

Aggression Is No Longer a Crime in Limbo

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1. Pre-Kampala Predictions of Uneven Applicability

This policy brief is published when the Justice Award named after Professor M. Cherif Bassiouni is conferred for the first time since his untimely passing in 2017.¹ His passing left a void not only in the field of international law and human rights, but also in the hearts of all who knew and loved him. His wisdom, energy, generosity of spirit, and the remarkable scope of his learning and contributions to the advancement of the rule of law have inspired many, and will surely do so for years to come.

I well recall the concerns that Professor Bassiouni expressed during a panel in which we participated at a 2008 symposium on “The International Criminal Court and the Crime of Aggression” at Case Western Reserve University School of Law.² Although aggression had nominally been included in the Statute of the International Criminal Court (‘ICC’) as a crime within the Court’s jurisdiction, such jurisdiction could not be exercised until amendatory provisions would be added, defining the crime and setting forth the conditions under which the Court’s jurisdiction could be triggered.³ It was a crime stuck in legal limbo. Professor Bassiouni correctly anticipated that the Court’s jurisdiction over aggression, if and when activated, would inevitably include additional features of State consent, resulting in a jurisdictional regime of potentially uneven applicability.⁴ He cautioned

that “a piece of Swiss cheese with a lot of holes in it” may be of dubious utility.⁵

2. The Kampala Amendments and Their Detractors

When the ICC Review Conference met two years later in Kampala, Uganda, the Assembly of States Parties (‘ASP’), after arduous negotiations, unanimously adopted amendments on aggression.⁶ Prior to Kampala, the permanent members of the United Nations (‘UN’) Security Council (‘P-5’) had uniformly expressed the view that Article 39 of the UN Charter grants the Council the exclusive right to make the determination as to whether an act of aggression has occurred in a particular case. This view continued to be among the driving forces at the Review Conference.

Going into the Conference, it was impossible to predict whether a compromise solution could be crafted, whereby the Court would not be seen as being controlled by the P-5 as to its aggression jurisdiction. A group led by Argentina, Brazil and Switzerland (known as the ‘ABS group’) put forward proposals aimed at bridging the gaps between the parties, using various entry-into-force mechanisms as the tool for achieving the necessary bal-

¹ M. Cherif Bassiouni (1937–2017) taught at DePaul University College of Law from 1964 to 2012; was President of the International Association of Penal Law and the International Institute of Higher Studies in Criminal Sciences; and, among numerous posts, served as Chairman of the Drafting Committee of the Rome Statute of the International Criminal Court (hereinafter the ‘ICC Statute’) in 1998.

² Case Western Reserve University School of Law, “The International Criminal Court and the Crime of Aggression – Panel 4”, 26 September 2008, published 19 October 2009 (a recording was available on YouTube at the time of writing).

³ See ICC Statute, Article 5 (<http://www.legal-tools.org/doc/7b9af9/>).

⁴ This was so because he was aware that according to Article 121(5) of the Statute, “[i]n respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a

crime covered by the amendment when committed by that State Party’s nationals or on its territory”.

⁵ He re-confirmed such scepticism in M. Cherif Bassiouni, “The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization”, in *Harvard International Law Journal*, Spring 2017, vol. 58 (online journal), pp. 87–89 (<http://www.legal-tools.org/doc/fda4e1/>).

⁶ See ASP, “The crime of aggression”, RC/Res.6, in the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010, RC/9/11, pp. 17–22 (<http://www.legal-tools.org/doc/146df9-1/>). For a comprehensive discussion, see Stefan Barriga and Leena Grover, “A Historic Breakthrough on the Crime of Aggression”, in *American Journal of International Law*, 2011, vol. 105, p. 533; and Claus Kreß and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 1179 ff.

ancing of interests.⁷ The approach of the ABS group was countered by proposals from the Canadian delegation, suggesting that Article 121(5) alone should apply.⁸ The United States, though not itself a State Party, suggested deferring decisions pertaining to the Court's *proprio motu* and State Party referral jurisdiction to a later time.⁹ In the end, a negotiated compromise was accepted and approved, calling for a consent-based approach for such jurisdiction, but requiring States Parties who did not wish it to apply to them to pay the 'political cost' of publicly opting out.¹⁰

The definition of the crime in Article 8bis includes a high threshold, covering only the commission of "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".¹¹ Article 15ter provides for broad jurisdictional coverage for acts of aggression committed in situations referred to the Court by the UN Security Council.¹² By contrast, Article 15bis, covering the Prosecutor's *proprio motu* and State Party referral jurisdiction for aggression, is much narrower in scope. It altogether excludes non-States Parties from such jurisdiction and grants each State Party the right to opt out of its reach.¹³ Articles 15bis and 15ter further provide that they would not become effective until at least 30 ASP members would have ratified them and the ASP re-approved them, with such re-approval delayed until at least 1 January 2017.

From the outset, the amendments had their detractors.¹⁴ Nonetheless, by 2016, the threshold of 30 ratifications had been met, and the ASP directed that a facilitation process be established to work toward consensus in advance of the activation decision expected in 2017.¹⁵

⁷ See Marcel Biato and Marcelo Böhlke, "Brazil", in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, 2017, Cambridge University Press, vol. 2, chap. 33, p. 1127.

⁸ *Ibid.*

⁹ *Ibid.*, p. 1128.

¹⁰ *Ibid.*

¹¹ ASP, "The crime of aggression", see *supra* note 6, p. 18.

¹² Jurisdiction by Security Council referral may be conferred in accordance with Article 13(b) of the Statute.

¹³ Jurisdiction by State Party referral and at the Prosecutor's *proprio motu* initiative is generally conferred in accordance with Article 13(a) and (c), respectively.

¹⁴ For an example of some of the objections, see Harold Hongju Koh and Todd F. Buchwald, "The Crime of Aggression: The United States Perspective", in *American Journal of International Law*, April 2015, vol. 109, pp. 257–285. But see Donald M. Ferencz, "Current U.S. Policy on the Crime of Aggression: History in the Unmaking?", in *Case Western Reserve Journal of International Law*, 2016, vol. 48, no. 1, pp. 189 ff. (<http://www.legal-tools.org/doc/23d0e5/>); see also Donald M. Ferencz, "Continued Debate Over the Crime of Aggression: A Supreme International Irony", in *Harvard International Law Journal*, Spring 2017, vol. 58 (online journal), pp. 24–27 (<http://www.legal-tools.org/doc/9c6d48/>).

¹⁵ See ASP, "Strengthening the International Criminal Court and the Assembly of States Parties", 24 November 2016, ICC-ASP/15/Res.5,

A handful of non-ratifying States argued that, notwithstanding the terms of what was agreed to in Kampala, non-ratifiers could simply not come within the Court's aggression jurisdiction, regardless of whether they had opted out of such jurisdiction.¹⁶

Discussion of the Kampala amendments has been ongoing since their initial adoption in 2010.¹⁷ At the inaugural LI Haopei Lecture Seminar in Oslo on 8 February 2011, an address on the crime of aggression was delivered by the late Judge Hans-Peter Kaul,¹⁸ followed by observations from Judge LIU Daqun.¹⁹ Their remarks have been summarized in *FICHL Policy Brief Series No. 2* (2011).²⁰ Judge Kaul emphasized the need for universal acceptance of the criminalization of aggression and called for broad ratification of the Kampala amendments, including, in particular, by Britain and France, the two members of the ASP who are also permanent members of the UN Security Council.²¹

Judge LIU noted with regret that because the crime of aggression covers only acts by States themselves, it fails to reach non-State actors. Though satisfied that the Court's aggression jurisdiction will not depend exclusively on referrals by the UN Security Council, he observed that the jurisdictional regime is such that those who are most likely to commit acts of aggression are least likely to be tried for it – a factor potentially impugning the integrity of the international justice system itself.

Such sentiments echo those expressed immediate-

Annex I ("Mandates of the Assembly of States Parties for the intersessional period"), para. 18(b) (<http://www.legal-tools.org/doc/991a13/>).

¹⁶ This group most notably included Canada, Colombia, France, Japan, Norway, and the United Kingdom. For a discussion of their position, see ASP, Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression, 27 November 2017, ICC-ASP/16/24, Annex II, pp. 15–17 (<http://www.legal-tools.org/doc/d22720/>) ('Facilitation Report').

¹⁷ For a relatively succinct summary of recently stated views of various States Parties, see the position papers included in the Facilitation Report, *ibid.* For a comprehensive two-volume work on the subject, see Kreß and Barriga (eds), 2017, *supra* note 7.

¹⁸ Judge Kaul (1943–2014) was a Judge and Vice-President of the ICC.

¹⁹ Judge LIU Daqun was an appellate Judge and Vice-President of the International Criminal Tribunal for the Former Yugoslavia, and is a Judge of the UN Mechanism for International Criminal Tribunals.

²⁰ See Hans-Peter Kaul and LIU Daqun, "Implications of the Criminalisation of Aggression", *FICHL Policy Brief Series No. 2* (2011), Torkel Opsahl Academic EPublisher, Oslo, 2011 (<http://www.toaep.org/pbs-pdf/2-kaul-liu>).

²¹ In the full text of his paper, Judge Kaul also took aim at the vast global arms trade: "The armament industry and its agents, not only in the United States but also in other countries including Germany, are relentlessly active to develop and sell new deadly means of war-making. As a normal human being, you do not notice these 'merchants of death' as they always fly first class, and their deals are made in darkness and secrecy", see Hans-Peter Kaul, "Is It Possible to Prevent or Punish Future Aggressive War-Making?", *FICHL Occasional Paper Series No. 1* (2011), Torkel Opsahl Academic EPublisher, Oslo, 2011, p. 8 (<http://www.toaep.org/ops-pdf/1-kaul>).

ly after the Kampala Review Conference by Professor Kevin Jon Heller. In “The Sadly Neutered Crime of Aggression”²², he decried the fact that Article 15bis allows States Parties “to take a completely hypocritical approach to aggression”. Heller observed that “a State Party that opts out of aggression cannot be prosecuted if it commits an act of aggression against a State Party that has not opted out. But the converse is not true: States Parties that have not opted out could be prosecuted for acts of aggression against an opting-out State Party”. Moreover, he noted that, by leaving acts of aggression committed either *by or against* non-States Parties entirely beyond the reach of the Court’s Article 15bis jurisdiction, the Kampala compromise violates the general jurisdictional scheme enshrined in Article 12 of the Statute.

3. Aggression Activation by the ICC Assembly in December 2017

Throughout the facilitation process leading up to the sixteenth Session of the ASP, Britain, Canada, Colombia, France, Japan and Norway insisted that the second sentence of Article 121(5) must be applied literally to the Kampala amendments.²³ If so construed by the ICC judges, it could mean that the Court would not be able to exercise jurisdiction under Article 15bis with respect to acts of aggression committed by States Parties which have not yet ratified it, even if they have not bothered to formally opt out.²⁴ Because the activation decision was intended to be taken by consensus, it would seem that even one recalcitrant member could scuttle the activation, and everyone knew it.

Despite the best efforts of the facilitation group under the able leadership of Nadia Kalb of Austria, irreconcilable differences of opinion persisted throughout the ASP’s Session in December 2017, well into the final night. Re-approval of Articles 15bis and 15ter, whether by unanimous consensus or otherwise, was, therefore, very much an open question.

In a relatively unsparing effort to achieve consensus, compromise proposals which were acceptable to the vast majority of States Parties had already offered a very generous concession. They provided that non-ratifying States Parties which expressed the view that the second sentence of Article 121(5) must be followed literally would be considered to be beyond the Court’s 15bis jurisdiction, even without having to ‘pay the price’ of taking specific steps to formally opt-out. While it was hoped

that this would be acceptable to the group of non-ratifiers who had expressed their adherence to this view, the proposals were rejected by the British and the French, who wanted more.

After a difficult night of seriously flirting with failure, at 40 minutes past midnight on the morning of 15 December 2017, the activation-decision was finally taken by consensus, but at what many considered a high cost. Very late in the game, the British offered the language which appears in paragraph 2 below, which felt to many in the room as an ultimatum along the lines of “accept this, or go home with nothing”²⁵.

The Assembly of States Parties [...]

1. *Decides* to activate the Court’s jurisdiction over the crime of aggression as of 17 July 2018;
2. *Confirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;
3. *Reaffirms* paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court;²⁶
4. *Renews* its call upon all States Parties which have not yet done so to ratify or accept the amendments to the Rome Statute on the crime of aggression.

Paragraph 2 will surely be seen by many as indicating an intention on the part of a small but powerful minority of States Parties to erode the finely-tuned compromise agreement negotiated in Kampala. If a State which fails to ratify simply cannot be subjected to the Court’s Article 15bis jurisdiction at all, then Article 15bis(4) loses its meaning, and the ‘political cost’ of avoiding the Court’s 15bis jurisdiction no longer involves paying the price of having to formally opt out. Nonetheless, Article 86 of the Statute still requires States Parties to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court” – whether they have ratified or not.

Paragraph 3 was introduced by the Vice-Presidents, who were chairing the meeting, out of sensitivity to those States that wished, in some fashion, to see a counterbalance to paragraph 2. It offers a reminder that, even if the ASP may be subject to bullying, the judges should

²² In *Opinio Juris*, 13 June 2010, available at <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/>, last accessed on 5 January 2018. At the time of writing, Heller is Associate Professor of Public International Law, University of Amsterdam and has been a Visiting Professor of Criminal Law at SOAS University of London.

²³ See Facilitation Report, *supra* note 16.

²⁴ As reaffirmed in the activation decision itself, such matters are for the ICC judges to decide.

²⁵ See ASP, “Activation of the jurisdiction of the Court over the crime of aggression”, 14 December 2017, ICC-ASP/16/Res.5 (<http://www.legal-tools.org/doc/6206b2/>).

²⁶ Article 40(1) provides: “The judges shall be independent in the performance of their functions”; and Article 119(1): “Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”.

not be.²⁷

4. The Crime of Aggression Applies Equally to All

Aggression was characterized at Nuremberg as the “supreme international crime”.²⁸ The bottom line, as the American Chief Prosecutor, Robert Jackson, put it during his opening statement, is that national leaders should not be able to get away with it:

the ultimate step in avoiding periodic wars [...] is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.²⁹

The greatest challenge facing the ICC relative to the crime of aggression is that if the powerful nations which sat in judgment at Nuremberg, such as Britain and France, fail to ratify the aggression amendments, such failure not only creates a gaping hole in the Court’s aggression jurisdiction, but also sends a signal that international law is intended only for the ‘little people’.³⁰ That ordinary foot-soldiers who violate the laws of war can be criminally prosecuted, yet the leaders who send them out to fight in clear violation of *jus ad bellum* remain immune from prosecution, reflects a hypocritical double standard that cries out for remediation.

In his closing remarks at the Rome Conference in July 1998, Professor Bassiouni declared: “The ICC reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted. It asserts that impunity for the perpetrators of genocide, crimes against humanity and war crimes is no longer tolerated”.³¹ Notwithstanding the escape hatches extracted

²⁷ For a discussion of the process of the activation decision itself and its potential consequences, see Nikolas Stürchler, “The Activation of the Crime of Aggression in Perspective”, in *EJIL: Talk!*, 26 January 2018, available at <https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/>, last accessed on 5 February 2018, and Annegret L. Hartig, “Dubious negotiations in New York: Did France and the UK come to blow it up?”, in *IntLawGrrls*, 18 January 2018, available at <https://ilg2.org/2018/01/18/dubious-negotiations-in-new-york-did-france-and-the-uk-come-to-blow-it-up/>, last accessed on 5 February 2018.

²⁸ International Military Tribunal, *Trial of the Major War Criminals*, vol. XXII, p. 427 (<http://www.legal-tools.org/doc/d1427b1>).

²⁹ *Ibid.*, vol. II, p. 154 (<http://www.legal-tools.org/doc/3c08b1>).

³⁰ Yet, despite the failure of Britain and France to ratify, it should be noted that the 35 nations which have ratified the amendments at the time of writing include over half the members of NATO.

³¹ See M. Cherif Bassiouni, “Negotiating the Treaty of Rome on the

by delegates of nations which wielded the heavy stick of *Realpolitik* both in Kampala and again in New York in December 2017, the crime of aggression has, at long last, finally joined the roster of crimes prosecutable by the ICC.

Now that jurisdiction has been activated, it is time to begin working in earnest on closing the loopholes. Civil society must use all available tools to assure that powerful leaders who have reason to hide from the Court’s aggression jurisdiction will know that the world is not only watching, but working to see to it that they are eventually held to account in a court of law.³² The common sense of mankind demands it.³³

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Establishment of an International Criminal Court”, in *Cornell International Law Journal*, 1999, vol. 32, no. 3, p. 468 (<http://www.legal-tools.org/doc/f19d20>).

³² For example, in the lead-up to the aggression activation decision, *The Guardian* underscored that neither Britain nor France has ratified the Kampala amendments on aggression, implying that they should be ashamed of such hypocrisy. See Owen Bowcott, “UK calls for ‘greater clarity’ on ICC’s new crime of aggression”, in *The Guardian*, 15 November 2017 (<http://www.legal-tools.org/doc/b85875>).

³³ As part of his opening statement at Nuremberg, Robert Jackson declared “The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched”, see International Military Tribunal, The Blue Series, vol. II, *supra* note 28, p. 99. The last surviving Chief Prosecutor of the Subsequent Proceedings at Nuremberg happens to be my father, Benjamin B. Ferencz, whose current views are not far removed from Jackson’s: “As long as perpetrators of aggression can avoid personal responsibility simply by having their government opt out of criminal accountability, the Nuremberg precedent is being repudiated”. He urges peace-loving nations to help deter illegal use of armed force “by letting offenders know they will also be charged with crimes against humanity and genocide”. See www.benferencz.org.