

THE CRIME OF AGGRESSION UNDER THE ROME STATUTE. KAMPALA AMENDMENTS COMING TO LIFE

ZLOČIN AGRESIE PODĽA RÍMSKEHO ŠTATÚTU. OŽIVENIE DODATKOV Z KAMPALY

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ABSTRACT

The subject of this paper is an analysis of the crime of aggression from the perspective of international criminal law. For the purpose of contextualization and proper understanding of the topic, the author begins with the historical development of the crime of aggression, starting from the post-World War II era events all the way to the adoption of the Rome Statute of the International Criminal Court. Moving on, attention is paid to the content of the Kampala Amendments adopted in 2010 and their impact on the treaty system of the Rome Statute. Elaboration on the activation decision made by the Assembly of State Parties to the Rome Statute in December 2017 is presented in the fourth part of the paper, focusing on the solution it provides to a friction between two camps of State Parties to the Rome Statute caused by the Kampala Amendments, taking into account its legal nature and potential consequences on the jurisprudence of the International Criminal Court.

ABSTRAKT

Predmetom článku je analýza zločinu agresie z perspektívy medzinárodného trestného práva. Za účelom lepšieho uvedenia do problematiky začína autor v druhej kapitole historickým vývojom zločinu agresie, počnúc udalosťami z obdobia po druhej svetovej vojne až do prijatia Rímskeho štatútu Medzinárodného trestného súdu. Následne v tretej kapitole je pozornosť venovaná obsahu dodatkov k Rímskemu štatútu z Kampaly z roku 2010, ako aj ich vplyvu na zmluvný systém Rímskeho štatútu. V štvrtej kapitole autor pokračuje rozborom aktivačného rozhodnutia Zhromaždenia zmluvných strán k Rímskemu štatútu urobeného v decembri roku 2017, sústrediac sa na riešenie sporu dvoch skupín zmluvných strán Rímskeho štatútu týkajúceho sa výkladovej nejednotnosti vybraných ustanovení dodatkov z Kampaly. Pri posudzovaní predmetného rozhodnutia sa do úvahy vzala aj jeho právna povaha i potenciálny vplyv na rozhodovaciu činnosť Medzinárodného trestného súdu.

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I. INTRODUCTION

Occasionally described as „the crime of crimes“, aggression has played one of the central roles in the field of international criminal justice. Already the Nuremberg judgment referred

to as “the supreme international crime“.¹ One will not exaggerate by stating that aggression has received the most attention out of all core international crimes which today constitute the *corpus* of substantive international criminal law. Aggression is, at the same time, one of the leading phenomenons of the law on the use of force, the foggy areas of which have been occupying the academia for decades. It is, however, undeniable that this privileged status of aggression is fully justified by its immense impact on the stability of international peace and security, the protection and maintenance of which is one of the basic objectives of the United Nations (hereinafter the “UN”) and the international community as a whole.

The ambition of this article is to scrutinize the crime of aggression predominantly from the viewpoint of international criminal law. On this note, the author will focus both on issues of substantive law as well as procedural law. With regard to the former, attention will be paid to the effort of legally defining the crime of aggression and its eventual success during the Review Conference to the Rome Statute in Kampala 2010. As to the procedural law, the entry into force of the Kampala Amendments and the mechanism of activation and exercise of jurisdiction of the International Criminal Court (hereafter “ICC”) over the crime of aggression will be examined more closely, concluding by an assessment of the outcomes of the Assembly of State Parties from December 2017 in this context.

II. DEFINING THE CRIME OF AGGRESSION

1. From Nuremberg and Tokyo to Kampala

The historic precedents of prosecuting and convicting the leading Nazi and Japanese state officials after World War II by the International Military Tribunal in Nuremberg (hereinafter also the “Nuremberg Tribunal”) and the International Military Tribunal for the Far East in Tokyo (hereinafter also the “Tokyo Tribunal”) were the first occasions of applying individual criminal responsibility for international crimes in the modern history of mankind by international courts, including for what we today call the crime of aggression.² It stands out, however, that the constituent documents of both Nuremberg Tribunal and Tokyo Tribunal use different terminology than the one we are familiar with today. The Charter of the Nuremberg Tribunal establishes the tribunals jurisdiction over, among others, crimes against peace, “namely, 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 (...).”³ The Charter of the Tokyo Tribunal offers essentially the same provision.⁴ Judges of both tribunals were confronted with an objection that war (be it even “aggressive”) was not a crime under international law at the time of its waging and that the tribunals therefore apply law retroactively, *ex post facto*. The Nuremberg Tribunal determinedly declined this argument.⁵

¹ International Military Tribunal in Nuremberg, Judgment of 1st October 1946, p. 25, available at: https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.

² The very first historically documented occasion of prosecuting an individual in front of a *quasi*-international criminal court (for crimes against humanity) was the case from 1474 AD against a provincial governor of Burgundy, Peter von Hagenbach. HOLLING, J. Internationaler Strafgerichtshof und Verbrechensprävention: Eine Analyse der Auswirkungen globaler Strafrechtspflege auf die Bekämpfung von Makrokriminalität. Berlin: LIT Verlag, 2016, ISBN 978-3643132864, s. 8-10.

³ Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8th of August 1945 (hereafter also the “Charter of the Nuremberg Tribunal” or “Nuremberg Charter”), Article 6 lit. a); available at: http://avalon.law.yale.edu/subject_menus/imtproc_v1lmenu.asp.

⁴ Charter of the International Military Tribunal for the Far East (hereafter also the “Charter of the Tokyo Tribunal” or “Tokyo Charter”), Article 5 lit. a); available at: http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.

⁵ “(...) In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in International Law; and that those who plan and wage such a war, with

It should be stressed that there was no coincidence in placing crimes against peace in front of other crimes in the Charters of the Tokyo Tribunal and the Nuremberg Tribunal. This solution was a result of the American strategy to emphasize the main point of the prosecution's interest. Another instance of contention was the criminalization of conspiracy to commit a crime against peace, against which the French Delegation was most vocal, nonetheless without success, as it was voted in favour of inclusion.⁶ In addition, individual responsibility was extended to several other forms of criminal liability by the last sentence of Article 5 of both Charters.⁷

As to the terminology used, adoption of the term "crimes against peace" had its roots in the proposal of the Soviet Delegation Leader, General Nikitschenko, who was naturally inspired by the Soviet teaching of international law. The use of the terms "aggressive war" or "war of aggression" in both Nuremberg and Tokyo Charter is most probably linked to a rather consistent practice in their utilization in a number of international treaties concluded in the first half of the 20th century.⁸

The trials of perpetrators other than the chief war criminals⁹ after the conclusion of Nuremberg trials (*Nachfolgeprozesse*) had their legal basis in the Control Council Law No. 10 which stuck to the definitions of crimes against peace contained in the above-mentioned Nuremberg and Tokyo Charters.¹⁰ While describing these trials as particularly successful in terms of convictions would be misleading, trial number 11 conducted in the American Occupation Zone (also called the Ministries Trial) with 19 out of 21 defendants found guilty might be considered as most memorable.¹¹

Following these events, the General Assembly of the United Nations (hereafter the "UN GA" or "UN General Assembly") acknowledged their palpable contribution to international criminal justice by affirming in its Resolution 95 (I) "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."¹²

Albeit these developments, the fact remained that a vacuum concerning the exact definition of the crime of aggression existed for years to come, since subsuming a "war of aggression" under the term crimes against peace did not shed much light on what constituted a crime of aggression. This legal lacuna is even more dramatic when one considers that the term "aggression" was incorporated to some of the articles of the Charter of the United Nations¹³

its inevitable and terrible consequences, are committing a crime in so doing. (...)” International Military Tribunal in Nuremberg, Judgment of 1st October 1946, op. cit., p. 53.

⁶ SAFFERLING, C. Internationales Strafrecht: Strafanwendungsrecht - Europäisches Strafrecht - Völkerstrafrecht. Berlin: Springer Berlin, 2011. ISBN 9783642149139. p. 249-251.

⁷ "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

⁸ The unratified 1923 draft Treaty of Mutual Assistance; the preamble to the 1924 Protocol for the Pacific Settlement of International Disputes; the 1927 resolution of the Assembly of the League of Nations; and the Sixth International Conference of American States in 1928. TRAHAN, J. Defining Aggression: Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum, 24 Loy. L.A. Int'l & Comp. L. Rev. 439 (2002), 442-443.

⁹ Predominantly industrialists and diplomats.

¹⁰ Article II of the Control Council Law No. 10 provided 2 differences. First, in the definition it included invasion and second, it emphasized the non-exhaustive enumeration of the forms of war of aggression by the formula „including but not limited to“. Historical Review of Developments relating to Aggression, United Nations Publication, Sales No. E.03.V10, 2003, ISBN 92-1-133538-8. 69ff.

¹¹ In German speaking countries more known as *Wilhelmstraßeprozess*, so named because the prosecuted were members of the German Foreign Ministry which had its seat at Wilhelmstraße in Berlin. In this instance, 19 out of 21 defendants were found guilty. SAFFERLING, C. Internationales Strafrecht: Strafanwendungsrecht - Europäisches Strafrecht - Völkerstrafrecht, op. cit., p. 251.

¹² Including the recognition of crimes against peace as crimes punishable by international law. [(Principle VI, lit. a)]. Resolution of the UN GA 95(I), 11th December 1946.

¹³ Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html>.

(hereafter the “UN Charter”) with various modifications.¹⁴ The body which arguably suffered the most from this gap was the Security Council of the United Nations (hereafter the “UN Security Council”). Having been given the task to maintain international peace and security by Article 24 para. 1 of the UN Charter, based on which preconditions should it determine the existence of (among others) an act of aggression under Article 39 of the UN Charter?¹⁵ Another question which presented itself was the relation of aggression to the prohibition of threat or use of force codified in Article 2 para. 4 of the UN Charter. Is every act of aggression violating this rule? Might there be a case of aggression which does not amount to such a grave use of force as to infringe Article 4 para. 2 of the UN Charter?

It was also due to these interpretational issues that the UN GA managed to define aggression in a legally non-binding resolution, providing a guideline for the UN Security Council when determining the existence of an act of aggression under Article 39 of the UN Charter.¹⁶ However, because the definition of aggression contained in the UN GA Resolution 3314 served the purposes of establishing *state responsibility*, a question mark over the *individual criminal responsibility* for a crime of aggression remained. The reason for reluctance of the international community to codify the crime of aggression was primarily twofold. One, the exclusive authority of the UN Security Council to determine a case of an act of aggression, two, the ever present political sensitivity surrounding the topic caused a visible hesitance of states in their law-making endeavours.¹⁷

The renaissance of international criminal law in the form of the establishment of two *ad hoc* tribunals by the UN Security Council in the 1990s, one for the former Yugoslavia and one for Rwanda, did not bring any development as to the crime of aggression, since neither tribunal was given jurisdiction with respect to this crime.

Called by the UN General Assembly to continue its work¹⁸ which began already in 1950, the International Law Commission (hereafter the “ILC”) adopted the draft Code of Crimes against the Peace and Security of Mankind in 1996, stating in Article 16: “An individual who, as leader or organiser, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.” What the crime of aggression actually is was left untouched.¹⁹

After the negotiations preceding the adoption of the Rome Statute of the International Criminal Court (hereafter the “ICC”), states at the Rome Conference in 1998 conferred on the ICC jurisdiction over the crime of aggression,²⁰ yet a consensus about the crimes definition and the conditions under which the ICC should exercise jurisdiction over it could not be reached. While on the one hand proposals were made for a wide definition based on the UN GA Resolution 3314, on the other there was a demand for a narrower language tailored for very specific cases of armed force usage amounting to aggression. The most contested in this regard was the issue of the UN Security Council’s involvement in the process of possible prosecution for a crime of aggression. The negotiators could not unite themselves in deciding whether a previous determination by the UN Security Council that an act of aggression exists

¹⁴ Such as an „act of aggression“ (Article 1, Article 39 UN Charter), „aggressive policy“ or simply “aggression“ (Article 53 para. 1 UN Charter).

¹⁵ Although a legal definition of an act of aggression is not a precondition for the UN Security Council to make a determination that such an act exists, it is nevertheless helpful to have a point of reference in the form of law.

¹⁶ Resolution of the UN GA 3314 (XXIX), 14th of December 1974 (hereafter “UN GA Resolution 3314”).

¹⁷ SCHMALENBACH, K. Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen. in *Juristen Zeitung*, 15/16, 65. Jahrgang, 13. August 2010, 745-796, ISSN 0022-6882, p. 745.

¹⁸ Resolution of the UN GA 36/106, 10th December 1981, available at: <http://www.un.org/documents/ga/res/36/a36r106.htm>.

¹⁹ CRYER, R. *et al.* An introduction to international criminal law and procedure. 2nd ed. Cambridge: Cambridge University Press, 2010. ISBN 9780511789342, p. 315.

²⁰ Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html>, (hereafter the “Rome Statute”). Art. 5 para. 1 lit. d).

was necessary before any activity by the ICC could take place.²¹ So it happened that even though the ICC was vested with the jurisdiction over the crime of aggression, adoption of its definition and conditions of exercise of jurisdiction were postponed to a later date, not sooner than seven years after entry into force of the Rome Statute.²²

The task of preparing proposals for a provision concerning this matter, as well as proposals for the definition of Elements of Crimes of aggression, was first given to the Preparatory Commission for the International Criminal Court (1999-2002)²³, after that to the Special Working Group on the Crime of Aggression [hereafter “SWGCA”, (2003-2009)], which submitted its proposals to the Assembly of States Parties to the Rome Statute (hereafter also the “ASP”) in early 2009.²⁴

2. The Kampala Compromise

The Review Conference to adopt the provision demanded by Article 5 para. 2 of the Rome Statute (*Disclaimer: If there is no reference to the source of an Article in the remaining parts of this paper, it is always an Article of the Rome Statute.*) convened in the capital city of Uganda took place from 31st of May until 11th of June 2010 and it went down to history for its particularly eventful course with an unexpected conclusion. The discrepancy between the negotiating delegations of states rested on basically the same issues as in 1998 in Rome, mainly on the involvement of the UN Security Council as a prerequisite for an admissible prosecution for aggression. Unsurprisingly, the permanent members of the UN Security Council proved to be the ones most arduous in defending the necessity of a determination of an act of aggression by the UN Security Council before any procedure could occur before the ICC. Their intent was that only the UN Security Council should be authorized to refer a case to the ICC.²⁵ Politically and economically less influential states, such as African and Latin-American states, pursued a complete dropout of the UN Security Council from the process.²⁶ These preserving complications led to the emergence of voices suggesting a postponement of resolving the whole aggression dilemma.

Despite the legally required quorum required by Article 121 para. 3 of the Rome Statute was, in the absence of a consensus, a two-thirds majority, the leaders of state delegations insisted upon consensus. Hopes for success were low when the President of the ASP presented the last proposal for a solution to be voted upon. Just when all belief was lost as Japan presented its sharp critique of the proposal, the Japanese delegate ended his speech by a conclusion that Japan after all agrees and the so much awaited amendment²⁷ was born.²⁸ Years of preparatory works came to an end and another major step towards the fulfilment of the Nuremberg legacy was made.

²¹ SAFFERLING, C. Internationales Strafrecht: Strafanwendungsrecht - Europäisches Strafrecht - Völkerstrafrecht, op. cit., p. 252.

²² Articles 121 and 123 of the Rome Statute. The Rome Statute entered into force on 1st of July 2002.

²³ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, para. 7, UN Doc A/CONF.183/10 (1998), para. 7.

²⁴ Assembly of States Parties to The Rome Statute of the International Criminal Court Seventh session (first and second resumptions) New York, 19 - 23 January and 9 - 13 February 2009 Official Records, ICC-ASP/7/20/Add.1, Appendix 1.

²⁵ Applying only the regime of Article 13 lit. b) of the Rome Statute.

²⁶ Applying only Article 13 lit. a) and c) of the Rome Statute.

²⁷ ICC Assembly of State Parties, Resolution RC/Res.6! Adopted at the 13th plenary meeting, on 11 June 2010, by consensus (hereafter the “Kampala Amendments”, “Kampala Compromise” or “amendment”). Available at: <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>.

²⁸ SCHMALENBACH, K. Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof, op. cit., p. 746. Blog of the Kampala Conference, Chief Editor Professor William A. Schabas, Middlesex University, Ireland, <http://iccreviewconference.blogspot.sk/>. For an exhaustive description of the negotiations in Kampala see KREß, C., VON HOLTZENDORFF, L. The Kampala Compromise on the Crime of Aggression, *Journal of International Criminal Justice* 8 (2010), 1179-1217, ISSN 1478-1395.

III. WHAT WAS ACHIEVED IN KAMPALA?

The results of the Kampala Amendments in the form of statutory regulation may be, for systematic purposes, categorized into two parts: substantive law and procedural law. The content of the substantive law comprises of Article 8 *bis* and Article 25 para. 3 *bis* of the Rome Statute, as well as Article 8 *bis* of the Elements of Crimes (hereafter also “Elements”). Concerning the procedural law, it is Article 15 *bis* and Article 15 *ter* of the Rome Statute. The author will now turn to the analysis of both parts respectively.

1. Substantive law

Substantive law should give us an answer to the question what the crime of aggression is. In other words, it should provide both the *actus reus* and specify the *mens rea* of the crime.²⁹ As for the *actus reus* of the crime of aggression, the following criteria have to be fulfilled: **a)** Existence of an act of aggression, **b)** Demanded character of action, **c)** Demanded status or position of the perpetrator or other persons, **d)** Specific quality of an act of aggression.

Ad a) Turning to the interpretation of Article 8 *bis*, it is necessary to emphasize at the very beginning that it differentiates between a crime of aggression³⁰ and an act of aggression,³¹ each triggering distinct kind of responsibility - the former individual criminal responsibility, the latter state responsibility. Due to the structure of Article 8 *bis* para. 1 it can be concluded that there can be no crime of aggression without an act of aggression, since according to this paragraph, a 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.”³² Based on these findings, it is logical to first turn to the elaboration of an act of aggression before we can proceed any further.

The Kampala Compromise provides the following definition of an act of aggression, which is essentially a copy-paste of the definition of aggression from the UN GA Resolution 3314: “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.”³³ Emphasis must be put on a few crucial legal divergences. First, after the first sentence of Article 8 *bis* para. 1, a list of acts classified as acts of aggression follows, which is an *exhaustive* enumeration.³⁴ Second, no

²⁹ In civil law jurisdictions commonly known as objective element (*actus reus*) and subjective element (*mens rea*) of a crime.

³⁰ Article 8 *bis* para. 1 of the Rome Statute.

³¹ Article 8 *bis* para. 2 of the Rome Statute.

³² There is therefore a clear distinction of individual responsibility (crime of aggression) and collective state responsibility (act of aggression). Professor Clark presents a rather concise gloss that a crime of aggression is what a leader does, and an act of aggression is what a state does. CLARK, R. Negotiating Provisions, Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It, EJIL (2009), Vol. 20 No. 4, 1103–1115, p. 1104. Even the UN GA Resolution 3314, which served as a template for defining the crime of aggression, distinguishes in its wording an aggression and a war of aggression (See Article 5 para. 2 UN GA Resolution 3314). This however bears no qualitative difference, since the resolution concerns only state responsibility.

³³ Also referred to as the “Chapeau” definition. Article 8 *bis* para. 2, first sentence of the Rome Statute.

³⁴ Compare Article 4 of the UN GA Resolution 3314. It would be inconsistent with one of the basic principles of criminal law *nullum crimen sine lege* (Article 22 of the Rome Statute) to allow an open-ended enumeration like that contained in the UN GA Resolution 3314. There is nonetheless a suggestion to accept other possible conducts through interpretation *eiusdem generis*. CLARK, R. Negotiating Provisions, Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It, op. cit., p. 1105. Doubts were expressed about some acts in the list, particularly under lit. c) and e), because they do not necessarily have to encompass use of force. AMBOS, K. Das Verbrechen der Aggression nach Kampala, Zeitschrift für Internationale Strafrechtsdogmatik, 11/2010, ISSN 1863-6470, p. 657, available at: http://www.zis-online.com/dat/artikel/2010_11_501.pdf.

such clause as contained in Article 2 of the UN GA Resolution 3314 can be found in the Rome Statute.³⁵

Ad b) Having dealt with an act of aggression, we can move on to a closer scrutiny of the language defining the crime of aggression. Respecting the order of the legal text, the crime of aggression is, first, the “planning, preparation, initiation or execution” of an act of aggression. Hence, it is not required that the perpetrator engages in the crime from its inception until its conclusion. These various modalities of conduct are inspired by Article 6 lit. a) of the Nuremberg Charter, except that “execution” substituted “waging” for the sake of language modernization.³⁶ Indeed, on top of the aforementioned, other forms of liability contained in Article 25 of the Rome Statute apply also to the crime of aggression.³⁷

A connection worth pointing out is the requirement laid down in Element 3 of Article 8 *bis* of the Elements of Crimes. Following its wording, an act of aggression has to be *committed*. Yet, looking back into Article 8 *bis* para. 1 of the Rome Statute, an act of aggression can also be *planned*, *prepared* or *initiated* in order to constitute a crime of aggression. What exactly is then meant by “committed” in Element 3 of Article 8 *bis* of the Elements of Crimes? Does “committed” mean the commission of a plan, preparation or initiation of an act of aggression? The author, following the criminal legal theory of continental jurisdictions, is of the opinion that the only form of action provided in Article 8 *bis* para. 1 of the Rome Statute which captures the meaning of “committed” is “execution” of an act of aggression and that this eventual terminological inconsistency might be confronted by the future ICC jurisprudence.

Ad c) When it comes to the objective characteristic of the perpetrator himself, he must be “a person in a position effectively to exercise control over or to direct the political or military action of a State (...).” Based on this, the crime of aggression is often labelled as a leadership crime and it stands out from other crimes under the jurisdiction of the ICC which do not possess such a precondition.³⁸ At this point it should be noted that the leadership requirement applies not only to the perpetrator acting in the form of planning, preparation, initiation or execution, but also to persons responsible under Article 25 para. 3 of the Rome Statute.³⁹

Ad d) Next requirement is that the act of aggression must, by its character, gravity and scale, be a manifest violation of the Charter of the United Nations. This qualitative aspect is termed the threshold clause. Considering the connector “and” it is safe to conclude that the act of aggression should meet all three criteria cumulatively. Satisfying only one or two of them would not be enough for the act to be a manifest violation.⁴⁰ A crucial finding to which this clause leads is that an act of aggression does not *ipso facto* amount to a crime of aggression.

³⁵ Paraphrased into simple words, this provision allows the UN Security Council to make a decision that a certain conduct which normally would satisfy the definition of aggression does not amount to aggression due to “other relevant circumstances” or a lack of gravity. Its absence undoubtedly strengthens the independence of the ICC in prosecuting crimes of aggression.

³⁶ ARONSSON-STORRIER, M. Article 8 *bis* (1) – Crime of Aggression, The Rome Statute, Klamburg, Mark (ed.), The Commentary on the Law of the International Criminal Court, available at: www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc.

³⁷ This is called the differentiated approach, opposite to the initially proposed monistic approach which advocated solely an active participation of the perpetrator as an umbrella term. KREß, C., VON HOLTZENDORFF, L. The Kampala Compromise on the Crime of Aggression, op. cit., p. 1190.

³⁸ The *ratio legis* for this kind of reduction of potential perpetrators is the fact that through the course of history it has proven that aggression does not injure the same legally protected value as crimes against humanity, war crimes or genocide (which cause harm mainly to the individual). In the first place, aggression infringes the sovereignty, territorial integrity, political independence of another state or the principle of friendly relations between states; thus, it is only fair to frame the “leadership clause” in the definition of the crime. HEINSCH, R. The Crime of Aggression After Kampala: Success or Burden for the Future?, *Göttingen Journal of International Law* 2 (2010) 2, ISSN 1868-1581, 713-743, p. 722.

³⁹ As provided by the amended Article 25 para. 3 *bis* of the Rome Statute. Attention needs to be paid again to Element 3 of Article 8 *bis* of the Elements of Crimes, which implicitly excludes an attempt to commit a crime of aggression under Article 25 para. 3 lit. f) of the Rome Statute by stating that the act of aggression must be committed.

⁴⁰ ICC Assembly of State Parties, Resolution RC/Res.6!, Annex III, para. 7.

Purpose of the concept is to exclude controversial incidents of uses of force from criminal liability, such as minor borderline skirmishes, humanitarian interventions or other such confrontations.⁴¹ Not seldom received the threshold clause critique for its apparent vagueness, all the more because it is utilized in the area of criminal law, which should be distinctive by the highest level of precision.⁴² Though suggestions how the threshold clause should be formulated instead are sparse. General satisfaction is in this sense problematic to reach because by precisising the threshold clause, evident crimes of aggression may end up outside the scope of its wording. How should the threshold clause be properly understood will be the duty of the judges to clarify.⁴³

Concerning the *mens rea*, the default rule of Article 30 of the Rome Statute⁴⁴ applies also to the crime of aggression together with Elements 4⁴⁵ and 6⁴⁶ of Article 8 *bis* of the Elements of Crimes.⁴⁷ Accordingly, **intent** is required with regards to: (i) the conduct of an act of aggression described in ad a); (ii) the conduct of actions described in ad b) in the form of *dolus directus* as provided by Article 30 para. 2 lit a); **awareness** is required regarding the circumstances constituting a leadership position described in ad c); **knowledge** is required regarding the circumstances satisfying the requirements for the quality of an act of aggression described in ad d).⁴⁸

The Elements of Crimes provide additionally that “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.”⁴⁹ This should serve as a hindrance to most attempts to claim a mistake of law as a ground for excluding criminal responsibility under Article 32 para. 2 of the Rome Statute. The same principle applies to legal evaluations of the “manifest” nature of the violation of the UN Charter.⁵⁰ Further, because the term “manifest” is an objective qualification, subjective opinions of the victim state bear no relevance.⁵¹

An innovation in the treaty system of the ICC are the “Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression” contained in Annex III of the Kampala Amendments (hereafter also “Understandings”). Until the Review Conference in 2010, such a normative text was unknown for the ICC, natu-

⁴¹ The author is aware of the interrelation between the criminal aspect of aggression and the unresolved issues surrounding the *ius ad bellum*, such as self-defence under Article 51 of the UN Charter (be it preventive, pre-emptive or used to justify the American doctrine of the war on terror, as well as the protection of nationals abroad), humanitarian intervention, approvals of the UN Security Council under Chapter VII of the UN Charter, responsibility to protect or wars of self-determination. It is the opinion of the author, however, that these subjects are beyond the scope of this paper and he will therefore not dedicate himself to further elaborate on them.

⁴² Based on the principle *nullum crimen sine lege certa*.

⁴³ AMBOS, K. Das Verbrechen der Aggression nach Kampala, op. cit., p. 655. SCHMALENBACH, K. Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof, op. cit., p. 748.

⁴⁴ “1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”

⁴⁵ “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.”

⁴⁶ “The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.”

⁴⁷ At first, the SWGCA pursued a special *animus aggressionis* coupled with an aim for a long-term occupation, submission or annexation, but dropped the proposal after not finding sufficient support among states. AMBOS, K. Das Verbrechen der Aggression nach Kampala, op. cit., p. 655.

⁴⁸ SAFFERLING, C. Internationales Strafrecht: Strafanwendungsrecht - Europäisches Strafrecht - Völkerstrafrecht, op. cit., p. 256-257.

⁴⁹ Article 8 *bis*, Introduction, para. 2 of the Elements of Crimes.

⁵⁰ Article 8 *bis*, Introduction, para. 4 of the Elements of Crimes.

⁵¹ Article 8 *bis*, Introduction, para. 3 of the Elements of Crimes.

rally, therefore, questions arose as to their legal relevance. They should presumably serve as an interpretational tool foreseen by Article 32 para. 2 of the Vienna Convention on the Law of Treaties⁵² (hereafter the “VCLT”) and as far as their legal value is concerned, it has been voiced that they are not binding on the judges of the ICC under the given circumstances.⁵³ Their inclusion in the Kampala Amendments was a means to alleviate concerns especially of the permanent members of the UN Security Council.⁵⁴ Particularly the first and third Understanding might prove to be quite problematic when used as an interpretational tool. Since they are relevant in the context of procedural law, we will get back to them in the next section.

2. Procedural law

While the negotiations that accompanied the adoption of substantive law were at least troublesome, meeting expectations of states pertaining to a normative text of procedural law proved to be a true Gordian knot. As noted earlier in this paper, the most debated issue was the involvement of the UN Security Council in the jurisdictional regime of the crime of aggression. In simple words, should the UN Security Council have a monopoly with respect to the initiation aggression proceedings? In this part, the author will pay attention also to the entry into force of the Kampala Amendments, as he considers it a part of procedural law in a wider sense. The key provisions which are examined are Article 15 *bis*, concerning State referrals and *proprio motu* proceedings, Article 15 *ter*, concerning UN Security Council referrals, and Article 121 of the Rome Statute, concerning legal regime of amendments.

Because of the rather complex character of procedural law adopted in Kampala and for the sake of clarity of explanation it needs to be said that it is impossible to interpret the respective articles of the Rome Statute on jurisdictional regimes (Article 15 *bis* and 15 *ter*) and amendments (Article 121) in isolation, as they have to be read in relation to each other in order to properly grasp their (hopefully) true meaning.

As far as the regime of UN Security Council referrals under Article 15 *ter* is concerned, basically the same rules apply as in cases of prosecuting other crimes than the crime of aggression, bearing in mind that the requirements in paragraphs two and three of Article 15 *ter* elucidated below have to be fulfilled. The rest of this section will concentrate on Article 15 *bis*.

The basic principle of Article 15 *bis* found in its first paragraph is that the ICC may exercise jurisdiction in accordance with Article 13 lit. a) and c), which distinguish the subject warranted to start the proceedings.

Second paragraphs of both articles 15 *bis* and 15 *ter* set out a *ratione temporis* jurisdictional limitation by allowing its exercise only with respect to crimes of aggression committed one year after the acceptance of the amendments by thirty States⁵⁵. In addition to this, third paragraphs of both articles further delay the exercise of jurisdiction until a decision of the State Parties is taken no sooner than 1st of January 2017.⁵⁶ Attention should be paid to the word

⁵² Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html>.

⁵³ HELLER, K. J. Are the Aggression “Understandings” Valid?, *Opinio Juris*, ISSN 2326-0386, <http://opiniojuris.org/2010/06/16/are-the-aggression-understandings-valid/>. LIPOVSKÝ, M. The Understandings to the Rome Statutes Crime of Aggression in Czech yearbook of public & private international law: Česká ročenka mezinárodního práva veřejného a soukromého, vol. 6, Prague 2015, Praha: Czech Society of International Law, 2011-. ISBN 978-80-87488-23-2. ISSN 1805-0565, p. 97-101.

⁵⁴ HEINSCH, R. The Crime of Aggression After Kampala: Success or Burden for the Future?, *op. cit.*, p. 730.

⁵⁵ Palestine was the 30th State Party to ratify or accept the Kampala Amendments on 26th of June 2016. ICC Press Release: State of Palestine becomes the thirtieth State to ratify the Kampala amendments on the crime of aggression. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1225>.

⁵⁶ This requirement was fulfilled during the Sixteenth session of the Assembly of State Parties in December 2017, to which further attention is paid below.

“committed” used in the second paragraphs and its absence in the third paragraphs. The impact of this observation can be best illustrated by a practical example and by disregarding for a moment that, at present, both requirements have been met. State Party A (aggressor) attacked State Party B (victim) after a year had passed since the 30 ratifications or acceptances were made, both State Parties accepted the amendments but the ASP did not make an activation decision yet. The crime of aggression committed by State Party A is prosecutable, because it took place one year after 30 ratifications/acceptances were made, however the ICC cannot exercise its jurisdiction because it was not activated by the ASP. As soon as the ASP makes that decision, the prosecution in this case is unlocked. Let us say, under the same situation, that we switch the order in which the relevant events took place – the ASP activation decision happened sooner than the passage of one year after 30 ratifications/acceptances were made. This would mean that the ICC could at that point prosecute crimes of aggression, but only those committed one year after 30 ratifications/acceptances were made.

Applying this logic, the matter would be rather clear if it weren't for Understandings one and three in Annex III of the Kampala Amendments which, contrary to serving as an interpretational instrument, make the law only more confusing. The problem which the author identifies by a purely textual interpretation of the first and third Understanding is that they use the word “committed” in relation to both requirements for a possible crime of aggression prosecution. It implies a possibility of prosecuting a crime of aggression committed not only one year after 30 ratifications/acceptances, but also a crime of aggression committed after the ASP makes the activation decision, whichever is later. This would change particularly the second situation of the aforesaid example – the ICC could prosecute crimes of aggression committed in the period after the ASP activation decision but before one year after 30 ratifications/acceptances were made. For the proponents of capturing as many crimes of aggression as possible under the jurisdiction of the ICC it would not be detrimental, because a larger number of persons responsible for crimes of aggression could be brought to justice. A question, however, arises: Have the Understandings the legal power to prevail over a rather clear but distinct meaning of the normative text of the Kampala Amendments? The answer will be relevant only on a doctrinal and academic level, because we know at the present time in what order the requirements for the exercise of jurisdiction took place.⁵⁷

The fourth paragraph of Article 15 *bis* will be dealt with in Part IV of this paper by cause of subject matter connection.

Law on one of the most sensitive points of the Kampala Review Conference, the involvement of the UN Security Council in prosecuting a crime of aggression after a State Party referral or *proprio motu*, is found in paragraphs 6 to 8 of Article 15 *bis*. According to them, the Prosecutor may proceed with an investigation of a crime of aggression when there is a reasonable basis and after ascertaining that the UN Security Council has made a determination of an act of aggression. If there is no such determination within six months after the date of notification to the UN Security Council, the Prosecutor needs an authorization by the Pre-Trial Division⁵⁸ to commence investigation, respecting Article 15 and on condition the UN Security Council has not deferred investigation or prosecution under Article 16 (temporary Red-light-Option).⁵⁹ It is fairly surprising that states could reach consensus on such provisions, since they warrant the ICC to exercise jurisdiction even in those cases when the UN Security Coun-

⁵⁷ What are their procedural effects on the exercise of jurisdiction of the ICC is discussed in Part IV. For further issues related to the Understandings see also LIPOVSKÝ, M. The Understandings to the Rome Statute Crime of Aggression, op. cit., p. 94-97.

⁵⁸ Distinguish Pre-Trial Chamber [Article 39 para. 2 lit. b) (iii) of the Rome Statute] and Pre-Trial Division (Article 39 para. 1 second sentence of the Rome Statute)].

⁵⁹ SCHMALENBACH, K. Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof, op. cit., p. 751.

cil remains passive. That, together with the language of Article 15 *bis* para. 9,⁶⁰ grants the ICC a considerable amount of political independence which only boosts the potential of the ICC in delivering justice.

The selection of an entry into force mechanism for the Kampala Amendments was not a straightforward decision at all, in spite of a quite clear reading of the former Article 5 para. 2 of the Rome Statute. There, reference was made to Article 121 and 123 of the Rome Statute as embodiments of the rules that should regulate the adoption of a provision concerning the crime of aggression. From these two articles, Article 121 is the relevant one in the discussed matter. The question, however, was, which paragraph of this article should be chosen, paragraph 4⁶¹ or paragraph 5?⁶² After lengthy discussions over issues of very technical nature⁶³ it was Article 121 para. 5 of the Rome Statute which prevailed.⁶⁴ The Rome Statute thus distinguishes State Parties that accepted the amendment and those which did not accept the amendment. In relation to the latter, the ICC “shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.”⁶⁵ In other words, the ICC cannot exercise jurisdiction over a national of an aggressor-state, if that state did not accept the amendments, even if that national would act on the territory of a State Party which accepted the amendments, which is not in conformity with the territoriality principle enshrined in Article 12 para. 2 lit. a).

This situation leads to the emergence of two factual observations. First, two separate jurisdictional regimes were established, one exclusive for the crime of aggression, the other “ordinary” for the rest of the crimes under ICC jurisdiction, to which of course the territoriality principle applies. Second, it puts non-State Parties into a disadvantaged position compared to the State Parties not accepting the amendments, because they are not offered an option not to accept the amendment. This might have led to a possible scenario where the ICC could exercise jurisdiction over a crime of aggression of a national of a non-State Party when committed on a territory of a State Party which accepted the amendment, because Article 121 para. 5 does not apply to non-State Parties. The potential discriminating position was prevented by paragraph 5 of Article 15 *bis*, which excludes any possible crime of aggression prosecution of a non-State Party national.⁶⁶

As a final word which must be added at the end of this part, the author recognizes the interrelation of Article 121 para. 5 and paragraph 4 of Article 15 *bis*, nevertheless he provides an analysis of the former in this part for the reader to better understand the argument surrounding the aforementioned provisions, contained in Part IV.

⁶⁰ “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.”

⁶¹ An amendment enters into force for all State Parties but requires ratification by a 7/8 majority.

⁶² Paragraph 5 is a *lex specialis* provision to paragraph 4 (“Except as provided in paragraph 5, (...)” according to paragraph 4) and an amendment in this case enters into force only for those State Parties which have accepted it.

⁶³ For details see SWGCA Report 2009, para. 6-11, ICC-ASP/7/20/Add.1. SWGCA Non-paper by the Chairman on the conditions for the exercise of jurisdiction, 28th May 2009. Exhaustively also in CORACINI, A. R. The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some, Göttingen Journal of International Law 2 (2010) 2, ISSN 1868-1581, 745-789, p. 763-771.

⁶⁴ ICC Assembly of State Parties, Resolution RC/Res.6!, Preamble, para. 1.

⁶⁵ Article 121 para. 5, second sentence.

⁶⁶ There is an opinion questioning this legal position of non-State Parties with which the author agrees, particularly in the case where a non-State Party is the aggressor and a State Party which ratified the amendments is the victim. The argument is that why should a non-State Party national be in this case excluded from the ICC jurisdiction if in relation to all other crimes under the same circumstances, prosecution is possible. At the same time, it is important to keep in mind that prosecutions of non-State Party nationals are possible after a UN Security Council referral under Article 15 *ter*.

IV. THE FINAL DECISION ON THE ACTIVATION OF JURISDICTION OVER THE CRIME OF AGGRESSION

While it is undeniable that a major step has been made in Kampala in pursuit of completing the missing parts of the Rome Statute regarding the legal rules about what the crime of aggression is and how the ICC should exercise jurisdiction over it, there still remained primarily two unresolved matters to be dealt with by the ASP. One, make the activation decision foreseen by paragraphs 3 of Article 15 *bis* and 15 *ter*, two, clarify an interpretational conflict between two positions maintained by two groups of State Parties related to paragraph 4 of Article 15 *bis* (also called the opt-out clause).⁶⁷ This paragraph establishes the so called “softly consent-based” regime which allows State Parties to opt out from the reach of the ICC jurisdiction regarding the crime of aggression, or to be more precise, block the exercise of jurisdiction of the ICC over crimes of aggression committed by nationals or on the territory of the opting-out state.⁶⁸

For years after agreeing on the amendments, a handful of non-ratifying states (hereafter also the “opt-in camp”)⁶⁹ claimed that there is no possibility that the ICC jurisdiction over the crime of aggression could stretch to their nationals or their territory, even if they do not lodge a declaration under the opt-out clause, arguing by one of the cornerstones of the law of treaties *pacta tertiis nec nocent nec prosunt*.⁷⁰

On the other hand, different group of states (hereafter also the “opt-out camp”) made the argument that a State Party which has not ratified the amendments should be treated the same way as a State Party that has, with respect to the exercise of the ICC jurisdiction, if it is alleged that nationals of a State Party committed the crime of aggression on the territory of a State Party that has ratified. The justification for this position rested upon the non-applicability of Article 121 para. 5 to the aggression amendments, because State Parties had accepted the jurisdiction of ICC over the crime of aggression, since it was included in Article 5 para. 1 of the Rome Statute from the very beginning. Hence, only by expressly opting out from the ICC jurisdiction could a State Party which did not ratify or accept the amendments avoid potential crime of aggression proceedings against its nationals. It was crucial for these states to clarify the interpretation of the subject provisions before any decision on jurisdiction activation could take place.⁷¹ The roots of the problem can be found in the Kampala Review Conference itself, when states decided to adopt a text of the amendment which, as has been shown by later practice, clearly did not reflect their sincere belief.

During the facilitation process leading up to the sixteenth session of the ASP in New York all the way to its final stages, confronting positions were maintained by both groups of states concerning the interpretation of the opt-out regime.⁷² The situation suggested that consensus would not be reached. The final proposal was put on the table by the United Kingdom repre-

⁶⁷ “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.”

⁶⁸ The opt-out clause is one of the reasons why the Kampala Amendments are also called Kampala Compromise, since some states conditioned their acceptance of the amendment upon inclusion of the opt-out clause in the amendment. On potential legal outliers which the Kampala Amendments allow, see remarks made by Professor Heller. HELLER, K. J. The Sadly Neutered Crime of Aggression, *Opinio Juris*, 13th June 2010, ISSN 2326-0386 <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/>.

⁶⁹ United Kingdom, France, Japan, Canada, Norway, Colombia and others.

⁷⁰ Article 34 of the VCLT, coupled with Article 40 para. 4 VCLT and Article 121 para. 5 of the Rome Statute.

⁷¹ Together with agreeing on the position of new State Parties to the Rome Statute, namely whether by ratifying the Statute they are automatically deemed to ratify or accept the aggression amendments, although Article 40 para. 5 of the VCLT gives a clear answer. ICC Assembly of State Parties, Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression, Sixteenth session New York, 4-14 December 2017, ICC-ASP/16/24, p. 15f, <https://www.legal-tools.org/doc/d22720/pdf/>.

⁷² *Ibid.* p. 5-7.

senting the opt-in camp, gesturing a “take this or go home with nothing” offer.⁷³ As it turned out, the will of states to finally achieve a complete framework of liability for the crime of aggression overcame the divergences between opinions and the activation decision was made by consensus on 14th of December 2017.⁷⁴

Looking closer at the wording of the activation decision, particularly its operative paragraph 2,⁷⁵ it might be considered as a win for the opt-in camp. The outcome is that the Kampala Amendments are not binding for State Parties which did not ratify them even without an opt-out declaration.⁷⁶ This ultimately places non-ratifying State Parties in the position of a non-State Party, by which paragraph 4 of Article 15 *bis* becomes obsolete.

The legal basis for operative paragraph 2 of the activation decision is, however, rather shaky. We must remind ourselves of the legal character of the Kampala Amendments and the activation decision. The former is a part of the Rome Statute, whereas the latter is only a procedural act foreseen by the normative text of the Rome Statute. Utilizing once again a textual interpretation of operative paragraph 2 of the activation decision and Article 15 *bis* para. 4, the former runs in contradiction to the latter, without explicitly revising it, because the activation decision is not an amendment to the Rome Statute as it was not adopted in virtue of Article 121 of the Rome Statute. In the author’s view, it could possibly be understood as a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” under Article 31 para. 3 lit. a) of the VCLT. The academia adds to this provision that an agreement as to the interpretation of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.⁷⁷ Even if we accept this view, can a tool of interpretation run *contra legem*? From the standpoint of positive law, such an approach is unacceptable.⁷⁸

A hint that State Parties themselves were aware of the inconsistency of operative paragraph 2 of the activation decision with the Rome Statute is operative paragraph 3 of the activation decision.⁷⁹ It emphasizes the functional independence of the judges of the ICC in their decision-making activity. At the end of the day, precisely the judges are the ones who will be called in each case to pronounce what the law is. Thus, we will be wiser after first proceedings on a crime of aggression take place.

Leaving the aforesaid issue for the future to resolve, the prime objective of the sixteenth session of the ASP was to activate the jurisdiction of the ICC with respect to the crime of aggression, successfully doing so by operative paragraph 1 of the activation decision. A symbol-

⁷³ FERENCZ, D. Aggression Is No Longer a Crime in Limbo, FICHL Policy Brief Series No. 88 (2018), TOAEP, ISBN 978-82-8348-075-7, p. 3.

⁷⁴ The ICC Assembly of State Parties, Draft resolution proposed by the Vice-Presidents of the Assembly Activation of the jurisdiction of the Court over the crime of aggression, Sixteenth session New York, 4 – 14 December 2017, ICC-ASP/16/L.10, 14 December 2017 (hereafter also the “activation decision”), <http://www.ejiltalk.org/wp-content/uploads/2017/12/ICC-ASP-16-L10-ENG-CoA-resolution-14Dec17-1130.pdf>.

⁷⁵ (note added) “(The ASP) *Confirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;” Ibid.

⁷⁶ Which basically only reiterates Article 121 para. 5 second sentence.

⁷⁷ Draft Articles on the Law of Treaties with commentaries 1966, Yearbook of the International Law Commission 1966, vol. II, p.221, http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf.

⁷⁸ Very interesting and valid points are made regarding the issue by Professor Heller, reaching the conclusion that regardless of which path of possible interpretation is chosen, the position of the opt-in camp prevails. HELLER, K. J. Activating the Crime of Aggression: A Response to Stürchler, 27th January 2018, *Opinio Juris*, ISSN 2326-0386, <http://opiniojuris.org/2018/01/27/activating-crime-aggression-response-sturchler/>.

⁷⁹ (note added) “(The ASP) *Reaffirms* paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court;”

ic date, 17th of July 2018, was chosen as the day when first proceedings concerning a crime of aggression can be initiated, precisely 20 years after the adoption of the Rome Statute.

V. CONCLUSION

As has been shown, international community struggled greatly in its venture throughout history to criminalize aggression. Only after the butchery of the Second World War were the responsible Nazi and Japanese protagonists brought to justice for what was then known as crimes against peace. Judgments of Nuremberg and Tokyo set a precedent in international criminal law after which a general conviction formed among nations that aggression cannot be left unpunished not only on a state level, but also on an individual level. While the “Global Stage” at the General Assembly of the United Nations in 1974 managed to adopt a soft-law Resolution 3314 (XXIX) providing an auxiliary definition primarily for the UN Security Council to determine the existence of acts of aggression, it was not until a few decades later that aggression entered the field of individual criminal responsibility.

By virtue of Article 5 para. 1 of the Rome Statute, the Rome Conference in 1998 remarkably vested to the ICC jurisdiction over crimes of aggression, adjourned however the adoption of its definition and conditions of exercise of jurisdiction over it for a later time. This was successfully done in 2010 in Kampala, Uganda, with the result of a definition contained in Article 8 *bis* of the Rome Statute, noticeably inspired by the UN GA Resolution 3314 and following the Nuremberg legacy. One potential structural flaw in substantive law is the questionable meaning of the “committed” requirement provided by Element 3 of Article 8 *bis* of the Elements of Crimes with respect to the forms of action enumerated in Article 8 *bis* para. 1 of the Rome Statute along with the responsibility for an attempt (Article 25 para. 3 lit f). Otherwise, the provision might be evaluated as relatively sustainable. A similar conclusion cannot be made after a close analysis of the Kampala contribution regarding procedural law of the crime of aggression. From the two adopted provisions, Article 15 *bis* and Article 15 *ter*, it is the former which causes considerable interpretational difficulty when read in connection with Article 121 para. 5 of the Rome Statute. The text of the amendment, majority opinion and the present author suggest that it is applicable to the Kampala Amendments. Be as it may, the Kampala Amendments further delayed a potential prosecution for crimes of aggression to a date not sooner than 1st January 2017.

The historic activation decision envisaged in the Kampala Amendments was made by the Assembly of State Parties in New York on 14th December 2017 by consensus. Even though its primary task was to unlock the ability of the ICC to prosecute crimes of aggression, it produced a verdict to a conflict between the opt-in and opt-out camps of State Parties which had formed after Kampala Conference, in favour of the former and, at the same time, running contrary to the normative text of the Rome Statute. The author believes that judges should not rely on operative paragraph 2 of the activation decision and should follow a strict textual interpretation of the Rome Statute. As a result, the law adopted in Kampala should be applied in accordance with Article 121 of the Rome Statute, just as the amendment itself declares. Thus, crimes of aggression committed by the nationals or on the territory of a State Party which did not ratify the amendments should remain beyond the reach of the ICC jurisdiction, even without an opt-out declaration. This, essentially, leads to the same outcome as was deliberated by operative paragraph 2 of the activation decision, but applies, in the authors view, the appropriate legal reasoning.

How the judges decide to approach the issue, mainly the conflicting paragraph 4 of Article 15 *bis* and the second sentence of Article 121 of the Rome Statute, remains to be seen. Because we cannot rule out that they prioritize the former (e.g. by *lex posterior* argument), the author would strongly recommend the State Parties which did not ratify the Kampala

Amendments to submit an opt-out declaration in any case. By doing so, they would be guaranteed to avoid prosecutions of their nationals before the ICC in every possible scenario, just as a non-State Party. State Parties should, nevertheless, take a lesson out of the Kampala Amendments and the activation decision. Specifically, they ought not to agree with law which does not correspond their genuine conviction and afterwards try to cure such flaw by legal acts of procedural character, like the activation decision, with debateable and confusing implications on the treaty system as such.

KLÚČOVÉ SLOVÁ

Medzinárodné trestné právo, zločin agresie, individuálna trestná zodpovednosť, Dodatky z Kampaly, aktivačné rozhodnutie, výklad medzinárodných zmlúv

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