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Rethinking the Crime of Aggression

International and Interdisciplinary Perspectives

Stefanie Bock
Eckart Conze *Editors*

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Preface

We as editors are honoured to present in this volume a selection of contributions that originated as papers presented in September 2018 at the International Conference *Rethinking the Crime of Aggression: International and Interdisciplinary Perspectives* in Marburg, Germany and which we have subsequently revised and updated. The opening of the conference took place in Marburg University's Great Hall (Aula der Alten Universität), which was inaugurated in 1903, when Marburg had become one of the leading universities of Prussia and Germany. The Great Hall's wall paintings by Peter Janssen (1844–1908) show scenes related to the history of Marburg and its university (which was founded in 1527 as a Protestant university by Philipp the Magnanimous—Philipp der Großmütige –, Landgrave of Hesse), among them a battle scene—the battle of Laufen in 1534—between Protestant troops under the command of Landgrave Philipp and Catholic Austrian troops. This painting in a way epitomises the topic of our conference and of this volume: war and aggression, in this case war and mass violence induced by religious tensions. Naturally, we need not to go back to the 16th century to find other examples of inter-state wars or inter-state conflicts related to religion, as well as examples of the politicisation of religion and of religious dimensions or legitimations of war or aggression.

Aggression, of course, is not only a historical issue. On the contrary, its current significance is beyond any doubt. A few days before the conference's opening in September 2018, the perspective of an imminent attack of Syrian troops on the region of Idlib, including the possible use of chemical weapons, triggered a controversial debate in Germany about the participation of German troops in Allied military measures against the Assad regime. Against this background, the German Federal Parliament's Research Service (*Wissenschaftlicher Dienst des Deutschen Bundestages*) provided a report including an assessment of relevant questions of international criminal law and the potential criminal nature of such measures and of German participation under the German International Criminal Code (*Völkerstrafgesetzbuch*). The report concluded that a parliamentary decision on a German military mandate would have to consider the implications of international criminal law and the criminal liability for acts of aggression.

But even without these—at the time of the conference—recent developments, the topicality of the question of aggression in international politics and especially in

international criminal law can hardly be ignored. In December 2017, the Assembly of State Parties of the International Criminal Court (ICC) decided to activate the Court's jurisdiction over the crime of aggression and give effect to the Statute's aggression provisions, which were agreed on the first ICC review conference in 2010 in Kampala. Since 17 July 2018, the ICC has the right to prosecute '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, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. A highly controversial debate about the ICC's competence has, thus, found at least temporary end.

This reinforcement that the crime of aggression is—like genocide, crimes against humanity and war crimes—a core crime under international law and that the use of force by States is subject to international regulation constituted a starting point of our conference. However, discussions about the crime of aggression are not limited to the present or to the very recent past. Instead, they are part and the continuation of complex historical and political dynamics going back at least to the beginning of the 20th century and, in particular, the years of the First World War. And yet, today these dynamics of more than one hundred years ago are not only of historical importance and interest, they are not a faraway past, these dynamics continue to cast their shadow on more recent and even current developments and debates. Against this background, it was the aim of the conference to bring together international experts from various disciplines and to start a dialogue regarding aggressive war and the crime of aggression: a dialogue not only addressing the historical genesis of the current situation, the content of the new aggression provisions, their implementation in practice and their possible regulatory effects, but also instigating perspectives for future developments and problems.

Aggressive war is a crime against world peace, the core element of the international community. At the same time, it certainly is the root of multiple violations of individual rights under conditions of armed conflicts. The Nuremberg International Military Tribunal (IMT) in 1945 regarded aggression as the gravest international crime, the 'crime of crimes', as Chief Prosecutor Robert H. Jackson once called it, integrating and accumulating the horrors of all other international crimes. In this perspective, it seemed consistent to prosecute the violation of the prohibition of force under international law as an international crime. Still, compared to other international crimes (war crimes and crimes against humanity above all), the crime of aggression has a special character making its legal definition and application extremely complicated. More than other international crimes, aggression has a highly political nature. Today, it seems to be widely accepted that a right of sovereign states to wage war (*ius ad bellum*) does not exist—or does not exist any longer—and that the use of armed force is not a legitimate means to solve international disputes. The exact limits of the prohibition of force are, however, disputed. Self-defence is part of the UN Charter, but what about 'preventive self-defence'? Human rights discourse further complicates the question: Can humanitarian objectives or considerations legitimise military interventions (by, for example, applying the concept of

R2P—'Responsibility to Protect')? There is obviously a large grey zone which needs discussion—politically, legally and academically.

Questions of individual responsibility and individual guilt add another dimension to the debate. How can one relate the principle of individual guilt to state crimes and collective decision-making structures? How can one identify individual responsibilities and contributions in state action contexts? And is—in the case of aggression—criminal responsibility limited to the top political or military leaders? These burning questions go back to the very beginnings of international criminal law and to the revolution it meant for both international and penal law. They indicate the complexity of the matter, historically and politically, and underline the need for a thorough academic—disciplinary and interdisciplinary—discourse.

The programme of the conference was—and this volume is—shaped by its interdisciplinary approach. After an overview on the emergence of the ICC's aggression provisions, it starts with the general and basic question what aggression means in various social circumstances and how our understanding of social aggression or aggressiveness is influencing the perception of aggression in an international context. Part II directs the attention to States as aggressors and to the relation between the use of force and the emergence and development of the modern state or of modern statehood. Part III is dedicated to attempts—historically and politically—to regulate aggression and to the rise of the idea to prosecute individuals for aggressive state behaviour and to develop corresponding legal norms. It also treats the problem of civil war, of state-internal war, and whether aggression in this context can be regarded as an international crime. The next part (IV) addresses strategies or attempts to legitimise military interventions and the use of force, from the idea of 'humanitarian intervention' to the concept of R2P. The last two parts (V and VI) have their focus, first, on the criminal prosecution of aggression, the problem of individualising responsibility and guilt, the role of the Security Council in aggression trials, and the risks and difficulties of prosecuting individuals for state conduct.

The conference's programme was broad and demanding. We are grateful that so many colleagues accepted our invitation and contributed to our understanding of this complex and challenging matter—challenging politically and academically. Moreover, we warmly thank the Team of the International Research and Documentation Centre for War Crimes Trials (Marburg), in particular Alexander Benz, for their constant and dedicated support in organising the conference and during the whole editing process. We hope that this volume with its interdisciplinary approach can contribute to the discussion on the crime of aggression and to the understanding of the roots, dynamics and regulation of aggressive wars.

Marburg, Germany
March 2021

Stefanie Bock
Eckart Conze

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Chapter 1
Negotiating Aggression: From Rome over Kampala to New York

Christoph Henrichs

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Abstract This chapter gives an overview over the process how the International Criminal Court gained jurisdiction over the crime of aggression and puts it into a wider perspective. It highlights the milestones in that development, from the Diplomatic Conference in 1998 adopting the Rome Statute over the Kampala Review Conference in 2010 introducing the provision on the crime of aggression to the Assembly of States Parties in New York in December 2017 which after a nail-biting poker gamble eventually took the decision to activate the Court's jurisdiction over the crime of aggression. The chapter particularly focuses on the conflict about the conditions for the exercise of the jurisdiction which nearly caused the activation to fail. It analyses the underlying legal provisions, the different positions deducted from them and the process that was set up to find a compromise solution. Particular attention is paid to the mechanisms behind the scene of the official negotiations also pointing at the role the individual human actors have as representatives of States Parties in international decision-making processes.

Keywords International Criminal Court · Jurisdiction · Crime of Aggression · Assembly of States Parties · Activation Decision

The views expressed in this chapter are entirely personal and do not necessarily reflect the position of the Federal Republic of Germany.

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1.1 Introduction

This chapter aims to document the long-standing—and at times frustrating—attempts of the international community to establish international criminal jurisdiction for the crime of aggression. It describes a journey from Rome via Kampala, the capital of Uganda, to New York, each stop on the way marking an essential milestone for the International Criminal Court.

1.2 Rome

It is important to realize that this journey is about the development of criminal justice. Criminal justice entails prosecuting an individual person for his personal behaviour, putting him before a court for a crime he is accused to have committed, deciding on his liability for punishment and possibly sentencing him to prison. Criminal justice takes the step from state conduct to individual responsibility for a personal wrongdoing, in this case the step from an 'act of aggression' to a 'crime of aggression'.

The 'crime of aggression' is to be considered in the context of war crimes. In fact, it constitutes the ultimate war crime because a war of aggression violates the very core of international co-existence of States: peace. The flyer of the Marburg conference quotes a key statement from the judgment of the International Military Tribunal in Nuremberg in 1946 which impressively illustrates the magnitude: 'To initiate a war of aggression […] is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'[1]

This quote also spans the timeline that has been covered in discussing criminal jurisdiction for the crime of aggression. The idea to establish an international tribunal to bring to court political leaders accused of international crimes goes back to the end of World War I but never materialized at the time. Following World War II, the allied powers established two ad hoc tribunals to prosecute leaders accused of war crimes: the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo. The charges before those Military Tribunals were centred around 'crimes against peace' which were—among others—defined as 'planning, preparation, initiation or waging of a war of aggression'. Soon after these tribunals, in 1950 the International Law Commission of the United Nations drafted the 'Nuremberg Principles',[2] which were a set of guidelines for determining what constitutes a war crime, taken from the statute of the Nuremberg tribunal. Included in the Nuremberg principles again was the term 'war of aggression'.

[1] IMT Nuremberg, Judgement of 1 October 1946 (Prosecutor v. Goering et al.), in: Trial of the Major War Criminals before the International Military Tribunal, Volume I, Nürnberg; Editors 1971, p. 186.

[2] http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf (accessed 1 March 2021).

However, attempts to establish a permanent structure of an international criminal court system for war crimes froze for many decades after Nuremberg as during the Cold War they lacked any political perspective to be realized. Only in the 1990s did the idea gain momentum again. The United Nations Security Council established two ad hoc tribunals responding to regional instances of severe war crimes and genocides, the International Criminal Tribunal for the former Yugoslavia established in 1993 and the International Criminal Tribunal for Rwanda established in 1994. The creation of these tribunals highlighted the need for a permanent international criminal court and put the issue back on the international agenda.

Based on drafting work by the International Law Commission, efforts were intensified, first in an ad hoc Committee on the Establishment of an International Criminal Court, then in a Preparatory Committee which worked on a draft text of a statute. In June 1998 the General Assembly convened a Diplomatic Conference in Rome which on 17 July 1998 successfully adopted the 'Rome Statute', the founding treaty of the International Criminal Court (ICC). Following 60 ratifications, the Rome Statute entered into force on 1 July 2002. The International Criminal Court was established. Currently, the Rome Statute has 123 States Parties. Member States include France and the United Kingdom as the only two of the permanent members of the United Nations Security Council; the other three—USA, Russia and China—have not ratified the Rome Statute.

The ICC is seated in The Hague in the Netherlands and has the jurisdiction to prosecute individuals for the 'most serious crimes of concern to the international community as a whole'.[3] These crimes are contained in an exhaustive list in Article 5 Rome Statute. They are: the crime of genocide, crimes against humanity, war crimes—and: the crime of aggression.

In the following Articles of the Rome Statute, the first three of these crimes are legally defined.[4] Originally, the Rome Statute, however, did not include a definition on the crime of aggression. Instead, Article 5 (2) Rome Statute (former version) read:

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted […] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

The Diplomatic Conference in Rome had not been able to reach consensus on this point. In order to save the conference from failing, it was decided to postpone the definition of the crime of aggression—and thus to postpone the jurisdiction of the Court to judge on crimes of aggression. Some States opposed including the crime of aggression into the jurisdiction of the Court altogether, among whom in particular France and the UK. There was also a considerable debate about the scope the definition of the crime of aggression should take. Furthermore, the conference was divided on the question if and how the Security Council of the United Nations should be involved. The permanent members demanded a key role of the Security

[3] Article 5 (1) Rome Statute. Similar Article 1: 'jurisdiction over persons for the most serious crimes of international concern'.

[4] Articles 6–8 Rome Statute, containing long exhaustive lists of individual acts that constitute international crimes.

Council in establishing that an act of aggression has taken place. This view faced strong opposition from developing countries and countries from the Arab world who emphasized the independence of the Court. In view of this line of conflict many delegations spoke in favour of postponing the whole issue of aggression from the conference, always in fear that the negotiations for the Statute could fail entirely.[5]

Various options were circulated how this postponement should be handled. The solution was the compromise that found its way into Article 5 (2) Rome Statute, often described as 'half in, half out-solution': The crime of aggression was included, but the definition should be determined later. Only then the Court would gain jurisdiction over the crime of aggression. Seen from the perspective of proponents of international criminal justice, there was some merit in this compromise: At least the question *whether* the crime of aggression should fall under the jurisdiction of the Court had been decided in the affirmative and was no longer an issue of debate.

At the same time Article 123 was introduced into the Rome Statute providing that a Review Conference be convened seven years after the entry into force of the Rome Statute to consider any amendments to the Statute, a mechanism to ensure that the issue of the jurisdiction for the crime of aggression remained on the agenda.

1.3 Kampala

In the years following the Rome Diplomatic Conference work was initiated to solve the open question of the crime of aggression. Negotiations were being held in different formats and gradually the proposals on the table began to take shape and structure.

The Diplomatic Conference in Rome established a Preparatory Commission and entrusted it with the necessary preparatory work for the coming into operation of the Court.[6] Part of the mandate of this Commission was to prepare proposals for a provision on aggression to be adopted at the Review Conference mentioned above.[7] However, faced with many other pressing tasks to prepare the necessary framework to make the Court operational, the discussion about the crime of aggression was only one topic among many others and not of highest priority of this Commission. As a result, little progress was made during this time.[8]

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[5] In detail on the Rome negotiations, see Kreß and Barriga 2017, pp. 201 et seq.

[6] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I F, https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Compendium.3rd.27.ENG.pdf (accessed 1 March 2021).

[7] Final Act, Annex I F, para 7: 'The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.'

[8] Kreß and von Holtzendorff 2010, p. 1183.

More significant progress was made when a Special Working Group specifically on the crime of aggression was established in 2003 under the chairmanship of Ambassador Wenaweser to the United Nations from Liechtenstein. Ambassador Wenaweser is a leading figure in the Assembly of States Parties to the present day. His prominent role illustrates that individual qualities like personal leadership abilities and charisma can be of much higher importance for influence in international negotiations than the size of a country a person is representing. It does not necessarily have to be the big States that lead; in fact, coming from a small country may actually prove as an advantage for conducting negotiations.

The atmosphere of the discussions in the Special Working Group was informal and fruitful, more academic than political,[9] and substantial progress was made. By the time the Review Conference as foreseen in Article 123 Rome Statute was approaching, the group had agreed on concrete proposals for a definition of the crime of aggression.

The Review Conference took place in Kampala, Uganda, from 31 May to 11 June 2010 and was chaired, once again, by Ambassador Wenaweser. It ended with a last-minute breakthrough success. The conference adopted a resolution which contained a definition of the crime of aggression and rules on the conditions how this jurisdiction should be exercised.[10]

There were several aspects under discussion in Kampala:

First, there was the substantial definition of the crime of aggression. This is the area where most progress had been made during the years of negotiations since the Rome Diplomatic Conference. The Special Working Group had agreed on a consensus package and nobody felt particularly inclined to open up that discussion again in Kampala. The Kampala Resolution introduces a new Article 8*bis* into the Rome Statute which contains a definition of the crime of aggression, similar in structure to the Articles before which contain definitions of the other crimes that the Court has jurisdiction over. Paragraph 1 reads:

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

Several elements are noteworthy here: The paragraph contains two elements, the first one is the individual behaviour by a person of 'planning, preparing, initiating or executing' the act, which sets off the personal criminal prosecution. Secondly, what needs to be committed in one of these ways is an '*act of aggression*'. If there was no act of aggression by a State, nobody can be held responsible before the Court for a crime of aggression.[11]

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[9] Substantial parts of the Working Group were held in Princeton University which inspired the character of the negotiations, therefore often referred to as the 'Princeton Process'. See in great detail: Kreß and Barriga 2017; Kreß and von Holtzendorff 2010, pp. 1183 et seq. with further references.

[10] ICC Resolution RC/Res. 6 of 11 June 2010, Annex I.

[11] Quintana 2018, p. 245.

What constitutes an '*act of aggression*', is then defined in para 2:

> For the purpose of paragraph 1, '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.

Following in letters (a) to (g) is a list of actions that constitute acts of aggression, such as invasion or attack by the armed forces of a State of the territory of another State, bombardment, military occupation etc.

This definition is not new. As can be seen by the reference in the provision, it was taken from a resolution which was adopted by the UN General Assembly in 1974[12] as a recommendation to the Security Council on the definition it should use for the purpose of establishing whether an act of aggression has occurred. Under Article 39 UN Charter, 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression' and shall 'decide what measures shall be taken to maintain or restore international peace and security.' The Security Council has, however, due to the veto powers of its five permanent members, been very reluctant in affirming acts of aggression. The result was a legal vacuum which was filled by the resolution of the General Assembly of 1974, now reutilized in Kampala.

According to the definition in Article 8*bis* Rome Statute, the 'act of aggression' then needs to meet a further qualification: Paragraph 1 requires that it 'by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.' This is setting an additional threshold of relevance to make sure that not any bagatelle act of aggression automatically constitutes a crime of aggression which then results in personal prosecution.

Another restriction has been made in view of the personal applicability of the jurisdiction for the crime of aggression. It can only be committed 'by a person in a position effectively to exercise control over or to direct the political or military action of a State'. The crime of aggression is designed as a pure leadership crime. Following the example of the Nuremberg War Crime Tribunal, those that give the commands and are responsible for the military acts of aggression are those that should be put before the Court. The character of the crime of aggression as a leadership crime was taken very serious in Kampala and carried through in full consequence. It is also reflected by an addition that the Kampala Conference made to Article 25 Rome Statute. Paragraph 3 provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court not only if he commits that crime but also if he aids or assists in committing it. The Kampala Resolution inserted a new para 3*bis* stating that 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.[13] In other words, even for assistance to a crime of aggression only persons in a leadership position can be criminally responsible; subordinate staff cannot be brought before the court for a crime of aggression, neither for committing it nor for assisting it.

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[12] UNGA Resolution 3314 (XXIX) of 14 December 1974.

[13] ICC Resolution RC/Res. 6 of 11 June 2010, Annex I, para 5.

However, as indicated above, the definition of the crime of aggression was not the main issue at the Kampala conference. A different question dominated the discussion. This was the question how the UN Security Council should be involved—which had already been one of the most controversial issues at the Rome Diplomatic Conference in 1998.

The ways how the ICC can exercise its jurisdiction under the general rules of the Rome Statute are laid out in Article 13. There are three possible ways to initiate proceedings:

- A State Party refers a situation to the prosecutor.
- The Security Council refers a situation to the prosecutor.
- The prosecutor initiates an investigation by its own initiative (so called *proprio motu* powers).

There was no doubt that the middle option, i.e. the referral from the Security Council, would also apply in the case of the crime of aggression. This option was being dealt with in a separate provision in the Kampala Resolution, the new Article 15*ter* Rome Statute.[14] But what about the other two alternatives of Article 13? Should it be possible to initiate proceedings if the Security Council did not make a referral and remained silent? This was the core issue of the negotiations in Kampala. It was delicate because the political authority of the Security Council was at stake. Its key role could easily be undermined if the Court had the power to confirm the existence of a crime of aggression independent from the Security Council.

There were numerous suggestions to solve this question on the way to Kampala. Obviously those countries that hold permanent seats in the Security Council had a vital interest to keep their monopoly. This could be ensured by several options:

- The Security Council alone would be entitled to initiative proceedings in front of the ICC,
- or at least would have to make a determination under Article 39 UN Charter first that an act of aggression had occurred,
- or at least would have to authorize proceedings before the ICC to commence,
- or at least would have the authority to veto and prohibit them.

Beside these options, other alternative proposals were tabled according to which the UN General Assembly or the International Court of Justice would have to determine that an act of aggression had taken place or at least would have to give their approval to commence proceedings before the Court.

In all these variations, there was a common denominator: Some external filter outside the ICC Court system would have to be passed through to activate the jurisdiction of the Court. In the end none of these elements survived the Kampala negotiations. They were faced with a strong counter-movement of States stressing the independence of the Court according to which the Court should have the authority to rule on the existence of a crime of aggression from its mere own competence. At the end of the day that view prevailed, and the general rules of how the Court's

[14] ICC Resolution RC/Res. 6 of 11 June 2010, Annex I, para 4.

jurisdiction can be initiated for the other crimes listed in the Rome Statute were basically mirrored for the crime of aggression without any extra conditions. As a result, under the new Article 15*bis* Rome Statute[15] State Parties or the Prosecutor can initiate proceedings for the crime of aggression without any prior requirement of an act by any other institution, just like with any other crime before the ICC.[16]

Looking back on how the different positions strongly opposed each other, it can seem quite surprising that a consensus was found in Kampala.[17] A lot of it was due to the negotiating skills of the President of the Conference, Ambassador Wenaweser. Success was hanging in the balance for a long time, literally until the very last minute, deep into the night of the last day of the conference. In the end no State wanted to take the blame for breaking the consensus, and the Kampala Resolution was adopted.

1.4 New York

However, one element remained unsolved in Kampala. That was the question who should fall under the new jurisdiction for the crime of aggression. Again, this question was postponed in order to save the compromise. This postponement was achieved by introducing a sophisticated two-step mechanism for the entry into force:

First, a threshold of thirty ratifications in Article 15*bis* (2) has to be met: '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.' As a second step, an additional activation mechanism was put into operation, set out in Article 15*bis* (3): '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.' Once again, time was gained to further negotiate an element on which no consensus could be reached at the conference.

Over the years following the Kampala conference, ratifications of the Kampala amendments were coming in solidly as planned. The threshold of thirty ratifications was reached on 26 June 2016;[18] the first condition was fulfilled. Everything now

[15] ICC Resolution RC/Res. 6 of 11 June 2010, Annex I, para 3.

[16] However, the specific significance of the Security Council is nevertheless recognized in Article 15*bis* (6)–(8) Rome Statute. These provisions assign to the Security Council a key role in the further course of investigation proceedings. According to this rather complicated procedure, the Prosecutor will have to ascertain whether the Security Council has made a determination that the State concerned has committed an act of aggression. If so, the Prosecutor may proceed with his investigation. If not, the Prosecutor has to wait for six months whether the Security Council will still make such a determination. If not, the Prosecutor has to ask authorisation from the Pre-Trial Division of the Court to commence investigation while the Security Council under Article 15*bis* (8) in conjunction with Article 16 Rome Statute can still defer further investigation.

[17] For details on the road to the Kampala breakthrough, see in great detail Kreß and von Holtzendorff 2010, pp. 1202 et seq.

[18] Quintana 2018, p. 245. By the time the Assembly of States Parties gathered in December 2017, 35 ratifications had been deposited.

depended on the question whether the activation decision required in Article 15*bis* (3) would be taken by the States Parties. The States that are party to the Rome Statute gather once a year as the Assembly of States Parties (ASP), the governance body of the ICC as established in Article 112 Rome Statute. The Assembly scheduled in December 2017 in New York was the first opportunity to adopt the activation decision. The topic was put on the agenda of the ASP and became the dominating question of that Assembly.

The central issue was: In what constellation of ratifying/non-ratifying States should the Court have jurisdiction over the crime of aggression? It is important to note that the discussion that follows only concerns state referrals or *proprio moto* investigations under Article 15*bis*. It would not affect referrals by the Security Council under Article 15*ter*. Given its authority as the leading organ under the UN Charter to maintain peace and security in the world, its referral to initiate proceedings would be binding and would not be subject to any further restricting conditions or any requirement of state acceptance.[19]

As far as the jurisdiction under Article 15*bis* is concerned, different constellations have to be distinguished. To start with the easy cases: The Court would definitely have jurisdiction for an alleged crime of aggression over a national of a State that has ratified the Kampala amendments.[20] By ratifying the amendments the State has accepted the Court's jurisdiction over a crime of aggression committed by its nationals.

Inversely, the Court would not have jurisdiction for the crime of aggression over a national of a State that is not a party to the Rome Statute at all. This is set out clearly in Article 15*bis* para 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 this rule seems to be stating the obvious, it is actually the exception to the general rule in the Rome Statute which codifies the exact opposite. Under Article 12 (2) Rome Statute '[t]he Court may exercise its jurisdiction if EITHER the State on the territory of which the conduct in question occurred OR the State of which the person accused of the crime is a national is a Party to the Statute.' This rule lays down the 'principle of either territoriality or nationality'. If only ONE of these two conditions is fulfilled, the Court has jurisdiction—possibly even over a national of a State that is not a party to the Rome Statute. Article 15*bis* (5), however, deviates from that rule for the crime of aggression and shields nationals of a State that is not a party to the Rome Statute. Those nationals cannot be put before the Court for the crime of aggression.

But what is the situation if the act of aggression is committed by a national of a State that is a party to the Rome Statute as such but has not ratified the Kampala amendments? Should the Court have jurisdiction over that national? This is not a purely academic question as it may seem at first glance. Far from it, it bears significant relevance and can have severe implications in practice. It should be recalled that the crime of aggression is designed as a leadership crime which can only be committed

[19] Quintana 2018, p. 248.

[20] Provided the State has not made an opt-out declaration under Article 15*bis* (4) Rome Statute, see below.

by political or military leaders. Hence, prosecution for the crime of aggression is quickly leaning towards Heads of State or Government making the issue particularly relevant for States that have a high military exposure in the world. For that reason, it does not come as a surprise that in particular France and the UK, the only two permanent members of the UN Security Council that are parties to the Rome Statute and who originally opposed the inclusion of the crime of aggression into the Rome Statute in the first place, were conducting the negotiations in New York with the firm intent to prevent that result. Their view was that the Court could not have jurisdiction over their nationals for the crime of aggression as long as they have not ratified or accepted the Kampala amendments. In their view, this position was a natural consequence of the Law of Treaties and the principle of State consent[21] under which no State could be bound by an obligation it has not agreed to.

Further confirmation to support their case was taken from the Kampala Resolution itself which says that the amendments 'shall enter into force in accordance with Article 121 para 5'.[22] Sentence 1 of Article 121 (5) provides that amendments '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.' According to sentence 2 '[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.' This is exactly what the position of France and the UK was, enshrined in the Rome Statute itself.

As negotiations took off, camps were beginning to form. France and the UK gathered a group of 12 to 15 States around them who shared their view and formed what was then be called the 'restrictive position',[23] 'narrow approach'[24] or 'Camp Consent'—because the jurisdiction over the crime of aggression would, according to them, only apply to a State that has consented to this jurisdiction by ratifying the Kampala amendments. This group demanded to see this position explicitly spelled out and confirmed by the States Parties in the text of the activation decision. In their view, the Assembly of States Parties would have the competence and even the obligation to express itself clearly on this issue. They would not support an activation decision without the clarity that non-ratifying States Parties were not forced into the jurisdiction of the Court for the crime of aggression.

There was a strong opposing group which consisted of about 30–40 States, the main opinion leaders of which were Switzerland and Liechtenstein. In their view the Court may exercise jurisdiction over a crime of aggression, even one committed by a national of a State Party that has not ratified the amendments, just in line with the general principle of territoriality as set out in Article 12 Rome Statute and consented by all States Parties. They argued that only jurisdiction over nationals of all States would achieve universal jurisdiction of the ICC and would ensure maximum protection for victim States from the crime of aggression, hence the name of this

[21] Quintana 2018, p. 240.

[22] ICC Resolution RC/Res. 6 of 11 June 2010, para 1.

[23] Kreß 2018, p. 8.

[24] Quintana 2018, p. 240.

group: 'Camp Protection'. In operational terms, their position was widely expressed by the demand that the decision to be taken by the ASP should simply activate the Court's jurisdiction without saying anything further about the modalities. In their view, the package was sealed and done in Kampala and the ASP now seven years later would not have the competence to set up further restrictions on the exercise of the jurisdiction while adopting the activation decision. According to this view, it was rather up to the Court itself to decide on its jurisdiction for the crime of aggression (assuming that the Court would have jurisdiction *erga omnes*, even over nationals of a State that has not ratified the Kampala amendments, and assuming the Court would affirm this on a given opportunity). This position also became known as the 'simple activation' approach.[25]

This position, however, needed to provide a solution for States that wanted to be shielded against this jurisdiction. Camp Protection had a perfectly logic answer to this: Article 15*bis* (4) Rome Statute as adopted in Kampala contains a possibility for States Parties to declare that they will not accept the jurisdiction of the Court over the crime of aggression. This opt-out clause reads:

> 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.

This clause is a clear deviation from Article 121 (5) sentence 2 according to which, as seen above, nationals of States Parties that do not ratify the Kampala amendments per se do not fall under the Court's jurisdiction for those amendments without the need to make any opt-out declaration. Article 15*bis* (4) can be construed as a permissible *lex specialis* to this general rule,[26] brought in at the Kampala Review Conference for the specific case of the Kampala amendments. Camp Protection took the existence of Article 15*bis* (4) as a strong confirmation of their position: An opt-out clause only makes sense if otherwise the State were bound to the jurisdiction of the court. It would not be necessary if a State could protect its nationals from the Court's aggression-related jurisdiction by simply not ratifying the Kampala amendments. In other words: The Kampala agreement was based on Camp Protection's understanding. Camp Consent with its opposing view was seen as undermining the Kampala consensus, contradicting it[27] and reversing it back to the general rule of Article 121 (5).[28]

However, this brought up the next question: How could Camp Protection explain that, as seen above, the Kampala Resolution explicitly states that the amendments 'shall enter into force in accordance with Article 121 para 5'? Does that not refer back to the rule of Article 121 (5) (2) that Camp Protection disagreed with? The answer of Camp Protection to this objection was that the Kampala Resolution mentions Article

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[25] Cf. Quintana 2018, p. 240; Kreß 2018, p. 9; Stürchler 2018, printout p. 1.

[26] Kreß 2018, p. 8.

[27] Stürchler 2018, printout p. 4.

[28] Zimmermann 2018, p. 23: 'Article 15*bis* (4) Rome Statute has become completely redundant and superfluous'; p. 27: 'de facto amendment of the Kampala amendment (including the de facto abolition of Article 15*bis* (4)'.

121 (5) only in the context of 'entering into force'. And entering into force, it was argued, is only covered by sentence 1 of Article 121 (5), while sentence 2 deals with a different issue, the jurisdiction of the Court. As a result, Camp Protection concluded that the Kampala Resolution does not incorporate sentence 2 of Article 121 (5). One may find this a rather sophisticated distinction which seems less than evident.[29] But as Camp Protection had to find an answer to the challenge how their position was compatible with the reference to Article 121 (5) in the Kampala Resolution, this was their line of reasoning.

It is obvious from this short overview that there was a lot of ambiguity in the rules adopted at Kampala. There were elements and parts of provisions that could be quoted in favour of either side, and there was no clear right or wrong position. While in Kampala leaving this question open was a mechanism to accommodate all sides and to secure the compromise, the situation was different now with the unsolved question falling on the States' feet. The Assembly in New York was faced with the task to adopt the activation decision; a solution to the dispute had to be found.

In order to prepare the activation decision in the best possible way, the ASP one year earlier in 2016 decided to set up a facilitation process in New York.[30] A facilitation process is a way to allow space for preparing decisions, exchanging different positions and exploring the ground for compromise in disputed matters. The chairmanship of this facilitation was put in the hands of the Austrian Ambassador to the United Nations Nadja Kalb. There were a number of meetings held under the facilitation process, during which the different groups of States confirmed their opposing views and tried to support them with respective position papers.[31] While some attempts were made to bridge the gap, including input from academic scholars, mostly the well-known positions were re-iterated and not much progress and certainly no breakthrough was achieved. The process was documented in a Facilitation Report dated 27 November 2017[32] which lays out in great detail the different positions including the names of the States taking them.

During the Assembly of States Parties in December 2017 in New York efforts continued and were intensified. In daytime, the routine business of the Assembly was conducted, and after the official negotiations were finished for the day, facilitation meetings took over in the evenings. During the first week, however, not much progress was made. On the contrary, it felt that the two camps rather solidified instead of moving towards each other. As the days of the Assembly went by and the end was coming in sight, there was a widespread sentiment that there was a possibility that the Assembly would fail to find agreement on the activation decision everybody was waiting for. Another scenario considered possible was a controversial vote on this issue.

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[29] Strongly opposing: Quintana 2018, p. 244 arguing that the two sentences of Article 121 (5) cannot be separated and that the reference to Article 121 (5) in the Kampala Resolution naturally covers both sentences.

[30] ICC Resolution ICC-ASP/15/Res. 5 of 6 December 2019, Annex I, para 18(b).

[31] Cf. Kreß 2018, p. 9; Quintana 2018, p. 241, footnote 10.

[32] ICC Report ICC-ASP/16/24 of 27 November 2017.

There was general agreement that both of these scenarios should be avoided at all costs. Failing to activate the Court's jurisdiction over the crime of aggression would send a disastrous signal to the world of international justice, especially in a context where the Court was under general political pressure anyway and the overall world order seemed to be sliding into fragile times. Also, there was no obvious merit in trying to postpone the activation decision until next year's Assembly. Rather on the contrary, without any substantial progress being made, it was highly likely that the ASP would be faced with the same positions and the same discussion next year. Postponing it would not mean solving the conflict but rather losing the momentum and increasing the danger of burying the activation decision for good.[33]

Similarly, nobody was inclined to run into the risk of having a vote on this matter the outcome of which seemed unpredictable. According to the rules in the Kampala Resolution, the activation decision would require a two-thirds majority of State Parties,[34] amounting to no less than 82 positive votes necessary.[35] While the two camps and their main protagonists were clearly visible, there was a big majority of silent States which were very hard to predict what side they would take when it came to voting. The outcome was entirely open. And there was also another aspect: So far in the history of the Assembly of States Parties, all relevant decisions had been taken by consensus. This has always been considered to be an important signal of unanimity among States Parties. Putting such a crucial question to a vote could open Pandora's Box for future decision-taking.

In the second week of the Assembly, the political directors from the ministries of many key delegations arrived, including Germany, France and the UK, giving the Assembly a higher-ranking representation than usual. It was a clear signal that States were aware that the discussions were at a crucial stage and States were taking all possible political efforts to solve the situation.

As the bilateral meetings and talks behind the scenes in the corridors intensified even more, one idea was emerging that looked as if it could serve as the basis for a compromise breakthrough: facilitating the use of the opt-out clause in Article 15*bis* (4).[36] The idea was that every State that so wished—either on adoption of the activation decision or at any later stage—could add its name to a list as sharing the view that nationals of a State that has not ratified the Kampala amendments do not fall under the Court's jurisdiction for the crime of aggression. In doing so, the States on that list would be assured exemption. There was some charm about this idea: It would not explicitly be called an 'opt-out' and hence no State would be forced to take a firm position on the legal question whether an opt-out was necessary to preclude the Court from exercising aggression-related jurisdiction over its nationals. It would be a pure

[33] Stürchler 2018, printout p. 3.

[34] According to Articles 15*bis* (3) and 15*ter* (3) Rome Statute '[t]he 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.' which refers to Article 121 (3) Rome Statute requiring a two-thirds majority of States Parties.

[35] Stürchler 2018, printout p. 3; Quintana 2018, p. 246.

[36] Zimmermann 2018, p. 24: 'opting-out light approach'.

list with names of States sharing the restrictive view which would be communicated to the Registrar. While the exact legal meaning would remain uncertain, in practice that list would be treated as a collection of opt-out declarations under Article 15*bis* (4). A typical diplomatic compromise: leaving the legal question open, allowing both sides to maintain their respective legal positions and focusing on a pragmatic result that would provide a solution for legal certainty for the States.[37]

As the days of the Assembly progressed, this idea became more and more the corner stone around which a possible compromise could be built. Texts on how such a wording could look like were drafted and discussed in the facilitation meetings. Further modifications were brought into play in order to simplify the listing mechanism even further, hoping this would made this model even easier to digest for the members of Camp Consent: One idea was to attach an annex to the activation decision putting on record States that follow the restrictive approach. Or—even easier—the position of those States that had expressed their restrictive position during the facilitation process and appear documented as taking that position in the written facilitation report would be automatically recognized. This would avoid the need for a new explicit individual act of declaration or joining a list, and States would not have to step out of the shadow now.

On the second last day of the Assembly, it seemed that more and more States that had originally supported France and the UK had reached the point where they were willing to accept the opt-out listing model in one variation or the other. For them, the perspective to gain consensus on the activation decision was the bigger merit. The impression was growing that France and the UK were increasingly isolated in their firm demand to have explicit clarification in the activation decision that a national of a State that has not ratified the Kampala amendment cannot be brought before the Court for the crime of aggression. Nevertheless, they continued to dismiss all attempts to find a compromise solution around an opt-out listing model. If such a proposal was to be put on the table, they would demand a voting on it. And as mentioned before, the result of that would have been entirely uncertain.

As the Assembly was on its last day, final efforts were made by the Austrian Facilitator. The Assembly was suspended a number of times for behind the scene consultations which, however, did not bring about any breakthrough. When the Assembly was resumed, she declared that in spite of her best possible efforts she had been unable to reach a compromise solution and declared the facilitation process as failed. In consequence she handed the issue back to the President of the Assembly[38] who was now charged with the difficult task of saving the activation decision from failing.

By that time, it was the evening of the last negotiation day. There was a lot of idle time to be spent; delegations were sitting around in the corridors of the basement of the UN building throughout long interruptions while further bilateral negotiations were taking place behind the scenes. Those delegates who had already attended the Kampala Review Conference in 2010 had a déjà-vu as the Kampala compromise

[37] Kreß 2018, p. 10.

[38] At this point and for the remainder of the Assembly Vice-President Ambassador Sergio Ugalde from Costa Rica as acting President.

was also reached in the late hours of the last day of the Assembly. As time turned midnight, technically the final day of the Assembly was over and the diplomatic clocks were 'stopped'. This is an instrument to virtually freeze the time to allow any decisions that may still be taken to be dated on the last day of the conference and thus within the mandate of the Assembly. Both in Rome and in Kampala the clocks had been stopped on the last day of the conferences, and now the same was happening in New York—a clear indicator that this decision was in one line with the previous historic milestones in the development of the International Criminal Court.

Naturally, while there was nothing to do, the rumour mill was churning, and the news that were coming through were not encouraging. France and the UK were still firmly insisting on their position and not willing to consider any other approach as a basis for compromise. It became evident that no consensus could be reached on any opt-out listing model. As a result, the strategy was changed, almost out of despair: If the minority were not willing to follow the vast majority, the view of the minority was put before the majority to see what would happen. A new draft text of the activation decision was presented to the delegations including explicit wording stating that the Assembly 'confirms that […] 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'—precisely the position of France and the UK.

The two camps met in separate rooms, faced with a 'take it or leave it' decision. It is probably fair to say that there was great dissatisfaction and frustration among Camp Protection about how persistently the other side were insisting on their position, without any visible readiness to move towards a compromise. It would have been an obvious reflex at this point to say 'If they don't move at all, we're not giving in either' possibly resulting in the activation to fail. But it speaks for the rationality of the protagonists of Camp Protection that they did not let their anger take over their decision-making. The choice was clear: Consensus could only be reached on the basis of this text or no consensus would be reached at all. And a failure of this Assembly to reach an activation decision would cause enormous damage, possibly beyond repair, to the system of international criminal justice. This is why, among all their frustration, the prevailing view was: We are having a unique window of opportunity here tonight to reach consensus on the activation and the chance is too historic to let go, even if it was under conditions this camp did not agree to. More and more delegations that took the floor in this internal meeting shared this view. In the end, Camp Protection took the painful choice to report back to the Assembly that they were—reluctantly—willing to accept this wording in view of the historic significance of the activation.

This was, however, still not the breakthrough. The draft text which the President had put as the final compromise attempt before the delegations not only included the explicit wording that France and the UK had demanded so firmly. It also included one further paragraph reading: 'The Assembly of States Parties […] 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'.

This provision is quoting two existing Articles of the Rome Statute that highlight the independence of the judges.[39] This was, of course, not adding anything new in substance. These Articles were in force anyway, and referring to them was nothing more than stating the obvious, in fact a fundamental principle of the Court. The inclusion of this paragraph was meant as an attempt to provide at least some soothing language[40] for the large number of States in Camp Protection whose view was not reflected in the draft text at all, who had advocated a simple activation decision and were concerned that any further modalities to the activation decision would interfere with the independence of the Court. It might be difficult to see that a pure quotation of an Article of the Rome Statute which states an obvious fact, namely the independence of the judges of the Court, could produce any further complications. But France and the UK argued this additional paragraph was watering down the effect of the declaration in their favour in the paragraph before and obscuring again the certainty they were seeking. As a result, they demanded this paragraph be deleted or at the very least shifted to a preambular paragraph of the activation decision.

However, what would this have changed? A hundred percent certainty about exemption from the Court's jurisdiction was not to be gained anyway, with or without any reference to the independence of the Court. At the end of the day, it was up to the Court to decide whether it has jurisdiction over the person before it, regardless of what the Assembly said. Having said this, it was highly unlikely that the Court would disregard the intention explicitly expressed by the States Parties in the activation decision as their own interpretation of the rules they made themselves in Kampala.[41] France and the UK were about to get the best result in their favour they could possibly get, and the reference in the additional paragraph of the activation decision to the rules about the independence of the Court really did not make any substantial difference at all.

Tension at the ASP was reaching its peak. A number of delegations, including some that had remained silent so far, expressed in impressive personal interventions their lack of understanding for the latest twists. They clearly indicated that their willingness to contribute to a compromise solution was reaching a limit after what the vast majority of States Parties were willing to concede in order to accommodate the concerns of two delegations. Demanding deletion of what was in their view a harmless reference to the independence of the Court at this stage, was pushing it too far for many delegations.

One last time the Assembly was suspended. The President of the Assembly announced this was his very last attempt to reach consensus; after this break he would not admit any more interventions or negotiations but just induce a decision on the text. This final interruption took place in an atmosphere of utmost pressure and

[39] Article 40 (1) Rome Statute: 'The judges shall be independent in the performance of their function.' Article 119 (1) Rome Statute: 'Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.'

[40] Quintana 2018, p. 248; Kreß 2018, p. 12: 'a symbolic concession', 'softening the unconditional surrender'.

[41] Quintana 2018, p. 249.

hectic talks. After years of long tiring negotiations, would the historic decision to activate the Court's jurisdiction over the crime of aggression seriously fail over the bagatelle whether a self-evident reference to the independence of the judges would be quoted in an operative or a preambular paragraph? The situation was on a knife's edge, and for many in the room it was hard to comprehend the relevance of this discussion in relation to the historic dimension of the decision at stake.

After a few minutes, the President of the Assembly resumed the meeting and, as announced, only put forward one question: 'Can I take it that the proposal on the table meets with the consensus in the room?' Nobody asked for the floor, not France, not the UK, the silence was not broken.[42] The President's hammer fell and the decision to activate the international Criminal Court's jurisdiction over the crime of aggression had been adopted, well after midnight, in consensus. The tension dissolved into a huge applause of relief on this historic achievement.

In the resolution, as it was adopted,[43] the Assembly is 'recalling'—nothing more than that—in the preamble the two provisions that were at the core of the debate: the opt-out clause of Article 15*bis* (4) and Article 121 (5). Operative paragraph 1 contains the actual activation decision required under Article 15*bis* (3) and Article 15*ter* (3).[44] The activation date was set for 17 July 2018 which marked the 20th anniversary of the adoption of the Rome Statute—a suitable symbolic date to expand the Court's jurisdiction and to demonstrate that after 20 years the Court is alive and vital.

Reading on, paragraphs 2 and 3 contain the provisions that had almost brought the whole activation process to a failure in the very last minute: the wording France and the UK had insisted on so firmly and the reference to the rules of the Rome Statute highlighting the independence of the Court. The resolution ends on paragraph 4 with the usual 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.

Meanwhile, in the Assembly the initial relief about the last-minute consensus was turning into a different tone. The adoption of the activation decision was followed by a long list of States that took the floor to give an 'explanation of vote' which would be taken to the minutes of the Assembly. In these statements many delegations of Camp Protection explicitly maintained their legal view—in spite of the contradicting wording of the activation decision. While there was a clear sentiment of satisfaction that this historic chance eventually had not been missed, there was also a frequent expression of irritation and disappointment about the outcome of the negotiations. In the view of many delegations, two States had forced their position onto the vast majority of States Parties.[45]

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[42] Kreß and von Holtzendorff 2010, p. 1180 describe the crucial moment of the Kampala Review Conference in a remarkably similar way.

[43] ICC Resolution ICC-ASP/16/Res. 5 of 14 December 2017.

[44] 'The Assembly of States Parties […] 1. Decides to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018'.

[45] Cf. the citations in Kreß 2018, footnotes pp. 13 et seq.

Stepping back from the emotions of that final night in New York, it is probably realistic to conclude that the way the negotiations went is reflecting the changing times we live in. The Rome Statute was concluded in the 1990s in a unique window of opportunity after the decline of the Eastern Bloc. The global optimistic spirit of those times that allowed the adoption of the Rome Statute has been swept away by the realities of new global crises, the fight against international terrorism and new regional conflicts. Military tension has risen considerably again around the world, with new complex types of conflict arising in which multiple actors are involved and the boundaries between international and non-international conflicts are increasingly blurred. All these aspects make international military engagements less clear-cut and predictable, not only in reality but also in legal terms under international law. This results in uncertainties for States about the consequences before the International Criminal Court and their wish to protect themselves against undesired jurisdiction for their military engagement in the world.

Putting the decision of that New York night into this overall perspective, one should appreciate what has been achieved:[46] In spite of all its deficiencies, we can still applaud the existence of the International Criminal Court which now also holds jurisdiction over the crime of aggression—a milestone in the development of International Criminal Law. More than 70 years after the judgment of the Nuremberg Military Tribunal, the individual personal liability for the crime of aggression has finally been established, completing the Rome Statute as originally drafted and contributing to the fight against the 'most serious crimes of concern to the international community as a whole'.

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[46] In the same spirit Stürchler 2018, printout p. 5.

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