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# International Criminal Court:

# The Results of the Review Conference on the Rome Statute

**Diplomová práce**

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# 1. Introduction

The most severe crimes in human history were recognized as international crimes by the international criminal law[1]. These crimes fall into category of jus cogens, the worldwide recognized hard law. The idea for international criminal justice first seriously emerged with the establishment of post-World War II criminal tribunals in Nurnberg and Tokyo.

More lately, in 1993, motivated by the atrocities that happened at the Balkan Peninsula, the UN Security Council established the International Criminal Tribunal for Former Yugoslavia (further ICTY)[2]. A judge and chief UN international war crimes prosecutor in Yugoslavia and Rwanda, Richard J. Goldstone, calls it "the birth of international justice"[3]. The court charges those most responsible for war crimes, crimes against humanity and genocide, including the officials. Just in 1994 the United Nations Security Council established the International Criminal Court for Rwanda. The Court was established to prosecute crimes during terrible conflict between Hutu and Tutsi group, where more than 800,000 people died in the period of three months[4]. As Richard J. Goldstone concludes:" This was an experimental approach, as prior to these tribunals, international lawyers and political leaders thought that only treaties could achieve international justice".

Another practice emerged in cases of the Special Court for Sierra Leone (established in 2002) and Extraordinary Chambers in the Courts of Cambodia (established in 2003). These courts are so called mixed tribunals[5]. They consist of an

[1] Čepelka, Čestmír, Šturma, Pavel, Trestání válečných zločinů a jiných zločinů podle mezinárodního práva, Mezinárodní právo veřejné (International Public Law), 2003, p. 721
[2] About ICTY, http://www.icty.org/sections/AbouttheICTY last access on 14 April 2012
[3] An inerview with Goldstone Richard J., Obstacles in International Justice, Harvard International Review, Winter 2009, available at: http://hir.harvard.edu/rethinking-finance/obstacles-in-international-justice, last access on 14 April 2012
[4] Thakur, Ramesh Chandra, Malconet Peter, Sovereign Impunity to International Accountability; The Search for Justice in the World of States, United Nations University Press, 2004, p. 204
[5] Anderson, Kenneth, The Rise of International Criminal Law: Intended and Unintended Consequences, The European Journal of International Law, Volume 20, no.2, p.353

international element represented by the United Nations and a national element of concerned countries. These courts combine international and national approach to the crimes.

All of the above mentioned courts have been courts ad hoc, they have been established after the conflict had ended and have been temporary. Also, the establishment of these Courts was always a time consuming process of negotiations based on political circumstances. It was insecure whether there would be enough political will to establish other Courts. The international community however called for another institution, a permanent one. An institution with broader jurisdiction which would step in even during the conflict. The project of the ICC is an ambitious one with many obstacles to overcome. Kofi Annan, former United Nations Secretary General, stated that the establishment of the ICC was "a gift of hope to future generations, and a giant step forward in the march toward universal human rights and the rule of law"[6]. Thus the Court has a lot of opponents and critics. Some don't believe in the idea of international criminal justice as such, some underestimate the role of the ICC because of the political reasons.

From the peace of Westphalia the practice of not intervening to other states' matters became an international policy rule. Though jus cogens is universal and should be recognized by every international entity, nevertheless, the ICC could be seen as breaking this rule. Also, the court's jurisdiction is not limited to army personnel; it can affect anyone from common individuals to leaders. This conflicts with the constitutional framework of many states. The ICC and other international criminal tribunals are also seen just as a substitution for use of power. Kenneth Anderson even sees international criminal tribunals as "a new branch of collective security itself through the UN"[7].

The Court is in the middle of the fight for its legitimacy. It got the approval from the international community, got its legal framework and started its operations. As a new unprecedented institution, "in each of its early cases, it will be not just the suspect but also the Court itself which is on trial"[8]. The theoretical legitimacy does not matter, if the ICC is not accepted worldwide and does not gain a factual legitimacy. If its

[6] Glasius Marlies, What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations, Human Rights Quarterly 31, 2009, p. 496
[7] Anderson, Kenneth, supra note 5
[8] Glasius Marlies, supra note 6, p. 497

sentences, arrest warrants and other decisions are not accepted and followed, the institution does not in fact exist.

Notwithstanding the fact that activities of the Court are assessed regularly during the Assemblies of States Parties, the Review Conference provided the Court, States Parties, Non-governmental organizations and civil society with an unique opportunity of a deeper analysis of the Court's functioning and amending the ruling document of the Court, the Rome Statute.

My first experience with the International Criminal Court was a simulation of the United Nations' Security Council session during my studies at the University of Miami in 2009. Our main topic for the semester was a preparation for this final simulation regarding the situation in Sudan. What at the beginning of the semester seemed as a never ending situation without any news and no possible new outcomes radically turned by the issuance of the arrest warrant for Sudanese president Omar Al-Bashir and expelling of the humanitarian organizations from Sudan. The preparation then turned into a real adventure of looking for or making up the countries' positions and discussing the best solution for the crisis. I was in the middle of all discussions as I applied and gained the position of the ICC's Chief Prosecutor Luis Moreno-Ocampo. I had to become familiar with the Rome Statute, the procedures and crimes as well as with the ongoing investigation in Sudan. I became a strong supporter of the idea of the international criminal tribunals and tried to explain to my classmates the objectives of the ICC. I was facing the deferral option from most of the permanent UN Security Council's representatives and it was impossible for me to persuade them to change their position. The deferral was eventually accepted in our class on the altar of real politics and it came to our class as a great surprise that the real UN Security Council chose not to use the option.

My second and so far last experience with the ICC was an internship in Amnesty International CR. I was working in the Group for Foreign Affairs as a Coordinator for Foreign Affairs. The group was originally founded in 2008 when AI CR recognized its need for more organized lobbying. The original group had unexpected success and involvement of the individual members and their contribution to human rights promotion in the Czech Republic was also recognized by high positioned members in

the European structures of AI. The aim of this group is mainly lobbying and influencing new legislation in our topics.

One of the two of my areas of responsibilities was International Justice, focusing mainly on the International Criminal Court. The ICC and coherent questions are a part of AI's campaign "Make International Justice Real". This campaign's goal is the universal ratification of the Rome Statute and assistance in the development of cooperation between the Member States and the ICC. There is a need for drafting a new legislation in order to arrange proper cooperation. The long term goal is to strengthen the position of ICC and help to ensure it is wide recognized and respected institution[9].

The Czech Republic signed the Rome Statute already in 1999; nevertheless it didn't ratify[10] the treaty until July 2009. The Czech Republic was the last country of the European Union to ratify the treaty and one of the last countries in Europe. The AI CR set the ratification of the Rome Statute as one of its priorities and set up an informal Coalition for ICC for the Czech Republic.

As a new Coordinator for Foreign Affairs responsible for the ICC my first aim was to reestablish the informal Coalition for the ICC which was previously established by my predecessor from the first group of Coordinators. The members of the Czech informal Coalition are well known organizations defending human rights including the biggest one in the Czech Republic: Human in Need. Others most active members of the Coalition were Europeum and League for Human Rights. Fortunately, the members were interested in reestablishing the Coalition and we starter join work again in January 2010. We set up together four priorities: ratification of the Agreement on Privileges and Immunities; Review Conference in Kampala; Trust Fund for Victims and the procedure of electing possible candidates for ICC judges.

The Czech Republic was together with Malta last country to ratify the Agreement on Privileges and Immunities. As the Coalition agreed, the ratification of the APIC could be a good starting point for a new cooperation. We set up a meeting with the official from the Ministry of Foreign Affairs CR to ask why the Czech position to

[9] Amnesty International, OP1 Global Priority Statement: Portfolios and Flagship Projects, POL 50/012/2009, Internal Document not to be distributed

[10] The treaties have to be accepted by two chambers of parliament and signed by the President in order to be ratified

the APIC is so reserved. The process was in final stages and the Agreement on Privileges was soon adopted.

Amnesty International participated at the Review Conference in Kampala as it is a member of International Coalition for International Criminal Court. The head office covering the international justice prepared materials to be distributed to the respective Czech officials. AI focused on promoting States' cooperation with the Court, proper implementation of the Rome Statute and further ratification.

Lastly, we wanted to promote the idea of contributing to the Trust Fund of Victims. Our main target was the Czech Republic as a State-Party to the Rome Statute. However, the timing was not very fortunate due to an ongoing financial crisis.

I found my internship experience in this world-known non-governmental organization very useful and inspiring. I was also very surprised by a welcoming approach from the side of the respective representative for the ICC of the Ministry of Foreign Affairs CR who considered our letters and other documents.

From my personal perspective, Amnesty International has done a significant work to promote International Criminal Court in the Czech Republic, especially before the ratification of the Rome Statute. Unfortunately, due to lack of both financial and personal resources, the Group of International Affairs significantly reduced its activities.

Last, but not least, the reason why I decided to devote my final thesis at the Charles University Law Faculty to the results of the Review Conference in Uganda, Kampala was my personal interest in the topic and in the outcomes of the process of negotiating the crime of aggression.

Throughout working on my thesis I worked with number of different materials. The most important were declarations and resolutions adopted during the Review Conference, but also materials prepared by working groups. Thanks to multiple observers present in Kampala who shared their views with the civil society through articles in magazines or internet blogs I was able to follow negotiations from the side of non-governmental organizations, academics or judges of the ICC. I was also helped by number of publications regarding international criminal law and the Court and commentaries on the Rome Statute. I tried to find as many different opinions as possible which I found particularly important writing the section on crime of aggression.

In my thesis I will first shortly present the International Criminal Court as an institution, followed by an introduction to the Review Conference in Kampala and its objectives. The next section consists of topics decided to be the agenda of the Review Conference. First to be covered is the so-called Stocktaking, namely: Cooperation, Complementarity, The Impact of the Rome Statute System on Victims and Affected Communities and Peace and Justice. I leave a brief comment on Strengthening the Enforcement of Sentences. The final chapters consider the actual amendments to the Rome Statute starting with unchanged Article 124 followed by amendments of Article 8 and finally concluding with the most important and controversial topic of the Kampala Review Conference: the crime of aggression.

I commented on all the decisions taken in Kampala and I tried to assess them as well as the outcome of the Review Conference and the possible impact on the future of the International Criminal Court and international justice system.

## 2. Introduction to the International Criminal Court

The ICC was founded on the Rome conference in July 1998 where the Rome Statute, the ruling document of the Court, was signed. However, it came into efficiency not sooner than on 1. July 2002[11]. Though the statute was adopted by 160 states, it took nine years to gather 60 signatures necessary for the Rome Statute ratification[12]. The first trial of began in 2009[13] and finally, the first trial was concluded in 2012. Though founded by the United Nations structure, the ICC is independent from the United Nations as well as from any government or intergovernmental organization. The seat of the Court is in Hague, Netherlands. Today, the Rome statute was signed by 139 countries and ratified by 121 states[14].

According to principle of complementarity that respects the primary function of the national jurisdiction, the ICC is the court of the last resort, it can take action only if the original national court is either not willing to prosecute the crimes or are due to any reason unable to prosecute them. Nevertheless, in case the State is not fulfilling this primary responsibility, the Court shall proceed with its own jurisdiction.

The ICC is an independent judicial institution founded to prosecute perpetrators responsible for the most severe crimes known to international criminal law: genocide, crime against humanity, war crimes and aggression. The aim was to "create a permanent institution that would dispense with the need to create a special tribunal every time genocide, war crimes or crimes against humanity were committed because the national systems having jurisdiction did not work as they should"[15].

[11] About the Court, available at http://www.iccnow.org/?mod=court, last access on 14. April 2012
[12] Lindberg Tod, A Way Forward with the International Criminal Court, Policy Review, Feb/Mar 2010, pg. 15
[13] Schabas, William A., The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press Inc., 2010, p. 139
[14] About the Court, supra note 11, last access on 14. April 2012
[15] Kirsch, Philippe, The International Criminal Court: From Rome to Kampala, The John Marshall Law Review, 2009-2010, p. 515

Any situation to be considered and prosecuted by the ICC must also "meet temporal, territorial, and/or personal jurisdiction requirement"[16]. More of so-called "treaty-based crimes"[17] as terrorism or drug trafficking were considered to be included in the Rome Statute, however the delegations to the Rome Statute opted for the way of codifying existing customary law[18].

Genocide was declared as international crime by the UN General Assembly in 1946 and was later defined in Convention on the Prevention and Punishment of the Crime of Genocide[19]. The Rome Statute in Article 6 also adopted this definition. It contains a general definition of genocide followed by five acts that will fulfill the commitment of genocide. Both general part of the definition stating the necessity of intent to "destroy, in whole or in part, a national, ethnical, racial or religious group" and concrete act[20] has to occur in order to create the "crime of crimes".

Crimes against humanity were first prosecuted at the Nuremberg trials, but since then the definition developed and widened[21]. They could be seen as "an implementation of human rights norms within international criminal law"[22]. Crimes against humanity do not have to be committed only within the armed conflict only "as a part of a widespread attack directed against any civilian population, with knowledge of the attack"[23]. First paragraph states the acts[24] that constitute the crime against the

[16] Schabas, William A., supra note 13, p. 101
[17] Crimes that are not based on international customary law, but have been established trough international treaties
[18] Sturma, Pavel, Mezinarodni trestni soud a stihani zlocinu podle mezinarodniho prava, Nakladatelstvi Karolinum, 2002, p.126
[19] Schabas, William A., An Introduction to the International Criminal Court, Cambridge University Press, 2004, p.1
[20] The acts stated by the Statute are: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group.
[21] Sturma, Pavel, supra note 18, p.133
[22] Schabas, William A., supra note 13, p. 139
[23] The Rome Statute, Article 7
[24] Acts constituting the crime against humanity: murder; extermination; enslavement; deportation of forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons, the crime of apartheid,

humanity, while the second paragraph provides the definitions of the above stated acts. It's for the first time when the definition is neither demonstrative nor without a concrete definition[25].

War crimes are the oldest of the crimes prosecuted under the Rome Statute, but as a novelty in international criminal law, it codifies acts committed in internal conflicts as war crimes as well[26]. Moreover, the development of international law can be seen in progressive codification of new crimes, such as recruitment of child soldiers that occurs in African internal conflicts often and as is precisely described in Lubanga case. The wide definition of Article 8 covers breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in both international and non-international armed conflict.

The Court does not have universal jurisdiction. It can only prosecute crimes "with the consent of either the state of the territory were the crime was committed or the state of the nationality of the accused"[27]. It is also cannot prosecute retroactively, but only crimes committed as of 2002.

The Court consists of four organs: a Presidency, Divisions: Pre-trial Division, Trial Division and an Appeal Division, a Registry and an Office of the Prosecutor. The Court consists of eighteen judges who are elected by the Assembly of States Parties for nine-year terms. They are not eligible for re-election. The judges have to be nationals of States Parties with an additional rule stating there can be "only one judge of any given nationality at any one time"[28].

The Presidency is formed by three judges elected by their fellow judges. It consists of President and First and Second Vice-Presidents. The Presidency is responsible for the administration of the Court and other specialized responsibilities outlined by the Rome Statute.

The Pre-Trial Division and Trial Division are formed each by at least six judges, while Appeal Division consists of five judges including the President. The assignment

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other inhumane acts of a similar character intentionally causing great suffering, r serious injury to body or to mental or physical health.

[25] Sturma, Pavel, supra note 18, p.133

[26] Schabas, William A., supra note 13, p. 195

[27] Kirsch, Philippe, supra note 15, p. 517

[28] Schabas, William A., supra note 19, p.177

of judges to individual divisions is "based on their qualifications and experience and so as to ensure an appropriate combination of expertise in criminal and international law"[29]. The Court allocates the cases to Chambers. The Pre-Trial Division is heard by a single judge or three-judge Chamber, the Trial Division constitutes three-judge chambers and an Appeal Division single judge Chamber. The decisions of the Pre-Trial and Trial Chambers can be appealed before the Appeals Chamber.[30]

The Registry is responsible for the non-judicial administration of the ICC and respective services; it maintains the records of the Court. The head of Registry is the Registar who is elected by the judges for a five-year term.[31]

The office of the Prosecutor is an independent and separate organ, which is responsible for criminal investigations and prosecution of all the cases before the Court[32]. The prosecution is led by the office of Prosecutor assisted by one or more Deputy Prosecutors. The Prosecutor is elected by an absolute majority of the Assembly of the States Parties by a secret ballot for a nine-year term[33]. The first prosecutor of the ICC has been Luis Moreno-Ocampo from Argentina. He has been criticized for becoming a too political figure for a judicial institution. Recently, as his nine years old mandate has expired, a new prosecutor Fatou Bensouda has been elected and will replace her predecessor in June 2012. Mrs. Bensouda has been a deputy prosecutor with the ICC[34]. Many welcome her election as she already has a significant experience with the Court and because her origins are in Africa which is the most targeted continent by the ICC.

The prosecution may be initiated by various ways. Firstly, the State Party to the Rome Statute can refer its case to the ICC, as the original courts are unable to prosecute the domestic atrocities. This could be on the ground of lack of political stability or institutional background.

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[29] Schabas, William A., supra note 19, p.181

[30] Mackenzie, Ruth, Romano, Cesare, Shany, Yuval, Sands, Philippe, The Manual on International Courts and Tribunals, Oxford University Press, 2010

[31] Schabas, William A., supra note 19

[32] Mackenzie, Ruth, Romano, Cesare, Shany, Yuval, Sands, Philippe, supra note 30

[33] Schabas, William A., supra note 19

[34] An interview with the new ICC prosecutor, available at: http://bosco.foreignpolicy.com/posts/2011/12/12/an_interview_with_the_new_icc_prosecutor, last access on 14. April 2012

Secondly, the Security Council of the United Nations can refer the situation in any country for the investigation acting under Chapter VII of the United Nations' Charter as happened in the case of Sudan and Libya. Obtaining the referral from the UN Security Council, the Court can investigate also situations in Non-State Parties. This concludes from the universal jurisdiction of the United Nations. On the other hand, the Security Council has also power to defer the investigation of the ICC under Article 16 of the Rome Statute. It cannot prohibit the investigation, but the deferral may last up to 12 months and can be renewed.

The last third possibility is so called proprio motu power of the Prosecutor. The Prosecutor can initialize the investigation on the basis of the information about possible violations of the international criminal law obtained from individuals or organizations. The proprio motu has to be approved by a Pre-Trial Chamber. The Court obtained hundreds of such impulses, including the requests for prosecution of Mr. Tony Blair or previous American president George W. Bush[35]. None of these initiations were accepted. On the other hand, there are two other examples of usage of the proprio motu power in the case of Kenya and Côte d'Ivoire.

The ICC is only a judicial institution which has its executive branch represented by the Assembly of States. It has no police organs, so it can't execute the arrest warrants itself. It depends on the cooperation with States, which are lawfully obliged to cooperate with the Court, however the praxis shows that the lack of cooperation could result in great damage to court's credibility and affectivity.

If the court founds enough evidence, the trial is held by the judicial division of the court with all the universal features of the criminal proceeding that are known from the continental law systems with some features from common law[36]. If the accused is found guilty he or she will be imprisoned or could get a life sentence, as there is no death penalty possibility in the Rome Statute. Additionally, the judges can rule the convicted person to pay damages to victims or other statutory penalty.

There are many reasons for the tribunal's establishment; among all of them, holding the perpetrators accountable. Yet, not all of the reasons are judicial, the ICC's

[35] Lindberg Tod, supra note 12, p.24

[36] Norton, E. Jerry, The International Criminal Court: An Informal Overview, Loyola University Chicago International Law Review, Vol. 8, 2010-2011, p. 88

other aims are to "serve broader political purposes, such as promoting long-term peace and stability, fostering respect for human rights, creating a historical record, and providing closure for victims and communities affected by the crimes". These goals are admirable, though, very complicated to achieve.

The ICC has up to date 121 members, the last to join was Guatemala in April 2012[37]. It is however hard to gain global support without three permanent members of the United Nations Security Council; China, Russia and USA, being parties to the court. China and Russia, usually cooperating partners in the Security Council, are not considering joining the ICC, but they have an observer status with the ICC. The participant status enables them to participate in the discussion, nonetheless, they can't vote. On the other hand, Russia is currently cooperating with the ICC regarding the conflict in South Ossetia, Georgia in August 2008[38]. Georgia has been party to the Rome Statute since 2003 and thus the Court has jurisdiction over the crimes that happened on its territory. Russia and the ICC stated their satisfaction about the mutual cooperation.

Last but not least, United States. U.S. is in a considerably different position from the countries discussed above. Publicly demonstrating a position of world promoter of human rights, it is uneasy to turn back to the universal judicial institution that by its function go ahead to the same goals. The U.S. supported the general idea of international criminal court, though the Court lost its support during the creation process. Firstly, U.S. opposes the proprio motu power of the prosecutor[39]. It would rather welcome larger involvement of the UN Security Council. Another problematical aspect was the jurisdiction of the court over the citizens from the non-state parties. There are also collisions with the U.S. constitutional framework. As the Rome Statute cannot be ratified with any reservations to its provisions, the U.S. president Bill Clinton signed the Rome Statute, but it was expected that it would not be ratified by the U.S.

[37] Global Civil Society Coalition Welcomes Guatemala as 121st State to Join ICC, available at: http://us2.campaign-archive1.com/?u=8758bcde31bc78a5c32ceee50&id=022e07619d&e=7b4592183e, last access on 14 April 2012

[38] ICC prosecutor is working with the Russian Federation to promote justice for all victims of Georgian conflict – OTP and Russian Federation pledge cooperation at conclusion of Moscow visit, available at: http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr505, last access on 14 April 2012

[39] Lindberg Tod, supra note 12, p. 17

parliament. Under the next president, the U.S. sent later in 2002 a letter to the secretary general of the UN "declaring that United States no longer intended to become a party"[40]. Nevertheless, from the lawful point of view, U.S. still remains a signatory[41]. The U.S. is now an observer to the ICC and its future participation with the Court remains unclear, but closer cooperation might be in place and would be prosperous for both the ICC and U.S.

The Court is now investigating seven situations with at least another eight[42] being under preliminary investigation of the Office of the Prosecutor[43]. All of the processed situations take place on African continent. Three have been started by self-referral of the involved countries, two by a referral of the UN Security Council and two by usage of a proprio motu power of the Chief Prosecutor of the ICC.

The first situation was referred to the Court by the government of Uganda in January 2004[44]. The first arrest warrants were issued in July 2005 for five senior leaders of the Lords Resistance Army (further "LRA"). The most "famous" person to be accused of crimes against humanity and war crimes was Joseph Kony, alleged Commander-in-Chief of the LRA. His name has recently been made known to global public by the campaign of Invisible Children: Kony 2012[45].

Second situation referred to the ICC was Democratic Republic of Congo in April 2004. Not only there was a first sentencing judgment in case of Thomas Lubanga Dyilo, but another case, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, is now waiting for decision as the closing statements have been heard on 23 May 2012.

The third and so far last referral of the country was of the government of the Central African Republic in December 2004. The trial with Jean-Pierre Bemba Gombo has not started sooner than in 2010. President and Commander in Chief of the

[40] Lindberg Tod, supra note 12, p. 20
[41] Press Briefing with Stephen J. Rapp Ambassador-at-Large for War Crimes Issues, available at: http://geneva.usmission.gov/2010/01/22/stephen-rapp/, accessed on 14. April 2012
[42] Afghanistan, Colombia, Georgia, Guinea, Honduras, South Korea, Nigeria, Palestine
[43] Cases & Situations : Court Developments in Relation to Other Countries, Coalition for the International Criminal Court , http://www.iccnow.org/?mod=developments, last access on 31.May 2012
44 Situations, International Criminal Court, http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/, last access on 31.May 2012
[45] More information and the film „Kony 2012" available at http://www.invisiblechildren.com/, accessed on 31. May 2012

"Movement de Libération du Congo" and former Vice-President of the Democratic Republic of Congo and a senator in the Parliament is accused of committing crimes against humanity and war crimes.

The first participation of the UN Security Council came with its referral of the situation in Darfur, Sudan, to the ICC. It was the first time the Court issued a warrant against sitting head of state, Omar Al-Bashir. There is no proceeding trial at the moment.

The first case of proprio motu of the Chief Prosecutor appeared in the case of Kenya as a consequence of the post-election violence in 2007. The prosecutor received an authorization to open an investigation in March 2010. Out of six suspects, the Pre-Trial Chamber declined to confirm charges in case of two suspects and confirmed charges of crimes against humanity in case of other four in January 2012.

The sixth situation being investigated by the Court and second time the situation was referred to the Court by the United Nations Security Council was the situation in Libya in February 2011. This time however, the resolution was passed unanimously[46]. The process is now in Pre-Trial stage. The case against Muammar Mohammed Abu Miryar Gaddafi, the former head of state, was terminated due to the death of the suspect. The future of the case of his son Saif Al-Islam Gaddafi is now uncertain as Libyan authorities have arrested Mr. Gaddafi and want to prosecute him in Libya. As stated in by the Mr. Ocampo: "this is the first time in the short history of the International Criminal Court that a State is requesting jurisdiction to conduct a national investigation against the same individual and for the same incidents under investigation by the International Criminal Court"[47].

The seventh and so far last situation investigated by the Court is the Republic of Côte d'Ivoire. It is also the second example of proprio motu power of the Prosecutor initiating the investigation. There was only one warrant issued in this case against

[46] Cases & Situations : Libya, Coalition for the International Criminal Court , http://www.iccnow.org/?mod=libya, last access on 31.May 2012

[47] International Criminal Court, ICC Prosecutor Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011), http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/otpstatement160512, last access on 31.May 2012

Koudou Gbagto former President of the Côte d'Ivoire. Mr. Gbagto is in custody, hearings should start in June 2012[48].

The ICC is a small institution and does not have the capacity to prosecute every crime it comes across. The complexity and difficulty of criminal trials due to burden of proof on the prosecutor's side implicates that the trials are complicated, time consuming and costly. Therefore the ICC focuses on the "big fish". This is sometimes opposed from the victims' site as their focus lay with the "small fish". It is usually small fish they truly connect with individual crimes, as they have experienced it[49]. The ICC defends itself that it holds accountable those who are most responsible, those who were in charge and whose wrongdoings were most severe. Again, if we follow the law principles properly, the law does not prefer one perpetrator to another, so anyone who committed a crime should be sentenced. A possible solution to this problem may lead to national courts which would prosecute "minor" offenders.

[48] International Criminal Court, Côte d'Ivoire , http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/ICC0211/Situation+Index.htm, accessed on 31.May 2012

[49] Glasius, Marlies, supra note 6, p. 504

# 3. Review Conference in Kampala

## 3.1. Introduction to the Review Conference in Kampala

Even though the Rome Conference in 1998 was considered as a great success in promotion and evolution of international criminal justice, it left behind unresolved issues. The signatories to the Rome Statute concluded that there should be no amendments to the Rome Statute for the seven years period from its entry into force. After this period should the UN Secretary General "convene a Review Conference to consider any amendments to this Statute"[50] as predicted by Article 123. During the review conference should had been considered especially the crimes under Article 5. The only obligation required the revision of Article 124, the transitional provision regarding the war crimes. However, the most important challenge awaiting its consideration was the definition of the crime of aggression.

The conference was placed from 31 May to 11 June 2010 in Uganda, Kampala. The decision that the Review Conference should take place in Uganda was partly welcomed and partly doubted. The First Review Conference should take place in the State Party which situation the Court investigates. The Court estimated all the possible security risks and we all know its final decision. It came out as a good decision. The Court was closer to the civil society and enabled it to participate significantly[51] during the review conference. It also brought the State Parties to the "crime scene" and helped all sides to have a better idea of one another.

Parties to the Rome Statute had right to propose amendments to UN Secretary General. Many amendments were proposed, but not all were discussed during the Review Conference. Lots of them did not gain substantial support and were considered premature[52]. Moreover, the Bureau of the Assembly of States was from the beginning "determined to limit the scope and number of amendments for fear of undermining the

[50] Kaul, Hans-Peter, Kampala June 2010 – A First Review of the ICC Review Conference, Goettingen Journal of International Law, 2/2010, p. 651

[51] Smith, Lorraine, What did the ICC Review Conference Achieve, EQ: Equality of Arms Review, 2/2010, November 2010, p.5

[52] ASP Working Group on Amendments, available at: http//:www.iccnow.org/?mod=asp=wgoa, last access on 17. April 19, 2012

integrity of the Rome Statute"[53]. But even the amendments that were not included in discussions at the review conference can show us trends in international criminal law, as well as political will to consider those ideas. The amendments which were unsuccessful in gaining enough support were the proposal for the crime of terrorism, proposal to include international drug trafficking as an international crime, including using nuclear weapons as a war crime or strengthening the enforcement of the ICC prison sentences[54]. Other interesting proposal considered change in the Article 16 regarding the deferral of the investigation or prosecution from the UN Security Council. African parties to the Rome Statute wanted to shift this power to the UN General Assembly[55]. This could be understood as a reaction to the refusal to defer the case of Omar Al-Bashir because most of the African and Arab states supported it.

The first preparatory works for the Review Conference began already in 2006; in 2007 the Assembly of the States Parties decided the Review Conference could serve as a welcomed opportunity to assess the recent impact of the functioning of the Court by the stocktaking exercise[56]. The agenda for the Review Conference was finalized at the Assembly of States Parties in 2009[57].

The possible amendments to the Rome Statute that were considered at the Review Conference were transition provision of the Article 124 that enables State Party which ratified the Rome Statute to withdraw its citizens from the jurisdiction of the ICC in respect of the war crimes for period of seven years, extension of the list of weapons prohibited in the international conflicts to internal conflicts in Article 8, but most notably the definition of the crime of aggression and the Court's jurisdiction over it. Crime of aggression was the most controversial theme of the Conference and it was deeply uncertain whether a necessary compromise could be achieved despite the years' long preparatory works.

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[53] Smith, Lorraine, supra note 51, p.2

[54] ASP Working Group on Amendments, available at: http//:www.iccnow.org/?mod=asp=wgoa, last access on 17. April, 2012

[55] ASP Working Group on Amendments, supra note 54, accessed on 17. April 19, 2012

[56] Coalition for the International Criminal Court, Report on the First Review Conference on the Rome Statute, available at http://www.iccnow.org/documents/RC_Report_finalweb.pdf, last accessed on 16 June 2012, p.2

[57] Schabas, William A., Introductory Note to the Documents of the Review Conference of the International Criminal Court, 49 International Legal Materials, 2010, p.1

The Stocktaking exercise consisted of: impact of the Rome Statute system on victims and affected communities, complementarity, cooperation and peace and justice[58]. This part of the Review Conference was understood as important as the amending of the Rome Statute. It provided a great opportunity for sharing views and experience, provided lessons from history to learn from and possible topics for future discussions.

The preparation of the Review Conference took many years and the outcome amendments represented the consensus of international criminal lawyers and specialists not only from the State parties, but also the contribution from non-state parties like China, India, Russia and many Arab states[59].

Over 4600 experts participated in the Conference; "international justice experts from 115 governments, high-level UN officials, representatives from the current ad hoc and special international criminal tribunals, international media, academia and more than 600 representatives from 143 NGOs"[60]. The crucial role of the civil society in the Rome Statute system was once more proven especially during the stocktaking exercise.

The Conference was opened by speeches of UN Secretary-General, Uganda's president and representatives of organizations. It was followed by the adoption of the Kampala Declaration. The next days were devoted to stocktaking exercise, "panel discussions which took place during the main plenary in the first week of the Conference were completed by side events organized by the civil society"[61]. The Review Conference was closed by the discussions upon possible amendments to the Rome Statute, leaving the complicated agenda of the crime of aggression to the very last days.[62]

[58] ASP Working Group on Amendments, supra note 54, accessed on 17. April 19, 2012
[59] Kreß Claus, Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus, The European Journal of International Law, Vol 20, No.4, 2010, available at: http://ejil.oxfordjournals.org, accessed on 11. April 2012
[60] Coalition for the International Criminal Court, supra note 56
[61] Smith, Lorraine, supra note 51, p.4
[62] Schabas, William A., supra note 57, p.1

## 3.2. Stocktaking

*3.2.1. Cooperation*

The theme of cooperation has always been crucial to the ICC. Unfortunately, cooperation of the State Parties is more problematic than it should be. As professor Schabas explains: "State cooperation is the area where the Court is at its most vulnerable"[63]. The execution of most of the Court's decisions is to be held by Parties to the Rome Statute. However, it is often the case, that the requests remain unanswered. For this reason has the Assembly of States Parties included cooperation in the stocktaking part of the Review Conference. No resolution, but Declaration on Cooperation was adopted.

The State Parties to the Court have a general obligation to cooperate with the Court. This obligation is expressed in the Rome Statute in Article 86: "State Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". Every organ of the ICC might request relevant cooperation.[64]

In this context, the distinction has been made between the obligatory cooperation and the voluntary cooperation. In the category of voluntary cooperation fall enforcement of sentences or relocation of acquitted persons[65]. It was stated however, that "the distinction should not become a dividing line between cooperation and non-cooperation"[66], in other words, the States shall nevertheless try to provide all necessary assistance to the Court.

In case the State Party does not fulfill its obligation to cooperate, the Court "may make a finding to that effect and refer the matter to the Assembly of States Parties, or,

[63] Schabas, William, supra note 13, p. 976
[64] Report of the Bureau on Cooperation, International Criminal Court, available at http://www.icc-cpi.int/Menus/ASP/Sessions/Documentation/7th+Session/, last accessed on 17 April 2012, p.5
[65] Stocktaking of International Criminal Justice, Cooperation, Summary of the roundtable discussion, available at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.d-ENG.pdf, last accessed on 17 April 2012, p.114
[66] Summary of the roundtable discussion, supra note 65, p.119

where the Security Council referred the matter to the Court, to the Security Council"[67]. Up to today, the Court has not made such a finding.

It seems that not only lack of will prevents the State Parties from cooperation. Only one third of the State Parties have implemented all necessary legislation or other procedures to enable them to cooperate. The most relevant is the legislation regarding the investigation and prosecution of the international crimes under the Rome Statute and ratification of the Agreement on Privileges and Immunities[68]. Some States expressed their obstacles with implementing respective legislation and welcomed initiative that proposed more sharing of information regarding this topic at the Assembly of Parties. Though, more effort has to be shown to enable the Court to work properly.

Not only State Parties to the Rome Statute, but all requested states are obliged with the Court in case they accept the Court's jurisdiction or the situation was referred to the ICC by UN Security Council. The experience in these situations is the toughest, as states are not willing to cooperate if they don't agree with the Court's jurisdiction on their territory, as in Sudan where the Court repeatedly reported to the United Nations about the failure to cooperate from the Sudanese authorities[69].

Last but not least, the theme of cooperation is not connected only with the State Parties to the Rome Statute; all relevant stakeholders are encouraged to cooperate with the ICC[70], i.e. international organizations, non-governmental organizations and civil society.

Most importantly, the ICC has strong connection with the United Nations. The relationship between the two is governed by Relationship Agreement concluded in 2004.[71] But the ICC has vital cooperation with the European Union, OAS and the African Union[72], "the Court is also committed to developing and deepening its relationship with the Arab League and with the OIC".[73]

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[67] Rome Statute, Article 87
[68] Report of the Bureau on Cooperation, supra note 64, p.7
[69] Report on the First Review Conference on the Rome Statute, supra note 56, p.36
[70] Declaration on Cooperation, International Criminal Court, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf, last accessed on 17 April 2012
[71] Report of the Bureau on Cooperation, supra note 64, p.24
[72] Though it is important to mention African Union's encouragement towards its members not to cooperate with the Court in case of execution arrest warrant on Sudanese president Omar Al-Bashir
[73] Report of the Bureau on Cooperation, International Criminal Court, ICC-ASP/8/44, 15.November 2009, p.26

Every outstanding request from the Court or any delay to the obligation to cooperate is very costly. The time is a crucial criterion in criminal proceedings. The significant part of the ICC's criticisms is derived from the time consuming trials. The situation can never change unless the approach of the State Parties and all parties obliged to cooperate with the ICC differs. The sad shining example is the eight unexecuted arrest warrants[74]. The trial cannot proceed in absence of the accused.

[74] Khan, Albar, Cooperation between States Parties and the ICC: Challenges and Opportunities for Improvement, EQ: Equality of Arms Review, 2/2010, p. 14

### *3.2.2. Complementarity*

The principle of Complementarity is unique for the ICC. Prosecuting of the crimes should be the primarily the responsibility of the respective States. The Court states itself as a court of the last resort; it shall only act when the domestic courts are unwilling or unable to act. The Court is empowered to "rule on a state's genuine unwillingness or inability to investigate or prosecute"[75]. This fundamental principle of complementarity is not only stated in the Rome Statute[76] itself, but also in its Preamble[77].

Further, the Court's ambition is not to prosecute all the Crimes that fall within its jurisdiction. The chief prosecutor Ocampo stated in the prosecutorial strategy that only those most responsible would be investigated and prosecuted by the ICC. Other, less severe crimes fall solely in the jurisdiction of the respective states.

The usual problems the domestic courts are facing are obvious and were repeated many times during the Review Conference in Kampala as well as during previous Sessions of the Assembly of States[78]. The State parties where an active investigation of ICC has taken place claim they are not unwilling to prosecute those responsible for crimes and atrocities, but their lack of infrastructure, trained personal, professionals, funds, respective legislation and experience make it difficult if not impossible. The Prosecutor has named this "positive complementarity"; the actions of the Court are then seen "as one of collaboration and assistance to the national system"[79].

Therefore, the intention of the Court is to support the domestic courts in fulfilling their obligation and strengthening national jurisdictions. Its role is to encourage State parties and other stakeholders of the Court, i.e. international organizations, NGOs and civil society in acting proactively in this matter. The ICC does

[75] Kress, Claus, International Criminal Law: The International Criminal Court as a Turning Point in the History of International Criminal Justice, Oxford University Press, 2009, p.156
[76] Article 1 stating the Court "shall be complementary to national criminal jurisdictions"
[77] Affirming that the most serious crimes of concerns to the International Community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation
[78] Especially during the 8th Session of ASP which concluded with report of the Bureau "Taking stock of the principle of complementarity: bringing the impunity gap
[79] Schabas, William A., supra note 13, p.52

not have sufficient funds and capacity to accept this task on its own as well as it clearly stated it was not a development agency[80].

This effort was integrated in the principle called positive complementarity. Though never mentioned in any official document of ICC, it is widely used and recognized. Positive complementarity is defined as ″all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigation and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis"[81]. The Court then acts more like "catalyst"[82] of efforts made by all stakeholders of the international community.

Last but not least should be mentioned other, prevent, effect of the principle of complementarity. It motivates the states to precisely investigate and prosecute international crimes that fall under the jurisdiction of the ICC. Otherwise, they risk the involvement in the Court. The Rome Statute states in the Article 17 conditions when the Court shall act nevertheless the domestic proceeding takes place, i.e. when the purpose of the proceeding is to shield the person, there is an unjustified delay in the proceeding or the proceeding is not conducted independently or impartially.

The debate of complementarity was resolved by the Resolution on Complementarity[83]. The topic was further discussed at the tenth Session of Assembly of States Parties in December 2011 which also decided to make "Implementation and Cooperation" a regular agenda for the Assembly which needs to be continuously examined[84].

[80] Bergsmo Morten, Bekou Olympia, Jones Annika, Complementarity After Kampala: Capacity Building and the ICC's Legal Tools, Goettingen Journal of International Law 2/2010, p. 798

[81] Report of the Bureau on stocktaking: Complementarity, International Criminal Court, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf, last accessed on 17 April 2012

[82] Report of the Bureau on stocktaking: Complementarity, supra note 81, p.8

[83] Resolution on Complementarity, International Criminal Court, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf, last accessed on 17 April 2012

[84] International Criminal Court, Assembly of States Parties, Retreat on the Future of the International Criminal Court, ICC-ASP/10/INF.3, 1 December 2011

### *3.2.3. The Impact of the Rome Statute on Victims and Affected Communities*

The Rome Statute made an unprecedented switch in understanding of the victims of the crimes and their role in the proceeding. It was emphasized in the preamble of the Rome Statute and repeated in the Resolution adopted by the Review Conference: "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". In accordance with the understanding of restorative justice the victims became more than witnesses, as Ms. Radhika[85] pointed out in her statement at the Review Conference, "the defendants must be entitled to all their guaranteed rights but it is the victim who is raison d'etre of this process". Following a strong support to a Chilean and Finland's proposal from both States Parties and non-governmental organizations the eighth Session of the Assembly of the States Parties concluded to include the impact of this brand new system on victims and affected communities[86]. The preparatory works for this part of Stocktaking exercise included widely distributed questionnaires with the aim of evaluation what the Court has achieved in this field as well as identifying the areas where progress was necessary.

The individual rights of victims are recognized by international law, including international documents. Most important to mention would be Basic Principles of Justice for Victims of Crimes and Abuse of Powers together with Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, however the ICC has been the first of the international criminal tribunals to put the principles in praxis.

According to the Rules of Procedure and Evidence victim is "a natural person who have suffered harm as a result of the commission of any crime within the

[85] Special Representative of the Secretary General for Children and Armed Conflict

[86] The Impact of the Rome Statute System on Victims and Affected Communities, Final Report by the Focal Points, International Criminal Court, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.a-ENG.pdf, last accessed on 17 April 2012, p.2

jurisdiction of the Court", but can also include "organizations or institutions that have sustained direct harm to any of their property dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes".

The Resolution pointed out victims' right to "equal and effective access to justice, protection and support" as well as reparation and information. Victims have right to "present their views and concerns" to the ICC at any procedural stage as long as they can prove their personal interest may be affected[87]. They can participate as witnesses. Victims and witnesses are entitled to a specific treatment from the Court; their needs shall be always taken into account.

The victims can choose their legal representative and most of them enjoy this option[88]. In case they have no financial means the Court will provide them with an attorney and will cover the costs.

In case the victims, the witnesses or their families are endangered because of their cooperation with the Court they shall be provided with necessary means of protection. The testimony of the witnesses can be taken in alternative ways in order to prevent them from facing the defendant or to protect their identity. During Review Conference was emphasized the need of the State Parties to enter into more agreements regarding the relocations of the witnesses. A new welcomed initiative was the establishment of the Relocation Fund.

The never-ending frustration from the side of the victims often results from too high expectations they placed on the Court. The communities often expect the Court to solve the situation as well as the consequences of the conflict. The Court's strategy is clear in prosecuting only the gravest breaches of the international criminal law, thus a lot of crimes shall be prosecuted on the national level according to the principle of complementarity. Needless to say lots of crimes remain unpunished. That also resolves in accusations of the Court of being biased or one-sided. Careful explanations to public and impartial approach to the situations are necessary to present the Court as a legitimate institution of international criminal law.

[87] The Impact of the Rome Statute System on Victims and Affected Communities, Final Report by the Focal Points, supra note 86, p.18

[88] The Impact of the Rome Statute System on Victims and Affected Communities, Final Report by the Focal Points, supra note 86, p.3

Despite the recognition of the right of the victims to participate in the proceeding and a general policy that states "bureaucratic or resource-related arguments, such as the high number of victims, the costs involved or any other organizational problems require practical solutions: they are never a basis to oppose participation per se…"[89] a lot of victims are not given their voice in the proceeding[90].

The most striking problem discussed during the Review Conference appeared to be the outreach of the ICC. A disturbing lack of information was felt in all the countries where the Court was present. Given the limited media outreach, illiteracy and isolation, the awareness of what is the ICC, its function and jurisdiction and the possibilities how to participate in the proceeding were mostly unknown. The situation is improving in most recent situations, especially in the case of Kenya, where the outreach activities were conducted before the investigation has proceeded and therefore the population was better informed and prepared[91].

In connection with lack of information, also a limited support of the international investigation could be seen in some of the countries as Colombia, Democratic Republic of Congo or Uganda. In those countries national jurisdiction was a preferred option.

Unfortunately the investigation and the trials at the Court last too long. A lot of survivors don't live long enough to see the results of the Court's work. For instance, the case of Mr. Memba has been started in 2002 and now, ten years later, there is no visible end of impunity to the victims. The due process with respect to all the defendants' is complicated and hard to understand for affected communities.

Intermediaries together with non-governmental organizations play a crucial role in the Court's outreach and in assistance to the victims, "they help bridge the physical, cultural and linguistic gap between the Court and members of the community"[92].Even though their importance to the Court is unquestionable; their role has never been addressed and specified in any of the Court's documents. Consequently, intermediaries

[89] International Criminal Court,, Policy Paper on Victims' Participation, available at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-M.1-ENG.pdf, last accessed on 17 April 2012, p. 4

[90] As to June 2010 2.648 victims have submitted the application to participate in the proceedings, 770 were granted the right

[91] The Impact of the Rome Statute System on Victims and Affected Communities, Final Report by the Focal Points, supra note 86, p.12

[92] International Federation for Human Rights, ICC Review Conference; Renewing Commitment to Accountability, 25 May 2010, N°543a, available at: http://www.unhcr.org/refworld/docid/4bfcc04e2.html, accessed on 20 March 2012, p.10

suffer from lack of protection even though often threatened because if their connections to the ICC's proceeding. There should be a respective policy towards them and their financing and especially protection should be covered.

Special attention was brought to children and women as to the two most vulnerable groups in the society. It was explained it was hard to reach them to provide them with the relevant information about the Court. The outreach in this case must be specifically tailored and respectful to the victims' needs. Women suffer from stigmatization after being the victims of gender-based violence; it is extremely hard to gain their trust. The importance of seeing the child soldiers as victims and not as perpetrators was also stressed. The re-integration of both of these groups is more complicated and should be targeted by the Court.

There is a strong interest and need for the reparations among the victims. The Court can entitle the victim to reparations in the sentence, either from the funds of the sentenced perpetrator or from the funds of the Court. In case of the perpetrator, necessary legislation regarding the asset tracking and freezing shall be implemented; nevertheless, the seized assets of the accused persons would not cover all the claimed damages.

The unfortunate possible outcome of providing reparations and assistance is a jealousy that may occur resulting from an insensitive distribution policy, categorizing or simply the lack of information[93]. It is necessary to address the reparation to the victims or group of victims in order to prevent most of possible future tensions in the society[94].

The Trust Fund for Victims (further "TFV") is a new institution established only in 2002 by the decision of the Assembly of State Parties at first session[95]. The Fund is operated by five voluntary members of Board of Directors. The main responsibilities of the TFV are providing "physical rehabilitation, psychological assistance and material support"[96], the assistance "can take forms that overlap with reparations, such as medical

[93] The Impact of the Rome Statute System on Victims and Affected Communities, Final Report by the Focal Points, supra note 86, p.6
[94] Tolbert, David, Taking Stock of the Impact of the Rome Statute and the International Criminal Court on Victims and Affected Communities, p.4
[95] Schabas, William A., supra note 19, p. 175
[96] The Impact of the Rome Statute System on Victims and Affected Communities, Final Report by the Focal Points, supra note 86, p.12

care, scholarships, housing and financial help"[97]. Now with more than 30 programs in the field the TFV reached more than forty thousand direct beneficiaries and two hundred thousand indirect beneficiaries. It was very fortunate to allow the TFV to provide assistance to the victims before the conviction from the Court so that the current needs of the victims can be at least partly solved.

The biggest obstacle regarding the TFV is insufficient funding, the resources in June 2010 amounted to only around five millions Euro[98]. The State-Parties were not very generous though big promises have been made. The TFV must find a new strategy how to attract new donors, not only from the States Parties, but also organizations or individuals.

The Court has so far no experience with the reparations, by the time the Kampala Conference took place there was not a single trial completed. However, the Court has only a complementary reparatory function; the primary responsibility lies according to the international law with the national state.

There are many obstacles and challenges to overcome in the Court's policies towards victims. It could have been expected. The ICC is doing a "pioneer" work in this field and so mistakes inevitably happen. It has established the system in which the Court has an obligation to hear what the victim has about to say. Giving the day-to-day reality of life, the opinions of the victims often differ, even in between the victims from the same communities. ICC would never be able to please everybody, unfortunately neither to provide justice to everybody nor compensate everybody, but "even if we cannot bring justice to every victim, we must try to bring the benefits of an international justice system to those we can"[99]. With keeping in mind that the solutions must be sensitive to victims and their cultural and social background a lot has been done to improve and learn from already made mistakes.

[97] Tolbert, David, Taking Stock of the Impact of the Rome Statute and the International Criminal Court on Victims and Affected Communities, p.3
[98] Tolbert, David, supra note 97, p.4
[99] Statement by Ms. Radhika Coomaraswamy, The Rome Statute, The Voices of Victims: Breaking the silence of atrocities, 2. June 2012, Kampala, Uganda

*3.2.4. Peace and Justice*

Both, promoting peace and justice belong to the main of the Court's objectives. The Preamble to the Rome Statute expressed that "recognizing that grave crimes threaten the peace, security and well-being of the world"[100]. However, lots of discussions whether the Court in pursuing justice doesn't undermine hopes for peace took place as of the firsts Court's judicial interventions. Its effects on peace negotiations, humanitarian conditions and further commitments of atrocities were always on the table. Consequently, the Session of the State Parties decided to devote necessary time to evaluate the consequences of the Court's actions by appointing Argentina, Democratic Republic of Congo and Switzerland to present co-focal points at the Review Conference.

The ICC was not the only Court that was accused of threatening peace. It was also the case of International Criminal Tribunal for former Yugoslavia. However, considering the permanent character of the ICC, it is more likely that its possible intervention won't be only part of the solution in the after-math of the conflicts, but also part of an ongoing conflict, not mentioning its preventive function.

The discussion was always introduced as "peace vs. justice" meaning that both is hard or even impossible to achieve at the same time. There was a purpose why was this stocktaking exercise named "peace and justice". The aim is to show the conflict in between the two is evitable and that the terms are in reality compatible. As the United Nation's Secretary-General Ban Ki-Moon stated: "the debate is no longer between peace and justice, but between peace and what kind of justice"[101].

There is a considerable shift that was expressly stated at the Review Conference. There is no possibility to negotiate about amnesties for those who fall within the jurisdiction of the ICC, "amnesties, once viewed as a necessary price for peace, are no

[100] Mendez, Juan E., The Importance of Justice in Securing Peace, International Criminal Court, 30.5.2010, RC/ST/PJ/INF.3, p.1

[101] Report of the Bureau on Stocktaking: Peace and Justice, International Criminal Court, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-52-ENG.pdf, last accessed on 17 April 2012, p.1

longer considered acceptable for the most serious international crimes"[102]. There are multiple reasons for that.

First of all, there could be no further precedents for the possible future perpetrators that they can ever go unpunished, "evidence presented at the recent tribunals suggests, that the failure to prosecute perpetrators such as Pol Pot, Idi Amin, Saddam Hussein, Augusto Pinochet, and Papa Doc Duvalier convinced the Serbs and Hutus that they could commit genocide with impunity"[103]. Especially in sensitive areas in the world like Africa, the consequences could be deadly.

The preventive function of the Court does not have to be necessarily long-termed. It is recognized what effects on the ongoing conflicts had the mentioning of the possibility of the Court's involvement[104], "the mere threat of prosecution may have a stabilizing effect by exacting the cost for continuing atrocities and by undermining the power of genocidal leaders"[105]. Sometimes the African warlords weren't even aware of the fact that their actions committed international crimes.

Respecting the concept of not only retributive justice, but more importantly restorative justice, the question comes in mind whether the local societies prefer the intervention of the ICC or would prefer rather traditional justice. It was apparent, that in some cases, most notably Uganda, the Court wasn't welcomed. In case of alternative means of justice, the truth seeking commissions are most commonly mentioned.

Truth Commissions are non-judicial "investigatory bodies that have usually been created as a part of a country's political transition to examine human rights violations"[106]. They are becoming popular; at least twenty-five were established in last forty years[107] including the well-known South African Truth Commission. The advantage of truth seeking commissions is the direct involvement of a broad affected society and thus direct and possibly prompt reconciliation and reestablishment of trust

[102] Report of the Bureau on Stocktaking: Peace and Justice, International Criminal Court, supra note 101, p.1
[103] Akhavan, Payam, Are International Criminal Tribunals a Disincentive to Peace?: Reconciliation Judicial Romanticism with Political Realism, Human Rights Quarterly, Vol. 31, 2009, p. 629
[104] Mendez, Juan E., The Importance of Justice in Securing Peace, International Criminal Court, 30.5.2010, RC/ST/PJ/INF.3, p.3
[105] Akhavan, Payam, supra note 103, p. 629
[106] Sooka, Yasmin, Confronting Impunity: The Role of Truth Commissions in Building Reconciliation and National Unity, Review Conference of the Rome Statute, 30. May 2010, p.7
[107] Sooka, Yasmin, supra note 106

and peace in the community. In case of properly managed and established within a reasonable time period after the termination of the conflict, the truth seeking commissions are "giving a voice to the voiceless and empowering those who for years have been prosecuted and made visible"[108]. They can have a significant impact if they target sensitive groups of women and children.

The situations after the conflict share the same feature, the victims hope first for peace and justice is placed on the second place. However, when the peace is achieved and the humanitarian conditions improved, the demand for justice becomes stronger. So in case justice was called off because of the power realities in place, the tensions in the societies remain stronger. "Experience in several post-conflict societies has shown that, where culprits were not prosecuted for a number of reasons, the banished ghost of the victim's thirst for justice returns years later to haunt those societies, reopening old wounds thought to have been healed."[109]

In case of Rwanda, so-called gacaca courts took place. Over eleven thousands of these courts operated to prosecute genocide. However, they were also objects of criticism, because traditionally, those courts were used to settle minor disputes, their ability to prosecute such a complicated crime as genocide was consequently questionable.

The views on the matter of the Court's impact in the peace talks differ. The example of Sudan is the most popular. The situation of Sudan was referred to the Court by United Nation's Security Council in March 2005, "determining that the situation in Sudan continues to constitute a threat to international peace and security"[110]. After the issuance of the arrest warrant for the sitting head of State, Omar Al-Bashir, the Sudanese president expelled thirteen humanitarian organizations out of the country, leaving thousands of people deprived of their basic needs. A huge criticism of the Prosecutor's timing came from State Parties as well from civil society and journalists. On the other hand, even though the arrest warrant was not executed, mostly due to the lack of cooperation of both State-Parties and Non-State Parties, the situation concluded

[108] Sooka, Yasmin, supra note 106, p.2
[109] Thakur, Ramesh Chandra, Malcontent, Peter, Sovereign Impunity to International Accountability: The Search for Justice in a World of States, United Nations University Press, 2004, p. 199
[110] Mendez, Juan E., supra note 104, p.3

in international isolation of Sudanese president and certain shift of power in Sudan[111]. The main leader of the Janjaweed Ali Kushayb was prosecuted nationally; even it was more a theater for the international community.

In case of this stocktaking exercise, no resolution was adopted. The most important document remains the Commentator's Summary. Nevertheless, the ongoing debate does not stop here. This controversial area on the Court's impact is hard to evaluate. The preventive function can be hardly if ever measured, "because successful prevention is measured by what does not happen"[112]. In cases of both successful and unsuccessful cases of pursuing justice and peace, the Court's actions are part of multiple factors that influence the outcome. Nonetheless, there are no two same situations and "important differences between national circumstances must be respected"[113].

[111] Mendez, Juan E., supra note 104, p.6
[112] Akhavan, Payam, supra note 103, p. 636
[113] Hayner Priscilla, Managing the Challenges of Integrating Justice Efforts and Peace Processes, International Criminal Court, 30.5.2010, RC/ST/PJ/INF.4, p. 1

## 3.3. Strengthening the Enforcement of Sentences

The resolution on strengthening the enforcement of sentences was adopted in place of debating over an amendment that was proposed by Norway in 2009. The Assembly of the State Parties decided not to include discussions regarding the facilitation of service of sentenced in the Kampala Review Conference. [114]

The resolution stressed the key and irreplaceable role of the State Parties in enforcement of the sentences of imprisonment. The Court cannot force any State Party to accept a sentenced person, it only choses from the list of States "that have indicated to the Court their willingness to accept"[115] them. So far the States have been very reluctant to indicate this willingness to the Court.

[114] Schabas, William A., supra note 57
[115] The Rome Statute, Article 103

## 3.4. Article 124

Article 124[116] allows new party states to the Rome Statute to withdraw from the jurisdiction of the ICC for a limited period of seven years. This withdrawal is concerning only the war crimes committed by their nationals or on their territories.

The transnational provision was used only twice during the Court's history: by France and Colombia. France revoked the provision on 13 August 2008 after approximately 6 years[117]. The provision lost its effect in 2009 in case of Colombia[118].

Reviewing of the transitional provision was directly implemented in the Article 124. The consensus over deleting of the Article 124 was expected before the Review Conference supported by the outcome of 2009 Assembly of States Parties[119]. Therefore, it came as a surprise when the discussions came with the conclusion of retaining Article 124 in an unchanged form. Consequently, many international organizations concerned with human rights expressed their disappointment.

Deletion of the Article 124 was not the only possible solution. The Venezuela delegation proposed "sunset clause" as a compromise[120]. Article 124 would automatically expire after a previously framed period of time. Although number of states was in favor of this solution, even the compromise proposal didn't gain enough support.

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[116] Article 124
Transitional Provision
Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

[117] Clark, Roger S., Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010, Goettingen Journal of International Law 2, 2010, p. 691

[118] Kaul, Hans-Peter, supra note 50

[119] Proposed deletation of the Article 124, Resolution ICC-ASP/8/Res.6, November 2009, Annex I.

[120] Coalition for the International Criminal Court, Report of the First Review Conference on the Rome Statute, supra note 56, p.20

Withdrawing from the court's jurisdiction is controversial[121] and it opposes the general rule of prohibition of reservations to the Rome Statute. The reason for keeping Article 124 unchanged, though supported by the minority of the participating parties to the Review Conference, was to support other states to become a party to the ICC and providing them with the equal conditions that previous becoming members have had. Nonetheless, existence of Article 124 has so far not proved this wishful effect.

Article 124 shall be reviewed again during the 14th session of the Assembly of State Parties which will be held in 2015[122].

[121] Clark, Roger S., supra note 117, p.692

[122] Resolution on Article 124, International Criminal Court, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf, last accessed on 14 March 2012

## 3.5. Article 8

Following the proposal of Belgium, successful consensus was reached regarding the prohibition of selected weapons in the conflicts of internal character. These include poison or poisoned weapons; asphyxiating or other gasses, and all analogous liquids, materials or devices and bullets which expand or flatten in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions[123]. What might seem as a significant change is however only widening of the current prohibition of the same weapons in international conflicts. The gap between the severity of international and national conflicts is almost none nowadays. Contrary, some of the most brutal attacks against civilians were committed during the national scaled conflicts, the most severe crimes national committed against national. There is no reason for setting different protection for possible victims and the perishing distinction considering legal tools between international and national conflicts is a logical consequence of that phenomenon.

However, this first amendment to the Rome Statute in history is followed by minor controversies. Firstly, emphasized by the delegation of France, "mental requirement of the crime"[124] must be fulfilled in the case of expanding bullets, meaning "the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law"[125]. This part of the provision refers to cases where expanding bullets are used to protect civilians, in situations as rescuing hostages, "a regular bullet may go through a participant and hit innocent person", conversely, the expanding bullet remains in the aimed person[126].

Secondly, the crime is committed only in context of armed conflict, not in cases of law enforcement situations. Amnesty International expressed its concern that it may

[123] Resolution RC/Res.5 Amendments to article 8 of the Rome Statute, International Criminal Court, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf, last accessed on 12 March 2012

[124] Coalition on International Criminal Court, Report on the First Review Conference on the Rome Statute, supra note 56, p.21

[125] Resolution RC/Res.5 Amendments to article 8 of the Rome Statute supra note 123

[126] Clark, Roger S., supra note 117, p. 708

negatively affect the customary humanitarian law and shall not be understood as authorization to use above mentioned weapons[127].

This amendment falls within the scope of "negative understanding"; it applies only to member states to the ICC[128]. Pursuant to Article 121 paragraph 5 the amendments enter into force for those State Parties which consequently ratify it. The first flagship that ratified amended provision of article 8 was San Marino on 26 September 2011. President of the Assembly of State Parties, Ambassador Christian Wenaweser welcomed this firs ratification with hope that "it would constitute a catalyst for other States to follow"[129].

Also other weapons were proposed to be prohibited, namely chemical weapons, biological weapons, anti-personnel land mines, non-detectable fragments, blinding laser weapons and cluster munitions or nuclear weapons[130]. However, no consensus has been reached and will further be worked on by the established Working Group.

[127] Amnesty International Public Statement, Comments regarding the language included in the resolution amending Article 8 of the Rome Statute, adopted in plenary on the 10 June 2010, 11 June 2010

[128] Schabas, William A., supra note 57

[129] Press Release of 28.09.2011, First Ratification of Kampala amendment to article 8, available at http://www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2011/PR727.htm, kast accessed on 17 March 2012

[130] Clark, Roger S., supra note 117, p. 708

## 3.6. Crime of Aggression

The most important outcome of the Kampala Review Conference has been without doubts a compromise reached in defining the crime of aggression. Decades of legal research and diplomatic negotiations were concluded in Uganda and both celebrated and regretted throughout the world. In this section I would like first to present a short history of the crime of aggression and different attempts to define and prosecute it. Further, I would like to describe definition which was adopted at the Review Conference followed by explaining the obstacles and uncertainties following its adoption.

History of the Crime of Aggression

It was a century ago when the German Kaiser Vilhelm II, who initiated World War I, was accused of breaching Article 227 of the Peace Treaty of Versailles and was about to be charged with "supreme offence against international morality and the sanctity of treaties"[131]. Kaiser Vilhelm II however escaped to the Netherlands and therefore couldn't be prosecuted[132].

General Treaty for Renunciation of War as an Instrument of National Policy, so called Kellogg-Briand Pact, was signed in 1928. It instructed to "all disputes to be settled by pacific means"[133]. However, there was no legal tool to prosecute individuals.

The next and most significant milestone in prosecuting crime of aggression came in 1947 with Nuremberg and Tokyo international military tribunals famously calling aggressive war to be "not only an international crime: it is supreme international crime differing from other war crimes in that it contains within itself the accumulated evil of

[131] Heinsch, Robert, The Crime of Aggression After Kampala: Success or Burden for the Future?, Goettingen Journal of International Law, 2/2010, p. 716
[132] The Netherlands refused to extradite Kaiser Vilhelm II
[133] Fletcher, Kari M, Defining the Crime of Aggression: Is there an Answer to the International Criminal Court's Dilemma?, Air Force Law Review, Vol. 65, 2010, p.233

the whole"[134]. The definition of crime in Article 6 of the Charter of International Military Tribunal covered "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"[135]. The result was twenty two persons in Nuremberg Trial and twenty eight persons in Tokyo trials sentenced, even though there were significant doubts that crime of leading aggressive war has no grounds in international customary law and consequent violation of nullem crimen nulla poena sine lege principle. On the contrary, Nuremberg judges and most importantly Chief U.S. Prosecutor Robert Jackson were persuaded that in existing international documents, including Briand-Kellogg Pact, there is a definition and a prohibition of leading an aggressive war. The Military Tribunals were thus applying only "existing expression of international law existing at the time of its creation"[136].

Finally, the definition of aggression was found by consensus for the purposes of maintaining international peace in the Charter of United Nations. In 1974 the General Assembly of the United Nations adopted a Declaration on the Definition of Aggression in the Resolution 3314. Article 1 defines 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"[137]. Article 3 states acts that constitute aggression regardless of declaration of war, however as articulated in Article 4 "the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provision of the Charter"[138]. Recent definition concluded in the Rome Statute of the International Criminal Court is very much based on the definition of the Resolution 3314. It bases the grounds for some critiques as the definition was not supposed to serve

[134] Anderson, Michael, Reconceptualizing Aggression, Duke Law Journal, Vol. 60/2010, p. 414
[135] Drumbl, Mark A., The Push to Criminalize Aggression: Something Lost Amid the Gains?, Case Western Reserve Journal of International Law, 41/2009, p. 295
[136] Ferenz, Benjamin B., Enabling the International Criminal Court to Punish Aggression, Washongton University Global Studies Law Review, 3/2007
[137] Resolution 3314, General Assembly, Twenty Ninth Session, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement, last accessed on 2/29/12
138 Resolution 3314

international criminal law purposes, but rather political ones and so it lacks the precision of careful law wording.

Nuremberg and Tokyo trials were not only first courts to prosecute the crime of aggression, but also gave necessary impulse to create other international criminal tribunals, mostly as an aftermath of international conflicts. Within the jurisdiction of these courts[139] were war crimes, crimes against humanity, even genocide, but never aggression.

Finally, after establishing the ICC in 1998, the states at the Rome Conference decided to include crime of aggression within the crimes over which the Court shall have jurisdiction. However, the States Parties didn't agree upon the definition. Article 5(2) of the Rome Statute was decided to be left for the decision at the first review conference. Until June 2010 Article 5 stated: "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 the crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations"[140]. The Preparatory Commission of the Court was responsible for the respective work on the definition of aggression as well as Elements of Crimes and conditions for jurisdiction. More importantly, the decision to create a Special Working Group on the Crime of Aggression (further "SWGCA") was taken in 2002. The SWGCA operated from 2003 till the Review Conference and prepared a complete definition of the crime of aggression, possible solutions of the Court's jurisdiction as well as draft of the amendments to the Elements of Crime. The preparatory work before the Kampala Conference was discussed among academics and the debate was also opened to the non-state parties[141] and non-governmental organizations.

[139] International Criminal Tribunal for Rwanda, International Criminal Tribunal for former Yugoslavia, special courts in Sierra Leone, East Timor, Cambodia

[140] Heinsch, Robert, supra note 131, p. 718

[141] Active part of discussion took for instance: China, the Russian Federation, India, United States of America did not participate in the SWGA discussion, but were active observers of the Review Conference

The outcome of Kampala

Article 8 bis defines two features of aggression, firstly the actual crime of aggression in paragraph 1 and secondly, the act of aggression. Article 1 defines the crime of aggression as "the planning, preparation, initiation or execution, by 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", so it can only committed by persons and moreover only by persons in charge as will be described lately. Contrary, the act of aggression can only be committed by a State and is described 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". The general definition is followed by enumerative list of possible acts of aggression. The list is exactly the same as stated for the purposes of the Resolution 3314. These facts lead many commentators[142] to question; whether the list of acts of aggression is exhaustive or not as in the Resolution 3314 was described that Security Council may decide that other acts than the ones stated in the definition can create an act of aggression[143]. The current understanding is that the list is exhaustive[144].

Not all acts of aggression create prima facie crimes of aggression. Summing up, "a crime of aggression is an act of aggression that violates the Charter"[145]. The State Parties and the SWGA preferred a rather conservative approach to the definition of aggression and let it cover only the most severe breaches of the prohibition of use of force. The adopted definition is said to be consistent with current international customary law[146], but it does not encourage any progressive development in understanding of aggression. Some academics accepted this approach with regrets and as a missed chance, but it was the smoothest and possibly the only way to reach the compromise.

[142] Ex. Michael J. Glennon
[143] Article 4 of Resolution 3314
[144] See Kress, Claus, Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus
[145] Glennon, J. Michael, The Blank-Prose Crime of Aggression, Yale International Law, Vol. 71, 2010, p. 89
[146] Aggression is by most authors considered as a crime under international law and was confirmed as such by British law lords in judgment R. v. Jones in 2006

Unlike other crimes stated in the Rome Statute the crime of aggression can only be committed by "by person in a position effectively to exercise control over or to direct the political or military action of a State"[147]. The crime focuses only on top leaders either political or military. Questions were raised, as not only the above mentioned leaders do possess the necessary influence to control political or military action. Also persons enjoying economic power or nowadays religious leaders may have significant authority. It seems to be understood that Article 8 bis does not exclude those persons from a possible prosecution[148].

As was already said, the proposed definition shields only the most significant incidents of illegal use of force, carefully avoiding the controversial cases that would fall into the "grey area". Most doubts were raised in connection with understanding of the self-defense and a new phenomenon of the international law, so-called responsibility to protect and following humanitarian intervention. But within this ambiguous area fall also "forcible reactions to a "minor" use of force of another state, armed interventions to rescue nationals, the extraterritorial use of force against a massive non-state armed attack"[149] and others.

The uncertain coverage of the definition of the crime of aggression gave rise to many doubts questioning the legality of the definition. The attempt to precise the definition was held by adopting the "Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression". The Understandings were supposed to clarify some of the unclear aspects of the definition of aggression, including referrals by the Security Council, jurisdiction over the crime of aggression or explaining the exact meaning of the word "manifest" in the definition. For the purposes of the crime of aggression as stated in the Rome Statute the violation of the Charter must be "manifest" in "character, gravity and scale". As the Understandings state the three components must be sufficient, "no one component can be significant

[147] Also consult Article 25(3)bis considering individual criminal responsibility "In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State".
[148] Heinsch, Robert, supra note 131, p. 723
[149] Kress, Claus, supra note 144, p. 1140

enough to satisfy the manifest standard by itself"[150]. Unsurprisingly, only another debate occurred whether all three criteria have to be met or only two fulfill the condition.

The possible vagueness of the definition of the crime of aggression is criticized for another reason also. The adopted definition aims to prosecute only the gravest breaches of international law. It might not gain the preventive effect as it is connected with other crimes covered by the Rome Statute. Is it possible that the future perpetrators can even be encouraged by the limited possibility of being charged for their crimes? Some parts of the definition as the meaning of the word "manifest" are opened to judicial defining. But the definition is hopefully clear enough for raising the awareness of the legal consequences for the possible future perpetrators.

Prosecution of the crime of aggression according to the Rome Statute

The prosecution of the crime of aggression differs depending on where the impulse to investigate came from. The first possibility is the referral by the Security Council. In this case, covered by Article 15 ter, the prosecutor may proceed with the investigation without fulfilling any further conditions. The Court may investigate the situation even in case the States are not parties to the Rome Statute.

Contrary, the citizens of the Non-State Parties cannot be prosecuted for the crime of aggression in case of State-Party referral or initiative of the Prosecutor of the ICC, so called proprio motu. These options are included in the Article 15 bis. There was also an opposition against non-prosecution of the situations in Non-State parties. It is claimed, and the same principle is applied in case of other grave crimes under Rome Statute, that the crime takes place on the territory of the victim state. Hence, it would be sufficient if only the attacked state was a State-Party to the ICC. However, the opt-out close that will be explained later and its recent understanding would consequence in an unacceptable difference between the prosecution regarding the Non-State Parties and the State-Parties that have used the option to prevent their citizens from the prosecution.

[150] Paragraph 7, Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Anex III to the Resolution RC/Res.6 The Crime of Agression

The relationship with the Security Council of the United Nations

The dependence on the Security Council's declaration of the existent act of aggression had been one of the biggest burdens to overcome in the negotiating process. The positions of the State Parties were strong and the compromise seemed to be impossible. That is also a reason why SWGA included so many options in the draft proposals. Some State Parties and academics insisted that Security Council's referral or approval was necessary and any way that would pass it would violate the Charter of the United Nations. Such a strong dependence on a purely political body of international administration was unacceptable for others. It is widely seen that the decision making of the Security Council is complicated and that it is very reluctant to make a decision of illegal use of force. Moreover, the majority of states and academics are persuaded that the Security Council has primary, but "does not have exclusive responsibility with regard to threats to international peace and security"[151].

The compromise options were merely based on a pre-decision of another body inside or outside the ICC in case of Security Council's inactivity. Those proposed were General Assembly of the United Nations, International Criminal Court of Justice or Pre-Trial Chamber of the ICC. General Assembly was criticized because of its political function and lack of judicial competence[152]. International Criminal Court of Justice seemed to be a better option, but it would "add costly and undesirable time-consuming procedures"[153].

As we know now, the accepted compromise is a strong one. Any option that the prosecution of the aggression within the jurisdiction of the ICC can be suspended by an institution outside of the ICC was abandoned[154]. In case of six months of inactivity after the necessary notification to the Secretary General of the United Nations, the prosecutor of the ICC has the right to proceed with the investigation "in respect of a crime of aggression provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance

[151] Kress, Claus, The Crime of Aggression before the First Review Conference of the ICC Statute, Leiden Journal of International Law, 20/2007, p.861

[152] As Benjamin B. Ferenz stated when compared General Assembly to the Security Council: "there is not much advantage in jumping from the frying pan into the fire".

[153] Kress, Claus, supra note 151, p.863

[154] Excluding the possibility of deferral of the Security Council according to Article 16 of the Rome Statute

with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with the Article 16"[155]. We can see a switch from the previous proposal, as the whole Pre-Trial Division has not been considered before. This approach not only respects the primary power to determine an act of aggression, but also emphasizes the "need of the Court to be able to act independently and to avoid politicization, with a view to ending impunity"[156]. Only future will tell whether the adopted solution would result in tension or even conflicts between the Court and the Security Council. Nevertheless, the Security Council still has the power to defer the ongoing investigation of the ICC.

The amendment process and entry into force: Article 121(4) v. 121(5)

Yet another problem came with the question how to amend the Rome Statute. It was unclear whether the Article 121(4) should be applied or Article 121(5). The outcome was most likely surprising for all, as a specific "tailor made" procedure was created for the adoption and coming into force of the crime of aggression. The ratifying process was also a possible reason to downturn of the negotiations as some State-Parties expressed their deep concerns about a specific procedure that is not derived from the Rome Statute.

Article 121(4) states a general procedure for amendments, "an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations", the ratification or the acceptance is required of 7/8 of the States Parties.

Article 121(5) is applied in case of amendments to Articles 5, 6, 7, and 8 and the amendments enter into force only for those Parties that have accepted the amendment and one year after their instruments of ratification or acceptance have been deposited.

[155] Article 15bis (8) of the Rome Statute
[156] International Criminal Court, Report of the Working Group on the Crime of Aggression, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.III-ENG.pdf, last accessed on 17 March 2012

Under the ruling of the Article 121(4) "no-one is bound until everyone is bound"[157], on the other hand, amendments of the Articles 5, 6, 7 and 8 bound only those State-Parties that have ratified it.

The specific approach for the crime of aggression is stated in the Article 15 bis and uses a combination of both of the above mentioned principles. According to Article 15 bis (2) the ICC shall exercise jurisdiction only "with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties". Moreover, the finalization of the jurisdiction over the crime of aggression will be based upon a decision taken by the 7/8 of the States Parties after 1 January 2017[158].

The above mentioned doubts raised mostly from concerns weather the States Parties "had the legal power to be as creative as they were"[159] without amending the amendment procedure first.

Opt-out clause

One of the most confusion causing amendments to the Rome Statute was Article 15 (4). State Parties have opened a special option how to prevent possible jurisdiction of ICC regarding the proprio motu prosecution of the crime of aggression: "The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar[160]. The withdrawal of such a declaration may be affected at any time and shall be considered by the State Party within three years"[161]. Commentators have come to very different understandings of the provision. Some understand[162] that all State Parties are bound by the aggression amendments after they come into force, unless

[157] Clark, Roger S., Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for the ICC Exercise of Jurisdiction Over It, The European Journal of International Law, Vol. 20/2010
[158] Article 15 bis (3)
[159] Kress, Claus, Holtzendorff, Leonie, The Kampala Compromise on the Crime of Aggression, Journal of International Criminal Justice 8/2010, p.1215
[160] Registar represents the head of Registry, one of the four organs of the ICC which is responsible for the non-judicial agenda of the Court
[161] Article 15 bis (4) of the Rome Statute
[162] Bill Schabas, Kevin Jon Heller

the State Party enjoys a possibility of lodging a declaration with the Registar. On the contrary, others[163] are persuaded that from the fact that the amendment process was governed by Article 121(5) the necessary consequence of its second sentence: "in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment" would be that no State Party is bound unless it ratifies the provisions regarding the crime of aggression. The reason for an opt-clause would then be to enable the State Party to ratify the respective amendments and help to fulfill a necessary condition of thirty acceptances so as the provisions of the crime of aggression could come into force, but at the same time prevents the ICC's jurisdiction over its citizens. This seems as a rather controversial political approach and State Parties "which consider making such a declaration will probably have to pay a high political price that many may not be willing to pay"[164].

Conclusion

There is no surprise that the adopted definition was accomplished only with necessary compromises. When we look back at the complicated process of reaching the definition we must understand that its vagueness and binds to resolution 3314 of the United Nations were inevitable, "historical differences among the states and disparities in military and economic power have generated profound disagreement over when force may appropriately be used"[165]. International criminal lawyers create the definitions and seek for precision; however, those are not lawyers but diplomats who have to adopt the definition then. Taken into consideration the current status and support of the ICC, it would be naïve to expect a strong progressive definition of the crime of aggression. I don't think that the doors are closed when it comes to considering terrorist attacks, internal conflicts or cyber-attacks with the connection of the crime of aggression, but the international society has not been ready for it yet. This said, I personally understand the reached compromise as a success and a first step in prosecuting the crime of aggression on international level.

[163] Roger S. Clark, Robert Heinsch
[164] Kaul, Hans-Peter, supra note 50, p.665
[165] Glennon, J. Michael, supra note 145, p. 111

# 4. Conclusion

An atmosphere at and especially after the Review Conference reminded the one after successful adoption of the Rome Statute at Rome Conference in 1998.[166] The State Parties as well as non-State parties seemed to be satisfied with the outcomes. All academia started to evaluate. Was the First Review Conference successful? As Mr. Fife stated: „the key criteria for success of the Conference may have less to do with the amendments to the Statute than with what kind of overall message is conveyed to the international community at large about international justice"[167]. It seems the international community really accomplished to show its commitment to permanent international criminal judicial institution as once proved in Rome. It was not for free; necessary compromises smoothed the edges between our ideal idea of ending impunity and political realities.

The outcome of the Review Conference lies in six resolutions on Complementarity, The Impact of the Rome Statute system on Victims and Affected Communities, Strengthening the Enforcement of Sentences, Article 124, Amendments to Article 8 of the Rome Statute, The Crime of Aggression; two declarations, the Kampala Declaration and the declaration on Cooperation. The discussions regarding the Peace and Justice exercise did not concluded in neither resolution nor declaration, the only outcome is the summary of the moderator.

The Kampala Declaration has been concluded at the beginning of the Review Conference. It stressed all the important factors of the Court's proper functioning as complementarity principle and necessary cooperation, promoting victims and witnesses rights as well as stating peace and justice as „complementary requirements". It also promoted the goal of universality of the Court. At the time of the Review Conference there were 111 State Parties to the Rome Statute, other states are invited to join. At the very end of Kampala Declaration is the decision to celebrate the 17th July, the day of adoption of the Rome Statute as the Day of International Criminal Justice.

[166] Song, Sang-Hyun, Reflections on the ICC Review Conference: Perspectives of the ICC President, EQ: Equality of Arms Review, 2/2010, November 2010
[167] Smith, Lorraine, supra note 51, p.3

Even before the Kampala Review Conference, states were encouraged to make pledges as to how they want to contribute to the smooth functioning of the ICC. Over 100 pledges were made by not only State Parties but also by Non-State Parties and organizations. Most of pleges regarded contribution to the Trust Fund for Victims, others efforts to implement necessary legislation, cooperate with the ICC, ratification of the Agreement on Privileges and Immunities.[168]

The stockatings part is hard to evaluate. Some are very pleased with the outcomes of the discussions, some are more reserved and wait for the concrete actions on the side of stakeholders. It is obvious that without the real commitment from the State Parties, the ongoing discussions remain pointless. However, as was stated at the most recent Assembly of the State Parties in New York in December 2011, cooperation is slightly improving, the State Parties stood up to their obligation to adopt necessary legislation. Cooperation is a backbone to all the Court functioning. Therefore its continual assesment is necessary. The complementarity principle is also inevitable as the scope of the Court possible activities is limited, only joined effort can lead to diminishing impunity and bring justice which "is a fundamental building block of sustainable peace"[169]. Even though the discussion on peace and justice did not conclude to any official document, the new fundamental trends were expressed, most notably, the unacceptability of providing amnesties to international criminals. Last but not least, the effects on victims and affected communities emphasized the unprecedented role of the victim in the Rome Statute system and his or her right for justice and participation. None of the outcomes of the discussions are final, the Court is too young organization and the proper evaluation will have to come after more investigations take place, more perpetrators are called to the Court, more trials are started and more importantly conducted. However, the Court and all its stakeholders used the opportunity to appreciate what has been already achieved and learn from obstacles that have come.

The second part of the Review Conference regarding the amendments to the Rome Statute has more concrete outcomes. The State Parties concluded Article 124 should remain a part of the Rome Statute leaving most of the non-governmental

[168] Coalition for the International Criminal Court, Report on the First Review Conference on the Rome Statute, supra note 56

[169] Kampala Declaration, International Criminal Court, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf, last accessed on 16 June 2012

organizations disappointed. As stated before, its promoting function remains questionable, but as it was not much used in the past, it is improbable it would have grave significance in the future. Amending Article 8 was also noncontroversial issue. The same standards that applied to the usage of arms in international conflicts are extended for internal conflicts only reflecting the ongoing practices and situations in the world and therefore met no opposition.

The most crucial, emotive and more compromise needed amendment to the Rome Statute was undoubtedly the crime of aggression. The consensus was reached at the very end of the Review Conference and actually in the early morning of the 12 June. It was necessary to reach the consensus as firstly it would demonstrate the State Parties commitment towards codifying the crime and secondly, lots of the delegations had not been already present and consequently the voting would not proceed.

The definition itself was not much of a surprise as it copied widely known definition of the United Nations. This does not mean that all international law experts approve of it, but no significant change to the definition itself was expected before the Review Conference. However, the exercise of jurisdiction over the crime of aggression was awaited with great uncertainty whether any compromise could be achieved. The weak position of the Court and the disagreement in-between the states can be read in opt-clause as well as in the impossibility to prosecute individuals from Non-State Parties. On the other hand, the consensus on preventing the Court from binding resolutions from outside the ICC proved strong position in protecting the Court's independency. The role of the UN Security Council is definitely weaker than the permanent member had hoped for; the approval for the investigation on case of UN Security Council has to come from Pre-Trial Section, thus remains the Court's jurisdiction. The postponing of the jurisdiction of the crime of aggression is unfortunate, however in current conditions inevitable. Moreover, it provides international community with more time to prepare itself for a finally codified international crime.

Almost two years after the Review Conference, it is still too early to evaluate its overall impact. Most discussions consider adoption of the crime of aggression. But most answers will be available only after the Court can really prosecute it. The impulses from the stocktaking excercise and its follow up are present in further discussions and their discussions most notably during the State Parties Assembly sessions.

Another milestone in the ICC's history and thus in history of international criminal justice took place on 14 March 2012, the Court completed its first trial when the trial chamber found guilty Congole warlord Thomas Lubanga Dyilo. Mr. Lubanga committed war crime consisting of abducting children and using them as soldiers. The trial was unfortunately very time-consuming starting in 2006 and "lasted twice as long as the first cases at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda"[170]. Nevertheless, "the trial has done much to highlight the gravity of the crime of using child soldiers and has helped to bring the issue into international focus"[171].

More trials need to be conducted to promote the Court and in order the Court gains necessary respect and acknowledgement. International community shall step in and cooperate in this effort. However, the Court has started to be proactive as well and tried to find new ways to widen its impact. The Court has recently appealed to the United Nations to assist the Court in enforcing the unexecuted arrest warrants[172].

The Court will celebrate its 10th anniversary in July this year. It has definitely changed face of international criminal justice. The outcomes of its presence in the international field of crime were not always welcomed nor appreciated. However, I personally think that it proved to be needed and most of the responsibility for the disappointments falls not on the Court itself, but with the international community that is so reluctant to fulfill their duties as the Courts creator.

[170] Guilty Verdict Delivered in First ICC Trial, Coalition for the International Criminal Court, available at: http://www.iccnow.org/documents/CICCPRLUBANGAVERDICT.pdf, last accessed on 12 August 2012
[171] Guilty Verdict Delivered in First ICC Trial, supra note 170
[172] Bench-mark: The ICC's first verdict, The Economist, 17 March 2012, p.57

## 6. Literature


Akande, Dapo, What Exactly was Agreed in Kampala on the Crime of Aggression? , 21 June 2010, available at: http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/, accessed on 3 June 2012

Akhavan, Payam, Are International Criminal Tribunals a Disincentive to Peace?: Reconciliation Judicial Romanticism with Political Realism, Human Rights Quarterly, Vol. 31, 2009

Amnesty International, International Criminal Court – Making the right choices at the Review Conference, April 2010

Amnesty International, OP1 Global Priority Statement: Portfolios and Flagship Projects, POL 50/012/2009, Internal Document not to be distributed

Amnesty International, Commissioning Justice: Truth Commissions and Criminal Justice, 1 June 2010, available at: http://www.amnesty.org/en/library/info/POL30/004/2010, accessed on 18 October 2011

An inerview with Goldstone Richard J., Obstacles in International Justice, Harward International Review, Winter 2009, available at: http://hir.harvard.edu/rethinking-finance/obstacles-in-international-justice, last access on 14 April 2012

Anderson, Kenneth, The Rise of International Criminal Law: Intended and Unintended Consequences, The European Journal of International Law, Volume 20, no.2

Anderson, Michael, Reconceptualizing Aggression, Duke Law Journal, Vol. 60/2010

Bautekas, Ilias, International Criminal Law, Hart Publishing Ltd, 2010

Bench-mark: The ICC's first verdict, The Economist, 17 March 2012

Bergsmo Morten, Bekou Olympia, Jones Annika, Complementarity After Kampala: Capacity Building and the ICC's Legal Tools, Goettingen Journal of International Law

2/2010, available at: http://www.casematrixnetwork.org/fileadmin/documents/Goettingen_Journal_of_International_Law_2__2010__2__791-811.pdf, last accessed on 3 June 2010

Bilkova, Veronika, Mezinarodni trestni soud a otazniky kolem vyberu kauz, Trestnepravni revue 1/2001

Cassese, Antonio, On Some Problematical Aspects of the Crime of Aggression, Leiden Journal of International Law, Vol.20, 2007

Cepelka, Cestmír, Sturma, Pavel, Trestani valecnych zlocinu a jinych zlocinu podle mezinarodniho prava, Mezinarodni pravo verejne (International Public Law), 2003

Clark, Roger S., Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010, Goettingen Journal of International Law 2, 2010 available at: http://heinonline.org, last accessed on 3 June 2010

Clark, Roger S., Negotiating Provisisons Defining the Crime of Aggression, its Elements and the Conditions for ICC Excercise of Jurisdiction Over It, The European Journal of International Law, Vol.20, no.4, 2010

Coalition for the International Criminal Court, Report on the First Review Conference on the Rome Statute, available on: http://www.iccnow.org/documents/RC_Report_finalweb.pdf, accessed on 20 March 2012

Coalition for the International Criminal Court, Guilty Verdict Delivered in First ICC Trial, 14 March 2012, available at: http://www.iccnow.org/documents/CICCPRLUBANGAVERDICT.pdf, last accessed on 21 March 2012

Chatman House, The International Criminal Court: Reviewing the Review Conference, 24 June 2010, available at: http://www.chathamhouse.org/publications/papers/view/109384, last accessed on 20 March 2012

Cooper, Belinda, The Limits of International Justice, World Policy Journal, Fall 2009

Damoska, Mirjan, What is the Point of International Criminal Justice?, Chicago-Kent Law Review, Vol. 83, 2008

deGuzman, Margaret M., Gravity and the Legitimacy of the International Criminal Court, August 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1257612, last accessed on 19 February 2012

Drumbl, Mark A., The Push to Criminalize Aggression: Something Lost Amid the Gains?, Case Western Reserve Journal of International Law, 41/2009

Drumbl, Mark, International Criminal Law: Taking Stock of a Busy Decade, Melbourne Journal of International Law, Vol 10, 2009

Farer, Tom J., Restraining the Barbarians: Can International Criminal Law Help? Human Rights Quarterly 22, 2000

Ferenz, Benjamin B., Enabling the International Criminal Court to Punish Aggression, Washington University Global Studies Law Review, 3/2007

Ferenz, Benjamin B., Ending Impunity for the Crime of Aggression, Case Western Journal of International Law, Vol.4, 2009

Ferenz, Benjamin B., Reconciling Legitimate Concerns and Removing the Lock from the Courthouse Door, May 2008, available at: http://www.benferencz.org/index.php?id=4&article=9, last access on 19 February 2012

Ferenz, Donald M., Bringing the Crime of Aggression within the Active Jurisdiction of the ICC, Case Western International Law, Vol.42, 2009

Fish, Eric S., Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions, The Yale Law Journal 119, available at: http://yalelawjournal.org/the-yale-law-journal/comment/peace-through-complementarity:-solving-the-ex-post-problem-in-international-criminal-court-prosecutions/, last access on 19 October 2011

Fletcher, Kari M, Defining the Crime of Aggression: Is there an Answer to the International Criminal Court's Dilemma?, Air Force Law Review, Vol. 65, 2010

Glasius, Marlies, What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations, Human Rights Quarterly 31, 2009

Glennon, Michael J., The Blank-Prose Crime of Aggression, Yale Journal of International Law, 71/2010

Harrington, Joanna, The Aggression Negotiations at the ICC Review Conference, 8 June 2010, available at: http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/, last access on 3 June 2012

Harrington, Joanna, The President's Non-paper on the Crime of Aggression (Updated), 10 June 2010, available at: http://www.ejiltalk.org/the-presidents-non-paper-on-the-crime-of-aggression/, last access on 3 June 2012

Heinsch , Robert, The Crime of Aggression After Kampala: Success or Burden for the Future?, Goettingen Journal of International Law 2/2010

Heller, Henry Jon, The Sadly Neutered Crime of Aggression, available at: http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/, last access on 19 February 2012

International Federation for Human Rights, ICC Review Conference; Renewing Commitment to Accountability, 25 May 2010, N°543a, available at: http://www.unhcr.org/refworld/docid/4bfcc04e2.html, last access on 20 March 2012

Johansen, Robert C., The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity, Human Rights Quarterly Vol.28, 2006

Kaul, Hans-Peter, Kampala June 2010 – A First Review of the ICC Review Conference, Goettingen Journal of International Law, 2/2010

Kaye, David, Who's Afraid of the International Criminal Court?, Foreign Affairs, May/June 2011

Keller, Linda M., The False Dichotomy of Peace versus Justice and the International Criminal Court, Hague Justice Journal, Vol. 3, 2008, available at: http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Keller_Uganda_ICC_EN.pdf, last access on 20 April 2012

Khan, Albar, Cooperation between States Parties and the ICC: Challenges and Opportunities for Improvement, EQ: Equality of Arms Review, 2/2010

Kirsch, Philippe, The International Criminal Court: From Rome to Kampala, The John Marshall Law Review, 2009-2010

Kreß Claus, Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus, The European Journal of International Law, Vol 20, No.4, 2010, available at: http://ejil.oxfordjournals.org, last access on 11. April 2012

Kress, Claus and Leonie von Holtzendorff, The Kampala Compromise on the Crime of Aggression, Journal of International Criminal Justice, 8/2010

Kress, Claus, International Criminal Law: The International Criminal Court as a Turning Point in the History of International Criminal Justice, Oxford University Press, 2009

Kress, Claus, The Crime of Aggression before the First Review of the ICC Statute, Leiden Journal of International Law 20/2007

Kress, Claus, Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus, The European Journal of International Law, Vol.20, no.4, 2010

Lindberg, Tod, A Way Forward with the International Criminal Court, Policy Review, Feb/Mar 2010

Mackenzie, Ruth, Romano, Cesare, Shany, Yuval, Sands, Philippe, The Manual on International Courts and Tribunals, Oxford University Press, 2010

Manson, Robbie, Smoothing out the Rough Edges of the Kampala Compromise, available at: http://iccreviewconference.blogspot.cz, last access on 3 June 2012

Matwijkiw, Anja, The No Impunity Policy in International Criminal Law, Justice versus Revenge, International Criminal Law Review 9, 2009

Mayerfeld, Jamie, Who Shall be the Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights, Human Rights Quarterly, Vol.25, 2003

McAuliffe deGuzman, Margaret, The Road from Rome: The Developing Law of Crimes against Humanity, Human Rights Quarterly Vol.22, 2000

Murphy, Sean D., Aggression, Legitimacy and the International Criminal Court, The European Journal of International Law, Vol.20, no.4, 2010

Norton, E. Jerry, The International Criminal Court: An Informal Overview, Loyola University Chicago International Law Review, Vol. 8, 2010-2011

Paulus, Andreas, Second Thoughts on the Crime of Aggression, The European Journal of International Law, Vol.20, no.4, 2010

Peskin, Victor, Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan, Human Rights Quarterly Vol.31, 2009

Pipek, Jiri, Mezinarodni trestni soud – k nekterym aspektum Rimskeho stututu, Trestnepravni revue 2/2004

Reynolds, Mary T., Legitimizing the ICC: Supporting the Court's Prosecution of those Responsible in Darfur, Boston College Third World Law Journal Vol.30, 2010

Roach, Steven C., Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council, International Studies Perspectives, 6/2005

Roach, Steven C., Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court, Journal of Human Rights, 4/2005

Rodman, Kenneth A., Darfur and the Limits of Legal Deterrence, Human Rights Quarterly Vol.30, 2008

Schabas, William A., An Introduction to the International Criminal Court, Cambridge University Press, 2004

Schabas, William A., Introductory Note to the Documents of the Review Conference of the International Criminal Court, 49 International Legal Materials, 2010

Schabas, William A., The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press Inc., 2010

Scheffer, David, A Pragmatic Approach to Jurisdictional and Definitional Requirements for the Crime of Aggression in the Rome Conference, Case Western Reserve Journal of International Law, 41/2009

Smith, Lorraine, What did the ICC Review Conference Achieve, EQ: Equality of Arms Review, 2/2010, November 2010

Song, Sang-Hyun, Reflections on the ICC Review Conference: Perspectives of the ICC President, EQ: Equality of Arms Review, 2/2010, November 2010

Sturma, Pavel, Definice zlocinu a dalsi hmotnepravni aspekty v Rimskem statute Mezinarodniho trestniho soudu, Trestnepravni revue 2/2002

Sturma, Pavel, Mezinarodni trestni soud a stihani zlocinu podle mezinarodniho prava, Nakladatelstvi Karolinum, 2002

Thakur, Ramesh Chandra, Malcontent, Peter, Sovereign Impunity to International Accountability: The Search for Justice in a World of States, United Nations University Press, 2004

Tolbert, David, Taking Stock of the Impact of the Rome Statute and the International Criminal Court on Victims and Affected Communities

Trahan, Jennifer, The New Agreement on the Definition of the Crime of Aggression, June 2010, available at: http://www.derechos.org/nizkor/aggression/doc/jtrahan.html, last access on 2 June 2012

Usacka, Anita, Building the International Criminal Court, Global Business & Development Law Journal, Vol. 23, available at http:heinonline.org, last access on 26 March 2012

Weisbord, Noah, Prosecuting Aggression, Harvard International Law Journal, Vol.49, 2008

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**Mezinárodní trestní soud: Výsledky Revizní konference Římského statutu**

Nejzávažnější zločiny v historii lidstva byly kodifikovány jako mezinárodní zločiny podle mezinárodního trestního práva. Myšlenka mezinárodního trestního soudnictví se poprvé uplatnila po druhé světové válce v souvislosti s trestními tribunály v Norimberku a Tokiu. Tyto průlomové soudy byly následovány Mezinárodním tribunálem pro bývalou Jugoslávii, Rwandu a zvláštními soudy pro Sierru Leone a Kambodžu. Všem těmto tribunálům je společná jejich ad hoc povaha. Ambice mezinárodního společenství založit trvalou instituci s kompetencí trestat nejzávažnější mezinárodní zločiny se promítla na Římské konferenci v roce 1998 založením Mezinárodního trestního soudu (dále jen MTS). Tato přelomová instituce má zastánce i odpůrce, nelze však přehlédnout její vliv na celé odvětví mezinárodního trestního práva. Historicky první revizní konference si dala za cíl zmapovat a vyhodnotit dosavadní působení soudu a zvážit změny Římského statutu, základního právního dokumentu MTS.

Poprvé jsem se osobně zabývala problematikou MTS v průběhu studia na Univerzitě v Miami, kde jsem v simulovaném zasedání Rady bezpečnosti Organizace spojených národů (dále jen OSN) představovala vrchního žalobce soudu Luise Moreno-Ocampu. Následně jsem se MTS intenzivně zabývala při své stáži v Amnesty International ČR. Byla jsem členkou Skupiny pro mezinárodní otázky a byla jsem zodpovědná za agendu projektu Mezinárodní spravedlnosti. Amnesty International se jako jeden ze zástupců nevládních organizací zúčastnila konference v Kampale a živě se vyjadřovala ke všem navrhovaným změnám i diskutovaným tématům. K rozhodnutí věnovat svoji diplomovou práci problematice MTS výrazně přispěl i můj osobní zájem o tuto instituci.

V průběhu zpracování práce jsem využila dokumenty MTS přijaté na Revizní konference, oficiální přípravné dokumenty pracovních skupin, články v odborných časopisech i internetové blogy významných odborníků na mezinárodní právo. Zároveň jsem ocenila četné publikace v knihovně Právnické fakulty Univerzity Karlovy.

Ve své práci jsem nejprve krátce představila Mezinárodní trestní soud a způsob jeho fungování, následně se již plynule věnuji Revizní konferenci

v Kampale. Po jejím stručném uvedení se postupně věnuji oběma jejím částem: Inventuře (Stocktaking) a následně návrhy na konkrétní novelizace Římského statutu. Pro sekci Inventura byla pro Revizní konferenci vybrána čtveřice témat. Kooperace se zabývala nutností zvýšené a efektivní spolupráce, u Komplementarity se zdůrazňuje úloha MTS jako instituce poslední instance a nutnost podpořit národní jurisdikci států. V části Vliv Římského statutu na oběti a postižené komunity popisuji problémy, se kterými se Soud potýká především kvůli nedostatečné informovanosti ohledně činnosti a pravomocí Soudu a reparacemi. V sekci Mír a spravedlnost se věnuji možnému souznění těchto pojmů a jejich přetrvávajícímu konfliktnímu chápání. Následně jen stručně reflektuji Deklaraci o posílení výkonu rozsudků. Část věnovaná hodnocení vlivu MTS je následovaná změnami v Římském statutu, nejprve překvapivým ponecháním v platnosti článku 124 a novelizací článku 8, která rozšiřuje zákaz stanovených druhů zbraní na vnitřní konflikty. Změny Římského statutu jsou zakončené nejvýznamnějším výsledkem konference: zločinem agrese. Následuje závěr, který pozitivně hodnotí celý průběh kampalské konference.

**Úvod k Mezinárodnímu trestnímu soudu**

Římský status podepsaný 160 stranami Římské konference vstoupil v platnost v roce 2002, kdy byl ratifikován potřebnými 60 státy, v současné době je signatáři 139 členských států. MTS je nezávislá soudní instituce se sídlem v Haagu, v Nizozemí.

MTS je soudní instituce povolaná soudit jen nejzávažnější zločiny podle mezinárodního práva: genocidu, zločiny proti lidskosti, válečné zločiny a zločin agrese. MTS je ovládán principem komplementarity, který upřednostňuje národní jurisdikci států před mezinárodní. Postrádá také univerzální jurisdikci, může stíhat pouze zločiny spáchané na území členského státu nebo jeho národního příslušníka. Není možné stíhat zločiny spáchané před rokem 2002.

Nejzákladnějšími orgány soudu jsou předsednictvo, oddělení: vyšetřovací, soudní a odvolací, soudní kancelář a úřad prokurátora. Soud je obsazen 18 soudci, kteří jsou voleni Shromážděním smluvních stran na devět let. Nejznámější osobou MTS je prokurátor, jako první byl do funkce zvolen Luis Moreno-Ocampo z Argentiny, kterého vystřídala Fatou Bensouda.

Vyšetřování je možné zahájit několika způsoby. Především na základě podnětu členského státu, dále na základě pověření Rady bezpečnosti OSN (v tomto případě je možné vyšetřovat i situace nastalé mimo členské státy MTS) nebo v rámci tzv. proprio motu oprávnění prokurátora, který má pravomoc iniciovat vyšetřování na základě informací o porušování mezinárodního práva.

Výkonná složka Soudu je reprezentována Shromážděním smluvních stran. Soud nemá žádné výkonné orgány a zatykače nemůže vykonávat jinak než prostřednictvím svých členů. Smluvní strany jsou podle Statutu povinné Soudu poskytnout potřebnou součinnost, ale praxe za tímto závazkem poněkud zaostává.

Soudní proces vede soudní úsek podle základních zásad trestního řízení, ve kterém převládají zásady kontinentálního práva doplněné o některé prvky Common law. V případě, že je obžalovaný shledán vinným, je možné uložit trest odnětí svobody v maximální délce na doživotí. Trest smrti se nepřipouští. Odsouzenému je též možno uložit zaplacení odškodného.

MTS momentálně vyšetřuje sedm situací a dalších nejméně osm je ve stádiu prošetřování. První situací, která byla Soudem vyšetřována bylo porušování

mezinárodního práva v Ugandě, ke kterému dala podnět ugandská vláda v lednu 2004. Nejznámějším obviněným v této kauze je Joseph Kony, jehož případ byl v nedávné době silně medializován. Následovala situace v Kongu v dubnu 2004 a Centrální africké republice v prosinci 2004. První pověření vyšetřováním od Rady bezpečnosti OSN přišlo v souvislosti se situací v Darfúru, Súdánu. Zároveň byl poprvé vydán zatykač na hlavu státu ve funkci, Omara Al-Bashira. Následně, po povolebních násilnostech v Keni prokurátor Ocampo poprvé použil svoji proprio motu pravomoc. V roce 2011 podruhé pověřila vyšetřováním Rada bezpečnosti OSN, tentokrát pro vyšetřování v Libyi. V tomto případě se ale vyšetřování komplikuje, protože i Libye si nárokuje vyšetřování zločinů spáchaných na jejím území. Zatím poslední vyšetřování bylo zahájeno na Pobřeží slonoviny, podruhé na základě vlastní iniciativy prokurátora.

Vzhledem k omezeným možnostem MTS není v kapacitách Soudu vyšetřovat všechny zločiny podle mezinárodního práva. Proto se Soud soustředí na případy jeho nejzávažnějšího porušování, i když se to ne vždy shledává s pochopením obětí.

**Úvod k Revizní konferenci v Kampale**

Přes nesporný úspěch konference v Římě v roce 1998, zůstaly v Římském statutu nevyřešené otázky. Jeho signatáři se ale dohodli, že po dobu sedmi let od účinnosti Římského statutu nebudou přijímány žádné návrhy na jeho změnu. Až po uběhnutí této lhůty měl generální tajemník OSN svolat revizní konferenci, která byla předpokládána článkem 123. V rámci této konference se měly uvažovat zejména zločiny popsané v článku 5. Jediné povinné téma byla revize článku 124, přechodného ustanovení týkající se válečných zločinů, největší výzvou zůstávala definice zločinu agrese.

Strany Statutu měly právo navrhnout novelizace generálnímu tajemníkovi OSN. Ne všem se dostalo stejné pozornosti a již před začátkem konference byl zřejmý záměr omezit jejich rozsah a počet a zabránit tak rozpadu integrity Římského statutu.

Přípravné práce započaly již v roce 2006. V roce 2007 se Shromáždění smluvních stran rozhodlo zahrnout do programu Revizní konference i Inventuru (Stocktaking) a zhodnotit tak dosavadní fungování soudu a vyměnit si zkušenosti. Tato rovnocenná část konference zahrnovala vliv Římského statutu na oběti a zúčastněné komunity, komplementaritu, spolupráci a mír a spravedlnost. Z návrhů na změny v Římském statutu byly debatovány změny článku 124, změna článku 8 a zločin agrese, který byl nejdůležitějším a nejkontroverznějším bodem konference. Na přípravných pracích se podíleli mezinárodní právní experti a odborníci nejen z členských států, ale i z nečlenských států jako např. z Číny, Indie, Ruska a arabských států.

Konference se konala od 31.května do 11.června 2010 v Kampale, Ugandě, to znamená v zemi, jejíž situaci zároveň MTS vyšetřuje. Zúčastnilo se jí přes 4600 mezinárodních expertů včetně odborníků zastupujících členské státy, OSN, zástupci jiných mezinárodních soudů, médií, akademické obce a neziskových organizací.

## „Inventura“ (Stocktaking)

Spolupráce

Toto téma bylo pro fungování MTS vždy stěžejní, avšak problematické. Přes generální povinnost členských států se soudem spolupracovat, se často stává, že požadavky soudu na součinnost zůstávají nevyslyšeny. I proto se Shromáždění členských států rozhodlo toto téma do sekce „Inventura“ zařadit.

Přestože se rozlišuje mezi kooperací dobrovolnou a obligatorní, nemělo by toto rozdělení znamenat rozdíl mezi spoluprací a „nespoluprací“ ze strany členských států. Častou překážkou efektivní spolupráci nebývá neochota smluvních stran, ale i nedostatečná národní legislativa nebo nedostatek procedurálních opatření.

V případech kdy je Soud pověřen vyšetřováním Radou bezpečnosti OSN jsou ke spolupráci povinny i ty státy, které nejsou smluvními stranami MTS. Zkušenosti v těchto případech jsou nejméně uspokojivé, jedná se o státy, které nesouhlasí s jurisdikcí MTS a nerespektují jeho požadavky.

Do oblasti spolupráce spadá i spolupráce s mezinárodními organizacemi. Nejužší spolupráce funguje mezi soudem a OSN, ale živá spolupráce panuje i s Evropskou Unií, Organizací amerických států a Africkou Unií, posílení spolupráce se plánuje s Arabskou ligou a Organizací islámské konference.

Každý nedostatek v kooperaci, i pokud jde jen o zdržení, se podepisuje na fungování Soudu a možnosti dosažení spravedlnosti. Mezi nejzávažnější příklady patří nevykonané příkazy k zatčení. Čas je u procesu klíčová veličina, proto je velmi důležité, aby si to smluvní strany uvědomily a svoji spolupráci zefektivnily.

Komplementarita

Princip komplementarity je pro fungování Soudu klíčový. Vyšetřování zločinů, i těch mezinárodních by mělo být primární zodpovědností příslušných národních soudních orgánů. Soud sám sebe nazývá soudem poslední instance, který vede proces jen v případě, že domácí soudy nemohou nebo k tomu nejsou ochotné. Soud také postihuje jen nejzávažnější zločince, prokurátorova strategie výslovně zmiňuje jen ty, kteří nesou nejvíce zodpovědnosti za spáchané zločiny.

Méně závažná porušení mezinárodního práva spadají výlučně do národní jurisdikce. Nejčastějšími problémy, se kterými se potýkají národní soudy jsou nedostatek infrastruktury, personálu, expertů, finančních prostředků, zkušeností a legislativy. Proto se Soud snaží v rámci tzv. pozitivní komplementarity národním soudům asistovat a podpořit národní jurisdikci. Dalším dopadem principu komplementarity je nepřímá podpora řádného domácího vyšetřování. Pokud k němu postižené státy nepřikročí, riskují aktivní zakročení MTS.

Vliv Římského statutu na oběti a postižené komunity

Římský statut znamenal bezprecedenční přelom v chápání obětí zločinů. Jejich role v řízení a jejich oprávnění jsou nesrovnatelná s předchozími mezinárodními tribunály. Stávají se mnohem více než svědky, jsou východiskem celého procesu. Obětmi mohou být podle Římského statutu nejen fyzické osoby, ale i organizace nebo instituce. Mají právo na přístup ke spravedlnosti, ochranu, podporu, informace, právní zastoupení, odškodnění a právo vystupovat jako svědci před Soudem. Svědci a oběti zločinů mají právo na speciální zacházení ze strany Soudu. Je ovšem prakticky nemožné umožnit všem obětem a svědkům participaci v soudním procesu.

Častým problémem, se kterým se soud potýká, jsou příliš veliká a nereálná očekávání ze strany obětí. Dále bývá MTS obviňován z uplatňování selektivní spravedlnosti. Pozitivnímu vnímání MTS nepřispívá ani fakt, že procesy trvají neúměrně dlouho. V tomto ohledu je nutné postižené komunity vzdělávat a osvětlovat úlohu soudu i jeho možnosti, protože informovanost postižených komunit je velmi nízká. Velmi prospěšné je v tomto procesu zapojit nevládní organizace a zprostředkovatele.

Nejcílenější asistence je ze strany soudu adresovaná dvěma nejzranitelnějším skupinám společnosti: dětem a ženám. Ve vyšetřovaných situacích se často opakovaly genderově orientované zločiny a ženy trpěly následnou stigmatizací. Problém dětských vojáků a jejich vnímání jako obětí, nikoli jako agresorů, je akcentován u dětí. Společným cílem je reintegrace těchto skupin zpět do společnosti.

Oběti projevují mimořádný zájem o možnost reparací. Zde je opět na místě zvýšená informovanost, aby jejich poskytování neposilovalo tenze ve společnosti. Za účelem asistence obětem byl v roce 2002 založen Svěřenecký fond pro oběti. Jeho cílem je poskytovat fyzickou rehabilitaci, psychologickou asistenci a materiální podporu obětem zločinů. V současné době provozuje více než třicet podpůrných programů. Velikou výhodou Svěřeneckého fondu je možnost uvolňovat peněžní prostředky ještě před vynesením rozsudku u Soudu. Přes veliké množství adresátů pomoci tohoto fondu se nedaří zajistit dostatečné zdroje financování. MTS proto neustále apeluje na členské státy k větší participaci, ale snaží se motivovat k podpoře i organizace a fyzické osoby.

Přístup k obětem a svědkům se v prvních letech fungování soudu neobešel bez chyb, vzhledem k průkopnické práci Soudu v tomto ohledu se není čemu divit. MTS zavedl systém, ve kterém není možné oběti mezinárodních zločinů opomíjet. Ne všude se samozřejmě MTS nebo jeho postupy stanou vítaným řešením. Současná situace ale zdá se směřuje zdárným směrem a vždy s ohledem na zájmy obětí.

Mír a spravedlnost

Soud zdůrazňuje důležitost obou těchto hodnot zároveň a to již v předmluvě Římského statutu. Zároveň je ale často diskutováno zda soudní intervence MTS nepodrývá snahu o dosažení míru. V minulosti byly tyto dva cíle vždy představovány jako konfliktní, ale v rámci programu v Kampale byly vždy uvažovány jako kompatibilní. Nová strategie Soudu již v žádném případě do budoucna nepřipouští beztrestnost pro zločince, na které se vztahuje jurisdikce MTS. A to ani v rámci vyjednávání podmínek míru v konfliktních situacích.

Ne vždy je v místě konfliktu intervence Soudu žádaná, nejčastěji by v těchto případech místní komunity upřednostnily nějaký alternativní způsob uplatnění spravedlnosti, a to nejčastěji komise pravdy. Tyto nesoudní instituce se vyznačují přímým spojením s místní komunitou, a proto zvýšenou možností o urovnání vztahů v post-konfliktní společnosti.

Po skončení konfliktu je v rámci komunity vždy v prvé řadě upřednostňován mír před spravedlností. Nicméně pokud se požadavek spravedlnosti potlačí do pozadí, napětí ve společnosti dále zůstává.

Názory na vliv Soudu při vyjednávání míru se liší. Nejčastěji zmiňovaným příkladem je Súdán a vyhoštění humanitárních organizací, které následovalo po vydání zatykače na súdánského prezidenta. Rozhodnutí prokurátora se v té době stalo terčem mediální kritiky. Na druhou stranu došlo i přispěním intervence MTS ke změně v rozložení sil v Súdánu a izolaci Omara Al-Bashira.

Soud plní v rámci udržování míru významnou preventivní funkci. A to jak z dlouhodobého hlediska, tak právě i v rámci vyjednávání v případě konfliktních situací. Ale tato jeho funkce je velmi obtížně měřitelná a proto často i nedoceněná.

**Posílení výkonu rozsudků**

Namísto návrhu předloženého Norskem byla přijata rezoluce „Posílení výkonu rozsudků“, která zdůraznila nezastupitelnou roli států v této otázce. Prozatím jen málo členských států projevilo ochotu přijmout odsouzené MTS do svých vlastních zařízení.

**Článek 124**

Článek 124 umožňuje nově přistupujícím státům vyhnout se jurisdikci MTS pro válečné zločiny spáchané jejich občany nebo na jejich území po dobu maximálně sedmi let. Po dobu historie trvání MTS byla tato možnost využita pouze dvakrát: Francií a Kolumbií. Francie odvolala opatření v roce 2008, Kolumbii vypršelo v roce 2009. Před revizní konferencí byl předpokládán konsensus ohledně vymazání článku 124, a to i s ohledem na výsledek Shromáždění smluvních stran z roku 2009. Proto bylo rozhodnutí ponechat ho nezměněný v platnosti přijato s velkým překvapením a ze strany neziskových organizací dokonce se značnou nevolí. Vymazání článku 124 nebylo jediným možným řešením. Dalším z navrhovaných kompromisních řešení byla tzv. „sunset clause“ (skončení platnosti), kdy by platnost článku vypršela po předem stanovené době. Důvodem pro ponechání článku bylo podpořit přistoupení novým stranám za stejných podmínek, které měly dříve přistupující členské státy. Článek 124 by měl být znovu hodnocen na čtrnáctém Shromáždění smluvních stran v roce 2015.

**Článek 8**

Podle očekávání byla bez problémů přijata změna zakazující použití vyjmenovaných typů zbraní v rámci vnitřních konfliktů. Jedná se o stejné zbraně, které jsou v již v mezinárodních konfliktech Římským statutem zakázány. Vzhledem k překrývání se mezinárodních a interních konfliktů a četnosti vnitřních konfliktů není důvod pro rozdílná pravidla. Naopak, některé z nejvážnějších útoků vedené proti civilnímu obyvatelstvu byly součástí interních konfliktů. Přes všeobecný konsenzus ohledně této změny Římského statutu byly v rámci debaty zdůrazněny některé problematičtější části. V prvé řadě byl zdůrazněn požadavek úmyslu pachatele u použití tříštivých střel, aby se tento případ jejich použití odlišil od použití při ochraně civilního obyvatelstva, kdy naopak brání nechtěným zásahům např. osvobozovaných rukojmí. V druhé řadě je změna cílena na ozbrojené konflikty, ne na vynucování práva. Změna článku 8 bude účinná pro ty státy, které ji ratifikují. Jako první tak učinilo San Marino. Požadavek na zákazy různých druhů zbraní byl původně širší. Jednalo se mimo jiné i o chemické zbraně, biologické zbraně nebo nukleární zbraně, nicméně ohledně těchto nebylo dosaženo dohody a budou dále zpracovány Přípravnou skupinou.

**Zločin agrese**

Nejdůležitější výsledek konference v Kampale byl nepochybně kompromis dosažený v rámci definování zločinu agrese. Završily se tím roky diplomatických jednání a právního výzkumu. Tento kompromis byl některými přijat s radostí, jinými byl naopak podroben silné kritice. V části mé diplomové práce věnované agresi jsem nejdříve stručně předestřela historii zločinu agrese a postupné pokusy ji definovat a stíhat. Dále jsem popsala definici, která byla přijata na kampalské konferenci a věnovala se některým jejím zajímavým nebo problematickým aspektům.

Historie kodifikování zločinu agrese začíná u německého císaře Viléma II., který inicioval První světovou válku. Následně byl obviněn z porušení Mírové smlouvy z Versailles. Před obviněním ovšem utekl do Nizozemí a nemohl být souzen. Další krok byl spatřován v Brien-Kellogově paktu podepsanému v roce 1928. Nejvýznamnějšími se z pohledu vývoje a trestání zločinu agrese staly oba poválečné tribunály, ale především ten Norimberský. Zločin agrese byl nazván zločinem zločinů. V této době byly pochybnosti o existenci zločinu agrese v mezinárodním právu, přesto byly u obou tribunálů odsouzeny desítky osob. Žádný následný ad hoc mezinárodní trestní soud již agresi netrestal. Konečně, byla v roce 1974 přijata definice v rámci Charty OSN. Současná definice zločinu agrese přijatá na kampalské konferenci z definice OSN přímo vychází. Na Římské konferenci v roce 1998 se rozhodlo zahrnout do jurisdikce vznikajícího MTS i zločin agrese. Nicméně dohody ohledně definice dosaženo nebylo a bylo rozhodnuto ponechat konečnou podobu revizní konferenci. Za vytváření definice byla zodpovědná Přípravná komise, ale v roce 2002 vznikla Speciální pracovní skupina pro zločin agrese, která připravila varianty definice zločinu agrese i Znaky skutkových podstat zločinů. Debata ohledně konečné definice agrese se vedla v akademických kruzích, v rámci členských i nečlenských států a neziskových organizací.

Článek 8 bis definuje dvě stránky agrese: samotný zločin agrese a akt agrese. Zločin agrese může být spáchán jen fyzickou osobou, naopak akt agrese může provést jen stát. Výčet činností, které zakládají akt agrese je shodný s výčtem obsaženým v Rezoluci 3314 OSN. Každý akt agrese nezakládá zločin

agrese, ale jen ten, který porušuje Chartu OSN. Členské státy upřednostnily konzervativní přístup a za zločin agrese označily jen ty nejzávažnější porušení mezinárodního práva. Na rozdíl od ostatních zločinů definovaných Římským statutem je ke spáchání zločinu agrese způsobilá jen osoba, která kontroluje nebo řídí politické nebo vojenské činnosti státu. Při snaze dále zpřesnit definici byla také přijata „Porozumění týkající se změn Římského statutu Mezinárodního trestního soudu pro zločin agrese“, některá tato upřesnění jen vyvolala další otázky. Celkově se definice agrese potýká s kritikou týkající se její nepřesnosti a vágnosti, řada otázek bude předmětem dalšího posouzení soudců. Zpochybňován je také preventivní efekt definice vzhledem k možnosti postihovat jen nejzávažnější zločiny.

Podmínky stíhání zločinu agrese podléhají způsobu zahájení vyšetřování. První možností je pověření Radou bezpečnosti OSN, která je popsána v článku 15 ter. V tomto případě může hlavní žalobce vyšetřovat bez dalších omezení. V případě pověření Soudu členským státem nebo iniciativy proprio motu hlavního žalobce nemůže Soud stíhat osoby, které jsou občany státu, který není stranou Římského statutu.

Jako další problematické místo zločinu agrese byl chápán vztah MTS a Rady bezpečnosti OSN. Ještě na konferenci bylo otevřených mnoho variant, přičemž ochota vyjednávajících stran k ústupkům se zdála velmi omezená. Někteří zastávali názor, že vyloučení Rady bezpečnosti OSN by znamenalo porušení Charty OSN. Významnější zapojení politického orgánu do rozhodování mezinárodní spravedlnosti bylo ale nemyslitelné pro jiné. Do úvahy musela být také vzata momentální praxe rozhodování Rady bezpečnosti OSN a její neochota k přijetí rezolucí o nelegálním použití síly. Kompromisní řešení se opírala především o předběžné rozhodnutí jiné instituce. Mezi navrhované patřily Generální shromáždění OSN, Mezinárodní soudní dvůr nebo přípravný senát MTS. Výsledný kompromis patří k siným potvrzením samostatnosti MTS. Jakékoliv zapojení instituce mimo MTS bylo vyloučeno. V případě, že Rada bezpečnosti nezareaguje ve lhůtě šesti měsíců od upozornění generálního tajemníka OSN na podezření ze spáchání zločinu agrese, má žalobce MTS právo pokračovat ve vyšetřování za předpokladu, že přípravný úsek možnost

vyšetřování potvrdí a Rada bezpečnosti OSN nerozhodne jinak. Rada bezpečnosti OSN má samozřejmě dál pravomoc pozastavit vyšetřování MTS.

Další problematická otázka vyvstala ohledně procesu novelizace Římského statutu. Nebylo zřejmé zda použít článek 121 odst. 4 nebo odst. 5. Řešení tohoto problému překvapilo všechny zúčastněné. Byla vytvořena procedura speciálně pro případ zločinu agrese. To se nelíbilo některým členským státům, které nebyly spokojené s postupem, který se neodvíjí od Římského statutu. Uvedená procedura stanovená v článku 15 bis „na míru" kombinuje oba výše uvedené odstavce. MTS může vykonávat jurisdikci pouze v případě zločinů agrese spáchaných jeden rok po ratifikaci nebo schválení novelizace 30 členskými státy. Finalizace jurisdikce MTS ohledně zločinu agrese bude ale upřesněna až rozhodnutím 7/8 členských států po 1. lednu 2017.

Jedno z nejkontroverznějších rozhodnutí kampalské konference je obsaženo v článku 15 odst. 4 v rámci tzv. „opt-out clause". Členské státy otevřely možnost vyhnout se možné jurisdikci MTS. Pokud členský stát deklaruje listinou uloženou u tajemníka MTS, že neakceptuje jurisdikci MTS nad zločinem agrese, vyplývající z aktu agrese spáchaném tímto členským státem, nemůže MTS tento zločin agrese stíhat. Toto rozhodnutí lze kdykoliv odvolat a mělo by být členským státem přehodnoceno během tří let. Komentátoři kampalské konference dospěli k velmi rozdílným výkladům tohoto ustanovení. Někteří jsou názoru, že všechny členské státy jsou vázáni novelizacemi týkajícími se agrese jakmile budou účinné, pokud se u tajemníka nevysloví jinak. Nicméně jiní jsou názoru, že členský stát musí ratifikovat novelizaci, aby jí byl vázán.

Není žádným překvapením, že přijatá definice byla umožněna jen za cenu ústupků ze strany všech zúčastněných. Celý proces byl komplikovaný a propojenost s rezolucí 3314 byla zřejmě nevyhnutelná. Pokud vezmeme v úvahu momentální pozici MTS na poli mezinárodních vztahů, nebylo možné doufat v ještě silnější definici zločinu agrese, která by zásadně přetvářela mezinárodní právo. To ale neznamená, že tyto dveře jsou do budoucna zavřené, hlavní míra zodpovědnosti leží na mezinárodním společenství. Osobně považuji dosažený kompromis za dílčí vítězství v mezinárodní spravedlnosti a první krok k trestání agrese v mezinárodním měřítku.

## Závěr

Atmosféra během a především po skončení Revizní konference v Kampale připomínala tu po úspěšném schválení Římského statutu v rámci římské konference v roce 1998. Státy mezinárodního společenství se zdály spokojené s výsledky, odborníci začali hodnotit. Byla první revizní konference úspěšná? Celkový výsledek se ukáže až v dalším průběhu fungování MTS tím, jak samotný soud i mezinárodní společenství naváží na rozhodnutí přijatá v Kampale. Je zřejmé, že ideální řešení byla poznamenána nezbytnými kompromisy, zdá se však, že se opět ukázalo silné odhodlání pro rozvoj mezinárodní spravedlnosti. Klíčové je, aby nezůstalo jen na papíře.

Kampalská deklarace byla přijata na začátku konference. Rozvíjela všechny principy, které jsou důležité pro fungování MTS a zdůraznila dlouhodobý cíl univerzality soudu. V závěru deklarace bylo schváleno ustanovení 17.července jako Den mezinárodní trestní spravedlnosti.

Před stovku států a organizací, a to i nečlenských států MTS, vyslovilo před a během kampalské konference přísliby jak chtějí přispět k fungování MTS.

Je těžké zhodnotit inventarizační část kampalské konference. S proběhnuvšími diskusemi byli spokojeni všichni, ale klíčové zůstávají konkrétní navazující činy států, bez kterých jsou diskuze bezpředmětné. Žádné z témat posuzovaných v „inventuře“ nemá finální řešení, je nutné vývoj dále sledovat a hodnotit, a to zejména až bude více dokončených procesů, více odsouzených a více schválených reparací.

Druhá část konference týkající se změn Římského statutu měla konkrétnější výsledky. Přes zjevné zklamání neziskových organizací nad ponecháním článku 124 v účinnosti se nezdá, že by zmíněný článek měl v budoucnosti větší význam. Rozšíření zákazu zbraní v článku 8 bylo přijato hladce a všichni s ním souhlasí. Nejdůležitější rozhodnutí ohledně zločinu agrese bylo přijato až na úplný konec konference ve velmi napjaté atmosféře, tolik potřebné dohody bylo nakonec dosaženo a oslavy mohly začít, i když ne každý s dosaženým výsledkem souhlasí. Pozastavení účinnosti bylo zřejmě nevyhnutelné, ale alespoň poskytuje mezinárodnímu společenství dostatek času připravit se na stíhání zločinu agrese.

MTS oslavil v červenci desáté výročí a může zároveň oslavit první rozsudek své historie z března 2012 nad Thomasem Lubangem Dyilou. K úspěšnému fungování soudu je zapotřebí více soudních procesů a zejména více rozsudků. Jen tak může potvrdit svoje odhodlání a vliv na mezinárodní spravedlnost. Budoucí fungování MTS samozřejmě nezávisí jen na soudu samém, ale i na členských státech a jejich proaktivnímu přístupu.

# Part II
# Resolutions and Declarations adopted by the Review Conference

## A. Resolutions

### Resolution RC/Res.1

*Adopted at the 9th plenary meeting, on 8 June 2010, by consensus*

**RC/Res.1**
**Complementarity**

*The Review Conference,*

*Reaffirming* its commitment to the Rome Statute of the International Criminal Court,

*Reaffirming* its determination to combat impunity for the most serious crimes of international concern as referred to in the Rome Statute,

*Reaffirming further* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

*Welcoming* the efforts of the Court to investigate and prosecute those bearing responsibility for the most serious crimes of international concern,

*Stressing* the need to achieve universality of the Statute as a means to end impunity and *acknowledging* that assistance to strengthen domestic capacity may have positive effects in this regard,

1. *Recognizes* the primary responsibility of States to investigate and prosecute the most serious crimes of international concern;

2. *Emphasizes* the principle of complementarity as laid down in the Rome Statute and *stresses* the obligations of States Parties flowing from the Rome Statute;

3. *Recognizes* the need for additional measures at the national level as required and for the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community;

4. *Notes* the importance of States Parties taking effective domestic measures to implement the Rome Statute;

5. *Recognizes* the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level;

6. *Takes note of* the report of the Bureau on complementarity and its recommendations as a background paper for discussions at the Review Conference;

7. *Welcomes* the fruitful discussions on the issue of complementarity held during the Review Conference;

8. *Encourages* the Court, States Parties and other stakeholders, including international organizations and civil society, to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern as set out in the Report of the Bureau on complementarity, including its recommendations;

9. *Requests* the Secretariat of the Assembly of States Parties, in accordance with resolution ICC-ASP/2/Res.3, and, within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions, and *requests* the Secretariat of the Assembly of States Parties to report to the tenth session of the Assembly on progress in this regard;

10. *Requests* the Bureau to continue the dialogue with the Court and other stakeholders on the issue of complementarity and *invites* the Court to present to the Assembly at its tenth session, as appropriate, a report in this regard.

# Resolution RC/Res.2

*Adopted at the 9th plenary meeting, on 8 June 2010, by consensus*

## RC/Res.2
## The impact of the Rome Statute system on victims and affected communities

*The Review Conference,*

*Recalling* the Preamble of the Rome Statute which reminds that millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

*Reaffirming* the importance of the Rome Statute to the victims and affected communities in its determination to put an end to impunity for the perpetrators of the crime of genocide, crimes against humanity and war crimes, thus contributing to their prevention,

*Recalling* United Nations Security Council resolutions 1325, 1820, 1888 and 1889 on women, peace and security, as well as resolutions 1612 and 1882 on children in armed conflict, and in this context, *underlining* the need to address the specific needs of women and children as well as to put an end to impunity for sexual violence in conflict,

*Further recalling,* inter alia, the 1985 United Nations General Assembly Resolution 40/34 "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", and the 2005 United Nations General Assembly Resolution 60/147 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law",

*Recognizing* that victims' rights to equal and effective access to justice; protection and support; adequate and prompt reparation for harm suffered; and access to relevant information concerning violations and redress mechanisms are essential components of justice,

*Emphasizing* the importance of outreach to victims and affected communities in order to give effect to the unique mandate of the International Criminal Court towards victims,

1. *Encourages* States to consider implementing those provisions of the Rome Statute relevant to victims/witnesses, where applicable, through national legislation or appropriate measures;

2. *Further encourages* the Court, in dialogue with victims and affected communities, to continue to optimize the Court's strategic planning process, including the Court's Strategy in relation to victims, as well as its field presence in order to improve the way in which it addresses the concerns of victims and affected communities, paying special attention to the needs of women and children;

3. *Underlines* the need to continue to optimize and adapt outreach activities, in light of the different phases of the judicial cycle, and to encourage further efforts to ensure that victims and affected communities have access to accurate information about the Court, its mandate and activities, as well as about victims' rights under the Rome Statute, including their right to participate in judicial proceedings and claim for reparations;

4. *Encourages* governments, communities and civil organizations at the national and local level to play an active role in sensitizing communities on the rights of victims in accordance with the Rome Statute in general and victims of sexual violence in particular, to speak against their marginalization and stigmatization, to assist them in their social reintegration process and in their participation in consultations, and to combat a culture of impunity for these crimes;

5. *Expresses its appreciation* to the Board of Directors of the Trust Fund for Victims for its continuing commitment towards easing the suffering of victims;

6. *Stresses* the importance of an ongoing dialogue between the Secretariat of the Trust Fund for Victims, the Court and States Parties, with a view to ensuring the transparency of the management of the Trust Fund and its Secretariat and *further stresses* the importance in this regard of regular exchanges with the international community, including donors and civil society, so as to promote the activities of the Trust Fund and contribute to its visibility;

7. *Calls upon* States Parties, international organizations, individuals, corporations and other entities to contribute to the Trust Fund for Victims to ensure that timely and adequate assistance and reparations can be provided to victims in accordance with the Rome Statute, and *expresses its gratitude* to those that have done so.

# Resolution RC/Res.3

*Adopted at the 9th plenary meeting, on 8 June 2010, by consensus*

## RC/Res.3
## Strengthening the enforcement of sentences

*The Review Conference,*

*Recalling* the Rome Statute of the International Criminal Court,

*Conscious of* the key role of States in the enforcement of the Court's sentences of imprisonment,

*Recalling* that the Court's sentences of imprisonment shall be served in prison facilities provided by States that have indicated their willingness to accept sentenced persons, in accordance with the Statute,

*Mindful of* the need for broader participation of States in the enforcement of sentences in order to allow for such enforcement in all relevant regions and sub regions and *taking note* of the unanimous view expressed by States Parties to this effect,

*Emphasizing* the need for enhanced international cooperation with a view to enabling more States to voluntarily accept sentenced persons on the basis of widely accepted international treaty standards governing the treatment of prisoners,

1. *Calls upon* States to indicate to the Court their willingness to accept sentenced persons in accordance with the Statute;

2. *Confirms* that a sentence of imprisonment may be served in a prison facility made available in the designated State through an international or regional organization, mechanism or agency;

3. *Urges* States Parties and States that have indicated their willingness to accept sentenced persons, directly or through competent international organizations, to promote actively international cooperation at all levels, particularly at the regional and sub regional levels;

4. *Requests* the Secretary-General of the United Nations to bring this resolution to the attention of all members of the United Nations, with a view to encouraging that the above objectives may be considered, as appropriate, in the relevant programmes of assistance of the World Bank, the regional banks, the United Nations Development Programme, and other relevant multilateral and national agencies.

# Resolution RC/Res.4

*Adopted at the 11th plenary meeting, on 10 June 2010, by consensus*

## RC/Res.4
## Article 124

*The Review Conference,*

*Recognizing* the need to ensure the integrity of the Rome Statute,

*Mindful* of the importance of the universality of the founding instrument of the International Criminal Court,

*Recalling* the transitional nature of article 124, as decided by the Rome Conference,

*Recalling* that the Assembly of States Parties forwarded article 124 to the Review Conference for its possible deletion,

*Having reviewed* the provisions of article 124 at the Review Conference in accordance with the Rome Statute,

1. *Decides* to retain article 124 in its current form;

2. *Also decides* to further review the provisions of article 124 during the fourteenth session of the Assembly of States Parties to the Rome Statute.

# Resolution RC/Res.5*

*Adopted at the 12th plenary meeting, on 10 June 2010, by consensus*

## RC/Res.5
## Amendments to article 8 of the Rome Statute

*The Review Conference,*

*Noting* article 123, paragraph 1, of the Rome Statute of the International Criminal Court which requests the Secretary-General of the United Nations to convene a Review Conference to consider any amendments to the Statute seven years after its entry into force,

*Noting* article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and *confirming* its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute,

*Confirming* that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute,

*Noting* article 9 of the Statute on the Elements of Crimes which states that such Elements shall assist the Court in the interpretation and application of the provisions of the crimes within its jurisdiction,

*Taking due account of the fact* that the crimes of employing poison or poisoned weapons; of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, already fall within the jurisdiction of the Court under article 8, paragraph 2 (b), as serious violations of the laws and customs applicable in international armed conflict,

*Noting* the relevant elements of the crimes within the Elements of Crimes already adopted by the Assembly of States Parties on 9 September 2000,

*Considering* that the abovementioned relevant elements of the crimes can also help in their interpretation and application in armed conflict not of an international character, in that *inter alia* they specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court's jurisdiction of law enforcement situations,

*Considering* that the crimes referred to in article 8, paragraph 2 (e) (xiii) (employing poison or poisoned weapons) and in article 8, paragraph 2 (e) (xiv) (asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices) are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law,

*Considering* that the crime referred to in article 8, paragraph 2 (e) (xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws and customs applicable in armed conflict not of an international character, and *understanding* that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law,

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* See Depositary Notification C.N.651.2010 Treaties-6, dated 29 November 2010, available at http://treaties.un.org.

1. *Decides* to adopt the amendment to article 8, paragraph 2 (e), of the Rome Statute of the International Criminal Court contained in annex I to the present resolution, which is subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Statute;

2. *Decides* to adopt the relevant elements to be added to the Elements of Crimes, as contained in annex II to the present resolution.

# Annex I

## Amendment to article 8

*Add to article 8, paragraph 2 (e), the following:*

"(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."

# Annex II

## Elements of Crimes

*Add the following elements to the Elements of Crimes:*

**Article 8 (2) (e) (xiii)**
**War crime of employing poison or poisoned weapons**

**Elements**

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.

2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (e) (xiv)**
**War crime of employing prohibited gases, liquids, materials or devices**

**Elements**

1. The perpetrator employed a gas or other analogous substance or device.

2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.[1]

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (e) (xv)**
**War crime of employing prohibited bullets**

**Elements**

1. The perpetrator employed certain bullets.

2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.

3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[1] Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.

# Resolution RC/Res.6*

*Adopted at the 13th plenary meeting, on 11 June 2010, by consensus*

## RC/Res.6
## The crime of aggression

*The Review Conference,*

*Recalling* paragraph 1 of article 12 of the Rome Statute,

*Recalling* paragraph 2 of article 5 of the Rome Statute,

*Recalling* also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

*Recalling* further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

*Taking note* of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

*Resolved* to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

3. *Also decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;

4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;

5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

* See Depositary Notification C.N.651.2010 Treaties-8, dated 29 November 2010, available at http://treaties.un.org.

# Annex I

## Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

*1. Article 5, paragraph 2, of the Statute is deleted.*

*2. The following text is inserted after article 8 of the Statute:*

**Article 8 *bis***
**Crime of aggression**

1. 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.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

*3. The following text is inserted after article 15 of the Statute:*

**Article 15 *bis***
**Exercise of jurisdiction over the crime of aggression**
**(State referral, *proprio motu*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

*4. The following text is inserted after article 15 bis of the Statute:*

**Article 15 *ter***
**Exercise of jurisdiction over the crime of aggression**
**(Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

*5. The following text is inserted after article 25, paragraph 3, of the Statute:*

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

*6. The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

*7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

# Annex II

## Amendments to the Elements of Crimes

**Article 8 *bis***
**Crime of aggression**

**Introduction**

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

**Elements**

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – 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 – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

# Annex III

## Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

**Referrals by the Security Council**

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

**Jurisdiction *ratione temporis***

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

**Domestic jurisdiction over the crime of aggression**

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

**Other understandings**

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

# B. Declarations

## Declaration RC/Decl.1

*Adopted at the 4th plenary meeting, on 1 June 2010, by consensus*

**RC/Decl.1**
**Kampala Declaration**

*We, high-level representatives of States Parties to the Rome Statute of the International Criminal Court, gathered in Kampala, Uganda, at the first Review Conference under this Statute, held from 31 May to 11 June 2010*,

*Guided* by a renewed spirit of cooperation and solidarity, with a firm commitment to fight impunity for the most serious crimes of international concern and to guarantee lasting respect for the enforcement of international criminal justice,

*Recalling* the aims and purposes of the Rome Statute and *recognizing* the noble mission and the role of the International Criminal Court in a multilateral system that aims to end impunity, establish the rule of law, promote and encourage respect for human rights and achieve sustainable peace, in accordance with international law and the purposes and principles of the Charter of the United Nations,

*Mindful* that despite progress in realizing the aims and purposes of the Statute and the mission of the Court, countless children, women and men continue to be victims of unimaginable atrocities that deeply shock the conscience of humanity,

*Recalling* the historic establishment and commencement of functioning of the International Criminal Court as an independent and permanent judicial institution complementary to national criminal jurisdictions,

*Welcoming* actions undertaken by States Parties to strengthen national criminal jurisdictions in accordance with the Statute,

*Appreciating* the invaluable assistance of civil society for the advancement of the International Criminal Court,

*Convinced* that there can be no lasting peace without justice and that peace and justice are thus complementary requirements,

*Convinced also* that justice and the fight against impunity are, and must remain, indivisible and that in this regard universal adherence to the Statute is essential,

*Stressing* the importance of full cooperation with the International Criminal Court,

*United* by the common bonds of our peoples, our cultures pieced together in a shared heritage,

*Together solemnly:*

1. *Reaffirm* our commitment to the Rome Statute of the International Criminal Court and its full implementation, as well as to its universality and integrity;

2. *Reiterate* our determination to put an end to impunity for perpetrators of the most serious crimes of international concern, with full respect for international fair trial standards, and thus to contribute to the prevention of such crimes that threaten the peace, security and well-being of the world;

3. *Emphasize* that justice is a fundamental building block of sustainable peace;

4. *Determine* to continue and strengthen our efforts to promote victims' rights under the Rome Statute, including their right to participate in judicial proceedings and claim for reparations, and to protect victims and affected communities;

5. *Resolve* to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity;

6. *Express* our firm commitment to work actively during the Review Conference towards a satisfactory outcome on the amendment proposals included in resolution ICC-ASP/8/Res.6, keeping in mind the mission the International Criminal Court is meant to accomplish in the international community;

7. *Further resolve* to continue and strengthen our efforts to ensure full cooperation with the Court in accordance with the Statute, in particular in the areas of implementing legislation, enforcement of Court decisions, execution of arrest warrants, conclusion of agreements and witness protection, and to express our political and diplomatic support for the Court;

8. *Express* our appreciation to the Court which has become fully operational as a judicial institution in accordance with the provisions of the Rome Statute;

9. *Express* our appreciation to the Secretary-General of the United Nations for the cooperation extended to the International Criminal Court by the United Nations system;

10. *Welcome* the fact that 111 States from all regions of the world have now become Parties to the Rome Statute of the International Criminal Court and *invite* States that are not yet parties to the Statute to become parties as soon as possible, and *reiterate* our commitment to proactively promote universality and full implementation of the Statute;

11. *Acknowledge* the pledges made by States Parties and by non-States Parties and other organizations to promote the aims and purposes of the Rome Statute;

12. *Decide* to henceforth celebrate 17 July, the day of the adoption of the Rome Statute in 1998, as the Day of International Criminal Justice.

# Declaration RC/Decl.2

*Adopted at the 9th plenary meeting, on 8 June 2010, by consensus*

## RC/Decl.2
## Declaration on cooperation

*The Review Conference,*

*Recalling* that the effective fight against impunity requires timely justice and, to this end, that proceedings are pursued with proper expedition,

*Stressing* the importance of effective and comprehensive cooperation by States, international and regional organizations so that the Court can properly fulfill its mandate,

*Noting* the extensive efforts undertaken with a view to enhancing cooperation, both by the Assembly of States Parties and by the Court,

*Acknowledging* the progress achieved to date in enhancing the level of cooperation provided by States to the Court, and also *acknowledging* that further progress is required in this matter,

1. *Reaffirms* the importance of all States Parties meeting fully their obligations under Parts 9 and 10 of the Rome Statute;

2. *Emphasizes* that those States under an obligation to cooperate with the Court must do so;

3. *Emphasizes* the particular need to have in place adequate implementing legislation or other procedures under national law to enhance cooperation with the Court;

4. *Reaffirms* the importance of compliance with requests for cooperation from the Court;

5. *Emphasizes* the crucial role that the execution of arrest warrants plays in ensuring the effectiveness of the Court's jurisdiction and further *emphasizes* the primary obligation of States Parties, and other States under an obligation to cooperate with the Court, to assist the Court in the swift enforcement of its pending arrest warrants;

6. *Encourages* States Parties to continue to engage in seeking to enhance their voluntary cooperation with the Court through arrangements or any other appropriate form of assistance on an *ad hoc* basis;

7. *Encourages* all other States to cooperate with the Court and, to this end, also *encourages* the Court to enter into appropriate arrangements;

8. *Decides* that the Assembly of States Parties should, in its consideration of the issue of cooperation, place a particular focus on sharing experiences;

9. *Encourages* all relevant stakeholders to provide assistance, using existing measures and exploring innovative methods, to States seeking to enhance their cooperation with the Court;

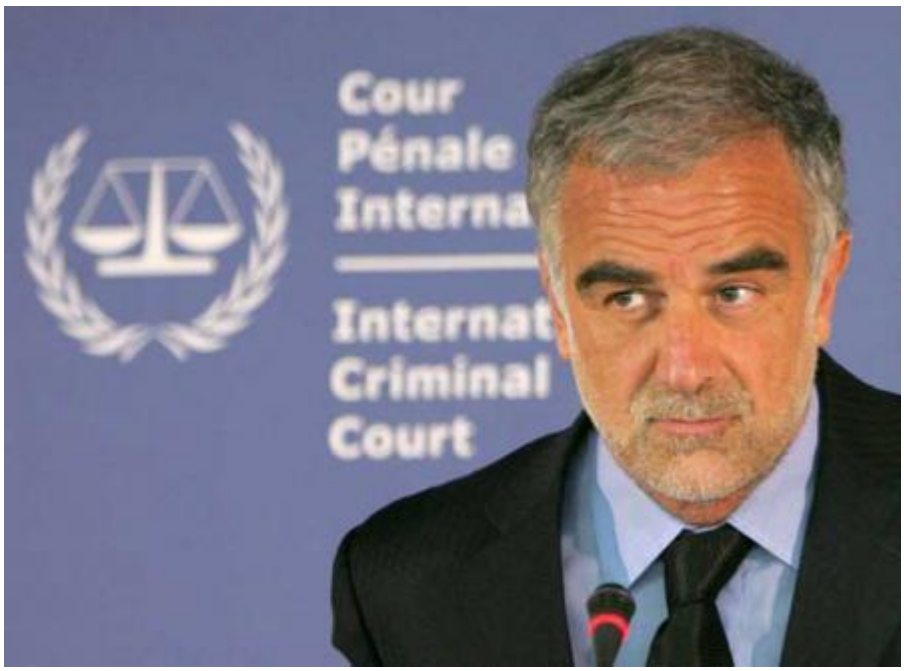
10. *Emphasizes* the importance of enhancing support for the Court, including by broadening an understanding of issues relevant to the Court, at national level;

11. *Requests* the Assembly of States Parties in its future consideration of the issue of cooperation to examine how to enhance public information on, and promote an understanding of, the mandate and operations of the Court.


Official Logo of the International Criminal Court
Source: http://www.uniosil.org/international-criminal-court.html

International Court is celebrating its 10-year anniversary
Source: http://www.10a.icc-cpi.info/index.php/en/


The seat of International Criminal Court in the Hague
Source: http://www.denhaag.nl/en/residents/to/International-Criminal-Court-ICC-1.htm




The first chief prosecutor of the International Criminal Court: Jose Mario Ocampo

Source: http://withintheblackcommunity.blogspot.cz/2012/03/beware-of-international-criminal-courts.html

New chief prosecutor of the International Criminal Court: Mrs. Fatou Bensouda

Source: http://www.guardian.co.uk/commentisfree/2012/jun/28/international-criminal-courts-flaws-overlooked

Opening of the Review Conference in Kampala, Uganda
Source: http://www.coalitionfortheicc.org/?mod=review