arrest, trial, detention of individuals regarding the ICC and on the other hand enforcement of sanctions against noncompliant states by the Security Council concerned with the maintenance of international peace and security). "A state, the argument would go, can carry out one set of obligations without undermining the other; viewed correctly, the two sets of duties will not in fact be seen as conflicting with each other, and Article 103 would therefore be inapposite."¹⁶

¹² *Glennon, M.*, The Blank-Prose Crime of Aggression, 35 *Yale J. Int'l L.* 71 (2010) at p. 105.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

II. Background and Development of the Crime of Aggression

1. The (exceptional) nature of the Crime of Aggression:

The nature of the crime of aggression was famously described in the International Military Tribunal (IMT) in Nuremberg termed ‘crimes against peace’ the “supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”.¹⁷ Because of its direct link to *jus ad bellum* it is deeply (more than in the other crimes of the Rome Statute¹⁸)¹⁹ embedded in peace maintenance.²⁰

Furthermore, as opposed to the other core crimes contained in Art. 5 of the Statute, there is no element of immediacy or directness involved²¹ and that only when State aggression exists can the individual commit the crime of aggression.²² The Security Council’s primary responsibility regarding the maintenance of international peace and security is, however, not exclusive.^{23,24}

2. Historical Abstract on the Notion of Aggression:

As early as 1758, “the Swiss jurist, Emmerich de Vattel wrote, in his Law of Nations, that the sovereign who takes up arms without a lawful cause is ‘chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes. He is guilty of a crime against the enemy [...] he is guilty of a crime

¹⁷ *France et al. v. Göring et al.*, 1947, 41 AJIL 172, 186 ; cited in *Schabas, W.*, The International Criminal Court: a commentary on the Rome Statute (2010) at p. 109.

¹⁸ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

¹⁹ Art. 5 of the Rome Statute of the International Criminal Court (the Statute) lists the crime of genocide; crimes against humanity; war crimes; crime of aggression.

²⁰ *Stahn, C.*, The ‘End’, the ‘Beginning of the End’ or the ‘End of the Beginning’? Introducing Debates and Voices on the Definition of ‘Aggression’, *Leiden J.I.L.*, 23 (2010), at pp. 875-876.

²¹ *Schuster, M.*, The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword, *Criminal Law Forum* 14 (2003), at p. 22

²² *Ibid.*, at p. 36; See also, Proceedings of the Preparatory Commission, at Its Ninth Session (8–19 April 2002), UN Doc. PCNICC/2002/L.1/Rev.1, at p. 23.

²³ *Yengejeh, S.*, Reflections on the role of the Security Council in determining an act of aggression, In: *The International Criminal Court and the crime of aggression*, Politi, M./Nesi G., (eds.) (2004), at p. 76.

²⁴ See e.g.: *Uniting for Peace Resolution* (United Nations General Assembly Resolution A-RES-377(V) on 3 November 1950); *Nicaragua Case* (Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. United States of America*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 of June 27 1986).

against his people [...] finally, he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example.”²⁵

In 1919 the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties²⁶ argued that because there is no competent compulsory jurisdiction to determine the legality of a war, aggression is not a part of international law.²⁷ However, following the havoc of World War I, the 1920s “saw various resolutions and protocols providing that a war of aggression is an international crime (among them the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, and unanimous resolutions of both the Eighth Assembly of the League of Nations in 1927 and the Sixth Pan-American Conference of 1928), but they lacked meaningful enforcement or sanctions.”²⁸

At Nuremberg the International Military Tribunal intended to “establish a binding precedent that aggression is a punishable crime, enforceable as a matter of international law”²⁹ The UN General Assembly resolved to adopt the Nuremberg Principles³⁰ in its first session that same year.³¹

Then in the 1950’s the International Law Commission’s (ILC) proposal for the establishment of an International Criminal Code³² failed because of disagreement for regarding the definition of aggression.³³ Another issue considered a problem during negotiations was the lack of national law penalizing aggression³⁴.

²⁵ *Ferencz, D.*, The Crime of Aggression: Some Personal Reflections on Kampala, Leiden J.I.L, 23 (2010), at p. 906.

²⁶ established by the preliminary peace conference of Paris in January 1919, see United Nations War Crimes Commission, ed. (1948). History of the United Nations War Crimes Commission and the Development of the Laws of War. London: His Majesty's Stationary Office.

²⁷ *Solera, O.*, Defining the Crime of Aggression (2007) at p. 18.

²⁸ *Ferencz, D.*, The Crime of Aggression: Some Personal Reflections on Kampala, Leiden J.I.L, 23 (2010) at p. 906.

²⁹ *Ferencz, D.*, The Crime of Aggression: Some Personal Reflections on Kampala, Leiden J.I.L, 23 (2010) at p. 906.

³⁰ See e.g., Crimes Against Peace, see Principle VI (a) of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal 1950, appeared in: Yearbook of the International Law Commission, 1950, vol. II, at para. 97.

³¹ *Ferencz, D.*, The Crime of Aggression: Some Personal Reflections on Kampala, Leiden J.I.L, 23 (2010) at p. 906.

³² Draft Code of Offences against Peace and Security of Mankind of 1954, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf (accessed 27.12.2010).

³³ *Stagel, D.*, Sicherheitsrat und Internationaler Strafgerichtshof: zur Abgrenzung ihrer Kompetenzen nach der Charta der Vereinten Nationen und dem Römischen Statut (2008) at pp. 3-4.

³⁴ See *Bruer-Schäfer, A.*, Der Internationale Strafgerichtshof: die internationale Strafgerichtsbarkeit im Spannungsfeld von Recht und Politik, (2001) at p. 167; see also *Zimmermann*, Die Schaffung eines ständigen Internationalen Strafgerichtshofes, *ZaöRV* 58, 1998, at p. 73; see also Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GA Official Records 50th Session, Suppl. No. 22 (A/50/22) 1995.

3. The Rome Statute and the Negotiations regarding Aggression:

When the Rome Statute establishing the International Criminal Court (ICC) was adopted in Rome in 1998, many of the Permanent Members of the Security Council (P-5) demurred.³⁵ While the United Kingdom and France have become Members to the ICC, Russia, the United States and China largely oppose the Court.³⁶

In a compromise the crime of aggression was included in Art. 5 (d) of the Statute after the crime of genocide, crimes against humanity, war crimes, the crime of aggression.³⁷ The exercise of jurisdiction, however, was delayed until an amendment to the Statute is adopted by the Assembly of States Parties pursuant to Art. 5 (2).³⁸

In general three considerations produced this result:

Firstly the question to even include the crime of aggression into the statute was contested. Secondly, if included, the question of the role of the Security Council, and thirdly the definition of the crime.³⁹ The United States and the United Kingdom opposed including it in the Statute although another permanent member, France did not.⁴⁰ The 'like-minded states'⁴¹, were frustrated by the major power's opposition to the establishment of the ICC. The Labour Party's victory in the British elections of 1997 proved to be a positive impulse towards a successful adoption of the Rome Statute.⁴²

The compromise now contained in the Statute was adopted during the last day of the conference.^{43,44} The issue of the role of the Security Council in determining aggression proved to be the most controversial.⁴⁵ The P-5 indicated that they would only agree on the inclusion of the crime provided that the court would exercise

³⁵ *Weiss, T/Daws, S.*, The Oxford Handbook on the United Nations (2008), at pp. 128-129.

³⁶ *Ibid.*

³⁷ *Schabas, W.*, The International Criminal Court: a commentary on the Rome Statute (2010) at p. 112.

³⁸ i.e. until "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 this crime." Art. 5 (2).

³⁹ *Lee, R.*, The International Criminal Court: the making of the Rome Statute; issues, negotiations, results (1999) at p. 82.

⁴⁰ *Schabas, W.*, The International Criminal Court: a commentary on the Rome Statute (2010) at p. 111.

⁴¹ A handful of Western European and Latin American states (later joined by a number of states from different regions) albeit they "did not agree on every issue, they were committed, as a group, to the success of the Rome Conference and the creation of the court", see *Arsanjani, M.*, The Rome Statute of the International Criminal Court, 93 American J.I.L., 22 (1999), at p. 23.

⁴² *Arsanjani, M.*, The Rome Statute of the International Criminal Court, 93 American J.I.L., 22 (1999), at p. 23.

⁴³ *Schabas, W.*, The International Criminal Court: a commentary on the Rome Statute (2010) at p. 112.

⁴⁴ 120 votes in favour, 7 against, 21 abstentions, see *Politi, M.*, The international criminal court and the crime of aggression (2004) ref 2 at p. 55.

⁴⁵ *Politi, M.*, The international criminal court and the crime of aggression (2004) at p. 55.

jurisdiction only after the Council determined that an act of aggression had occurred.⁴⁶ On the other hand this was fiercely opposed by the Nonaligned Movement.⁴⁷

Regarding the definition there were three basic approaches considered: First a general definition, containing general criteria for the crime, second a general definition with a list of acts that might or should be considered as an Act of Aggression (based on the GA Res 3314 (XXIX) of Dec 1974), thirdly, no definition and simply leaving it to the Council's discretion.⁴⁸ The new approach which is now contained in the Statute is based on a submission by the Nonaligned Movement.⁴⁹

On the one hand, State Parties submitted sovereignty issues and the lack of domestic criminalization of aggression to make its arguments as well as the stance that whether or not use of force is considered an act of aggression is a mere political question and therefore falls solely into the competence of the Security Council as essentially a political organ.⁵⁰ On the other hand, a decisive role of the Council was engaged with concerns over the independence of the Court (e.g. the P-5 would never be subject to prosecution for aggression without their consent). And that "a central factual issue in a judicial debate would be left to what is essentially a political body."⁵¹

The Draft Articles prepared by the International Law Commission gave the Council initially wide 'veto' powers i.e. that the court would only have jurisdiction when the council agreed.⁵²

It contained "[t]wo Categories of options (both imposing a jurisdictional filter upon the court) 1= redlight approach = requires the Security Council to recognize the commission of an act of aggression, or only a situation is referred to the court without a position 2= green light approach = operational after SC has not acted for 6 months, then either Pre-Trial Chamber, ICJ or GA gives green light as a prerequisite to prosecution."⁵³

⁴⁶ *Arsanjani, M.*, The Rome Statute of the International Criminal Court, 93 American J.I.L., 22 (1999), at pp. 29-30.

⁴⁷ *Lee, R.*, The International Criminal Court: the making of the Rome Statute; issues, negotiations, results (1999) at p. 82.

⁴⁸ *Ibid.*, at p. 82.

⁴⁹ *Ibid.*, at p. 85.

⁵⁰ *Politi, M.*, The Rome Statute of the International Criminal Court: a challenge to impunity (2002) at p. 39.

⁵¹ *Ibid.*

⁵² *Ibid.*, at p. 40.

⁵³ *Ibid.*, at p. 114-115.

III. The Kampala Review Conference

1. The Preparatory Work prior to the Review Conference:

In 2002, the Special Working Group on the Crime of Aggression (SWGCA, Working Group) was established by the Assembly of States Parties (ASP) of the ICC to address the questions regarding a definition and issues of jurisdiction over the crime of aggression. The SWGCA was comprised of member-states as well as non-members of the ICC.⁵⁴ However, after the United States ‘unsigned’ the Rome Statute on May 6, 2002, it did not participate in the discussions of the SWGCA either.⁵⁵ Its preparatory work was rewarded with adopting a definition of the crime of aggression in February 2009⁵⁶, making the Working Group confident that “[they] would be able to adopt the definition by consensus, and therefore used the formula ‘Definition Plus’ as the goal for an outcome.”⁵⁷

The fundamental difficulty, i.e. the issue of the jurisdictional filter, could not be solved in the preparatory work. This rooted in controversy over the role of the SC, which is a rather political question⁵⁸ for governments i.e. whether there “should be a continued role for the Security Council in the jurisdictional framework in the absence of an explicit decision by the Council on aggression, and whether that role should reflect the reality of how the Council actually operates.”⁵⁹

⁵⁴ *Clark, Roger S.*, Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It, *European Journal of International Law*. Oxford:Nov 2009. Vol. 20, Iss. 4, at p. 1104.

⁵⁵ *Glennon, M.*, The Blank-Prose Crime of Aggression, 35 *Yale J. Int'l L.* 71 (2010) at p. 112.

⁵⁶ Report of the Special Working Group on the Crime of Aggression, February 2009, ICC-ASP/7/20/Add.1.

⁵⁷ *Wenaweser, C.*, Reaching the Kampala Compromise on Aggression: The Chair’s Perspective, *Leiden J.I.L.*, 23 (2010), at pp. 883-884.

⁵⁸ Human Rights Watch, Making Kampala Count Advancing the Global Fight against Impunity at the ICC Review Conference, (2010) at para. 97.

⁵⁹ *Scheffer, D.*, The International Criminal Court and the Crime of Aggression: A Pragmatic Approach to Jurisdictional and Definitional Requirements for the Crime of Aggression in the Rome Statute, 41 *Case W. Res. J.I.L.* 397 (2009) at p. 401.

An illustrative chart contained in the Report of the Working Group on the Review Conference (WGRC)⁶⁰ gives 4 possible solutions:

<p>Combination 1: Acceptance by aggressor State required + SC filter <i>Step 1: Prosecutor may only investigate situations where the aggressor State has accepted the Court's jurisdiction over the crime of aggression and present that case to the Security Council.</i> <i>Step 2: Prosecutor may only proceed with the Security Council's agreement.</i></p>	<p>Combination 2: Acceptance by aggressor State not required + SC filter <i>Step 1: Prosecutor may investigate any situation in which the victim State has accepted the Court's jurisdiction over the crime of aggression and present that case to the Security Council.</i> <i>Step 2: Prosecutor may only proceed with the Security Council's agreement.</i></p>	<p>Combination 3: Acceptance by aggressor State required + non-SC or no filter <i>Step 1: Prosecutor may only investigate situations where the aggressor State has accepted the Court's jurisdiction over the crime of aggression and present that case to the Security Council.</i> <i>Step 2: Prosecutor may proceed in the absence of a SC determination, either without any external filter² or on the basis of a "broader" filter (GA, ICJ).</i></p>	<p>Combination 4: Acceptance by aggressor State not required + non-SC or no filter <i>Step 1: Prosecutor may investigate any situation in which the victim State has accepted the Court's jurisdiction over the crime of aggression and present that case to the Security Council.</i> <i>Step 2: Prosecutor may proceed in the absence of a SC determination, either without any external filter or on the basis of a "broader" filter (GA, ICJ).</i></p>
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The 'non filter' option as well as the 'GA and ICJ option' in case of inaction by the SC was deleted in the first revision of the text.⁶¹

⁶⁰ Report of the Working Group on the Review Conference, ICC-ASP/8/20/Add.1, Annex II ,56.
⁶¹ Wenaweser, C., Reaching the Kampala Compromise on Aggression: The Chair's Perspective, Leiden J.I.L. 23 (2010), at p. 884.

3. At Kampala:

Three documents submitted by the Chair⁶² of the Working Group on the Crime of Aggression, formed the basis for the consultations at the Review Conference:

- Conference Room Paper on the Crime of Aggression⁶³
- Non-Paper by the Chair⁶⁴
- Draft Report of the Working Group on the Crime of Aggression⁶⁵

The Draft Report points out - while acknowledging the agreement on most issues⁶⁶ - that still two divergent views on the requirement of an alleged aggressor state to have accepted the courts active jurisdiction on the one hand, and the question how the Court should proceed when the Security Council did not make a determination of an act of aggression.⁶⁷

The Non-Paper⁶⁸ by the Chair⁶⁹ addressed certain issues such as the timing of the entry into force under Art 121 (5) which was considered early, and proposed a provision specifying that the Court should begin exercising jurisdiction at a later stage only not affecting the entry into force of the amendments (which was adopted in Art 15 bis (2)⁷⁰). A proposed review clause was not adopted. Domestic jurisdiction over the crime of aggression addressed the concerns that have been raised regarding the consequences of the amendments for the domestic jurisdiction over this crime. The Non-Paper proposed adding a paragraph to expressly exclude any consequences to domestic jurisdiction. This was added in the outcome to the understandings.⁷¹

At Kampala, the Conference Room Paper⁷² offers then only two alternatives on the issue of the role of the SC, one being that without a prior determination of an act of aggression the prosecutor may not proceed with the investigation, the other one

⁶² H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini (Jordan).

⁶³ RC/WGCA/1/Rev.2.

⁶⁴ Further elements for a solution on the Crime of Aggression, RC/WGCA/2 of 25 May 2010, including ideas to reach a compromise with the proposal to delay the entry into force of the amendment, see at para. 2.

⁶⁵ The Draft Report of the Working Group on the Crime of Aggression, RC/WGCA/3 of 6 June 2010.

⁶⁶ e.g. the definition of aggression envisaged in the conference room paper contained no brackets.

⁶⁷ Draft Report of the Working Group on the Crime of Aggression, RC/WGCA/3 of 6 June 2010, at para. 2.

⁶⁸ Non-Paper by the Chair : Further elements for a solution on the Crime of Aggression RC/WGCA/2.

⁶⁹ Chairman H.R.H. Mr. Zeid Ra'ad Zeid Al-Husseini (Jordan).

⁷⁰ Which reads: "The 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." Art 15 *bis* (2).

⁷¹ See para. 4, 5 of the Annex III, Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, RC/10/Add.1.

⁷² Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.2, June 7 2010, 4.

allowing the prosecutor to proceed with investigation where no such determination was made, waiting [6] months after the notification of the Secretary-General of the UN, provided that the Pre-Trial-Chamber has authorized the commencement of the investigation.

Chairman *Christian Wenaweser* admitted in “The Chair’s Perspective”⁷³ that “[t]he work done before Kampala had not led to an apparent narrowing of positions in this area.”⁷⁴ The UK and France (both State Parties to the ICC and Permanent Members of the Security Council) appeared to accept only the red light approach (see above) regarding the court’s jurisdiction over the crime until the last day of the conference.⁷⁵ The other P-5 members (US, China, Russia), not party to the ICC, attended the conference as observers,⁷⁶ with the intention to prevent any agreement between State Parties turning then - for tactical reasons - to support for the red light approach.⁷⁷ Arguing that Art. 39 of the UN-Charter bestows on them the ‘exclusive’ power to make determinations of the existence of an act of aggression, and thus a Security Council pre-determination of aggression is an essential precondition to exercise of the ICC’s jurisdiction.⁷⁸

On the other hand, this approach was fiercely opposed by African and Latin-American States, pointing out that Article 24 of the Charter confers primary but not exclusive power on the Council in respect of the maintenance of international peace and security.⁷⁹ A uniform position of the European Union was not formed because of the adamant position of UK and France.⁸⁰ The mostly bilateral negotiations between the Assembly of State Parties President *Christian Wenaweser*, paved the way for eventually adopting the proposed amendment by consensus in the 11th hour of the conference.⁸¹

⁷³ *Wenaweser, C.*, Reaching the Kampala Compromise on Aggression: The Chair’s Perspective, *Leiden Journal of International Law*, 23 (2010).

⁷⁴ *Ibid.*, at p. 884.

⁷⁵ *Schmalenbach, K.*, Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen, 65 *Juristen Zeitung* 15/16 (2010), at p. 746.

⁷⁶ Pursuant to Art. 12 of the Rules of Procedure of the Review Conference in conjunction with Art. 112 (1) of the Rome Statute.

⁷⁷ *Schmalenbach, K.*, at p. 746.

⁷⁸ *Clark, R.*, Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It, 20 *European J.I.L.*, 4, (2009) at p. 1113.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Schmalenbach, K.*, at p. 746.

III. The Kampala Outcome

1. Entry into Force:

The amendments were adopted by consensus in accordance with Art. 5(2) of the Statute and will enter into force pursuant to Art. 121(5) in conjunction with Art. 15 *bis* and *ter* paras. (2) and (3) respectively.

These provisions provide that the Court will not be able to exercise its jurisdiction over the crime of aggression until:

- at least 30 States Parties have ratified or accepted the amendments; and
- a decision is taken by two-thirds of States Parties to activate the jurisdiction at any time after 1 January 2017.⁸²
- only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.⁸³

2. The Conditions for the Exercise of Jurisdiction:

The text of articles 15 *bis* and 15 *ter* set out the conditions for the Court's exercise of jurisdiction over the crime of aggression. In contrast to the other crimes in the Statute, these articles establish a unique jurisdictional regime outlining when the ICC Prosecutor can initiate an investigation into a crime of aggression.

Article 15 *bis*

Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

Art. 15 *bis* reads as follows:

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

Art. 13 (a) *leg. cit.* in conjunction with Art. 14 of the Statute prescribes a state referral, allowing the prosecutor to proceed with an investigation when requested by the state concerned. Paragraph (c) refers to the prosecutor proceeding with an investigation *proprio motu*.

⁸² Art. 15 *bis* (3).

⁸³ Art. 15 *bis* (2).

3. The Opting-Out Clause:

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

The so-called opt-out clause provides that States Parties may opt-out of the Court's jurisdiction under the article by lodging a declaration of non-acceptance of jurisdiction with the Court's Registrar. Such a declaration can be made at any time (including before the amendments enter into force) and shall be reviewed by the State Party within three years.

This paragraph has been called hypocritical⁸⁴ and compared to the other crimes included in Art. 5 of the Statute it creates an asymmetry insofar as nationals of State Parties which have opted out under this provision are excluded from investigation and prosecution in a crime of aggression committed against another state party but protected from the same state party which has not opted out.⁸⁵ Admittedly, an opting-in model would be worse. Barring the ICC from investigation and prosecution requires an express declaration and therefore the need for political justification.⁸⁶

Consequently, State Parties including those most likely to use military force abroad may avoid prosecution regarding acts of aggression committed by its nationals or on its territory, by lodging such an opt-out declaration.⁸⁷ That said, one must bear in mind however, that the Security Council irrespective of the acceptance of jurisdiction may refer a situation with respect to an act of aggression committed by Non-Member State's nationals or on its territory.^{88,89}

⁸⁴ See *Heller, K.*, The Sadly Neutered Crime of Aggression, available at <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/> (accessed 30.10.2010)

⁸⁵ *Stahn, C.*, The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression', *Leiden Journal of International Law*, 23 (2010), at p 878.

⁸⁶ *Ibid.*

⁸⁷ *Murphy, S.*, Aggression, Legitimacy and the International Criminal Court, 20 *European J.I.L.* 4 (2009) at p. 1149.

⁸⁸ Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Annex III, RC/10/Add.1, at p. 1.

⁸⁹ See below.

4. Non-State Parties:

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

While it is generally agreed that in case a national of a Non-Party State commits genocide, crimes against humanity or war crimes on the territory of a State Party, the Court has jurisdiction.⁹⁰ However, regarding the crime of aggression Art. 15 *bis* (4) expressly excludes jurisdiction over Non-Party States when committed by that State's nationals or on its territory.

This result is viewed as a concession to military powers not members to the ICC, most importantly the United States which then presented the outcome as rather positive noting that the “prosecutor cannot charge nationals of non-state parties, including U.S. nationals, with a crime of aggression. No U.S. national can be prosecuted for aggression so long as the U.S. remains a non-state party. And if we were to become a state party, we'd still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.”⁹¹

5. State Referral and proprio motu:

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

The prosecutor may only proceed *proprio motu* with an investigation where he or she concludes that there is a reasonable basis to do so. This only after first ascertaining whether the Security Council (the Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents) has made a determination of the existence of an act of

⁹⁰ Clark, R., Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It, 20 European J.I.L. 4 (2009) at p. 1107.

⁹¹ Remarks by the head of the US Delegation Koh in a press briefing following the Kampala Conference, see Crook, J., Contemporary Practice of the United States relation to International Law: International Criminal Law: U.S. Delegation Active in ICC Negotiations to Define Crime of Aggression, 104 A.J.I.L. 511 (2010) at p. 513.

aggression (acting under Chapter VII of the UN Charter) and waiting for a period of 6 months for the Council to react. It may then, after the Pre-Trial Division of the Court has authorized the commencement of the investigation start its proceedings. The question arises what is to be understood by the wording 'determination of the existence of an act of aggression'? Could a determination of a threat to the peace, or breach of the peace be interpreted as implying an act of aggression and therefore giving green light for the commencement of the investigation into a crime of aggression?

The purpose of this provision is clear. It provides a means to initiate an investigation if the Security Council remains deadlocked and does not adopt a relevant resolution.⁹² However, it is not quite clear what the consequences of a negative determination⁹³ are. It could be understood that in cases of a determination of the situation concerned as a threat to the peace or a breach of the peace (interpreting it as implying an act of aggression) or in cases in which the SC makes a determination of an act of aggression in a present situation for strictly political reasons without referring it to the ICC, as having coverage in the present wording of the amendment.⁹⁴

Accepting this as green light for the ICC to investigate would, however, ignore the established practice of the Security Council of carefully choosing the wording of a resolution, and would thus constitute interpretation against otherwise clear intentions.⁹⁵ In the opinion of the author such attempts at giving clear wording a very broad interpretation is reminiscent of the Second Admission Opinion⁹⁶ in which the wording of 'recommendation' was argued to also including a negative vote by the Security Council, a notion that was rejected by the ICJ with good reasons.⁹⁷

⁹² *Anderson, M.*, Reconceptualizing Aggression, 60 Duke L.J. (2010) at pp. 440-441.

⁹³ A resolution deciding whether or not referring to the ICC, and determining that no act of aggression took place.

⁹⁴ *Anderson, M.*, Reconceptualizing Aggression, 60 Duke L.J. (2010) at pp. 440-441.

⁹⁵ ICC, Assembly of States Parties, Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, P 30, ICC Doc. ICC-ASP/6/SWGCA/INF.1 (July 25, 2007) ("Under such an approach a Council decision might be interpreted as [a] de facto determination of an act of aggression, irrespective of the Council's intention."), cited in *Anderson, M.*, Reconceptualizing Aggression, 60 Duke L.J. (2010) at pp. 440-441.

⁹⁶ Competence of the General Assembly for the Admission of a State to the United Nations, advisory opinion, (1950) ICJ Reports 4.

⁹⁷ *Klabbers, J.*, An Introduction to International Institutional Law (2002) at p. 109.

The Council, for example, referred the situation in Darfur,⁹⁸ but it did not specifically allege a crime of aggression.⁹⁹ Accordingly, as pointed out above, Art. 15 *bis* (7), only makes sense when interpreting the wording 'determination' as a positive determination of an act of aggression by the Security Council acting under Chapter VII of the Charter.¹⁰⁰

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

In the (rather unlikely) case the Security Council has made a determination of an act of aggression (acting under Chapter VII of the Charter) the Prosecutor simply proceeds with the investigation into the crime of aggression with respect of the situation concerned.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

When there is no 'such' determination (i.e. no resolution adopted by the Security Council determining an act of aggression or a resolution which refers to the situation concerned 'merely' as a breach of the peace or a threat to the peace)¹⁰¹ within six months after the date of notification of the Secretary-General of the UN the Prosecutor may proceed with the investigation in respect of a crime of aggression after the authorization of the Pre-Trial Division, following the procedure laid down in Art. 15 of the Rome Statute.

6. Deferral by the Security Council:

The Security Council may however - in accordance with Art. 16 in conjunction with Art. 15 *bis* (8) - decide otherwise and halt any investigation. Such a deferral by the Council pursuant to Art. 16 has the effect that "[n]o investigation or prosecution may

⁹⁸ Because Sudan has not ratified the Rome Statute.

⁹⁹ Deciding "to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court" without alleging any specific crime, S.C. Res. 1593, U.N. Doc. S/RES/1593 of March 31 2005.

¹⁰⁰ *Scheffer, D.*, *The Complex Crime of Aggression under the Rome Statute*, Leiden J.I.L., 23 (2010), at p. 901.

¹⁰¹ See above.

be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”¹⁰² The Security Council members “could believe that in fact aggression is occurring between two states but still want the ICC to back down for at least 12 months in order to give negotiators a (perhaps) better chance to stop the fighting.”¹⁰³

Theoretically such a request may be renewed for 12 months indefinitely and resulting eventually in a total prevention of the situation concerned from being investigated. However, considering the history of the decision making process in the Security Council,¹⁰⁴ such a decision, which is subject to the veto-right. Accordingly, a veto by a P-5 member may impede such a deferral but cannot compel one.¹⁰⁵ That means that a Veto-Power with a vital interest in impeding an investigation in an act of aggression would find itself soon in political isolation.¹⁰⁶

7. Security Council Referral:

Article 15 *ter*

Exercise of jurisdiction over the crime of aggression

(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

Accordingly, Art. 15 *ter* in conjunction with Art. 13 (b) envisages the following: The Security Council (acting under Chapter VII of the Charter¹⁰⁷) may refer “a situation in which one or more of such crimes appears to have been committed [...] to the

¹⁰² Art. 16 of the Rome Statute.

¹⁰³ Scheffer, D., The Complex Crime of Aggression under the Rome Statute, *Leiden Journal of International Law*, 23 (2010), pp. 901–902.

¹⁰⁴ See e.g.: Security Council Resolution 1422 (2002), 1487 (2003) and 1479 (2003), strongly pushed by the US to assure Soldiers under the command of the UN or within the framework of a UN-authorized mission being exempt from any ICC jurisdiction; further such ‘Immunity-Resolutions’ were blocked by the other Council Members. See Schmalenbach, K., Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen, 65 *Juristen Zeitung* 15/16/2010 (2010), at p. 751.

¹⁰⁵ Schmalenbach, K., Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen, 65 *Juristen Zeitung* 15/16/2010 (2010), at p. 751.

¹⁰⁶ *Ibid.*

¹⁰⁷ Art. 13 (b) at the end.

Prosecutor”¹⁰⁸ of the International Criminal Court. The wording ‘situation’ means that the Security Council shall not refer isolated cases and neglect other crimes (due to political considerations) committed in the same context.¹⁰⁹ Another intention was to minimize politicization of the court by abstaining from the naming of individuals involved.¹¹⁰ In the event of a situation of aggression referred by the Security Council, the Prosecutor may commence with his or her own investigation. There is no magnitude test to be applied.¹¹¹

Moreover paragraph 2 of the Understandings¹¹² explicitly states that “it is understood that the Court shall exercise jurisdiction over the crime [...] irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.”¹¹³

The Council can therefore (pursuant to its powers arising from Chapter VII) refer situations of aggression involving non-state or non-consenting¹¹⁴ parties to the ICC¹¹⁵.¹¹⁶ Notable is the outcome regarding Art 15 *ter* in conjunction with Art 13 (b) of the Rome Statute, because in the case of a referral of a situation by the SC, the Prosecutor may investigate into any crimes of Art 5 (then including the crime of aggression) without any prior determination under Chapter VII of the Charter.¹¹⁷

Remarkable as it seems, one should not overestimate its impact, bearing in mind that since the ICC’s inception, the SC referred only twice a situation (that of Darfur in 2005)¹¹⁸ to the ICC after struggling for US support in the Council¹¹⁹.¹²⁰

¹⁰⁸ Art. 13 (b).

¹⁰⁹ *Contag, C.*, *Der Internationale Strafgerichtshof im System kollektiver Sicherheit* (2009) at p. 110.

¹¹⁰ *Arsajani, M.*, *The Rome Statute of the ICC*, *American J.I.L.* 93 (1999), 22 at p. 27.

¹¹¹ Meaning that whatever the SC refers is automatically eligible for consideration by the prosecutor and judges. See *Scheffer, D.*, *The Complex Crime of Aggression under the Rome Statute*, *Leiden J.I.L.*, 23 (2010) at p. 899.

¹¹² Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Annex III, RC/10/Add.1.

¹¹³ *Ibid.* para. 3, at p. 1.

¹¹⁴ Concerning general international law, the *monetary gold* consent principle is considered not applicable in the case of an authoritative decision taken by the Security Council: see *Akande, D.*, *Prosecuting Aggression: The Consent Problem and the role of the Security Council*, Working Paper May 2010, Oxford Institute for Ethics, Law, and Armed Conflict, available at:

<http://www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf> (accessed 23.12.2010).

¹¹⁵ *Stahn, C.*, *The ‘End’, the ‘Beginning of the End’ or the ‘End of the Beginning’? Introducing Debates and Voices on the Definition of ‘Aggression’*, *Leiden Journal of International Law*, 23 (2010), at p 878.

¹¹⁶ The theoretical question whether the SC could do so without such a provision in the Statute, must be answered in the negative: As an international court set up by a treaty outside the UN system, the SC has no such power; see further e.g.: *Contag, C.*, *Der Internationale Strafgerichtshof im System kollektiver Sicherheit* (2009) at p. 110.

¹¹⁷ *Schmalenbach, K.*, *Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen*, *65 Juristen Zeitung* 15/16/2010 (2010), at p. 751.

¹¹⁸ Security Council Resolution 1593 (2005).

¹¹⁹ *Hoge, W.*, *France Asking U.N. to Refer Darfur to International Court*, *The New York Times*, March 24, 2005.

Accordingly, without the possibility for the Security Council to politically influence the investigation the Council will be rather reluctant to make use of the possibility to refer a situation to the Prosecutor.

8. Independence of the ICC:

The independence of the ICC is assured by the identical provisions regarding state referral, *proprio motu*, pursuant to Art. 15 *bis* (9) and in the case of a Security Council referral in Art. 15 *ter* (4) prescribing 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.”

That means that a determination of an organ outside the Court (i.e. the Security Council), is not limiting the Court in its own findings.¹²¹ It therefore provides for “fair and effective investigations and prosecution”¹²² and this is further strengthened by the fact that there is no external filter envisaged, i.e. no need for a prior determination by the General Assembly of the UN (as a political filter) or the International Court of Justice.¹²³

9. Non-State Actors:

Furthermore it should be noted that this approach is completely exclusive of non-State entities (the adopted definition as well as the conditions of jurisdiction refer only to actions which can be linked to a state).¹²⁴ Thus, this is reflecting a concept of international law, “[...] based on the Westphalian model of nation-states, [that] has not kept pace”¹²⁵ with the realities on the ground. The state-centric concept of what constitutes international peace and security is arguably outdated¹²⁶ (Excluding actors such as terrorist organisations, revolutionary groups or rival “breakaway” factions

¹²⁰ *Schmalenbach, K.*, at p. 751.

¹²¹ *Scheffer, D.*, The Complex Crime of Aggression under the Rome Statute, *Leiden J.I.L.*, 23 (2010), at p. 899.

¹²² Para. 4 of the preamble and Art. 54(1)(b) of the Rome Statute.

¹²³ *Stahn, C.*, The ‘End’, the ‘Beginning of the End’ or the ‘End of the Beginning’? Introducing Debates and Voices on the Definition of ‘Aggression’, *Leiden J.I.L.*, 23 (2010), at p. 877.

¹²⁴ *Schuster, M.*, The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword, 14 *Criminal Law Forum* 1 (2003), at p. 22

¹²⁵ *Crawford M./Miscik, J.*, The Rise of the Mezzanine Rulers, *Foreign Affairs* November/December 2010, at p. 123.

¹²⁶ *Rayfuse, R.*, The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission, 8 *Criminal Law Forum* 43 (1997) at p. 60.

within a State's army).¹²⁷ While it could be argued that "international law traditionally deals only with the relations between States, this is certainly not true of the Court, which is a forum within which individuals are tried."¹²⁸

The Assembly of State Parties of the ICC therefore failed to provide progress regarding the contemporary challenges to present international law conceptualizing the ever growing role of non-state actors in the international peace and security realm.¹²⁹

V. Conclusion

The aggression regime adopted by the Conference, would render authority to the ICC to investigate and prosecute cases of aggression without the approval of the Security Council.¹³⁰ In that regard, concerns were raised e.g. by US Representative Koh that in particular cases, "the ICC's pursuit of an aggression case against a head of state or other senior government official could complicate the Security Council's efforts to address an ongoing threat to peace and security. Accordingly, there is some potential that the proposed aggression regime could reduce the effectiveness of the Council's mechanisms for addressing situations that may be of concern to the United States."¹³¹

Furthermore the above mentioned loopholes in the ICC's jurisdiction over the crime of aggression would "entail a (further) devaluation of the prohibition on the use of force, and thus be detrimental to the cause of fighting aggression. Worse: the Security Council may become even more reluctant to designate aggressions as such under Chapter VII. ICC jurisdiction could thus hamper the Security Council in the exercise of its primary responsibility to maintain international peace and security."¹³²

Moreover, noting the different regimes of responsibility, (i.e. individual and state responsibility) there may be situations "where one of those bodies does not consider that aggression has materialized, whilst a national or international court may

¹²⁷ *Hebel, H/Robinson D.*, Crimes Within the Jurisdiction of the Court, in *The International Criminal Court: The Making of the Rome Statute*, 79, ed. Lee, R. (1999) at p. 105.

¹²⁸ *Ibid.*

¹²⁹ *Anderson, M.*, Reconceptualizing Aggression, 60 *Duke L.J.* 411 (2010) at 421-422.

¹³⁰ International Criminal Court Review Conference Kampala Uganda, A Joint Committee Staff Trip Report prepared for the use of the Committee on Foreign Relations, United States Senate 111th Congress, 2nd Session, September 2 2010, at p. 10.

¹³¹ *Ibid.*

¹³² *Paulus, A.*, Second Thoughts on the Crime of Aggression, 20 *European J.I.L.*, 4 (2010) at p. 1125.

take a contrary position and consequently find individuals criminally responsible for aggression.”¹³³ But on the other hand, political bodies such as the Security Council should duly take into consideration such judicial findings on the respective matters for its own actions.¹³⁴

In the US Senate Address by the Head of the US Delegation Mr. Koh reports regarding potential impact on coalition activities that “[b]ecause many U.S. allies, including all NATO members except Turkey, are parties to the ICC, they would be potentially subject to the ICC’s aggression jurisdiction once it is brought into effect. This could make some U.S. allies more hesitant to join with the United States in uses of force without clear U.N. Security Council approval, as was the case with the 1999 NATO military actions in Kosovo and the 2003 military action in Iraq.”¹³⁵ In that regard the opt-out clause was considered as mitigating such risks.¹³⁶

Due to the complications elaborated on above and the politicized nature of the crime of aggression, some authors¹³⁷ - while acknowledging the achievement to have been able to reach consensus at Kampala - have argued that it should not be included in the Rome Statute.¹³⁸ “They also suggest that the ICC may not be the right forum to punish the crime of aggression, and that it is too early to burden this nascent institution. These concerns are in fact very serious and deserve attention.”¹³⁹ In the opinion of the author these concerns are pointing out that the ICC would face serious challenges to its credibility if the crime of aggression remained a dead letter. This would not only hurt the Court’s reputation but also undermine its assertiveness, resulting in politically motivated victor’s justice.¹⁴⁰

However, judging from the recent unanimous decision¹⁴¹ (including the concurring votes of China, Russia and USA) taken by the Security Council to refer the

¹³³ *Cassese, A.*, On Some Problematical Aspects of the Crime of Aggression, *Leiden J.I.L.*, 20 (2007) at p. 846.

¹³⁴ *Ibid.*

¹³⁵ International Criminal Court Review Conference Kampala Uganda, A Joint Committee Staff Trip Report prepared for the use of the Committee on Foreign Relations, United States Senate 111th Congress, 2nd Session, September 2 2010, at p. 10.

¹³⁶ *Ibid.*

¹³⁷ See e.g. *Contag, C.*, *Der Internationale Strafgerichtshof im System kollektiver Sicherheit* (2009) at p. 212.

¹³⁸ *Kacker, D.*, The Rome Statute and the Crime of Aggression, 33 *Suffolk Transnational Law Review* 257 (2010) at p. 286

¹³⁹ *Ibid.*

¹⁴⁰ *Contag, C.*, *Der Internationale Strafgerichtshof im System kollektiver Sicherheit* (2009) at p. 212.

¹⁴¹ See e.g. *Wyatt, E.*, Security Council Calls for War Crimes Inquiry in Libya, *The New York Times*, February 27, 2011.

situation in Libya¹⁴² to the ICC¹⁴³ on February 26th 2011, the author deems the future of the court not that bleak. Although not members of the ICC, China, Russia and the United States supported this referral, indicating that they acknowledge and recognize the court's role in the international security realm. In that light, the Security Council's readiness to take action with regards to the Crime of Aggression is likely to be crucial for the future relevance of the adopted amendments.

Albeit apparent loopholes in the Courts jurisdiction over the crime, the institutional framework - political will provided - is now in place and it will be up to the Security Council and the State-Parties to duly take up its responsibility to end immunity for the gravest of crimes.

¹⁴² Not a Member State of the International Criminal Court.

¹⁴³ Security Council Resolution 1970 (2011).

VI. Bibliography

Books:

Bruer-Schäfer, A., Der Internationale Strafgerichtshof: die internationale Strafgerichtsbarkeit im Spannungsfeld von Recht und Politik, (2001)

Contag, C., Der Internationale Strafgerichtshof im System kollektiver Sicherheit (2009)

De Wet, E., The chapter VII powers of the United Nations Security Council (2004).

Frowein, J., Verhandeln für den Frieden: liber amicorum Tono Eitel = Negotiating for peace (2003).

Klabbers, J., An Introduction to International Institutional Law (2002)

Kurth, M., Das Verhältnis des Internationalen Strafgerichtshofes zum UN-Sicherheitsrat: unter besonderer Berücksichtigung von Sicherheitsratsresolution 1422 (2002), (2006).

Lee, R., The International Criminal Court: the making of the Rome Statute; issues, negotiations, results (1999).

Politi, M., The international criminal court and the crime of aggression (2004).

Politi, M., The Rome Statute of the International Criminal Court: a challenge to impunity (2002).

Schabas, W., The International Criminal Court : a commentary on the Rome Statute (2010).

Schweigman, D., The authority of the Security Council under chapter VII of the UN Charter: legal limits and the role of the International Court of Justice (2001).

Sewall, S., The United States and the International Criminal Court: national security and international (2000).

Solera, O., Defining the Crime of Aggression (2007)

Stagel, D., Sicherheitsrat und Internationaler Strafgerichtshof : zur Abgrenzung ihrer Kompetenzen nach der Charta der Vereinten Nationen und dem Römischen Statut (2008).

Struett, M., The politics of constructing the international criminal court: NGOs, discourse, and agency (2008).

Triffterer, O., Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article (2008).

Law Journals, Press Articles and NGO Reports:

Akande, D., Prosecuting Aggression: The Consent Problem and the role of the Security Council, Working Paper May 2010, Oxford Institute for Ethics, Law, and Armed Conflict.

Anderson, M., Reconceptualizing Aggression, 60 Duke L.J. 411 (2010).

Arsajani, M., The Rome Statute of the International Criminal Court, 93 American J.I.L., 22 (1999).

- Blokker, N.* The Crime of Aggression and the United Nations Security Council, 20 Leiden J.I.L. 867 (2007).
- Cassese, A.*, On Some Problematical Aspects of the Crime of Aggression, Leiden J.I.L., 20 (2007)
- Clark, Roger S.*, Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It, 20 European J.I.L. 4 (2009).
- Crawford M./Miscik, J.*, The Rise of the Mezzanine Rulers, Affairs November/December 2010
- Crook, J.*, Contemporary Practice of the United States relation to International Law: International Criminal Law: U.S. Delegation Active in ICC Negotiations to Define Crime of Aggression, 104 A.J.I.L. 511 (2010).
- Ferencz, D.*, The Crime of Aggression: Some Personal Reflections on Kampala, Leiden J.I.L, 23 (2010).
- Glennon, M.*, The Blank-Prose Crime of Aggression, 35 Yale J.I.L. 71 (2010).
- Human Rights Watch*, Making Kampala Count Advancing the Global Fight against Impunity at the ICC Review Conference, New York 2010.
- Kacker, D.*, The Rome Statute and the Crime of Aggression, 33 Suffolk Transnational Law Review 257 (2010)
- Kress, C.*, Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus, 20 European J.I.L., 4 (2010)
- Manson, R.*, Identifying the rough edges of the Kampala Compromise, 21 Criminal Law Forum 417 (2010).
- Murphy, S.*, Aggression, Legitimacy and the International Criminal Court 20 European J.I.L. 4 (2009).
- Paulus, A.*, Second Thoughts on the Crime of Aggression, 20 European J.I.L., 4 (2010)
- Scheffer, D.*, The International Criminal Court and the Crime of Aggression: A Pragmatic Approach to Jurisdictional and Definitional Requirements for the Crime of Aggression in the Rome Statute, 41 Case W. Res. J.I.L. 397 (2009)
- Schmalenbach, K.*, Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen, 65 Juristen Zeitung 15/16 (2010).
- Schuster, M.*, The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword, Criminal Law Forum 14 (2003).
- Smith, S.*, Definitely maybe: The Outlook for U.S. Relations with the International Criminal Court during the Obama Administration, 22 Florida Journal of International Law, 155 (2010).
- Stahn, C.*, The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression', Leiden J.I.L., 23 (2010).
- Wenaweser, C.*, Reaching the Kampala Compromise on Aggression: The Chair's Perspective, Leiden J.I.L., 23 (2010).