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I

Introduction to the negotiation history

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Negotiating the Amendments on the crime of aggression

STEFAN BARRIGA

A. Introduction

Late at night on Friday, 11 June 2010, the States Parties to the Rome Statute of the International Criminal Court (Statute), gathered at the first Review Conference, adopted resolution RC/Res.6 on the crime of aggression. Annex I to the resolution contains six amendments to the Rome Statute incorporating the definition of the crime of aggression (new article 8 *bis*), certain conditions for the exercise of jurisdiction for State referrals and *proprio motu* investigations (new article 15 *bis*) as well as for Security Council referrals (new article 15 *ter*), a new paragraph 3 *bis* to be added to article 25 of the Statute confirming the leadership nature of the crime, and two technical changes to articles 9 and 20 of the Statute. Annex II contains the corresponding amendments to the Elements of Crimes. Annex III contains a set of interpretive understandings clarifying issues related, inter alia, to the principle of non-retroactivity, the conditions for Security Council referrals, the effects of the amendments on domestic jurisdiction over the crime of aggression, and the required magnitude of a State act of aggression.

The Kampala compromise is without a doubt a historic achievement.¹ It provides a legally binding definition of the crime of aggression for the purpose of individual criminal justice at the international level and specifies the conditions under which the International Criminal Court (Court) may in the future exercise jurisdiction over

¹ For early assessments of the outcome, see C. Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective', *Leiden Journal of International Law*, 23 (2010), 883–887; K. Ambos, 'The Crime of Aggression after Kampala', *German Yearbook of International Law*, 53 (2010), 463–509; N. Blokker and C. Kreß, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala', *Leiden Journal of International Law*, 23 (2010), 889–95; D. M. Ferencz, 'The Crime of Aggression: Some Personal Reflections on Kampala', *Leiden Journal of International Law*, 23 (2010), 905–8; R. Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future?', *Goettingen Journal of International Law*, 2 (2010), 713–43; Hans-Peter Kaul, 'Is It Possible to Prevent or Punish Future Aggressive War-making?', *FICHL Occasional Paper Series*, 1 (2011), available at www.ficlh.org/occasional-paper-series/; C. Kreß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', *Journal of International Criminal Justice*, 8 (2010), 1179–217; Robbie Manson, 'Identifying the Rough Edges of the Kampala Compromise', *Criminal Law Forum*, 21 (2010), 417–43; A. Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last . . . in Reach . . . over Some', *Goettingen Journal of International Law*, 2 (2010), 745–89; D. Scheffer, 'The Complex Crime of Aggression under the Rome Statute', *Leiden Journal of International Law*, 23 (2010), 897–904; K. Schmalenbach, 'Das Verbrechen der Aggression vor dem

the ‘supreme international crime’.² The Kampala compromise is the culmination of international efforts to define and criminalise aggression that can be traced back to the Charters of the tribunals of Nuremberg and Tokyo and beyond.³ Another crucial event was the adoption on 14 December 1974 of UN General Assembly Resolution 3314 (XXIX) (GA Resolution 3314), which contains in its annex a ‘Definition of Aggression’. The text of that definition is not legally binding but is intended to offer guidance to the Security Council on determining the occurrence of a State act of aggression (as opposed to guiding a court for the purpose of ascertaining individual guilt).⁴ The International Law Commission (ILC), in turn, also undertook considerable efforts to define the crime of aggression as part of its work on the Draft Code of Crimes against the Peace and Security of Mankind.⁵

This article is not intended to dwell on the historic dimension of the criminalisation of aggression, but will focus on the negotiation history of the resolution adopted in Kampala. This is admittedly a serious limitation, in particular since GA Resolution 3314 provides the basis of the definition of the act of aggression contained in article 8 *bis*, and therefore merits closer analysis in itself. At the same time, an account of the more immediate *travaux préparatoires* of the resolution already spans more than a decade. Indeed, if one were to include here only intergovernmental negotiations, and not necessarily the work of the ILC, then the beginning of that history could be 3 April 1995, the opening of the Ad Hoc Committee on the Establishment of an International Criminal Court, more than fifteen years prior to the Kampala Review Conference.⁶

The main purpose of this article is to help the reader better understand the amendments on the crime of aggression by describing how certain formulations,

Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen’, *Juristen Zeitung*, 65 (2010), 745–52; J. Trahan, ‘The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference’, *International Criminal Law Review*, 11 (2011), 49–104; B. v. Schaack, ‘Negotiating at the Interface of Power & Law: The Crime of Aggression’, *Columbia Journal of Transnational Law*, 49 (2011) 505.

² ‘Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences’, *American Journal of International Law*, 41 (1947), 186.

³ For a comprehensive historic account of these efforts, see B. Ferencz, *Defining International Aggression: The Search for World Peace* (2 vols., New York: Oceana, 1975).

⁴ On GA Resolution 3314, see B. Broms, ‘The Definition of Aggression’, *Recueil des cours de l’Académie de droit international* 154 (1997-I), 305–399; T. Bruha, *Die Definition der Aggression. Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968–1974* (Berlin: Duncker & Humblot, 1980), *passim*; J. Stone, ‘Hopes and Loopholes in the 1974 Definition of Aggression’, *AJIL*, 71 (1977), 224–246; J. Zourek, ‘Enfin une définition de l’agression’, *Annuaire français de droit international*, 20 (1974), 9–30; for a comprehensive documentation of the *travaux préparatoires* on GA Resolution 3314, see Ferencz, note 3, vol. 2, 79–598.

⁵ For an overview, see O. Solera, *Defining the Crime of Aggression* (London: Cameron May, 2007), 253–334; see also R. O’Keefe, ‘The ILC’s Contribution to International Criminal Law’, *German Yearbook of International Law*, 49 (2006), 201–57.

⁶ For an extensive documentation of the drafting history of the Rome Statute as a whole, see M. C. Bassiouni (ed.), *The Legislative History of the International Criminal Court* (3 vols., Ardsley: Transnational Publishers, 2005); see also R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague, London and Boston: Kluwer, 1999), *passim*.

choices and compromises came about in the course of the negotiations. It therefore seems appropriate to focus the lens even further, namely on the negotiations on the crime of aggression as mandated by the Rome Conference itself on 17 July 1998.⁷ Up to that point, the negotiations on the crime of aggression were overshadowed by the question whether to include that crime in the Statute at all. As a result, the Rome Conference and its preparatory process did not yield any meaningful convergence on the core questions of the definition of the crime and specific conditions for the exercise of jurisdiction. With the adoption of the Rome Statute, however, an important circumstance changed: the advent of the International Criminal Court itself was no longer just an aspiration, and the negotiation process on the crime of aggression now had a concrete, legally binding context – the Rome Statute itself. The Statute, in combination with Resolution F of the Final Act of the Rome Conference (Resolution F), gave the negotiations from 1999 to 2010 a more or less coherent framework, and, with the first Review Conference mandated to be held seven years after the entry into force of the Statute, a clear target.⁸

The post-Rome negotiation history can be divided into four phases. In the first phase, from 1999 to 2002, the Preparatory Commission (PrepComm) made some progress by providing a better structure for the negotiations, notably through the July 2002 Coordinator's Paper, as well as a thematic list of issues to be discussed. In the second phase, from 2003 to 2009, the Special Working Group on the Crime of Aggression (Special Working Group or Group) achieved major progress on numerous technical questions and prepared proposals that allowed for a smooth integration of the provisions on the crime of aggression in the Rome Statute. Most importantly, the Special Working Group found agreement on the definition of the crime. In the third phase, from spring 2009 to spring 2010, the Assembly of States Parties to the Rome Statute (ASP) consolidated political support for the Special Working Group's proposals, sharpened the discussion on the major outstanding questions and completed the technical drafting of the amendments to the Elements of Crimes. These efforts prepared the ground for the compromise found in the fourth phase, the Review Conference itself, which was held in Kampala, Uganda, from 31 May to 11 June 2010.

B. The end of Rome, the beginning of Kampala

The question of the crime of aggression was one of the central points of contention during the Rome Conference (15 June–17 July 1998) and during the preparatory process in the Ad Hoc Committee (1995) and the Preparatory Committee (1996–8).⁹

⁷ Resolution F of the Final Act and article 5(2) of the Statute. ⁸ Article 123 of the Statute.

⁹ For a detailed account of the negotiations on the crime of aggression at the Rome Conference and in preparation thereof, see Solera, note 5, 335–74. See also G. Gaja, 'The Long Journey towards Repressing Aggression', in

The problem was compounded by the fact that the 1996 ILC Draft Code of Crimes did not include the crucial definition of the State act of aggression, contrary to the Draft Code it adopted in first reading in 1991.¹⁰ Negotiations in the Preparatory Committee on the definition of the crime of aggression therefore essentially had to start from scratch. By the end of its mandate, the Committee submitted three broad options for a definition that formed the basis for negotiations in Rome.¹¹ Option 1 was largely based on article 6(a) of the Nuremberg Charter, but contained also several other bracketed elements for a ‘generic’ definition of the crime. Option 2 was based on the approach of GA Resolution 3314, and combined a general definition with a specific list of concrete acts of aggression. Option 3, in turn, was based on previous German proposals that sought to put the Nuremberg precedent of a ‘war of aggression’ into more concrete terms.¹²

The second and politically more controversial question was the role of the Security Council. The 1994 ILC Draft Statute posited that the Court could only prosecute a crime of aggression if the Council had previously determined the occurrence of an act of aggression by the State concerned¹³ – a concept strongly rejected by most Arab and developing countries, but ardently defended by the permanent members of the Security Council and many Western countries. In addition, several delegations submitted that the crime of aggression should not be included in the Statute at all.¹⁴

At the Rome Conference itself, the Bureau put much emphasis on the question whether to include the crime in the Statute or not, despite the fact that the great majority of delegations did actually favour its inclusion. The controversy over this question of principle made progress on the substantive questions virtually impossible. Cameroon, for example, made an innovative proposal regarding the relationship between the Court and the Security Council which was barely discussed.¹⁵ The atmosphere on this issue was too antagonistic for a substantive negotiation, and

A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (Oxford: Oxford University Press, 2002), 427–441; H. v. Hebel and D. Robinson, ‘Crimes within the Jurisdiction of the Court’, in R. Lee (ed.), note 6, 79–127; M. Kamto, *L’agression en droit international* (Paris: A. Pedone, 2010), 281–93; A. Zimmermann, ‘Article 5: Crimes within the Jurisdiction of the Court’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Munich: C. H. Beck, 2008), 22–5; G. Westdickenberg and O. Fixson, ‘Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes’, in J. Abr. Frowein, K. Scharioth, I. Winkelmann and R. Wolfrum (eds.), *Verhandeln für den Frieden. Negotiating for Peace. Liber Amicorum Tono Eitel* (Berlin, Heidelberg, New York, Barcelona, Hongkong, London, Milan, Paris and Tokio, 2003), 483–525.

¹⁰ 1996 ILC Draft Code of Crimes, article 16; 1991 ILC Draft Code of Crimes, article 15.

¹¹ 1998 PrepCom Draft Statute, article 5.

¹² See the 1997 Proposals by Germany (February, December) and the 1998 Revised German Proposal. See also Option 3 in the 1998 PrepCom Draft Statute.

¹³ 1994 ILC Draft Statute, article 23 and commentary, paras. 8–15.

¹⁴ See 1998 Rome Summary Records (18 June), paras. 33 (Norway), 45–50 (Israel), 84–6 (Mexico), 97–8 (United States), 141 (Brazil) and 143 (Turkey); 1998 Rome Summary Records (19 June), para. 19 (Netherlands).

¹⁵ 1998 Proposal by Cameroon.

some delegations feared the controversy might derail the adoption of the Statute as a whole.

The first Bureau draft of Part 2 of the Statute, submitted on 6 July 1998, reflected an attempt to make some progress on the crime of aggression.¹⁶ The draft picked Option 3 as the way forward on the definition, including language requiring a previous determination by the Security Council of an act of aggression. At the same time, the draft contained a clear warning that the crime of aggression might not be included if no progress was made on the substance. But the subsequent round revealed again deep divisions on the question of the definition and the role of the Security Council.¹⁷ The second Bureau draft of 10 July 1998 no longer contained any draft definition of the crime of aggression. Instead, it gave delegations time over the weekend to find a compromise on related provisions.¹⁸ This ultimatum prompted a strong response from the Non-aligned Movement (NAM) at the next round of discussions.¹⁹ The delegations of Azerbaijan and Greece then paved the way for a compromise by suggesting that the crime should be included in article 5 without a definition and without entering into force, and that the future Preparatory Commission should be mandated to formulate such provisions for consideration and action by the Review Conference.²⁰ The NAM delegations submitted this approach as a formal proposal,²¹ which was subsequently in essence adopted and reflected in article 5(2) of the Statute:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

The last sentence of article 5(2) was not part of the NAM proposal, but added by the Bureau evidently as a placeholder for the question of the role of the Security Council.²²

In addition, Resolution F of the Final Act mandated the Preparatory Commission to 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

¹⁶ 1998 Bureau Proposal (6 July), articles 5 and 10. ¹⁷ 1998 Rome Summary Records (7 and 8 July).

¹⁸ 1998 Bureau Proposal (10 July), article 5. ¹⁹ 1998 Rome Summary Records (13 July), para. 17.

²⁰ 1998 Rome Summary Records (13 July, 3.00 p.m.), para. 43; 1998 Rome Summary Records (13 July, 6.00 p.m.), para. 10.

²¹ 1998 Proposal by NAM.

²² See in particular the statements by the United Kingdom and by the United States, 1998 Rome Summary Records (17 July), paras. 29 and 51.

crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.

The Rome Conference thus did not fail completely on the issue of aggression. It included the crime of aggression in the list of crimes under the jurisdiction of the Court in article 5(1), while postponing the exercise of that jurisdiction until an agreement on the relevant provisions was found. It was a classic last-minute compromise, and therefore also accompanied by considerable ambiguity. On the one hand, the crime of aggression was included in the list of crimes under the Court's jurisdiction (article 5); article 12(1) furthermore stated that 'a State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5', which included the crime of aggression. On the other hand, article 5(2) deferred the Court's exercise of jurisdiction to a future agreement on relevant provisions, accompanied by a vague reference to the relevant provisions on entry into force (articles 121 and 123). The resulting tension of the crime of aggression being 'half in and half out'²³ of the Statute would come back to haunt the negotiation process ahead, up to the last day of the Review Conference.

The value added by the Rome Conference for the future negotiations did not end here. The successful adoption of the Rome Statute itself provided great advantages. The very fact that the Statute was completed and no longer just a negotiating text full of variables meant that the drafting process now had a clear context. This also meant that the issue of aggression was no longer one bargaining chip in a much greater negotiation process, but a more isolated question. Furthermore, Resolution F of the Final Act committed all delegations, including those who were opposed to the inclusion of aggression in the Statute in the first place, to embarking on a negotiation process with a clear target, the first Review Conference. Rome thus prepared the ground for a much more focused and structured negotiation process ahead.

C. The PrepComm prepares a basis for negotiation

From February 1999 to July 2002, the PrepComm held a total of ten sessions to 'prepare proposals for practical arrangements for the establishment and coming into operation of the Court', as mandated by the Final Act.²⁴ Initially, aggression was not high on the agenda of the Commission, which began its substantive work on

²³ The expression is borrowed from Jutta Bertram-Nothnagel (Union internationale des avocats), who was the most active and influential civil-society representative in the negotiations on the crime of aggression from Rome until Kampala.

²⁴ For a detailed account of the discussions during the PrepComm, see 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', *Leiden Journal of International Law*, 15 (2002), 859–90. See also the various contributions in M. Politi and G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*

the crime of aggression only at the third session in the framework of a Working Group. The proposals made during and prior to the Rome Conference remained on the table.²⁵

The resumption of the substantive negotiations on the crime of aggression was marked by a negative atmosphere and mutual distrust. Some delegations objected to the attempts of the first Coordinator of the Working Group, Mr Tuvaku Manongi of Tanzania, to produce a real negotiating text as a basis for further progress.²⁶ In December 1999, the Coordinator was therefore only in a position to issue a consolidated text of proposals, which remained unchanged until April 2002.²⁷ Nevertheless, the consolidated text brought at least some structure into what had become increasingly diffuse negotiations. The more methodological approach of the Coordinator shifted the atmosphere in the Working Group from being political to being more technical and constructive. The consolidated text sparked further proposals and conceptual thinking, most notably an extensive analysis of the question of the definition submitted by the delegation of Germany,²⁸ as well as further proposals attempting to reconcile the Security Council's responsibility under the UN Charter and the Court's independent judicial role.²⁹ In April 2002, the new Coordinator of the Working Group, Ms Silvia Fernández de Gurmendi (Argentina), was eventually able to submit a discussion paper that more closely resembled a negotiating text, narrowing down the options to some extent.³⁰ The Coordinator further revised this paper in July 2002, including for the first a time a set of draft elements of the crime.³¹ Upon Italy's initiative,³² the Working Group also produced a list of thematic issues that helped bring further structure into the discussions during the next phase.³³

The July 2002 Coordinator's Paper was the final outcome of the PrepComm on the crime of aggression, and, with all of its options, variants and brackets, indicated that consensus remained elusive. Strictly speaking, the PrepComm had failed its mandate under Resolution F and not generated proposals for a provision on aggression that were advanced enough to be considered by a Review Conference. But, then

(Aldershot: Ashgate, 2004). See further S. Fernandez de Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court', *Fordham International Law Journal*, 25 (2001–2), 589–605; Kamto, note 9, 293–5; J. Trahan, 'Defining "Aggression": Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum', *Loyola Los Angeles International and Comparative Law Review*, 24 (2002), 439–74; 'The Definition of Aggression and the ICC', *Proceedings of the American Society of International Law*, 96 (2002), 181–92; D. D. Ntanda Nsereko, 'Aggression under the Rome Statute of the International Criminal Court', *Nordic Journal of International Law*, 71 (2002), 497–521.

²⁵ 1999 Compilation of Proposals.

²⁶ S. A. Fernández de Gurmendi, 'An Insider's View', in Politi and Nesi, note 24, 176–88, at 185.

²⁷ 1999 Coordinator's Paper. ²⁸ 2000 Proposal by Germany.

²⁹ 1999 Proposal by Greece and Portugal; 2000 Proposal by Colombia; 2000 Proposal by Greece and Portugal; 2001 Proposal by Bosnia and Herzegovina, New Zealand and Romania (Conditions, February and August); 2002 Proposal by the Netherlands.

³⁰ 2002 Coordinator's Paper (April). ³¹ 2002 Coordinator's Paper (July). ³² 2000 Proposal by Italy.

³³ 2000 List of Issues.

again, that mandate did not quite take into account that under article 123 of the Statute, the first Review Conference was to take place no earlier than seven years after its entry into force. The deadline was thus way too far ahead for any real concessions to be expected at the conclusion of the PrepComm in July 2002. Furthermore, the PrepComm had a number of intense and more pressing drafting exercises to deal with, including the drafting of the Rules of Procedure and Evidence and the Elements of Crimes. The work on aggression therefore had only limited time allocated, and relatively few delegations participated actively.³⁴

I. Discussions on the definition of the crime of aggression

The July 2002 Coordinator's Paper clearly distinguished the individual's crime of aggression from the State act of aggression, which in itself was a methodological step forward.³⁵ Paragraph 1 focused on the definition of the crime by describing the mental element as well as the individual's conduct ('intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression'). The phrase 'planning, preparation, initiation or execution' was based – though not entirely³⁶ – on article 6(a) of the Nuremberg Charter and was ultimately retained in the definition of the crime of aggression adopted at the Review Conference.³⁷ Furthermore, paragraph 1 contained the leadership clause, which during previous years seemed to be the only issue on which there was agreement in principle. The requirement for the perpetrator to be 'in a position effectively to exercise control over or to direct the political or military action of a State' also made its way unchanged into article 8 *bis* of the resolution adopted in Kampala.³⁸

The second part of paragraph 1 of the July 2002 Coordinator's Paper, taken together with paragraph 2, encapsulated the difficult discussion on how to describe the State act for which the individual was to be held responsible. The main approaches on the table can be distinguished according to their scope and their legal technique. As for their scope, the main approaches were the following:

Limited scope, based on the Nuremberg Charter. Some delegations wished to limit criminal responsibility to wars of aggression, as spelled out in the Nuremberg Charter, despite the lack of a precise definition of the term 'war'. This approach had

³⁴ M. Politi, 'The Debate within the Preparatory Commission for the International Criminal Court', in Politi and Nesi, note 24, at 45.

³⁵ Fernandez de Gurmendi, note 24, at 597.

³⁶ The Nuremberg Charter used the phrase 'planning, preparation, initiation or waging of a war of aggression'.

³⁷ See, however, the significant discussion on the conduct verbs in the Special Working Group reflected at 20.

³⁸ For the related discussion in the Special Working Group, see at 22.