

ON THE ACTIVATION OF ICC JURISDICTION OVER THE CRIME OF AGGRESSION²

ABSTRACT

In the early hours of 15 December 2017, the Assembly of States Parties to the Rome Statute made the decision to activate the International Criminal Court's jurisdiction over the crime of aggression from 17 July 2018 onwards. The activation resolution was adopted after intense negotiations about one aspect of the jurisdictional regime, which had remained controversial since the adoption of the Kampala amendments on the crime of aggression. The New York breakthrough completes the work of the Rome and Kampala conferences and marks the culmination of a fascinating century-long journey. With all its imperfections, the consensus reached at the United Nations headquarters sends a timely appeal to the conscience of mankind about the fundamental importance of the prohibition of the use of force in any international legal order aimed towards the preservation of world peace.

1. VERSAILLES, NUREMBERG, TOKYO, AND ROME: INITIAL MILESTONES OF A LONG JOURNEY

In a speech during an electoral campaign event in November 1918, the British Prime Minister, David Lloyd George, declared: 'Somebody [...] has been responsible for this war that has taken the lives of millions of the best young men in Europe. Is not one to be made re-

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² Reprinted from: Claus Kreß, On the Activation of ICC Jurisdiction over the Crime of Aggression, *Journal of International Criminal Justice*, Volume 16, Issue 1, 1 March 2018, Pages 1–17, doi:10.1093/jicj/mqy007, reprinted by the permission of the Author. (c) The Author 2018. For permissions please email Oxford University Press at journals.permissions@oup.com. The Georgian translation is provided by Dr. Giorgi Dgebuadze (Research Fellow of the Institute for Comparative and Transnational Criminal Law, Faculty of Law, Ivane Javakishvili Tbilisi State University).

sponsible for that? All I can say is that if that is the case there is one justice for the poor and wretched criminal, and another for kings and emperors.’³

While the Prime Minister’s message provoked applause from his audience, the response of the diplomats of the time was less than enthusiastic. In its report of 29 March 1919 to the Preliminary Peace Conference, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties reached the following conclusion:

The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reprovcs and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace ... a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference.

This confirmation of the predominant view of nineteenth century international law on the use of force by states foreshadowed the failure of the first attempt to set a precedent for the international criminalization of aggressive warfare.⁴ This failure, however, also was a prologue. The Commission on Responsibilities had already complemented its rather dry conclusion with a hint that pointed to a possible change of direction: ‘It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.’

In the inter-war period, this ‘desire’ was taken up by a movement of scholars which made a pioneering contribution to the formation of the discipline of international criminal law. In particular, the proposal for a crime of aggression held a prominent place in Vespasian Pella’s 1935 *Plan d’un code répressif mondial*. But, as Pella himself observed in retrospect, ‘States did almost nothing between the two wars to bring about an international system of justice’.

By this time, the United Kingdom had also joined the ranks of the sceptics. In 1927, the British Foreign Minister Austen Chamberlain informed the House of Commons of his view that a definition of aggression would amount to ‘a trap to the innocent and a signpost for the guilty’.⁵ Yet, at the more traditional inter-state level of international law, the 1928 Kellogg-Briand Pact (which is the centrepiece of the fascinating and currently much-debated book

³ The first part of this essay follows parts of C. Kreß, ‘Introduction: The Crime of Aggression and the International Legal Order’, in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2 vols, Cambridge University Press, 2017) 1–18. This earlier part of the international conversation about the subject has received a magnificent monographic treatment in K. Sellars, *Crimes Against Peace and International Law* (Cambridge University Press, 2013).

⁴ For a colourful account of this ‘first attempt’, see K. Sellars, ‘The First World War, Wilhelm II and Article 227: The Origin of the Idea of “Aggression” in International Criminal Law’, in Kreß and Barriga (eds), *supra* note 3, 19–48.

⁵ This famous citation is taken up by Martti Koskeniemi in his reflections ‘A Trap for the Innocent ...’, in Kreß Barriga (eds), *supra* note 3, 1359–1385.

‘The Internationalists’ by Oona A. Hathaway and Scott J. Shapiro⁶) marked the transition in positive international law from a *ius ad bellum* to a *ius contra bellum*. The Pact went even further and opposed the idea that the enforcement of a legal obligation could, as such, constitute a ‘just cause’ for war. The Pact was well received and entered into force as early as 1929. And when the decision was made at the end of the Second World War to make Germany’s aggressive wars the subject matter of criminal proceedings, the Pact became the legal document of reference. The fact that the Pact lacked a penal sanction was of course well known. But now the world’s political leaders were determined to set a creative precedent. At the Nuremberg trial, the British Chief Prosecutor Hartley Shawcross translated that determination into the following words: ‘If this be an innovation, it is an innovation which we are prepared to defend and justify.’ And Robert Jackson, the charismatic United States Chief Prosecutor, who was one of the most important driving forces behind the creative precedent that was to be set, made this famous promise: ‘And let me make clear that while this is first applied against German aggressors, the law includes, if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.’

The British delegation at Nuremberg, which was advised by Hersch Lauterpacht, then in the process of establishing himself as a leading authority in international law, could feel itself emboldened by the powerful statement that Lauterpacht had made a few years prior to the Nuremberg trial: ‘The law of any international society worthy of the name must reject with reprobation the view that between nations there can be no aggression calling for punishment.’ The defence replied by placing reliance on the legality principle. Not without eloquence, Hermann Jahrreiß, professor at the University of Cologne, pleaded:

[T]he regulations of the [London] Charter negate the basis of international law, they anticipate the law of a world state. They are revolutionary. Perhaps in the hopes and longings of the nations the future is theirs. The lawyer, and only as such may I speak here, has only to establish that they are new, revolutionarily new. The laws regarding war and peace between states had no place for them — *could* not have any place for them. Thus they are criminal laws with retroactive force.

But, as was perhaps to be expected, the 1946 Nuremberg Judgment essentially endorsed the case for the Prosecution. It emphatically stated: ‘To initiate a war of aggression ... is not only an international crime; it is the supreme international crime ...’.⁷

While Nuremberg and the subsequent Tokyo judgment,⁸ together with the United Nations (UN) General Assembly’s confirmation of the Nuremberg principles, crystallized the con-

⁶ O.A. Hathaway and S.J. Shapiro, *The Internationalists. How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, 2017).

⁷ For a comprehensive analysis of the Nuremberg judgment on ‘crimes against peace’, see C. McDougall, ‘The Crimes against Peace Precedent’, in Kreß and Barriga (eds), *supra* note 3, 49–112.

⁸ It should not be forgotten that the Tokyo Judgment, unlike Nuremberg, was not unanimous and that the ‘Tokyo Dissents’ form part of the long debate about the crime of aggression. For a comprehensive analysis, see K. Sellars, ‘The Legacy of the Tokyo Dissents on “Crimes against Peace”’, Kreß and Barriga (eds), *supra* note 3, 113–141.

cept of the crime under international law of waging a war of aggression, developments over the next few decades would continue to bear greater resemblance to the state of affairs in the inter-war period. The 1945 UN Charter had transformed the prohibition of war into a prohibition of the use of force. The Charter sought to fortify that latter prohibition through a system of collective security, which aimed higher than its forerunner in the 1919 Covenant of the League of Nations. But while these precedents had given birth to the idea of possible penal sanction for the unlawful use of force, the enforcement of this sanction — either through an international criminal court or at the national level — was to remain a vain hope for the time being. In the 1950s, Bert Röling, the Dutch member of the Tokyo Tribunal, articulated the pessimism of the time: ‘It would be a remarkable and astonishing thing: to find a generally acceptable definition of aggression.’

The year 1974 did not prove Röling’s scepticism wrong, although, on 14 December that year, the General Assembly succeeded in adopting its Resolution 3314⁹ by consensus. But on somewhat closer inspection, the ‘Definition of Aggression’, as contained in the annex to that resolution, turns out to be replete with constructive ambiguity.¹⁰ Most importantly for our purposes, the consensus text distinguished between ‘act of aggression’ (within the meaning of Article 39 of the UN Charter) and ‘war of aggression’. Only the latter concept was directly related to the idea of individual criminal responsibility under international law (*cf.* the first sentence of Article 5(2) of the annex to 1974 GA Resolution 3314) and no attempt was made to define this concept.

And Röling’s scepticism would resonate even in the 1990s when the world witnessed the revival of international criminal law *stricto sensu*. The renaissance of the idea to create a global system of international criminal justice did not encompass the Nuremberg and Tokyo legacy on ‘crimes against peace’. The Statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda did not even list such a crime. Due to a last minute compromise resulting from a proposal submitted by the Movement¹¹ of Non-Aligned Countries,¹² Article 5(1)(d) of the Rome Statute of the newly created International Criminal Court (ICC) did include the ‘crime of aggression’, as it is now named. But the second paragraph of this provision made plain that the ICC was yet to be empowered to exercise its jurisdiction

⁹ General Assembly, ‘Definition of Aggression’, GA Res. 3314 (XXIX), 14 December 1974.

¹⁰ For a detailed account, see T. Bruha, ‘The General Assembly’s Definition of the Act of Aggression’, in Kreß and Barriga (eds), *supra* note 3, 142–177.

¹¹ A group of states (also called Non-Aligned Movement) not formally associated with any major power bloc. One of the main goals of creating this group was to struggle against big power and bloc politics (editor’s note).

¹² ‘Amendments Submitted by the Movement of Non-Aligned Countries to the Bureau Proposal (A/CONF.183/C.1/L.59)’, 14 July 1998, UN Doc. A/CONF.183/C.1/L.75, as repr. in S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) 315. It bears recalling that Arab States (and among their distinguished delegates, Professor Mohammed Aziz Shukri from the University of Damascus deserves a special mention) have been particularly active in support of this last minute, and very important, diplomatic activity. And now Arab States will hopefully remember that they have repeatedly stated that the absence of the Court’s power to exercise its jurisdiction over the crime of aggression constitutes an important obstacle for them to ratify the ICC Statute. For a detailed analysis of the policy positions of Arab States, see M.M. El Zeidy, ‘The Arab World’, in Kreß and Barriga (eds), *supra* note 3, 960–992.

over this crime.¹³ Once again, it had proven impossible to agree on a definition of the crime.¹⁴

2. LIECHTENSTEIN'S APPEARANCE: PRINCETON AND KAMPALA

An overwhelming majority of states, however, have not been prepared to accept that the crime of aggression is, for all practical purposes, not part of the *corpus* of crimes under international law. Since 2003,¹⁵ Liechtenstein's Permanent Representative to the United Nations, Ambassador Christian Wenaweser, and his chief legal advisor Stefan Barriga, with the support of a number of eminent personalities, including perhaps most notably the charismatic Nuremberg prosecutor Benjamin Ferencz,¹⁶ and Jordan's¹⁷ not less charismatic diplomat (and since 2014 UN High Commissioner for Human Rights) Ambassador Prince Zeid Ra'ad Al Hussein from Jordan have worked tirelessly to give voice to this sentiment and to create a momentum for change that has ultimately proved irresistible.¹⁸

By the year 2009, a consensus on a draft substantive definition of the crime had emerged within the Special Working Group on the Crime of Aggression, a sub-organ of the ICC's

¹³ In addition, Paragraph 7 of the Final Act of the Rome Conference (UN Doc. A/CONF.183/13, 17 July 1998, as repr. in Barriga and Kreß, *supra* note 12, 331) entrusted the Preparatory Commission with the mandate to prepare 'an acceptable provision on the crime of aggression for inclusion in this Statute'.

¹⁴ For a detailed account of the negotiations at the Rome conference, see R.S. Clark, 'Negotiations on the Rome Statute', in Kreß and Barriga (eds), *supra* note 3, 244–270. For a documentation of the discussion and the proposals submitted between 1995 and 1998, see Barriga and Kreß, *supra* note 12, 201–331.

¹⁵ No significant progress was achieved between 1998 and 2002. The work during these years is recounted by R.S. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002) 859–890, and it is documented in Barriga and Kreß, *ibid*, 334–419.

¹⁶ B.B. Ferencz' monumental documentation *Defining International Aggression – The Search for World Peace: A Documentary History and Analysis* (2 vols, Oceana Publications, 1975) is well known. For his moving personal memoir, see B.B. Ferencz, 'Epilogue. The Long Journey to Kampala: A Personal Memoir', in Kreß and Barriga (eds), *supra* note 3, 1501–1519. It should also be noted that Ben's son, Professor Donald Ferencz, the founder of the Global Institute for the Prevention of Aggression, has carried the flame forward and made numerous dedicated contributions to the negotiations, especially in their final phase. For Don's account of the activation of the ICC's jurisdiction over the crime of aggression, see D.M. Ferencz, *Aggression Is No Longer a Crime in Limbo*, FICHL Policy Brief Series No. 88 (2018).

¹⁷ Jordan has continued to play an active and constructive role in the negotiations, including those in New York in December 2017.

¹⁸ The remarkably substantial (and at the same time transparent) discussions during 2003 and 2009, which, in important parts, took place in the splendid grounds of Princeton University (and have therefore often been referred to as the 'Princeton Process'), and which were greatly facilitated by the hospitality of the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School, are documented in Barriga and Kreß, *supra* note 12, 422–724. For a rather critical scholarly assessment in the form of a monographic treatment, see O. Solera, *Defining the Crime of Aggression* (Cameron May, 2007); for a monographic treatment of the subject in French, see M. Kamto, *L'agression en droit international* (Editions A. Pedone, 2010).

Assembly of States Parties (ASP).¹⁹ This consensus proved robust, even after the United States had returned to the negotiation table.²⁰ The definition reads as follows:

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.

The threshold requirement that the act of aggression must be in ‘manifest’ violation of the Charter of the United Nations constituted the key to reach agreement about the most demanding aspect of the negotiations: the formulation of the State Conduct Element.²¹ The double function of this requirement is to set a quantitative (‘by its gravity and scale’) and a qualitative (‘by its character’) threshold. The qualitative dimension bears emphasizing. It reflects the fact that the undisputed core of the prohibition of the use of force is surrounded by certain grey areas which are characterized by both sophisticated legal debate and deep legal policy divide. These areas, which unfortunately are of significant practical relevance, remain outside the scope of the definition of the crime of aggression. The threshold requirement provides the definition with its necessary anchor in customary international law and, at the same time, it ensures that the ICC will not have to deal with questions, which are not only legally but also politically highly controversial.

The agreement about the substantive definition of the crime made it possible to place the crime of aggression on the agenda of the First Review Conference of the Rome Statute held in the capital of Uganda, Kampala, in 2010. Yet, due to persisting controversies about the jurisdictional regime and the role of the UN Security Council, consensus at Kampala²² only

¹⁹ The draft substantive definition was soon complemented by draft elements of the crime of aggression. Australia and Samoa deserve particular credit with respect to the formulation of this document in view of the submission of their ‘March 2009 Montreux Draft Elements’. For a detailed account of the negotiations, see the chapter written by the Australian negotiators F. Anggadi, G. French, and J. Potter, ‘Negotiating the Elements of the crime of aggression’, in Barriga and Kreß, *supra* note 12, 58–80.

²⁰ In Kampala, the substantive definition became the subject of discussion (only) to the extent that the US delegation proposed certain ‘Understandings’ regarding this definition (for the formulation of the US proposal, see Barriga and Kreß, *supra* note 12, 751–752). The fact that the last open issue was resolved at the end of a conversation, which had pitted the US against Iran, is just another remarkable element in the long journey described in this essay. For a detailed account, see C. Kreß, S. Barriga, L. Grover, and L. von Holtendorff, ‘Negotiating the Understandings on the crime of aggression’, in Barriga and Kreß, *supra* note 12, 81–97. For negotiators’ perspectives from Iran and the US, see D. Momtaz and E.B. Hamaneh, ‘Iran’, in Kreß and Barriga (eds), *supra* note 3, 1174–1197, and H.H. Koh and T.F. Buchwald, ‘United States’, in Kreß and Barriga (eds), *supra* note 3, 1290–1299.

²¹ For a detailed legal analysis of this element, see C. Kreß, ‘The State Conduct Element’, in Kreß and Barriga (eds), *supra* note 3, 412–564.

²² The *Journal* devoted its 10th Anniversary Special Issue to the topic: ‘Aggression: After Kampala’, 10 *Journal of International Criminal Justice (JICJ)* (2012) 3–288 (ed. by C. Kreß and P. Webb). For an excellent monographic treatment of the Kampala outcomes, see C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013). For a collection of essays, including a number of Belgian perspectives, see G. Dive, B. Goes, and D. Vandermeersch, *From Rome to Kampala: The first 2 amendments to the Rome Statute* (Bruylant, 2012).

emerged after the conference clocks had been stopped during the night of 11 to 12 June 2010.²³ This consensus does not involve a Security Council monopoly over proceedings with respect to the crime of aggression before the ICC. But the Kampala consensus does include conditions for the Court's exercise of jurisdiction over the crime of aggression, which are significantly more restrictive than the conditions governing the Court's exercise of jurisdiction over genocide, crimes against humanity and war crimes. The essential point is that in a situation, which has not been referred to the ICC by the Security Council, the exercise of the Court's jurisdiction over the crime of aggression, pursuant to Article 15*bis* of the ICC Statute, will remain dependent on the consent of the states of the relevant territories and of the nationality of the individuals concerned.²⁴

3. ONE MORE HURDLE

Even the consensus reached at Kampala did not constitute a complete breakthrough. Instead, it was decided to stipulate two additional conditions for the activation of the Court's jurisdiction over the crime. Pursuant to Articles 15*bis*(2) and (3) and 15*ter*(2) and (3) of the ICC Statute, the activation would require (i) the ratification or acceptance of the amendments by 30 States Parties, and (ii) 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. The first condition already having been fulfilled,²⁵ the activation decision was placed on the agenda of the sixteenth session of ASP held between 4 and 14 December 2017 in New York.

Making this activation decision proved to be far more than a ceremonial act. The reason for this is a legal controversy that had surrounded one detail of its consent-based jurisdictional regime ever since the adoption of the Kampala amendments. It is undisputed that paragraphs 4 and 5 of Article 15*bis* preclude the Court from exercising its jurisdiction over an alleged crime of aggression arising out of an act of aggression allegedly committed by a state which

²³ For a detailed account of the Kampala negotiations in the *Journal*, see C. Kreß and L. von Holtendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *JICJ* (2010) 1179–1217. For a meticulous account of the negotiations from 1998 to 2010, see S. Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Barriga and Kreß, *supra* note 12, 3–57.

²⁴ For an analysis of the jurisdictional regime established in Kampala in the *Journal*, see A. Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', 10 *JICJ* (2012) 209–227. For a comprehensive analysis of the same subject from a different perspective, see S. Barriga and N. Blokker in their three closely intertwined chapters 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', and 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', in Kreß and Barriga (eds), *supra* note 3, 621–674.

²⁵ It is just another noteworthy element of the long journey described in this essay that it was Palestine that deposited the 30th instrument of ratification. One felt tempted to feel relief that more ratifications were to follow soon thereafter, so that the legal complexities surrounding the question of Palestine's statehood would not constitute a further hurdle to the activation of the ICC's jurisdiction over the crime of aggression. The distinguished Palestinian delegate Majed Bamya will be remembered by all participants in the December 2017 New York negotiations for his outstanding eloquence. For a thoughtful Israeli perspective on the overall negotiations, see R.S. Schöndorf and D. Geron, 'Israel', in Kreß and Barriga (eds), *supra* note 3, 1198–1216.

is not a party to the ICC Statute in a situation not referred to the Court by the Security Council. However, a division of legal opinions has been apparent ever since the adoption of the Kampala amendments with respect to how the state consent-based exercise of the Court's jurisdiction precisely operates between States Parties to the ICC Statute. In essence, two conflicting legal views had emerged.

According to the first position, in such a case, the Court is precluded from exercising its jurisdiction over an alleged crime of aggression if committed either on the territory or by a national of a State Party to the ICC Statute, if this state has not ratified the Kampala amendments. This 'restrictive position' is based on the second sentence of Article 121(5) of the ICC Statute, which, it is argued, has provided States Parties to the ICC Statute with a treaty right, which, under the law of treaties, cannot be taken away without their consent, as expressed by the ratification or acceptance of a treaty amendment concerning the point in question.

According to the opposite position, a State Party, by ratifying the Kampala amendments, provides the Court with the jurisdictional links referred to in Article 12(2) of the ICC Statute. This means that the Court may, *inter alia*, exercise its jurisdiction over a crime of aggression allegedly committed on the territory of such a State Party by the national of another State Party to the ICC Statute, even if this second state has not ratified the Kampala amendments. This state may, however, preclude the Court from exercising its jurisdiction in such a case by previously making a declaration, as referred to in Article 15*bis*(4) of the ICC Statute, that it does not accept such jurisdiction. This 'more permissive position', so it is argued, is not in conflict with the law of treaties, because Article 5(2) of the original ICC Statute empowered States Parties to adopt 'a provision ... setting out the conditions under which the Court shall exercise jurisdiction with respect to' the crime of aggression, which would, in case and to the extent that it deviates from the second sentence of Article 121(5) of the ICC Statute, operate as *lex specialis*.

In a nutshell: The legal controversy in question only concerns situations not referred to the ICC by the Security Council. And for such situations it boils down as to whether a State Party that has not ratified the Kampala amendments must have made a declaration under Article 15*bis*(4) of the ICC Statute in order to preclude the Court from exercising its jurisdiction over a crime of aggression arising from an act of aggression allegedly committed by that State Party against a State Party which has ratified the Kampala amendments.

4. NEW YORK: CONSTRUCTION WORK ON A FINAL BRIDGE

During the process instituted before the ASP's December 2017 session to facilitate the activation decision, the fact that views were divided on this issue was confirmed and the con-

flicting legal arguments rehearsed.²⁶ Already in March 2017, Canada,²⁷ Colombia, France, Japan, Norway,²⁸ and the United Kingdom had put forward a paper in order to explain their adherence to the ‘restrictive position’.²⁹ Liechtenstein and then Argentina,³⁰ Botswana,³¹ Samoa, Slovenia,³² and Switzerland,³³ responded through the submission of papers detailing the ‘more permissive position’.³⁴

One possible way of dealing with the situation would have been simply to activate the Court’s jurisdiction and to leave it to the Court to decide the legal question if it arose. More than 30 delegations joined Switzerland in a call for such a ‘simple activation approach’.³⁵ But many of those States Parties supporting the ‘restrictive position’ did not wish to take the risk that the Court might, after the activation of its jurisdiction, decide not to follow their view. They rather sought to have their position accepted and confirmed by all States Parties as part of the resolution accompanying the activation decision. Soon after the States Parties had gathered in New York on 4 December, their delegates, masterfully guided by the Austri-

²⁶ *Report on the Facilitation on the Activation of the Jurisdiction of the International Criminal Court over the Crime of Aggression*, ICC-ASP/16/24, 27 November 2017 (‘*Report on the facilitation ...*’), §§ 11–22.

²⁷ Canada’s strong support before and in New York for the ‘restrictive position’ was more than a little astonishing because in Kampala this state had, after having made a proposal based on the ‘restrictive position’, worked together with Argentina, Brazil and Switzerland to pave the way toward a compromise; see Kreß and Von Holtendorff, *supra* note 23, 120–124.

²⁸ Norway had adopted a comparatively sceptical attitude towards the negotiations on the crime of aggression more broadly; for the thoughtful reflections of the long-standing Norwegian head of delegation, Ambassador Rolf Einar Fife, on the subject, see ‘Norway’, in Kreß and Barriga (eds), *supra* note 3, 1242–1263.

²⁹ *Report on the facilitation ...*, *supra* note 26, Annex II A. A few other states, including, in particular, Australia, Denmark, and Poland also went on record by adhering to the restrictive position.

³⁰ In New York, Argentina continued the active role that this state had already played in Kampala (on that role, see Kreß and Von Holtendorff, *supra* note 23, 1202–1204) and before. The fact that the President of the ICC, the eminent former Argentinian diplomat Silvia Fernández de Gurmendi, was one of the early two Coordinators (the other being Tuvako Manongi from Tanzania) of the Working Group of the Crime of Aggression should not be forgotten and this includes the fact that her ‘Coordinator’s Discussion Paper’ of 11 July 2002 (Barriga and Kreß, *supra* note 12, 412–414), was an important point of reference in the subsequent negotiations.

³¹ Botswana’s important role throughout the negotiations on the crime of aggression constitutes only one of many facets of this state’s leading role in support of the establishment of a system of international criminal justice. In particular, Ambassador Athalia Molokomme’s numerous principled (and thus powerful) interventions during the negotiations on the crime of aggression will be remembered.

³² Slovenia’s constructive role during the negotiations on the crime of aggression bears emphasizing. The distinguished Slovenian delegate Danijela Horvat will be remembered for an entire series of thoughtful, dedicated and eloquent interventions during the New York Assembly meeting in December 2017. A similar note of recognition is due to the distinguished delegates Shara Duncan Villalobos from Costa Rica, Vasiliki Krasa from Cyprus, Päivi Kaukoranta from Finland, James Kingston from Ireland and Martha Papadopoulou from Greece for their valuable contributions to the New York December 2017 negotiations. In the case of Greece, the important role played, over many years, by the distinguished delegate Phani Dascalopoulou-Livada will be remembered.

³³ Switzerland continued the active role that this state had already played in Kampala (on that role, see Kreß and Von Holtendorff, *supra* note 23, 1202–1204). In New York, Switzerland took a leading role in support of the ‘simple activation approach’.

³⁴ *Report on the facilitation ...* *supra* note 26, Annex II B and C.

³⁵ Letter of 7 December 2017 by the Permanent Representative of Switzerland to the United Nations to all Permanent Representatives of States Parties to the Rome Statute, on file with the author.

an facilitator Nadia Kalb, together with the country's head of delegation Konrad Bühler,³⁶ spent long negotiating hours and displayed a remarkable degree of creativity in attempts to build a final bridge between the two opposing approaches.

The essence of such a bridge would have consisted of allowing both camps to maintain their respective legal positions and of providing any State Party that supported the 'restrictive position', if it so desired, with a legal avenue for jurisdictional protection in the event that the Court were to embrace the 'more permissive position'. One proposed variant of such a legal avenue was to have all States Parties agree that the communication by a State Party of its 'restrictive position' to the Registrar should be treated by the Court as a declaration, as referred to in Article 15*bis*(4) of the ICC Statute, if the Court were to embrace the 'more permissive position'.³⁷ A second variant, as developed by Brazil,³⁸ Portugal and New Zealand,³⁹ was to allow any State Party, which so desired, to be placed on a list established by the President of the Assembly of States Parties and to be transferred to the Registrar, and to have the Assembly of States Parties decide that the Court shall not exercise its jurisdiction over the crime of aggression 'over nationals or on the territory' of any such State Party.⁴⁰

³⁶ The two distinguished Austrian diplomats received knowledgeable advice from Dr Astrid Reisinger-Coracini from the University of Salzburg who had participated in the overall negotiations since 1999 and had made numerous important scholarly contributions since then.

³⁷ Professor Dapo Akande and this author had formulated a joint draft encapsulating this legal position. This was done in the hope that it would be considered a genuine bridge-building attempt in view of the fact that Professor Akande and this author had taken opposite views regarding the underlying legal controversy. The draft was transmitted to the Austrian Facilitator by Germany without adopting it. This proposal has occasionally been referred to as the 'Non-German Non-Paper' and, to a certain extent, it was reflected in the 'Discussion Paper, Rev. 1, 11 December 2017', as presented by the Facilitator. The revised paragraph read: 'Confirming that any statement made by a State Party, individually or collectively, that *it subscribes to the view noted in preambular paragraph 4* shall ('when made in writing and communicated to the Registrar,') be regarded as *also* fulfilling the conditions required for a declaration referred to in article 15*bis*, paragraph 4, *while recognizing that the issuance of any such statement would be without prejudice to that State maintaining its view that, in the absence of its own ratification or acceptance of the amendments, no declaration referred to in article 15 bis paragraph 4, is necessary to preclude the Court from exercising jurisdiction over the crime of aggression, arising from an act of aggression allegedly committed by that State Party.*' (Emphasis in the original).

³⁸ Brazil had already played an important role in Kampala (Kreß and von Holtzendorff, *supra* note 23, at 1202-1204). In New York, this state, through its distinguished delegate Patrick Luna, worked tirelessly to build a final bridge. For the Brazilian policy perspective on the overall negotiations, see M. Biato and M. Böhlke, 'Brazil', in Kreß and Barriga (eds), *supra* note 3, at 1117-1130.

³⁹ New Zealand's association with this bridge-building attempt is noteworthy for its constructiveness as this state had made it clear that it believed the 'restrictive position' to be the correct legal view. So these three delegations lent further credit to the idea that it was possible to find a bridge. Sweden, it should be noted, took a position similar to that of New Zealand. Sweden's constructiveness in New York was in line with the helpful role this country had played during the 'Princeton Process', in particular through the contributions of its distinguished delegate, Pal Wrangé.

⁴⁰ See 'Additions by Brazil, Portugal and New Zealand to the discussion paper', 11 December, 13:00 (on file with the author). See also ICC-ASP/16/L.9, 13 December 2017, OP 1, and the explanations provided by the distinguished Swiss delegate Nikolas Stürchler in his blog entry, 'The Activation of the Crime of Aggression in Perspective', EJIL Talk! Blog of the European Journal of European Law, 26 January 2018, available online at <http://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/> (visited on 28 January 2018).

5. BREAKTHROUGH WITHOUT A BRIDGE: A MEMORABLE NIGHT AT UN HEADQUARTERS

But in the very late hours of the Assembly session, it turned out that France and the United Kingdom were not prepared to cross any such bridge. Their demand remained unchanged: All States Parties should accept the ‘restrictive position’ as part of the ASP resolution accompanying the activation decision. The French and British adamancy created an extremely difficult situation. Legally, it would have been possible to put a draft to a vote encapsulating either the ‘simple activation approach’ or a ‘final bridge’. But irrespective of the uncertainties of voting⁴¹ — would it have been wise to allow a question of such supreme political sensitivity to be overshadowed by a dispute within the ASP? In this latter regard, a great many delegations entertained the most serious doubts, as much as they had hoped that France and the United Kingdom would eventually show a spirit of compromise. Outvoting France and the United Kingdom was therefore not a real option. This meant that the fairly large group of States Parties, which believed in the correctness of the ‘more permissive position’, were left with the painful choice either to accept language which, from their legal perspective, strongly pointed in the direction of an ‘amendment to the (Kampala) amendment’, or to allow the open window for the activation of the Court’s jurisdiction to close until an uncertain moment in the future.⁴²

This was when, one last time, conference clocks had to be stopped in order to allow delegations to make up their minds concerning the draft resolution proposed by the two Vice-Presidents of the Assembly to whom Austria had handed over the task of making the final attempt. Crucially, the ‘Draft resolution proposed by the Vice-Presidents’ reflected the French and British demand⁴³ in the form of the following operative paragraph:

The Assembly of States Parties ...

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 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; ...

With a view to softening the ‘unconditional surrender’ to the demand of France and the United Kingdom, the next paragraph was drafted as follows:

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; ...

⁴¹ On those uncertainties, see Stürchler, *ibid.*

⁴² The point is clearly articulated by Nikolas Stürchler. *ibid.*

⁴³ For the first articulation of this demand in the form of a text, see *Report on the facilitation ... supra* note 26, Annex III *sub A*.

This language is no more than a statement of the obvious fact that the ASP cannot replace the Court as the judicial body charged with applying the law in complete independence. It was therefore difficult to consider the inclusion of this paragraph in the Vice-Presidents' proposal as more than a symbolic concession to those asked to give in. Yet, France was still not entirely satisfied and, with the support of the United Kingdom, it proposed to move the latter paragraph to the preamble. When Switzerland⁴⁴ disagreed, the drama in New York had peaked and the almost incredible possibility loomed large that the century long journey towards providing for an international criminal jurisdiction over the crime of aggression would ultimately derail because of the question as to whether the few words in question should be placed either in a preambular or an operative paragraph. At this absolutely critical juncture, the delegates from South Africa,⁴⁵ Samoa⁴⁶ and Portugal,⁴⁷ each of them in their own way, made valuable contributions to prevent the negotiations from collapsing. Instead, Vice-President Sergio Ugalde from Costa Rica, after finding that the French proposal had met with opposition, asked one final time whether the Vice-Presidents' proposal gathered the consensus of the room. This was followed by a dramatic moment of suspense after which it was clear that France and the United Kingdom had decided not to play hard-ball beyond the extreme, so that the proposal made by the Vice-Presidents was eventually adopted by consensus.⁴⁸

⁴⁴ While Switzerland took the step to formally oppose the proposal, this state was certainly expressing the sentiment of a great many delegations present when it criticized the French proposal in question. This author recalls Cyprus and South Africa, in particular, voicing their lack of comprehension regarding France's move.

⁴⁵ South Africa, especially through its distinguished delegate André Stemmet, had consistently supported the idea of the Court exercising its jurisdiction over the crime of aggression (for South Africa's policy position on the overall negotiations, see A. Stemmet, 'South Africa', in Kreß and Barriga (eds), *supra* note 3, 1271–1284). It is particularly noteworthy that South Africa did not change course even at the New York 2017 Assembly of States' meeting where the same state again contemplated the possibility of leaving the community of States Parties.

⁴⁶ Samoa is another smaller state that has been making important contributions to the negotiations on the crime of aggression. In particular, the countless thoughtful (and good-humoured!) interventions by the distinguished Samoan delegate, Professor Roger S. Clark, constitute a precious part of the *travaux préparatoires*. Samoa's ultimate contribution to the success of the negotiations, expressed through its distinguished head of delegation, Ambassador Aliioaiga Feturi Elisaia, consisted of adopting a non-lawyer's perspective of a world citizen reminding delegations at a most critical juncture of the negotiations what really is at stake.

⁴⁷ Portugal has been an important voice in the negotiations from an early moment in time (see, for example, the '1999 Proposal by Greece and Portugal', as repr. in Barriga and Kreß, *supra* note 12, 343). In New York, the interventions by the distinguished Portuguese delegate Mateus Kowalski stood out for their wisdom, fairness and elegance. This author would not wish to let pass this occasion to recall the important contributions made over many years by the late Professor and Legal Advisor of the Portuguese Ministry of Foreign Affairs Paula Escarameia.

⁴⁸ The 'Draft resolution proposed by the Vice-Presidents of the Assembly. Activation of the Jurisdiction of the Court over the Crime of Aggression', ICC-ASP/16/L.10, 14 December 2017 became Resolution ICC-ASP/16/Res.5. One of the leading negotiators, Nikolas Stürchler in his blog, *supra* note 40, who recalls that consensus had emerged 'at around Friday 0:40 AM'.

6. ‘IT’S BETTER TO BEND THAN TO BREAK’

By accepting operative paragraph 2 of the Activation Resolution, a large number of States Parties have made a concession, which must have felt very hard indeed after a protracted and *bona fide* attempt to build a bridge between the two conflicting legal views. These States Parties deserve praise. First, they genuinely believed in their ‘more permissive position’ and the very apparent fear of the opposite side that the Court might agree with this position only confirmed the strength of the arguments in support of it. Second, they had been engaging in an intensive *bona fide* bridge-building effort not only during the Assembly session, but also throughout the facilitation process all year long only to recognize at the very end that two states with a more powerful negotiation position were unprepared to respond.

Now they were being asked to give in.⁴⁹ In deciding to do so,⁵⁰ the States Parties in question demonstrated that, despite all this, they had not lost sight of the broader picture. So they were able to appreciate that the legal controversy, which had occupied so many minds for so long, almost paled to insignificance if seen in light of the historic dimension of the decision to activate the Court’s jurisdiction by a consensus within the ASP.⁵¹ This historic dimension

⁴⁹ It bears recording that, at this critical juncture of the New York 2017 negotiations, many distinguished civil society representatives made their voices heard in support of a final concession, which many of them found painful as well. This constructive role is noteworthy in light of the fact that the ‘NGO community’ has been playing a less active role with respect to the negotiations on the crime of aggression than it did with respect to the ICC Statute in general (for a detailed analysis, see N. Weisbord, ‘Civil Society’, Kreß and Barriga (eds), *supra* note 3, 1310–1358. This author wishes to take this opportunity to pay tribute to the distinguished non-state delegates, Professor David Donat Cattin, Professor Donald Ferencz, Jutta Bertram Nothnagel, Professor Jennifer Trahan, and Professor Noah Weisbord, for the substantial contributions to the success of the negotiations they have made, in one form or the other, over the long years of the discussions.

⁵⁰ Perhaps understandably, many of those states confined their concession to what they felt was the necessary minimum and maintained their legal view in their explanations of vote. In Liechtenstein’s explanation of position (on file with the author), for example, Ambassador Christian Wenaweser stated: ‘we are of the firm view that the Court, in exercising its jurisdiction over the crime of aggression, must and will apply the law contained in the Kampala amendments’.

⁵¹ In Liechtenstein’s explanation of its position, Ambassador Wenaweser powerfully articulated sentiments subsequently echoed, in one way or the other, by many other delegations. In some particularly noteworthy parts, Liechtenstein’s statement reads as follows:

‘The historic significance of the decision we have taken today to activate the Court’s jurisdiction over the crime of aggression cannot be overstated. Never has humanity had a permanent international court with the authority to hold individuals accountable for their decisions to commit aggression — the worst form of the illegal use of force. Now we do. ... We are disappointed that a few States conditioned such activation on a decision that reflects a legal interpretation on the applicable jurisdictional regime over the crime of aggression that departs from the letter and spirit of the Kampala compromise, and which aims to severely restrict the jurisdiction of the Court and curtail judicial protection for States Parties. Our reasons for joining the decision are twofold: [...]. Second, we believe that the importance of the activating jurisdiction has to be our overriding goal.’

In the same vein, the distinguished Swiss delegate Nikolas Stürchler, in his blog entry in EJIL Talk!, referenced *supra* note 40, wisely concludes:

‘In all of this, let us not forget that the activation of the crime of aggression is meant to be a contribution to the preservation of peace and the prevention of the most serious crimes of concern to the international community as a whole. More than 70 years after the Nuremberg and Tokyo trials, the ICC has received the historic opportunity to strengthen the prohibition of the use of force as enshrined in the UN Charter and completed the Rome Statute as originally drafted. This is the perspective we should preserve.’

is all the more apparent if it is considered that Germany,⁵² Japan⁵³ and Italy⁵⁴ had not only joined the consensus, but had, each of them in their own way, contributed to making this consensus materialise. For it had been those states in particular that, through their wars of

⁵² At the Rome conference, Germany was an unequivocal supporter of the inclusion of the crime of aggression into the jurisdiction of the ICC. Germany was accordingly quick to applaud the NAM proposal which inspired the original Art. 5(2) of the ICC Statute (*supra* note 12) and Germany was then instrumental in formulating paragraph 7 of the Final Act of the Rome Conference (UN Doc. A/CONF.183/13, 17 July 1998, *supra* note 12). At this juncture, one would be remiss not to acknowledge the outstanding role that the late eminent German diplomat Hans-Peter Kaul, the first German judge at the ICC, has played also in the course of the negotiations on the crime of aggression. In a personal memoir, which this author hopes will also be published in English in due course, Judge Kaul, recalls his memory of the crucial moments of the Rome Conference (Hans-Peter Kaul, 'Der Beitrag Deutschlands zum Völkerstrafrecht', in C. Safferling and S. Kirsch (eds), *Völkerstrafrechtspolitik* Springer, 2014, 51–84, at 67–68). During the 'Princeton Process', a German delegate acted as one of the three sub-coordinators. In Kampala, Germany was designated Focal Point for the consultations on the US proposals for certain understandings. The head of the German delegation in Kampala, Ambassador Susanne Wasum-Rainer, has offered a German policy perspective on the negotiations in her chapter 'Germany', in Kreß and Barriga, (eds), *supra* note 3, at 1149–1157. Regarding the legal controversy underlying the New York negotiations, Germany had taken the position not to express a position. This was done with a view not to overemphasize the practical importance of the question and in order to be available, if need be, to serve as an 'honest broker' for a final bridge-building effort. During the final hours in New York, Germany's head of delegation, Ambassador Michael Koch, before and behind the scenes, demonstrated that his country's promise to be of assistance in making the activation of the Court's jurisdiction a reality had not been an empty one. Germany's contribution to the negotiations on the crime of aggression since the lead up of the Rome conference and until shortly after the Kampala conference is recounted and documented by this author in C. Kreß, 'Germany and the Crime of Aggression', in S. Linton, G. Simpson, and W.A. Schabas (eds), *For the Sake of Present and Future Generations. Essays on International Law, Crime and Justice in Honour of Roger S. Clark* (Brill/Nijhoff, 2015), 31–51.

⁵³ Japan's sceptical perspective on the historic Tokyo trial is well known and Hathaway and Shapiro, *supra* note 6, at 133 *et seq.* provide their readers with a fascinating account of the broader background to Japan's perspective. It is all the more important to state that Japan has unambiguously supported the idea that the ICC would exercise its jurisdiction over the crime of aggression. Regarding the legal controversy underlying the New York 2017 negotiations, Japan, perhaps most consistently of all states, has been defending the 'restrictive position' as the correct legal view (see the chapter 'Japan' written by the head of Japanese delegation at Kampala, the late Ambassador Ichiro Komatsu, in Kreß and Barriga (eds), *supra* note 3, 1217–1233 and, in particular, at 1231–1232). Against this background, Japan's role during the New York 2017 negotiations is particularly noteworthy. While not leaving a shadow of doubt regarding Japan's legal position, Japan's head of delegation at New York, Director-General Masahiro Mikami, displayed great sensitivity for the perspective of the opposing side and ultimately also indicated Japan's readiness to consider crossing a final bridge. The Republic of Korea is another Asian state which has continuously supported the idea that the ICC should exercise its jurisdiction over the crime of aggression (for the perspective of a scholarly advisor to various South Korean delegations, see Y.S. Kim, 'Republic of Korea (South Korea)', in Kreß and Barriga (eds), *supra* note 3, 1234–1241). During the December 2017 New York negotiations, the Republic of Korea stayed silent, however.

⁵⁴ Italy has been supportive of the process since the beginning of the negotiations (see, for example, the proposal submitted by Egypt and Italy as early as in 1997 (repr. in Barriga and Kreß, *supra* note 12, 226–227) and the contributions by the former distinguished Italian diplomat and Judge at the ICC, Mauro Politi, in the early phase of the negotiations should be remembered (for a useful collection of short comments on the negotiations by influential voices before the beginning of the Princeton Process, see M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate, 2004)). While it is probably fair to say that Italy has not been playing a leading role during the 'Princeton Process' and in Kampala, the country, when the New York December 2017 negotiations had reached their final part, through its distinguished delegate Salvatore Zappalà, was among the first delegations to support the Austrian facilitation in its bridge-building effort. Eventually, and one is tempted to see a providence of destiny at work, it was an Italian Vice-President of the Assembly of States Parties, Ambassador Sebastiano Cardi, who co-presided over the consensual adoption of the activation resolution.

aggression before and during the Second World War, had also placed the ‘New Legal Order’ (Hathaway and Shapiro) established by the Kellogg-Briand Pact under attack.⁵⁵

7. THE COURT TAKES THE WHEEL

Pursuant to operative paragraph 1 of the Activation Resolution, the Court’s jurisdiction will be activated as of 17 July 2018. By this, States Parties have provided the Court with a final space to make the few adjustments necessary in order to enable the Pre-Trial Division of the ICC to play its unprecedented judicial role under Article 15 *bis*(8) of the ICC Statute.⁵⁶ From 17 July 2018 onwards, it will be for the Court to indicate how it will apply the law, which is now ready on the books, in practice. It may seem advisable for the Office of the Prosecutor to signal at an early moment in time that it will take seriously the core message underlying the threshold requirement contained in Article 8*bis*(1) of the ICC Statute: that the substantive definition of the crime of aggression covers only a use of force by a state which reaches a high level of intensity and which is unambiguously unlawful. Such a signal will help dispel persisting — and understandable⁵⁷ — doubts that the Court could get involved in burning

⁵⁵ The story is powerfully told by Hathaway and Shapiro, *supra* note 6, 131 *et seq.*

⁵⁶ Those in charge within the Court will wish to turn to the comprehensive analysis provided by E. Chaitidou, F. Eckelmans and B. Roche, ‘The Judicial Function of the Pre-Trial Division’, in Kreß and Barriga (eds), *supra* note 3, 752–815.

⁵⁷ This author does not find it easy fully to appreciate why France, led in New York by Ambassador Francois Alabrune, and the United Kingdom, led in New York by Ambassador Ian MacLeod, have remained unprepared to cross a final bridge in the 2017 December negotiations in New York. He even wonders whether those two states would not have achieved greater legal certainty to their benefit (as they perceived it) had they crossed the bridge built for them by Professor Akande and this author (for certain potential legal ambiguities surrounding operative paragraph 2 of the Activation Resolution, not to be explored in this editorial, see Stürchler, *supra* note 40). But this author does appreciate why quite a few states involved in military activities in grey legal area scenarios, instead of ratifying the Kampala amendments, appear to have adopted a position of ‘wait and see’ how the Court will interpret the substantive definition of the crime. This author also believes that it should be acknowledged that France and the United Kingdom are the only permanent members of the Security Council that have, until now, ratified the ICC Statute and that those two states have eventually accepted a jurisdictional regime that does not provide the Security Council with a monopoly over proceedings regarding the crime of aggression before the ICC. This author wishes to take this opportunity to acknowledge the important contribution made by the eminent former British diplomat Elizabeth Wilmschurst to the negotiations. In a number of very noteworthy statements (for some references, see C. Kreß, *supra* note 21, 515–516, citations accompanying note 570), Ms Wilmschurst had reminded the negotiators of the need to ground firmly the substantive definition of the crime of aggression in customary international law. For British and French negotiators’ perspectives on the Kampala amendments, see E. Belliard, ‘France’, and C. Whomersley, ‘United Kingdom’, both in Kreß and Barriga (eds), *supra* note 3, 1143–1148, and 1285–1289. The intensity of the controversy over the proper role to be attributed to the Security Council when it comes to proceedings before the ICC involving the crime of aggression, gives any observer a vivid idea of how much constructive spirit had to be shown to make the ultimate breakthrough possible. Just compare the vigorous pleading for a Security Council monopoly by the eminent Chinese diplomat L. Zhou, ‘China’, in Kreß and Barriga (eds), *supra* note 3, 1133–1138, with India’s fierce opposition to a strong Security Council role, as recounted and documented by the eminent Indian diplomat N. Singh, ‘India’, in Kreß and Barriga (eds), *supra* note 3, 1164, 1165–1168, 1171.

legal controversies about anticipatory self-defence,⁵⁸ self-defence against a non-state armed attack,⁵⁹ and humanitarian intervention.⁶⁰ Once states can be confident that the Court will not exercise its jurisdiction over the crime of aggression in these grey legal areas, it may be hoped that the number of ratifications will increase significantly as it will become extremely difficult for any victorious power whose judges sat in judgment at Nuremberg and Tokyo to explain why they still do not wish fully to embrace the legacy of their own pioneering course of action after the Second World War.

8. EPILOGUE: AN IMPERFECT THOUGH TIMELY APPEAL TO THE CONSCIENCE OF MANKIND

There can be no doubt that the substantive definition of the crime of aggression is (as) narrow (as a definition of a crime under international law should be) and that the jurisdictional threshold for the Court's exercise of jurisdiction over the crime is (more) stringent (than desirable). But it would be fallacious therefore to belittle the December 2017 breakthrough in New York. Russia has recently crossed the red line and forcibly annexed foreign territory.⁶¹ North Korea and the United States have long been exchanging martial threats of nuclear

⁵⁸ For the increasingly intensive debate, see, most notably, the recent speeches delivered, first, by the UK and, subsequently, by the Australian Attorney-General, as repr. in EJIL Talk! Blog of the European Journal of International Law, available online at, respectively: <http://www.ejiltalk.org/the-modern-law-of-self-defence/> and in <http://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#more-15255> (visited 28 January 2018). For an analysis of 'anticipatory self-defence' in the context of the State Conduct Element of the crime of aggression, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 3, 473–479.

⁵⁹ For example, the legal intricacies with respect to the use of force against the 'Islamic State' that many states have been carrying out in Syria at Iraq's request, were very much in the minds of decision makers when the crime of aggression has been discussed recently. For an analysis of 'The Use of Force in Response to an Armed Attack by Non-State Actors Emanating from the Territory of Another State' in the context of the State Conduct Element of the crime of aggression, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 3, 462–467.

⁶⁰ The intriguing question of the use of force in a case of dire need to avert a humanitarian catastrophe, but without a Security Council authorization, has loomed large in the background to all the negotiations. For an analysis of 'The Use of Force to Avert a Humanitarian Catastrophe' in the context of the State Conduct Element of the crime of aggression, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 3, 489–502, and 524–526.

⁶¹ If seen in the context of Russia's important role in the long journey described in this essay, one cannot be but even more saddened by this state's manifest violation of the prohibition of the use of force in the case of Crimea. The fact that politics and law have always been inextricably intertwined in Russia's contributions to the century-long conversation is no distinctive feature of Russia's approach to the subject and does not constitute a reason not to acknowledge that Russia has made noteworthy text proposals from 1933 on, when Maxim Litvinov submitted a Soviet 'Definition of "Aggressor": Draft Declaration' to the Disarmament Conference (repr. in Barriga and Kreß, *supra* note 12, 126–127). Russia's role before Nuremberg is usefully recalled by Hathaway and Shapiro, *supra* note 6, at 257. Stalin had supported a trial at a critical juncture and, in that respect, he formed 'an odd couple' together with Stimson. (The meeting of minds of Stalin and Stimson did not go much further, though, in light of Stalin's preference for a show trial). In this historic context, it bears recalling that it was the Russian professor A.N. Trainin, who coined the Nuremberg and Tokyo term 'crime against peace' (in A.Y. Vishinsky (ed.), *Hitlerite Responsibility Under Criminal Law*, transl. by A. Rothstein

war. At the time of writing, Turkey has started a major military invasion in Syria without any concession to the idea that the prohibition of the use of force mattered a great deal.⁶² At such a juncture, the signal that has been sent to the conscience of mankind by activating the ICC's jurisdiction over the crime of aggression is timely.

(Hutchinson & Co., 1945), at 37). For Russia's active role during the Cold War, see, for example, Sellars, *supra* note 6, 119–126, 130–138, and Bruha, *supra* note 10, 150–154). The '1999 Proposal of the Russian Federation' (repr. in Barriga and Kreß, *supra* note 12, at 339) is as succinct as it has been incapable of securing a consensus in its insistence on both the old Nuremberg and Tokyo language of 'war of aggression' and the idea of a Security Council monopoly. Yet, it is as noteworthy as it is promising, that the two distinguished Russian diplomats Gennady Kuzmin and Igor Panin state (in 'Russia', in Kreß and Barriga, *supra* note 3, 1264), that 'Russia is satisfied with the outcome of the Review Conference with regard to the definition of the crime of aggression'.

⁶² The identical Turkish letters addressed to the Secretary-General and to the President of the Security Council (S/2018/53) makes reference to the right of self-defence as recognized in Art. 51 UN Charter, but does almost nothing to present facts in order to substantiate this legal claim. Instead, the letters make a dangerously vague reference to the 'responsibility attributed to Member States in the fight against terrorism' as if such a 'responsibility' could serve as a legal basis for a use of force on foreign territory without the consent of the territorial state and absent a Security Council mandate.

