

## The First Review Conference of the Rome Statute of the International Criminal Court

By David Kaye

### Introduction



Twelve years ago this summer, hundreds of delegations—from governments, non-governmental organizations, international organizations and elsewhere—cheered the establishment of the first permanent international criminal court in Rome. At the time, Rome Conference Chairman Philippe Kirsch exulted to the Conference newspaper, *Terraviva*: "This is an extraordinary moment, a historical moment. I am not sure to what extent those present here

know how important this is for the future of humankind."<sup>[1]</sup> Much has happened in the years since Rome to clarify the significance of that moment. The Rome Statute of the International Criminal Court (ICC) entered into force in 2002.<sup>[2]</sup> The ICC has become a fully operational tribunal, seeking the arrests of individuals from Uganda, the Democratic Republic of Congo, Sudan and the Central African Republic, launching an investigation in Kenya, examining other situations and beginning three trials.<sup>[3]</sup> It not only seeks to hold accountable those it accuses of war crimes, crimes against humanity, and genocide; it has become an actor in domestic and international politics, in the countries where it pursues cases and in those countries that are non-States Parties anxious about the reach of its jurisdiction.

From May 30th to June 11th, the 111 States Parties to the Rome Statute—along with observer delegations from non-States Parties, NGOs, civil society, and others—will have an opportunity to assess the development of the ICC over the past decade when they gather in Kampala, Uganda, to hold their first Review Conference. While the Conference will take stock of the progress of the Court in a variety of areas and consider a handful of proposals on other matters, the negotiation of an amendment to add aggression as a crime under ICC jurisdiction promises to overshadow all else. At the same time, the United States will participate as an observer, bringing to Kampala not only a new level of American engagement and

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support but also strong opposition to any resolution of the aggression issue that fails to give the United Nations Security Council a pivotal role. All the while, the absence from the Court's detention facility in The Hague of several high-profile accused individuals—such as Sudan's President Omar Hasan al-Bashir and the Ugandan Lord's Resistance Army's Joseph Kony—will serve as a reminder that States Parties still have some distance to go before the Court operates as a credible response to mass atrocities.

This Insight takes an advance look at key issues on the agenda at Kampala.<sup>[4]</sup>

## Aggression

Under the Rome Statute, the ICC may now exercise jurisdiction over three categories of crimes: genocide, crimes against humanity, and war crimes. The Court may not exercise jurisdiction over a fourth crime, aggression, until the State Parties adopt a provision "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."<sup>[5]</sup>

Aggression has a distinguished pedigree in international law, principally dating from the immediate aftermath of World War II. The United Nations Charter grants the Security Council the power to determine the occurrence of an act of aggression.<sup>[6]</sup> While the General Assembly adopted a Definition of Aggression in 1974,<sup>[7]</sup> the Security Council itself has never defined the term. The Charter of the International Military Tribunal (IMT) at Nuremberg designated a "war of aggression" as a crime against peace,<sup>[8]</sup> while the IMT for the Far East, the Tokyo Tribunal, similarly defined as a crime against peace "a declared or undeclared war of aggression."<sup>[9]</sup> Both the Nuremberg and Tokyo Tribunals convicted several high-ranking German and Japanese leaders, respectively, of the crime of aggression (and acquitted several others). Since that time, a number of international instruments have restated the criminality of aggression.<sup>[10]</sup> However, the international criminal tribunals since Nuremberg and Tokyo have not followed their steps, instead possessing jurisdiction only over war crimes, crimes against humanity, and genocide.

Notwithstanding its place in the post-war pantheon of international crimes, aggression was among the key controversies at the Rome Conference in 1998, and participants in Rome were unable to reach agreement on its definition or the mechanism to trigger the Court's jurisdiction.<sup>[11]</sup> Since 2002, States Parties and others (including non-party governments and NGOs) participated in a working group (known as the "Princeton Process") to develop a consensus definition of aggression and the conditions under which the Court may exercise jurisdiction. Several prominent non-States Parties, including China, participated in these discussions; however, the Bush Administration decided that the United States would not participate. In the absence of the United States, participants achieved a definition for which a consensus has seemingly emerged. However, they failed to achieve consensus with respect to jurisdiction.

The proposed definition provides a substantive legal definition of the *crime of aggression* as

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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.<sup>[12]</sup>

The proposal defines an *act of aggression* as "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."<sup>[13]</sup> Modeled on the UN General Assembly's 1974 Definition of Aggression, the proposal provides a list of seven acts that qualify as acts of aggression.<sup>[14]</sup>

The proposal is arguably consistent with contemporary understandings of the *jus ad bellum*.<sup>[15]</sup> Yet much remains open to interpretation. For instance, how serious must an act of aggression be to merit ICC attention? To what extent would humanitarian justifications of force, such as those envisaged by the Responsibility to Protect,<sup>[16]</sup> be taken into account by the Court? Would the Court consider the examples of aggressive force illustrative or exhaustive?

Jurisdiction presents a much more serious obstacle to adoption of an aggression amendment. States and NGOs broadly agree that the Court could exercise jurisdiction where the Security Council has already determined an act of aggression (assuming all other elements required for jurisdiction are met). They differ over whether such a determination should be *required* before the Court may open an investigation, as the permanent Security Council members desire. The Review Conference will need to determine whether a Security Council trigger is required or whether other mechanisms—such as the Prosecutor's independent powers or a General Assembly referral—might enable the initiation of an investigation.

One alternative to the Security Council requirement would be to require the "aggressor State" to consent to ICC jurisdiction, which would achieve the functional equivalent of a Security Council trigger for the Council's permanent members (assuming they would not provide such consent). Still, a large plurality of States Parties oppose such a requirement. A poll of States Parties during the March resumed session of the Assembly of States Parties (ASP) indicated continued lack of consensus, with the vast majority of delegations opposing the Security Council requirement.<sup>[17]</sup>

The Obama administration clearly is anxious about the Kampala outcome; it undoubtedly wishes to support the ICC, but a negative outcome on aggression (from its perspective) could conceivably undermine such engagement. The U.S. Ambassador at Large for War Crimes Issues, Stephen J. Rapp, told the ASP in November in The Hague that "[o]ur view has been and remains that . . . jurisdiction should follow a Security Council determination that aggression has occurred."<sup>[18]</sup> State Department Legal Adviser Harold Koh amplified this position in March, indicating that the Obama Administration strongly favors the requirement of a Security Council trigger and casting doubt on the compatibility of the definition with customary international law.<sup>[19]</sup> France and the United Kingdom—the two permanent

Security Council members that are parties to the Rome Statute—share the U.S. jurisdictional concerns, but whether they can find a creative solution that meets everyone's needs remains to be seen.<sup>[20]</sup>

After several years of negotiations, States Parties have found resolution of the jurisdictional issues to be elusive. In this light, it may well be that the Review Conference will fail to conclude the aggression negotiations. One possibility might involve a piecemeal approach: the adoption of a definition but the deferral of the negotiations over jurisdiction, thereby keeping aggression out of the ICC until some later negotiation. It is uncertain whether such an approach would be acceptable to those States strongly supportive of adding the crime of aggression to the Rome Statute.

### **The War Crimes Opt-out**

Article 124 of the Rome Statute enables a party to opt out of the war crimes jurisdiction of the Court (Article 8) for an initial period of seven years after the entry into force of the Statute for that party. It also mandates a review of the opt-out by the Review Conference. France strongly sought this provision in Rome in 1998, but it withdrew its opt-out declaration in 2008. Colombia is the only other country to have exercised the opt-out, but its declaration expired this fall. The opt-out was highly controversial in Rome, but its impact has been minimal. Given the limited use of the provision, State Parties will have difficulty arguing that retaining Article 124 will entice non-parties to ratify the Rome Statute. Thus far, States Parties acknowledge the limited value of Article 124, but whether a consensus in favor of its deletion has emerged remains unclear.

### **Proposed Amendments**

States Parties have proposed a number of amendments to the Rome Statute. Mexico proposed the criminalization of the use or threat of use of nuclear weapons.<sup>[21]</sup> The Netherlands proposed a new Rome Statute crime of terrorism.<sup>[22]</sup> Norway proposed new language to deal with the enforcement of sentences.<sup>[23]</sup> Trinidad and Tobago proposed jurisdiction over drug offenses.<sup>[24]</sup> South Africa and the African Union, reflecting their opposition to the arrest warrant for Sudanese President al-Bashir, proposed amending Article 16 to make it easier for outside parties to seek the deferral of a case pending before the Court.<sup>[25]</sup> None of these amendments will be subject to formal discussion at the Review Conference, as the ASP decided to establish working groups to develop each of these proposals at subsequent meetings of States Parties.<sup>[26]</sup>

One proposal by Belgium will be considered by the Review Conference.<sup>[27]</sup> The proposal would extend the criminalization in international armed conflict of three existing categories of weapons – poison and poisoned weapons, gases, and certain kinds of long-prohibited bullets – to non-international armed conflict. The proposal has received broad support among States Parties but very little substantive discussion; unless serious concerns are raised, it should be a strong candidate for adoption in Kampala.

### **Stocktaking**

In addition to the treaty-based work, the Review Conference will hold a

number of "stocktaking" sessions. As currently conceived, the exercise will involve a review of the complementarity regime, the Statutory mechanism by which the Court defers to ongoing investigations and prosecutions in domestic tribunals; cooperation with the Court; the ICC's impact on victims and affected communities; and the interaction of "peace and justice."<sup>[28]</sup> The sessions will be designed around keynotes and panels of experts on the four topics. Although it is difficult to predict, it seems unlikely that the stocktaking exercise will amount to a probing review of the ICC's strengths and weaknesses in these areas and lead to concrete recommendations and proposals.

## Conclusion

The ICC Review Conference is likely to involve hard work (especially on the definition of aggression), workaday treaty considerations (focusing on the war crimes opt-out and the Belgian proposal), and assessment (stocktaking). Amidst this busy schedule, the Court, States Parties, and NGOs should not shy away from critically reflecting on what the Court has done right and wrong over the past several years. The Review Conference provides an important moment to examine the Court's performance to ensure that it is fulfilling objectives established more than a decade ago.

The Review Conference, of course, also presents an opportunity for the United States to take stock of its own relationship to the Court. The Obama administration has already advanced the relationship with a concrete proposal to meet with the chief prosecutor to find where it might make contributions.<sup>[29]</sup> The aggression negotiations, however, guarantee that the new relationship will have elements of disharmony, as U.S. Government representatives will likely push hard for a required Security Council trigger. The administration will face pressure in Washington to step away from a new era of cooperation with the Court if the aggression negotiations lead to a bad result from the U.S. perspective. In that sense, the stakes in Kampala are high, providing a key test not only for U.S. policy but for the future of the institution and international justice.

## About the Author

David Kaye, a member of the ASIL Executive Council and co-editor of the *Insight* series, is Executive Director of the International Human Rights Program at UCLA School of Law. He led a team of six UCLA Law School students in the School's International Justice Clinic to the ASP Meeting in The Hague in November.

## Endnotes

[1] See *And They Took It*, TERRAVIVA: CONF. DAILY NEWSPAPER, available at <http://www.ips.org/icc/tv180701.htm>.

[2] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> [hereinafter Rome Statute].

[3] Basic information on current ICC activities may be found at the ICC web

site, *Situations and Cases*, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/>.

[4] For more detailed analysis of the Review Conference, see UCLA School of Law, International Justice Clinic, *The Road to Kampala: U.S. Participation in the Review Conference of the International Criminal Court* (Apr. 2010), available at <http://law.ucla.edu/humanrights>; and Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, Council on Foreign Relations Special Report (Apr. 2010), available at [https://secure.www.cfr.org/publication/21934/from\\_rome\\_to\\_kampala.html](https://secure.www.cfr.org/publication/21934/from_rome_to_kampala.html).

[5] Rome Statute, *supra* note 2, art. 5(2).

[6] UN Charter art. 39.

[7] See G.A. Res. 3314, U.N. GAOR 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974).

[8] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.C. 280, available at <http://www.icrc.org/ihi.nsf/FULL/350?OpenDocument>.

[9] Charter of the International Military Tribunal for the Far East art. 5(a).

[10] See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 112-113 (3rd ed. 2001).

[11] For a brief overview of the aggression negotiations at Rome, see Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 79, 81-85 (Roy S. Lee ed., 1999).

[12] Proposal of Amendment by Liechtenstein, U.N. Doc. C.N.727.2009.TREATIES-7 (Oct. 29, 2009), available at <http://www.adh-geneva.ch/RULAC/news/LiechtensteinCN727EN.pdf>.

[13] *Id.*

[14] *Id.*

[15] *But see* Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 *Yale J. Int'l L.* 71 (2010), available at [http://www.yjil.org/index.php?option=com\\_content&view=article&id=130:blank-prose-crime-of-aggression&catid=6:archives](http://www.yjil.org/index.php?option=com_content&view=article&id=130:blank-prose-crime-of-aggression&catid=6:archives).

[16] G.A. Res. A/RES/60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); and S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (the Security Council reaffirmed the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect).

[17] A discussion of the various options now on the table for jurisdictional purposes may be found at Assembly of States Parties to the Rome Statute of

the International Criminal Court, Resumed 8th Sess., Annex II: Report of the Working Group of the Review Conference, ICC-ASP/8/20/Add.1, at 42-45, 49-52, (Mar. 22 – 25, 2010), *available at* <http://www.icc-cpi.int/NR/rdonlyres/C125A0AE-9069-45CE-80F6-75665F6619E4/0/ORASPR8ENGANNEXES.pdf>.

[18] Stephen J. Rapp, Ambassador at Large for War Crimes Issues, Speech to the Assembly of States Parties (Nov. 19, 2009), *available at* [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf).

[19] See Harold H. Koh, Legal Advisor U.S. Dept. of State, Statement Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court (Mar. 23, 2010), *available at* <http://usun.state.gov/briefing/statements/2010/139000.htm>; and Harold H. Koh, Obama Administration and International Law, Speech at the Annual Meeting of the Am. Soc. Int'l L. (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>.

[20] For a discussion of the debate over the modality for adoption and entry-into-force of an aggression amendment, see *The Road to Kampala*, *supra* note 4, at 13-14.

[21] Proposal of Amendment by Mexico, U.N. Doc. C.N.725.2009.TREATIES-6 (Oct. 29, 2009), *available at* <http://www.icc-cpi.int/NR/rdonlyres/4420B7E1-F93D-4D08-AF5C-3B07C1C3E6F1/0/MexicoCN725EN.pdf>.

[22] Proposal of Amendment by The Netherlands, U.N. Doc. C.N.723.2009.TREATIES-5 (Oct. 29, 2009), *available at* <http://www.adh-geneva.ch/RULAC/news/NetherlandsCN723EN.pdf>.

[23] Proposal of Amendment by Norway, U.N. Doc. C.N.713.2009.TREATIES-4 (Oct. 29, 2009), *available at* <http://www.icc-cpi.int/NR/rdonlyres/C6E2893C-D4BD-4DD2-8F70-63D220190D9F/0/NorwayCN713EN.pdf>.

[24] Proposal of Amendment by Trinidad and Tobago, U.N. Doc. C.N.737.2009.TREATIES-9 (Oct. 29, 2009), *available at* <http://www.icc-cpi.int/NR/rdonlyres/03DAF164-78C7-4129-A0BD-91534F80BF81/0/TrinidadTobagoCN737EN.pdf>.

[25] Proposal of amendment by South Africa, C.N.851.2009.TREATIES.10 (Nov. 30, 2009).

[26] Press Release, Assembly of States Parties to the Rome Statute of the International Criminal Court [ASP], Assembly of States Parties Concludes its Eighth Session, ICC-ASP-20091126-PR481 (Nov. 27, 2009), *available at* <http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202009/assembly%20of%20states%20parties%20concludes%20its%20eighth%20session>.

[27] See Resolutions Adopted by the Assembly of States Parties, ICC/ASP

/8-20, Annex III, at 41, Belgium: Proposal of Amendment, *available at* [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Part.II.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Part.II.pdf); *see also* a fuller Belgian proposal dealing with additional categories of weapons, not forwarded to the Review Conference, U.N. Doc. C.N.733.2009.TREATIES-8 (Oct. 29, 2009), *available at* <http://www.icc-cpi.int/NR/rdonlyres/3798777A-F998-4B22-9F3D-5B25940CD299/0/BelgiumCN733EN.pdf>.

[28] See Res. ICC-ASP/8/Res.9 (Mar. 25, 2010), *available at* [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf).

[29] See Stephen J. Rapp, U.S. Ambassador at Large for War Crimes Issues, Statement Regarding Stocktaking at the Eighth Resumed Session of the Assembly of States Parties of the International Criminal Court (Mar. 23, 2010) *available at* <http://usun.state.gov/briefing/statements/2010/138999.htm>.