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Editorial

After our last issue “Strategies for Solving Global Crises - The Financial Crisis and Beyond” in March we are delighted to present this issue to our esteemed readers.

Like every student activity, GoJIL also goes through a process of constant rejuvenation. With this characteristic feature it is necessary to maintain the essence of experience and to rethink and further the underlying idea. Having this in mind, we would like to introduce our new section, “GoJIL-Focus”. In GoJIL-Focus we shall put complex questions or events that are of vital importance to international law into perspective by facilitating a comprehensive assessment through the eyes of a variety of authors. We are very pleased to begin this new feature with an exceptional highlight – nothing less than the first Review on the ICC-Review Conference in Kampala, Uganda.

The Conference in Kampala focused mainly on the crime of aggression. We do not assume that the never-ending discussion on this topic can be brought to an end by the outcome documents of Kampala and therefore, GoJIL is pleased to continue this debate in the new light of the results reached in Kampala.

Vice-President of the ICC, Judge Hans-Peter Kaul opens the floor with an introductory comment. He is convinced that the judges of the ICC will be able to assess whether a crime against peace has been committed or not, “just as the judges at Nuremberg have been in 1946”.

The article by Professor Roger S. Clark centers on the other amendments proposed to the Rome Statute, apart from the definition of the crime of aggression: the deletion of Article 124 and the incorporation of provisions on weapons banned in an international armed conflict into the chapter of the Statute dealing with non-international armed conflicts.

While Dr. Robert Heinsch focuses on the definition of the crime of aggression, Ms. Astrid Reisinger Coracini concentrates on the exercise of the Court’s jurisdiction thereon.

Ms. Sabine Klein assesses the strategies of the Ugandan government to deal with the country's past, and alludes to the ICC's influence therein and its concept of positive complementarity.

Professor Morten Bergsmo, Professor Olympia Bekou and Ms. Annika Jones discuss the relevance of the ICC Legal Tools Project, a unique collection of legal databases, digests and applications designed to facilitate the application of international criminal law, to the discussions that took place in Kampala.

Judicial mechanisms are not primarily known for being the fastest. It is therefore a pleasant surprise that the International Court of Justice delivered its much anticipated "Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence of Kosovo", only half a year after the oral session was completed. The public interest in this matter was so immense that the Court's official Website could not handle the amount of traffic on the day the Advisory Opinion was delivered and had to be taken down. To cater to this interest, we decided to partly dedicate this issue to the Advisory Opinion: We are proud to be able to present one case note on this Advisory Opinion by Dr. Mindia Vashakmadze and Mr. Matthias Lippold. This issue also contains an article by Ms. Ioana Cismas, which assesses the assumption of whether the international community missed a rare opportunity to take clear-cut stance on remedial secession.

Focusing on a different field of international law, Professor Stephan Hobe and Mr. Jörn Griebel, in their article, examine recent examples of protectionist measures and discuss to what extent such measures may be justified by rules stemming from the WTO legal regime or international investment law in general.

Ms. Johanna Fournier's article analyses the legal requirements of reservations in the Vienna Convention for the Law of Treaties and examples of reservations to Human Rights Treaties. The author demonstrates the importance of reservations for the aim of universally applicable human rights, and suggests a mechanism with which the advantages of reservations for this aim can be assured.

The article by Mr. Charles Riziki Majinge shows the development of peace-keeping in Africa over the last few decades. It points out that instead of the United Nations, it is the African Union which covers most of the operations.

Dr. Bernhard Kuschnik examines how the term *humanity* in „crimes against humanity“ should be construed and how its notion influences the normative interpretation of „other inhumane acts“.

With a focus on the Russian Federation, Professor Bill Bowring examines the adoption by the Council of Europe of Protocol No.14 to the European Convention on Human Rights, and its long-delayed entry into force.

Lastly, a note on the 2010 GoJIL-Conference “Resources of Conflict – Conflict over Resources”. We are proud to announce that the second Keynote-Speech will be delivered by Professor Marie-Claire Cordonier Segger, Director of the Centre for International Sustainable Development Law (CISDL) in Montreal, Canada; the first, as previously announced, will be delivered by Professor Bruno Simma, Judge of the ICJ. The response to our Conference’s Call-for-Papers was overwhelming and we are pleased to have some very distinguished scholars from all around the world present at the Conference and to publish their papers in a special issue in 2011. The Conference will take place from 7 to 9 October 2010; interested scholars and students are invited to attend the conference in the audience and can register on our website until 15 September 2010.

The Editors

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New Protectionism – How Binding are International Economic Legal Obligations During a Global Economic Crisis?

Stephan Hobe & Jörn Griebel*

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Abstract

The global financial crisis has not only instigated states to enact a wide range of protectionist measures, by which they seek to protect their economic interests, but it also forms the background against which possible justifications regarding protectionist measures have to be discussed and measured. The present article examines recent examples of protectionist measures and discusses, to what extent such measures may be justified by rules stemming from the WTO legal regime or international investment law in general. The authors focus on the concept of “economic necessity”, which is enshrined in Art. 25 of the ILC Articles on State Responsibility and which has taken on even greater importance due to the Argentina investment law cases. They furthermore explore, whether this concept has been recognized by the WTO legal regime and/or bilateral investment treaties (BITs) and what criteria would have to be met so that a state could successfully rely on necessity to justify its actions in times of an economic crisis.

A. Introduction

The current financial crisis has instigated national programs for the promotion of national economies to an extent previously unknown. Almost no state could resist the temptation of creating such programs and intervening in the economic process. An environmental bonus for buying new cars and other subsidies as well as the creation of barriers to trade or subsidies on exports are only some of the many different protectionist measures that governments carried out. The same is true for many state measures in the banking industry.

It is well known that the history of international economic relations has witnessed major and minor crises. The worldwide economic crisis of 1929-1933 with its borderless protectionist measures as well as the history of countless uncompensated expropriations of foreign investment during the 20th century in particular have, however, contributed to the creation of international rules in the areas of trade and the protection of foreign investment. These rules are of a public international law character, and are found within the WTO System and almost 2700 bilateral investment treaties

(BITs)¹. They limit a government's freedom to enact protectionist measures. It is of paramount interest to observe to what degree states in crisis situations demonstrate their readiness to overstep existing legal boundaries and violate their public international law obligations. But for a system which – irrespective of existing enforcement mechanisms – heavily relies on the willingness of the states to observe the rules and to obey to the rule of law, voluntary compliance is of key importance. This is particularly true for the current crisis which has been called the most serious crisis of its kind since the Great Depression in the 1930s.² The international economic system can be regarded as a reliable system only if the rules are effectively observed at all times. In the absence of effective observation of the rules in a time of crisis, one may have doubts as to the effectiveness of the whole body of rules within this system.

A crucial question in this context concerns the existence of general exceptions to the existing rules which are meant to justify violations for reason of economic emergency situations. This question will likely be asked very soon in the context of the already existing mechanisms for dispute settlement, especially in the area of investment protection.

In the following, a number of observations will be made, first regarding the diverse protectionist measures which have been in the focus of attention in recent months (B.). Second, this paper will raise the more general question as to whether the particular situation of a global financial crisis may exceptionally give leeway for states to adopt protectionist measures (C.). In this context, we will briefly discuss to what extent the respective systems of rules, WTO law, and international investment law recognize such exceptions. The observations shall finally be summarized. (D.).

B. Areas of New Protectionism – Some Examples

In view of the imminent danger of protectionist measures to combat the current financial crisis, the Australian Minister for Trade, Simon Crean, had stated the following:

¹ UNCTAD, 'Recent Developments in International Investment Agreements (2008 - June 2009)', IIA Monitor No. 3 (2009), available at http://www.unctad.org/en/docs/webdiaeia20098_en.pdf (last visited 14 June 2010).

² See with further references S. Wilske, 'Crisis? What Crisis? – The Development of International Arbitration in Tougher Times', *Contemporary Asia Arbitration Journal* (2009) 187.

“We must re-commit ourselves to renouncing protectionism, be it trade or financial. To ensure we get the biggest bang for our buck, we need to ensure the benefits of our stimulus and rescue packages can flow across borders, so that all can benefit from the action we take individually. G20 leadership by example is essential to create a virtuous cycle in which countries lift each other up rather than pull each other down through protectionism”.³

Not long time ago, on 15 November 2008, at the peak of the financial crisis, the G20 States formulated their intention to follow exactly this approach and to avoid protectionism. Ever since, however, numerous states – among them the majority of the G20 States – have applied protectionist measures.⁴

Governments have undertaken a great variety of legally problematic measures in response to the current crisis. Industrial nations especially have been using subsidies. One very prominent example of an environmental subsidy was the so-called “scrapping bonus” - a governmental measure to serve the purpose of stimulating the sale of automobiles and, thus, protect this industry from extreme disruption. Such measures for the protection of automobile industries have reached a volume of 48 billion US Dollars worldwide.⁵ Because the German scrapping bonus did not differentiate between German and foreign producers, a possible discrimination contrary to international trade and investment laws was not present. The United States has also made such a program, which seems to be consistent with the prohibition of discrimination in international economic law. Other states have followed different roads in this respect.⁶ There has been a report that Japan, due to required bureaucratic hurdles, effectually excluded foreign

³ S. Crean, ‘Protectionism and the Global Economic Crisis – the Role of Trade in the Response’, in R. Baldwin & S. Evenett (eds), *The Collapse of the Global Trade, Murky Protectionism and the Crisis: Recommendations for the G20* (2009), available at http://www.voxeu.org/reports/Murky_Protectionism.pdf (last visited 14 June 2010), 13-14.

⁴ E. Gamberoni & R. Newfarmer, ‘Trade Protection: Incipient but Worrisome Trends’, in R. Baldwin & S. Evenett (eds), *The Collapse of the Global Trade, Murky Protectionism and the Crisis: Recommendations for the G20* (2009), 49.

⁵ *Id.*, 50.

⁶ See e.g. R. Baldwin & S. Evenett, ‘Introduction and Recommendation for the G20’, in R. Baldwin & S. Evenett (eds), *The Collapse of the Global Trade, Murky Protectionism and the Crisis: Recommendations for the G20* (2009), 50.

producers from the privileges of such a bonus. In Korea, it is not the rules for the scrapping bonus which excludes foreign producers, but rather non-tariff trade barriers which result in only a limited number of foreign cars profiting from the bonus.

While the US “scrapping bonus” system seems unproblematic, another measure taken by the United States has received great international attention. The People’s Republic of China understood the punitive customs of 25 percent on Chinese car wheels as a “serious act of trade protectionism”.⁷ Although there may be no doubt that this measure has a protectionist character, one must take into account that China’s entry into the WTO brought about special rules allowing for an increase of tariffs in case of imports of extremely cheap products endangering a whole branch of an industry.⁸ Arguably, the American measures could be justified by these specific circumstances.

Many other states enacted protectionist measures in response to the current crisis. For example, Russia increased customs duties for used cars, Ecuador increased tariffs for more than 900 types of goods, and Argentina introduced non-automated license procedures concerning imports of parts for cars, televisions, shoes, and other products.⁹ Finally, India enacted an import ban on Chinese toys and China banned imports on Irish pork and various other European products.¹⁰

A third range of problematic measures is contained in packages for the stimulation of the economy which confine the financial support to home producers. As these are often linked to environmental concerns, such measures can in part be designated as “green protectionism”.¹¹ In the United States’ package for the strengthening of the economy, for example, the subsidies for the producers of specific progressive batteries would be provided under the sole condition that these producers were in the United States.

Finally, one could mention export subsidies. For example, two of the G20 States are considered to subsidize the export of their agriculture

⁷ See *Frankfurter Allgemeine Zeitung* of 15 September 2009.

⁸ See the agreement on the entry of the Peoples Republic of China into the WTO.

⁹ Baldwin & Evenett, *supra* note 6, 4.

¹⁰ For example: for Belgian chocolate, Italian Brandy, Dutch eggs or Spanish milk products, see Baldwin & Evenett, *supra* note 6, 4.

¹¹ S. Evenett & J. Whalley, ‘Resist Green Protectionism or Pay the Price at Copenhagen’, in R. Baldwin & S. Evenett (eds), *The Collapse of the Global Trade, Murky Protectionism and the Crisis: Recommendations for the G20* (2009), 93-97.

products when these products enter the world market. Measures in the area of procurement and, of course, the bailouts for banks¹² complete the picture. How is it possible that some banks (for example Fannie Mae and Freddie Mac) were rescued while others (Lehman Brothers) were not? Is this discriminatory to foreign shareholders of the Lehman Brothers?

Accordingly, one can state the following: The various measures show that the special situation of the economic crisis brings about state measures which may not be in conformity with international obligations. The World Bank has identified at least 74 problematic measures in the area of trade. Among the states applying these measures are 17 of the G20 States.¹³ This can be seen as a relatively clear tendency for states, in times of crisis, to think first about serving their own economic interests, irrespective of possible prohibitions under international trade or investment law. It recalls the old but crucial observation that politicians' voters sit in their own countries, not abroad. While it may go too far to say that the crisis brought about a change from a system of free market to a system of managed economy,¹⁴ one can well argue that the demonstrated degree of market intervention, much of which was motivated by protectionist intentions, was quite remarkable. Such findings may, however, be premature should international law regard such "emergency measures" as justified by reference to a specific circumstance precluding wrongfulness, namely "necessity".

C. Necessity as a Justification to Violations of International Economic Law

Within the scope of this article, it is clearly impossible to analyze each of these measures against the background of international trade law or international investment law.¹⁵ Some may even have implications within

¹² See Chapters 16 and 17 in R. Baldwin & S. Evenett (eds), *The Collapse of the Global Trade, Murky Protectionism and the Crisis: Recommendations for the G20* (2009).

¹³ Baldwin & Evenett, *supra* note 6, 4.

¹⁴ J. Werner, 'Revisiting the Necessity Concept', 10 *The Journal of World Trade and Investment* (2009), 551.

¹⁵ For a more detailed analysis of the possibly violated standards in international investment law, see A. van Aaken & J. Kurtz, 'The Global Financial Crisis: Will State Emergency Measures Trigger International Investment Dispute', 3 *Columbia FDI Perspectives* (2009) 3; see also Werner, *supra* note 14, 552.

both fields, such as in the case of a branch office established abroad in order to facilitate or coordinate the import of certain goods. Trade measures affecting these goods would automatically have an impact on the investment of the branch office, too. Furthermore, it would be difficult to prove that all of the measures violate international agreements. The measures described above are not *ipso facto* contrary to international law. Indeed, international economic law permits exceptions from the duty to observe the rules in fields such as health protection or protection of the environment,¹⁶ and it might be difficult to show in specific cases that relying on these exceptions is unjustified.

Leaving such specific questions aside, each of the cases raises the question of whether international economic law recognizes that, in cases of economic emergency, violations of the rules may be justified. If that question is answered in the affirmative, the next issue is whether all of the various protectionist state measures taken for reason of the severe global economic crisis can be regarded as justified. This question must be addressed separately regarding the two fields of trade and investment law.

I. Necessity Within the System of WTO

The GATT¹⁷ has a rather extensive system of exceptions from the prohibition of trade restricting measures.¹⁸ Interestingly enough, however, it does not contain provisions regarding “economic necessity”. The GATT provides for “Emergency Action on Imports of Particular Products” (Art. XIX), “General Exceptions” (Art. XX) which mostly concern measures in protection of human life, health, and environment, and “Security Exceptions” (Art. XXI). If one regarded the crisis as an “emergency” one might arguably consider Art. XXI (b) (III) which addresses also the case of an “other emergency in international relations”. However, on reading this in context it becomes clear that a mere economic crisis does not fit to the key notion in this paragraph which is the “essential security interest”.¹⁹

¹⁶ Baldwin & Evenett, *supra* note 6, 4.

¹⁷ For descriptions of the WTO system, see P. van den Bossche, *The Law and Policy of the World Trade Organisation*, 2nd ed. (2008); W. Weiß *et al.* (eds), *Welthandelsrecht*, 2nd ed. (2009).

¹⁸ See in particular van den Bossche, *supra* note 17, 614-683.

¹⁹ In this sense, see H.-J. Prieß & G. M. Berrisch, *Handbook on WTO* (2003), 157 as well as M. Hilf & S. Oeter, *WTO Law* (2005), 194-195; see for a general description also Bossche, *supra* note 17, 664-667.

Even if one considered some of the measures in the context of the justifications provided by GATS, no other result would be achieved.²⁰ Here, too, we have a list of comparable exceptions to those of the GATT. And in one of these, Art. XIV GATS, we find opposed to Art. XX GATT that “measures necessary [...] to maintain public order” may also be justified. Even if one does not go into the difficulties of an examination of the “chapeau” of Art. XIV GATS²¹, it would be extremely difficult to find reasons for the assertion that basic values of society and “public order” were in danger when the measures were taken.

Accordingly, the trade rules themselves do not constitute a basis which could justify protectionist measures. If there were a basis for justification, this could thus only be found outside the explicit rules within general international law. However, considering that the WTO system is explicit regarding the set of exception rules and is likewise concerned with determining specifically their content, recourse to rules of customary international law is not convincing. In respect of the regime of exceptions, the WTO system has to be regarded as a self-contained regime which does not allow any additional justification based on customary international law. This understanding is also consistent with the object and purpose of the agreements which were meant to provide a reliable system of trade liberalization even in – and one might even say specifically in cases of – economic crisis. Accordingly, the current economic crisis can not be brought forward in order to justify violations of the WTO agreements.

II. Necessity in International Investment Law

The legal situation of international investment law is in many respects quite different to that in the WTO system.²²

First, contrary to the GATT and GATS the great majority of all bilateral investment treaties (BITs) does not provide for any exceptions to the protection standards. An exception regime is hardly ever found. It is only now that some countries have begun to modify their Model BITs in

²⁰ See in this respect Bossche, *supra* note 17, 652-653.

²¹ Art. XIV provides that a measure “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between two countries where like conditions prevail, or a disguised restriction on trade in services” shall not be subject to a justification.

²² See for a general account of international investment law J. Griebel, *Internationales Investitionsrecht* (2008).

respect of such rules. Often Art. XX GATT and Art. XIV GATS serve as a sample which is sometimes to a greater sometimes to a lesser degree copied.²³ The second difference lies in the fact that some BITs do provide for a kind of necessity defense.²⁴ Still, the exceptional character of such rules must be emphasized, and modern Model BITs are quite restrictive in this respect.²⁵ Third, it is generally recognized that the so called “circumstances precluding wrongfulness”²⁶, justifications under customary international law to which “necessity” forms a part,²⁷ can in principle be relied upon in international investment disputes.²⁸ BITs do not, contrary to the WTO rules, provide for a self-contained regime in this respect.

It is interesting that the two main areas of international economic law concerning trade and investment have developed differently in this respect. It may very well be that today’s international economic law concerning the trade in goods and services has already tried to learn the lessons of the deep economic depression of the years 1929-1933 and that these experiences are reflected in the WTO system. Compared to the area of international trade law, international investment law is at a rather archaic stage with respect to an explicit regime of exceptions. Not even questions of health and environment are generally recognized by way of explicit rules as exceptions from general rules.

The question as to whether a state can rely on necessity in investment disputes has been raised in cases involving Argentina. Here, the tribunals

²³ See in particular Art. 10 of the *Model of Canada* (2004) and Art. 24 of the *Draft Model of Norway* (2007), available at <http://ita.law.uvic.ca/investmenttreaties.htm> (last visited 14 June 2010).

²⁴ See for example Art. XI of the BIT between Argentina and the USA, available at http://www.unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf (last visited 14 June 2010); see A. K. Bjorklund, ‘Economic Security Defenses in International Investment Law’, in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2008-2009* (2009), 479, 492.

²⁵ Of the Model BITs of the USA, Canada, France, Germany, India and Norway none provides for such a clause, see the mentioned BITs available at <http://ita.law.uvic.ca/investmenttreaties.htm> (last visited 14 June 2010).

²⁶ Terminology of the International Law Commission in its Articles on State Responsibility.

²⁷ *Gabčíkovo-Nagymaros Project*, ICJ Reports (1997) 7, 63 para. 102 and Bjorklund, *supra* note 24, 480, with further references to investment cases.

²⁸ See in general R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2008), 168.

were concerned with governmental measures as a reaction to the Argentine Financial Crisis at the beginning of the 21st century. The central point was that the Peso was devalued, leading to considerable losses incurred by various foreign investors.²⁹

If one looks at the Articles on State Responsibility of the International Law Commission,³⁰ Art. 25 of these articles lists the prerequisites of necessity. In principle three rather complex requirements need to be given: According to this rule, a measure must be “the only way for the state to safeguard an essential interest against a grave and imminent peril”. Furthermore, it may not “seriously impair an essential interest of the state or states toward which the obligation exists” and finally, no reliance on necessity is possible if “the state has contributed itself to the situation of necessity”.

In the Argentina investment law cases,³¹ the majority of tribunals as well as literature have already correctly established that Argentina had contributed to the crisis.³² However, contrary to a national economic crisis, it is rather difficult if an international financial crisis occurs to directly attribute some responsibility to a particular state. Even regarding the United States, it would be difficult to argue that they are responsible by reason of the fact that the crisis is seen to have started on United States’ territory. In cases of a common failure of the whole of the international state community, it would be inadequate to blame specific states.

Doubts can furthermore be expressed that one cannot regard the states as acting in order to preserve a predominant interest to protect its citizens from a great danger which was immediately threatening it. It is a matter of fact that the arbitral tribunals involved with the Argentina cases have treated

²⁹ For further explanations see S. Schill, ‘Auf zu Kalypso? Staatsnotstand und Internationales Investitionsschutzrecht’, *SchiedsVZ* (2007) 179.

³⁰ See J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

³¹ See in particular *CMS v. Argentina*, ICSID Case No. ARB/01/8, *Enron v. Argentina*, ICSID Case No. ARB/01/3, *Sempra v. Argentina*, ICSID Case No. ARB/02/16, *LG&E v. Argentina*, ICSID Case No. ARB/02/1, *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9.

³² See in particular *CMS v. Argentina*, *supra* note 31, Award, para. 329; Bjorklund, *supra* note 24, 491.

the criterion of *essential interest against a grave and imminent peril* rather generously.³³

It may thus be crucial to ask the key question whether a measure was “the only means” in order to secure the essential interest against a grave danger. In its commentary, the International Law Commission has indicated under which circumstances it is impossible to speak of the only means.³⁴ This would be the case, “if there are other [otherwise lawful] means available, even if they may be more costly or less convenient.” On the basis of this rigid understanding, a measure applying the law in either a discriminatory or otherwise protectionist way will hardly ever be justified.³⁵ Especially subsidies of highly industrialized countries could also have been executed with a little more financial input and little less effectiveness and would then have been in conformity with international law. Therefore, the criterion of the “only means” is likely to be decisive in all upcoming cases concerning the measures taken during the financial crisis.

Leaving aside for a moment the question whether or not one can apply necessity as a justification, the further question at stake is whether a given case of necessity would also exclude a duty to compensate for losses.³⁶ Art. 27 of the ILC Articles on State Responsibility states in this respect the following: “The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: [...] (b) The question of compensation for any material loss caused by the act in question”.³⁷ With regard to this provision, there is a tendency in investment jurisprudence to hold that there is a duty to compensate even in cases of such an emergency.³⁸ For example, the arbitral tribunal in the claim of *CMS v. Argentina* held that “Article 27 establishes the appropriate rule of

³³ See especially *CMS v. Argentina*, *supra* note 31, Award, paras 319-322.

³⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited 14 June 2010), 83, para. 15.

³⁵ See on this point also Aaken & Kurtz, *supra* note 15.

³⁶ So on this point Bjorklund, *supra* note 24, 500.

³⁷ See for a commentary: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited 14 June 2010), 85.

³⁸ See with further reference Bjorklund, *supra* note 24, 501.

international law on this issue”.³⁹ As a consequence, any invocation of a situation of emergency may justify not honoring certain obligations for a certain period of time. However, after the readjustment of the necessary state of the law, compensation for losses that had happened during this period of time should be possible. It shows that there would be a duty to compensate for damages regardless of whether or not one accepts the justification.

III. Tentative Results

Against this background, one could draw the following conclusions: Even if necessity can in principle be invoked in order to justify violations of international investment law as opposed to WTO law, its field of application, even in economic crisis situations, is rather limited. It is therefore doubtful that, regarding the current economic crisis, necessity could be invoked successfully by any specific state. Even if this were possible, there would still be the duty of compensation under the customary law principle laid down in Art. 27 of the ILC Articles on State Responsibility. Necessity is thus not the easy way out which would open new exceptions to states.

D. Perspectives

The number of different protectionist measures taken by states in response to the current economic crisis is remarkable. This rather short examination has made evident that states are prepared to breach international legal obligations if it is necessary to protect their own interests.

While it has further become clear that the effects of a necessity defense are very limited, one has to point out that there is not yet a reliable precedent concerning situations of global financial and economic crisis which would allow a more thorough examination and assessment of what governments would be allowed to do.

This may well have been one of the reasons why states are currently demonstrating a clear tendency to use protectionist measures. Apart from this, they will have stimulated each other in taking protectionist measures in violation of international law. Accordingly, one can assume that compliance

³⁹ *CMS v. Argentina*, Award, para. 390.

with international economic obligations is not quite on the agenda of states in economic crisis situations.

What one can already see on the horizon are the first claims with an investment law background against government measures in the course of the financial crisis.⁴⁰ The recovery of a bank in Kazakhstan through a Kazakhstani government fund which purchased the 57.1% majority of shares and lowered the percentage owned by the other shareholders has already led to a claim before an international arbitral tribunal.⁴¹ Dutch shareholders have already filed a claim and other claims of Austrian shareholders are expected to follow. Further, it is reported that a Chinese financial services provider is planning a claim against Belgium with respect to a bank's insolvency in the course of the financial crisis.⁴² Along such lines, it would not be surprising if foreign shareholders of the Lehman Brothers would come with claims based on discrimination because the United States government failed to grant support to the Lehman Brothers while at the same time rescuing other banks.

All these claims are likely to give rise to in depth considerations concerning necessity by the arbitral tribunals. This will hopefully lead to jurisprudence which will give directions as to which degree governmental measures are limited by international economic obligations. In this respect, the international economic crisis is not only a big challenge for the international economic and financial order which produced interesting examples of protectionist measures. It is an opportunity for academia and international organizations to suggest how the legal background for government action should be readjusted. In this respect, there can be no doubt that the current financial crisis also has its positive aspects.

⁴⁰ Werner, *supra* note 15, 552.

⁴¹ See report in IA Reporter Vol. 2, no. 8, topic 7.

⁴² See report in IA Reporter Vol. 2, no. 11, topic 3.

Reservations and the Effective Protection of Human Rights

Johanna Fournier*

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Abstract

Already since the first United Nations (UN) human rights treaties have been signed in 1966, it has been contested whether signatory states should be allowed to make reservations to different articles of the treaties. Many argue that reservation undermine the treaties and are not compatible with the universal application of human rights. One might hence ask whether reservations are compatible with human rights at all. Without disagreeing with these demurs, this essay will reverse the question: Is an effective protection of human rights possible without reservations? To answer this question, this essay will outline the current legal and practical framework on making reservations to UN human rights treaties in Part A. and will present a possible modification to this framework. In Part B. it will then demonstrate how reservations can be used to actually advance the effective protection of human rights. By being used as a starting point for the dialogue between the treaty bodies and the signatory state, reservations do not undermine human rights treaties, but support their purpose: the effective protection of human rights.

A. Introduction

“[A] large number of reservations made by a great many States will turn a human rights instrument into a moth-eaten guarantee”.¹ This is indeed true when looking at extensive reservations as for example Saudi-Arabia’s to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)², in which the country states that “[i]n case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention”³. A similar reservation has been made by Mauritania. These far-reaching reservations clearly undermine the object and purpose of a Convention aimed at protecting women from discrimination.

Thus, one might ask whether reservations are compatible at all with the effective protection of human rights. As early as 1949, when the

¹ L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (1995), 3.

² *Convention on the Elimination of all Forms of Discrimination against Women*, 1 March 1980, 1249 U.N.T.S. 13-23 [CEDAW].

³ *CEDAW, Ratification (with reservation) Saudi Arabia*, 7 October 2000, 2121 U.N.T.S. 342.

International Law Commission (ILC) was engaged in the codification of the law of treaties, it struggled with the question of reservations.⁴ Although reservations were later considered a necessary evil, since “human rights treaties will continue to have uncomfortable alliances with reservations”⁵, reservations have been a topic of discussion again since the mid-1990s.⁶ Indeed, Tyagi was right insofar as reservations are still allowed even in the most recent human rights treaties such as the Convention on the Rights of Persons with Disabilities (CRPD)⁷ or the International Convention for the Protection of All Persons from Enforced Disappearance⁸. This is especially noteworthy since a range of other multilateral treaties especially in the field of environmental law, as for example the Vienna Convention for the Protection of the Ozone Layer⁹ or the Convention on Biological Diversity,¹⁰ prohibit any reservations.¹¹

However, the question remains whether this “alliance” between human rights treaties and reservations is actually “uncomfortable”. There is no doubt that reservations to human rights are incompatible with the fundamental notion of human rights as being of universal application to every single human being. The overall aim is thus to reach a status in which there are no reservations to human rights treaties anymore, not because reservations are prohibited, but rather because they are no longer necessary.

Hence, when creating an *effective protection* of these human rights, the question is not whether reservations are incompatible with human rights;

⁴ Jan Klabbers, ‘On Human Rights Treaties, Contractual Conceptions and Reservations’, in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), 149, 149 [Klabbers, Human Rights Treaties].

⁵ Yogesh Tyagi, ‘The Conflict of Law and Policy on Reservations to Human Rights Treaties’, 71 *British Yearbook of International Law* (2000) 1, 181, 256.

⁶ Klabbers, Human Rights Treaties, *supra* note 4, 151.

⁷ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 30 March 2007, Doc. A/61/611.

⁸ *International Convention for the Protection of All Persons from Enforced Disappearance*, 6 February 2007, Doc. A/61/488. C.N.737.2008.TREATIES-12 and C.N.1040.2008.TREATIES-20.

⁹ *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 U.N.T.S. 293.

¹⁰ *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79.

¹¹ Art. 18 Vienna Convention for the Protection of the Ozone Layer; Art. 37 Convention on Biological Diversity; United Nations Environment Programme, *Training Manual on International Environmental Law* (2006), 5.

one should rather ask whether an effective protection of human rights *without* reservations is possible at all.

In order to find a solution to a problem, one has to know what the problem exactly is and how it is defined. Only then a solution can be found. The same is true for human rights violations. The United Nations (UN) human rights treaty bodies need to know what the problem exactly is in order to be able to both exert pressure on the particular states parties and give helpful advice and support to them as they try to eliminate human rights violations in the respective countries. Reservations made by states parties pinpoint these violations of human rights and hence serve as a starting point for the Committees for their constructive dialogue with the states parties. As a result, reservations entail several important procedural elements, such as both the reserving state and the Committees being aware of the specific problematic aspects as well as the constructive dialogue between the state and the Committees.

Yet this approach operates on the premise that a reliable framework for the application of reservations is provided, in order to prevent human rights instruments from being completely undermined by excessive reservations such as Saudi-Arabia's and Mauritania's regarding CEDAW. Extensive and undefined reservations are of no help to the treaty bodies and are incompatible with the object and purpose of a human rights treaty. Thus, it is necessary to have a reliable framework within which reservations to human rights treaties do not undermine the respective treaty but help both the Committees and the states parties to effectively protect human rights.

To elaborate this approach, this paper will focus on the protection of human rights through the treaty bodies of the UN and their periodic review system.

B. How to Treat Reservations

I. Introducing a Reservation

First of all, the question arises what exactly a reservation is, and how it can be introduced into a state party's instrument of ratification.

1. Definition

Section Two of the Vienna Convention on the Law of Treaties (Vienna Convention)¹² is titled “Reservations”; this term is defined by the Vienna Convention itself as “a unilateral statement, [...] made by a state, [...] whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.¹³ This includes namely substantive,¹⁴ procedural,¹⁵ and territorial¹⁶ reservations.¹⁷ Although technically derogations are also included,¹⁸ for example statements limiting the legally binding effect of certain norms in state of emergency, these will be disregarded in this paper.

Entering into a treaty requires consent of the respective state. The scope of all human rights treaties is to implement human rights in domestic laws and practice. A state may support this general aim, but may not be able or willing to adjust every domestic law affected by the treaty. This will especially occur regarding treaties with a very broad scope, as for example the International Covenant on Civil and Political Rights (ICCPR)¹⁹, the International Covenant on Economic, Social, and Cultural Rights (ICESCR)²⁰ or the Convention on the Rights of the Child (CRC)²¹. In making a reservation, the state thus excludes a specific area from the treaties’ scope. Consequently, the reservation is part of the state’s consent; ignoring the reservation would therefore contravene with this consent and

¹² *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 [Vienna Convention].

¹³ Art. 2(1) *lit. d* Vienna Convention.

¹⁴ *E.g.* Monaco regarding Art. 2(1) ICERD; Argentina regarding Art. 21 *lits b–e* CRC.

¹⁵ *E.g.* Austria, France, and Germany regarding Arts 19, 21, 22 in conjunction with Art. 2(1) ICCPR.

¹⁶ *E.g.* Netherlands regarding Art. 8(1) *lit. d* ICESCR.

¹⁷ Dinah Shelton, ‘State Practice on Reservations to Human Rights Treaties’, *Canadian Human Rights Yearbook* (1983) 205, 207.

¹⁸ Christoph Schreuer, ‘Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights’, 9 *Yale Journal of World Public Order* (1982-1983) 1, 113, 114.

¹⁹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 [ICCPR].

²⁰ *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3 [ICESCR].

²¹ *Convention on the Rights of the Child*, 2 September 1990, 1577 U.N.T.S. 3 [CRC].

violate the states' sovereignty, since "a State is free, in virtue of its sovereignty, to formulate such reservation as it thinks fit."²²

2. Prohibition

According to Art. 19 of the Vienna Convention, reservations can be introduced throughout the different stages of entering into a contract, namely ratification, signature, and accession, but not after the state has become an official contracting party. Bahrain acceded to the ICCPR on 20 September 2006, but made its three reservations only on 4 December 2006. Thus, nine states²³ objected to these reservations; every country except Italy based its objections, inter alia, on the lateness of the reservation. Trinidad and Tobago chose another way: on 26 May 1998, it denounced the Optional Protocol to the ICCPR (OP1-ICCPR)²⁴ and immediately afterwards re-accessed to the Protocol²⁵, but making a reservation concerning Art. 1 OP1-ICCPR for the right of appeal for prisoners on death row.²⁶ Although this procedure does not contravene the Vienna Convention or the OP1-ICCPR itself, it provoked two objections²⁷ as well as seven additional communications to the Secretary-General.²⁸ In 2000, Trinidad and Tobago ultimately denounced the OP1-ICCPR.

Art.19 Vienna Convention is formulated with a double negation, so that reservations are generally allowed, unless one of the three enumerated criteria for exclusion is given: the first two exclusions apply when either (a) every reservation is prohibited or (b) only specific reservations are expressly

²² ILC Law of Treaties, Yearbook of the International Law Commission (1962), Vol. II, 27, 65, para. 9; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), Art. 19, para. 9.

²³ Netherlands, Latvia, Portugal, Czech Republic, Estonia, Canada, Australia, Ireland, Italy.

²⁴ *ICCPR Optional Protocol*, 19 December 1966, 999 U.N.T.S. 302.

²⁵ *ICCPR, Accession by Trinidad and Tobago*, 26 May 1998, 1120 U.N.T.S. 488.

²⁶ Glenn McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol', 23 *Human Rights Quarterly* (2001) 3, 769, 771.

²⁷ *ICCPR Optional Protocol, Objection (to the reservation made by Trinidad and Tobago upon accession) Denmark*, 6 August 1999, 2077 U.N.T.S. 300; *ICCPR Optional Protocol, Objection (to the reservation made by Trinidad and Tobago upon accession) Norway*, 6 August 1999, 2077 U.N.T.S. 302.

²⁸ Netherlands (6 August 1999); Germany (13 August 1999); Sweden (17 August 1999); Ireland (23 August 1999); Spain (25 August 1999); France (9 September 1999); Italy (17 September 1999).

allowed by the respective treaty; if neither alternative applies, then a reservation is also illegal if it is (c) “incompatible with the object and purpose of the treaty”. Regarding the UN human rights treaties, Art. 19 *lit. a* Vienna Convention applies to the Optional Protocol to CEDAW (OP-CEDAW)²⁹ as well as to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (OP-CAT)³⁰ which both explicitly prohibit any reservations.³¹ Art. 19 *lit. b* Vienna Convention only applies to the Second Optional Protocol to the ICCPR (OP2-ICCPR)^{32,33}. Some treaties expressly state that reservations have to be compatible with the object and purpose of the treaty; these stipulations are merely a reference to Art. 19 *lit. c* Vienna Convention.

Regarding Art. 19 *lit. c*, the code adopts a finding by the International Court of Justice (ICJ). In this finding, the ICJ gave an advisory opinion about the legality of reservations to the Genocide Convention,³⁴ albeit originally the ICJ envisaged this rule not only to reservations, but also to objections.³⁵ However, it seems impossible to identify a universally valid definition of a treaty’s “object and purpose”. It is only possible to decide whether a specific reservation to a specific treaty is compatible,³⁶ considering the “character of a multilateral convention, its purpose, provisions, mode of preparation and adoption”.³⁷ Art. 31 Vienna Convention provides a list of places, where one might find indications for the object and purpose of a treaty, namely: the text including preamble and appendix; agreements and instruments relating to the conclusion of the

²⁹ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 10 December 1999, 2131 U.N.T.S. 83 [OP-CEDAW].

³⁰ GA Resolution A/RES/57/199, 9 January 2003.

³¹ Art. 17 OP-CEDAW; Art. 30 OP-CAT.

³² *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 15 December 1989, 1642 U.N.T.S. 414 [OP 2-ICCPR].

³³ Art. 2(1) OP2-ICCPR.

³⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, 24.

³⁵ Massimo Coccia, ‘Reservations to Multilateral Treaties on Human Rights’, 15 *California Western International Law Journal* (1985) 1, 1, 30.

³⁶ Ulf Linderfalk, ‘On the Meaning of the “Object and Purpose” Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19’, 72 *Nordic Journal of International Law* (2003) 4, 429, 431.

³⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, *supra* note 34, 22.

treaty;³⁸ as well as subsequent agreements or practice in the application.³⁹ Hence, a comprehensive survey of the whole treaty including relating texts and practices is necessary to determine the treaty's object and purpose. Only with the help of this overall view is it possible to interpret single articles and their respective object and purpose.

Regarding the treaties' text, both the stipulated rights as well as the interplay between these rights have to be taken into account; all of them taken together aim at creating "legally binding standards for human rights".⁴⁰ Identifying an overall object and purpose of a treaty is particularly difficult concerning comprehensive conventions, as for example the ICCPR or the ICESCR.

II. Reacting to a Reservation

The Vienna Convention provides for three ways to react to a reservation: other states parties can either expressly accept a reservation, they can tacitly accept it, or they can object to it. Whereas states parties practically never explicitly accept reservations, they do occasionally object to incompatible reservations.

1. Objections

According to Art. 20(4) Vienna Convention, other states parties can either object to a reservation or accept the reservation expressly, as well as tacitly by not objecting within twelve months. In all cases, the reserving state will become a contracting party unless an objecting state expressly precludes the entry into force of the contract between the objecting and the reserving state itself.⁴¹ However, this case has never occurred until now.

Human rights treaties differ from other multilateral treaties, since they are not reciprocal and do not imply a synallagma of duties between the contracting parties. The duty states parties oblige themselves to fulfill exists in fact not towards the other contracting parties, but towards their own

³⁸ Art. 31(2) Vienna Convention.

³⁹ Art. 31(3) Vienna Convention.

⁴⁰ UN Human Rights Committee (HRC), CCPR General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 6, 4 November 1994, para. 7.

⁴¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ, *supra* note 34, 25 *et seq.*

citizens. By signing a human rights treaty, a state undertakes to implement the respective human rights in its country and simultaneously acknowledges this same promise made by the other signatory states. The difference to other treaties lies in two points: First, the beneficiaries are not the other contracting parties, but each contracting state party's citizens. For example, a state party owes a duty to the children on its territory to actually "recognize that every child has the inherent right to life"⁴²; to the other states parties, however, it owes to fulfil its promise to implement this right. Hence, although a state can only actually fulfil towards its citizens, it owes fulfilment to both the citizens and the other states parties. Second, although all states parties give a legally binding promise to the other contracting parties, these promises are not reciprocal but discrete. This means that fulfilment can be claimed by other states parties, but no state can refuse fulfilment on the grounds that another contracting party has not fulfilled its obligations yet. This discrepancy leads to the fact that states parties do not benefit from other parties' performance or non-performance. As a consequence, they also do not benefit from objecting to reservations.

Additionally, since every state is free to formulate reservations by virtue of their sovereignty, objecting to a reservation can, from a political point of view, also be perceived as an intervention in the respective state's domestic affairs.

Thus, between 1951 and the mid-1980s, the number of objections constantly decreased.⁴³ Since the 1990s, however, this has changed towards an increased trend to objecting to reservations. Especially Western European states are part of this development, although it is noteworthy that regarding ICERD, a number of non-European states also objected to reservations.⁴⁴

2. Motivations

If a country enters a reservation to a specific article of the treaty, this article will not come into force to the extent that it is excluded by the reservation. If, now, another state objects to this reservation, Art. 21(3)

⁴² Art. 6(1) CRC.

⁴³ Coccia, *supra* note 35, 34.

⁴⁴ Anja Seibert-Fohr, 'The Potential of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties', in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), 183, 198 *et seq.*

Vienna Convention rules that “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation”. This leads to the unfortunate effect that, irrespective of whether an objection has been made, the reserving state will not be bound to the contract to the extent of the reservation. Hence, from a legal point of view, an objection to a reservation is superfluous, unless it additionally expressly excludes the treaty’s coming into force between the two respective states.⁴⁵ Consequently, objections are either made or omitted out of political reasons – or often with no specific reason at all.⁴⁶ From a legal point of view, however, objections seem rather irrelevant. France for example declared that Art. 27 ICCPR, which stipulates a minority’s right to practice its own culture, language, and religion, is not applicable as far as the Republic is concerned due to the nation’s laicism. Disregarding the question whether this “declaration” has to be considered as a reservation, Germany did not formally object to the declaration, but only formulated an interpretation of France’s declaration, stressing the “great importance attach[ed] to the rights guaranteed by article 27 [ICCPR]”. This reluctant behaviour, i.e. not formally objecting, can probably be attributed to political reasons: a formal objection would not have triggered any different legal consequence, but it would have had a different political meaning. Thus, the absence of an objection does not imply any indication, neither in favour of compatibility of the reservation with the object and purpose of the treaty, nor against it.⁴⁷ However, an objection to a reservation does serve as an indication for the treaty body, when determining a treaty’s object and purpose.

III. How to Treat Reservations

Objections by states parties only have effect between the objecting and the reserving party and do not affect other states parties. Particularly, an objection on the ground of incompatibility with the object and purpose of a treaty does not put the reserving state in a different position compared to states parties who did not object.⁴⁸ First, this is inconsistent with the importance of the rights protected by human rights treaties. Additionally, it

⁴⁵ Jan Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’, 69 *Nordic Journal of International Law* (2000) 1, 179, 179.

⁴⁶ Coccia, *supra* note 35, 35.

⁴⁷ UN HRC, CCPR General Comment N° 24, *supra* note 40, para. 17.

⁴⁸ Lijnzaad, *supra* note 1, 48.

also runs counter to the Vienna Convention itself, which prohibits reservations incompatible with the object and purpose of the treaty.

1. When Are Incompatible Reservations Void?

Art. 19 Vienna Convention stipulates that '[a] state may, when signing, ratifying, accepting, approving or acceding a treaty, formulate a reservation unless: [...] (c) [...] the reservation is incompatible with the object and purpose of the treaty.' Thus, a reservation incompatible with the object and purpose of the respective treaty is prohibited; the reservation hence does not come into force. Art. 20(4) *lit. a* Vienna Convention ("acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States") does not speak against this either. Whereas Art. 19 Vienna Convention deals with prohibited reservations, Art. 20 Vienna Convention relates only to permitted reservations, i.e. those reservations that do not fall under any provision of Art. 19 Vienna Convention.⁴⁹ Hence, it is not possible to make an incompatible reservation valid by accepting it. Art. 19 *lit. c* has been established in order to prevent states parties from undermining a treaty.⁵⁰ If a state party wishes to formulate reservations incompatible with the very object and purpose, its intention to fulfil the treaty becomes questionable. Allowing this by accepting such a reservation would contravene with the very nature of the treaty on the one hand, as well as Art. 19 *lit. c* on the other.

Objections hence have a declarative character. Still, they are important indicators when it comes to defining a particular treaty's object and purpose. This approach concurs with the one by the ILC's *special rapporteur* on the issue, Alain Pellet, who stated that Art. 21(3) Vienna Convention is not applicable to human rights treaties.⁵¹ This interpretation gives consideration to the fact that human rights treaties do not have a reciprocal character but that the rights and duties stipulated there exist between the states parties on the one hand, as well as their respective people on the other.

The Human Rights Committee follows another path; however, its approach has not found any support by the different states parties. In

⁴⁹ Villiger, *supra* note 22, Art. 20, para. 2.

⁵⁰ Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988), 121.

⁵¹ ILC The Law and Practice relating to Reservations to Treaties, Yearbook of the International Law Commission (1996), Vol. II Part 1, 65, para. 155.

particular the United States, the United Kingdom and France, as well as *special rapporteur* Pellet, have criticized its approach.⁵² In its *General Comment N° 24*, the Human Rights Committee declares itself competent to “determine whether a specific reservation is compatible with the object and purpose of the Covenant”.⁵³ The Human Rights Committee points out that states parties object to reservations out of political, rather than legal, reasons; Cyprus for example objected three times⁵⁴ and every time only to reservations made by Turkey. Yet, the Committee sees it as essential to have a legal inspection of the different reservations and, most importantly, to trigger legal effects with this inspection. Additionally, it argues that this task accompanies the traditional Committees’ work,⁵⁵ as can be seen in various *Lists of Issues*, where the Committee integrates questions about reservations in its work, e.g. regarding Poland,⁵⁶ Egypt,⁵⁷ or the United States.⁵⁸ Hence, the Human Rights Committee legitimises itself not only to examine the reservations regarding their compatibility, but also to nullify incompatible reservations.⁵⁹

However, there is no legal basis for the Committee’s declaration. Human rights treaties are multilateral treaties and therefore are concluded by the states parties among each other for the benefit of citizens and not between one state and the Human Rights Committee. It would have been

⁵² Roslyn Moloney, ‘Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent’, 5 *Melbourne Journal of International Law* (2004) 1, 155, 165.

⁵³ UN HRC, CCPR General Comment N° 24, *supra* note 40, para. 18.

⁵⁴ ICCPR, *Objection (to the reservation made by Turkey upon ratification) Cyprus*, 26 November 2003, 2232 U.N.T.S. 266; ICESCR, *Objection (to the reservation made by Turkey upon ratification) Cyprus*, 26 November 2003, 2232 U.N.T.S. 264; CERD, *Objection (to the reservation made by Turkey upon ratification) Cyprus*, 5 August 2003, 2223 U.N.T.S. 201.

⁵⁵ Elena Annette Baylis, ‘General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties’, 17 *Berkeley Journal of International Law* (1999) 2, 277, 299.

⁵⁶ UN Committee against Torture, List of Issues to Be Considered During the Examination of the Fourth Periodic Report of Poland, UN Doc CAT/C/POL/Q/4/Rev. 1, 26 February 2007, para. 37.

⁵⁷ UN Committee on Migrant Workers (CMW), Consideration of Reports Submitted by States Parties Under Article 73 of the Convention, UN Doc CMW/C/EGY/Q/1, 7 November 2006, para. 7.

⁵⁸ UN CERD, Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth, and Sixth Periodic Reports of the United States of America, UN Doc CERD/C/USA/6, 18 February – 7 March 2008, para. 4.

⁵⁹ UN HRC, CCPR General Comment N° 24, *supra* note 40, para. 18.

possible to allocate adjudicative powers to the Committee in the ICCPR. Yet the Covenant's drafters chose not to do so except in cases where states parties separately agree to such a power, as for example regarding inter-state controversies⁶⁰ or regarding the later introduced possibility of individual complaints.⁶¹ At present, the Committee is merely allowed to "study the reports submitted" as well as to "transmit [...] general comments".⁶² All other international tribunals, e.g. ICJ, Inter-American Court of Human Rights, or European Court of Human Rights (ECtHR), also only have jurisdiction, if the parties have expressly consented to this jurisdiction.⁶³

In its *General Comment N° 24*, the Committee therefore argues from a functional point of view. Although it is in fact unnecessary to legitimise a person or institution to nullify incompatible reservations, since reservations are void by Art. 19 lit. c Vienna Convention, the Committee as well as the other treaty bodies indeed have a very important function. Through both their General Comments on different human rights and their instructive dialogue with the states parties within the scope of the periodic review system, the Committees evolve and define the respective treaties' object and purpose. Their work thus strongly influences the question which reservation is compatible and which is incompatible with the object and purpose of the particular treaty.

2. To what Extent Are Reservations Void?

It remains unclear to what extent incompatible reservations are void. Both the ICJ and the ECtHR apply the so-called "severability-doctrine", according to which incompatible reservations are "severed" from the reserving state's ratification. Thus, the reserving state becomes a state party to the treaty without benefiting from the incompatible reservation.⁶⁴ The ICJ did not consider the issue of severing incompatible reservations directly until today, although on two occasions, Judge Hersch Lauterpacht commented on this topic in his dissenting opinions. In both the *Case of Certain Norwegian Loans* and the *Interhandel Case*, Lauterpacht on the one hand stated that invalid reservations shall be severed from the rest of the instrument of ratification; on the other hand, he limited this rule to those

⁶⁰ ICCPR, 19 December 1966, Art. 41(1), 999 U.N.T.S. 171, 182.

⁶¹ ICCPR *Optional Protocol*, 19 December 1966, Art. 1, 999 U.N.T.S. 302.

⁶² ICCPR, 19 December 1966, Art. 40(4), 999 U.N.T.S. 171, 182.

⁶³ Baylis, *supra* note 55, 296.

⁶⁴ Moloney, *supra* note 52, 160.

reservations that are not essential to the reserving state's consent.⁶⁵ Although Lauterpacht is right in paying regard to the state's consent, he goes too far with this limitation. Applying the rule of good faith, one has to assume that a state ratifying a treaty consents with the treaty's object and purpose; otherwise one would impute the respective state bad faith when ratifying the treaty. Hence, reservations which are essential to the reserving state's consent and at the same time incompatible with the treaty's object and purpose are in fact not worthy of protection: either, the reservation is not essential and can thus be severed; or the reserving state is not in good faith since it ratifies a treaty without the will to actually support its core elements. Limiting the severability-doctrine to inessential reservations is therefore superfluous.

The ECtHR has also dealt with the issue of severing incompatible reservations, on two occasions. First in *Belilos v. Switzerland* and later in *Loizidou v. Turkey* the Court held that the reserving states, i.e. Switzerland and Turkey, are parties of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) without benefiting from their respective incompatible reservations.⁶⁶ The Court did not give any reasons for its decision.

Since severing a reservation infringes the reserving state's consent, it is important not to sever more parts of the reservation than necessary to protect the treaty's object and purpose.

Erasing the entire reservation would violate the state's consent, since this consent did not cover ratifying the treaty without this particular reservation. On the other hand, leaving an incompatible reservation in virtue infringes the object and purpose of the treaty and therewith the human rights of individuals. Hence, in order to find a compromise, one could apply a solution used in German consumer protection law. Regarding illegal clauses in general terms and conditions, a so-called "blue-pencil-test" is applicable, which veers towards the Human Rights Committee's approach of reservations being "specific and transparent".⁶⁷ According to this test, one crosses out – with a blue pencil – exactly and only that part of a reservation

⁶⁵ *Case of Certain Norwegian Loans (France v. Norway)*, Separate Opinion of Judge Sir Hersch Lauterpacht, Judgement, ICJ Reports 1957, 34, 56-57; *Interhandel Case (Switzerland v. United States of America)*, Dissenting Opinion of Sir Hersch Lauterpacht, Judgement, ICJ Reports 1959, 95, 116-117.

⁶⁶ *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132, 23, para. 60; *Loizidou v. Turkey*, ECHR (1995) Series A, No. 310, 27, para. 97.

⁶⁷ UN HRC, CCPR General Comment N° 24, *supra* note 40, para. 19.

that is illegal. The deleted part is then void, whereas the rest of the reservation remains valid, as long as it remains a correct sentence making full sense.⁶⁸ If, however, the remaining part does not constitute a grammatically correct sentence, the whole reservation has to be considered void. Applied to the striking example of the above-mentioned reservation by Saudi-Arabia to CEDAW, the whole reservation is void. If, on the contrary, Saudi-Arabia had phrased its reservation in a more detailed way, naming all the different relevant clauses of CEDAW as well as of its domestic law, only those parts would be null which are incompatible with the object and purpose of CEDAW. Although every reservation to a substantive guarantee implies a violation of human rights, not every reservation is completely incompatible with the object and purpose of a treaty. Hence, this “blue-pencil-test” not only constitutes a compromise between the state’s consent and the protection of human rights; it also induces the reserving states to think about their reservations in a more detailed manner. Since it is to their advantage to formulate very detailed reservations, the states are likely to make use of this technique and with it become more aware of which reservations they really want and need and which reservations might constitute a violation of the object and purpose of the treaty. Evoking this awareness of the different reservations and their particular severity is a first step towards abolishing every single reservation, since awareness of a problem is essential for solving it.

It is however not advisable to carry out a compatibility test prior to the introduction of reservations. This bears the risk of leading to a kind of “horse-trading” over human rights, since the state might use its accession to the treaty as a pressurising medium in order to push through its reservations. However, the Office of the High Commissioner could provide a counsel for the formulation of reservations.

The fact that incompatible reservations to human rights treaties are void results from Art. 19 lit. c Vienna Convention. The blue-pencil-test, however, cannot be found in the Vienna Convention or any other treaty yet. Since the test concerns the execution of Art. 19 lit. c Vienna Convention, rather than its legal effect, it suffices to regulate the test as a mere guideline. It would be appropriate to introduce the blue-pencil-test into the ILC’s guidelines on reservations to human rights treaties. Since 1993, the ILC deals with the issue of reservations to human rights treaties on a regular

⁶⁸ Otto Palandt & Peter Bassenge, *Bürgerliches Gesetzbuch: Kommentar*, 68th ed. (2008), Art. 307, para. 11.

basis. It decided that amending both the Vienna Convention and the different human rights treaties by concluding a new treaty dealing with reservations and objections to human rights treaties would lead to legal uncertainty. Thus, the Commission started to formulate guidelines regarding this issue.⁶⁹ To date, a range of rules have been prepared, but the guidelines are not yet complete.⁷⁰ They particularly do not regulate the question to what extent incompatible reservations shall be void, although they already stipulate that reservations incompatible to the object and purpose of a treaty are prohibited.⁷¹ It is therefore possible to introduce the blue-pencil-test as one of these guidelines.

C. How to Achieve Effective Protection of Human Rights

I. Admitting Reservations...

Admittedly, it is quite idealistic to think that advisedly chosen reservations in combination with constant reminding by the different Committees lead to full implementation of human rights and thus to a status where reservations are not necessary anymore. At the same time, however, it is also more realistic than protecting human rights by blindly prohibiting any reservation. First of all, with environmental multilateral treaties in mind, which mostly prohibit any reservations, it becomes clear that a range of states still do not consider themselves thoroughly bound to the respective treaties. Some states make declarations upon accession which in fact amount to reservations. Chile for example made a declaration to the Convention on Biological Diversity, in which it excluded pine-trees from the scope of the Convention. The Sudan went even further by declaring that “no state is responsible for acts that take place outside its control even if they fall within its judicial jurisdiction and may cause damage to the environment of other states or of areas beyond the limits of national judicial jurisdiction.” A nominal prohibition of reservations is thus evaded by simply allowing de-facto reservations as “declarations”. Furthermore, a human rights treaty

⁶⁹ ILC The Law and Practice relating to Reservations to Treaties, Yearbook of the International Law Commission (1995), Vol. I, 171, para. 42.

⁷⁰ Villiger, *supra* note 22, Articles 19-23: Subsequent Developments, para. 11, 326.

⁷¹ Guidelines N°3.1. (c) and N° 3.1.3 in Villiger, *supra* note 22, Articles 19-23: Subsequent Developments, para. 11, 334.

prohibiting reservations will discourage many states and thus prevent them from acceding to the treaty. Yet, it is very important to reach a broad coverage of human rights. Every ratification not accomplished imports a range of different rights not guaranteed to many individuals. Finally, a reform in law and practice becomes even more unlikely, since the instructive dialogue with the Committee and other states parties on the one hand, as well as political and legal pressure on the other hand are missing.

Switzerland was the very first country whose (although disguised) reservation has been ruled invalid by a competent institution, in this case the ECtHR. In consequence of the decision in *Belilos v. Switzerland*, the respective Swiss cantons reformed their cantonal laws to make them accord with the ECHR.⁷² The reservation itself has also been withdrawn, although only in 1998 and hence ten years after the Court's ruling.⁷³ Thus, the ECtHR's decision to sever Switzerland's reservation to Art. 6(1) ECHR from the State Party's instrument of ratification showed effect. One could argue that hence an institution like the ECtHR is necessary in order to protect the different treaties' object and purpose. Though, the combination of the periodic review system of the UN human rights treaty bodies together with the described interpretation of the Vienna Convention as well as the introduction of the blue-pencil-test can indeed have the same power and desirable effect. Also a broad range of its reservations to different UN human rights treaties have been withdrawn by Switzerland, although there was no court that officially declared the respective reservations void.

Switzerland had and still has a range of reservations to four UN human rights treaties.⁷⁴ To date, Switzerland has withdrawn several reservations to three of these treaties. The withdrawals took place during a tentative reform process. The first withdrawal of a reservation took place earlier, in 1995, when Switzerland withdrew its reservation to Art. 20(2) ICCPR in which it postponed introducing hate crimes into its criminal code. Indeed, a law prohibiting incitement to discrimination and violence out of

⁷² *Botschaft zur Änderung des schweizerischen Strafgesetzbuches (Allgemeine Bestimmungen, Einführung und Anwendung des Gesetzes) und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht*, 21 September 1998, BBI 1999, 1979, 2161.

⁷³ Eidgenössisches Justiz- und Polizeidepartement, 'Vorbehalte zu Art. 6 EMRK sollen zurück gezogen werden', Press Release (15 June 1998) available at <http://www.admin.ch/cp/d/35851808.7281@mbox.gsejpd.admin.ch.html> (last visited 19 July 2010).

⁷⁴ Art. 12(1), Art. 20, Art. 25 *lit.* b, Art. 26 ICCPR; Art. 2(1) *lit.* a, Art. 4 ICERD; Art. 15(2), Art. 16(1) *lits* g, h CEDAW; Art. 10(1), Art. 37 *lit.* c, Art. 40 CRC.

hate has been introduced and came into force in 1995, as Art. 261*bis* of the Swiss Criminal Code. Through this new law, Switzerland attended to its duty under the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁷⁵. In 2004, Switzerland withdrew several reservations. First, in January, it withdrew reservations to Art. 14(3) *lits* d and f ICCPR as well as to Art. 40(2) *lit.* b sublit. vi CRC, and second, in April, it went on with reservations to Art. 7 *lit.* b CEDAW and to Art. 5 CRC. All these reservations have in common that the respective Committees reminded the government to withdraw these reservations during the various sessions. The Human Rights Committee mentions Art. 14 ICCPR in its concluding observations considering the state party's second periodic report;⁷⁶ the Committee on the Rights of the Child even expressly reminds Switzerland to "[e]xpeditiously as much as possible the process for the withdrawal of the reservation regarding [...] Art. 40(2) (b) (vi)" and urges "to withdraw as soon as possible the reservation to Art. 5".⁷⁷ Although the Committee on the Elimination of Discrimination against Women records the reservation to Art. 7 *lit.* b CEDAW,⁷⁸ it only refers implicitly to this point again by stating that "[t]he Committee is concerned about the persistence of entrenched, traditional stereotypes regarding the role and responsibilities of women".⁷⁹ The last wave of withdrawals took place in May 2007, when Switzerland withdrew its reservations to Art. 10(2) *lit.* b and Art. 14(1) and (5) ICCPR as well as to Art. 7(2) and Art. 40(2) CRC. Also these reservations have been mentioned by the Human Rights Committee⁸⁰ as well as the Committee on the Rights of the Child.⁸¹ Of the 24 reservations Switzerland had all in all, eleven have been withdrawn, ten of them within the last four years. One cannot prove whether this extent of law reform would also have taken place if, from the beginning, Switzerland had not made any reservations. However, it is at least doubtful whether such a wave of new laws concerning the protection of human rights

⁷⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195.

⁷⁶ UN HRC, Concluding Observations of the Human Rights Committee: Switzerland, UN Doc CCPR/CO/73/CH, 12 November 2001, para. 12.

⁷⁷ UN CRC, Concluding Observations of the Committee on the Rights of the Child: Switzerland, UN Doc CRC/C/15/Add.182, 7 June 2002, para. 7 *lit.* a.

⁷⁸ UN CEDAW, Switzerland: Concluding Comments of the Committee, UN Doc A/58/38(PART I), 20 March 2003, para. 100.

⁷⁹ *Id.*, para. 114.

⁸⁰ UN HRC, Concluding Observations Switzerland, *supra* note 76, paras 12, 14.

⁸¹ UN CRC, Concluding Observations Switzerland, *supra* note 77, para. 7 *lits* b, d *et seq.*

would have taken place without the constant reminders of the different Committees.

II. ...to Universally Applicable Human Rights

Although this was not the case with Switzerland, other states often defend their reservations by denying that human rights are universal and claiming that in their culture, the respective aspect is no human right. Therefore, the question arises whether human rights actually are universal.

Since the end of the Cold War, a holistic approach to human rights has evolved. According to this approach, the different human rights cannot be separated from each other, since every right also has effect on other rights. Most importantly, the rights guaranteed in the ICCPR as well as in the ICESCR have to be treated not as rights of the so-called first and second generation,⁸² but as complementing and affecting each other. In a holistic approach, human rights can be seen as the different knots of a huge net. In this picture, violating a right means untightening one of these knots. But even one single loose knot makes the net as a whole less stable and particularly affects the surrounding knots and thus other human rights. If, for example, a girl cannot go to school, not only her rights to primary education and to equal treatment compared to boys of her age are violated. She will not be able to apply for jobs in which she has to read, write, and calculate; she will not be able to read medical information; she can easily be defrauded when buying or selling something; and she will not be able to fully participate in political life or even vote – to name just a few consequences. Thus, all these rights are part of human dignity, which is in itself indivisible, since the different constitutive pieces affect each other. As a consequence, human rights are also indivisible.⁸³

Hence, a certain standard of human rights has to be regarded as universal and inherent in every culture, applying to every human being in the world. Excluding certain rights in certain regions also violates those rights which are said to be guaranteed in this region; thus, a reservation saying that certain rights do not apply in certain countries is a violation of human rights. Reservations are therefore incompatible with human rights.

⁸² Brigitte I. Hamm, 'A Human Rights Approach to Development', 23 *Human Rights Quarterly* (2001) 1, 1005, 1006.

⁸³ Mac Darrow & Amparo Tomas, 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation', 27 *Human Rights Quarterly* (2005) 2, 471, 502 *et seq.*

Yet, one recurring point of discussion is reservations to the CEDAW with reference to Islamic law. Thus, the question arises whether equal treatment of women is a rather Western notion and not universally applicable. A strong argument against this is the mere fact that the CEDAW is, with 186 states parties, the treaty with the second most ratifications or accessions of all UN human rights treaties. Furthermore, not every state party with a predominantly Muslim population has made a reservation to CEDAW stating that the Convention was only applicable if not in contradiction with the *Sharia*.⁸⁴ This shows that also states parties with a predominantly Muslim population consider equal treatment of men and women as a universal human right. In addition to that, some members of the Committee on the Elimination of Discrimination against Women also have a Muslim background and still criticize reservations with reference to the *Sharia*. Ms. Meriem Belmihoub-Zerdani from Algeria for example consistently remarks when reservations or laws in the respective country referring to Islamic law are, according to the *Quran*, not strictly necessary. For example, she did so regarding Bahrain and Arts 9-15 CEDAW,⁸⁵ or Morocco and Arts 15-16 CEDAW.⁸⁶ Sometimes, she also makes proposals on how the respective state party could solve the problem without neglecting its Islamic culture. In one case, she acknowledged that the *Quran* concedes to women only half of a man's share in matters of inheritance. Thus, she requested Bahrain to "promulguer des lois qui permettraient aux parents de léguer des montants égaux de leur richesse à leurs fils et à leurs filles."⁸⁷ This is an interesting solution in order to harmonise requirements of both *Sharia* and CEDAW. Nonetheless, according to Art. 4(1) CEDAW, such measures can only be allowed as interim solutions, they "shall in no way entail as a consequence the maintenance of unequal or separate standards".⁸⁸ Finally, an unequal treatment of men and women leads to violations of those rights, which are allegedly guaranteed in the respective

⁸⁴ Indonesia, Turkey and Yemen did not enter reservations referring to Islamic law; see also Jane Connors, *The Women's Convention in the Muslim World*, in Christine Chinkin *et al.* (eds), *Human Rights as General Norms and a State's Right to Opt Out* (1997), 85, 89 *et seq.*

⁸⁵ UN CEDAW, Quarante-deuxième session, 861^e séance, 30 octobre 2008, à 15 heures, UN Doc CEDAW/C/SR.861, para. 53.

⁸⁶ UN CEDAW, Twenty-ninth session, 627th meeting, 15 July 2003, at 3 p.m., UN Doc CEDAW/C/SR.627, para. 22.

⁸⁷ UN CEDAW, Quarante-deuxième session, 861^e séance, 30 octobre 2008, à 15 heures, UN Doc CEDAW/C/SR.861, para. 63.

⁸⁸ Art. 4(1) CEDAW.

countries. A range of states parties⁸⁹ made for example reservations with reference to Islamic law to Art. 9 CEDAW which guarantees women equal rights with men to acquire, change, or retain their nationality (para. 1) and equal rights with men with respect to the nationality of their children (para. 2). This reservation, however, has further consequences and violates also other rights. If an alien woman marries a citizen of the respective country and thus has to give up her own nationality and obtain her husband's nationality, she will lose several rights in her original home country. She will for example not be allowed to vote or to run for office; furthermore, she might lose claims regarding subsidy or pensions; finally, she may also have difficulties to visit her home country and her family without special visas. The same can become true for her children, if the father has the sole right to decide upon their nationality. Although the reserving countries do not explicitly or even willingly violate these rights, they do so by making a reservation to Art. 9 CEDAW. Thus, excluding certain rights from universal application leads to violating rights which are universally accepted.

Nonetheless, one has to bear in mind the huge differences between the different cultures. By formulating mere goals instead of ways of reaching these goals, the UN human rights treaties leave enough room for regional diversity. States parties are thus free to implement the different rights according to their particular cultural conditions.⁹⁰

The existence of regional human rights treaties such as the ECHR or the African Charter on Human and Peoples' Rights does not contradict with the notion of universally applicable human rights. Human rights themselves exist on a global level, inherent to every human being in the world. Yet, rights alone do not suffice. In order to realize these rights, it is necessary to establish mechanisms through which one can call for the corresponding duties and monitor their implementation. Rights therefore have to be transformed into duties. To achieve this goal, the different regional and global human rights treaties exist, since only these treaties give a reliable basis on which states parties can be held accountable.⁹¹ It is, however,

⁸⁹ Reservation to Art. 9(1), (2) CEDAW: Iraq, United Arab Emirates; reservation only to Art. 9(2) CEDAW: Bahrain, Brunei Darussalam, Jordan, Kuwait, Morocco, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Tunisia; not counted are those reservation which either do not name any specific article or reservations to Art. 2 CEDAW.

⁹⁰ Douglas Lee Donoho, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards', 27 *Stanford Journal of International Studies* (1990-1991) 1, 345, 386.

⁹¹ Hamm, *supra* note 82, 1013 *et seq.*

important to note that human rights themselves exist irrespective of these treaties; the treaties merely transform the intangible rights into contractual and thus enforceable duties.

It is striking that withdrawals of reservations with reference to Islamic law, except for those by Pakistan, always took place promptly before or after the particular state party presented its periodic state report and faced the Committees' questions. All in all, explicitly *Sharia*-based reservations have been withdrawn by four states parties to the CEDAW⁹² and by four states parties to the CRC⁹³ plus withdrawals by Pakistan of such reservations made to the ICESCR and to the CRC. Since the conflict between Islamic family law on the one hand, and regulations in international human rights treaties concerning family law on the other hand has always been a contentious issue, it is remarkable that these of all reservations have been withdrawn shortly after the periodic review by the treaty bodies had taken place. Bangladesh withdrew its reservations to Art. 13 *lit. a* and to Art. 16(1) *lit. f* CEDAW on 23 July 1997 while the 17th session was held, in which also Bangladesh took part. Kuwait was not as quick as Bangladesh in withdrawing its reservation to Art. 7 *lit. a* CEDAW, but did so in 2005, one year after it attended the treaty body's 30th session and was urged to withdraw particularly this reservation.⁹⁴ Jordan withdrew its reservation to Art. 15(4) CEDAW very recently, in May 2009, after it had faced the Committee's question in the 39th session.⁹⁵ Although the Libyan Arab Jamahiriya did not withdraw the reservation in 1995 but "replace[d] the formulation", it is still noteworthy that the state party limited its very extensive reservation ("[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic *Shariah*.")) to reservations concerning inheritance portions as well as Art. 16 *lits c* and *d* CEDAW. The Libyan Arab Jamahiriya, however, gave an account of the situation regarding women's rights to the Committee one year earlier in 1994. Furthermore, it is noteworthy that the depositary, i.e. the Secretary-General of the UN,⁹⁶ seems to have accepted this "new

⁹² Bangladesh, Kuwait, Libyan Arab Jamahiriya, Jordan.

⁹³ Egypt, Indonesia, Morocco, Qatar.

⁹⁴ UN CEDAW, Kuwait: Summary Record of the 634th Meeting, UN Doc CEDAW/C/SR.634, 15 January 2004, paras 3, 30, 35, 38, 39; Kuwait: Summary Record of the 642nd Meeting, UN Doc CEDAW/C/SR.642, 22 January 2004, para. 34.

⁹⁵ UN CEDAW, Jordan: Summary Record of the 806th Meeting, UN Doc CEDAW/C/SR.806(A), 2 August 2007, para. 25.

⁹⁶ Art. 25(2) CEDAW.

formulation”, although it is in fact not possible under the CEDAW or any other UN human rights treaty to modify a reservation. Concerning the CRC, the same pattern can be detected. Except for Morocco, which needed three years to withdraw its reservation to Art. 14 CRC, Egypt, Indonesia, and Qatar all withdrew their *Sharia*-based reservations promptly before or after they had presented their periodic state reports and had answered the Committee’s questions. Whereas there lay two years between Egypt being interrogated at the 26th session in 2001 about its reservation to Arts 20 and 21 CRC⁹⁷ and the withdrawal of the reservation, it took Indonesia only one year to withdraw a broad range of reservation it had to the CRC in 2005, namely to Arts 1, 14, 16, 17, 21, 22, and 29 CRC. Qatar, on the other hand, withdrew its extensive reservation a few months before it had to appear before the Committee in 2009, which most likely was due to the otherwise upcoming questions by the Committee members.

Since reservations with reference to Islamic law to aspects of family law within the CEDAW or the CRC have always been heavily contested, it is remarkable that these reservations in particular have been withdrawn in a temporal relation with the periodic dialogue with the respective Committee. Family law is the main bastion that Islamic states do not want to submit to international standards. Thus, especially in this issue, the constructive dialogue proves to be fruitful. The respective reservations serve as a guideline for the Committee members, of where to apply pressure and which questions to ask in order to eliminate human rights violations.

D. Conclusion

Reservations are substantially incompatible with the comprehensive and universal protection of human rights; but, at the same time, the procedural elements that reservations entail are essential for the effective protection of human rights. One has to distinguish human rights themselves from the *effective protection* of human rights. The aim is to achieve a status where no reservations to human rights exist; not because they are forbidden, but because they are not necessary. To reach this state of human rights without reservations, reservations are not only allowed, but can even be helpful.

⁹⁷ UN CEDAW, Egypt: Compte rendu analytique de la 679 séance, UN Doc CRC/C/SR.679, 15 January 2001, para. 14; Egypt: Summary Record of the 680th Meeting, UN Doc CRC/C/SR.680, 15 January 2001, paras 20, 88.

The first step is to raise the respective government's awareness that in its own country, specific laws do not comply with human rights. If a state accedes to a human rights treaty prohibiting reservations, the government might know that its laws are "not perfect", but it will not think about it in detail. If, on the contrary, the government has to formulate detailed reservations, mentioning the exact contravening law, it will become aware of where the problems really are. This, indeed, only functions with a strict framework for reservations. By declaring broad and non-transparent reservations invalid pursuant to Art. 19 *lit. c* Vienna Convention, states parties are urged to find well-thought-out and detailed formulations for their reservations, which have to comply to the so-called "blue-pencil-test". Additionally, a given state party may become aware that it is only a matter of one or two regulations that have to be changed in order to comply with the respective human rights treaty, while at first glance, it may have seemed as if a huge law reform was necessary and this deterred the government from even trying to find a solution. Later, reservations will also fulfil a constant warning function, admonishing the state party of its domestic laws still violating human rights. Furthermore both pressure and advice by the respective treaty bodies in the course of the periodic reviews will be more effective and accurate if the Committee members know exactly where the problems are; a detailed reservation gives the treaty body precisely this information. Reservations help the Committees to review a state party's report and to ask the right questions. Without reservations, it is easier for the contracting state to hide the areas in which it does not comply with the respective treaty. A reservation on the other hand, although it discharges the state party from a legal point of view, will provoke precise questions by the Committee as to why this reservation exists, which impact it has on the country's citizens, and when the state will reform its domestic laws. The political and factual pressure the Committee exerts by these recurring questions outweighs the legal advantage a reservation might imply for the state party. This pressure can then lead to a law reform, hopefully also including a change in practice, although the latter cannot be achieved merely by allowing or prohibiting reservations. After a successful law reform, the state party can withdraw its reservation and thus take a further step towards the main aim of guaranteeing human rights without any reservations.

It is therefore not advisable to blindly prohibit any reservations to multilateral human rights treaties. Instead, Art. 19 *lit. c* Vienna Convention should be interpreted closer to both letter and spirit of the law, according to which reservations incompatible with the treaty's object and purpose are

prohibited. In addition to that, the blue-pencil-test should be introduced as a guideline in order to guide the states parties when formulating their reservations. Through these two minor changes, the protection of human rights will become more effective and reservations will not undermine human rights treaties anymore, but support their purpose: the effective protection of human rights.

The Future of Peacekeeping in Africa and the Normative Role of the African Union

Charles Riziki Majinge*

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Abstract

While it has been the responsibility of the United Nations to conduct peacekeeping operations on the continent, the trend is gradually changing. African Union and its regional organizations (RECs) are increasingly assuming responsibility of securing peace and stability on the continent. Many reasons militate in favour of this trend. Chiefly the unwillingness of the United Nations Security Council and of the developed countries to intervene timely and adequately to avert humanitarian catastrophes as happened in Rwanda, Southern Sudan and Angola. Furthermore, the desire of Africa to take steps to address its own problems without heavily relying on assistance from the international community whose availability is neither assured nor sufficient. This contribution argues that Africa can no longer expect the international community to shoulder the burden of peacekeeping in some of the most intractable conflicts on the continent without taking steps to participate actively in the process itself. While Africa has expressed its desire to address its own problems through the vision of “African solutions for African Problems”, African leaders must show greater willingness to fund and strengthen institutions they establish to carry out this vision. Lastly, the paper contends that the international community, especially the developed states, should take genuine and adequate measures to assist Africa realize its vision. A strong African Union capable of securing peace and stability on the continent is in the best interests not only of Africa but also of the international community as a whole.

A. Introduction

Conflict among organized human groups is as old as human society itself. Peacekeeping missions enjoy growing popularity as the international community’s tool of choice for conflict containment in different parts of the world.¹ Essentially the goal of peacekeeping is not the creation of peace but the containment of war so that others can search for peace in stable conditions. The concept of peacekeeping is based on two major tenets. First,

¹ E. G. Berman & K. E. Sams, *Peacekeeping in Africa: Capabilities and Culpabilities*, United Nations Institute for Disarmament Research (2000), 26-39; see also, D.J Francis, ‘Peacekeeping in Africa’, in R. E. Utley (ed.), *Major Powers and Peacekeeping: Perspectives, Priorities, and the Challenges of Military Intervention*, (2006), 102.

the need to halt armed conflict in order to create a semblance of a stable environment in which negotiations can occur. The second purpose is to function as a deterrent against the outbreak of armed hostilities, following arrangement of ceasefire.² Traditionally it has been the responsibility of the United Nations (UN) to maintain peace and security.³ The United Nations Charter bestows upon the UN through its Security Council the responsibility to maintain peace. But as will be shown in this contribution the concept of peacekeeping has evolved since the early 1950s when the UN started seriously considering peacekeeping as an effective tool to maintain peace and security of the world until today when the organization is maintaining thousands of blue helmets around the world.⁴

Over the years, the UN has undertaken several peacekeeping missions of varying scope, duration and degree of success. Most of them involved conflicts of multiple dimensions.⁵ During the Cold War, the UN could hardly do the job for which it was created. Global collective security, the underlying precepts of its Charter, was impossible in a world divided into hostile camps between the Eastern Block led by U.S.S.R and Western Block led by U.S.A. Admittedly, the UN as a neutral organization helped to bring small conflicts to an end, keep them from flaring anew and keep them from being a source of tension between the major powers. In fact, during this period the UN was more associated with the mediation of conflicts, the monitoring of ceasefire arrangements and the separation of hostile armed forces than actual peacekeeping.⁶

The end of the cold war in the early 1990s fundamentally changed the security trajectory of continental Africa. The global geo-political and strategic relevance of the continent was gradually - yet markedly -

² K. P. Magyar & E. Conteh-Morgan (eds), *Peacekeeping in Africa: ECOMOG in Liberia* (1998), 12-27; see also F. H. Fleitz, Jr, *Peacekeeping Fiascoes of the 1990s: Causes, Solutions and US Interests* (2002), 3-5; for further reading on this topic, see L. M. Howard, *UN Peacekeeping in Civil Wars* (2009).

³ For the work of the UN Security Council as pertains to peacekeeping in Africa, see N. MacQueen, *United Nations Peacekeeping in Africa Since 1960* (2002); see also E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 256-268.

⁴ The first mission explicitly labelled "peacekeeping" was the UN Emergency Force (UNEF) dispatched to the Sinai Peninsula following the Suez Crisis of 1956; see W. J. Durch (ed.), *The Evolution of the UN Peacekeeping: Case Studies and Comparative Analysis* (1993), 7.

⁵ *Id.*, 1-11.

⁶ *Id.*, 1.

diminished. The major powers' interests to win strategic friends and allies on the continent had virtually disappeared. Several Cold War defence alliances, military and technical assistance were terminated or remodeled to reflect the wave of democratization and human rights, which was emerging after the fall of the iron curtain. African dictators whose stay in power had largely depended on these Cold War alliances were caught off guard with these new developments. Further, these changes came at a time when the UN Security Council was gradually developing lacklustre indifference to the plight of the continent because major powers were becoming more selective to be engaged in large-scale overseas mission considered of low strategic value.

This indifference was partly reinforced by the UN Peacekeeping experience in Somalia, which ended in total failure. In 1992, the United Nations Security Council authorized the United Nations Operation in Somalia (UNOSOM) with the mandate to maintain law and order and also facilitate the delivery and deter attacks against humanitarian relief operations.⁷ This mission failed to bring peace and stability in Somalia and also led to the loss of lives of many soldiers from the United States, which was the major western power involved in peacekeeping in Somalia. It was the first time ever the UN had left a country without fulfilling its aims. Indeed, almost fifteen years since the withdrawal of the UN troops from Somalia in 1995, the UN has consistently expressed its willingness to deploy peacekeeping forces in Somalia when the "appropriate time comes" but up to today the organization has been unable to do so. Meanwhile, common Somalis continue to endure suffering.

The declining interests of the Security Council in African conflicts was practically demonstrated by the Security Councils' increasing application of political considerations rather than humanitarian needs in intervening in African conflicts. For example, while conflicts in Rwanda or Angola costing many lives went silent through the corridors of the Council, conflicts in the Balkan and Middle East were dealt with swiftly. At the same time, major powers were willing to commit their resources and troops as well as massive funds to enforcement operations without the Council's authorization. In fact, the increased participation of major powers like the

⁷ SC Res. 751, 24 April 1992; this Resolution was later reinforced by SC Res. 775, 28 August 1992 to strengthen the UN Operation; for a detailed overview of UN involvement in Somalia see C. E. Philipp, 'Somalia - A Very Special Case' in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Vol. 9 (2005), 517-554.

US in peacekeeping operations was done selectively and largely premised on the need to protect *national* rather than *collective* interests.⁸

During the outbreak of the DRC conflict in the late 1990s the UN Security Council authorized the establishment of the UN Observer Mission in DRC (MONUC). The primary mandate of the mission was to supervise the withdrawal and disengagement of rebel forces and provide protection for humanitarian aid. When the conflict escalated in 2003 the UN authorized the expansion of the mission - making it the largest in the world. Despite resources and mandate given to the mission it has failed to bring peace in DRC. With more than a decade since its establishment, Congo is still embroiled in conflict. The mission has failed to consolidate peace and disarm the rebel groups who are accused by neighbouring countries of Rwanda and Uganda of fueling instability in their countries. The challenges, facing the mission include inadequate financial resources and the inadequate number of peacekeepers who are too few, given the vast size of DRC.

Various responses to African security challenges have not only been slow, but also reluctant, reflecting the strategic marginality of the continent. Much needed assistance has not been forthcoming, and when pledges were made, the pledge fulfillment has been too slow and perennially inadequate to mitigate the effect of conflicts on the victims and to facilitate transition from emergencies to recovery and development.⁹ Nowhere is this reality more vivid than in Southern Sudan. Despite the signing of the Comprehensive Peace Agreement in 2005 between rival factions, the region is still struggling in the transition from conflict to recovery. It is partly because of this reality and little interests by major powers in the Security Council that arguments have been made to the effect that Africa should take a more proactive role in addressing its own peace and stability challenges.

This paper is divided as follows: Part two of the paper provides an overview of the concept of the African solutions for African problems as has been conceptualized by the African Union (AU). Part three reviews the legal framework upon which the Organization of African Unity (OAU) historically undertook peacekeeping mission in different African countries.

⁸ See B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* (1999) 1, 1-22; see also D. S. Sorenson, 'The United States' in D. S. Sorenson & P. C. Wood (eds), *The Politics of Peacekeeping in the Post Cold War Era*, (2005), 117.

⁹ G. Prunier, *Darfur: The Ambiguous Genocide*, (2007), 137-138; see also W. v. Genugten *et al.*, *The United Nations of the Future: Globalization with a Human Face* (2006), 144-145.

This part also discusses the experience gained by the OAU in course of peacekeeping in different hotspots on the continent like Chad and Rwanda. It also evaluates lessons identified by the organization while undertaking peacekeeping exercise. Part four examines various peacekeeping initiatives undertaken at the auspices of regional bodies like the Economic Community of West Africa (ECOWAS) amidst fragility of consensus among Member States. Specifically this part addresses ECOWAS involvement in Liberia and Sierra Leone respectively. Similarly part five of this work takes stock of the Southern African Development Community (SADC) involvement in peacekeeping mission in the Democratic Republic of Congo (DRC) a country, which has been embroiled in successive dictatorship and political instability since its independence from Belgium in 1960.

The birth of the AU at the dawn of the 21st Century and its enhanced engagement in peacekeeping initiatives as a tool to address conflicts and instabilities on the continent is examined under part six of the contribution. Under this part legal framework upon which AU conducts peacekeeping mission and specific peacekeeping initiatives undertaken by the organization in Burundi and Darfur are discussed in detail. Finally, the concept of African solutions for African problems is addressed under part seven of the paper. In this part, the concept is extensively discussed and its viability or practicality within the African context carefully examined. Also under the same part, the paper examines the future of peacekeeping on the continent. Essentially the paper addresses the question as to whether the AU through this concept of African solutions for African problems can effectively and successfully use peacekeeping missions as a tool of choice to address perennial conflicts in deadly hotspots like Mogadishu or Goma. The paper concludes by making some modest recommendations both to the African Union and the international community in the quest of making the concept of African solutions for African problems a reality.

B. Overview of the Concept of African Solutions to African Problems

Underlying the concept of African renaissance is the growing recognition and determination by Africa to find African solutions for African problems. This sentiment is well reflected in the African Union Constitutive Act and its Protocol on Peace and Security Council, which reaffirm the determination of Africa to be a master of its own destiny. Nowhere has the vision of African solutions for African problems been

more challenged than in the peace and security realm. The AU has struggled to mobilize resources to address various security challenges with minimal success. From Somalia to Darfur the organization is increasingly looking towards the international community to provide resources to match the preponderance of the security challenge on the continent. It is this inability of the organization to secure peace and stability on the continent on its own which provides a reality check on the practicality of the concept of African solutions for African problems.

The endeavour of putting the concept of African solutions for African problems into practice has not been an exclusive challenge of the AU only. Instead even regional peacekeeping efforts undertaken under the auspices of ECOWAS and SADC have faced similar challenges. For example, despite the commendable work of ECOWAS Mission in Sierra Leone and Liberia, the Security Council had to approve UN led and much resourced missions in both countries (UNAMSIL and UNAMIL for Sierra Leone and Liberia respectively). The same can be said of DR Congo where after a brief intervention by SADC, the UN approved MONUC as the primary organ to secure peace and stability in this war ravaged country. As such realizing the concept of African solutions for African problems is a challenge to both regional organizations and the AU itself. In this contribution, I examine the previous efforts undertaken by the OAU and later the AU and other regional organizations like SADC and ECOWAS to realize the vision of African solutions for African problems. I decipher the challenges encountered and give modest proposals on some possible mechanisms to realize this vision where Africa can ably take charge of challenges to its own peace and security.

C. OAU Peacekeeping in Africa

I. Legal Framework for the OAU

The involvement of the OAU in peacekeeping has always been minimal. The OAU undertook only three peacekeeping operations during its 36 years of existence.¹⁰ Despite the keen interests, at least theoretically, of African Nations to resolve their conflicts themselves, they have in most cases failed to achieve this goal. This scenario is recounted by the former

¹⁰ G. Kieh, 'International Organizations and Peacekeeping in Africa', in K. P. Magyar & E. Conteh-Morgan (eds), *Peacekeeping in Africa: ECOMOG in Liberia* (1998), 22-28.

OAU Secretary General who stated that: “Traditionally a strong view has been held that conflicts within states fell within the exclusive competence of the states concerned. Arising from the basic assertion was the equally strong view that it was not the business of the OAU, to pronounce itself on those conflicts and that the organization certainly had no mandate to involve itself in the resolution of problems of that nature. In consequence, the organization had to standby in apparent helplessness as many of these conflicts have torn countries apart, caused millions of death, destroyed infrastructure and property, created millions of refugees and displaced persons and caused immense hurt and suffering to men, women and children.”¹¹

The main legal framework regulating peacekeeping in Africa undertaken under the aegis of the AOU is first and foremost the UN Charter. The Charter recognizes the existence of regional arrangements to deal with threats to peace and security. It should however be noted that such arrangements are qualified by the requirements to conform to the purposes and principles of the United Nations.¹² Further, the Charter compels regional arrangements and agencies to first address such threats through amicable means before taking such drastic measures involving the use of force.¹³

The OAU Charter had no express provision regulating the use of military force as an instrument of conflict resolution. The absence of external rules for collective intervention in the Charter can be explained partly by the values attributed to non-intervention, which was entrenched and faithfully adhered to in the Charter by the member states.¹⁴ Instead the OAU Charter reaffirmed the application of the various traditional methods of conflict resolution for addressing conflicts on the continent, such as the use of negotiations, mediation, arbitration and conciliation.¹⁵ Indeed the

¹¹ Quoted in K. Powell, ‘The African’s Union Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect’, Working Paper, The North-South Institute (2005), 14, Hamburg; also quoted in C. Peck, *Sustainable Peace: The Role of the UN and Regional Organizations in Preventing Conflict* (1998), 160.

¹² R. Zacklin, ‘The Use of Force in Peacekeeping Operations’, in N. Blokker & N. Schrijver (eds), *The Security Council and the Use of Force* (2005), 91-92.

¹³ Art. 52(2) and (3) of the United Nations Charter.

¹⁴ T. Lyons, ‘Can Neighbours Help? Regional Actors and African Conflict Management’, in F. M. Deng & T. Lyons (eds), *African Reckoning: A Quest for Good Governance* (1998), 69-75.

¹⁵ Art. III(4) Charter of the Organization of African Unity.

organization established the Commission for Mediation as one of the principle organs of the organization.¹⁶

II. The OAU Peacekeeping Experience

The history of peacekeeping under the aegis of the OAU is fraught with both, success and failure.¹⁷ Despite having no express provision in the OAU Charter, the organization had used peacekeeping as a tool to bring peace on three occasions, twice in Chad and once in Rwanda. Largely the peacekeeping options by the OAU were undertaken after realizing that its traditional methods of conflict resolution as provided in the Charter were ineffective and that new challenges required new thinking.

The conflict between Chad and Libya¹⁸ in 1981 furnished the OAU with its first major peacekeeping experience and a first test of its capability to resolve conflicts on its own continent.¹⁹ Under this initiative, a force consisting of troops from Benin and Zaire was to be deployed in Chad. The mandate of the force included supervision of the ceasefire, ensuring the freedom of movement, disarming the combatants, the restoration of order, and the establishment of the new Chadian army.²⁰

Serious obstacles stood in the way for the successful operation of the mission. For example, Guinea and Togo that were to contribute troops could not do so partly because of a lack of funds.²¹ The ceasefire that was to be enforced before the deployment of troops collapsed before the arrival of forces from contributing countries.²² The fact that OAU member states failed to honour and remit their financial contributions to the organization to fund the mission was the decisive factor for the failure of the mission.²³ Summarizing the difficulties encountered by the Mission in Chad, one of the force commanders stated that throughout the duration of the OAU peacekeeping mission in Chad, member states were long on rhetoric and

¹⁶ *Id.*, Art. VII(4).

¹⁷ T. Mays, *Africa's First Peacekeeping Operation: The OAU in Chad 1981-1982* (2002), 52-53.

¹⁸ See generally, R. Lemarchand, 'The Crisis in Chad' in G. J. Binder *et al.*, (eds) *African Crisis Areas and US Foreign Policy* (1985), 239-256.

¹⁹ Magyar & Conteh-Morgan, *supra* note 2, 24.

²⁰ *Id.*

²¹ A. Sesay, 'The Limits of Peacekeeping by Regional Organizations: The OAU Peacekeeping Force in Chad', 11 *Conflict Quarterly* (1991) 1, 15.

²² *Id.*

²³ *Id.*

resolutions but short on implementing the same, especially when the financial contributions were involved. Little or no funds were made available for collective administration of the force. Such a situation could not but lead totally to the collapse of the mission and it did.²⁴

The second attempt of the OAU in peacekeeping was again in Chad, commonly referred to as Chad II. This mission was organized in the wake of the failure of the first intervention in Chad. Unlike its predecessor, the number of countries, which were willing to commit troops was more significant and the size of the force was projected at 3000.²⁵ The mission had limited success. It managed to enforce the ceasefire and establish temporary security zones where belligerents could be separated, but as usual these limited successes were outweighed by the challenges, which complicated the effectiveness of the mission. For example, the battalion from Zaire, which was to take care of medical needs of all the troops, went with doctors but without any drugs or medical equipment:²⁶ while the battalion from Benin, which was to take care of communication could not travel because of lack of communication equipments and uniforms. With multiple challenges confronting the mission, its success was eclipsed by the failure of the parties to hold the peace. It is no wonder then that the conflict in Chad continued despite the earlier commitment of the organization to secure peace.²⁷

The third attempt by the OAU to secure peace and security through peacekeeping mission was in Rwanda. This mission was created in the wake of the Arusha Peace Accord between the Rwandan government and the rebels of the Rwanda Patriotic Front concluded in Arusha in 1992. This Accord required the parties among other things to (i) form a new transitional government (ii) form a new army and (iii) hold new elections. Concerned with the shaky outcome in the implementation of the accord, the OAU decided to form a peacekeeping mission to facilitate the implementation of the accord.²⁸ The specific mandate of the force was to establish security zones and secure ceasefire. This mission comprised 130 troops from Congo

²⁴ T. Mays, *supra* note 17, 128-129.

²⁵ Magyar & Conteh-Morgan, *supra* note 2, 25.

²⁶ G. Klay Kieh Jr., 'Resolving African Conflicts', 5 *Peace Review - A Journal of Social Sciences* (1993) 4, 447-454.

²⁷ See C. Clapham, 'Problems of Peace Enforcement: Lessons to be Drawn from Multinational Peacekeeping Operations in Ongoing Conflicts in Africa', in T. Zack-Williams, D. Frost & S. Thomson (eds), *Africa in Crisis: New Challenges and Possibilities* (2002), 215-217.

²⁸ Magyar & Conteh-Morgan *supra* note 2, 26-27.

Brazzaville, Tunisia and Senegal. Interestingly the mission was approved and lasted only for two months.²⁹ The outcome of the mission was largely successful with both, Rwandese and the rebels, praising the mission for the successful completion of their tour of duty. This assessment can be measured in the short spell of the mission. The mission lasted for fewer than sixty days and then was handed over to the United Nations.³⁰

III. Evaluation and Lessons Identified

Critical analysis of these three missions undertaken by the OAU reveal that the organization had neither comprehensive nor defined legal criteria for peacekeeping missions during its existence.³¹ Indeed as already shown above, the OAU Charter made no provision for peacekeeping options. Rather it included a provision for a Commission of Mediation whose role was to solve conflicts through peaceful means.³² This problem is succinctly elaborated by a former OAU official who stated that “even though the OAU and its Charter came into existence as the continental framework for the promotion of the African collective will to ensure collective security and collective development, we have been unable in over thirty years to craft a comprehensive security architecture to drive the peace and security agenda of the continent. This is in spite the establishment in Cairo in 1993 of the Continental Mechanism for Conflict Prevention, Management and Resolution”.³³

Thirty years after its formation in 1993, the organization decided to establish the OAU Mechanism for Conflict Prevention, Management and Resolution. The main goal of this mechanism was to prevent, manage and resolve conflicts on the continent.³⁴ It should however be noted that from the beginning this mechanism was not bound to accomplish much, primarily because it did not depart from the principle of non-intervention. This argument is well captured by the then Secretary General of the

²⁹ *Id.*

³⁰ *Id.*

³¹ F. David, *Uniting Africa: Building Regional Peace and Security Systems* (2006), 122-123.

³² *Id.*, 121.

³³ *Id.*

³⁴ G. P. Okoth, ‘Conflict Resolution in Africa: the Role of the OAU and AU’, in A. Nhema & T. Zeleza (eds), *The Resolution of African Conflicts: The Management of Conflict Resolution and Post Conflict Reconstruction* (2008), 22-33.

Organization, Salim Ahmed Salim, who, after the formation of the mechanism, noted that “the mechanism would be guided by the objectives and principles of the OAU Charter, in particular, the sovereign equality of member states, non interference in the internal affairs of the states, their inalienable right to independence existence, the peaceful settlement of disputes as well as the inviolability of borders inherited from colonialism. It was further supposed to function on the basis of the consent and cooperation of the parties to a conflict.”³⁵

The inability of the organization to resolve some conflicts on the continent through peacemaking and peacekeeping are mainly attributable to the loose arrangement in the Charter setting up the organization. The immediate needs and fears of the founding members characterized the organization’s structure and agenda. Many countries reeling from colonial domination had no desire to have a *supra*-nation organ dictating terms from far away in Addis Ababa.³⁶ Two main goals of the organization from its inception were to solidify African solidarity and Pan Africanism and to protect the hard won individual sovereignty, hence the reluctance to intervene in domestic affairs of other countries.

With multiple conflicts bedeviling the continent for much of its existence it would be hard placed for example to know why the organization intervened in some conflicts and not in others. The conflicts in Angola or Southern Sudan is a case in point. While these conflicts claimed thousands of lives the organization did not intervene militarily. The indifference displayed by OAU to conflicts in its member states reaffirm the argument that the decision to intervene in any given conflict was highly dependent on some factors. These factors include (i) the OAU Charter which would have been the basis for any likely intervention and which was premised on the doctrine of non-intervention in domestic affairs of member states and the sovereign equality of states; (ii) the member states lack of willingness to commit required financial resources to undertake such mission; and (iii) the lack of political willingness of member states to commit their resources and diplomatic credibility to specifically intervene in affairs of other states.

It is against this background of the OAU peacekeeping experience that it is important to discuss the contemporary role of African regional organizations in peacekeeping efforts. In fact, efforts undertaken by some

³⁵ Speech by the OAU Secretary General to the Assembly of Heads of States and Government, Cairo, Egypt, 28-30, June, 1993.

³⁶ S. M. Makinda & F. W. Okumu, *The African Union: Challenges of Globalization, Security and Governance* (2008), 19-29.

regional groups have yielded some positive outcomes compared to those of the OAU. The Liberian experience demonstrates how international and in particular western interests in Africa evaporated in the aftermath of the Cold War. The failure of the US to intervene militarily in Liberia which some would consider its “step child”³⁷ because of its close historical alliance, drove home the reality check of the Post Cold war era for Africans.³⁸ It is this reality, which compelled African countries to re-examine their historical dependence on the western powers to address its security challenges. Whether subsequent peacekeeping efforts under the aegis of the regional organizations succeeded in filling the void of the OAU in peacekeeping can be examined in light of the regional initiatives undertaken for this purpose.

IV. Peacekeeping Under the Auspices of ECOWAS

1. ECOMOG in Liberia

ECOWAS was established by the Treaty of Lagos in 1975 with the main goals to promote trade, cooperation and self reliance among its members.³⁹ Originally the ECOWAS treaty did not contain any explicit provisions that could justify its intervention in conflicts. But because of the multiple conflicts, which bedevilled the region since the inception of the organization, the community adopted a protocol on Mutual Assistance in Defence which was signed in 1981.⁴⁰ The Protocol stipulated that member states will consider any threat or act of aggression against any member state as a threat or act of aggression against the entire community.⁴¹ It also made the provision to the effect that member states of ECOWAS were committed to provide each other with aid and assistance for their defence against all those threats or acts of aggression.⁴² Further, the Protocol made a provision to the effect that in case of an internal conflict fueled by external support and likely to endanger security and peace in the entire community, the

³⁷ Liberia: America’s Stepchild, PBS television broadcast, October 10, 2002.

³⁸ See generally A. Adebajo, ‘From Congo to Congo: United Nations Peacekeeping in Africa After the Cold War’, in I. Taylor & P. Williams (eds), *Africa in International Politics: External Involvement on the Continent* (2004), 195-209.

³⁹ K. van Walraven, ‘Some Aspects of Regional Economic Integration in Africa’, in *Hague Yearbook of International Law* (1991), 114-115.

⁴⁰ ECOWAS Decision A/SP3/5/81.

⁴¹ Protocol Relating to Mutual Assistance on Defence, Art. 2, 29 May 1981, 1690 U.N.T.S. 51.

⁴² *Id.*, Art. 3.

community would be authorized to take measures. Specifically the community was empowered to convene an extraordinary session and decide on military action. However, no military intervention was authorized if the conflict remained purely an internal affair with no external meddling.⁴³

The history of effective peacekeeping missions by ECOWAS dates back in 1989, when ECOMOG (ECOWAS Cease-fire Monitoring Group), intervened in Liberia to quell the civil war, which had erupted between the rebels led by Charles Taylor and the government of Liberia under Samuel Doe. The decision to establish ECOMOG was taken by the ECOWAS members' heads of state as the primary organ to maintain peace and stability in Liberia. The mandate of ECOMOG was specifically to conduct a military operation for the purpose of monitoring the ceasefire between the rebels and the government, clear the Liberian capital of all threats of attack and establish and maintain law and order. It was also charged with controlling acquisition and flow of arms from neighbouring countries into the hands of the rebels in Liberia.⁴⁴ The funding of the mission was decided to be drawn from a Special Emergency Fund, which was established for that purpose. But given the reality of financial difficulties, which faced many ECOWAS member states, the financial burden was shouldered by Nigeria and some other few countries like the US.⁴⁵

Making decision to authorize ECOMOG, ECOWAS heads of state argued that regional peace and security were necessary conditions for effective cooperation and that the frequent conflicts and disputes between member states had a negative effect on the ultimate goal of ECOWAS.⁴⁶ Despite these arguments some ECOWAS members like Burkina Faso and Ivory Coast were against military intervention, insisting rather on diplomacy.⁴⁷ ECOWAS was seen and considered by some of its members as a regional organization formed solely for economic integration and development and not a political organ to interfere in the domestic affairs of

⁴³ *Id.*, Art. 18 (2).

⁴⁴ ECOWAS Decision A/DEC. 1/8/90; see also, D. Francis, *supra* note 31, 174.

⁴⁵ K. Kufour, 'The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States', 2 *African Journal of International and Comparative Law* (1993) 3, 523-524.

⁴⁶ See generally, K. van Walraven, *The Pretence of Peacekeeping, ECOMOG, West Africa and Liberia* (1999).

⁴⁷ E. Lumsden, 'An Uneasy Peace: Multilateral Military Intervention in Civil Wars', 35 *New York University Journal of International Law and Policy* (2003) 3, 819.

its member states.⁴⁸ Indeed, while rejecting the mandate of ECOMOG, Charles Taylor argued that the intervention contradicted Art. 3(2) of the OAU Charter and Art. 2(4) of the UN Charter which forbid interference in the domestic affairs of member states.⁴⁹ Further, he argued that the intervention went against Art. 2 of the 1978 ECOWAS Protocol on Non-Aggression, which reaffirmed that “each member state shall refrain from committing, encouraging or condoning acts of subversion, hostility or aggression against territorial integrity or political independence of member states.”⁵⁰

The OAU was not involved militarily in the planning or funding of the mission and rather offered moral support to the initiative. When the OAU Secretary General was asked about the legitimacy of the mission from the OAU point of view he reiterated his full support to the mission. He said he considered the ECOWAS intervention in Liberia as timely and a bold decision by regional members to address security challenges in their region. He further contended that there would be no justifications to leave Liberians to fight and kill each other.⁵¹ The Nigerian President whose country had shouldered the larger part of the responsibility justified the military intervention of ECOMOG in Liberia on humanitarian grounds. He argued that “we are in Liberia because events in that country have led to massive destruction of property, the massacre by all parties of thousands of innocent civilians including foreign nationals, women and children. Some of whom had sought sanctuary in churches, mosques, diplomatic missions, hospitals and under Red Cross protection contrary to all recognized standards of civilized behavior and international ethics and decorum”.⁵² The UN did not respond to calls for effective engagement and eventual takeover from ECOWAS of the mission. Rather its Secretary General wrote to the ECOWAS Chairman that he was “wishing the organization’s initiative in Liberia every success”.⁵³ Meanwhile the President of the Security Council,

⁴⁸ A. Adeleke, ‘The Politics and Diplomacy of Peacekeeping in West Africa: The Ecomog Operation in Liberia’, 33 *The Journal of Modern African Studies*, (1995), 576-578.

⁴⁹ J.M Taw & A.G, *US Support for Regional Complex Contingency Operations: Lessons from ECOMOG*, 22 *Studies in Conflict and Terrorism* (1999), 62-65.

⁵⁰ Protocol on Non-Aggression, 22 April 1978, 1690 U.N.T.S. 40.

⁵¹ The OAU Secretary General, *West Africa*, 22-28 October 1990, 2690.

⁵² Adopted from I. Udogu, ‘Economic Community of West Africa: From an Economic Union to a Peacekeeping Mission?’ 7 *The Review of Black Political Economy* (1999) 2, 67.

⁵³ Taylor rejects Bamako initiative, *West Africa*, November (1990), 2289-2290.

on behalf of the Council, commended the efforts made by the heads of state and government of the ECOWAS to promote peace and normalcy in Liberia.⁵⁴

Although the civil war was contained for a while, peace continued to elude Liberia. Marginal successes especially in the areas disarmament, demobilization and reintegration were achieved under ECOMOG. The serious response by the UN came almost three years after the war broke out. In November 1992, the Security Council adopted a resolution calling belligerents to observe a ceasefire and endorsed arms embargo on weapons and military equipments destined for Liberia with the exception of arms to ECOMOG.⁵⁵ The Security Council initiative resulted in the establishment of the UN Observer Force in Liberia (UNOMIL). ECOWAS continued playing an active role with the support of the International Contact Group on Liberia comprising Britain, USA, Morocco, Nigeria, Senegal and Ghana. It successfully negotiated the peace deal which required Charles Taylor to step down. Indeed in 2003 Charles Taylor left the country and sought asylum in Nigeria, which paved way for the transitional government to assume power and conduct election.

2. ECOMOG Intervention in Sierra Leone

With the unqualified success in Liberia and anarchy reigning in Sierra Leone, in 1997 ECOWAS was again compelled to intervene in Sierra Leone where the civil war had erupted and claimed thousands of lives. In the Sierra Leone crisis, the international community was complacent to send military intervention to reinstate the government, which had been democratically elected in 1996. Indeed, with the fresh memory of the UN peacekeeping fiasco in Somalia and the ongoing conflict in the former Yugoslavia, little room was left for the effective UN intervention. Following the overthrow of the legitimate government of Tejan Kabbah in Sierra Leone, ECOMOG altered and extended its already stretched resources in the Liberian conflict to cover Sierra Leone. This was done by stationing the ECOMOG troops under the previous Status of Force Agreement signed between the

⁵⁴ The situation in Liberia, initial proceedings, Decision of 22nd January 1991, (2974th Meeting) Statement of the President, available at http://www.un.org/en/sc/repertoire/8992/CHAPTER%208/AFRICA/item%2002_Liberia.pdf (last visited 26 August 2010).

⁵⁵ SC Res. 788, 19 November 1992.

government and ECOMOG to prevent the spread of the Liberian crisis in the neighbouring country.

Just like the ECOMOG intervention in Liberia, the ECOMOG presence in Sierra Leone was neither approved by the Security Council nor the OAU. Some commentators have argued that the intervention was not an ECOMOG intervention, but that of Nigeria, supported by Guinea and Ghana, because it finds no basis in the ECOWAS legal framework.⁵⁶ However, it can be argued that if the doctrine of humanitarian intervention is recognized as a rule of international customary law, then a state or a group of states in this case ECOMOG were justified to intervene to avert humanitarian catastrophe and remedy serious violations of human rights. Earlier, the final Communiqué of a meeting of ECOWAS foreign ministers in Conakry in June 1997 argued that every effort was made to restore the lawful government by using dialogue, arms embargo and force. It did not authorize outright military intervention⁵⁷ because the decision to intervene is reserved to the Authority of Heads of State and Government.⁵⁸ The Final Communiqué of the Heads of State and Government of ECOWAS which had been adopted in Bamako⁵⁹ is considered as the basis for the ECOWAS intervention. Specifically the Communiqué stated that “sub regional forces shall employ all necessary means to implement the decision of the heads of state and government.”⁶⁰ Indeed the OAU Chairman expressed his strong support to the ECOWAS “noble mission” to restore peace and stability in Sierra Leone.

The intervention of ECOMOG led by Nigeria was legitimized later by the UN Security Council.⁶¹ The OAU was largely supportive of the efforts of the ECOWAS as a legitimate organ with responsibility to secure peace and stability within the broader goals of the OAU Charter. These two peacekeeping campaigns made ECOMOG an example of how regional

⁵⁶ M. Goldmann, Sierra Leone: ‘African Solutions to African Problems?’, in 9 *Max Planck Yearbook of United Nations Law* (2005), 468-471.

⁵⁷ SC Doc. S/1997/499, 27 June 1997, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20S%201997%20499.pdf> (last visited 26 August 2010).

⁵⁸ Protocol Relating to Mutual Assistance on Defence, Art. 6(3), 29 May 1981, 1690 U.N.T.S. 51.

⁵⁹ Decision of the ECOWAS Authority of 29 August 1997, see Annex II to Doc. S/1997/695, Article 2.

⁶⁰ Security Council, *supra* note 57, Art. 6.

⁶¹ SC Res.1132, 8 October 1997.

groups can take charge of their own problems when the international community is not willing to commit troops and resources to secure peace and stability. Arguably, the UN did later authorize a peacekeeping mission but only after seeing the initiatives of the countries in the region. It may be argued that the international community endorsed the outcome of the intervention rather than the means used to accomplish the outcome. Because of these efforts some scholars have been inclined to argue that the intervention of ECOMOG showed that West African countries had gone further than any other African sub region in efforts to establish a security mechanism to manage its own conflicts.⁶² Though the international community played a significant role in both interventions, namely Liberia and Sierra Leone, it is undisputable that ECOWAS played a leading role in both operations.

V. SADC Intervention in Congo (SADCC)

SADCC was launched in 1980 by Southern African countries formerly of the Frontline States.⁶³ It was tasked to coordinate and harmonize economic cooperation within its member states. Its main objective was to reduce economic dependence from Apartheid South Africa and intensify regional efforts in close partnership with the OAU and other pan African initiatives to dismantle the Apartheid regime in South Africa.⁶⁴ With the end of apartheid in South Africa, SADC adapted to new challenges by evolving its mission to accommodate security and political challenges, which were facing its member states.

In 1996, the SADC Heads of States and Governments approved and adopted a Protocol of the Organ on Politics, Defence and Security Cooperation.⁶⁵ This organ established a subcommittee called the Interstate Defence and Security Committee, which was meant to enhance peace and security among its member states. Zimbabwe was given the mandate by ISDSC to coordinate and harmonize peacekeeping in SADC countries. The specific mandate and functions of the Organ included the promotion of

⁶² A. Adedeji, *Building Peace in West Africa: Liberia, Sierra Leone and Guinea Bissau* (2002), 15.

⁶³ For the history of SADCC and later SADC see generally, I. Mandaza (ed.), *Reflections on the Crisis on the Democratic Republic of Congo* (1999).

⁶⁴ *Id.*

⁶⁵ SADC, Protocol on Politics, Defence and Security Cooperation, 14 August 2001.

political cooperation among member states and evolving common political values and institutions, and the protection of the people and safeguard of the development of the region against instability arising from a breakdown of law and order and interstate conflict.⁶⁶ It was further charged with the task of cooperating fully on regional security and defence through conflict prevention, management and resolution.⁶⁷

The first test of peacekeeping for SADC came in 1997 during the DRC conflict when the Kabila government was challenged by rebels advancing from the eastern part of the country. It also faced challenges emanating from the military unrest in Lesotho and renewed fighting in Angola after the breakdown of the Lusaka Peace Accord between National Union for the Total Independence of Angola (UNITA) and the government of Dos Santos. The response of the OAU in these conflicts was marginal and instead the governments looked at the regional organization to mobilize the required resources to intervene. Just like in ECOWAS where there was lack of common approach between member states, in SADC also member states could not agree on the united position to respond to the crises in DRC, Lesotho and Angola.⁶⁸

To address the conflict in DRC, Namibia, Zimbabwe and Angola decided to send troops.⁶⁹ The justification of the intervention was based on “the need to secure its sovereignty, restore law and order, and protect a legitimate government of President Kabila”.⁷⁰ The decision was not taken by the full SADC Summit. Rather it was made by the SADC defence ministers under the aegis of Interstate Defence and Security Committee.⁷¹ During the 18th SADC Summit in Mauritius, the Summit issued a Declaration stating that the Summit

⁶⁶ *Id.*, Art. 2 (2).

⁶⁷ *Id.*

⁶⁸ S. Fredrik, ‘Whose Security? Comparing Security Regionalism in West and Southern Africa’, in J. J. Hentz & B. Morten (eds), *New and Critical Security and Regionalism, Beyond the Nation State* (2003), 167; 175.

⁶⁹ *Id.*, 172-176; see M. Rupiya, ‘A Political and Military Review of Zimbabwe’s Involvement in the Second Congo War’, in J. Clark (ed.), *African Stakes of the Congo War* (2002); see also, K. P. Coleman, *International Organizations and Peace Enforcement: The Politics of International Legitimacy* (2007), specifically see chapter four, 75-115.

⁷⁰ South African Defence Forces Communication Bulletin, 57/98, 22 September 1998.

⁷¹ The intervention was approved by SADC Defence Ministers in Harare, Zimbabwe in August 1998.

“welcomed initiatives by SADC and its Member States intended to assist in the restoration of peace, security and stability in DRC”. The declaration further “... commended the Governments of Angola, Namibia and Zimbabwe for timorously providing troops to assist the Government and people of DRC”.⁷²

Though the SADC Summit did not approve the intervention in DRC, nevertheless, it supported the initiative afterwards.

Another opportunity for SADC to intervene in internal affairs of its member states arose in Lesotho after election disputes which culminated with unrest within the country. South Africa, which was the leading nation in this mission, argued that outside intervention was requested by the Prime Minister of Lesotho in accordance with the SADC Agreement and that the mission was undertaken under the full authority of SADC.⁷³

Examining the peacekeeping experience of SADC, it can be argued that the organization performed better in some countries and marginally in others. For example, in Lesotho, it managed to quell the violence and restore peace and stability. In Angola together with other organizations like the UN, it managed to facilitate the Lusaka Peace Accord and the surrender of the rebel group of UNITA, which ushered in a new era of relative peace in the country. The intervention in DRC is considered largely a failure. The war is still ongoing and to date peace is still elusive. These partial successes can partly be attributed to the willingness of member countries to work together and also the presence of South Africa with considerable resources to support peacekeeping efforts of the organization.

⁷² *Final Communiqué of the 1998 SADC Summit of Heads of State and Government*, 15 September 1998, para. 20, available at http://www.info.gov.za/speeches/1998/98b24_4629811399.htm (last visited 26 August 2010).

⁷³ Coleman *supra* note 69, specifically see chapter five, 120-148, this Chapter is about the DRC.

VI. The birth of AU and the Evolution of Peacekeeping in Africa

The transition from the OAU to the AU⁷⁴ fundamentally changed the norms underpinning the peacekeeping concept as it was previously known and implemented under the OAU. The newly adopted Constitutive Act of the African Union discarded the old concept of absolute non-intervention in the domestic affairs of its member states.⁷⁵ In fact, the Organization upheld this right, but with qualifications. The Constitutive Act confirms the principles of sovereign equality among member states, respect of borders existing after independence and non-interference by any member state in the internal affairs of others.⁷⁶ However, the principle of non-interference had effectively encouraged a culture of impunity in a number of African countries.⁷⁷ The effect of this culture of non-intervention meant that OAU was a silent observer to atrocities committed in most African countries. Indeed the AU Chief Legal Counsel while commenting on the importance of the amendment and expansion of Art. 4(h) of the Constitutive Act stated that “the addition of Art. 4(h) was adopted with the sole purpose of enabling the AU to resolve conflicts more effectively on the continent, without ever having to sit back and do nothing because of the notion of non-interference in the internal affairs of member states.”⁷⁸

The normative differences between the AU and the OAU are significant. These differences reflect the desire and understanding of African leaders to create a strong institution capable to comprehensively address challenges facing Africa and its people. While the OAU Charter unequivocally committed itself to the principle of the “sovereign equality of all member states” the AU Constitutive Act rephrases the principle as the “sovereign equality and interdependence among member states of the Union”. Another major difference is that the OAU Charter adopts a rigid

⁷⁴ For overview of the creation of the AU see T. Maluwa, ‘The Constitutive Act of the African Union and Institution Building in post Colonial Africa’, 16 *Leiden Journal of International Law* (2003) 1, 157-170.

⁷⁵ AU Constitutive Act, 11 July 2000, Art. 4, 2158 U.N.T.S. 1.

⁷⁶ *Id.*, 4(h).

⁷⁷ S. Gomes, ‘The Peacemaking Role of the OAU and the AU: A Comparative Analysis’ in J. Akokpari *et al.* (eds), *The African Union and Its Institutions* (2008), 113-125.

⁷⁸ B. Kioko, ‘The Right of Intervention Under the African Union’s Constitutive Act’, 85 *International Review of the Red Cross* (2003) 852, 807-817.

policy of non-interference in internal affairs of another state.⁷⁹ In contrast, the AU Constitutive Act provides for non-interference of any member states in the domestic affairs of another, but it retains the right of the AU to intervene in the affairs of a member state pursuant to the decision of the AU Assembly in respect of grave circumstances such as averting genocide, war crimes or crimes against humanity. As well in case of serious threat to legitimate order or to restore peace and security to the member state of the Union upon the recommendation of the Peace and Security Council.⁸⁰

1. AU Legal Framework

The AU Constitutive Act makes a provision for the establishment of the Peace and Security Council as an organ of the organization.⁸¹ The initiative to establish a Peace and Security Council (PSC) stems from the decision of the 37th Ordinary Session of the OAU Heads of State and Government in Lusaka in 2001.⁸² This Session decided to incorporate the OAU Mechanism for conflict prevention in the AU Constitutive Act but with enhanced authority. Subsequently, in the following Summit, the name was changed from Conflict Prevention Mechanism to the PSC.

The PSC is responsible for coordination and harmonization of continental efforts in conflict resolution and peacebuilding.⁸³ The Protocol makes an explicit link between security and “democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of life and international humanitarian law”.⁸⁴ It provides the criteria for intervention in internal conflict to protect and safeguard life, and to prevent them from spilling into the neighbouring countries.⁸⁵ The Protocol further calls for creation of the African Standby Force (ASF) to give teeth to the Council’s peacekeeping efforts. According to the Protocol, the Standby Force “shall be composed of standby multi-disciplinary

⁷⁹ Art. III (2) OAU Charter.

⁸⁰ See *supra* note 75, Art. 4(h) AU Constitutive Act.

⁸¹ *Id.*, Art. 5(f).

⁸² OAU Decisions and Declarations 37th Ordinary Session of the Assembly of the Heads of State and Government of the OAU, Decision AHG/DEC.1 (XXXVII), 11 July 2001.

⁸³ Protocol on Peace and Security Council, 9 July 2002, Art. 3 (d), available at http://www.africaunion.org/root/AU/organs/psc/Protocol_peace%20and%20security.pdf. (last visited 26 August 2010).

⁸⁴ *Id.*, Art. 3(f).

⁸⁵ *Id.*, Art. 4.

units with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice.”⁸⁶ The ASF is conceived along the lines of the UN “standby arrangement” where a state identifies, trains and equips specific contingents for peacekeeping operations until the time comes for their deployment.

According to the Protocol establishing the PSC, its main functions include preventive diplomacy, peacemaking, peacekeeping and peace support operations and post conflict peacebuilding.⁸⁷ The PSC as the principle organ of the AU for peacekeeping and peacemaking on the continent is also tasked with spearheading coordination and cooperation between regional mechanisms and the AU in preservation of peace and security.⁸⁸ Since its establishment the AU has committed itself to secure peace and security in some troubled hotspots on the continent.⁸⁹ The efforts of the organization in Burundi and Darfur are cases in point. In the following discussion both initiatives will be examined in light of the growing recognition of the organization to assume responsibility for security challenges on the continent.

2. AU Experience

a) AU Peacekeeping Mission in Burundi

The OAU and later AU had engaged in Burundi since the overthrow and assassination of the first democratically elected President of Burundi in 1993. But the full-fledged mission did not materialize until 2003 when the African Union authorized the creation of the African Union Mission in Burundi (AMIB).⁹⁰ The full deployment of the AU Mission stemmed from the ceasefire Agreement between the Burundi government and the rebels in December 2002. The Agreement had specifically provided that “verification

⁸⁶ *Id.*, Art. 13.

⁸⁷ *Id.*, Art. 6.

⁸⁸ *Id.*, Art. 7.

⁸⁹ Since its creation, the AU has sent peacekeepers to Darfur, Somalia and Burundi. In 2008, its member states Tanzania, Senegal and Sudan intervened in Comoro to restore law and order under the auspices of the African Union; see the AU decision: Assembly/AU/DEC. 186 (X).

⁹⁰ Decision Central Organ/MEC/AMB/Comm. (XCI), adopted by the 91st Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial level in April 2003.

and control of the ceasefire agreement shall be conducted by an African Union Mission”.

The mandate of AMIB was among other objectives to: establish and maintain the liaison among the warring parties; provide VIP protection of returning leaders; and to monitor and verify the implementation of the ceasefire agreements.⁹¹ The mission was also responsible for facilitating and providing technical assistance to the Demobilization, Disarmament, and Reintegration (DDR) process. It was also mandated to facilitate the delivery of humanitarian assistance, including to refugees and internally displaced persons and coordinate mission activities with the UN presence in Burundi.⁹²

The success of AMIB was mixed.⁹³ While the ceasefire was not fully implemented because the rebels continued fighting, the mission managed to stabilize most parts of the country. This success created a conducive environment for the eventual deployment of UN troops.⁹⁴ Compared to other missions that had been undertaken previously by the predecessor of the AU, the AMIB had no problem with having a valid mandate. Rather it faced “traditional challenges”, which had plagued its successors elsewhere namely: the challenge of financial resources and the inability of troop contributing countries to deploy troops in a timely manner. The fact that South Africa was the leading nation in AMIB made a difference given the fact that South Africa is the most economically powerful on the continent. Nevertheless, it can rightly be argued that AMIB achieved significant success partly because of the commitment of South Africa and other troop contributing countries like Ethiopia and Mozambique to shoulder the financial and human responsibility to sustain the mission.⁹⁵

b) The AU intervention in Darfur and the Concept of “African Solutions for African Problems”

The conflict in Darfur is synonymous with the African Union peacekeeping efforts on the continent. Perhaps it is one of the missions

⁹¹ *Id.*

⁹² *Id.*

⁹³ M. Timothy, *The African Union: Pan Africanism, Peace building and Development* (2005), 91-95.

⁹⁴ F. Agoagye, ‘The African Mission in Burundi: Lessons Learned from the First African Union Peacekeeping Operation’, 2 *Conflicts Trends* (2004) 2, 9-15.

⁹⁵ *Id.*

which have come to define the capabilities and weaknesses of the organization as pertains to the concept of peacekeeping on the continent.⁹⁶ The involvement of the organization in Darfur has attracted mixed appraisals. Most Africans consider the mission as a bold statement on the willingness of Africa to confront its own challenges and realize the promise of providing African solutions for African problems. Yet others, especially those involved in humanitarian assistance, have constantly referred to the mission as one which is “largely ineffective, poorly equipped, financed and managed”.⁹⁷ To many the mission has miserably failed to live up to the responsibility of protecting the civilians as envisaged under its mandate.

The AU involvement in Darfur stems from the PSC decision taken in 2004. Under this decision the PSC determined the situation in Darfur to constitute threat to peace and security of the region and the entire continent. It authorized the Chairperson of the Commission to deploy the AU observer mission to monitor the ceasefire agreement signed between the government and rebels and ensure full compliance by the parties.⁹⁸ In October of the same year the PSC adopted a resolution asking the Chairperson of the Commission to enhance the capability of the mission by providing more personnel to that Mission. The mandate of the Mission was expanded to include protection of civilians “whom it encounters in danger of imminent threat”.⁹⁹ Effectively, the mission was granted significant power to use force to defend civilians in imminent danger.

The willingness of the organization to commit troops from its own member states to address security challenge in Sudan can be seen as a significant departure from previous attempts when the OAU was unwilling to intervene in domestic affairs of other countries. There are several reasons as to why the AU took the lead in intervening in Sudan. They include the fact that the AU was eager to do “something” in light of the massive violations of human rights which were taking place in Darfur and its desire to be different from the defunct the OAU, which had maintained passive

⁹⁶ S. Appiah-Mensah, ‘The African Union Mission in Sudan: Darfur Dilemmas’, 15 *African Security Review* (2006) 1, 2-19.

⁹⁷ For comprehensive account and international response on Darfur conflict and especially the indifference of the western countries to help the African Union fulfill its mandate, see K. Funk & S. Fake, *The Scramble for Africa: Darfur, Intervention and the US* (2009).

⁹⁸ AU Peace and Security Council Resolution PSC/AHG/Comm. (X), 25 May 2004.

⁹⁹ *Id.*, PSC/PR/Comm. (XVII) 20 October 2004.

engagement despite egregious human rights violations on the continent.¹⁰⁰ Further, as Sudan did not allow any international involvement in the conflict, the AU remained as the only credible institution to intervene.¹⁰¹ The fact that there was a deep division within members of the Security Council on the correct approach to address the conflict negated any possibility of consensus within the international community on what to do.¹⁰²

The mission faced insurmountable challenges from the start. Inadequate funding, poor logistical arrangements and the vast and complex territory of Darfur became the hallmark of the mission's operation. Still despite the serious challenges which faced the mission, it may be argued that, at least symbolically, it was an achievement for the organization, which had struggled to reassert its relevance before its own people on the continent. Further the fact that the Sudanese government and the rebels agreed to submit to the authority of the AU to the extent of signing the Darfur Peace Agreement at the auspices of the AU in Abuja, lend credence to the legitimacy of the organization in addressing peace and security challenges on the continent.¹⁰³ Moreover, to the extent that Sudan had rejected UN involvement in Darfur while insisting the unique role of the AU in addressing the Darfur conflict can partly be seen as recognition by African countries that the AU, if supported with necessary tools, can play a crucial role in the peace and security on the continent.

Arguably, the conflict of Darfur in Sudan is and has been a litmus test for the newly created AU. From the beginning the organization was actively involved in the resolution of the conflict. While previously the organization waited for the decision of the UN Security Council to send troops and allocate financial resources, in Darfur the organization was proactively taking the lead to address the conflict, by sending the Peacekeeping Mission

¹⁰⁰ See C. Heyns & F. Viljoen, 'The Regional Protection of Human Rights in Africa: An Overview and Evaluation', in P. Zeleza & P. McConaughay (eds), *Human Rights, Rule of Law and Development in Africa* (2004), 135-140.

¹⁰¹ Sudan always characterized the Darfur conflict as the African Problem as such asked AU to get more involved in solving the conflict. See the report of the AU Chairperson on the Situation in Darfur PSC/PR/2(V), 13 April 2004, 4.

¹⁰² See report Human Rights First; Investing in Tragedy: China's Money, Arms and Politics in Sudan, (2008), specifically pages 17-20.

¹⁰³ J D. Rechner, 'From the OAU to the AU: A Normative Shift with Implications for Peacekeeping and Conflict Management, or Just a Name Change', 39 *Vanderbilt Journal of Transnational Law* (2006) 2, 543, 570-75.

and also by embarking on the political process.¹⁰⁴ It can also be argued that by empowering AMIS to protect civilians in eminent danger reflected how the peacekeeping role is evolving from one of purely enforcing ceasefires between the belligerents to one of protecting civilians who in most cases have been ignored to their own peril. The mission lasted for less than four years until it was transformed into joint peacekeeping efforts between the AU and the UN.

The idea of African solutions for African problems is a relatively new concept which lay behind the birth of the AU. Unlike before, when most of the calamities bedevilling the continent were blamed on the colonialists and their successors, the new concept signals a new and more constructive attitude. It realizes that it is not enough to blame the west for Africa's problems. It rather acknowledges that Africa must be responsible for its own challenges. Be that as it may, the notion of African solutions for African problems is easier stated than realized in practice. Nowhere has the concept of African Solutions for African problems been challenged more than in Darfur. The Mission from its inception was poorly equipped. African member states provided troops for the mission but the organization could not mobilize sufficient resources to sustain the mission, which prompted the organization to seek external assistance. Here below I analyze whether these initiatives of the AU can be taken as the basis for future interventions by the organization somewhere else in other conflict spots on the continent.

VII. Whither African Solutions for African Problems?

1. The Concept in Practice

Clearly Darfur has shown and proved what the African Union can do on its own without external assistance. It has displayed both, the strength and the limitations of what it can realistically achieve in its efforts to maintain peace and security on the continent. The perennial challenge of financial and material shortages which has always characterized the peacekeeping efforts of the OAU have not spared the AU. It is this never

¹⁰⁴ Political efforts to address the Darfur conflict were reflected at first in the appointment in June 2005 of the notable Tanzanian diplomat and the former OAU Secretary General Salim A. Salim as the AU Chief Mediator between the rebels and the government of Sudan; press release available at http://www.africa-union.org/News_Events/Press_Releases/26%202005%20Press%20Release%20-%20Salim.pdf (last visited 26 August 2010).

ending challenge of resources, which casts a shadow of doubt on the practicality of the concept as espoused by the organization. The question is whether the AU can mobilize its own resources to address security challenges on the continent. The reality in Darfur has shown that the concept is good in theory, but its success will greatly depend on the willingness and readiness of the “international community” to provide the required resources.

It is because of the marginal success of the “African Solutions for African Problems” concept in facing up the challenge in Darfur, the organization decided to request for the establishment of a hybrid mission replacing the AU’s force.¹⁰⁵ With the international community considering AMIS as a failure for its inability to protect people in Darfur it was expected that the same international community could adequately finance the work of the mission. This was not the case. UNAMID has faced similar challenges like its predecessor; it has struggled to acquire necessary resources to undertake its vital mission to protect people.¹⁰⁶ In the beginning, the hybrid mission in Darfur was hailed as an excellent partnership between the UN and the AU in fostering the ability of the organization to take the lead in addressing its own problems. Despite this assessment, many human rights advocates consider the mission as another latest broken promise by the west to assist Africa.¹⁰⁷

UNAMID has struggled to get the required armoured vehicles and helicopters to conduct patrols. Though it is a hybrid, which is a joint mission between the UN and the AU, it largely depends on the UN budgetary assessment. The AU member states have provided a significant number of troops even though the available troops heavily depend on the UN to fund their salaries and other requirements. This experience suggests that a partnership or hybrid mission between the UN and the AU is not necessarily a panacea to the continent’s peacekeeping challenges.¹⁰⁸ Expressing his disappointments on the failure of the international community to fund the mission, which was established amidst high expectations the then commander of UNAMID troops remarked that “we remain desperately under-manned and poorly equipped. Our long shopping list of missing

¹⁰⁵ See SC Res. 1769, 31 July 2007.

¹⁰⁶ NGO Joint Report on Darfur, Grounded, *The International Community’s Betrayal of Darfur* (2008).

¹⁰⁷ G. Prunier, *supra* note 9, 138-143.

¹⁰⁸ T. Murithi, ‘The African Union’s Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur’, 14 *Journal of Peace, Conflict and Development* (2009) 1, 15.

equipments make shameful reading”.¹⁰⁹ The report commissioned by western NGOs exposes the weakness of this once heralded partnership between the UN and AU in promoting an African solution to African problems.¹¹⁰ A partnership premised on the need to strengthen the African capability to address its own challenges without necessarily relying on the external help from the developed countries.

The then AU Chairman Konare, frustrated by the unwillingness of AU member states to meet their financial obligations, stated that “member states must absolutely break off from improvisation and systematic recourse to external assistance. They must demonstrate their remarkable political will to empower the instrument they have established from crushing external dependence”.¹¹¹ The swelling of member states arrears and the dwindling of their assessed contributions are also a cause of great concern. For example, during the launch of the AU in Durban, 13 out of 52 countries had no arrears, while only 16 countries had met their financial obligations. The total arrears stood at more than 40 Mio USD.¹¹² All these challenges have cast doubt on the ability of the African Union to shoulder its own responsibility to secure peace and stability on the continent.

2. The Future of Peacekeeping in Context

Arguably, the duty to maintain peace and security of the world squarely falls on the shoulders of the UN Security Council.¹¹³ But in reality the Security Council has not determined the criteria for when particular situation merits the intervention by the world body. The decision is rather based on political considerations than actual human suffering.¹¹⁴ In some

¹⁰⁹ Fake, Funk, *supra* note 97, XVI.

¹¹⁰ NGO Joint report, *supra* note 106.

¹¹¹ AU Statement of the Chairperson of the Commission on the launching of the Peace and Security Council of the African Union, 25 May 2004, 5, available at http://www.africa-union.org/Official_documents/Speeches_&_Statements/HE_Alpha_Konare/Statement-CP%20Alpha%20konare%20-Africa%20Day.pdf (last visited 26 August 2010).

¹¹² M. Mwanasali, ‘From Non Interference to non Indifference: The Emerging Doctrine of Conflict Prevention in Africa’, in Akokpari *et al.*, *supra* note 77, 56-57.

¹¹³ Chapter VII Charter of the United Nations.

¹¹⁴ H. Kusano, ‘Humanitarian Intervention: An Interplay of Norms and Politics’, in M C. Davis *et al.*, *International Intervention in the Post Cold War World: Moral Responsibility and Power Politics*, 2004, 128-130; see also, S. Chesterman, *Just War of Just Peace? Humanitarian Intervention and International Law* (2002), 126-132.

cases, African conflicts have claimed thousands of lives with little international intervention even when clearly minimal intervention from the Council could have averted a humanitarian catastrophe. It is this ambiguity of the Council in authorizing and sufficiently equipping peacekeeping missions which provides a reality check for the African countries to scale back their expectations from what the international community through the UN Security Council can offer to Africa. There is a conspicuous poverty of human and financial resources facing African countries. Such equipment like transport planes, personnel carriers and telecommunications are either in short supply or non-existent. What is clear then is that African countries will continue to rely on unpredictable and insufficient external support to address peacekeeping challenges on the continent.

As eloquently stated by the Gambian representative to the UN, “a typical African country in conflict is poor, with weak government and public institutions, a small private sector, high illiteracy, a narrow skills base and limited capabilities for guaranteeing security and that state of affairs is rendered even more dire by civil strife, whose effects on the economy and the society at large are debilitating.”¹¹⁵ This assertion reflects the true picture of most African countries today especially those in conflict. Unfortunately, most of these countries experiencing civil strife are the ones supposed to contribute to the AU capability to keep peace and security on the continent. This would be a major challenge indeed for countries, which also must battle to address other intractable challenges within their own borders.

Africa has partnered with the European Union and other western and non-western countries to address peace and conflict challenges. In 2001, the EU established the Rapid Reaction Mechanism to address political or emergency related situations in countries undergoing “severe political instability or suffering from effects of technological or natural disasters”.¹¹⁶ In a similar move, in 2003 the EU signed an assistance package of what is called Peace Support Facility to strengthen Africa’s capacity to make interventions in conflict prone areas. These initiatives though highly timely and laudable, raise a serious concern as to their sustainability as regards to continued funding from rich countries. By and large the AU is

¹¹⁵ See C. Grey-Johnson, *Beyond Peacekeeping: The Challenge of Post Conflict Reconstruction and Peacebuilding in Africa*, available at <http://www.un.org/Pubs/chronicle/2006/issue1/0106p08.htm> (last visited 3 June 2010).

¹¹⁶ D. Bach, in Akokpari *supra* note 77, 362-363.

overdependent on the goodwill of international donors to carry out its core mandate of keeping peace and securing stability on the continent. As to whether Africa will manage to carry out its obligation, relying on the ever unpredictable resources from rich countries remains the biggest question, facing the AU as it attempts to take lead in addressing African challenges.

If the more developed countries in the world, particularly those in Europe and North America, are not prepared to get involved on the ground in Africa, then it is to a certain degree incumbent upon them to provide the kind of assistance African countries require in carrying out these operations to match their rhetoric with tangible actions. Assistance nearly always comes with a price tag, more often than not a political one. The sooner the states of Africa get themselves organized the sooner they will be able to pool what resources they have and learn from their collective past experiences. They will be able to make better use of what assistance they can obtain and hopefully gradually reduce their dependence on external help.¹¹⁷

Further, the effectiveness of the peacekeeping operations under the aegis of the AU greatly hinges on the ability of the force to keep peace. Again, the experience in Darfur has shown that African military personnel have marginal experience in keeping the peace in conflict zones like Darfur or Somalia. For example, a report commissioned by the Enough Project in 2008, a humanitarian think tank based in Washington D.C., argued that the peacekeepers in Darfur find it extremely difficult to protect themselves against external attacks from rebels - something which cast a serious doubt as to the peacekeepers ability to protect civilians.¹¹⁸ In light of the growing commitment of the AU to secure peace and stability in different hotspots on the continent, member states should equip their military personnel with advanced training specifically to keep peace. Despite the clear commitment and steps to establish Africa Standby Force, it is not clear whether this force can venture to keep and secure the peace in a most difficult and hostile terrains in places like Goma or Mogadishu.

Regional organizations like ECOWAS and SADC have a crucial role to play in strengthening future peacekeeping operation on the continent. Unlike any other regional institution on the continent, ECOWAS and SADC have considerable experience in peacekeeping. ECOWAS for its part has

¹¹⁷ R. May & G. Cleaver, 'African Peacekeeping: Still Dependent?', 4 *African Studies Centre* (1997) 2, 18.

¹¹⁸ J Fowler & J. Prendergast, *Keeping our Word: Fulfilling the Mandate to Protect Civilians in Darfur* (2008), 1-7.

sent in soldiers to secure peace and stability in some hostile hotspots like Liberia, Guinea Bissau and Sierra Leone. Similarly, SADC has been involved in Burundi and Democratic Republic of Congo. These two institutions could provide a strong complementary support to the African Union in its efforts to secure peace and stability on the continent. Indeed, the AU has recognized the important role of regional organizations in peacekeeping by stating that regional brigades shall constitute the African Standby Force (ASF)¹¹⁹ which is slated to be unveiled in 2010. ASF is envisaged to cooperate where possible with the UN and sub-regional African organizations in securing peace and stability in Africa. Further, regional institutions like IGAD, could play a pivotal role in securing peace and stability especially in the Horn of Africa, given its experience in conflict resolution especially its central role in the negotiations and eventual signing of the Comprehensive Peace Agreement in Sudan between the government and SPLM rebels. Indeed IGAD member states like Uganda, Kenya, Ethiopia and Djibouti are heavily involved in the Somalia peace process in one way or another. As such their experience in the regional could be vital for the AU efforts.

Despite the efforts of the AU to mobilize its own resources to intervene in intractable conflicts, the experience in Somalia where the AU authorized the African Mission in Somalia (AMISOM) in January 2007, is hardly encouraging. The AU, as part of its African solutions for African problems concept and as an alternative to a dithering, detached and disengaged international community,¹²⁰ authorized the Peacekeeping Mission to replace the withdrawing Ethiopian troops and support the fledgling but internationally recognized Transitional Federal Government of Somalia. Burundi and Uganda have contributed the largest share of troops but as always these troops suffer from inherent lack of resources. For example, out of the total yearly budget of around 600 Mio USD for 2008, AMISOM received less than 50 Mio USD in contribution.¹²¹

Indeed, this frustration is echoed by the then AU Special Envoy for Somalia Ambassador Nicholas Bwakira who contended that AMISOM is doing an international duty yet the international community has been

¹¹⁹ PSC Protocol, *supra* note 83, Art. 13.

¹²⁰ Murithi *supra* note 108, 15.

¹²¹ See the briefing report to the Security Council by the AU representative to the UN available <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/SOMALIA%20S%20PV%205837.pdf> (last visited 26 August 2010).

unwilling to pay up the bill.¹²² This argument of Ambassador Bwakira is premised on the fact that collective peace and security of the world is the responsibility of the UN through its Security Council. Similarly, despite promises by the Security Council to assist and eventually replace AMISOM by a stronger and better funded Multinational force “at an appropriate time”,¹²³ nothing has materialized. The UN Secretary General has not hidden his disappointment about the unwillingness shown by the rich countries especially Permanent Members of the Security Council to take the lead to secure peace and stability in Somalia. Despite approaching more than 50 countries, no country has been willing to take the lead of such a Multinational force.¹²⁴

As the experience in Somalia demonstrates, the fact that AU member states might be willing to contribute troops for peacekeeping they would correspondingly expect the AU to foot the bill for the costs involved. Otherwise there would be no incentive of having troops under the auspices of the organization if it cannot actively work with the international community to secure the necessary resources required. The advantage of having troops deployed under the auspices of the UN would naturally be a funding possibility. Since the UN is composed of diverse countries both rich and poor, it would ensure that substantial funding would be secured to sustain peacekeeping mission in such hotspots like Somalia. In the absence of the UN, the AU should devise strategies both internal and external of securing needed resources to support such missions.

This endeavor would perhaps be appealing if the rich countries are not asked to send in troops to Africa, if instead they are asked to contribute towards securing peacekeeping resources in the framework of the UN. As experience has shown, African countries are capable of contributing

¹²² See the interview of Ambassador Bwakira by Voice of America in November 2009 where he contended that AMISOM troops have spent five months without getting their salaries. Indeed Ambassador Bwakira argued international community to honour their commitments and promises. For example out of nearly US\$300m pledged during donor conference to support Somalia in April 2009 in Brussels, by November 2009, only 3 million had been realized. Available at <http://www1.voanews.com/english/news/africa/AU-Envoy-Says-AMISOM-Troop-Payments-Remain-In-Arrears--73895107.html>. (last visited 26 August 2010).

¹²³ SC Res. 1814, 15 May 2008.

¹²⁴ See UN SG Report; Give African Forces in Somalia Substantial, Credible Backing Urges as Security Council Considers Challenges Facing Horn of Africa Country, available at <http://www.un.org/News/Press/docs/2008/sgsm12011.doc.htm> (last visited 26 August 2010).

requisite troops for peacekeeping missions. What they lack are necessary resources to undertake the missions. Literally speaking, under this arrangement, the AU would manage and conduct peacekeeping operations on the continent on behalf of the UN as the ultimate institution with responsibility to maintain global peace and security. Furthermore, having all peacekeeping missions coordinated under the aegis of the AU would have some advantages. Politically it would play well with some African countries who consider outside intervention as an opportunity for western countries to meddle into internal politics of African countries. Hence, they would be comfortable of having African troops in their countries rather than having multinational forces. Financially, it would make the AU a focal point body to undertake the collective appeal for resources from the international community rather than having regional organizations like ECOWAS or SADC making their separate appeal for resources. This option, where Africa is ready and willing to take the lead to address its peace and security challenges, should be appealing to the international community and especially the resource-rich countries, since it eliminates the option of asking them to contribute troops to secure peace and stability in Africa.

Ultimately, the future of peacekeeping in Africa rests in African hands. Indeed even the UN has reinforced the concept of burden sharing by encouraging and arguing the international community to support African efforts to address peacekeeping challenges on the continent. The Former UN Secretary General has stated that “within the context of the United Nations primary responsibility for matters of international peace and security, providing support for regional and sub regional initiatives in Africa is both necessary and desirable. Such support is necessary because the UN lacks the capacity, resources and expertise to address all problems that may arise in Africa. It is desirable because wherever possible the international community should strive to complement rather than supplant African efforts to resolve African problems”.¹²⁵ This assertion by the UN Secretary General can only be realized with the genuine commitment of the western countries to genuinely and adequately support efforts of African countries to assume larger role in maintaining peace and stability in Africa. It is increasingly becoming apparent that western countries are becoming less and less interested to send in peacekeeping troops to the African continent to secure peace and stability.

¹²⁵ The causes of conflict and the promotion of durable peace and sustainable development in Africa, Report of the Secretary General, UN Doc. A/52/871 - S/1998/318, 13 April 1998, para. 41.

VIII. Conclusion

Although AU is numerically the largest regional body in the world boasting more than fifty countries in its membership column, it is also the most underfunded and the poorest of its type in the world. It is clear that there exists a wide gulf between what is desirable for the successful operation of peacekeeping in Africa and what is actually in place or may be offered by African countries. The future of peacekeeping on the continent fundamentally hinges on the political will of African states first to realize that it is Africa, which should be responsible for Africa. Whatever assistance may come “along the way” should be seen as a complement to what exists already. Further, it does not help when the international community criticizes African peacekeeping efforts, as “ill-equipped, ineffective, underfunded and not up to the job”¹²⁶ when the same international community cannot take steps to strengthen and enhance the capability of the AU to better undertake peacekeeping missions.¹²⁷ The international community has a political duty through the UN to keep peace and stability worldwide, as such the commitment to provide resources to African peacekeeping efforts can be justified on this political duty of the international community which is enshrined in the UN Charter.

From the preceding discussion on various efforts undertaken by the OAU and later AU on one hand and regional institutions like ECOWAS and SADC on the other, it is clear that the major challenge facing peacekeeping on the continent has been mobilizing required tools to successfully undertake such missions. As experience has shown there is a great disconnect between the political will of African countries and what they can actually do on their own. The political will of African countries can only stretch to their willingness and readiness to send their troops in harm’s way in the most hostile terrain of Mogadishu or Darfur. It is incumbent upon the international community to complement the efforts of the AU by giving the organization the necessary resources through the traditional UN framework to enhance the African capability to secure peace and stability on the continent. Admittedly, the international community through the UN could demand greater accountability from AU for resources allocated for this purpose. For example, the UN could require the AU to use the former’s

¹²⁶ Funk & Fake, *supra* note 97, 100-101.

¹²⁷ A. De Waal, ‘Darfur and the Failure of the Responsibility to Protect’, 38 *International Affairs* (2007) 6, 1040-1045.

standards of accounting and provide financial reports from time to time. This could in the process enhance the AU's accountability and transparency while making available required resources at its disposal.

Regional institutions like ECOWAS or SADC have a pivotal role to play to complement the AU's efforts to maintain peace and stability on the continent. The future role of these institutions could be envisaged as that of supporting and mobilizing the required resources especially troops to secure peace and stability under the aegis of AU. This could allow the AU to be a focal point in appealing for resources from the international community, instead of having separate regional bodies like ECOWAS or SADC make their separate appeal for resources. This partnership can only succeed if the AU is capable of mobilizing the required resources on behalf of troops contributed by these bodies. In the absence of this crucial aspect, regional bodies will see no added value of having their troops work under the aegis of the AU while they are being asked to stretch into coffers to foot the bill for their troops.

The experience in Darfur has shown that the much touted hybrid alternative which is the joint AU and UN peacekeeping mission, is not a panacea to the peacekeeping challenges afflicting Africa. Despite spending millions of dollars UNAMID is still far short of required tools to secure peace and stability in Darfur. Yet even if half of the financial resources spent by the international community in Darfur were more wisely spent to strengthen African capability to maintain peace and stability in Africa, the situation would be much better than it currently is.¹²⁸ It is a tragedy that the UN Security Council as the guarantor of peace and security of the world has deliberately failed to secure resources to enable African Mission in Somalia (AMISOM) do its job to the extent that AMISOM soldiers can go five months without pay. Yet AMISOM is doing what the UN is supposed to be doing. A duty clearly enshrined in the UN Charter whose membership includes African countries. This indifference by the Security Council has to be ultimately addressed, if at all the world and Africa in particular is to witness the credible peacekeeping efforts on the continent. Clearly, peacekeeping efforts in Africa will succeed and bear concrete results if the international community is to be willing and ready to provide resources and specifically money to African led peacekeeping initiatives.

African solutions for African problems is a dream, which can be fulfilled only when both African countries and the international community

¹²⁸ Murithi, *supra* note 108, 15.

join to work together. In the present state where the majority of African countries are economically struggling and politically unstable, it would be difficult for Africa to take charge of its peace and stability without external assistance. Further, at a time when the UN is proposing its own “capstone doctrine” for peacekeeping operations, Africa should be at the forefront of debates on modalities for the development of new types of peacekeeping operations, which would be availed adequate resources by the international community to carry out their missions.

The United Nations and rich countries should encourage and tangibly support the efforts of the AU. Certainly, the AU as an institution faces its own internal problems concerning both human and material resources management. But this should not be the reasons why rich countries should not be at the fore to help the organization. Even the UN has not been abandoned despite its countless internal problems and criticism.¹²⁹ Rather means should be improvised to reform the organization while enabling it to fulfill its core mission of securing peace and stability in Africa. A peaceful, stable and prosperous Africa is in the best interests of the world and in particular Africans themselves who have perennially endured untold sufferings resulting from these conflicts.

¹²⁹ M. Templeton, ‘The Achievements and Shortcomings of the United Nations’ in R Thakur (ed.), *Past Imperfect, Future Uncertain: The United Nations at Fifty*, (1998), 15-31. Also see M. Boot, ‘Paving the Road to Hell: The Failure of the UN Peacekeeping’, *The Council on Foreign Relations*, March/April 2000.

Humaneness, Humankind and Crimes Against Humanity

Bernhard Kuschnik*

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Abstract

Due to its vagueness, the notion of humanity has created some discomfort within the system of international criminal law ever since it was codified as a legally binding concept in the mid 1940's. In *Prosecutor v. Kantanga/Chui* the Pre-Trial Chamber I of the International Criminal Court (ICC) has given its own interpretation of the term. The Chamber claimed that the related provision of 'other inhumane acts' is more strictly construed in the ICC Statute than in previous Statutes of the ICTY and ICTR, and cannot be regarded as a catch all provision, and should predominantly be interpreted from the wording of the ICC Statute. The author argues in this article that a broad interpretation of 'other inhumane acts' pursuant to Article 7(1) (k) of the ICC Statute is required. The notions of humanity and 'other inhumane acts' should be concretized by relying closely on the legal historical and linguistic roots of the provision. Coming from this analysis, it is suggested that a serious injury to human dignity should count as an 'other inhumane act' and thus, as a crime against humanity.

A. Introduction

The notion of humanity has opened up misunderstandings in legal analysis ever since it was included in the so called *Lieber Code*¹ and The Hague Conventions.² It is not surprising that the same applies for the term crimes against humanity, which has its legal origins in the *Hagenbach Trial* of 1474.³ Unlike the international crimes of genocide and war crimes, there seems to be trouble in grasping in simple terms what a crime against humanity is. The problem is grounded on the fact that the legal framework of crimes against humanity is complicated. It will be seen that the crime is

¹ F. Lieber, *Instructions for the Government of Armies of the United States in the Field*, Originally Issued as General Orders No. 100, Adjutant Generals Office, 1863 (1898).

² *Convention with Respect to the Laws and Customs of War on Land*, 29 July 1899, 32 Stat. 1803, T.S. No. 403, 26 *Martens Nouveau Recueil* (ser. 2) 949; *Convention Respecting the Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 *Martens Nouveau Recueil* (ser. 3) 461.

³ R. Woetzel, *The Nuremberg Trials in International Law* (1960), 19; N. Birkett, 'International Legal Theories Evolved at Nuremberg', 23 *International Affairs* (1947), 317; G. Schwarzenberger, *International Law Volume II: The Law of Armed Conflict* (1968) 462; J. Paust et. al., *International Criminal Law Documents Supplement* (2000), 857.

built on two different pillars of micro- and macro-criminality. To apprehend the notion of humanity in international criminal law, it is thus necessary to have a closer look at both pillars of the crime, including its divergent usage of humanity and ‘other inhumane acts’, and analyze relevant reciprocal effects. From there, suggestions for legally interpreting the provision can be drawn. The essay is structured in such terms. As the notion of humanity includes non-legal components, the first question to be answered is, to what extent interdisciplinary considerations should be taken into account when analyzing humanity in international criminal law. Thereafter, the basic structure of the term humanity, with its basic components of humaneness and humankind is analyzed; followed by a discussion of the legal structure of the crime, including the interpretations brought forward by ICC Pre-Trial Chamber I.

B. Openness for Non-Legal Considerations?

Court practice involving international criminal law has regularly shied away from making profound interdisciplinary findings on the notion of crimes against humanity, which is not surprising as it might open up a *Pandora’s Box* of uncertainty in legal analysis. Indeed there is much misunderstanding on the notion. It is not uncommon to hear statements, which equate inhumane behavior to crimes against humanity *in generalis*. In this light, politicians, activists, and even representatives of the United Nations have declared various acts to be crimes against humanity which clearly can’t be regarded as such: the distribution of cigarettes by the tobacco industry,⁴ the systematic use of crops for bio-fuel instead of food,⁵

⁴ N. Francey ‘The death toll from tobacco; a crime against humanity?’, 8 *Tobacco Control* (1999), 221.

⁵ Statement of Jean Ziegler: “Noting that the price of wheat has doubled in one year, Mr. Ziegler warned that if the prices of food crops continued to rise, the poorest countries will not be able to import enough food for their people. While the arguments for biofuels is legitimate in terms of energy efficiency and combating climate change the effect of transforming food crops such as wheat and maize into agricultural fuel is ‘absolutely catastrophic’ for hungry people and will negatively impact the realization of the right to food, he said. ‘It is a crime *against humanity* to convert agricultural productive soil into soil which produces food stuff that will be burned into biofuel.” (emphasis added) in *UN independent rights expert calls for five-year freeze on biofuel production* (26 October 2007) available at <http://www.un.org/apps/news/story.asp?NewsID=24434&Cr=food&Cr1> (last visited 9 June 2010).

or the call of the German Government to Turkish fellow citizens to assimilate better into German society.⁶

It is clear that the notion of humanity has to be understood in a somewhat restricted way to make legal analysis possible. A reasonable start would be to have a closer look at the notion of ‘other inhumane acts’ – the catch all provision within the ICC Statute, which has been included in the text to increase the effectiveness of prosecuting crimes against humanity. According to Article 7(1)(k) of the ICC Statute, ‘other inhumane acts’ are acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The concretization is generally known as the *ejusdem generis* principle.

The problems do not stop here. One may ask what an ‘act of a similar character’ is supposed to be. Surely, the notion of a similar character applies to the crimes, which have been enumerated in the crimes catalogue of Article 7(1) of the ICC Statute; particularly: murder, extermination, enslavement, deportation or 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, as well as persecution in connection with any other crime referred to in Article 7(1), enforced disappearance of persons, and the crime of apartheid.

Footnote 30 of the ICC Elements of Crimes concretizes the notion of character by declaring that “it is understood that ‘character’ refers to the nature and gravity of the act”. Insofar, first and foremost, the term inhumane as it is understood in the ICC Statute rests on a character of two prongs. An act is only then inhumane, if it reaches a comparable threshold in gravity and is somewhat similar in nature in comparison to the crimes included in the crimes catalogue mentioned above.

It remains questionable however, what indicators and concretizations should be used to determine the stipulated threshold. One could claim that i.e. the abortion policy of the People’s Republic of China that restricts its population from having more than one child per family could be subsumable under the notion inhumane, since the fundamental rights to life and freedom of giving birth – which are comparably secured under the ICC Statute by criminalizing murder and enforced sterilization – is negated on grounds of a

⁶ Declaration of the Turkish Prime Minister during his visit to Germany in February 2008 ‘Erdogan warnt Türken vor Anpassung’, 36 *Süddeutsche Zeitung*, (11 February 2008), 1, 1.

decision by the Chinese Government on sole considerations of a quantitative excess of population,⁷ thus making the right to life dependent upon object-like assessments. Certainly, the question could be answered on strict normative grounds by relying on the decision of the framers of the ICC Statute not to criminalize such birth control measures. With regard to the Chinese one-child policy it can be argued that according to Footnote 19 of the ICC Elements of Crimes, measures of birth control should not fall under the notion of ‘other inhumane acts’.⁸

However, a strict normative approach does not lead to a greater insight of what is meant by ‘inhumane’ *in abstracto* with regard to the ICC Statute. Part of the problem is that definitions of crimes are *in se* tautological. It has been rightfully held that what is prosecuted is defined as a crime, and *vice versa* an action is considered as a crime on the basis of its prosecution.⁹

It follows that if the answer to the problem of what inhumanity constitutes is solely made dependent upon the will of the framers of the ICC Statute, the argument is restricted to the formal authority of the law. Such an approach may claim to have legal force. But it may not claim to be compliant with legal reasoning, because it cannot answer the question on what substantive bases a particular act shall be considered inhumane, and thus criminal. Insofar – even though a normative analysis may be helpful to determine the criminality of an act – it cannot solve the problem adequately *why* a particular act should be regarded as inhumane. This is where interdisciplinary considerations (may) come into play.

⁷ It is unclear until today whether the killing of an embryo is subsumable under “murder” as a crime against humanity; see *The Prosecutor v. Mikaeli Muhimana, Judgement and Sentence*, ICTR-95-1B-T, International Tribunal for Rwanda, 28 April 2005, para. 570. For considerations on the general status of embryos under public international law see N. Petersen, ‘The Legal Status of the Human Embryo in vitro: General Human Rights Instruments’, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005), 447. For a German view on the issue of embryos and right to dignity see H. Dreier, ‘Artikel 1’, in H. Dreier (ed.), in *Grundgesetz Kommentar, Volume I*, 2nd ed. (2004), Article 1 I para. 39; see further M. Nettesheim, ‘Die Menschenwürde zwischen transzendentaler Überhöhung und bloßem Abwägungstopos’, 130 *Archiv des öffentlichen Rechts* (2005) 1, 71, 96; *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 39, 1, 41.

⁸ ICC Elements of Crimes, *Official Journal of the International Criminal Court*, ICC-ASP/1/3(part II-B), 9 September 2002, Article 7(1) (g)-5 “1. The perpetrator deprived one or more persons of biological reproductive capacity [n.] 19.” note 19: “The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.”

⁹ H. Jäger, *Makrokriminalität* (1989), 21.

Pieroth and *Schlink* ascertained that ethically-impregnated legal terms such as humanity and human dignity are directly connected to philosophical traditions.¹⁰ Indeed, a trace from legal rules to fundamental values of society cannot be denied in the field of criminal law (mirror theory).¹¹ As for defining such notions, the problem of separating legal analysis and philosophical thought is intensified by the fact that components of compassion seem to play a relevant role. *Luban* concludes in the course of his analysis of crimes against humanity that

“the atrocities and humiliations that count as crimes against humanity are, in effect, the ones that turn our stomachs, and no principle exists to explain what turns our stomachs”.¹²

It follows that the notion of humanity as it is used in international criminal law includes a wide spectrum of non-legal components. Apparently, problems with regard to the sufficient foreseeability for the accused and violations of *nullum crimen sine lege* may arise. This however is not to say that a restriction to normative legal analysis would be more favourable for the accused. When taking a closer look at the case law of previous tribunals with regard to their findings on the term of ‘other inhumane acts’, it can be seen that a precedent method is favoured. Regularly it was noted that the International Military Tribunal of

¹⁰ B. Pieroth & B. Schlink, *Staatsrecht Volume II, Grundrechte*, 21st ed. (2005), para. 353.

¹¹ P. Legrand, 'The Impossibility of Legal Transplants', 4 *Maastricht Journal of European and Comparative Law* (1997) 111; W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', 43 *American Journal of Comparative Law* (1995), 489, 493. In the strict sense, a single mirror theory does not exist. Instead there are variations or classes of mirror theories, depending on the assumption of how deeply legal rules and social values are interconnected. On the contrary, Watson – one of the most acknowledged legal writers on legal transplants – believes that legal rules are mostly independent from society, as they are primarily used by experts (lawyers, judges, members of the public service etc.). However, even Watson believes that certain fields of law – such as constitutional law and criminal law – are of general interest for the society as a whole, and thus a reflection of social values; see A. Watson, 'Aspects of Reception of Law', 44 *American Journal of Comparative Law* (1996), 335, 335; A. Watson, 'From Legal Transplants to Legal Formats', 43 *American Journal of Comparative Law* (1995), 469; A. Watson, *Society and Legal Change* (1977), A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

¹² D. Luban, 'A Theory of Crimes Against Humanity', 29 *Yale Journal of International Law* (2004) 1, 85, 101.

Nuremberg (IMT) or Nazi War Crimes Tribunals classified a certain act as inhumane. When a precedent was missing, the ICTY and the ICTR regularly *stated* that particular acts should fall under the catch-all provision, but lacked a satisfactory explanation on what grounds they came to their conclusion.¹³

Insofar, a restriction to legal normative analysis when defining the term ‘inhumane’ added up to a simple *feeling*, and thus arbitrary judgement, of what should be unjust and hence criminalized. Whereas the IMT has aligned the individual criminal responsibility for crimes against humanity to its understanding of the *malum in se* principle according to natural law theory, thus giving the accused an explanation why he has committed a *crime*, the ICTY and the ICTR have not given concretized explanations. It thus seems to be puzzling, why it is generally acknowledged that ‘other inhumane acts’ is an accepted notion in the legal sense from which criminal responsibility can be inferred.¹⁴

When looking from this angle, an inclusion of interdisciplinary considerations does not endanger the foreseeability for the accused with regard to having committed ‘other inhumane acts’ as a crime against humanity, but rather reduces its vagueness in his or her favour. Surely, it may be a Herculean task for the ICC to display in comprehensive terms what an ‘other inhumane act’ constitutes. It is doubtful whether this is possible at all and it is not the intention of this article to display possible non-legal indicators, such as *Maslow’s* hierarchy of needs theory. What shall be noted however is that it does not harm, if interdisciplinary considerations are taken into account to describe the inhumanity of the act.¹⁵ It will be up to i.e. anthropologists, biologists and philosophers to work in this area and – if possible – create certain guidelines for lawyers and courts. It can’t be left out that an inclusion of interdisciplinary considerations bears two major risks. On the one hand, an interdisciplinary approach may find its own boundaries of competence, resulting in the potential danger of

¹³ V. Sautenet, ‘Crimes Against Humanity and the Principles of Legality: What Could the Potential Offender Expect?’, 7 *Murdoch Electronic Journal of Law* (2000) 1, paras 26-28.

¹⁴ *The Prosecutor v. Tharcisse Muvunyi*, Judgement, ICTR-2000-55A-T, International Tribunal for Rwanda, 26 September 2006, para. 527.

¹⁵ Article 7 of the ICC Statute partly relies on interdisciplinary considerations by stating in paragraph 3 “‘gender’ refers to the two sexes, male and female, within the *context of society*. The term ‘gender’ does not indicate any meaning different from the above.” (emphasis added).

misinterpretation and other shortcomings.¹⁶ On the other hand, there is the risk of wrong emphasis, potentially resulting in a distorted picture for legal analysis; one may point to the (debatable) legal conclusions of the neuroscientists *Singer* and *Roth* in regard to the question, in what way scientific findings on the determination of causal actions and its consequences may affect the principle of guilt and blameworthiness in criminal law.¹⁷ Yet, a good coordination between the various fields of science and a respectful understanding of its own strengths and weaknesses may offer valuable – and practical – insights of how the term humanity within the notion of crimes against humanity can be understood.¹⁸ Such an approach would also create synergic effects for a better understanding of the term dignity, which is included in the notion of humanity. It is interesting to note that a link between humanity and dignity is – at least indirectly – implicated in the wording of the ICC Statute (with regard to war crimes).¹⁹ Furthermore, ICC Pre-Trial Chamber II held in its Confirmation of Charges in *Bemba* that the elements of ‘outrages upon personal dignity’ pursuant to Article 8 of the ICC Statute can be fully encompassed in a rape charge as a crime against humanity pursuant to Article 7 of the ICC Statute, if grounded on essentially the same facts of coercion or force (yet in this case the rape charge prevails due to its greater normative specificity of describing the criminal conduct).²⁰ ICC Pre-Trial Chamber II has thus acknowledged some connection between the terms humanity and dignity. On the contrary, as it will be discussed later on in this article, arguably, Pre-Trial Chamber I in *Katanga/Chui* seems to have *not* incorporated the notion of dignity into the term ‘other inhumane acts’.

¹⁶ Jäger, *supra* note 9, 9.

¹⁷ M. Kriele, ‘Hirnforschung und Rechtsreform’, *Zeitschrift für Rechtspolitik* (2005) 6, 185, 185; C. Geyer, *Hirnforschung und Willensfreiheit: Zur Deutung der neuesten Experimente* (2009); W. Singer, *Der Beobachter im Gehirn: Essays zur Hirnforschung* (2009); W. Singer, *Ein neues Menschenbild? Gespräche über Hirnforschung*, 5th ed. (2003); G. Roth, *Das Gehirn und seine Wirklichkeit: Kognitive Neurobiologie und ihre philosophischen Konsequenzen* (2005); G. Roth, *Fühlen, Denken, Handeln: Wie das Gehirn unser Verhalten steuert* (2003).

¹⁸ D. Fabricius, ‘Natur – Geschichte – Recht: Evolution als Rechtsquelle?’, in C. Prittwitz (ed.), *Festschrift für Klaus Lüderssen zum 70. Geburtstag* (2002), 55.

¹⁹ Article 8 para. 2(b)(xxi) and (c)(ii) of the ICC Statute.

²⁰ *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the confirmation of charges, ICC-01/05-01/08-424 (Pre-Trial Chamber II), 15 June 2009, para. 312; also see K. Boon, ‘Rape and Forced Pregnancy Under the ICC Statute’, 32 *Columbia Human Rights Law Review* (2001), 625.

C. Humanity and Its Links to Dignity, Humaneness and Humankind

On grounds of their interpretative authority, the ICTY and the ICTR have made a suggestion of what should be understood by ‘other inhumane acts’ when analyzing Article 5 of the ICTY Statute, respectively Article 3 of the ICTR Statute. According to the *ad hoc* Tribunals, ‘other inhumane acts’ shall mean

”acts [...] that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity”.²¹

Taking the ICTY/ICTR definition into account, the notion of humanity consists of two different concepts. On the one hand, the upholding of humanity shall preserve the fundamental mental and physical human condition; on the other hand, it shall protect from a serious attack on human dignity. According to the ICTY/ICTR understanding of humanity, a violation of either notion is sufficient to conclude that an ‘other inhumane act’ has been committed. Naturally, there will be overlaps between the two concepts as one and the same act may constitute a serious mental or physical suffering as well as an attack on the human dignity.

Yet the disjunctive nature of both concepts may be decisive in certain constellations, as a serious attack on the human dignity must not be made dependent upon the agreement of the victim.²² If according to the ICTY/ICTR specification, a perpetrator debases a victim, even under consent, he may be guilty of a crime against humanity nevertheless; even if the victim has not suffered any severe physical or mental suffering. Such an understanding is acknowledged in international criminal law *inter alia* for

²¹ *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgement, ICTR-95-1-T, International Tribunal for Rwanda, 21 May 1999, para. 151; *The Prosecutor v. Ignace Bagilishema*, Judgement, ICTR-95-1A-T, International Tribunal for Rwanda, 7 June 2001, para. 91; *The Prosecutor v. Tihomir Blaškić*, Judgement, IT-95-14-T, International Criminal Tribunal for the Former Yugoslavia, 3 March 2000, paras 240-240; Article 18(k) of the *ICL Draft Code of Crimes Against the Peace and Security of Mankind* (1996); and *Draft Code of Crimes against the Peace and Security of Mankind with commentaries* (1996), International Law Commission 1996 Report, 103.

²² *International Covenant on Civil and Political Rights* (I.C.C.P.R.), General Comment No. 29 States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para. 13a.

the crimes of enslavement (Article 7(1)(c) of the ICC Statute) and apartheid as crimes against humanity (Article 7(1)(j) of the ICC Statute), which are criminalized regardless of whether the victim agrees to the act of being enslaved or being held in a system of apartheid. Hence, human dignity in international law is not to be understood as in sole individualistic terms. It includes traits of humankind. Accordingly, i.e. the UNESCO Declaration on Bioethics and Human Rights has split the notion of dignity into an individualistic and collective – genre related – part, and makes arrangements for both fields.²³

Recapitulating, the notion of humanity is understandable as an individualistic specification of humaneness – rendered more precisely by the upholding of the mental or physical human condition – as well as the protection of human dignity. The component of humankind emanates from humanity, too. In concert, crimes against humanity are generally regarded as crimes, which due to their heinous nature shock the collective conscience of the peoples and therefore are of concern for the international community as a whole,²⁴ resulting in the right for each state to prosecute crimes against humanity under the universality principle.²⁵

²³ See *UNESCO Declaration on Bioethics and Human Rights*, SHS/EST/BIO/06/01 (2006), Articles 2, 3, 5 and 6 for individual, and Articles 1 para. 2, 10, 11 and 24 for genre related rules. Also see the *Universal Declaration of Human Rights*, UN Doc A/810 (1948), Article 1 (“all human beings”) and Article 22 (“everyone, as a member of society”). Further see R. Andorno, 'Human Dignity and the UNESCO Declaration on the Human Genome', *Medicina e Morale* (2005) 1, 2; O. Schachter, 'Human Dignity as a Normative Concept', 77 *American Journal of International Law* (1983), 848, 848; R. Howard, 'Dignity, Community and Human Rights', in A. An-Na'im (ed.), *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (1992), 81 “collective dignity”. The separation between individual and collective dignity was already made by M. T. Cicero, *De officiis I*, paras 105-107. A translation and explanation of this passage provides H. Cancik, “Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105-107”, in D. Kretzmer & E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002), 19, 20.

²⁴ *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion on Jurisdiction, IT-94-1, International Criminal Tribunal for the Former Yugoslavia, 10 August 1995, para. 42: “affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.”

²⁵ Elaborated upon elsewhere, B. Kuschnik, 'Deutscher Sand im völkerstrafrechtlichen Getriebe? Eine Betrachtung des § 153f StPO im Lichte des in § 1 VStGB festgeschriebenen Weltrechtsprinzips', 21 *Journal of International Law of Peace and Armed Conflict/Humanitäres Völkerrecht - Informationsschriften* (2008) 4, 230.

The dualistic structure of humanity is corroborated by the legal framework of crimes against humanity.

On the one hand, the international community may certainly have an interest in fighting and preventing the fundamental destruction of the environment. Arguably, such an act can even constitute an international crime.²⁶ Yet, the value destroyed is – at least when looking at the direct damage caused – not strictly human-specific but rather organic, resulting in no violation of humanity. In this light, it is a welcoming development that the fundamental destruction of the environment has not found its way into the catalogue of crimes within crimes against humanity even though such an argument was made several times in the 1980's and 1990's.²⁷ This is not to say that the fundamental destruction of the environment should not be criminalized by international criminal law. Yet an inclusion as a crime against humanity would be a criminalization in the wrong place due to its divergent nature.

On the other hand, various serious injuries to the mental or physical human condition exist, which cannot be regarded as crimes against humankind. Isolated rapes surely are cruel to a high extent and blatantly violate the human dignity of the victim. Nevertheless, such uncoordinated acts – as cruel as they may be – do not reach the quantity to shock the conscience of the international community. Isolated rapes (unfortunately) are part of the human existence. This does not mean that one should tolerate such acts. They do not however justify an intervention of foreign states on grounds of a concern for the international community as a whole via the universality principle. Accordingly, the legal framework of crimes against humanity requires that a rape that is being committed by the perpetrator needs to be *part of* a widespread or systematic (broader) attack directed against any civilian population.

Interestingly, the legal history of crimes against humanity also indicates the proposed dualistic understanding. On the one hand, strong connections between humanity and humankind – respectively mankind – stem from the fact that shortly after World War II, the UN General Assembly assigned the International Law Commission (ILC) with the task to prepare Drafts of Offences against the Peace and Security of Mankind. The ILC Draft Codes of Offences – since 1988 Crimes – against the Peace and Security of *Mankind included* crimes against *humanity*. It is thus

²⁶ M. Reichart, *Umweltschutz durch völkerrechtliches Strafrecht* (1999).

²⁷ Luban, *supra* note 12, 90.

reasonable to hold that when sticking to strict legal normative analysis, a crime against humanity is considerable as a crime against the humankind. On the other hand, crimes against humanity, ever since they have been defined in Article 6(c) of the IMT Statute, never solely criminalized (any sorts of) offences against humankind, such as piracy. Instead only such acts were included in the catalogue of crimes bit by bit, which – due to their specific nature – became a general concern for the international community. In this sense the Joint Allied Declaration of 1915 Condemning the Turkish Genocide of Armenians made a distinction between humanity and humankind by stating that

“in view of those new *crimes of Turkey against humanity and civilization*, the Allied governments announce publicly [...] that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres”.²⁸ (emphases added)

In the German language – which made use of the notion ‘crimes against humanity’ for the very first time in legal history in the 15th century – the existence of the dualistic nature of the term humanity has led to a never ending controversy of how the term should be understood literally. Certainly, the starting point for interpreting legal norms should be the wording of such norms.²⁹ However, as has been stated, humanity on the one hand can mean, ‘to relate to all mankind’.³⁰ Consequently, a crime against

²⁸ France, Great Britain, and Russia Joint Declaration, 24 May 1915, in *United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesties Stationary Office, 1948, 35 (in French). Whereas the original declaration was drafted in French, the English version of this quote can be found in a telegram, which the US Department of State received from the US Embassy in Constantinople on 29 May 1915. It should be noted that the English version of the declaration was also published in the *New York Times* on 24 May 1915, omitting the relevant phrase “crimes [...] against humanity and civilization” (scans of both original texts on file). The French original of the declaration, which reads “*crimes contre l’humanité et la civilisation*” clarifies, that the version, which was published in the *New York Times*, is inaccurate.

²⁹ But also see M. Bohlander, ‘Völkerrecht als Grundlage internationaler Strafverfahren?’, in J. Hasse et al. (eds), *Humanitäres Völkerrecht* (2001), 393, 396 n. 9.

³⁰ Also see T. E. Hill, ‘Humanity as an End in Itself’, 91 *Ethics* (1980) 1, 84, 85.

humanity would predominantly be a crime against the human race,³¹ or in German *Verbrechen gegen die Menschheit*. This approach was taken in the *Hagenbach* Trial of 1474, where the conviction was grounded on a violation of the laws of god and humankind (“*Verbrechen gegen das Gesetz Gottes und der Menschheit*”).³² Comparably, the Preamble of the ICC Statute states:

“**Mindful** that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.” (emphasis in original)

In comparison, the German translation of this passage as published in Number 35 of the Official German Gazette (*Bundesgesetzblatt* Part II) of 7 December 2000 includes the notion of *Menschheit*:

“eingedenk dessen, dass in diesem Jahrhundert Millionen von Kindern, Frauen und Männern Opfer unvorstellbarer Gräueltaten geworden sind, die das Gewissen der Menschheit zutiefst erschüttern.“

Humanity can also be understood as to mean a characteristic of humaneness,³³ encoded by the fundamental standards of human behavior. In

³¹ C. Hollweg, 'Das neue Internationale Tribunal der UNO und der Jugoslawienkonflikt', 48 *JuristenZeitung* (1993) 26, 980. 986 n. 57, claims that "'Menschlichkeit' ist kein völkerrechtlich geschütztes Rechtsgut"; also G. Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit* (2003), 29; A. Zimmermann, 'Die Schaffung eines Ständigen Internationalen Strafgerichtshofs', 58 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1998), 47, 50. See further E. Schwelb, 'Crimes against Humanity', 23 *British Yearbook of International Law* (1946), 178, 195 "The word 'humanity' (l'humanité) has at least two different meanings, the one connoting the human race or mankind as a whole, and the other humaneness, i.e. a certain quality of behavior. It is submitted that in the Charter [...], the word 'humanity' is used in the latter sense. It is, therefore, not necessary for a certain act, in order to come within the notion of crimes against humanity, to affect mankind as a whole. A crime against humanity is an offence against certain general principles of law which, in certain circumstances, become the concern of the international community, namely, if it has repercussions reaching across international frontiers, or if it passes 'in magnitude or savagery any limits of what is tolerable by modern civilisations'."

³² H. Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert* (1999), 19 n. 56. See also A. O'Shea, 'Ad hoc Tribunals in Africa', 12 *African Security Review* 4 (2003), 17, 18 for "crimes against God and man".

³³ Already stated in the 18th century, see XII *The Gentleman's Magazine for October* 1742, 536 "The Word; Humanity may be defined to be The generous Warmth of a

this sense, the term humanity could foremost be equated to the readiness to help others that is performed on grounds of benevolence and a felt duty out of compassion, custom, or opinion, to respect others as human beings in se, instead of making assistance dependent upon a judgment on grounds of such persons' standing in society.³⁴ These principles, which are circumscribed in German by the term *Menschlichkeit*, could be concretized by the notions of charity, respect and preservation of human life, and the protection of human dignity.³⁵ The ICC Statute also reflects this line of understanding. In Article 7(1)(k) of the ICC Statute 'other inhumane acts' are referred to as a punishable crime. The same applies for the crime of apartheid (Article 7(1)(j) read in conjunction with Article 7(2)(h) of the ICC Statute – "inhumane acts"). In comparison, the German translations of Articles 7(1)(k) and 7(1)(j), read in conjunction with Article 7(2)(h), include *andere unmenschliche Handlungen* and *unmenschliche Handlungen*, making it clear that the term (*andere*) *unmenschliche Handlungen* derives from the concept of *Menschlichkeit* and not from *Menschheit*. Otherwise the term would have been coined as (*andere*) *unmenschheitliche Handlungen*, which is a rather strange expression to the German ear that does not seem to imply a rational meaning; arguably comparable to an English neologism like '(other) inhumankindly acts'.

Due to the dualistic concept in semantic and conceptual understanding, neither the component of humaneness nor humankind may be excluded to determine humanity in international criminal law, but need to be seen as two sides of the same coin. In simple terms, crimes against humanity are neither crimes against humaneness nor crimes against humankind, but both.³⁶ Makino came to a similar finding by stating

"In the German original of the paper is to be found an excursion concerning a separate development in German-speaking countries, a description and criticism of an erroneous translation, i.e. translating crimes

good Heart that distinguishes a Man for a more than ordinary Affection to his Fellow Creatures, to Justice, Mercy and every Social Virtue." available at <http://www.bodley.ox.ac.uk/cgi-bin/ilej/image1.pl?item=page&seq=1&size=1&id=g m.1742.10.x.12.x.x.536/> (last visited 9 August 2010); also see K. Ambos, *Internationales Strafrecht* (2008), 207.

³⁴ See *Brockhaus Enzyklopädie*, Volume 12 (1971), 412.

³⁵ A. Becker, *Der Tatbestand des Verbrechens gegen die Menschlichkeit* (1996), 114 and 117.

³⁶ See *American Heritage Dictionary* (2000), *Kernerman Multilingual Dictionary* (2006), *Collins Thesaurus of the English Language* (2000), each under "humanity"; also see *Yearbook of the International Law Commission*, Volume II (1950), 13.

against humanity (or *humanité*) by ‘Verbrechen gegen die Menschlichkeit’. The English and French terms ‘humanity/humanité’ include both the ideas of ‘mankind’ and a sense of ‘human dignity’, for example in a phrase like ‘human’ treatment of civilians or prisoners of war, whereas the German *Menschlichkeit* only covers the latter connotation”.³⁷

Makino’s conclusion whereby the notion of *Menschlichkeit* shall be part of the notion *Menschheit* is open to debate. By relying on the conceptual differences, which both notions embody, I personally feel that neither notion can be respectively subsumed under the other. Yet for the problem raised, a decision on a correct term in the German language, which would incorporate both notions, does not have to be decided upon as long as it is clear that at least nowadays (also in Romano-Germanic jurisdictions) crimes against humanity (*Verbrechen gegen die Menschlichkeit*, respectively) contain both concepts of humaneness and humankind.

After all, *Aroneanu* advocated the usage of the term ‘crimes against the human person’ as early as in 1947, since this notion would open up the possibility to emphasize the nature of the crime to a greater extent, thus creating a more precise differentiation to war crimes.³⁸ Becker (rightfully) concluded that *Aroneanu’s* approach however falls short of specificity. Not only macro-criminal practices like systematic rape or widespread torture directed against any civilian population would fall under the notion “crime against the human person”, but everyday assault, too.³⁹

D. From Linguistic Analysis to Normative Arrangements

I. Antecedents and Drafting History

The notion of humanity has developed remarkably throughout its international legal history. In the beginning, it was primarily used as a loose term to circumscribe certain acts which were believed to be generally unacceptable in the state of war. Both, the Instructions for the Government of Armies of the United States in the Field of 1863; also called General

³⁷ U. Makino, ‘Final solutions, crimes against mankind: on the genesis and criticism of the concept of genocide’, 3 *Journal of Genocide Research* (2001) 1, 49, 54.

³⁸ E. Aroneanu, *Das Verbrechen gegen die Menschlichkeit* (1947), 49.

³⁹ Becker, *supra* note 36, 114.

Orders 100 or *Lieber Code*,⁴⁰ as well as the Hague Conventions of 1899 and 1907 – particularly the so called *Martens Clause*⁴¹ – made use of the term humanity and laws of humanity without further elaborating on these notions.⁴² In the course of the Armenian Genocide of 1915, the Joint Declaration of France, Great Britain and Russia introduced the English term crimes against humanity for the first time.⁴³ A definition for crimes against humanity was firstly given in the Statute of the IMT, which was set up to punish the elite of the German Nazi criminals for their deeds against the Jews and other members of the European civilian population. Article 6 of the IMT Statute reads:

“The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following acts: [...] (c) crimes against humanity: namely, murder, extermination, enslavement, deportation, and ‘other inhumane acts’ committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime

⁴⁰ Lieber, *supra* note 1; Section I, Number 4.: “As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and *humanity* - virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.” Section I, Number 29.: “Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. The more vigorously wars are pursued the better it is for *humanity*. Sharp wars are brief.” Section III, Number 76.: “Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with *humanity*.” Section X, Number 152.: “When *humanity* induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power.” (scan of original text on file, emphases added).

⁴¹ Convention with Respect to the Laws and Customs of War on Land, *supra* note 2, Preambles of the First Hague Convention of 1899 and 1907 on the Law and Customs of War, “populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the *laws of humanity*, and the requirements of the public conscience”.

⁴² M.C. Bassiouni, *Crimes against Humanity in international Criminal Law*, 2nd ed. (1999), 61 “normative prescriptions on [...] unarticulated values”.

⁴³ France, Great Britain and Russia Joint Declaration, *supra* note 28.

within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Article 5(c) of the Statute of the International Military Tribunal for the Far East (IMTFE) in Tokyo,⁴⁴ and Article II 1.(c) of the Control Council Law No. 10⁴⁵ gave a somewhat similar yet not identical definition of crimes against humanity. Yet, with regard to the terms humanity and inhumane, no changes were made.⁴⁶ On the contrary, the Draft Codes from the ILC display an interesting picture on the development of the notion humanity. The ILC Draft Codes of 1951 and 1954 defined crimes against humanity as inhuman acts in se, and dropped the catch all provision of ‘other inhumane acts’.

⁴⁴ ‘Charter of the International Military Tribunal for the Far East of 19 January 1946’, reprinted in: J. Pritchard & S.M. Zaide, *The Tokyo War Crimes Trial*, Volume I (1981), Annex VI.

⁴⁵ ‘Gesetz Nr. 10 Bestrafungen von Personen, die sich Kriegsverbrechen, Verbrechen gegen den Frieden oder gegen die Menschlichkeit schuldig gemacht haben’, Berlin, 20 December 1945, 3 *Amtsblatt des Kontrollrates in Deutschland*, 31 January 1946, 50-55 (Control Council Law No. 10); also see T. Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10, 1949 available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf (last visit 9 August 2010); J. Brand, ‘Crimes against Humanity and the Nürnberg Trials’, 28 *Oregon Law Review* 2 (1949), 93, 97.

⁴⁶ Contrary to S.R. Ratner & J.S. Abrams, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy* (2001), 73, who hold that Article 6(c) of the IMT Statute reads “other inhuman acts”, the correct wording is “other inhumane acts”. The correct wording of Article II 1.(c) of the CCL No. 10 is “other inhumane acts” as well. In Taylor’s Final Report (*supra* note 45), both, the Appendix B, which covers the wording of Article 6(c) of the IMT Statute (Taylor, page 239) and the Appendix D, which contains the wording of Article II 1.(c) of the CCL No. 10 (Taylor, page 250) include the phrase “other inhumane acts”. Whereas the term “inhuman” can be found in Taylor’s Final Report – once on page 273 (“inhuman conditions”) and again on page 274 (“inhuman use of slave labor”) – the term “inhumane” is correctly cited when discussing Article 6(c) of the IMT Statute (Taylor, page 239); see further *International Military Tribunal Nuremberg, Trial of the Mayor War Criminals before the International Military Tribunal Nuremberg* 14 November 1945 – 1 October 1946, Volume I Official Text in the English Language (1947), 11 displaying the text of Article 6(c) of the IMT Statute with the phrase “other inhumane acts”. Also note that the original text of Article II 1.(c) of the CCL No. 10, which can be found in the *Enactments and Approved Papers of the Control Council and Coordinating Committee*, Allied Control Authority Germany, Volume I, Legal Division Office of Military Government for Germany (US) (1945), 306, reads at page 307 “other inhumane acts”. Despite the fact that parts of the original CCL No. 10 document are unreadable (due to aging), the phrase “other inhumane acts” is still well visible (scans of all original texts on file).

Apparently, there has been a different usage of the terms inhuman and inhumane over the times. Whereas the Nuremberg principles, which were drafted by the ILC and acknowledged by the UN General Assembly to formulate and approve the IMT law and set guidelines for the determination of international crimes⁴⁷ stated in Principle VI:

“The crimes hereinafter set out are punishable as crimes under international law: [...] (c) Murder, extermination, enslavement, deportation and other *inhuman* acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.”⁴⁸ (emphasis added)

Article 6(c) of the IMT Statute, Article 5 of the ICTY Statute, Article 3 of the ICTR Statute as well as Article 7 of the ICC Statute all make use of the term ‘other inhumane acts’.

To my knowledge, the ILC has not given an explanation why it has codified the term other ‘inhuman’ acts instead of other ‘inhumane’ acts when drafting the principles. It seems the problem is simply grounded on a mistake in writing. In the 1950’s report, the Special Rapporteur of the ILC *Spiropoulos inter alia* cited Article 6(c) of the IMT Statute, stating “[Article 6] (c) [IMT Statute] Crimes against humanity: namely murder, extermination, enslavement, deportation and other inhuman acts [...]”,⁴⁹ whereas, the correct wording of Article 6(c) reads ‘other inhumane acts’.⁵⁰ It is probably due to this error that the notion ‘other *inhuman* acts’ found its way into the official text of the principles, which are annexed on the very next page to the ILC report. Presumably, the ILC Draft Codes of 1951 and 1954 thereby adopted the wrong wording of Principle VI.⁵¹

⁴⁷ *Yearbook of the ILC, supra* note 36, 2.

⁴⁸ *Yearbook of the ILC, supra* note 36, 376 - 377.

⁴⁹ *Yearbook of the ILC, supra* note 36, 194.

⁵⁰ Also see *supra* note 46 with further specifications.

⁵¹ *Yearbook of the ILC, supra* note 36 263. Also see Article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, UN Doc GA RES 3068 (XXVIII) of 30 November 1973; “For the purpose of the present Convention, the term ‘the crime of *apartheid*’, which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following *inhuman* acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them” (emphases added); compare with Article

In its 1991 Draft Code the ILC made the unsuccessful attempt to widen the scope of crimes against humanity by rephrasing it to “systematic or mass violations of human rights”. Due to criticism from states and legal commentators, the ILC went back to the original phrase in its 1996 ILC Draft Code. Its Article 18(k) contained a definition of crimes against humanity, which formed the very basis of Article 7(1)(k) of the ICC Statute, including ‘other inhumane acts’.

II. The Legal Framework of Crimes Against Humanity

Apart from the divergent literal usage of ‘inhuman’ and ‘inhumane’, the codification of crimes against humanity within Article 7 of the ICC Statute has created normative problems in the understanding of the legal provision of ‘other inhumane acts’. With regard to Article 7 of the ICC Statute, this is partly due to the fact that the legal elements of crimes against humanity were formally split into different subsections within paragraph 1. Different tasks are assigned to the respective sections and subsections.

Article 7(1) of the ICC Statute defines the overall legal framework of crimes against humanity. A differentiation is made between a required macro-criminal context *eo ipso* – the so called *chapeau*; and a micro-criminal participation in a crime by the perpetrator. The macro-criminal context is codified as “widespread or systematic attack directed against any civilian population”. The micro-criminal participation is codified via the phrase “any of the following acts” followed by an enumeration of crimes, which have been included in a particular catalogue of crimes, including ‘other inhumane acts’. Finally, the notion “committed as part of [...] with knowledge of the attack” was incorporated to serve as a *nexus* between the macro- and micro-criminal sections of crimes against humanity.

Article 7(2) of the ICC Statute clarifies some of the legal notions used in Article 7(1) of the ICC Statute. Accordingly, Article 7(2) starts with the phrase “For the purpose of paragraph [7] 1”. Assistance in interpretation is given by the so called ICC Elements of Crimes; a (very short) commentary on the legal notions of the Statute, which according to Article 9 of the ICC Statute should serve the ICC judges as a basis for interpretation. The framework laid out is codified as follows in Article 7 of the ICC Statute:

7(2)(h) of the ICC Statute “The ‘crime of apartheid’ means *inhumane* acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups committed with the intention of maintaining that regime” (emphasis added).

“Crimes against Humanity

1. For the purpose of this Statute, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder; [...]

(j) The crime of apartheid;

(k) *Other inhumane acts* of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1 [...]

(h) “The crime of apartheid” means *inhumane acts of a character similar* to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups committed with the intention of maintaining that regime; [...]

 (emphasis added)

In order to understand the notions of humanity and ‘other inhumane acts’, one should be familiar with the purpose of the splitting between the macro- and micro-criminal elements. The *chapeau* of Article 7(1) of the ICC Statute was included to shift crimes against humanity to a level that would justify an application of criminal law on grounds of public international law, thereby giving the ICC judges a right to use rules of international law instead of the respective national criminal laws – i.e. the one which the accused is acquainted with. The macro-criminal “attack directed against any civilian population” is thus not to be understood as the attack by the perpetrator, but rather as the “broader attack”⁵², respectively “attack as a whole”⁵³, which is directed against any part of the civilian

⁵² *The Prosecutor v. Bagilishema*, *supra* note 21, para. 75.

⁵³ *The Prosecutor v. Emmanuel Nindabahizi*, Judgement and Sentence, ICTR-2001-71-I, International Tribunal for Rwanda, 15 July 2004, para. 477.

population; such as the aggregate of all micro-criminal acts that were – as part of *Hitler's* final solution – committed in *Auschwitz* against the Jews and other civilians during World War II.

As it is clear that the notion “attack directed against any civilian population” is – first and foremost – a contextual element, it follows that no perpetrator can be found guilty solely for the mere existence of a macro-criminal context. From a normative perspective the attack is not an international crime in a legal sense. This being said, a case can be made for Kirsch's conclusion that the macro-criminal contextual element is (predominantly) a jurisdictional element, and thus a mere precondition for prosecution.⁵⁴ The fact that the attack (as a whole) is embedded into the micro-criminal perpetration of the perpetrator may indicate that there is some sort of an element of blameworthiness, as the *mens rea* of the perpetrator needs to be proven for *both* the micro-criminal commission of the crime as well as the awareness that the crime was committed as part of the attack. *Finta* makes a similar point by stating that

“there are certain crimes where, because of the special nature of the available penalties or of the stigma attached to a conviction, the principles of fundamental justice require a mental blameworthiness or a *mens rea* reflecting the particular nature of that crime.”⁵⁵

Nevertheless, I hold that the inclusion of the *mens rea* element in the notion of attack should not lead to an assumption *in generalis* whereby the blameworthiness may be regarded as the *legal core* of the contextual element. Clarifications in that regard can be made by taking reference to the ICC Statute. According to Article 7(1) of the ICC Statute,

“‘crimes against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. (emphases added)

⁵⁴ S. Kirsch, ‘Two Kinds of Wrong: On the Context Element of Crimes against Humanity’, 22 *Leiden Journal of International Law* (2009) 3, 525; S. Kirsch, *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit* (2009); S. Kirsch, ‘Zweierlei Unrecht – Zum Begehungszusammenhang der Verbrechen gegen die Menschlichkeit’, in R. Michalke et al. (eds), *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (2008), 269.

⁵⁵ *Regina v. Finta* 1 S.C.R. 701 (1994), 132.

The notion “when committed [...] with knowledge of the attack” is of special interest for the problem raised. Particularly, the argument could be made that due to the interconnection between the *mens rea* (knowledge) of the perpetrator and macro-criminal context (attack), the latter should serve as an element specifying the aggravated wrongfulness or blameworthiness of the perpetrator’s criminal behavior. The notion “when committed as part of [...] the attack” may underline this finding, as the term ‘when’ describes a conditioned arrangement between both elements. However, such a reading of Article 7 of the ICC Statute would probably be flawed. The notion “part of” within the phrase “when committed *as part of* [...] the attack” demonstrates, that both levels of criminality are dependent upon each other, and in fact, the micro-criminal participation of the perpetrator is embodied into, and thus – part of – the macro-criminal context. If read together with the notion “when committed”, it can be concluded that both levels are arranged in equal hierarchy. Furthermore, a subordination of one level of criminality – in this case the macro-criminal component – under the other – the micro-criminal perpetration of a catalogue crime – leads to a false understanding of the legal framework of the crime, as it suggests that one level would be of less importance than the other to determine the criminal liability for crimes against humanity. Finally, legal history does not show that the macro-criminal contextual element should only be a subordinate part of the crime with regard to the element of blameworthiness. On the contrary, since its first definition in Article 6(c) of the IMT Statute, micro-criminal and macro-criminal elements were arranged in a rather mixed – than subordinated – order within crimes against humanity.

The problem of interpreting the notion of inhumane within ‘other inhumane acts’ is directly connected to a profound understanding of the micro- and macro-criminal splitting of the legal framework of crimes against humanity. As a matter of fact, much misunderstanding is rooted in the legal history of the provision of ‘other inhumane acts’. Article 6(c) of the IMT Statute did not strictly separate between a micro- and a macro-criminal level, nor did it give concretizations when the catch-all provision should be applied. A strict distinction between specific macro-criminal, chapeau elements and micro-criminal, enumerated crimes was not made. In consequence, the notion of ‘other inhumane acts’ was needed to reasonably make safeguards that only incidents of comparable nature and macro-

criminal gravity would fall under crimes against humanity.⁵⁶ Article 5 of the ICTY Statute introduced the split between the macro-criminal *chapeau* and the enumeration of micro-criminal crimes in the early 1990's. Thereafter in 1998, Article 7(1)(k) of the ICC Statute introduced the concretizations of 'other *inhumane* acts' by upholding the split. When drafting the concretizations of Article 7(1)(k), the element of 'inhumane' within 'other inhumane acts' was not adjusted. In consequence, today one could be of the opinion that the notion of inhumane within 'other inhumane acts' remains to be solely declaratory, without field of application and most likely was included due to mere legal history,⁵⁷ yet not without normative flaws.⁵⁸ The

⁵⁶ Also note that H. Feldmann, *Das Verbrechen gegen die Menschlichkeit* (1948), 44 distinguishes within the crimes-catalogue of the CCL No. 10 between *Einzelverbrechen* (singular crimes) and *Massenverbrechen* (mass crimes). Indeed there are quantitative differences. Whereas 'murder' as a crime against humanity would belong into the singular crimes category, 'extermination' as a crime against humanity rather fits into the category of 'mass crimes'. Feldmann's (rightful) distinction can certainly be upheld without giving up the differentiation between micro-criminal perpetration and macro-criminal context. With regard to the crime of extermination as a crime against humanity, the ICTR has held that a mass killing event needs to take place, yet the quantitative threshold of people to be killed is rather low; see *Prosecutor v. Kayishema*, *supra* note 21, para. 145. In *Prosecutor v. Akayesu* it was declared that the killing of 16 people is sufficient to show that an "extermination" had been committed, see *The Prosecutor v. Jean-Paul Akayesu, Judgement*, ICTR-96-4-T, International tribunal of Rwanda, 2 September 1998, paras 735 - 744. As can be seen in *The Prosecutor v. Milan Lukić & Sredoje Lukić, Judgement*, IT-98-32/1, International Criminal Tribunal for the former Yugoslavia, 20 July 2009. The quantitative threshold of "extermination" as a crime against humanity is anything but settled. The actual problem circles around the question to what extent the required "quantity" of extermination is directly connected to the normative splitting of macro- and micro-criminal levels. On the one hand, 6(c) of the IMT Statute did not split both levels of criminality. Therefore, the quantitative threshold of "extermination" was seen as rather high, since the macro-criminal component had to be attached to the crime of extermination *eo ipso*. Figuratively, the macro-criminal component of what is today known as *chapeau* found its inclusion in the interpretation of "extermination". On the other hand, Article 5 of the ICTY Statute [as well as Article 3 of the ICTR Statute/Article 7 of the ICC Statute] transferred the macro-criminal component to the *chapeau* elements and introduced a split between macro-criminal context and micro-criminal perpetration. It is thus reasonable to hold that the quantitative threshold for "extermination" pursuant to Article 5 of the ICTY Statute [as well as Article 3 of the ICTR Statute/Article 7 of the ICC Statute] can be reduced when comparing it with the requirements that are laid out by the IMT.

⁵⁷ See statement by Italy during the Rome Conference, UN Doc A/CONF.183/13 (Vol. II), *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment*

lack of applicatory ground for the term ‘inhumane’ would be grounded on the fact that the *raison d’être* of the *ejusdem generis* principle, which was essentially once codified in the term inhumane within Article 6(c) of the IMT Statute, has now been replaced by the concretizations of Article 7(1)(k) of the ICC Statute. Simply speaking, the notion “other inhumane acts of a similar character”, when read in conjunction with the specifications of ‘character’ in the elements of crimes, could be shortened to the phrase ‘other acts of a similar character’ without running the risk of losing any specific meaning. I will argue in the following section against such a redundant understanding of ‘inhumane’. The term ‘inhumane’ within Article 7(1)(k) has its own field of application particularly with regard to covering serious injuries to the collective and/or individual human dignity.

E. From Normative Arrangements to the Interpretation of ‘Other Inhumane Acts’ by ICC Pre-Trial Chamber I

The interpretation of ‘other inhumane acts’ pursuant to Article 7(1)(k) of the ICC Statute became relevant for the first time in the *Katanga and Ngudjolo Chui* joinder pending before the ICC, where the Office of the Prosecutor charged both defendants with ‘other inhumane acts’. In its 30 September 2008 decision on the confirmation of charges,⁵⁹ ICC Pre-Trial Chamber I gave some insights of how that notion should be interpreted from its point of view. It was particularly interesting to see whether the Chamber would take into account the legal history of the notion, or rather stick to a self governed reading.

After reiterating the wording of Article 7(1)(k) of the ICC Statute and the respective ICC Elements of Crimes, the Chamber notes:

of an International Criminal Court, Official Records, Volume II, Summary records of the meetings of the Committee of the Whole, 153, para. 164.

⁵⁸ The insecurity to properly arrange the catch all provision of Article 7(1)(k) of the ICC Statute can be seen by the fact that – whereas Article 7 of the ICC Statute normally splits between the enumeration of the crime in Article 7(1) and the definition of the crime in Article 7(2) – the concretizations of “other inhumane acts” have been included in Article 7(1) instead of Article 7(2), which, from a normative perspective, is the wrong place.

⁵⁹ *Situation in Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717 (Pre-Trial Chamber I), 30 September 2008.

“448. In the view of the Chamber [...] inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute.

449. The Chamber notes that, according to the jurisprudence of the ICTY [...] the conduct of intentionally causing serious physical or mental injury constitutes a serious violation of international customary law and of human rights of a similar nature and gravity to the crimes referred to in article 7(1) of the Statute. [...]

450. The Chamber notes, however, that the Statute has given to “other inhumane acts” a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived “other inhumane acts” as a ‘catch all provision’, leaving a broad margin for the jurisprudence to determine its limits. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action. [...]

452. [...] article 7(1)(k) of the Statute defines the conduct as ‘other’ inhumane acts, which indicates that none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as an other inhumane act encompassed by article 7(1)(k) of the Statute.

453. Article 7(1)(k) of the Statute and article 7(1)(k)(l) of the Elements of Crimes further require that great suffering, or serious injury to body or to mental or physical health occur by means of an inhumane act”.⁶⁰

When taking a closer look at the findings of ICC Pre-Trial Chamber I, it is worth noting that the Chamber omitted to deal with the most substantial concretization of ‘other inhumane acts’ by the ICTY and ICTR, which are described as

“acts that deliberately cause serious mental or physical suffering or injury *or constitute a serious attack on human dignity*”.⁶¹

⁶⁰ *Prosecutor v. Katanga*, *supra* note 59, paras 448 - 453 (footnotes omitted).

⁶¹ *Prosecutor v. Kayishema*, *supra* note 21, para. 151 and a similar wording in *Prosecutor v. Bagilishema*, *supra* note 21, para. 91; *Prosecutor v. Blaškić*, *supra* note 21, paras 240-242; Article 18(k) of the *ILC Draft Code of Crimes Against the Peace and Security of Mankind*, and *Commentary to the ILC Draft Code 1996*, ILC 1996 Report, 103. Also see M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, 531 (2001), mentioning the

On the contrary, despite the fact that according to Pre-Trial Chamber I, Article 5 of the ICTY Statute and Article 7 of the ICC Statute set the ground “for violation of international customary law and of human rights of a *similar* nature and gravity”⁶² (emphasis added), the Chamber stuck to the very wording of Article 7(1)(k) of the ICC Statute, as well as to the wording of the ICC Elements of Crimes, which exclude the latter specification. The Chamber did not elaborate on the issue of whether a serious injury to the human dignity should fall under the notion of ‘other inhumane acts’, but concluded that due to the (allegedly more specific) wording of the ICC Statute in terms of ‘other inhumane acts’, the notion is more strictly construed, and cannot be regarded as a catch all provision. Furthermore, the notion “other” within ‘other inhumane acts’ presupposes that one and the same act cannot simultaneously constitute an act encompassed in the catalogue of crimes within Article 7 and an ‘other inhumane act’ at the same time.

When analyzing the notion of ‘other inhumane acts’ pursuant to Article 7(1)(k) of the ICC Statute by taking into account the legal history of the term, the conclusions of the ICC Pre-Trial Chamber seem debatable. The notion of crimes against humanity has already been interpreted above as to consist of a set of fundamental violations against the humaneness and against the humankind; including injuries to the individualistic and collective dignity.

It seems to be difficult to come to more restrictive specifications for the term ‘inhumane’ by analyzing Article 7. The concretization within Article 7(1)(k) of the ICC Statute, whereby ‘other inhumane acts’ are “acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”, mostly recites the *ejusdem generis* principle, which was already applied by IMT to restrict a boundless application of the catch-all provision. Insofar, the concretization within Article 7(1)(k) is predominantly grounded on established case law dating back to the World War II era.⁶³ Looking at it that way, it is problematic to

differences between the jurisprudence of the ICTY and the wording of Article 7(1)(k) of the ICC Statute and raising the question, whether serious injury of the physical and mental integrity and the human dignity are be included in Article 7(1)(k).

⁶² *Prosecutor v. Katanga*, *supra* note 59, para. 449 (footnotes omitted).

⁶³ *The Prosecutor v. Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić, Drago Josipović, Dragan Papić, Vladimir Šantić*, Judgement, IT-95-16-T, International Criminal Tribunal for the former Yugoslavia, 14 January 2000, para. 564: “In interpreting the expression at issue, resort to the *ejusdem generis* rule of interpretation

conclude that due to the more concrete wording of Article 7(1)(k) of the ICC Statute – particularly the codification of the similar gravity and nature of the act requirement – one could draw any limiting factors for its application. The same applies for the notion of “other”, since “other” has been included within ‘other inhumane acts’ ever since it was firstly codified in Article 6(c) of the IMT Statute.

Insofar, as for the understanding of the ICC Pre-Trial Chamber with regard to the catch-all, I doubt whether the wording of ‘other inhumane acts’ pursuant to Article 7(1)(k) of the ICC Statute allows for the interpretation that has been brought forward. The catch-all provision has always been seen as what it is: a clause that should only come into play when a subsumption under all of the other catalogue crimes turns out to be unsuccessful, or are of no greater legal specificity. “Catch all” in this sense was never intended to mean being “applicable without limits”, but was – ever since it was firstly used by the IMT – restricted by the principle of normative complementarity application.

As for the (allegedly limiting) concretizations of Article 7(1)(k), it actually remains unclear what stance the Chamber is taking with regard to an redundant understanding of ‘inhumane’ within ‘other inhumane acts’.

On the one hand, Article 7(1)(k) seems to be interpreted with major reliance on the wording of the Statute and the Elements of Crimes. The ICC Pre-Trial Chamber held that the term ‘other inhumane acts’ is more strictly construed in the ICC Statute than in the ICTY (and ICTR) Statutes. It is also held that acts, which are subsumable under a catalogue crime within Article 7(1)(a) to (j) of the ICC Statute, cannot be charged under ‘other inhumane acts’ in principle, thus narrowing the scope of application of ‘other inhumane acts’. Finally, the Chamber connected the term “inhumane” with the term “character” as it is codified in the Elements of Crimes. When taking these points together, it seems to be doubtful, that the Chamber wanted to give the term “inhumane” an independent field of application.

On the other hand the ICC Pre-Trial Chamber held that ‘other inhumane acts’ “are to be considered as *serious violations of international*

does not prove to be of great assistance. Under this rule, that expression would cover actions similar to those specifically provided for. Admittedly such a rule of interpretation has been relied upon by various courts with regard to Article 6(c) of the London Agreement. [...] This interpretative rule lacks precision, and is too general to provide a safe yardstick for the work of the Tribunal.” para. 566: “Once the legal parameters for determining the content of the category of ‘inhumane acts’ are identified, resort to the *ejusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted“.

customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law”⁶⁴ (emphases added), which would allow for an inclusion of acts that are not strictly covered by the concretizations of Article 7(1)(k). There are many violations of basic human rights imaginable, such as acts of debasement, which are not covered by the wording of the concretizations.

By taking into account the legal history and *raison d'être* of crimes against humanity, I argue that a redundant understanding of the term ‘inhumane’ within ‘other inhumane acts’ – and thus a too narrow interpretation of Article 7(1)(k) – violates both the origin of the provision as well as the inner legal system of Article 7 of the ICC Statute. An interpretation for the notion of ‘inhumane’, which is guided by its literal meaning, purpose and systematic interplay with other provisions should be favored to give this legal element its independent field of application. Precisely, an interpretation, which favors an inclusion of serious injuries to dignity in the notion of “inhumane” integrates criminal acts that are historically, legally developed and rightfully deserve to be included today, also due to their comparable nature and gravity with other catalogue crimes; particularly, the crime of apartheid.

Due to the limitation of the wording of Article 7(1)(k), supposedly only such acts should fall within ‘other inhumane acts’ which are “of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. The wording of this provision, and its strict application by the ICC Pre-Trial Chamber, may suggest that the indicator for the evaluation of the comparability of the nature and gravity of the act must be related to an attack against the “mental or physical health” of the victim, or at least cause “great suffering”.

Such a bi-causal approach for determining the nature and gravity of the respective act hardly corresponds with the diversity of the *Schutzgüter* of the crimes enumerated in the catalogue of crimes, such as life, health, liberty and dignity.⁶⁵ The latter *Schutzgut* of dignity, which exclusively⁶⁶ forms part

⁶⁴ *Prosecutor v. Katanga*, *supra* note 59, para. 450.

⁶⁵ It is hence questionable if the monolithic formulation of “‘other inhumane acts’ of a similar character” (emphasis added) in Article 7(1)(k) ICC Statute should be applied literally; also see Elements of Crimes, *supra* note 9, Article 7(1)(k), n. 30 “It is understood that ‘character’ refers to the nature and gravity of the act.”

⁶⁶ Elaborated upon elsewhere, B. Kuschnik, *Der Gesamtbestand des Verbrechens gegen die Menschlichkeit* (2009), 438 citing UN Doc S/RES/392 19 June 1976; UN Doc S/RES/473 13 June 1980 with referencing sources UN Doc S/RES/417 31 October 1977; UN Doc S/RES/418 4 November 1977; UN Doc S/RES/591 28

of the crime of apartheid pursuant to Article 7(1)(j) of the ICC Statute, creates particular problems in that regard. If the nature and gravity of ‘other inhumane acts’ should only be concretized by an attack on the health or physical or mental suffering of the victim, one may ask how (due to the principle of *ejusdem generis* with its requirement of comparability), the crime of apartheid (and thus an exclusive serious injury to dignity) should fall under the given threshold of Article 7(1)(k).⁶⁷ From a normative point of view, it seems to be too farfetched to interpret the crime of apartheid as an act which causes great suffering of a similar nature and gravity in comparison to the other crimes listed in the catalogue of crimes within Article 7, let alone to subsume it under the notion of “serious injury to body or to mental or physical health”. If one follows the interpretation of the ICTR, which held that the crimes of rape as a crime against humanity, and the crime of torture as a crime against humanity are predominantly violations of the personal dignity,⁶⁸ similar problems arise.

Insofar, the concretizations within Article 7(1)(k) should be understood as to only give predominant indicators for the comparable gravity and nature of the act, but do not restrict the applicability of the catch-all provision *stricto sensu* to these constellations.⁶⁹ Particularly, a serious injury to human dignity should fall under the notion of ‘other inhumane acts’ as well. It follows that the term “inhumane” is particularly useful for making (broader) concretizations with regard to the comparable nature requirement. This suggestion is supported by the semantic analysis of the term humanity given above, which includes notions of humaneness and the preservation of human dignity.

F. Conclusion

This article intended to give some insights on the notion of humanity within crimes against humanity, and its interaction with the terms humaneness, humankind and ‘other inhumane acts’. Notably, crimes against

November 1986 and Article 1 of the *Declaration on Race and Racial Prejudice*, UN Doc E/CN.4/Sub.2/1982/Add.1 Annex V (1982): “1. All human beings belong to a single species and are descended from a common stock. They are born in dignity and rights and all form an integral part of humanity.”

⁶⁷ Also see for the strict understanding of “suffering” in relation to the crime of torture, Elements of Crimes, *supra* note 9, Article 7(1)(f), No 1.

⁶⁸ See K. D. Askin, Gender Crimes Jurisprudence in the ICTR, 3 *Journal of International Criminal Justice* (2005), 1007.

⁶⁹ Also see H. J. Koch & H. Rießmann, *Juristische Begründungslehre* (1982), 119.

humanity should be considered as crimes both against humaneness and humankind. Such understanding influences the normative interpretation of 'other inhumane acts', which are predominantly acts that violate the human condition physically, mentally, and spiritually; particularly dignity-wise. It will be interesting to see if the ICC will stick to the rather strict wording of the ICC Statute to exclude serious injuries to the human dignity from the scope of crimes against humanity, or will make adjustments. The legal framework of crimes against humanity, as well as its legal history, would call for the latter.

Secession in Theory and Practice: the Case of Kosovo and Beyond

Ioana Cismas*

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Abstract

Since 17 February 2008 - the day of Kosovo's declaration of independence from Serbia - it has become rather pressing to understand whether this act has legal precedential value and hence what its consequences are. This article carves out the place of secession in international law by appeal to fundamental principles and legal doctrine. It also explores major socio-political aspects in Kosovo's history, from the battle of Kosovo Polje in 1389 to Security Council resolution 1244 (1999) that set up the United Nations Interim Administration Mission in Kosovo (UNMIK). By following these two analytical paths Kosovo is exposed as a case of remedial secession and thus as a potential legal precedent. While the elements of remedial secession are gathered, it is argued that states deprived this instance of practice of its precedential value and made it a legally insignificant act. In other words, the international community missed a rare opportunity to clarify the concept of remedial secession and to reassert its preventive force as a non-traditional human rights protection mechanism.

A. Introduction

“It is quite obvious that such a development [the EU's recognition of Kosovo's independence] would create a serious negative precedent from the point of view of international law. It will be seen as a precedent by many people, perhaps far too many people, across the world.”¹

Imperfect as it may be, the focus of the global media may serve as an indicator of the priorities of the international community's agenda, not least in what concerns delicate legal issues. Since the mid 1990's, Kosovo² has been increasingly present in the international media. However, until 2007, news about its potential independence and the consequences thereof were at best sporadic. This situation changed radically in 2008 along with the developments on the ground. The concerns of some states – such as Russia,

¹ Vladimir Chizhov, Ambassador of the Russian Federation to the European Union as quoted in ‘Russia warns EU over Kosovo recognition’, *Financial Times*, 7 February 2008.

² *Kosovo* as opposed to *Kosova* will be used throughout the article since it is the term used in most English language publications.

which spearheads the group of countries rejecting an independent Kosovo without the consent of Belgrade, on the basis that it will set a legal precedent and fuel separatist movements worldwide – have been duly reflected by the press.³ On the other hand, independent media analyses were put forward that, on their own volition, pointed to possible secessionist implications.⁴ Not least, as one news title stresses, “breakaway territories watch and wait”.⁵ Leaving aside the sometimes inflated spirit of the media, the Kosovo precedent theory is of outmost interest in particular for the legal field at least since 17 February 2008, the date of Kosovo’s declaration of independence from Serbia. And it remains in the limelight despite, or because of, the Advisory Opinion on the *Unilateral Declaration of Independence* handed down by the International Court of Justice (ICJ) in July 2010.⁶ Questions related to whether a legal precedent has been created, as well as concerning the content and consequences of this possible precedent ought to be asked. As suggested by the introductory quote, the intensely championed idea is that the Kosovo precedent would revolutionize state creation by introducing a right to secession in international law. Against this background, the current article is an exploratory study on the place of Kosovo’s secession in international law and its potential legal consequences for other secessionist movements. It attempts to put forward a lucid account of the legal implications of Kosovo’s independence by exploring the international regulations on secession, as well as the circumstances which led to the case at hand.

³ For the Russian view on the consequences see ‘Russia warns EU over Kosovo recognition’, *The Financial Times*, 7 February 2008; for the Cypriot and Romanian view see ‘Romania and Cyprus confirm opposition to Kosovo independence’, *EUObserver.com*, 7 February 2008.

⁴ For the possible implications of the “Kosovo precedent” in the Balkans: ‘Kosovo: Gerechte Grenzen sind nicht zu haben’, *Le Monde diplomatique* (Swiss edition in *Die Wochenzeitung*), 15 January 2008; in East Asia: ‘Whose problem is it?; Kosovo, China and Taiwan’, *The International Herald Tribune*, 31 January 2008; in the former Soviet Union area: ‘If Kosovo goes free; the independence precedent’, *The Economist*, 29 November 2007; in other regions: ‘Breakaway regions look to Kosovo precedent’, *Reuters*, 9 December 2007.

⁵ ‘Breakaway territories watch and wait’, *Financial Times Deutschland*, 25 January 2008. See also ‘Kosovo’s “inevitable” independence sets important precedent for Transdnistria’, *The Tiraspol Times*, 31 January 2008.

⁶ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, 22 July 2010, available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited 23 August 2010).

The study is constructed as a juxtaposition of theory and practice: an inquiry into the legal theory on secession and an analysis of state practice in the case of Kosovo. Intuitively one acknowledges that if secession were accommodated by international law as a legal modality of state creation, then the Kosovo case would not set a precedent as such and any further discussion in this direction would be redundant. Once the issue of the existence/non-existence of a right to secession is clarified, the socio-political underpinnings of Kosovo's independence can be analyzed. These research steps will subsequently permit an assessment of the potential legal precedent.

In international law, the notion of precedent has to be regarded within the wider framework of creation and change of customary international law. International custom as one of the sources of law⁷ has two constitutive elements: state practice and *opinio iuris*. The latter refers to states acting out of a sense of legal obligation, "as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."⁸ This element permits the distinction between norms and other rules of behavior,⁹ or otherwise put "the role of *opinio iuris* [...] is simply to identify which acts out of many have legal consequence"¹⁰. What becomes evident and salient for the current study is that there are different types of acts performed by states, not all having relevance in the formation of international custom or, in other words, not all having precedential value. In the *North Sea Continental Shelf* judgment, while recalling cases in which continental shelf boundaries have been delimited according to the

⁷ Article 38 of the Statute of the International Court of Justice identifies the sources of international law: "a. international conventions [...]; b. international custom, as evidence of a general practice accepted as law; c. general principles of law [...]; d. [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations [...]", Statute of the International Court of Justice, 26 June 1949, 33 U.N.T.S. 993.

⁸ *North Sea Continental Shelf Cases (Germany v. Netherlands)*, Judgment, ICJ Reports 1969, 3, 44, para. 77 [*North Sea Continental Shelf*].

⁹ R. Bernhardt, 'Customary international law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law, Volume I* (1992), 898, 899. See also T. Treves, 'Customary International Law', *Max Planck Encyclopedia of Public International Law* (last updated November 2006), paras 11-13, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690e1393&recno=1&author=Treves%20%20Tullio (last visited 24 August 2010).

¹⁰ A. D'Amato, 'Trashing Customary International Law', 81 *American Journal of International Law* (1987) 1, 77, 102.

equidistance principle, the International Court of Justice concludes that there are several grounds that deprive those acts of weight as precedents.¹¹ Anthony D'Amato refers to those acts that can create or change customary law as "articulated precedential situations". The term "articulated" implies that the state's act is not merely a behavioral panache, i.e. habit, comity, courtesy, expediency, moral requirements, but a legally significant act.¹² If other states accept an action that is inconsistent with established and generally accepted practice then "the action enters into the flow of authoritative precedent giving rise to a new practice which is generally accepted"¹³. Similarly in the *Military and Paramilitary Activities* decision, the ICJ found that "reliance by a State on a novel right or an unprecedented exception to the principle right, if shared in principle by other States, tend towards a modification of customary international law"¹⁴. Consent expressed by all states of the international arena, while theoretically possible, is highly unlikely. Therefore, acquiescence – i.e. silence or absence of protest in circumstances which demand a positive reaction¹⁵ – and protest, understood as a form of communication from one subject of international law to another objecting to conduct by the latter as being contrary to international law,¹⁶ particularly coming from specially affected States are essential acts.

B. Theory: Secession in International Law

"Not surprisingly, existing States have shown themselves to be "allergic" to the concept of secession at all times."¹⁷

¹¹ *North Sea Continental Shelf*, *supra* note 8, para. 77.

¹² A. D'Amato, *The Concept of Custom in International Law* (1971), 105, 76, 174.

¹³ O. Schachter, *International Law in Theory and Practice* (1991), 23, 27.

¹⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. The United States of America)*, *Merits, Judgment*, ICJ Reports 1986, 14, 62, para.109 [*Military and Paramilitary Activities*].

¹⁵ C. Parry *et al.*, *Encyclopedic Dictionary of International Law* (1986), 4-5.

¹⁶ W. Karl, 'Protest', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume III (1997), 1157.

¹⁷ M. Kohen, 'Introduction', in M. Kohen (ed.), *Secession. International Law Perspectives* (2006), 1, 3.

I. Defining Secession

A starting point for any attempt to find *the* definition of secession is the recourse to the two Vienna Conventions which deal with state succession, as one would normally expect these documents to mention and explain the classification of state creation. Unsurprisingly for some observers, the Conventions are (symbolically) silent on the topic of secession: the preferred formula “separation of parts of a State” does not distinguish between a separation made with or without the accord of the predecessor state.¹⁸ The concept of secession is not an object of agreement among the legal scholarship, with different authors interpreting the boundaries of the notion in a broader or narrower sense. There are significant implications of this lack of uniformity: whereas according to one definition a case is considered as secession, according to a narrower understanding the same case can be regarded as dissolution.¹⁹ In the context of state succession, Matthew Craven discusses the problematic aspects of the lack of doctrinal consensus on the “schemata of principles to be applied” which in turn is translated in dissimilar taxonomies. In other words, the definition of secession is dependent on the chosen ordering principle, mutual consent or the issue of personality.²⁰

In line with the above, three streams of interpretation of the meaning of secession, differentiated by certain particularities, are prevalent in literature. Julie Dahlitz proposed that “[t]he issue of secession arises whenever a significant proportion of the population of a given territory, being part of a State, expresses the wish by word or by deed to become a sovereign State in itself or to join with and become part of another sovereign

¹⁸ Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978 Art. 34, 1946 UNTS 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 8 April 1983, Art. 17, 30, 40, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf (last visited 25 August 2010); M. Kohen, ‘La création d’Etats en droit international contemporain’, in J. Cardona Llorens (ed.), *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Volume VI (2002), 590.

¹⁹ To illustrate the dilemma, appeal to the case of SFRY will be made. Some authors consider the independence of the Yugoslav republics to represent instances of secession, given that they broke away from Yugoslavia. According to the definition employed in this paper the independence of the republics is the result of Yugoslavia’s dissolution. The issue of consent is essential; it was Serbia that did not give its consent to the independence, however Serbia was not the parent state, but the SFRY.

²⁰ M.C.R. Craven, ‘The Problem of State Succession and the Identity of States in International Law’, 9 *European Journal of International Law* (1998) 1, 142, 146-147.

State.”²¹ In the view of James Crawford “[s]ecession is the creation of a State by the use or threat to use force without the consent of the former sovereign”²², whereas Marcelo Kohén sees secession as

“the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter. [...] [also] in order to be incorporated as part of another State”²³.

The latter definition, while reducing the scope of Dahlitz’ proposal, brings with it a critical element – the lack of consent of the predecessor state. The import of this particular aspect lies in its profound resonance with practice. It is the lack of consent of the parent state that makes secession such a disputed topic in international law; it is this factor that gives rise to disputes between the predecessor and the newly independent entity, that compels the latter to look for legal justifications for its creation “elsewhere”²⁴ and hence, it is this that generates the precedent hysteria. The lack of consent, as was pointed out, *can* spark violent disputes, thus it appears that Crawford’s qualification – that secession ought to *necessarily* involve the threat or use of force on the part of the seceding entity – is a rather double restrictive element.

Yet another aspect concerning the definitional scope must be clarified. Some authors regard the decolonization process as instances of secession.²⁵ Martti Koskenniemi, referring to decolonization, asserts that “as a matter of international law, secessionism could explain itself as compliance – and opposing it as an international crime or possibly a breach of a peremptory norm of international law”.²⁶ Arguably, this could be an interpretation of Art. 19.3.b. of the Draft Articles on State Responsibility as these have been adopted by the International Law Commission on first reading in 1980, i.e. “an international crime may result, inter alia, from ... a serious breach of an international obligation of essential importance for

²¹ J. Dahlitz, ‘Introduction’ in J. Dahlitz (ed.), *Secession and International Law: Conflict Avoidance – Regional Appraisals* (2003), 6.

²² J. Crawford, *The Creation of States in International Law*, 2nd ed. (2006), 375.

²³ M. Kohén, *supra* note 17, 3.

²⁴ *Id.*

²⁵ See J. Crawford, *supra* note 22, 384.

²⁶ M. Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’, 42 *International and Comparative Law Quarterly* (1994) 2, 241.

safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination.”²⁷

Rosalyn Higgins offers an opposing view to the one above, with an argumentation path that echoes the etymological roots of the word secession – the Latin verb *secedere*, *se* meaning “apart” and *cedere* “to go”, hence the meaning to withdraw.²⁸ Thus, decolonization did by no means imply that the people “withdraw” their territory, but that the colonial rulers were the ones who had to leave. Another persuasive argument builds on the Friendly Relations Declaration, which states that “[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it”²⁹. The discussion cannot be framed in terms of separation of territories given the existence of distinct and separate territories.

To equate the process of decolonization with a long series of secessions would in fact imply that there is consistent state practice that admits secession as a legal means of creating new states, which evidently would be of outmost relevance for the study at hand. Nevertheless, as pointed out above, such an understanding of the decolonization process is rather exceptional in legal doctrine and major legal texts appear to speak against it.

²⁷ Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, January 1997, Art. 19(3)(b), at 105, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf (last visited 20 August 2010). As is well known the term “international crime” did not make it in the 2001 Draft Articles adopted by the International Law Commission. Nonetheless, the term has resonance in Article 40 and 41 of the of the 2001 version. Again, it should be underlined that the term secession does not appear in either version of the Draft Articles. See specifically footnote 651 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at 113, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited 25 August 2010).

²⁸ R. Higgins, “Self-Determination and Secession”, in J. Dahlitz (ed.), *Secession and International Law: Conflict Avoidance – Regional Appraisals* (2003), 21, 35.

²⁹ GA Res. 2625 (XXV), 24 October 1970 [Friendly Relations Declaration]; Kohen, *supra* note 18, 590.

II. Secession and Fundamental Principles of International Law

A potential right to secession cannot exist in a legal vacuum; therefore it is only reasonable to assume a certain interconnectivity with general principles of international law.

1. The Principle of Self-Determination

Self-determination matured throughout the last three centuries: from the seeds planted by the Declaration of Independence of the United States of America in 1776, to the principle heralded by nationalist movements during the 19th and early 20th century³⁰, to the principle enshrined in Article 1(2) and 55 of the UN Charter, and to the right of “all peoples” stipulated by Article 1 common to the International Covenants, and finally to a right giving rise to an obligation *erga omnes* as authoritatively interpreted by the ICJ in the *East Timor* judgment.³¹ Subsequently, in *The Wall* opinion, the Court adopted the “post-colonial view of self-determination”, which does not restrict the application of this right to a historic period but looks beyond colonialism.³²

The central question for the purpose of the current research is whether self-determination and secession cover the same content. One author notes the tendency throughout history to condemn secession whereas self-determination has gained sympathy, implying further that the difference between the two is a difference in name.³³ However, not all exercises of self-determination involve territorial change. In fact, to *non-avisées* it is rather the internal aspect of self-determination, i.e. the right of the peoples to determine their political status and pursue their economic, social and

³⁰ See D. Thürer & T. Burri, ‘Self-determination’ in *Max Planck Encyclopedia of Public International Law* (last updated December 2008), paras 1-4, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e873&recno=3&author=Thürer%20%20Daniel (last visited 25 August 2010).

³¹ *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, 101, para. 29.

³² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Higgins, Advisory Opinion, ICJ Reports 2004, 207, 214, paras 28-30.

³³ L.B. Serapiao, ‘International Law and Self-determination: The Case of Eritrea’, 15 *Issue: A Journal of Opinion* (1987), 3.

cultural development that is spelled out in the International Covenants.³⁴ The Covenants and the General Comment 12 of the Human Rights Committee on the implementation of the right do not explicitly enunciate the external component of self-determination. Nonetheless, the Committee³⁵ makes unequivocal reference to the consensually adopted Friendly Relations Declaration, which indeed lists “establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people” as modalities of implementing the right to self-determination.³⁶ Accordingly, the external feature amounts to the freedom of the peoples to decide their international status, which in turn includes the option for independent statehood.

One of the crucial aspects of determining the applicability of the right to self-determination lies in the long debated concept of peoples. The subject of the right to self-determination is notoriously undefined in the same documents that proclaim it. It has been UN practice that relied on territorial entities with a historical or administrative background, thus favoring the formula “un Etat=un peuple”.³⁷ Marcelo Kohen concludes that based on this practice “c’est le territoire qui définit le peuple et non le contraire.”³⁸ According to this, clearly the first to be recognized as peoples are the peoples of states. And in this context the principle of self-determination does not play the revolutionary role so often attributed to it, but contributes to the legitimation of the principles of sovereign equality and non-intervention.³⁹ As the Human Rights Committee put it, “States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination”⁴⁰.

³⁴ International Covenant on Civil and Political Rights, 19. December 1966, Art.1, 999 U.N.T.S. 171, 173 and International Covenant on Economic, Social and Cultural Rights, 19. December 1966, Art.1, 993 U.N.T.S. 3, 5.

³⁵ General Comments Adopted by the Human Rights Committee, No. 12 – The Right To Self-Determination (art. 1) [1984], 134, para. 4, UN Doc HRI/GEN/1/Rev.6 [General Comment No.12].

³⁶ Friendly Relations Declaration, *supra* note 29.

³⁷ G. Alfredsson, ‘The Right of Self-determination and Indigenous Peoples’ in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), 41, 46.

³⁸ M. Kohen, *supra* note 18, 585.

³⁹ J. Summers, *Peoples and International Law. How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (2007), 167-170.

⁴⁰ General Comment No.12, *supra* note 35, 135, para. 6.

Operationalizing further the concept of peoples gives one incontestable subject: colonial people. As Daniel Thürer and Thomas Burri point out based on the jurisprudence of the ICJ “[s]elf-determination [...] clearly emerged as the legal foundation of the law of decolonization”⁴¹. Yet, another widely employed category in UN practice are peoples under foreign or alien domination. Although this latter category might seem clear-cut, once particular cases are being discussed it becomes obvious that consensus falls prey to politics.⁴² Be that as it may, it would be incorrect to equate a right to independent statehood of peoples under colonial regime or foreign occupation with the right to secession. As was pointed out earlier, the peoples in question are not breaking away or separating their territory, but it is the colonial power or the occupier that is to leave, which in turn means that not all exercises of external self-determination are acts of secession. In conclusion, it appears that a potential right of secession resulting from the right to self-determination would apply only to people outside the decolonization and occupation contexts.

An example of people outside the decolonization and occupation settings which enjoy the right to self-determination and (sometimes) expressly to secession are people recognized by states as existing within themselves. Some states, albeit few, chose to recognize in their constitutive acts peoples, their explicit right to self-determination and even to secession. Article 39 of the Ethiopian Constitution explicitly reunites all the mentioned elements.⁴³ Following the model of the Soviet Constitution, the constitutive law of Russia recognizes in its preamble and Article 5 (3) peoples with a right to self-determination “in the Russian Federation”.⁴⁴ Famously, the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY) recognized the right of its “nations” to self-determination, which includes

⁴¹ D.Thürer & T.Burri, *supra* note 30, para. 15. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 31, para. 52; *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, 31, paras 54–59.

⁴² Summers, *supra* note 39, 169-171.

⁴³ See the Constitution of the Federal Democratic Republic of Ethiopia, Art. 39, available at <http://www.erta.gov.et/pdf/Constitution.pdf> (last visited 25 August 2010).

⁴⁴ Arguably, the qualification ‘in the Russian Federation’ circumscribes the right to self-determination to its internal aspect, this interpretation however is not evidenced by the provisions in the preamble. Constitution of the Russian Federation, available at <http://www.constitution.ru/en/10003000-01.htm> (last visited 25 August 2010).

also the right to secession.⁴⁵ Bosnia and Herzegovina proclaims “Bosnian, Croats and Serbs as constituent peoples (along with others)”⁴⁶. Such recognition could be interpreted as evidence for a shift from the purely territorial definition towards one that accepts nationality or ethnicity as differentiation factors.⁴⁷

The recently adopted UN Declaration on the Rights of Indigenous People could be said to prove that international law has moved away from the enunciated territorial formula. The Declaration proclaims the right to self-determination of indigenous peoples, however, proceeds by apparently restricting it to the internal component, i.e. “autonomy or self-government”.⁴⁸ Despite this clear restriction, several states with considerable indigenous populations cautiously rejected the document based on “language on self-determination”.⁴⁹

2. International Human Rights and Remedial Secession

The conceptual journey of peoples does not end here. Much rather it resembles an odyssey, given, some argue,⁵⁰ the different theoretical lenses one can choose to look at the concept. The ongoing debate revolves around whether cultural minorities⁵¹ have in certain conditions the right to self-

⁴⁵ The Constitution of the Socialist Federal Republic of Yugoslavia, Extracts, 1974, in H. Krieger (ed.), *The Kosovo Conflict and International Law* (2001), 2.

⁴⁶ Constitution of Bosnia and Herzegovina, Preamble, available at http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf (last visited 25 August 2010).

⁴⁷ On the contrary Marcelo Kohen asserts that the recognition by states of their multinational character amounts to “[I]’exception qui confirme la règle’, Kohen, *supra* note 18, 586.

⁴⁸ GA Res. 61/295, 2 October 2007, Art 3, 4.

⁴⁹ UN Department of Public Information, ‘General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President’, available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (last visited 25 August 2010).

⁵⁰ Natural law and positivist viewpoints are discussed in R. Lefebvre & M. Zieck, ‘Africa: Lost between Self-determination and *Uti Possidetis*’, in C. Brölmann, R. Lefebvre & M. Zieck (eds), *Peoples and Minorities in International Law* (1993), 37, 53-54; A. Falk, ‘The Coherence of Doctrine Versus the Incoherence of Experience’ in W. Danspeckgruber & A. Watts (eds), *Self-Determination and Self-Administration: A Sourcebook* (1997), 55.

⁵¹ Cultural minority, cultural group or minority are used interchangeably throughout this article and are taken to mean: a group which is numerically inferior to the rest of the

determination, including to the external aspect of self-determination that is secession. There have been constant attempts to redefine peoples in non-territorial terms,⁵² however, as Aureliu Cristescu confirms in his comprehensive study on UN practice, these attempts have not been embraced by states. Hence, in his words: “Le peuple ne se confond pas avec les minorités ethniques, religieuses ou linguistique.”⁵³ In a recent assessment, James Summers notes that “the lack of any positive intention to extend self-determination to minorities, at least in a form that includes secession” is evident from both the drafting of legal instruments and state practice.⁵⁴ Positivists rightly argue that state practice is scarce and conventional legal texts are silent on minorities becoming peoples.⁵⁵

While admitting the above, proponents of remedial secession build on the momentum of international human rights law and attempt to bridge a gap in the legal provisions. As Christian Tomuschat asserts in a powerful argument: “States are no more sacrosanct. [...] [T]hey have a specific *raison d’être*. If they fail to live up to their essential commitments they begin to lose their legitimacy and thus even their very existence can be called into question.”⁵⁶ In other words, respect for human rights has become a pillar-principle of today’s world, in addition to the principles of sovereignty and non-intervention in the affairs of other states. And it is this general principle that gradually emerged which prohibits gross and large-scale violations of human rights and fundamental freedoms.⁵⁷ In this (modern) context, if a state excludes or persecutes parts of its population, then that population might legitimately secede to form a more representative government.⁵⁸ Remedial secession sets a high threshold for those groups

population of a State, in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who maintain a sense of solidarity if only implicitly, directed towards preserving their culture, traditions, religion and language. F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979), 102, para. 568.

⁵² A. Cristescu, *Le droit à l’autodétermination: développement historique et actuel sur la base des instruments des Nations Unies* (1981), 37, para. 271; C. Tomuschat, ‘Self-Determination in a Post-Colonial World’, in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), 16.

⁵³ A. Cristescu, *supra* note 52, 38, para. 279.

⁵⁴ J. Summers, *supra* note 39, 333.

⁵⁵ See C. Tomuschat, ‘Secession and self-determination’, in M.G. Kohen (ed.), *Secession. International Law Perspectives* (2006), 23, 35-36.

⁵⁶ C. Tomuschat, *supra* note 38, 9..

⁵⁷ A. Cassese, *International Law*, 2nd ed. (2005), 59.

⁵⁸ J. Summers, *supra* note 39, 343-344.

invoking the right to secession, since the human rights violations perpetrated by the state in discriminatory fashion against the specific group must be “grave and massive”⁵⁹. Consequently, the criterion for acknowledging this right is not the mere existence of a people in cultural terms, but the existence of grave and massive violations of the human rights of such a people. Moreover, remedial secession is an exceptional solution of last resort which can be called upon only after all realistic and effective remedies for the peaceful settlement have been exhausted.⁶⁰ Yet, other authors add to these the necessity for the cultural group to be concentrated and majoritarian on the territory for which it seeks secession.⁶¹

It would appear that what is ultimately proposed by advocates of remedial secession – either explicitly or implicitly – is that a cultural minority becomes a people only when the high threshold of human rights abuse has been reached and when no other remedies are available. By becoming a people the right to self-determination is triggered, including in its external aspect, thus giving rise to the right to secession. Ultimately, the term “remedial” in the context of secession implies a remedy for grave and massive human rights wrongs, a correction by way of state creation at a center of which is a cultural minority turned people.

The high threshold of human rights abuse, the last remedy conditionality, as well as other characteristics that the cultural group ought to fulfill appear to narrow the scope of remedial secession to very few, if not singular, cases. In the end, not the implosion of the international system by a wave of secessionist movements is envisaged, but a remedy for situations, which by their existence can endanger peace and security. In fact, Lee Buchheit, who coined the term remedial secession, regards it as a conservative doctrine geared to protect the state-centered order. It is in the

⁵⁹ The example given by Tomuschat is that of genocide. C. Tomuschat, *supra* note 52, 9. Hannum sees only those ‘rare circumstance when the physical existence of a territorially concentrated group is threatened by gross violations of fundamental human rights’ as giving rise to remedial secession, H. Hannum, ‘Rethinking Self-Determination’, 34 *Virginia Journal of International Law* (1993) 1, 46-47.

⁶⁰ D. Thürer, ‘Self-determination’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (2000), 371; J. Dugard & D. Raič, ‘The role of Recognition in the law and practice of secession’ in M.G. Kohen, (ed.) *Secession. International Law Perspectives* (2006), 109.

⁶¹ D. Murawiek, ‘The Issue of A Right of Secession-Reconsidered’, in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), 27; T. Christakis, *Le droit à l'autodétermination en dehors des situation de décolonisation* (1999), 315.

power of the states not to let the situation reach the threshold and hence avoid opening the door to remedial secession.⁶²

It goes without saying that the different streams of thought that argue that cultural nations must become political states, would *a priori* raise objections to remedial secession.⁶³ Certainly, remedial secession can be subjected to many moral and factual challenges. It does introduce a double standard in recognizing the existence of a people and it does not offer a remedy to minority groups which experience discrimination short of massive and grave. It may involve tremendous human costs and does not offer a certain solution for peaceful coexistence and stability once the secession is consummate.⁶⁴ In legal doctrine, however, it is not these caveats that are central to the dispute; the unwillingness to accommodate remedial secession is rather based on its presumed failure to pass the legal scrutiny test.

The safeguard clause of the Friendly Relations Declaration is regarded as the starting point for inferring the right to remedial secession:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”⁶⁵

The first part of the text appears to represent a rejection of secession, while the second section comes to condition the rejection by the existence of a representative government. Arguments against implying a right to secession from the Friendly Relations Declaration stress upon the contextuality of the safeguard clause, i.e. the paragraph requiring representation has been envisaged against the South African and Southern

⁶² L. C. Buchheit, *Secession: The Legitimacy of Self-Determination* (1978), 222-223.

⁶³ André Liebich classifies these argumentation paths in definitional, causal or functional and moral, A. Liebich, ‘Must Nations Become States?’, 31 *Nationalities Papers* (2003) 4, 453-469.

⁶⁴ N. Sambanis, ‘Partition as a Solution to Ethnic War: An Empirical Critique of the Theoretical Literature’, 52 *World Politics* (2000), 4, 437-483; S. Kalyvas, *The Logic of Violence in Civil War* (2006), 330-363.

⁶⁵ Friendly Relations Declaration, *supra* note 29.

Rhodesian racist regimes.⁶⁶ Nonetheless, as the apartheid regime in South Africa was dismantling, in 1993, the UN World Conference on Human Rights included in its Vienna Declaration a very similar phrase,⁶⁷ the same example was followed by the GA Declaration with the occasion of the fiftieth anniversary of the UN in 1995.⁶⁸ Against this background, the validity of the contextuality thesis can be questioned.

Even admitting that remedial secession can be implied from the above documents it remains a fact that all of them amount to soft law.⁶⁹ In the eyes of some scholars, the non-binding legal character makes them short of law proper, hence at best a shaky ground for the remedial secession theory. Consensual adoption, corroborated with the principle of *bona fide* – of which the states were surely aware while agreeing to the texts – have to amount to more than uncertain grounds. Discounting this would equate with assuming that states did not express disagreement, however did not intend to follow the letter of the declarations either, therefore acted in bad faith.

Another line of thought insists on the temporary character of a government that pursues discriminatory policies. Hence, a radical solution, remedial secession, would be chosen to resolve a provisional situation, while the struggle for restoration of human rights would be more appropriate.⁷⁰ Resort to economic and political sanctions by the international community is also regarded as the less legally controversial means to determine governments to stop abuses.⁷¹ Indeed an interesting argumentation path. Nevertheless, at least since Einstein's discovery, one would have to acknowledge that time is relative. The temporary character of a regime committing extreme abuses against part of its population seen

⁶⁶ M. Kohen, *supra* note 17, 10.

⁶⁷ “In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.”, Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, UN Doc A/CONF.157/23, 12 July 1993.

⁶⁸ GA Res. 50/6, 24 October 1995.

⁶⁹ C. Tomuschat, *supra* note 55, 35-36.

⁷⁰ M. Kohen, *supra* note 17, 11.

⁷¹ G. Welhengama, *Minorities' Claims: From Autonomy To Secession, International Law And State Practice* (2000), 246-247.

through the eyes of that particular group might not look that temporary after all, and this image might linger beyond the actual taking place of the abuse. Indeed, psychological and sociological factors may at times step in to complicate situations. Even after a perpetrator seized to be a perpetrator, it tends to be difficult for a victim to peacefully live and strive alongside its former abuser. The second suggestion, which relies on the international community willingness or, as coined more recently by UN language, responsibility to protect, is obviously preferable to remedial secession. Besides experience which comes to contradict that this option is always validated – either because the world community fails to act or because its actions have no impact on the perpetrator government – such a path places the already massively and grave oppressed group in the position of a *dependent* victim.

Perhaps best to summarize the discussion regarding the *de lege lata* vs. *de lege feranda* status of remedial secession is by reference to the findings of the Supreme Court of Canada: “it remains unclear whether this [...] actually reflects an established international law standard”.⁷² With the risk of emitting truisms, this section concludes that the legal concept of people as subject of the right to self-determination – with its internal and external components – remains a social construction and hence its boundaries continue to be fluid, regardless of the apparent present preference for a purely territorial formula.

3. Sovereignty and Its Corollary Principles

As Helmut Steinberger asserts, “[t]he history of the notion of sovereignty in international law is almost identical with the full-scale history of international law itself.”⁷³ The principle of sovereignty has become the backbone of the world system; respect for territorial integrity and non-intervention in the affairs of other states, as corollary principles, are tenets of the Westphalian Model designed to sanction and safeguard the status quo in this system.⁷⁴ The prohibition on the threat or use of force, on the other hand, belongs to the new conceptual developments prompted by

⁷² Supreme Court of Canada, Reference re Secession of Quebec, [1998], 2 S.C.R. 217, 75, available at http://www.canlii.org/en/ca/scc/doc/1998/1998c_anlii793/1998canlii793.pdf (last visited 25. August 2010).

⁷³ H. Steinberger, ‘Sovereignty’ in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (2000), 500, 501.

⁷⁴ A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), 333.

the devastation of the two World Wars; it gained its status as fundamental principle of international law through its proclamation in Art. 2(4) of the UN Charter.

Territorial integrity refers to the material elements of a state, the physical and demographic resources that lie within the frontiers of the state.⁷⁵ It is beyond question that this principle applies generally in inter-state relations, and hence it represents a guarantee “contre tout démembrement du territoire”.⁷⁶ The question in the context of secession is whether a secessionist movement, as a non-state actor, is equally bound by this principle.

A differentiation has to be made here based on the character of the secessionist movement, i.e. whether the entity seeking secession is a people or not. As was discussed earlier, a people – subject to its recognition as such by the international community – has the right to internal and external self-determination and therefore respect for territorial integrity would not be opposable to it. On the contrary, the territory for which people seek independent statehood cannot be dismembered, by, for example, the former colonial power.⁷⁷ In the latter case, Olivier Corten discerns from current practice an oscillation between a traditional neutral approach towards secession and developments condemning the breach of territorial integrity by secessionist movements.⁷⁸ Traditionally, international law is said to be “legally neutral” to secession, envisaging the *modus operandi* “ni autorisée, ni interdite”.⁷⁹ Since secessionist groups are not regarded as subjects of international law, international regulations on the issue of territorial integrity are not extended to them. The second tendency is to oppose to (violent) secessionist movements the respect for the principle of territorial integrity.⁸⁰ By virtue of this development, the neutrality of international law

⁷⁵ C. Haverland, ‘Territorial integrity and political independence’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (2000), 813.

⁷⁶ M. Kohen, *supra* note 18, 579.

⁷⁷ Friendly Relations Declaration, *supra* note 29. For example, in the context of Mauritius’ exercise of its right to self-determination, the General Assembly “[i]nvites the Administering Power [the United Kingdom] to take no action which would dismember the Territory of Mauritius and violate its territorial integrity.” GA Res. 2066 (XX), 16 December 1965.

⁷⁸ O. Corten, ‘Are There Gaps in the International Law of Secession’, in M.G. Kohen (ed.), *Secession. International Law Perspectives* (2006), 231, 232.

⁷⁹ *Id.*; See also J. Crawford, *supra* note 22, 390.

⁸⁰ O. Corten, *supra* note 78, 231; See for example for a very strong statement in the context of the Abkhazia – Georgia conflict SC Res. 876, 19. October 1993.

in respect to secession appears to be challenged, rather an interdiction of secession could be inferred. It remains to be seen whether this trend will develop in opposition to the clear statement by the ICJ in its Advisory Opinion on the *Unilateral Declaration of Independence* which clearly confines the scope of the principle of territorial integrity to the “sphere of relations between states”.⁸¹

The principle of non-intervention in the affairs of other states, as it has been postulated by the ICJ, in a positive definition, involves “the right of every sovereign State to conduct its affairs without outside interference”.⁸² The principle of non-use of force enshrined in Article 2(4) of the UN Charter prohibits states from using or threatening to use force in the conduct of their international relations. Collective enforcement measures (Chapter VII), individual and collective self-defense (Article 51), enforcement measures by regional agencies with the authorization of the Security Council (Chapter VIII) and Articles 106 and 107 on former “enemy states” are the exceptions to the prohibition on the use of force.

In the context of the present discussion on secession, again, a distinction has to be made between peoples that exercise their right to self-determination and movements that are not recognized as having such a right. In the latter case, states are bound to abstain from giving any kind of support to such entities.⁸³ If the actions of the secessionist movement involve the threat or use of force, the assisting state would be in breach of both the principle of non-intervention and the prohibition on the use of force.⁸⁴ Article 16 on “aid and assistance in the commission of wrongful acts” of the ILC Draft Articles refers to situations between two states, and thus may arguably not be applicable to a situation in which a state is complicit in violations committed by a non-state entity such a secessionist

⁸¹ In the opinion of this author the statist position of the ICJ and its wide scope contrasts strongly with the increased awareness among the members of the international community in respect to the relevance of non-state actors and the importance of bringing them under the realm of norms. *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, *supra* note 6, para. 80.

⁸² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. USA)*, Merits, ICJ Reports 1986, 14, 106, para. 202 [Military and Paramilitary Activities].

⁸³ A. Cassese, *supra* note 57, 53.

⁸⁴ Friendly Relations Declaration, *supra* note 29; *Military and Paramilitary Activities*, *supra* note 82.

movement.⁸⁵ However, in the *Genocide Convention Case*, the ICJ resorted to the complicity test entailed by Article 16 to inquire whether Serbia and Montenegro aided and assisted the Republika Srpska – a non-state entity – in the commission of the Srebrenica genocide.⁸⁶ With Northern Cyprus as *res ipsa loquitur* example, it is argued more generally, that a shift from the *laissez faire* doctrine or neutrality of international law in respect to secession towards the principle of legality is at stake.⁸⁷ In other words, the conformity of newly created states with the existent legal order – among which the principles of non-intervention and non-use of force – is required, whereas solely effectiveness⁸⁸ becomes insufficient.

The case of peoples exercising their right to self-determination depicts a threefold relation informed by the principles of non-intervention and non-use of force. The first refers to the relation between a people seeking independent statehood in the view of its right to self-determination and the state against which it is opposing the claim. The state “has the duty to refrain from any forcible action” against the people;⁸⁹ if the state fails to respect this obligation the situation amounts to a particular case of self-defense, hence the people is granted “a legal license” to use force.⁹⁰ This however is not to say that the peoples have the right to use forcible means to exercise their right to self-determination, which indeed remains debated

⁸⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited 25 August 2010), 65-67.

⁸⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*, 2007, paras 420-424.

⁸⁷ T. Christakis, *supra* note 61, 137-138; M. Kohen, *supra* note 18, 629-631; G. Nolte, ‘Secession and external intervention’, in M.G. Kohen (ed.), *Secession. International Law Perspectives* (2006), 65, 78, 93.

⁸⁸ The principle of effectiveness is “le principe selon lequel une entité qui réussit à réunir les trois éléments constitutifs de l’Etat [population, sise sur un territoire déterminé et dotée d’un gouvernement effectif et stable] accède au statut d’Etat et a donc droit à la protection que le droit international accorde à ce statut.” T. Christakis, ‘The State as a ‘primary fact’: some thoughts on the principle of effectiveness’, in M. Kohen (ed.), *supra* note 17, 140, 143; C. Warbick, ‘States and Recognition in International Law’, in M.D. Evans, *International Law*, Second Edition, (2006), 231-240.

⁸⁹ GA Res. 2625 (XXV), 24 October 1970 [Friendly Relations Declaration]. Again, also here, the concept of complicity might be of relevance if a state is complicit in the denial by another state of the right to self-determination of a people. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *supra* note 85, 65-67.

⁹⁰ A. Cassese, *supra* note 57, 63; M. Kohen, *supra* note 18, 582.

among states and the doctrine.⁹¹ From the Friendly Relations Declaration it is clear that third states are also duty-bound not to assist the state denying self-determination. Moreover, the peoples are legally entitled to receive from third states assistance “in accordance with the purposes and principles of the Charter.”⁹² In the view of some of the scholars, the phrase is to be interpreted as aid short of military support. Nonetheless, military assistance or armed intervention by a third state on behalf of a people remains controversial and probably the major stumble block for agreement over the crime of aggression and the Comprehensive Convention on Terrorism.⁹³

The tension between sovereignty and corollary principles on one hand, and secession on the other is notorious. On a continuum of significations the relation is depicted as irreconcilable, necessary in order to sustain an unchaotic world or compatible. Context, however, is the key element in explaining all the attributed significations, as has been shown in the previous sections.

III. An Intermezzo: On State Practice and Secession

The current chapter on the theory of secession was introduced by a citation emphasizing the allergy of states towards the concept of secession. The quote could as well be employed to describe the behavior of states, or state practice, towards secession. Beyond the decolonization and occupation contexts – which, as has been underlined, cannot serve as evidence of secession⁹⁴ – state practice very rarely sanctions instances of secession.⁹⁵

For example, the new states created after the demise of the Soviet Union in the early 1990s were, allegedly, a result of dissolution not of secession. It is noteworthy that recognition and membership to the UN had been considered only after the Soviet Government recognized the “new”

⁹¹ Summers, *supra* note 39, 375-376.

⁹² Friendly Relations Declaration, *supra* note 89.

⁹³ Cassese, *supra* note 57, 63; Summers, *supra* note 39, 376-379.

⁹⁴ For the case of Eritrea belonging to the decolonization setting see F. Ouguergouz & D. L. Tehindraznarivelo, ‘The Question of Secession in Africa’, in M. G. Kohen (ed.), *supra* note 17, 266-267; in respect to East Timor see Tomuschat, *supra* note 55, at 34. For another interpretation of the two cases see Kohen, *supra* note 17, at 19-20.

⁹⁵ See discussion in Crawford, *supra* note 22, 391. See also C.J. Borgen, ‘The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia’, 10 *Chicago Journal of International Law* (2009) 1, 9-10, see in particular footnote 28.

republics.⁹⁶ In the case of Yugoslavia, it became generally accepted that the process at stake was one of dissolution, and not one of successive secessions. The Badinter Commission even announced the finality of the process of dissolution in its Opinion no. 8 and UN membership was granted to the former republics only after the SFRY renounced any territorial claims over them.⁹⁷ Lastly then, one should recall the case of Bangladesh. The break-away of the former East Pakistan from Pakistan in 1971 is proclaimed by some as a successful case of remedial secession.⁹⁸ However, others doubt the entrance of Bangladesh in the community of states via the remedial secession route and point much rather to the *fait accompli* theory corroborated with the renunciation of title over the territory by Pakistan in 1974.⁹⁹ What speaks for this interpretation is state practice, or absence thereof if one wishes, since the international community remained silent on the issue of self-determination in the case of Bangladesh.¹⁰⁰

Drawing on the work of James Crawford, one author asserts, “for a secession claim to be considered legal, State practice tends to emphasize consent of the parties involved as a necessary condition”¹⁰¹. This interpretation however seems to regard recognition as an equivalent to a claim of legality, while this might not hold true implicitly. For example, recognition can be lawfully granted when the recognizing state is merely convinced that the seceding state is not in violation of international law, which in turn does not automatically mean that there is a right to secession of that state but only a lack of an express prohibition. The ICJ appears to offer a similar interpretation when it argues that

“the illegality attached to the declarations of independence [by the Security Council] thus stemmed not from the unilateral character of these

⁹⁶ C. Tomuschat, *supra* note 55, at 30-31. J. Crawford, *supra* note 22, 394. In the case of the Baltic republics which suffered Soviet illegal occupation since the 1940s, the decolonization and occupation framework ought to be applied.

⁹⁷ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion No. 8, July 4, 1992; See also D. Fierstein, ‘Kosovo’s Declaration Of Independence: An Incident Analysis Of Legality, Policy And Future Implications’, 26 *Boston University International Law Journal* (2008), 430-431.

⁹⁸ J. Dugard & D. Raič, *supra* note 60, 120-123.

⁹⁹ See T.G. McLellan, ‘Kosovo, Abkhazia, and the Consequences of State Recognition’, 5 *Cambridge Student Law Review* (2009)1, 11-12 and C. Tomuschat, *supra* note 55, 29-30.

¹⁰⁰ See GA Res. 2937 (XXVII), 29 Nov. 1972.

¹⁰¹ D. Fierstein, *supra* note 97, at 430.

declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law”¹⁰².

In the end, outside the decolonization context, on the rare occasion when an act of secession is sanctioned by state practice, the latter appears not to be grounded in the right to self-determination or remedial secession.

IV. Is There a Right to Secession?

This chapter should have been placed under a warning of high complexity! Much too often the discussion was framed in conditional tenses and much too often a clear conclusion has not been reached. Yet, to paraphrase Martti Koskenniemi, this is the beauty of international law.¹⁰³

In a nutshell:

There is no general *jus secedendi*.

There are instances in which a right to secession is recognized under international law. These refer to states explicitly acknowledging a right to secession in their domestic law or multinational states recognizing that their constituent peoples have the right to self-determination.

There is one controversial case that divides scholarship, the one of remedial secession.

Lastly, there is a trend towards the legality principle governing secessions as distinguished from the traditional neutrality doctrine.¹⁰⁴

C. The Kosovo Practice

“What I experienced in our brotherly union, I wouldn't wish on my own brother.”

“We will do our best not to have any more fratricide. We will stop being brothers.”¹⁰⁵

¹⁰² *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, supra note 6, para. 81.

¹⁰³ M. Koskenniemi, *Address at the New York University School of Law*, 4 April 2006, as quoted in C. Leathley, “An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?”, 40 *Journal of International Law and Politics* 1 (2007), 270.

¹⁰⁴ This trend is clearly visibly in respect to secessions that came about as a result of grave violations of international law.

Given the findings in the previous chapter, it appears that remedial secession represents the core of the legal precedent debate in the Kosovo case. In the same time however, if the Constitution of Serbia in force at the time of Kosovo's secession provided for a right to secession then the precedent question would not have any relevance in the first place. It becomes obvious that the legal implications need to be fleshed out from socio-political and historic events.

I. Kosovo in History

1. History and Myth

It has become a tradition – for reasons of symbolism rather than historic accuracy – to seek the roots of the Kosovo conflict in the battle of Kosovo Polje (1389) when the Serbs were defeated by the Ottoman Empire.¹⁰⁶ Five hundred years later, in 1912, as a result of the First Balkan War, Serbia reacquired control over Kosovo. A memorandum sent to the Great Powers by the Serbian government in 1913 provided the justification for Belgrade's rule over Kosovo:

“[T]he moral right of a more civilized people; the historic right to an area which contained the Patriarchate buildings of the Serbian Orthodox Church and had once been part of the medieval Serbian empire; and a kind of ethnographic right based on the fact that at some time in the past Kosovo had had a majority of Serb population, a right which [...] was unaffected by the “recent invasion” of Albanians.”¹⁰⁷

While the first argument that relies on a (rightly) repudiated civilization doctrine does not deserve further discussion, the following two are essential and have deep implications on the current political configuration. Noel Malcolm argues that Kosovo as the Jerusalem of Serbian Orthodoxy is an “exaggeration”: a holy place in Christianity does

¹⁰⁵ Aphorisms by Aleksandar Baljak and Rastko Zakic, as quoted in “Serbs find comfort in dark wit”, *The International Herald Tribune*, 2 December 2007, available at http://www.nytimes.com/2007/12/02/world/europe/02iht-serbs.4.8561725.html?_r=1 (last visited 26 August 2010).

¹⁰⁶ H. Krieger, *supra* note 45, xxxi; M. Glenny, *The Balkans. Nationalism, War and the Great Powers (1804-1999)* (1999), 11.

¹⁰⁷ N. Malcolm, *Kosovo. A Short History* (1998), xxxi.

not play a similar role as in Judaism. Moreover, the seat of the Orthodox Church was arguably not founded in Kosovo, but moved here after the initial foundation in central Serbia got burnt. In addition, the institution of the Patriarchate is said not to have any continuous history.¹⁰⁸ Rebutting the claim for continuation, several authors assert that the Serbian empire was a medieval state that had its origins in Rascia, not in Kosovo.¹⁰⁹ Not least, the ethnographic factor is one of the most disputed issues in the history of the region. One can find accounts that depict Albanians as majoritarian even during the days of the medieval Serbian empire; other instances recall that no Albanians at all lived in Kosovo until the end of the seventeenth century. An explanation of today's demographics, said to be closer to historic evidence, would take into account both migration flows from Albania and the significant expansion of the indigenous Albanian population in Kosovo.¹¹⁰

Noel Malcolm's deconstruction exercise may be perfectly valid; nonetheless, what tends to be important are not facts, but the perception of facts or, otherwise put, the myth. Perception has been reinforced by the folk tradition of epic poetry and in modern times by nationalistic discourse. Hence the Serbs' emotional attachment to Kosovo as the source of Orthodoxy remains strong, equally their narratives of the battle of Kosovo and the loss of an empire. For the Albanians on the other hand, Kosovo represents the birthplace of Albanian nationalism, where in 1877 the League of Prizren was created as a response to the Treaty of San Stefano. Its goal was to defend Albanian territories and to seek autonomy within the Ottoman Empire.¹¹¹ One can trace the aspirations towards the creation of a Greater Albania to those days. Whereas Albania gained its independence from the Porte in 1912, Kosovo by contrast became controlled by Serbian-Montenegrin rule¹¹²; the Kosovo Albanians regarded this event as colonization¹¹³, which in turn reinforced their ideal of a Greater Albania.

Writers agree that the story of a perpetual ethnic conflict raging in Kosovo is a brutal oversimplification of a quite different reality, one that in

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; T. Judah, *The Serbs. History, Myth and the Destruction of Yugoslavia* (1997), 18.

¹¹⁰ Malcolm, *supra* note 107, xxxii, 139-140; J.R. Lampe, *Yugoslavia as history: Twice There Was a Country*, 2nd. Edition (2000), 26.

¹¹¹ M. Vickers, *The Albanians. A Modern History* (1999), 30-31, 34.

¹¹² With an interruption between 1941-1943, when a brief union of the biggest part of Kosovo with Albania – itself under Italian tutelage – took place. *Id.*, 144.

¹¹³ Miranda Vickers points to the existence of Serbian official documents that envisage a colonization policy of the Kosovo Albanians. *Id.*, 127-129.

fact saw the two groups themselves split along other types of allegiances than ethnic ones, or that witnessed them fight side by side as allies. That is however not to deny that, since the nineteenth century, ethnicity has become a significant element and today the same 1912 event is recalled by the Serbs as national liberation while the Kosovo Albanian portray it as colonization – two narratives forced to coexist.

2. Kosovo under Tito and the Titoists

After the end of World War II, Josip Broz Tito thought to forge legitimacy for communist Yugoslavia by invoking the mythology of the Partisan movement. The common resistance against Nazism was portrayed as the bonding element of the nations and nationalities of Yugoslavia, inter-ethnic cooperation that should have continued under the communist banner. In addition to the doctrine of brotherhood and unity, the federalization of Yugoslavia and the granting of autonomy to Kosovo and Vojvodina were measures intended to respond to ethnic grievances, seen as central to the failure of pre-war Yugoslavia.¹¹⁴ In 1964, with the passing of a new fundamental act, Kosovo-Metohija's status was elevated from that of an autonomous region to the equal of Vojvodina's, i.e. an autonomous province. Responding to increasingly sharp ethnic frictions among which the risings of Kosovo Albanians in 1968, the years to come saw further constitutional amendments in the direction of devolution, a process that culminated in the adoption of the 1974 Constitution. It granted Kosovo and Vojvodina nearly the same rights as to the six republics – Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia – in terms of administrative and economic power, as well as representation at the federation level. The crucial differentiation was that while the *narod*i (nations) were granted the status of republics, *narodnosti* (nationalities) were designated autonomous provinces. It is reckoned that this distinction is the *oeuvre* of the architects of the first Yugoslav constitution who considered that nations as potentially State forming units are those that have their principal homeland inside Yugoslavia, whereas nationalities as displaced segments of other nations had their homeland outside

¹¹⁴ S.P. Ramet, *The Tree Yugoslavias. State Building and Legitimation, 1918-2005* (2006), 163-165, 185; P. Lendvai & L. Parcell, "Yugoslavia Without Yugoslavs: The Roots of the Crisis", 64 *International Affairs (Royal Institute of International Affairs 1944)* (1991) 2, 252.

Yugoslavia.¹¹⁵ Consequently, it was only *narodi* that received the constitutional right to self-determination, which explicitly included the right to secession.

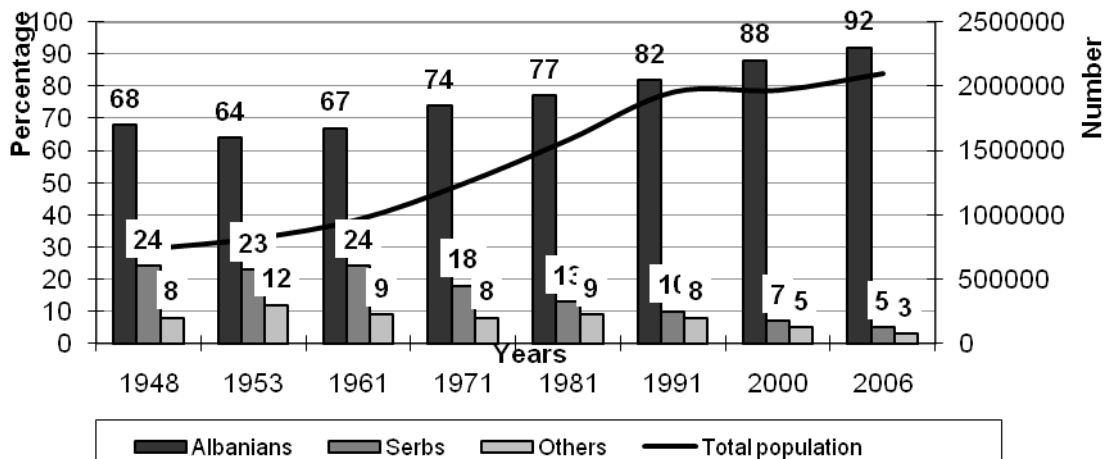
To mention the almost equal status of Kosovo with that of the republics does not mean to idealize the on the ground situation in Kosovo. As an autonomous region of Serbia, Kosovo was regarded as a developed region and did not benefit of economic aid until the mid 1950s. As Sabrina Ramet shows “Kosovo was by all measures, the poorest, most backward region in the SFRY”. Employment in the social sector and representation in the party ranks remained discriminatory of the Albanian majority population until the mid 1970s, only to become discriminatory of the Serbs few years later.¹¹⁶ Clearly, these facts fueled inter-ethnic tension and deepened the distrust within Kosovo; chiefly, the measures intended to ameliorate the lives of the members of one ethnic group were perceived as a threat to the other.

¹¹⁵ R. Caplan, ‘International Diplomacy and the Crisis in Kosovo’, 74 *International Affairs* (1998) 4, 745, 748.

¹¹⁶ S.P. Ramet, *supra* note 114, 298-299; P. Radan, *The Break-up of Yugoslavia and International Law* (2002), 197.

Graph 1 – Kosovo population by ethnic composition 1948-2006¹¹⁷

Kosovo population by ethnic composition 1948-2006



Legend

1948, 1953, 1961, 1971, 1981: population censuses of the Yugoslav Federation Office of Statistics (YFOS)
 1991: census boycotted by Kosovo Albanians, the data is an assessment of the YFOS
 2000: data from the Living Standard Measurement Survey 2000
 2006: assessment of the Statistical Office of Kosovo, residents (living within Kosovo, missing from permanent place for less than 12 months)
 Others: Roma, Turks, others

¹¹⁷ Source of the data used in the graph: Statistical Office of Kosovo, *Demographic Changes of the Kosovo Population 1948-2006*, 2008, available at <http://www.ks-gov.net/ESK/>, 15 June 2008; Statistical Office of Kosovo, *Kosovo and Its Population*, 2003, available at http://www.ks-gov.net/ESK/eng/index.php?option=com_docman&task=doc_download&gid=521&Itemid=8 (last visited 25 August 2010), 15 June 2008; M. Vickers, *Between Serb and Albanian. A History of Kosovo* (1998), Appendix: Population Data, 318.

Above all, while the Serbs experienced the sentiment of losing Kosovo, the Albanians' dissatisfaction continued to point to what they perceived as the original wrong, the lack of republic status within the federation. Soon after Tito's death in 1980, what started as a protest against food conditions in the cafeteria of the University of Pristina turned into a series of political protests with open demands for a Kosovo republic within Yugoslavia.¹¹⁸ The snowball was set in motion: accusations of brutalities committed by Albanians against Serbs were pouring and the rhetoric of the sufferings of the Serbs augmented sharply, culminating in the elites' articulation of the "physical, political, legal, and cultural genocide of the Serbian population in Kosovo and Metohija" in the Memorandum of the Serbian Academy of Sciences and Arts.¹¹⁹ Whereas several commentators note that some claims of violent actions against Kosovo Serbs were undeniable reality,¹²⁰ the accusation of genocide does not gather any support.¹²¹

3. The Milošević Era

It is argued that Slobodan Milošević had sensed already in the mid 1980s the potential political gains from linking the rising intellectual

¹¹⁸ N. Malcolm, *supra* note 107, 334-335.

¹¹⁹ Memorandum of the Serbian Academy of Sciences and Arts, English translation, available at http://www.trepca.net/english/2006/serbian_memorandum_1986/serbia_memorandum_1986.html (last visited 25 August 2010), 20 May 2008; See also M. Weller, *The Crisis in Kosovo 1989-1999*, International Documents and Analysis, Vol. 1, 36; For a more detailed account of the reawakening of nationalist discourse among Serb intellectuals see N. Malcolm, *supra* note 107, 337-341.

¹²⁰ K. Beurmann, 'Human Rights in Kosovo', 9 *Human Rights Review* (2008), 41, 79; M. Vickers, *supra* note 111, 220.

¹²¹ Louis Sell mentions a number of five inter-ethnic murders for the period 1981-1987 in Kosovo, two of which were committed by Albanians against Serbs and three by Serbs against Albanians. L. Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (2003), 79; Discussing the allegations of numerous rapes, Noel Malcolm notes the results of a study carried out by an independent committee of Serbian lawyers which shows that the frequency of rape and attempted rape in Kosovo was significantly lower than in other parts of Yugoslavia (for the period 1982-1989) and that in the great majority of cases the perpetrator and the victim had the same ethnic background. N. Malcolm, *supra* note 107, 339.

nationalist movement to the advancement of his own power.¹²² By the end of 1987, Milošević had ousted the Titoist leader of the Serbian Communist party and abandoned the bonding policy of Yugoslavia, the doctrine of brotherhood and unity. In a bid for legitimacy, Milošević sought the blessing of the Serbian Orthodox Church, while purging the leadership of Kosovo's and Vojvodina's communist parties and suspending the authority of the provincial police and judiciary.¹²³ "Strong Serbia, strong Yugoslavia" was the mass mobilizing slogan which demanded an end to the provinces' autonomy and parity with Serbia, the latter being long perceived as reducing Serbia to a minority status within its own federal unit.¹²⁴ In 1988 and 1989, while avoiding to take the legal route of the revision of the SFRY Constitution, the Serbian Parliament brought a series of amendments to the Serbian Constitution which in practice stripped Kosovo and Vojvodina of their federal status.¹²⁵ It is highly likely that abolishing in this way Kosovo's status as a federal unit was unlawful under the SFRY Constitution, and hence null and void.¹²⁶ The Yugoslav Constitutional Court itself has ruled some of the amendments as unconstitutional.¹²⁷ The new Serbian Constitution adopted in 1990 which sealed the full subordination of Kosovo¹²⁸, sounded the death bells for the SFRY, even for the few remaining Yugoslav optimists.

Kosovo responded with a declaration of sovereignty and after holding an underground referendum – boycotted by the Serb population – with the declaration of independence of 22 September 1991. Shortly after, three options were put forward in a political declaration¹²⁹:

¹²² A. March & R. Sil, *The "Republic of Kosova" (1989-1998) and the Resolution of Ethno-Separatist Conflict*, CIAO (1999), available at <http://www.ciaonet.org/wps/sir01/index.html> (last visited 25 August 2010).

¹²³ M. Vickers, *supra* note 111, 229-230.

¹²⁴ S.P. Ramet, *supra* note 114, 347; V. Pesic, 'Serbian Nationalism and the Origins of the Yugoslav Crisis', *Peaceworks* No. 8 (1996), 15.

¹²⁵ Amendments to Constitution of the Socialist Republic of Serbia, 1989, in H. Krieger, *supra* note 45, 8; M. Weller, *supra* note 119, 47-48.

¹²⁶ M. Weller, 'The Rambouillet Conference on Kosovo', *75 International Affairs (Royal Institute of International Affairs 1944-)* (1999) 2, 215.

¹²⁷ L.J. Cohen, 'Post-Federalism and Judicial Change in Yugoslavia: The Rise of the Ethno-Political Justice', *13 International Political Science Review* (1992) 3, 301, 307.

¹²⁸ See especially Art. 109, 110, 112, The Constitution of the Socialist Republic of Serbia, 28 September 1990, in H. Krieger, *supra* note 45, 9; See also P. Radan, *supra* note 116, 197.

¹²⁹ Declaration of the Coordinating Committee of Albanian Political Parties in Yugoslavia, October 1991, as quoted in M. Vickers, *supra* note 117, 250-254.

The status of nation of the Kosovo Albanians and of republic within Yugoslavia for Kosovo, if the internal and external borders of the SFRY were to remain unaltered;

The founding within the SFRY of an Albanian Republic incorporating Kosovo and the territories inhabited by Albanians in central Serbia, Montenegro and Macedonia, in case the internal borders were to be changed;

Unification with Albania and the creation of an “undivided Albanian state” with the boundaries proclaimed by the League of Prizren in 1878, if external borders were to be altered.

Whereas Slovenia and Croatia gained recognition of their independence in 1992, after the international community had accepted earlier that the SFRY was in a process of dissolution,¹³⁰ the sole state to recognize the Republic of Kosovo was Albania.¹³¹

4. The Human Rights Situation (1990-1997)

The Yugoslav/Serb government is reckoned to have conducted “repression ... very much officially and under a veritable legislative programme”.¹³² Thus, the scale and kind of abuse which took place in Kosovo are documented not only by UN bodies and special procedures¹³³ and NGOs¹³⁴, but also by Serbian laws which themselves legalized

¹³⁰ *Opinion No. 1*, Conference on Yugoslavia, Arbitration Commission, 29 November 1991, in A. Pellet, Appendix, 3 *European Journal of International Law* (1992) 2, 182-183.

¹³¹ J. Mertus, *Kosovo: How Myths and Truths Started a War* (1999), xvii.

¹³² M. Weller, *supra* note 119, 122.

¹³³ See for example General Assembly resolutions: GA Res. 47/147, 18 December 1992; GA Res. 48/153, 20 December 1993; GA Res. 49/204, 23 December 1994; GA Res. 50/190, 22 December 1995; GA Res. 51/111, 5 March 1997; Resolutions of the Commission on Human Rights: 1992/S-1/1, 14 August 1992; 1992/S-2/1, 1 December 1992; 1993/7, 23 February 1993; 1994/76, 9 March 1994; 1995/89, 8 March 1995; 1996/71, 23 April 1996; 1997/57, 15 April 1997; 1998/79, 22 April 1998; Reports of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia: E/CN.4/1992/S-1/9; E/CN.4/1992/S-1/10; A/47/666-S/24809; E/CN.4/1993/50; A/49/641-S/1994/1252; E/CN.4/1995/57; E/CN.4/1996/107; E/CN.4/1998/9; E/CN.4/1998/15; E/CN.4/1998/164.

¹³⁴ See for example reports and press releases of Human Rights Watch, *Yugoslavia: Human Rights Abuses in Kosovo 1990-1992* (1992); *Open Wounds: Human Rights Abuses in Kosovo* (1993); *Human Rights Abuses of Non-Serbs in Kosovo, Sandzak & Vojvodina* (1994); *Yugoslavia (Serbia and Montenegro): Persecution Persists, Human Rights Violations in Kosovo* (1996); *Kosovo – Fair Trail for Albanians* (1997); for

discrimination.¹³⁵ Based on these reports distinct categories of abuses can be identified for the period 1989-1998: discrimination in relation to property and resettlement; removal of ethnic Albanians from public office, commercial firms, the education system and the judiciary branch; large scale infringements of the freedom of the press; lack of fair trial; impunity for perpetrators; arbitrary arrests and seizures; torture and mistreatment; police brutality and disproportionate use of force; imposing of a Serb curricula which prompted the general break down of the official education system.

In short, Human Rights Watch in its report covering the period 1990-1992 notes that “the Serbian government has blatantly and systematically violated the most basic tenets set forth in international human rights documents.”¹³⁶ In 1996, the UN Committee on the Elimination of Racial Discrimination summarizes the situation as one that “deprived [the ethnic Albanians] of effective enjoyment of the most basic human rights provided for in the Convention”.¹³⁷

5. The Kosovo Albanian Resistance and Milošević’s Response

Non-violent resistance was the initial response of the Kosovo Albanians to the new situation. A shadow state had been created, with a parallel government and parliament of which Ibrahim Rugova, the leader of the Democratic League of Kosovo (LDK) was elected President. Some authors explain Rugova’s peaceful resistance – and non-alignment/lack of support for either Croatia or Bosnia-Herzegovina – as a sort of waiting period. In other words, Ibrahim Rugova had hoped that Krajina and the Republic of Srpska could join Serbia, which in turn would have set a precedent for Kosovo joining Albania.¹³⁸ The merit of this interpretation is however uncertain. In a 1992 interview, Bujar Bukoshi, the premier of the non-recognized Republic of Kosovo, affirmed that Kosovo should be

reports and briefings of Amnesty International see *Further Allegations of abuses by police* (1991); *Yugoslavia: Ethnic Albanians-Victims of Torture and Ill-Treatment by Police* (1992); *Yugoslavia: Ethnic Albanians: Trial by Truncheon* (1994); *Yugoslavia: Police Violence in Kosovo Province - the Victims* (1994).

¹³⁵ The Report of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia E/CN.4/1993/50 comprises a list of legislation considered to be discriminatory of the ethnic Albanians at paras 155-159.

¹³⁶ Human Rights Watch, *Yugoslavia: Human Rights Abuses in Kosovo 1990-1992* (1992).

¹³⁷ CERD, Concluding Observations, 15-16 March 1996, as quoted in M. Weller, *supra* note 119, 122-124.

¹³⁸ T. Judah, *supra* note 109, 306-307.

“independent, neutral and open to both Serbia and Albania”, whereas the unification with Albania would be postponed for “the third millennium, for example”.¹³⁹ Others point to the pacific strategy as a continuation of a tradition of democratic opposition and peaceful resistance dominant in Eastern Europe during the communist period.¹⁴⁰

Be it as it may, by 1993 some started to voice their disappointment towards the adopted non-violent path which seemed impotent. The LDK began to lose support in the mid-1990s when mostly the younger generation shifted its allegiances to more radical ethnic-Albanian groups.¹⁴¹ The alternative to the pacific path that divided the Albanians from Kosovo and the diaspora alike came from the Kosovo Liberation Army (KLA). In 1996, the KLA claimed responsibility for a series of bomb attacks and proclaimed the liberation of Kosovo through armed struggle as its goal.¹⁴² Whereas the collapse of the Albanian state meant access to weapons and training camps for the group, tapping into the disillusionment of Albanians meant support and swelling ranks; by 1998, the KLA staged several attacks that left them in control over the Drenica region.¹⁴³

The campaign of the Serbian security forces, termed as the fight against Albanian terrorism, was launched in February 1998. Reports from governmental sources or NGO accounts note unequivocally the atrocities against civilians. Establishing a balance sheet intended to compare the abuses committed by the Serbian government versus the ones for which the KLA was responsible would be a rather cynical exercise. With this restraint in mind however, and since the atrocities are an essential aspect in the context of remedial secession, the conclusion of Human Rights Watch should be recalled: “The vast majority of these abuses were committed by Yugoslav government forces ... The Kosova Liberation Army ... has also violated the laws of war ... Although on a smaller scale than the

¹³⁹ ‘News briefing with Bujar Bukoshi, Prime Minister, Republic of Kosova, National Press Club, Washington D.C.’ in *Federal News Service*, 21 October 1992.

¹⁴⁰ The Independent International Commission on Kosovo, *The Kosovo Report. Conflict, International Response, Lessons Learned* (2000), 44.

¹⁴¹ International Institute for Strategic Studies, *Serbia. (Kosovo). Historical Background*. Armed Conflict Database, available at <http://www.iiss.org/> (last visited 25 August 2010).

¹⁴² ‘Kosovo Liberation Army emerges from the shadows’, *BBC News*, 4 March 1998; International Institute for Strategic Studies, *supra* note 141.

¹⁴³ International Institute for Strategic Studies, *supra* note 141; R. Caplan, *supra* note 115, 752.

government abuses, these too are violations of international standards, and should be condemned.”¹⁴⁴

Regardless whether an *Operation Horseshoe*¹⁴⁵ existed or not, there is evidence that Serbian forces in Kosovo pursued a policy of ethnic cleansing at least since 20 March 1999. There is widespread agreement among those who documented and studied the 1999 events in Kosovo that a systematic and forced removal of Kosovo Albanians from their homes and communities had taken place.¹⁴⁶ In May 1999, after meeting refugees from Kosovo in the F.Y.R. Macedonia, Mary Robinson, the then High Commissioner for Human Rights, said: “the full magnitude of the problem and its tragic consequences can only be realized when seen first hand.”¹⁴⁷ Yet outside observers can grasp the scale of the atrocities by referring to the OSCE Kosovo Verification Mission estimates, which put forth that over 90 percent of the Kosovo Albanian population – over 1.45 million people – had been displaced by 9 June 1999.¹⁴⁸

To sum up with the evidently negotiated and hence diplomatic conclusion of the Independent International Commission on Kosovo: the “Serb oppression included numerous atrocities that appeared to have the character of crimes against humanity in the sense that this term has been understood since the Nuremberg judgment.”¹⁴⁹

¹⁴⁴ Human Rights Watch, *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo*, Vol. 10, No. 9, (1998); See also Human Rights Watch, *Kosovo War Crimes Chronology January 1998-April 1999*, available at <http://hrw.org/campaigns/kosovo98/timeline.shtml> (last visited 25 August 2010).

¹⁴⁵ The Operation Horseshoe was allegedly a plan of the Serbian government outlining the systematic expulsion of Albanians from Kosovo. The existence of this plan has been denied by the authorities in Belgrade and it remains highly controversial in literature. See for a discussion Select Committee on Foreign Affairs, Fourth Report, 23 May 2000, paras 90-8, available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfa/28/2802.htm> (last visited 25 August 2010).

¹⁴⁶ OSCE, *Kosovo/Kosova: As Seen, As Told* (1999), at viii; The Independent International Commission on Kosovo, *supra* note 140, 74, 80, 88-9; U.S. Department of State, *Erasing History: Ethnic Cleansing in Kosovo* (1999); U.S. Department of State, *Ethnic Cleansing in Kosovo: An Accounting* (1999).

¹⁴⁷ OHCHR, “High Commissioner For Human Rights, Ending Visit To Former Yugoslav Republic Of Macedonia, Calls Again For End To Ethnic Cleansing In Kosovo”, 5 May 1999.

¹⁴⁸ OSCE, *supra* note 146, at ix.

¹⁴⁹ The Independent International Commission on Kosovo, *supra* note 140, 164.

II. The International Community and Kosovo

1. The Response of the International Community Prior to 1998

From the early 1990s onwards, the abuses and discrimination on the ground have been duly noted by international organizations and subsequently condemned in statements and resolutions. Nonetheless, the status of Kosovo was largely left out from the European Community (EC) Peace Conference on Yugoslavia, the London Conference and later the Dayton negotiations. On 22 December 1991, Kosovo formally applied for recognition in a letter addressed to Lord Carrington, the Chair of the Peace Conference on Yugoslavia; the application was never forwarded to the Arbitration Commission of the Conference on Yugoslavia and hence was not addressed by the latter.¹⁵⁰ Regardless, some commentators see certain relevance in the findings of the Badinter Arbitration Commission in what concerns the status of Kosovo. As such:

“1. The Committee considers: [...] d) that in the case of a federal-type State, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the State implies that the federal organs represent the components of the Federation and wield effective power.”¹⁵¹

Paragraph 1.d. of Opinion No.1 could be interpreted as speaking in favor of Kosovo's independence claim since, under the 1974 Constitution, it had been a federal entity equally represented in the federal institutions and possessing a high level of autonomy.¹⁵² On the other hand, Opinion No.2 which dealt with the question whether “the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination” concluded that the Serbian population

¹⁵⁰ The Arbitration Commission of the Conference on Yugoslavia, known as the Badinter Arbitration Committee after the name of its president, was set up in 1991 by the European Community. It provided the Peace Conference on Yugoslavia with legal advice. See A. Pellet, ‘The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples’, 3 *European Journal of International Law* (1992) 1, 178 and M. Weller, *supra* note 119, 75.

¹⁵¹ *Opinion No. 1, supra* note 130, 182-183.

¹⁵² M. Weller, *supra* note 119, 76.

is “entitled to all the rights concerned to *minorities* and *ethnic groups* under international law”¹⁵³. By analogy and given the status of Kosovo under the 1974 Constitution as *narodnosti* – even more so under the controversial 1990 Serbian fundamental act – the Committee’s findings would speak against a right to self-determination of the Kosovo Albanians. This later interpretation is consistent with the view taken by some authors who regard the refusal to even submit Kosovo’s claim for independence to the Badinter Commission as a confirmation of the EC’s readiness to grant recognition solely to the republics of Yugoslavia.¹⁵⁴ The 1992 EC statement which reminded “the inhabitants of Kosovo that their legitimate quest for autonomy should be dealt with in the framework of the EC Peace Conference” comes to confirm the above.¹⁵⁵ What it does not suggest is the subsequent reality: the Hague, London and Dayton conferences did not foster any substantial discussion on Kosovo and failed to deal with its status. This silence is explained by an already rich and thorny agenda, the desire not to alienate Milošević, whose support was regarded as essential, and paradoxically the absence of violence in Kosovo given Rugova’s pacific resistance strategy.¹⁵⁶

2. The Breakout of Violence and the Response of the International Community

The course of action taken by the international community after the violence in Kosovo came to mirror, somehow cynically, President Bush’s letter addressed to Slobodan Milošević already in 1992: “In the event of conflict in Kosovo caused by Serbian action, the United States will be prepared to employ military force against the Serbs in Kosovo and Serbia proper.”¹⁵⁷ If in February 1998, the U.S. special envoy to the Balkans Robert Gelbard pointed to Washington’s readiness to lift several of the

¹⁵³ *Opinion No. 2*, *supra* note 130, 183-184 (emphasis added).

¹⁵⁴ P. Radan, *supra* note 116, 200; D. Kumbaro, *The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention* (2001), 37.

¹⁵⁵ EC Press Statement, Luxembourg, 15 June 1992, as quoted in R. Rich, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’, 4 *European Journal of International Law* (1993) 1, 36, 62.

¹⁵⁶ R. Caplan, *supra* note 115, 749-751; The Independent International Commission on Kosovo, *supra* note 140, 59.

¹⁵⁷ R. Caplan, *supra* note 115, 753.

sanctions imposed earlier on Belgrade¹⁵⁸, the following month he threatened with the reverse in case no amelioration of the Kosovo Albanians' situation would be visible.¹⁵⁹ It is undeniable that the interest in the Kosovo conflict grew proportionally with the violence occurring on the ground. From March 1998 onwards, Kosovo caught the attention of the international community and several fora addressed the situation on the ground, as well as the status issue; four of this institutional responses are of central importance for the further analysis.

The Security Council – which remained silent on the issue of human rights violations in Kosovo prior to 1998 – passed a series of resolutions under Chapter VII of the Charter. The potential of conflict spillover, the humanitarian dimension within Kosovo as well as the problem posed by the refugee flows are usually seen as being the key considerations which dismissed, in the eyes of the Security Council, the traditional objection brought by the Federal Republic of Yugoslavia (FRY), i.e. Kosovo as a matter essentially within the domestic jurisdiction.¹⁶⁰ The Council imposed an arms embargo upon the FRY “including Kosovo”¹⁶¹ and demanded, among others, that the FRY ceases “all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression” and that it enters “immediately into a meaningful dialogue without preconditions and with international involvement” aimed at negotiating a political solution for the “issue of Kosovo”.¹⁶² The rough criticism of the Belgrade government was balanced by two elements. The first amounts to the condemnation of “acts of terrorism by the Kosovo Liberation Army”.¹⁶³ Secondly, an aspect of great importance for the determination of Kosovo's status is the recurrent affirmation of the “commitment ... to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia”.¹⁶⁴

In June 1998 the European Council, gathered in Cardiff, condemned in its Declaration on Kosovo “in the strongest terms” the indiscriminate use of force by Milošević's security forces, underlining that brutal military repression of the own citizens would disqualify any state from finding a

¹⁵⁸ *Id.*

¹⁵⁹ ‘US envoy pressures Serbia over Kosovo’, *BBC News*, 19 March 1998.

¹⁶⁰ M. Weller, *supra* note 119, 179-180.

¹⁶¹ SC Res. 1160, 31 March 1998.

¹⁶² SC Res. 1199, 23 September 1998.

¹⁶³ SC Res. 1160, 31 March 1998.

¹⁶⁴ *Id.*; SC Res. 1199, 23 September 1998.

place in modern Europe.¹⁶⁵ The continuation of the repression would require in the words of the Council “a much stronger response of a qualitatively different order”. In the same time, the Council reiterated that “the European Union remains firmly opposed to [Kosovo’s] independence.”¹⁶⁶ Despite this clear stance, in early 1999 important political figures of the time could be heard advocating for either independence or a Kosovo placed under an international protectorate.¹⁶⁷

The Contact Group¹⁶⁸ as a modern concert of powers that had omitted to deal with Kosovo on the Dayton occasion plunged in the midst of the mediation process aimed at resolving the conflict. In July 1998, it declared that it supported neither the preservation of the status quo, nor Kosovo’s independence.¹⁶⁹ With both Ambassador Hill’s shuttle diplomacy¹⁷⁰ and the Holbrooke agreement¹⁷¹ having failed, the Contact Group summoned the

¹⁶⁵ Cardiff European Council 15 and 16 June 1998, Presidency Conclusions, Annex II, Declaration on Kosovo, SN 150/1/98/REV1, 35-37, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/54315.pdf (last visited 27 August 2010)

¹⁶⁶ *Id.*

¹⁶⁷ G. Welhengama, *supra* note 71, 295-296.

¹⁶⁸ The Contact Group established in spring 1994 served as a coordination forum of the crisis management efforts of France, Germany, Italy (since 1996), the Russian Federation, the United Kingdom and the United States of America, during the crisis in Bosnia as well as in Kosovo. C. Schwegmann, *The Contact Group And Its Impact On The European Institutional Structure* (2000), available at <http://www.iss.europa.eu/uploads/media/occ016.pdf> (last visited 27 August 2010).

¹⁶⁹ Contact Group Statement, Bonn, 8 July 1998, available at http://www.ohr.int/other-doc/contact-g/default.asp?content_id=3554 (last visited 25 August 2010).

¹⁷⁰ On the Hill process see Weller, *supra* note 119, 348-350.

¹⁷¹ The Holbrooke agreement provided among others the full compliance with SC Res. 1199 (1998) by the FRY, the establishment of the OSCE Kosovo Verification Mission, air-surveillance by NATO to verify compliance by all parties, and the agreement to reach a political settlement for broad self-government of the Kosovo Albanians. C. Schwegmann, *supra* note 168; Weller, *supra* note 119, 350; for the KLA part of responsibility for the failure of the agreement see T.W. Crawford, ‘Pivotal Deterrence and the Kosovo War: Why the Holbrooke Agreement failed’, 116 *Political Science Quarterly* (2001-2002) 4, 499-523; see also the Reports of the Secretary-General prepared pursuant to resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council S/1998/1221 of 24 December 1998, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/404/20/PDF/N9840420.pdf?OpenElement> (last visited 27 August 2010) and S/1999/293 of 17 March 1999, available at [http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/293/20/PDF/N9929320.pdf?OpenElement)

parties to the Rambouillet conference on 6-23 February 1999. The NATO, which since October 1998 had kept the activation order authorizing air strikes against targets on FRY territory in place, reiterated its threat¹⁷² and added the teeth – and the controversy – to the summons of the Contact Group.

The Rambouillet agreement was intended to be an interim mechanism – as its name fittingly suggests – aimed at achieving peace and self-government in Kosovo. The balancing between the interests of the parties is excellently illustrated by the preambular provision of Chapter 1:

Desiring through this interim Constitution to establish institutions of democratic self-government in Kosovo grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia and from this Agreement, from which the authorities of governance set forth herein originate.¹⁷³

The two pillar elements of the agreement are: 1. the establishment of a system of wide autonomy for Kosovo; 2. the guarantee for the territorial integrity and sovereignty of the FRY. The third crucial element is the time-boundness of the Rambouillet agreement. After three years upon the entry into force, an international conference was to be convened in order to establish

a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act.¹⁷⁴

The key to the reading of the first two elements is this last provision, which suggests that the status of Kosovo is not agreed upon beyond the three years period. Kosovo's interpretation was that it would not find itself locked by this agreement to respect the territorial integrity of the FRY beyond the three years period. Moreover, the mechanism to be established after the three years period in order to deal with Kosovo's final status was to operate, *inter alia*, based on the will of the people and in accordance with the Helsinki Final Act. The reference to the 1975 CSCE document has a

ny.un.org/doc/UNDOC/GEN/N99/074/86/PDF/N9907486.pdf?OpenElement (last visited 27 August 2010).

¹⁷² Statement by the North Atlantic Council on Kosovo, 30 January 1999, available at <http://www.nato.int/docu/pr/1999/p99-012e.htm> (last visited 25 August 2010), para. 5.

¹⁷³ Interim Agreement for Peace and Self-Government in Kosovo, 23 February 1999, Chapter 1, Constitution, Preamble, available at http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html (last visited 25 August 2010).

¹⁷⁴ *Id.*, Amendment, Comprehensive Assessment, and Final Clauses, Article I: Amendment and Comprehensive Assessment.

neutral effect on the future status question since the Helsinki Act stipulates both the respect for territorial integrity and the right to self-determination of peoples. On the other hand, the specific mention of the term people is even more so noteworthy. Given the legal implications of this term (which were pointed out in the first part of this article) one has to wonder if the Rambouillet agreement does not in fact open the door to Kosovo's secession.

The agreement was signed during the follow up meeting in Paris by Kosovo and rejected by Serbia/the FRY.¹⁷⁵ Much controversy surrounds the Rambouillet agreement and much of this debate needs to be understood in the context of the NATO's subsequent military operation against Serbia.

If there is a consensus among commentators regarding the NATO's Operation Allied Force launched on 24 March 1999, then that consensus refers to the interventions' controversial character. Not only the legality of the intervention is questioned, but equally the means and methods employed, as well as the practical result and the legal consequences. Given these circumstances, the current article will assume the shortcoming of not entering into an extensive discussion on the issue. Yet an important aspect needs to be retained: The NATO's official justification of the bombing campaign was "the massive humanitarian catastrophe."¹⁷⁶ It was noted earlier that according to doctrine, massive and grave abuse represents the threshold for remedial secession. Given the official explanation of the NATO's intervention, it appears that the trigger of the military campaign coincides with the threshold of remedial secession. By inference then, if humanitarian intervention was *presented* and *perceived* as legal by the NATO states, the same states should have theoretically followed the same logic subsequently in respect to remedial secession.

Given the prohibition on the use of force, if one regards the NATO bombing campaign on Serbia as illegal, then the question has to be asked, if this intervention can be seen as support on behalf of the Kosovo secessionist movement. As many doubts as there might be regarding the legality of humanitarian intervention, there is simply no plausible evidence that the NATO's goal was Kosovo's secession and not the declared one of avoiding

¹⁷⁵ M. Weller, *supra* note 126, 235-236.

¹⁷⁶ 'The Situation in and around Kosovo', Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, 12 April 1999, para. 2, available at <http://www.nato.int/docu/pr/1999/p99-051e.htm> (last visited 25 August 2010); The Independent International Commission on Kosovo, *supra* note 140, 85-86.

a humanitarian catastrophe and halting the spread of conflict. Security Council resolution 1244 (1999), while – in the view of this author – not legalizing the attack *a posteriori*, did address the precise humanitarian concerns previously exposed by the NATO and hence did legitimize the goal of the attack. Nonetheless, these series of “ifs” remain probably the major caveat of Kosovo’s secession from Serbia.

3. United Nations Interim Administration Mission in Kosovo

Security Council Resolution 1244 (1999) of 10 June 1999 is the result of the accord reached between members of the NATO and the Russian Federation during the G8 meeting in May 1999, an accord subsequently accepted by the Belgrade authorities.¹⁷⁷ The resolution authorizes an international security presence in Kosovo with “substantial North Atlantic Treaty Organization participation ... deployed under unified command and control” (KFOR) and an international civil presence “in order to provide an interim administration for Kosovo”.¹⁷⁸

The United Nations Interim Administration Mission in Kosovo (UNMIK) has two overarching responsibilities. The first refers to “promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords.”¹⁷⁹ A gradual process of devolution of power was provided for, so as to relocate the administrative responsibilities towards Kosovo’s local provisional institutions. Moreover, “in a final stage”, UNMIK is to oversee the transfer of authority from the provisional institutions to the “institutions established under a political settlement.”¹⁸⁰ The second major task is the facilitation of the “political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords.”¹⁸¹

The UNMIK February 2008 update on the situation in Kosovo acknowledges that the process of democratic institution building has been accomplished in a way which has allowed UNMIK to renounce its executive role and retreat in a position of monitoring and support to the local

¹⁷⁷ M. Kohen “Le Kosovo : Un Test pour la communauté internationale”, in V. Chetail (ed), *Conflits, sécurité, et coopération* (2007), 371.

¹⁷⁸ SC Res. 1244, 10 June 1999.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

institutions; “UNMIK in its present form is now in its final chapter before status resolution.”¹⁸² Referring back to the elements required for a State to come into being, the UNMIK statement could be interpreted as the fulfillment of the principle of effectiveness by Kosovo.¹⁸³

Since late 2005, the Special Envoy of the UN Secretary-General of the United Nations, Martti Ahtisaari, led the political process for the future status for Kosovo. In effect he was endorsed by the Council to implement the provisions related to the future status of resolution 1244 (1999). The Contact Group “informed” the parties involved in the negotiation that the resolve was to respect a number of principles, among which sustainable multi-ethnicity and the protection of cultural and religious heritage in Kosovo, in particular the Serbian Orthodox sites.¹⁸⁴ While neither independence nor autonomy is advocated, principle 6 rejects the partition of Kosovo or the union with another country or part of a country. The Contact Group is firm in its view regarding the process that ought to be followed for a final status: “Any solution that is unilateral or results from the use of force would be unacceptable”.¹⁸⁵ In 2006, in a statement resonant of remedial secession argumentation, the Contact Group added a new principle to its requirements, i.e. the acceptability of the settlement to “the people of Kosovo”.¹⁸⁶

¹⁸² UNMIK, *Kosovo In February 2008*, 1, available at http://www.unmikonline.org/docs/2008/Fact_Sheet_February_2008.pdf (last visited 25 August 2010).

¹⁸³ See also the view of Jean d’Aspremont concerning the “external *effectivité*” conferred upon Kosovo by the recognition of Western states. J. Aspremont, ‘Kosovo and International Law: A Divided Legal Scholarship’, *Interest Group on Peace and Security*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272194 (last visited 25 August 2010).

¹⁸⁴ Guiding Principles of the Contact Group for a settlement of the status of Kosovo, 7 October 2005, available at <http://www.unosek.org/docref/Contact%20Group%20%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf> (last visited 25 August 2010).

¹⁸⁵ *Id.*, Principle 6.

¹⁸⁶ “Ministers recall that the character of the Kosovo problem, shaped by the disintegration of Yugoslavia and consequent conflicts, ethnic cleansing and the events of 1999, and the extended period of international administration under UNSCR 1244, must be fully taken into account in settling Kosovo’s status. [...] Ministers look to Belgrade to bear in mind that the settlement needs, inter alia, to be acceptable to the people of Kosovo. The disastrous policies of the past lie at the heart of the current problems. Today, Belgrade’s leaders bear important responsibilities in shaping what happens now and in the future.” Statement by the Contact Group on the Future of Kosovo, Washington, 31 January 2006, available at

Before addressing the Ahtisaari Plan, it is necessary to distinguish the position of the Security Council vis-à-vis the status question. In other words, did the Council through its resolution forbid secession or did it endorse it? In the light of the theoretical part of this study, the principle of territorial integrity and the right to self-determination of peoples will be emphasized.

The preambular clause of Security Council resolution 1244(1999) reaffirms

the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2.¹⁸⁷

Whereas Annex 2, Article 8 stipulates that the “interim political framework agreement” shall take full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK.¹⁸⁸

The reference to territorial integrity is often presented as the paramount guarantee against Kosovo’s secession.¹⁸⁹ However, a correct reading of the text reveals that the commitment is towards territorial integrity – *nota bene* of FRY, not of Serbia – “as set out in the Helsinki Final Act and annex 2”.¹⁹⁰ Indeed, territorial integrity appears to be qualified by the Helsinki Final Act and the Rambouillet accords, as has been noted also by the USA in their Written Statement to the ICJ in the Kosovo proceedings.¹⁹¹ While the Helsinki Final Act proclaims both the principle of territorial integrity and the right to self-determination, the Rambouillet agreement clearly refers to Kosovo Albanians as a people.

<http://www.state.gov/p/eur/rls/or/62459.htm> (last visited 25 August 2010); see also UNOSEK, *Origins of UNOSEK*, available at <http://www.unosek.org/pressrelease/Origins%20of%20UNOSEK.doc> (last visited 25 August 2010).

¹⁸⁷ SC Res. 1244 10 June 1999, preamble.

¹⁸⁸ *Id.*, Annex 2, Art. 8.

¹⁸⁹ For an argumentation in this direction see Kohen, *supra* note 179, 371-372, 381; see also more recently M. Kohen, ‘Pour le Kosovo: une solution ‘made in Hongkong’’, *Le Temps*, 18 February 2008.

¹⁹⁰ SC Res. 1244, 10 June 1999, preamble

¹⁹¹ See *Written Statement of the United States of America concerning the request of the United Nations General Assembly for an advisory opinion on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, 61., 17 April 2009, available at <http://www.icj-cij.org/docket/files/141/15640.pdf> (last visited 25 August 2010).

Moreover, Annex 2 does not deal with the final status of Kosovo, but with the interim solution, as is also observed by the ICJ:

The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.¹⁹²

Thus the territorial integrity requirement appears to apply to Kosovo's interim status solely. Article 11(e) which refers to the political process aimed to determine the future status makes no mention of territorial integrity, on the contrary it stresses the need to take account of the Rambouillet agreement. The latter as has been pointed out earlier remains neutral in respect to Kosovo's final status, or else it even opens the door to secession via the self-determination route.

Throughout the English text of the resolution (including its annexes) the term "people" is mentioned three times, and at least twice in contexts which would suggest that the Kosovo Albanians are addressed¹⁹³, as distinguished from all inhabitants of Kosovo. In the same time, in the preamble, a phrase that appears to be directed towards all inhabitants refers to the "Kosovo population".¹⁹⁴ The French text on the other hand refers solely to "*population*" throughout the resolution.¹⁹⁵

While it cannot be said with absolute certainty, that resolution 1244 (1999) regards the Kosovo Albanians as a people with the right to self-determination and hence to secession, it certainly cannot be claimed that it prohibits secession as a solution for the final status by making appeal to the territorial integrity of the FRY.

The Ahtisaari Plan does not mention Kosovo's independence, but it surely describes it. The Comprehensive Proposal incorporates the principles outlined by the Contact Group regarding multi-ethnicity and the prohibition on partition or union with another State or part of a State.¹⁹⁶ There is no provision which could suggest a relation of subordination towards Belgrade;

¹⁹² *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, *supra* note 6, para. 100.

¹⁹³ SC Res. 1244, 10 June 1999, para. 10 and Annex 2, para. 5.

¹⁹⁴ "Condemning all acts of violence against the Kosovo population as well as all terrorist acts by any party", *Id.*, preamble.

¹⁹⁵ Resolution 1244, 10 June 1999, Préambule, para. 10, annexe 2, paras 4 and 5.

¹⁹⁶ Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, Art. 1(8).

in fact Kosovo and the Republic of Serbia are encouraged “to pursue and develop good *neighborly* relations”.¹⁹⁷ The Plan puts forward a series of provisions which are clear attributes of a statal entity. Famously, it stipulates the right to negotiate and conclude international agreements and the right to seek membership in international organizations¹⁹⁸, the right to have “its own, distinct, *national* symbols”, including a flag, seal and anthem¹⁹⁹, and in language reminiscent of the Vienna Conventions on State Succession, the duty to take over part of the external debt of the Republic of Serbia²⁰⁰, whereas immovable and movable property of SFR or Serbia located within the territory of Kosovo shall pass to Kosovo.²⁰¹

Martti Ahtisaari’s recommendation for Kosovo’s final status presented to the Security Council on 26 March 2007 and supported by the UN Secretary General Ban Ki-moon was “independence, supervised by the international community”.²⁰² The “categorical, diametrically opposed positions of Belgrade and Pristina” – the former demanding Kosovo’s autonomy within Serbia, the latter demanding independence – exhausted, in the view of the UN Special Envoy, the potential to produce any mutually agreeable outcome through negotiations.²⁰³ The recommendation for independence is based upon:

a history of enmity and mistrust exacerbated by oppression, systematic discrimination and repression of the Milošević regime during the 1990s

the recent reality of *de facto* discontinued Serbian rule over Kosovo given the UNMIK administration

the will of the “overwhelming majority of the people of Kosovo”.²⁰⁴

Martti Ahtisaari’s considerations in support of Kosovo’s independence are unquestionably identical to the reasoning for remedial secession.

The lack of reaction of the Security Council, which did neither endorse the plan nor rejected it, is the consequence of disagreement amidst its members. The United States and the European Union (EU) members of the Council agreed – more or less enthusiastic – that the Ahtisaari solution

¹⁹⁷ *Id.*, Art. 1(10).

¹⁹⁸ *Id.*, Art. 1(5).

¹⁹⁹ *Id.*, Art. 1(7) (emphasis added).

²⁰⁰ *Id.*, Art. 8(2).

²⁰¹ *Id.*, Art. 8(3).

²⁰² Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168 of 26 March 2007, 2.

²⁰³ *Id.*

²⁰⁴ *Id.*, 3.

was the only viable one and supported a draft resolution for its endorsement.²⁰⁵ Russia, being a veto power, has remained supportive of Belgrade's claim over Kosovo. The official discourse pointed to the legal precedent that was to be created by Kosovo's unilateral move to independence. Thus, the Russian Federation's resolution proposal is said to have asked for open-ended negotiations in order to allow the parties to come to a mutual acceptable solution.²⁰⁶

In summer 2007, to break the deadlock in the Council, the Contact Group agreed for a troika comprising representatives of the EU, the Russian Federation and the United States to lead further negotiations between Belgrade and Pristina.²⁰⁷ After four months of efforts, the troika reported its failure to assure consensus, since "[n]either party was willing to cede its position on the fundamental question of sovereignty over Kosovo", however a commitment to non-violence was extracted.²⁰⁸

4. The Republic of Kosovo

On 17 February 2008, the Assembly of Kosovo declared Kosovo's independence, accepted "the obligations for Kosovo contained in the Ahtisaari Plan", welcomed "an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission" and invited "the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo."²⁰⁹ The Serbian Parliament rejected Kosovo's independence prior to its

²⁰⁵ 'Bush backs plan for Kosovo independence', *AFP*, 17 February 2008; 'U.N. Resolution on Kosovo Circulated', *Associated Press*, 11 May 2007; 'Revised Kosovo Resolution Submitted to U.N. Security Council', *USINFO*, 20 June 2007.

²⁰⁶ 'Russia says more time for Belgrade, Pristina to reach agreement', *RIA Novosti*, 12 September 2007; 'Russia rejects U.N. Kosovo resolution', *Associated Press*, 20 June 2007.

²⁰⁷ Secretary-General Welcomes Agreement On New Kosovo Initiative, SG/SM/11111, 1 August 2007, available at <http://www.un.org/News/Press/docs/2007/sgsm11111.doc.htm> (last visited 25 August 2010).

²⁰⁸ Report of the European Union/United States/Russian Federation Troika on Kosovo, S/2007/723, 4 December 2007, at 4.

²⁰⁹ Kosovo Declaration of Independence, 17 February 2008, Art. 3 & 5, available at <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en> (last visited 25 August 2010); All 109 deputies present voted in favour, the 10 Kosovo Serb deputies did not attend the session. 'Secretary-General in Security Council Statement says United Nations Aim in Kosovo: Stable Political, Security Situation, Protection of Population, Minorities', SG/SM/11426 SC/9253, 18 February 2008.

proclamation and declared the planned deployment of the European Union Rule of Law Mission in Kosovo (EULEX) contrary to international law. It also initiated an Action Plan by means of which governmental institutions are to make use of all legal modalities to preserve Kosovo within Serbia.²¹⁰ The position was reiterated subsequently to Kosovo's declaration of independence:

These acts represent a violent and unilateral secession of a part of the territory of the Republic of Serbia and this is why they are invalid and void. These acts do not produce any legal effect either in the Republic of Serbia or in the international legal order.²¹¹

Russia, in the words of the Serbian Prime Minister Vojislav Koštunica is "a firm and principled ally all the while, defending ... Serbia's right not to have its territory usurped"²¹²; the Russian Federation denounced Kosovo's independence as contrary to international law and as a challenge to the state system posed by its precedential value.²¹³

There is little doubt that the Declaration of Independence has received US blessing and was coordinated with the EU, despite the latter's remaining divisions on the issue of recognition. The day preceding the Declaration of Independence, the Council of the European Union decided to launch the EULEX and to appoint the EU Special Representative for Kosovo²¹⁴, both

²¹⁰ Resolution of the National Assembly on the Protection of Sovereignty, Territorial Integrity and Constitutional Order of the Republic of Serbia, 26 December 2007, available at <http://www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=42050> (last visited 25 August 2010).

²¹¹ Decision on the Annulment of the Illegitimate acts of the Provisional Institutions of Self-government in Kosovo and Metohija on their Declaration of Unilateral Independence, 17 February 2008, available at <http://www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43159> (last visited 25 August 2010).

²¹² Seventh Sitting of The Second Regular Session of The National Assembly of The Republic of Serbia in 2007, 26 December 2007, available at http://www.parlament.sr.gov.yu/content/eng/aktivnosti/skupstinske_detalji.asp?Id=1238&t=A (last visited 25 August 2010).

²¹³ 'Russia denounces Kosovo declaration', *Associated Press*, 17 February 2008; 'Russia says independence for Kosovo undermines international law', *RIA Novosti*, 19 February 2008.

²¹⁴ Council of the European Union, Kosovo: Council establishes an EU Rule of Law Mission, appoints an EU Special Representative, 16 February 2008, 6613/08/, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98768.pdf (last visited 25 August 2010).

mechanisms being provided for in the Ahtisaari plan.²¹⁵ Most of the EU states, as well as the USA, have recognized the independence of Kosovo.²¹⁶ According to the view espoused by the declaratory school, an act of recognition does not have a constitutive effect, it simply “acknowledges as a fact something that has hitherto been uncertain.”²¹⁷ In the same time however, recognition cannot occur when an entity is created in breach of international law.²¹⁸ The recognition of Kosovo by several states could be interpreted as a proof of these latter states’ consideration that Kosovo’s independence is not the result of an illegal situation. In other words, potentially, that remedial secession is not prohibited under international law.

And lastly, the ICJ has contributed in July 2010 to advising on the unilateral declaration of independence of Kosovo, but not much beyond that. Unsurprisingly, given the request of the General Assembly²¹⁹, the insistence of states for confinement in interpreting the scope and meaning of the question²²⁰ and the record of the Court in approaching sensitive questions, the ICJ gave a “narrow and specific”²²¹ interpretation of the case at hand. In order to respond to the question posed to it, the Court does it not consider necessary to answer or even touch upon either of the following:

- The legal consequences of the declaration of independence, in particular “the validity or legal effects of the recognition of

²¹⁵ An 2007 ICG report mentions planning teams for the EULEX mission to have been on the ground for over one year, International Crisis Group, *Kosovo Countdown: A Blueprint for Transition* (2007), 21.

²¹⁶ The list of states which have recognized Kosovo, as well as the recognition statements are available online at <http://www.kosovothankyou.com/> (last visited 25 August 2010).

²¹⁷ On the other hand, in the absence of recognition an entity is not able to enter into relations with other states, therefore lacking one of the traditional criteria of statehood. In this sense then, recognition does have a certain role to play in the process of state creation. J. Dugard & D. Raič, *supra* note 60, 96-101.

²¹⁸ M. Kohen, *supra* note 18, 627.

²¹⁹ In its 2008 resolution the General Assembly requested the Court to advise on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”, see GA Res. 63/3, 8 October 2008.

²²⁰ See for example the view of the USA, *Written Statement*, *supra* note 191, 41. and that of Germany, *Statement of the Federal Republic of Germany, Verbalnote No. 54*, 15 April 2009, available at <http://www.icj-cij.org/docket/files/141/15624.pdf> (last visited 25 August 2010).

²²¹ As the Court considers the question to be, see *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, *supra* note 6, para. 51.

Kosovo by those States which have recognized it as an independent State” or whether Kosovo has achieved statehood.²²²

- Whether international law conferred a positive entitlement on Kosovo to declare unilaterally its independence²²³
- Whether international law generally confers an entitlement on entities situated within a State to break unilaterally away from it, that is a general right to secession.²²⁴

It finds that Kosovo’s declaration of independence did not violate general international law because “the Court considers that general international law contains no applicable prohibition of declarations of independence”. Read together with the Court’s statement in paragraph 56, it is entirely possible for a particular act, such as a unilateral declaration of independence, not to be in violation of international law without necessarily constituting the exercise of a right conferred by it.

The finding cannot be construed as implying that there is a right to secession for Kosovo, even less so for other secessionist movements. A prohibition on declaring independence is similarly not contained by Security Council resolution 1244. This, again, should not be understood as giving rise to a right to secession, since in the view of the Court the language of the resolution does not make any definitive determination on the final status.²²⁵ Bluntly put, the ICJ opinion adds little to the controversy over the legal precedent allegedly set by Kosovo and whether this would consist in a right to remedial secession.²²⁶

²²² *Id.*

²²³ *Id.*, para. 56.

²²⁴ *Id.*

²²⁵ *Id.*, para. 118; Although it goes beyond the scope of the article to offer an exhaustive analysis of the Court’s decision, it should be noted here that the Court introduces a sort of *dédoublement* for the Assembly of Kosovo, differentiating between this acting as a Provisional Institution of Self-Government in the past, as opposed to “persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration” while declaring independence. The later situation thus put the Assembly of Kosovo, or so the Court considers, outside the responsibility set forth by the Constitutional Framework, paras 102-109, 120-121.

²²⁶ The only paragraphs where the Court mentions secession are intended to decline its competence, as such: “[t]he Court considers that it is not necessary to resolve these questions in the present case” and “that issue is beyond the scope of the question posed by the General Assembly”. Secondly, it notes that “radically different views were expressed by those taking part in the proceedings and expressing a position” on whether the right to self-determination in its external aspects applies beyond the

D. Impact of Practice on Theory: the “Kosovo Precedent” and Beyond

“[A]fter having worked with UN officials for eight years, the Kosovars’ plan can no longer be viewed as “unilateral” but rather as continually prepared and “the most unsurprising and predictable event” that South Eastern Europe has seen for generations.”²²⁷

I. Kosovo’s Independence as an Act of Remedial Secession?

In legal language, the diplomatic phrase “coordinated independence”²²⁸ stands for secession. Kosovo’s independence proclaimed in 2008 represents the separation of a part of the territory and population of Serbia without the consent of the latter. These are and will remain factual elements virtually impossible to dispute. What is called into question is the right of Kosovo to secede from Serbia.

This article concludes that international law accommodates beyond controversy the right of an entity to secede, when the state it is part of explicitly acknowledges in its domestic law such a right or when it recognizes that its constituent peoples have the right to self-determination. This is not the case of Kosovo. Even arguing on the base of the 1974 Constitution, Kosovo as a federative unit, was an autonomous province, and the Kosovo Albanians a *narodnost* without the right to self-determination. Part of Kosovo’s struggle throughout its 20th century history aimed precisely at gaining the status of republic within Yugoslavia. As it was faced with the break-up of Yugoslavia in the 1990s, the international community upheld the territorial integrity of Serbia and rejected Kosovo’s claimed right to secession.

Remedial secession then remains the sole maybe-legal option. As was discussed, the doctrine is conspicuously divided on the issue of the existence of a right to remedial secession. The legal grounds for remedial

decolonization and occupation context and on remedial secession. *Id.*, paras 55-56, 83 and para. 82.

²²⁷ Agim Ceku, Prime Minister of UN-administered Kosovo (March 2006 - January 2008) as quoted in ‘EU prepares for early 2008 Kosovo independence’, *EUObserver*, 5 December 2007.

²²⁸ ‘Kosovo premier mulls deadline on independence’, 15 July 2007, available at <http://www.independent.co.uk/news/world/europe/kosovo-premier-mulls-deadline-on-independence-458096.html> (last visited 25 August 2010).

secession are disputed but foremost the lack of practice is invoked. It is this perpetual debate regarding the status as *de lege lata versus de lege ferenda* which makes the Kosovo case so precious for both advocates and rejectionists of remedial secession.

The second part of this article has shown that the case of Kosovo gathers the factual elements of remedial secession:

- The Milošević regime carried out a policy of systematic discrimination followed by the perpetration of massive and grave abuses against the Kosovo Albanians.
- The Kosovo Albanians are a cultural group within Serbia, concentrated and majoritarian on the territory of Kosovo.
- The potential to produce any mutually agreeable outcome through peaceful settlement of disputes has been exhausted.

This analysis also emphasizes that the abuses of the late 1990s determined a shift in the position of part of the international community towards the Kosovo Albanians' status. A gradual move towards elevating the Kosovo Albanians from a cultural minority to the status of a people has taken place. Despite the widespread discourse that depicts Security Council Resolution 1244 (1999) as the guarantee against secession, as has been shown in this article, the resolution does contain the seeds of the right to self-determination of the Kosovo Albanians. The most revealing evidence of this shift in status is to be found in the Rambouillet accords and the Ahtisaari plan. These documents, which linger as non-agreements between Kosovo and Serbia, did however gather the agreement of part of the international community. Lastly, states have recognized and continued to support Kosovo's independence. This support appears to contradict existent state practice, since in the past states have recognized new state entities - created either as a result of secession or dissolution - only after the parent state consented to the separation.²²⁹ Along these lines then, state practice in the case of Kosovo would appear to set a precedent and crystallize remedial secession as a legal option for state creation.

²²⁹ See *supra* B.III; An Intermezzo: On State Practice and Secession; and also O. Corten, 'Le reconnaissance prématuré du Kosovo: une violation du droit international', *Le Soir*, 20 February 2008.

II. And Yet the Exceptionality Discourse!

In order to verify the precedential value of Kosovo's remedial secession it is necessary to reframe the analysis. As was discussed in the beginning paragraphs, an action that is novel or inconsistent with current practice gains precedential value if other states accept it. As was indicated, acquiescence and protest are the fundamental state reactions to an action, therefore those are of interest in the case of Kosovo.

Serbia, as the state with most interest in resolving the Kosovo case, has strongly protested against the legality of Kosovo's secession. The protest's effectiveness, clearly, cannot be discarded as a mere 'paper protest', not least given Serbia's diplomatic actions which resulted in the UN General Assembly's request for an Advisory Opinion on the *Unilateral Declaration of Independence*.²³⁰ Moreover, Serbia belongs to the category of 'specially affected' states. In the *North Sea Continental Shelf*, the ICJ found that a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.²³¹

Given Serbia's protest, applying the ICJ test to the current matter would mean that Kosovo's unilateral declaration of independence did not set a precedent of remedial secession. However, there are two aspects that need to be pointed out at this stage. First, it would seem that granting to the parent state the status of 'specially affected' in a case of remedial secession would ironically reward and entrust the perpetrator of massive and grave human rights' abuses with the possibility of blocking the remedy sought by its victim. Second, the framework in which the *North Sea Continental Shelf* case test was applied was very different from the Kosovo remedial secession case – both in terms of procedural matters and substance. On the one hand, remedial secession is not to be inferred as a customary rule from a purely conventional rule. In fact, there is no clear rule in respect to remedial

²³⁰ See for example C. Eick, 'Protest', in *Max Planck Encyclopedia of Public International Law* (last updated July 2006), available at http://www.mpepil.com/app?letter=P&service=page&script=yes&page=subscriber_article&id=/epil/entries/law-9780199231690-e1460&recno=64 (last visited 25 August 2010).

²³¹ *North Sea Continental Shelf*, *supra* note 8, para. 74.

secession, conventional or otherwise and hence the major importance of precedence and the legal effect of protest. On the other hand, it is submitted that in the case of remedial secession the notion of ‘specially affected’ does not do ‘sufficient justice’.²³² Hence, if one accepts that massive and grave human rights’ abuse gives rise to the right of self-determination of the cultural people – a right that attaches an obligation *erga omnes* – one also has to cede that remedial secession cannot be the special concern of only one state or just of few but of all states. Thus, the notion of ‘specially affected’ would appear to be inapplicable or on the contrary universally applicable with all states equally affected.

Other states such as Russia, China, Argentina, Spain, Sri Lanka, Slovakia and Romania protested or decided to withhold recognition. Regardless whether these states are genuinely concerned with the preservation of the current system of international rules, or attempt to avoid possible destabilization effects, or would like to show loyalty towards Serbia or realize that their human rights record *vis-à-vis* their own minorities might lead to endangering their borders following the Kosovo model, they all officially identify the potential of setting a legal precedent as a reason for protest or withholding recognition.

The fascination about the Kosovo case lies in the discourse of those states that chose to support and recognize Kosovo as an independent state. The United States of America through the voice of Condoleezza Rice asserts that:

“The unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today.”²³³

Along similar lines, the Foreign Ministers of the European Union states declared:

²³² For a similar argumentation path in respect to certain international conventions see M.E. Villiger, *Customary International Law and Treaties* (1985), 44.

²³³ U.S. Department of State, *U.S. Recognizes Kosovo as Independent State*, Washington D.C., 18 February 2008, <http://www.america.gov/st/peacesec-english/2008/February/20080218144244dmslahrellek0.9832117.html>; see also C. J. Borgen, *supra* note 97, 11.

“The Council [...] underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions.”²³⁴

But surely the most staggering statement is made by Kosovo itself in its own declaration of independence:

“Kosovo is a special case arising from Yugoslavia’s non-consensual breakup and is not a precedent for any other situation.”²³⁵

Throughout the years it sought independence from Serbia, Kosovo has maintained that it has the legal right to do so, yet in its proclamation of independence it declares its case unique, and hence without legal consequences. This discourse portraying Kosovo’s path to independence as unique has been echoed in recent years also by writings of legal scholars.²³⁶

Unquestionably there are some specific features about the Kosovo case, notably the long period of international administration in a non-colonial setting. To this author, however, the uniqueness argument appears logically problematic, but legally potent. Some explanations are in order. Excluding the possibility that another entity will ever gather similar

²³⁴ Council of the European Union, Press Release, 2851st Council Meeting, General Affairs and External Relations, Brussels, 18 February 2008, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98818.pdf (last visited 25 August 2010).

²³⁵ Kosovo Declaration of Independence, 17 February 2008, Preamble, available at <http://www.assembly-kosova.org/?cid=2,128,1635> (last visited 25 August 2010).

²³⁶ See for example Bing Bing Jia who enumerates the following elements which contribute to the singular character of Kosovo: “first, a territory in question has to be placed under international supervision after violent events have resulted in a physical split of territory of an existing State. Secondly, the root of the events may vary from one case to another, but always involves a minority different, in terms of ethnicity, culture, language or other grounds, from the majority of the State from which the territory in question separates. Thirdly, any hope for holding together the union of these two parts of the State is dashed politically.” B.B. Jia, “The Independence of Kosovo: A Unique Case of Secession”, 8 *Chinese Journal of International Law* 1 (2009), 30. See also Daniel Thürer who observes that “Kosovo is distinct from other cases in important regards, notably in that the international community has administered Kosovo for almost ten years”, D. Thürer & T. Burri, *supra* note 30, para. 43.

characteristics to the ones in the Kosovo case borders on premonition. As particular as the circumstances in the case of Kosovo may have been, involving grave and massive human rights' abuses targeted at a cultural minority and foreign intervention to stop these abuses followed by international administration of the territory of the said minority, one simply cannot exclude the possibility that in the future a similar situation takes place.

Regardless of its imprecise logic, the uniqueness discourse has significant legal consequences. By virtue of their recognition of Kosovo's independence, the recognizing states have made a claim – albeit implicit – that the state entities were created not in breach of international legal norms.²³⁷ However, by systematically arguing that Kosovo's remedial secession does not represent a precedent, the international community deprived this instance of practice of its precedential value and made it a legally insignificant act. After all, only acts that appear as articulated precedential situations, such as acts intended to have legal consequences can create or change customary international law. The Kosovo secession has been articulated, but as a non-precedential situation. In the end, "states are both subjected to international law and create and authoritatively interpret it."²³⁸ And in this case, even the recognizing states have consciously and clearly opted not to create a general rule governing remedial secession.

Ultimately, states have guarded the *status quo* and continued to act allergic to a right to remedial secession with set boundaries and clear coordinates. Given the protests expressed by those who opposed Kosovo's secession and the uniqueness-and-no-precedent discourse of those who recognized its independence, a precedent for remedial secession cannot be inferred. Ironically, the consistent state practice is evidence of the absence of a customary right of remedial secession.²³⁹

²³⁷ In the view of Oliver Corten by "prematurely" recognizing Kosovo third states are in breach of the principle of sovereignty and of non-intervention in the internal affairs of Serbia. O. Corten, 'Le reconnaissance prématuré du Kosovo : une violation du droit international', *Le Soir*, 20 February 2008.

²³⁸ G. Nolte & H. P. Aust, 'Equivocal Helpers- Complicit States, Mixed Messages and International Law', 58 *International and Comparative Law Quarterly* (2009), 27.

²³⁹ The recognition of South Ossetia and Abkhazia by Russia does not alter the situation in any significant way, as long as Russia continues to oppose Kosovo's independence, *inter alia*, because of its precedential value. Perhaps, these seemingly mixed messages of Russia are best understood by appeal to the framework developed by Nolte and Aust starting from Scelle's *dédoublement fonctionnelle*; see *supra* note 238.

E. Conclusion: A Missed Opportunity

It is not the moment for naivety; states are fearful of setting a precedent. It is the fear of fueling nationalism, of legitimizing secessionist movements or of making their own cultural groups aware of the remedial secession option in case their minority rights are systematically refused, or autonomy and self-governance brutally denied. While not setting a legal precedent, the Kosovo precedent hysteria lingers. Claims for statehood will continue to be made, be they legitimate or not. The no-precedent safeguard will not discourage anyone.

The consequences of not assuming the precedent are, regrettably, far more important. The force of remedial secession lies in its prevention potential - empowering minority groups to hold governments accountable to their international obligations. It is not an implosive weapon within the Westphalian system, but a non-traditional human rights mechanism. By presenting Kosovo as unique, the international community undermined the theory of remedial secession, and made states and their borders sacrosanct even when governments by way of their discriminatory and repressive actions against part of their population question their own *raison d'être*. It is a perverse implication that states will have to deal with when another unique Kosovo enters the international arena.

Kosovo represents a missed opportunity of clarifying the concept of remedial secession: the 'required' threshold of abuse, the needed characteristics of a cultural group, the alternatives to be exhausted, the effect of time and democratization of the parent state on a secessionist claim, and not least, the question of *uti possidetis iuris*. Clarifying these aspects would have meant to offer a (more) objective yardstick for the international community to measure claims of secession. Today, arbitrariness prevails.

Thirty-nine years ago, Bangladesh seceded from Pakistan. The debate whether Bangladesh set a precedent for a right to remedial secession continues. Regrettably, Kosovo is merely a Bangladeshi *déjà-vu*.

The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR

Bill Bowring*

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Abstract

With a focus on the Russian Federation, this article examines the adoption by the Council of Europe of Protocol No.14 to the European Convention on Human Rights (ECHR), and its long-delayed coming into force. The author starts with the question of the original object and purpose of the Council, and how they have now changed. This leads to an analysis of the nature of the crisis – a crisis of success – now faced by the ECHR system, and the reform process which started, on the 50th anniversary of the ECHR, in 2000. After describing Protocol No.14 itself, and the discussion which has surrounded it, the article turns to the central issue. This is not the question of procedural reform, or even admissibility criteria, but what lies behind – the “soul” of the ECHR system. Should the Strasbourg Court remain a court which renders “individual justice”, albeit only for a handful of applicants and with long delays; or should it make become a court which renders “constitutional justice”? The article focuses on the specific problems faced by Russia in its relations with the Council of Europe; and an analysis of the lengthy refusal by the Russian State Duma to ratify Protocol No. 14. The author concludes with an attempted prognosis.

A. Introduction – Protocol No.14*bis*?

This article examines the adoption by the Council of Europe (CoE) of Protocol No. 14 to the European Convention on Human Rights (ECHR), and its long-delayed coming into force. Although the Protocol was adopted in 2004, it could not come into force until it had been ratified by all 47 member states of the CoE. Only on Friday 15 January 2010 did the State Duma of the Russian Federation vote to ratify it.¹ On 1 June 2010 Protocol 14 at last came into force.² Nevertheless, the ECHR system is now in deep crisis, and the question arises whether ratification of Protocol No. 14 will in fact play any significant role in alleviating that crisis.

¹ See <http://www.newsru.com/arch/russia/15jan2010/14.html> (last visited 27 August 2010).

² See A. Burkov, “Improvement in Compliance of the Russian Judicial System with the International Obligations Undertaken by the Russian Federation” (28 June 2010) available at <http://www.eu-russiacentre.org/our-publications/column/improvement-compliance-russian-judicial-system-international-obligations-undertaken-russian-federation.html> (last visited 27 August 2010).

In 2005 Lord Woolf predicted that the backlog of pending applications to the Court (those that have not been dealt with in any way, and have certainly not been communicated to the relevant government, much less held to be admissible or not) would increase year on year by about 20%, to 250,000 in 2010, in any event.³ The view of the Rapporteur to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) is that

“the case-processing capacity of the Court is likely to increase by 20 to 25% if two procedures envisaged in Protocol No. 14 to the ECHR were already now to be put into effect, i.e., the single-judge formation (to deal with plainly inadmissible applications) and the new competences of the three-judge committee (clearly well-founded and repetitive applications deriving from structural or systemic defects).”⁴

Russian delay in ratification meant that the Committee, on the basis of the Rapporteur’s report, took the unprecedented step of recommending the adoption of a Protocol No. 14*bis*, which would not require unanimous ratification.

I start with the question of the original object and purpose of the CoE, and how they have now changed. This leads me to an analysis of the nature of the crisis – a crisis of success – now faced by the ECHR system, and the reform process which started, on the 50th anniversary of the ECHR, in 2000.

After describing Protocol No. 14 itself, and the discussion which has surrounded it, I turn to the central issue. This is not the question of procedural reform, or even admissibility criteria, but what lies behind – the “soul” of the ECHR system. Should the European Court of Human Rights (ECtHR) remain a court which renders “individual justice”, albeit only for a

³ Lord Woolf, “Review of the Working Methods of the European Court of Human Rights” (December 2005) available at <http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf> (last visited 27 August 2010), 49.

⁴ K. De Vries, “Draft Protocol No. 14*bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms” (28 April 2009) available at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11879.pdf> (last visited on 27 August 2010), para. 8.

handful of applicants and with long delays; or should it make a painful transition to a court which renders “constitutional justice”?

Next, I analyse the specific problems faced by Russia in its relations with the CoE and the ECHR system; and the background to the lengthy refusal by the Russian State Duma to ratify Protocol No. 14. I add an extremely frank appraisal of the situation by Anatolii Kovler, the Russian judge on the ECtHR.

I conclude with an attempted prognosis.

B. What was the Council of Europe For?

Even though the CoE now includes 47 states, and has a population of around 811 million people from Iceland to the Bering Straits, it had a much more limited significance at its inception. Brownlie and Goodwin-Gill have correctly stated that the CoE was

“an organization created in 1949 as a sort of social and ideological counterpart to the military aspects of European co-operation represented by the North Atlantic Treaty Organisation. [It] was inspired partly by interest in the promotion of European unity, and partly by the political desire for solidarity in the face of the ideology of Communism.”⁵

In other words, the Western European states wished to demonstrate that they were as serious about the “first generation” of rights, the civil and political rights, as the USSR and its allies undoubtedly were with regard to the “second generation” of social and economic rights. After all, the “Communist” states guaranteed the rights to work, pensions, social security, health care, education and so on not only in their constitutions, but in practice. This provided the legitimacy of the “Communist” order, and is a reason why the USSR collapsed, indeed rotted away, rather than being overthrown. It also explains the continuing nostalgia especially in Russia for the late Soviet way of life.

The CoE had its origins in May 1948, when 1000 delegates met at the Hague Conference.⁶ This has been called “The Congress of Europe”. A

⁵ I. Brownlie & G. Goodwin-Gill, *Basic Documents on Human Rights*, 5th ed. (2006), 609.

⁶ http://www.ena.lu/congress_europe_hague_710_1948_overview-03-29731 (last visited 25 August 2010).

series of resolutions were adopted at the end of the Congress. These called, amongst other things, for the creation of an economic and political union to guarantee security, economic independence and social progress; for the establishment of a consultative assembly elected by national parliaments; for the drafting of a European charter of human rights; and for the setting up of a court to enforce its decisions. The last of these was the most revolutionary. There was no precedent in international law for an international court with the power to interfere in the internal affairs of its member states, and to render obligatory judgments.

The Congress also revealed some stark differences in approach. These divided unconditional supporters of a European federation (for example, France and Belgium) from those states that preferred straight-forward intergovernmental co-operation, such as the United Kingdom, the Republic of Ireland and the Scandinavian countries.

On 27 and 28 January 1949, the five ministers for foreign affairs of the Brussels Treaty countries, meeting in Brussels, reached a compromise. This was for a “Council of Europe” consisting of a ministerial committee, to meet in private; and a consultative body, to meet in public. In order to satisfy the United Kingdom and its allies, the Assembly was to be purely consultative in nature, with decision-making powers vested in the Committee of Ministers. In order to satisfy the federalists, members of the Assembly were to be independent of their governments, with full voting freedom. The United Kingdom had demanded that they be appointed by their governments. This important aspect of the compromise was soon to be reviewed and, from 1951 onwards, parliaments alone were to choose their representatives.⁷

The Statute of the CoE⁸ which opened for signature and was signed by ten states⁹ on 5 May 1949¹⁰, defines “democracy” in the Preamble: “Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”.

⁷ At <http://www.coe.az/Latest-News/4.html> (last visited 25 August 2010).

⁸ Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm> (last visited 25 August 2010).

⁹ The 10 states which signed it on that day were Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the UK.

¹⁰ It came into force, following 7 ratifications, on 3 August 1949.

The work of drafting the ECHR occupied the Committee of Ministers (meeting in secret) and the Consultative Assembly (meeting in public) from 11 May 1949 until 20 March 1952. The ECHR itself was opened for signature in Rome, 4 November 1950, while the First Protocol was opened for signature in Paris on 20 March 1952. The proceedings, so far as they were public, are published in the 8 volumes of the “Travaux préparatoires”.¹¹

According to Steven Greer and Andrew Williams, the original consensus was that

“the Convention’s main *modus operandi* should be complaints made to an independent judicial tribunal by states against each other (the ‘inter-state’ process). At its inception, therefore, the Convention was much more about protecting the democratic identity of Member States through the medium of human rights [...] than it was about providing individuals with redress for human rights violations [...]”¹²

Thus, recognition of the right of individual petition did not become a requirement of membership of the system until the 1990s, after the collapse of Communism. Greer has also pointed out that the original *raison d’être* for the Convention has undergone a profound transformation since its inception in the Cold War: “[...] it now provides an ‘abstract constitutional identity’ for the entire continent, especially for the former communist states [...]”.¹³

C. The Crisis of the ECHR System, and the Reform Process

The right of individual petition is at the centre of the ECHR system. But it is also a central cause of its current problems. In his recent Report for the Committee on Legal Affairs and Human Rights of the Parliamentary

¹¹ Council of Europe, *Collected Edition of the “Travaux préparatoires” of the European Convention on Human Rights in Eight Volumes (1975-1985)*.

¹² S. Greer & A. Williams, ‘Human Rights in the Council of Europe and the EU: Towards “Individual”, “Constitutional” or “Institutional” Justice?’, 15 *European Law Journal* (2009) 4, 462, 464.

¹³ S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006), 170-171, [Greer, 2006].

Assembly of the Council of Europe, the Rapporteur, Klaas de Vries, set out the nature of the crisis facing the Strasbourg Court.¹⁴

“In 1999 [, according to this report] 22,650 applications were lodged and nearly 3,700 disposed of judicially. [Within less than 10 years,] in 2006 over 50,000 applications were lodged of which nearly 30,000 were disposed of judicially. In 2006, the number of incoming applications rose by 11%, with the number of new Russian applications rising by 38%.”¹⁵

At 30 June 2009, 108,350 applications were pending, an increase of 11% from 1 January 2009, when there were 97,300. 57% of that number concerned Romania, Russia, Turkey and Ukraine, an increase of 23% in comparison with 2007. The report stated that

“[i]n 2008 judgments were delivered in respect of 1,880 applications (compared with 1,735 in 2007 – an increase of 8%) and 32,043 applications were disposed of judicially in 2008, an increase of 11% in relation to 2007.”¹⁶

Mr de Vries added:

“It follows that the Court must urgently find a way in which to deal with, in particular, three matters: judges must not spend too much time on obviously inadmissible cases (approximately 95% of all applications), they must deal expeditiously with repetitive cases that concern already clearly established systemic defects within states (this represents approximately 70% of cases dealt with on the merits), and by so doing, concentrate their work on the most important cases and deal with them as quickly as possible.”¹⁷

To this should be added the very long time that cases which have been declared admissible must wait for a determination by a chamber of the Court. In one of the Turkish Kurdish cases in which I represented the

¹⁴ De Vries, *supra* note 4.

¹⁵ *Id.*, 3.

¹⁶ *Id.*

¹⁷ *Id.*

applicant, *Abdurezzak Ipek v. Turkey*¹⁸, the applicant complained of the “disappearance” at the hands of Turkish forces of two of his sons in 1994. The case was only declared admissible in May 2002, and there was a fact-finding hearing in Turkey, at which I represented the applicant, in October 2002. Judgment was finally pronounced in February 2004 – Turkey was found to have violated the right to life of the two sons – ten years after the violation and after the case was lodged.

There has been no improvement. In 2008 while 34% of Chamber cases had been waiting for a year or less, 23% had been waiting from one to two years, 14% from two to three years, 11% from three to four years, 9% from four to five years, and as many as 9% for more than five years.¹⁹

Thus, in the words of Laurence Helfer, “[...] the ECtHR has become a victim of its own success [and] [...] now faces a docket crisis of massive proportions.”²⁰ Helfer identifies two particular categories of case which are “[both far less and far more momentous than] flagging and clearing roadblocks in domestic democratic processes or adjudicating good faith government restrictions on individual liberties”²¹ The two classes of case are first of all the repetitive cases concerned with structural problems in civil, criminal and administrative proceedings. Secondly, there are the complaints of serious and pervasive human rights abuses such as extrajudicial killings, disappearances, torture, and arbitrary detention.

The large number of judgments against Russia fall into both these categories: many concern the failure to enforce judgments given by the Russian courts, while there have also been many grievous complaints arising out of the conflict since 1999 in Chechnya. In many of these cases the prediction made by Robert Harmsen in 2001 came true: the Court ceased “to be a secondary guarantor of human rights and instead finds itself in a more crucial – and exposed – front-line position.”²²

¹⁸ *Ipek v. Turkey*, ECHR, Application No. 25760/94, Judgment of 17 February 2004.

¹⁹ European Court of Human Rights, ‘Analysis of Statistics 2008’ (March 2009) available at <http://www.echr.coe.int/NR/rdonlyres/55E4E440-6ADB-4121-9CEB-355E527600BD/0/Analysisofstatistics2008.pdf> (last visited 25 August 2010), 11.

²⁰ L. R. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, 19 *European Journal of International Law* (2008) 1, 125.

²¹ *Id.*, 129.

²² R. Harmsen, ‘The European Convention on Human Rights after Enlargement’, 5 *The International Journal of Human Rights* (2001) 4, 18, 29.

Leach has provided a detailed critical analysis of the reform process leading to the adoption of Protocol No. 14.²³ Furthermore, the CoE has now published a large (718 pages) compendium entitled “Reforming the European Convention on Human Rights: A work in progress”²⁴. This gives a full chronology of the various stages of the process, from 2000 to 2008.

This started with the European Ministerial Conference on Human Rights held in Rome on 3-4 November 2000, on the 50th anniversary of the ECHR.²⁵ The Committee of Ministers’ Deputies established an Evaluation Group of three persons including President Wildhaber, in February 2001. Their report was published in September 2001, and made a number of proposals.²⁶ Although the Evaluation Group had carried out little consultation with civil society, a very large number of NGOs, including Amnesty International and others, national human rights institutions and bar associations adopted a Response²⁷ which was highly critical of the proposals. Marie-Benedicte Dembour also commented that “what seems to be envisaged at the highest level [...] is a Court that would be more or less free to choose the cases with which it deals.”²⁸

After a further period of consideration, and somewhat ineffective consultation, in October 2002 the Steering Committee for Human Rights (CDDH) produced a further Interim Report.²⁹ In April 2003 the CDDH produced its Final Report on proposals for reforming the court³⁰.

However, the proposed changes to admissibility requirements were strongly criticised by PACE in April 2004, as “vague, subjective and liable

²³ P. Leach, ‘Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?’, 27 *Human Rights Law Journal* (2006) 1-4, 11.

²⁴ Steering Committee for Human Rights (CDDH), *Reforming the European Convention on Human Rights: A Work in Progress. A Compilation of Publications and Documents Relevant to the Ongoing Reform of the ECHR* (2009).

²⁵ *Id.*, 11-51.

²⁶ ‘Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights’, 22 *Human Rights Law Journal* (2001) 5-8, 308.

²⁷ *NGO Response to the Report of the Evaluation Group*; see Leach *supra* note 23, 13.

²⁸ M.-B. Dembour, “Finishing Off Cases”: The Radical Solution to the Problem of the Expanding ECHR Caseload’, *European Human Rights Law Review* (2002) 5, 604, 622.

²⁹ Steering Committee for Human Rights (CDDH), ‘Interim Report of the CDDH to Be Submitted to the Committee of Ministers – Guaranteeing the Long-term Effectiveness of the European Court of Human Rights’, CM (2002) 146, 18 October 2002.

³⁰ CDDH, ‘Guaranteeing the Long-term Effectiveness of the European Court of Human Rights – Final Report Containing Proposals of the CDDH’, CM (2003) 55, 8 April 2003.

to do the applicant a serious injustice”.³¹ In February 2004 Amnesty International had also published a critical Comment.³² Nevertheless, the CoE proceeded to the adoption of the new Protocol.

D. Protocol No. 14

Finally, Protocol No. 14³³ was adopted by the Committee of Ministers in May 2004.³⁴ The additional admissibility criterion for Article 35 provides that a case may be declared inadmissible if the Court considers that:

“the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”³⁵

Leach points out that the question what is “due consideration” will be very difficult to answer in the context of such a variety of legal systems and procedures.³⁶ It is plain that there will be ample scope for the application of judicial discretion.

The other significant changes proposed by Protocol No. 14 are:

- in certain cases a single judge will be able to decide on inadmissible applications
- a simplified summary procedure will enable a committee of three judges to decide on the admissibility and merits of “repetitive violation” and “clone” cases

³¹ PACE, ‘Opinion No. 251 (2004)’, 26 *Human Rights Law Journal* (2005) 1-4, 106.

³² Amnesty International, ‘Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights’, 2004, AI Index: IOR 61/005/2004.

³³ Available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm> (last visited 26 August 2010).

³⁴ ‘Protocol No. 14 to the ECHR, Amending the Control System of the Convention, 13 May 2004’, 26 *Human Rights Law Journal* (2005) 1-4, 88.

³⁵ Article 12 Protocol No.14 to the ECHR, amending Article 35(3) of the Convention.

³⁶ Leach, *supra* note 23, 19.

- a new procedure will enable the Committee of Ministers to bring proceedings to the Court where a state refuses to abide by a judgment
- judges will be appointed for a single 9 year term
- the CoE's Commissioner for Human Rights will be entitled to intervene in cases as a third party.

That was not the end of the process. In December 2005 Lord Woolf published his Report "Review of the Working Methods of the European Court of Human Rights"³⁷ at the request of the Secretary General of the Council of Europe and the President of the Court. His terms of reference were:

"To consider what steps can be taken by the President, judges and staff of the European Court of Human Rights to deal most effectively and efficiently with its current and projected caseload, and to make recommendations accordingly to the Secretary General of the Council of Europe and to the President of the Court."³⁸

He made a number of detailed recommendations for reform of procedure. In June 2006 a seminar – "The European Court of Human Rights: Agenda for the 21st Century" – took place in Warsaw³⁹, followed in November 2006 by the Report of the Group of Wise Persons (which include Venyamin Yakovlev of Russia, former Chairman of the Higher Arbitrazh Court) to the Committee of Ministers⁴⁰. On 22-23 March 2007 a Colloquy took place in San Marino entitled "Future Developments of the European Court of Human Rights in the Light of the Wise Persons Report"⁴¹. The Secretary General of the CoE, Terry Davis, noted that Protocol No. 14 had still not come into force, three years after its adoption.⁴² On 9-10 June 2008 a further Colloquy took place in Stockholm, on the vexed question of

³⁷ Lord Woolf, *supra* note 3.

³⁸ Lord Woolf, *supra* note 3, 2.

³⁹ CDDH, *supra* note 24, 131-215.

⁴⁰ Available at <https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> (last visited 26 August 2010).

⁴¹ CDDH, *supra* note 24, 217-280.

⁴² CDDH, *supra* note 24, 224.

implementation of the ECHR at national level.⁴³ Veronika Milinchuk, then the Russian State Agent at the Court, recognised that “failure to execute, or delays in execution of court decisions was one of the pressing issues addressed by Russian nationals [...]” at the Court.⁴⁴ She added:

“Notwithstanding all the efforts taken (including the allocation by the Russian Ministry of Finance of purposeful large-scale transfers), at the beginning of 2007 there were thousands of non-executed court decisions on settlement of ‘old’ debts, especially indexation of tardy monetary payments, at the expense of the Russian constituent entities’ budgets.”⁴⁵

This has now become, as I show below, a major source of embarrassment for Russia, threatening its very membership of the CoE.

E. The Soul of the ECHR

The debate around Protocol No. 14 could be said to conceal a much more fundamental argument about the nature and future of the ECHR system. Helfer states that “[t]he individual complaints mechanism of the ECtHR is the crown jewel of the world’s most advanced international system for protecting civil and political liberties.”⁴⁶ But there is now as a result a lively and very serious debate as to whether the Court should provide “individual” or “constitutional” justice. Marie Dembour described the former view as follows: “[...] the *raison d’être* of the Strasbourg Court is precisely that it will hear any case, from anyone who claims to be a victim of the Convention; there are no unworthy cases (except of course those which traditionally have been declared inadmissible).”⁴⁷

Philip Leach is a strong proponent of the importance of the right of individual application.⁴⁸ He cites the words of the CDDH’s Reflection Group, which described the right of individual petition as being “the

⁴³ CDDH, *supra* note 24, 463-559.

⁴⁴ CDDH, *supra* note 24, 506.

⁴⁵ CDDH, *supra* note 24, 506.

⁴⁶ Helfer, *supra* note 20, 159.

⁴⁷ Dembour, *supra* note 28, 621.

⁴⁸ Leach, *supra* note 23.

distinctive and unique achievement of the Convention system.”⁴⁹ For Leach, “[...] the right of individual application has become unquestionably by far the most important part of the Convention system, over and above the inter-state process, which is very rarely invoked.” He notes that as at January 2004 there had been just 20 inter-state cases.⁵⁰ He underlines the fact that at the heart of objections to proposals for limiting individual access to the Court has been a “fundamental concern that the amendments to the admissibility criteria will restrict the right of individuals to seek redress at the European Court, without adequately tackling the problem of the increasing number of Convention violations across Europe.”⁵¹

Leach’s use of the word “lottery” derives from the fact that a very high proportion of all applications submitted to the Court are declared inadmissible under the current criteria, more than 96% in 2005; and some 60-70% of the judgments in the cases found to be admissible concern “repetitive cases”, a very high proportion of them cases on excessive length of proceedings.⁵²

The “constitutional” argument was set out in 2002 by the former President of the ECtHR, Luzius Wildhaber. He identified a

“fundamental dichotomy running throughout the Convention. This is as to whether the primary purpose of the Convention system is to provide individual relief or whether its mission is more a ‘constitutional’ one of determining issues on public policy grounds in the general interest.”⁵³

In his view, the way forward for the Court was to “concentrate its efforts on decisions of ‘principle’, decisions which create jurisprudence.”⁵⁴ These he referred to as the “[...] leading judgments, judgments of principle, the judgments that contribute to the Europe-wide human rights jurisprudence, that help to build up the European ‘public order’”⁵⁵.

⁴⁹ Reflection Group on the Protection of the Reinforcement of the Human Rights Protection Mechanism, ‘Activity Report’, 15 June 2001, CDDH-GDR (2001) 010.

⁵⁰ Leach, *supra* note 23, 19.

⁵¹ Leach, *supra* note 23, 24.

⁵² Leach, *supra* note 23, 23-24.

⁵³ Luzius Wildhaber, ‘A Constitutional Future for the European Court of Human Rights?’, 23 *Human Rights Law Journal* (2002) 5-7, 161, 162.

⁵⁴ *Id.*, 164.

⁵⁵ *Id.*, 163.

Steven Greer has become the most articulate advocate for a fundamental change in the nature of the ECHR system. In a major article published in 2003⁵⁶, he identified three quintessentially constitutional questions for the ECHR usually described as principles of interpretation (for example, positive obligations, dynamic interpretation, subsidiarity, proportionality etc.):

“the ‘normative question’ of *what* a given Convention right means, including its relationship with other rights and with collective interests; the ‘institutional question’ of *which* institutions should be responsible for providing the answer; and the ‘adjudicative question’ of *how*, by which judicial method, the normative question should be addressed”.⁵⁷

The Court has, he argues, fallen short of a proper application of the Convention’s constitution first, because its judgments tend to be formulaic, “thin”, and in many cases are decisions on the facts, and second, because the interpretive principles are never put into any particular order. He concludes:

“[t]here is rarely any sense that the implications of deep constitutional values, in a state of dynamic tension with each other, are being carefully teased out, with the result that the jurisprudence has been deprived of the ‘constitutional authority’ it might otherwise possess and which it clearly requires.”⁵⁸

In his later book⁵⁹, he argued that, regrettably, none of the Strasbourg Committees contributing to the pre-Protocol 14 debate had adequately considered whether the Court should be concerned with delivering “individual” or “constitutional” justice or both. However, it is noteworthy that the CDDH considered the question, albeit inconclusively:

“The CDDH does not [...] believe that the choice is one between two views that seem radically opposed: one under which the Court would deliver ‘individual justice’; the other

⁵⁶ Steven Greer, ‘Constitutionalizing Adjudication Under the European Convention on Human Rights’, 23 *Oxford Journal of Legal Studies* (2003) 3, 405-433 [Greer, 2003].

⁵⁷ *Id.*, 407.

⁵⁸ *Id.*, 407.

⁵⁹ Greer, 2006, *supra* note 13.

under which the Court would deliver ‘quasi-constitutional justice’. Both functions are legitimate functions for a European Court of Human Rights, and the proposals set out in this report seek to reconcile the two.”⁶⁰

Greer characterised the opposing positions as follows. The desire for “individual justice” he described as

“[...] the attempt [...] to ensure that every genuine victim of a violation receives a judgment in their favour from the Court however slight the injury, whatever the bureaucratic cost, whether or not compensation is awarded, and whatever the likely impact of the judgment on the conduct or practice in question...”⁶¹

This is of course rather a caricature!

Greer gave “constitutional justice” a rather more sympathetic description:

“[It is] the attempt by the Convention system to ensure that cases are both selected and adjudicated by the Court in a manner which contributes most effectively to the identification, condemnation and resolution of violations, particularly those which are serious for the applicant, for the respondent state (because, for example, they are built into the structure or modus operandi of its public institutions), or for Europe as a whole (because, for example, they may be prevalent in more than one state).”⁶²

Greer made the highly salient point that if in 2005 the Court’s capacity for judgment on the merits was 1,039 cases (the figure for 2008 was 1,880 [compared with 1,735 in 2007 – an increase of 8% in the year⁶³, not much of an increase in reality]) and the population of the Council’s 47 states is some 811 million people, then “any given citizen of a Council of Europe state has

⁶⁰ CDDH, *supra* note 30, para. 11.

⁶¹ Greer, 2006, *supra* note 13, 166.

⁶² Greer, 2006, *supra* note 13, 166-167.

⁶³ European Court of Human Rights, *supra* note 19.

[...] about one in a million chance of having their complaint adjudicated [...]”⁶⁴

He was also critical of the position of Amnesty International and the other NGOs. In particular, Amnesty asserted that individuals have a right “to receive a binding determination from the European Court of Human Rights of whether the facts presented constitute a violation [...]”.⁶⁵ Greer points out, quite correctly, that the rights in question are to petition the Court and to receive a response. But, of course, only those whose cases are admissible, a tiny fraction of those who apply, have the right to a determination.⁶⁶ Greer then surveyed the practice of the European Court of Justice, with its system of preliminary rulings, and the US Supreme Court, and the German Federal Constitutional Court, both of which have a wide discretion as to which cases to hear.⁶⁷ But despite his urgent desire to enhance the constitutional mission of the Court, his conclusion was not so radical:

“In spite of its weaknesses it would be a mistake to terminate the individual applications process because it would be difficult to find a potentially more effective replacement and because, suitably altered, it may still be capable of facilitating the delivery of constitutional justice. However, individual applications should be selected for adjudication by the Court more because of their constitutional significance for the respondent state and for Europe as a whole, and less because of their implications for individual applicants.”⁶⁸

He was less forthcoming as to how, in addition to or in place of Protocol No. 14, this might be achieved. And, of course, he was writing in 2006, in the belief that Protocol No. 14 would be ratified.

Lucius Caflisch, himself a judge of the Court, takes an even more pessimistic view: “Protocol No. 14 will bring some, but insufficient, relief. For this reason, a Protocol No. 15 will be necessary, and work on it has already begun. Accordingly, there will have to be, after the reform of 1998

⁶⁴ Greer, 2006, *supra* note 13, 170.

⁶⁵ Amnesty International, *supra* note 32, para. 5.

⁶⁶ Greer, 2006, *supra* note 13, 173.

⁶⁷ Greer, 2006, *supra* note 13, 176-189.

⁶⁸ Greer, 2006, *supra* note 13, 322.

and the ‘reform of the reform’ of 2004, a ‘reform of the reform of the reform’.’⁶⁹

F. Continuing Tension Between Russia and the Council of Europe

In addition to the matters discussed above, a further restructuring of the reform of 2004 appeared to the CoE to be necessary because of Russia’s continuing failure to ratify Protocol No. 14.

On Wednesday 20 December 2006, the Russian State Duma (lower house of parliament) voted to refuse ratification of Protocol No. 14 to the ECHR, despite the fact that Russia had promised to ratify, and the draft law on ratification had been sent by the government. The debate indicated why the majority of the Duma voted against ratification⁷⁰.

The debate in the State Duma and media reactions showed that the refusal to ratify Protocol No. 14 was not based on a critique of the reforms themselves, but were a response to perceived discrimination against Russia.⁷¹

Russia poses an ever increasing problem for the Strasbourg Court. It has in recent years been losing some high-profile cases in the Court⁷².

In *Aleksanyan v. Russia*⁷³ the applicant, who was held in pre-trial detention, was seriously ill with AIDS. The Court drew attention to the fact that it had

“[...] indicated to the Government two interim measures⁷⁴ [...] on 27 November 2007, and then confirmed in December 2007

⁶⁹ L. Cafilich, ‘The Reform of the European Court of Human Rights: Protocol No.14 and Beyond’, 6 *Human Rights Law Review* (2006) 2, 403, 415.

⁷⁰ For further details on the Duma’s vote see Bill Bowring, ‘Russia and Human Rights: Incompatible Opposites?’, 1 *Goettingen Journal of International Law* (2009) 2, 257, 274.

⁷¹ “Duma Gives It to the European Court”, available at http://www.kommersant.com/p732043/r_500/State_Duma_European_Court/ (last visited 26 August 2010).

⁷² For an overview of judgments of 2004 and 2005 see Bowring, *supra* note 70, 273.

⁷³ *Aleksanyan v. Russia*, ECHR, Application no. 46468/06, Judgment of 22 December 2008, final on 5 June 2009 following rejection of Russia’s request for a hearing by the Grand Chamber.

⁷⁴ Following the case of *Mamatkulov and Askarov v. Turkey*, ECHR (GC), Application nos 46827/99 and 46951/99, performance of such interim measures is obligatory.

and January 2008. The Court, in view of the critical state of the applicant's health, invited the Government to transfer him to a specialist medical institution. However, it was not until 8 February that the applicant was transferred to Hospital no. 60. [...] What is clear is that for over two months the Government continuously refused to implement the interim measure, thus putting the applicant's health and even life in danger. The Government did not suggest that the measure indicated under Rule 39 was practically unfeasible; on the contrary, the applicant's subsequent transfer to Hospital no. 60 shows that this measure was relatively easy to implement. In the circumstances, the Court considers that the non-implementation of the measure is fully attributable to the authorities' reluctance to cooperate with the Court."⁷⁵

A further interim measure was indicated against Russia:

"Secondly, the Court notes that the Government did not comply with the second interim measures indicated by the Court on 21 December 2007. Namely, they did not allow the applicant's examination by a mixed medical commission which would include doctors of his choice ... Despite the applicant's attempt to form such a team, the Government refused to cooperate with him in this respect."⁷⁶

In the circumstances, the Court held that the Russian Government had failed to honour its commitments under Article 34 of the Convention ("The High Contracting Parties undertake not to hinder in any way the effective exercise of [the right of petition]").

Moreover, Russia is now making a major contribution to the crisis of the Court. This can be shown by a comparison between 2006 and 2008. In 2006, 10,569 (out of a total of 50,500) complaints were made against Russia, of which 380 were referred to the Russian government, and 151 were found to be admissible. There were 102 judgments against Russia (out of 1,498 against all CoE states). In 2008 there were 269 judgments against Russia, and 825 cases were communicated to the government.⁷⁷ By the end

⁷⁵ *Aleksanyan v. Russia*, ECHR, Application no. 46468/06, para. 230.

⁷⁶ *Id.*, para. 231.

⁷⁷ European Court of Human Rights, *supra* note 19.

of 2006, of 89,887 cases pending before the Court, about 20% concerned Russia, 12% Romania and 10% Turkey.⁷⁸ In 2008 Russia was again the leader, with 27,250 pending before a judicial formation, 28.0% of the total.⁷⁹

Consequently, Russia has been the subject of continuing criticism from the CoE.

On 26 May 2008, PACE published the latest in a series of important reports by the Cypriot parliamentarian Christos Pourgourides. The report, "Implementation of Judgments of the European Court Of Human Rights"⁸⁰, was prepared for the Committee on Legal Affairs and Human Rights. Pourgourides regretted that the non-execution of the Strasbourg Court's case law remains a (major) problem with respect to 11 States Parties⁸¹ to the ECHR.

The following issues were highlighted with respect to Russia. First, he raised deficient judicial review over pre-trial detention, resulting in its excessive length and overcrowding of detention facilities. Here, Russia was seen to be taking determined steps following the *Kalashnikov* judgment (15 July 2002).⁸² Second, Pourgourides turned to the problem of chronic non-enforcement of domestic judicial decisions delivered against the state. Again, he was able to report a series of relevant measures, taken in close cooperation with the CoE. Third, violations of the ECHR in the Chechen Republic continue to cause concern, with the Russian authorities maintaining their refusal to allow access to investigation files.⁸³

These concerns were echoed by the Russian judge on the Strasbourg Court, Anatolii Kovler, at a meeting with the Russian Constitutional Court in St Petersburg on Friday 27 February 2009. Kovler reviewed the results

⁷⁸ European Court of Human Rights, 'Annual Survey of Activity for 2006' (2007) available at http://www.echr.coe.int/NR/ronlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf (last visited 26 August 2010).

⁷⁹ European Court of Human Rights, *supra* note 19.

⁸⁰ Committee on Legal Affairs and Human Rights, 'Implementation of Judgments of the European Court Of Human Rights', AS/Jur (2008) 24, declassified on 2 June 2008.

⁸¹ Bulgaria, Germany, Greece, Italy, Moldova, Poland, Romania, Russian Federation, Turkey, Ukraine, United Kingdom.

⁸² The author can confirm this. He acted as lead expert for the CoE in a seminar in June 2008 in Pskov, with leaders of the Russian penitentiary service (FSIN).

⁸³ See the judgments of the Court in the cases of *Bazorkina v. Russia*, ECHR (2006) (No. 69481/01), *Imakayeva v. Russia* (2006) (No.7615/02); Committee of Ministers' Memorandum CM/Inf/DH(2006)32 revised 2, § 15; PACE Resolution 1571 (2007) and Recommendation 1809 (2007) on member states' duty to co-operate with the European Court of Human Rights, Doc 11183 and Addendum.

for Russia before the ECtHR in 2008 (reported above) and asserted that if Russia within the next six months failed to resolve the “systemic problem”⁸⁴ of failure to execute court decisions, this could lead to termination of Russian membership in the CoE.

Kovler observed that 2008 had witnessed a “falling dynamic” and a “saturated market”⁸⁵ of complaints against Russia. In 2008 10,500 applicants had complained to the ECtHR, however the number of complaints found to be admissible had risen, while the number of judgments was a record (269 as mentioned above). The Court had issued 40 findings of non-effective investigation of crimes in Chechnya, and for the first time had found in more than 20 cases “the absence of effective remedies” for Russians in relation to wrongful use of detention as a pre-trial “measure of restraint”, and in relation to conditions in remand prisons (SIZOs). But the most glaring tendency of 2008 had been the lengthy non-execution of judgments of Russian courts and the absence of a mechanism for payment of damages by the government for unlawful actions of judges. Some 72% of judgments against Russia at the ECtHR concern this problem, and there are now more than 5,000 of them awaiting decisions. In September 2008 the Supreme Court, on the proposal of President Medvedev, had submitted to the State Duma a draft constitutional law to remedy this problem. But the draft law had been “cut to the roots” by bureaucrats.⁸⁶

The patience of the ECtHR had, said Kovler, been exhausted by the case *Burdov v. Russia No.2*.⁸⁷ In this case the applicant, a veteran of Chernobyl, complained of the non-payment of compensation owed to him as the result of judgments of the Russian courts and of the ECtHR.⁸⁸ In this repeat complaint the ECtHR not only ordered Russia to pay Mr Burdov 6,000 Euro, but also held that these violations “originated in a practice incompatible with the Convention which consists in the State’s recurrent failure to honour judgment debts and in respect of which aggrieved parties have no effective domestic remedy.” The Court also delivered what is in effect the first “pilot judgment” against Russia, and ordered that:

⁸⁴ A. Pushkarskaya, ‘Yevropeiskiy sud pozhalovalsya na Possiyu Konstitutsionnomu: Potrebovav ispolneniya sudebnikh resehenii’, No.36P (4091), at <http://www.kommersant.ru/doc.aspx?DocsID=1128309> (last visited 26 August 2010).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Application No. 33509/04.

⁸⁸ See *Burdov v. Russia*, ECHR (2002) No. 59498/00, Judgment of 7 May 2002.

“the respondent State must set up, within six months from the date on which the judgment becomes final [...], an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments in line with the Convention principles as established in the Court’s case-law; [...] the respondent State must grant such redress, within one year from the date on which the judgment becomes final, to all victims of non-payment or unreasonably delayed payment by State authorities of a judgment debt in their favour who lodged their applications with the Court before the delivery of the present judgment and whose applications were communicated to the Government.”⁸⁹

Kovler pointed out that this would, if implemented, enable the ECtHR to get rid of about one thousand cases. He added that Russia is a “front-runner” in failing to execute the judgments of the ECtHR itself and explained that the Committee of Ministers of the CoE will ensure execution of this and other judgments of the ECtHR, including the use of sanctions including resolutions and warnings, right up to the termination of Russia’s membership of the CoE: “This is our (the ECtHR’s) reply for Russia’s failure to ratify Protocol No. 14”⁹⁰. It was reported that Kovler had the full support and understanding of the justices of the Constitutional Court.⁹¹

The Russian government was in a quite different, more truculent, mood. On the same day, the Collegium of the Russian Ministry of Justice alleged that the Strasbourg Court was guilty of lack of objectivity and of bias in relation to Russia. The Russian Minister of Justice, Aleksandr Kononov and the Russian Representative (Agent) before the Strasbourg Court (and also a Deputy Minister of Justice) Georgii Matyushkin argued that a series of the Court’s decisions concerning Russia suffered from a lack of reasons. These included the decision of the admissibility of the YUKOS claim against Russia, for billions of dollars following the destruction of the company by the Kremlin, and the recognition of the British barrister Piers Gardner as representative of YUKOS. Mr Kononov also emphasised that recent decisions of the Courts raised doubts as to the “fairness and complete

⁸⁹ *Id.*, No. 6-7 of the Court’s rulings.

⁹⁰ A. Pushkarskaya, *supra* note 84.

⁹¹ *Id.*

objectivity of the Court”, since these decisions “remain incomprehensible for Russia”.⁹²

On 13 July 2009, Mr Matyushkin spoke at a press conference following a meeting between the Ministry of Justice and the Constitutional Court.⁹³ He stated that the ECtHR had transgressed the boundaries of its own competence in hearing cases concerning events in Chechnya. In his words the Court had allowed itself to be led by the illicit presumption that every person who “disappeared” in Chechnya had been murdered. Mr Matyushkin sought to assert that the fact of killing by the Russian government “should first of all be established according to Russian Law.” The answer to this suggestion is to be found in one of the series of Chechen cases⁹⁴, in which the Court held, as it has so often done:

“no explanation has been forthcoming from the Russian Government as to the circumstances of the deaths, nor has any ground of justification been relied on by them in respect of the use of lethal force by their agents. It is thus irrelevant in this respect whether the killings had occurred “with the knowledge or on the orders” of the federal authorities. Liability for the applicants' relatives' deaths is therefore attributable to the respondent State and there has been a violation of Article 2 in respect of the applicants' eleven relatives killed.”⁹⁵

It is evident that despite the very frank analysis of Judge Kovler, the Russian government authorities, as represented by the Ministry of Justice and its Deputy Minister, the Russian representative before the ECtHR, seemed determined to keep up the rhetorical offensive against the Court and the ECHR system as a whole.

There was a further complicating factor, connected with the YUKOS case against Russia at Strasbourg.

The YUKOS oil company, which was originally state owned, became the largest, most successful and most transparent oil company in Russia. In July 2003, a series of raids were carried out by Russian law enforcement agencies on YUKOS premises. On 25 October 2003 YUKOS' owner,

⁹² *Id.*

⁹³ <http://www.newsru.com/Russia/13jul2009/stras.html> (last visited 26 August 2010).

⁹⁴ *Musayev and others v. Russia, ECHR* (2007) Applications Nos. 57941/00, 58699/00 and 60403/00, Judgment of 26 July 2007.

⁹⁵ *Id.*, para. 155.

Mikhail Khodorkovsky was arrested. On 31 May 2005 Mr Khodorkovsky was convicted of serious offences of fraud and was sentenced to nine years imprisonment, later reduced to eight years. A second trial of him and his colleague Mr Lebedev is now under way in Moscow.

On 23 April 2004 YUKOS lodged its application to the European Court of Human Rights.⁹⁶ YUKOS complains of violations of Article 1 of Protocol 1 to the ECHR (right to property). In more detail, these complaints are:

- YUKOS had been deprived of its possessions and that these deprivations had not been in accordance with the law and had imposed a disproportionate burden on it.
- the tax liability and enforcement proceedings were a *de facto* disguised expropriation.
- the seizure of assets was disproportionate in that the authorities ordered YUKOS to pay, and at the same time froze its assets, worth considerably more than its then liability
- the time of merely a couple of days given to YUKOS for payment was absurdly short
- the sale of OAO Yuganskneftegaz was unlawful, conducted at a gross undervaluation through a plainly controlled auction, with the participation of a sham bidder, OOO Baykalfinansgrup.

On 29 January 2009 the Court held that YUKOS' application was partly admissible. Although the Court has yet to make its findings on the merits, this has been taken as an indication that YUKOS may win.

There has now been an oral hearing in this case. It took place before the Grand Chamber on 4 March 2010.⁹⁷ Initially, the hearing was to have taken place on 19 November 2009. However, on 20 October 2009 Russia announced the appointment of a new judge *ad hoc* to sit on the case, after the first person appointed, St Petersburg Professor Valerii Musin, recused himself as he had been made a director of Russian state-owned *Gazprom*. The new appointee was not even a professor, but a senior lecturer of the same university, Andrei Bushev, who had studied with President

⁹⁶ *OAO Neftyanaya kompaniya YUKOS v. Russia* Application No. 14902/04.

⁹⁷ See B. Bowring, 'The YUKOS Hearing at Strasbourg', EU-Russia Centre (22 March 2010) available at <http://www.eu-russiacentre.org/our-publications/column/yukos-hearing-strasbourg.html> (last visited 26 August 2010).

Medvedev.⁹⁸ Russia then sought and was granted a further adjournment until 14 January 2010, to enable the new judge to familiarise himself with the case file.

However, on 13 January 2010 the Court announced, at the last possible moment, yet another adjournment at the request of Russia, this time to 4 March 2010. The grounds for Russia's request were two-fold. Mr Bushev was said to be in ill-health; and the Russian Agent (Plenipotentiary) at Strasbourg, Georgii Matyushkin, was said to be obliged to return to Moscow as the State Duma were to vote, on 15 January, on ratification by Russia of Protocol No. 14 to the ECHR, on the reform of the Court – the last of the CoE's 47 member states to do so, following a very long delay of six years.⁹⁹ The Law on Ratification, signed by President Medvedev, was published in the official *Rossiiskaya Gazeta* on 8 February 2010.

There was intense speculation by informed Russian commentators that the continued delay was the result of an attempt by Russia to ratify Protocol No. 14 before any hearing, in the hope of obtaining from the Court a *quid pro quo*, in the form of a more favourable judgment.¹⁰⁰

The leading legal affairs journalist, Olga Pleshanova, reported these rumours, strongly denied by Russia, in the daily *Kommersant* on 14 January 2010, and also reported that on 18 December 2009 Mr Matyushkin had used a conference at the Russian Academy of Justice held to celebrate the 50th anniversary of the Strasbourg court, in order to launch a strong attack on the European Court of Human Rights. He spoke of contradictory decisions of the Court, in which it had first recognised the competence of an applicant company despite the objections of the respondent state, then done the opposite. Although he did not name the case, it was clear to all that he was referring precisely to the YUKOS case, and Russia's insistence that YUKOS should be represented by the liquidator, Mr Rebgun.

In late December 2009 President Medvedev presented to the State Duma a package of draft laws to reform the judicial system on the

⁹⁸ O. Pleshanova, 'Instead of a Professor a Senior Lecturer is sent to Strasbourg' *Kommersant* (20 October 2009) available at <http://www.kommersant.ru/doc.aspx?DocsID=1259106&ThemesID=217> (last visited 26 August 2010).

⁹⁹ O. Pleshanova, 'The protocol on delaying the YUKOS case', *Kommersant* (13 January 2010) available at <http://www.kommersant.ru/doc.aspx?DocsID=1302525&ThemesID=217> (last visited 26 August 2010).

¹⁰⁰ O. Pleshanova, 'Rules of the Game', *Kommersant* (14 January 2010) available at <http://www.kommersant.ru/doc.aspx?DocsID=1302900> (last visited 26 August 2010).

recommendations of the CoE, including the creation of courts of appeal.¹⁰¹ In Pleshanova's view, Russia hopes that the hearing on 4 March will take place against the background of unprecedented Russian compliance with the CoE's wishes.

G. Why Protocol No. 14bis?

The refusal of the Russian State Duma to ratify Protocol No. 14 finally gave rise to a considered response. At its 1054th meeting on 15-16 April 2009, the CoE's Committee of Ministers invited the Parliamentary Assembly to provide it with an opinion on draft Protocol No. 14bis to the European Convention on Human Rights, with the request that this be done during its part-session in April 2009, under the urgent procedure provided for in Rule 50 of the Rules of Procedure of the Assembly. On 27 April 2009, the Assembly referred the request of the Committee of Ministers for an opinion to the Committee on Legal Affairs and Human Rights for a report. Mr Klaas de Vries was appointed as Rapporteur. According to the Report of Mr de Vries, dated 28 April 2009,

“the case-processing capacity of the Court is likely to increase by 20 to 25% if two procedures envisaged in Protocol No. 14 were now to be put into effect, i.e., the single-judge formation (to deal with plainly inadmissible applications) and the new competences of the three-judge committee (clearly well-founded and repetitive applications deriving from structural or systemic defects).”¹⁰²

He could

“only deplore the State Duma's refusal to provide its assent, since December 2006, to the ratification of Protocol No. 14 by Russia. By so doing, the State Duma has, in effect, considerably aggravated the situation in which the Court has found itself, and has also deprived persons within the jurisdiction of the Russian

¹⁰¹ O. Pleshanova, 'The President has Proposed a Re-hanging of Signs', *Kommersant* (11 January 2010) available at <http://www.kommersant.ru/doc.aspx?DocsID=1301726> (last visited 26 August 2010).

¹⁰² De Vries, *supra* note 4.

Federation from benefiting from a streamlined case-processing procedure before the Court.”¹⁰³

The new proposal was for the adoption of an Additional Protocol. As opposed to Protocol No. 14, which is an “amending protocol” which must be ratified by all states parties in order to enter into force, Protocol No. 14*bis*¹⁰⁴ is to be an “additional protocol” which could enter into force after its ratification by a certain number of states parties, but not all of them. As explained in the Explanatory Memorandum, this additional protocol requires only three ratifications for it to come into force. The number of states is set at three only, in order to allow the protocol to enter into force as quickly as possible.

H. A New Mood in the Russian Elite?

On Tuesday 22 June 2010 there was a true sensation at the Parliamentary Assembly of the CoE. The Russian delegation joined a unanimous vote for a report and resolution condemning Russian policy in the North Caucasus. This is the first time such a resolution has been voted through without dissent in the 14 years of Russia’s membership on the CoE.¹⁰⁵ Tom Balmforth asked: “No one doubts this is a signal from the Kremlin, but deciphering it is another matter. Is it all just a PR smoke screen, or are there fresh political winds blowing in the Kremlin?”¹⁰⁶

There are a number of additional straws in the wind. On 25 March 2010 President Medvedev submitted a draft Federal Law “On compensation of citizens for violation of the right to a fair trial within reasonable time or the right to execution of a judgment within a reasonable time.” This law was designed to answer the demands of the ECtHR in *Burdov No.2* (above), and

¹⁰³ *Id.*, para.10.

¹⁰⁴ The text of Protocol No. 14*bis* and of the Explanatory Report are to be found at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC11864.htm> (last visited 26 August 2010).

¹⁰⁵ <http://www.newsru.com/world/22jun2010/pace.html> (last visited 26 August 2010); see also Vladimir Solovyov, ‘Sessiya dobroj voli’ (session of good will), *Kommersant* (22 June 2010) available at <http://kommersant.ru/doc.aspx?fromsearch=f840399e-3475-490a-bff5-678145ada9e6&docid=1390526> (last visited 26 August 2010).

¹⁰⁶ T. Balmforth, ‘Caucasian Consensus’ (26 August 2010) available at <http://www.russiaprofile.org/page.php?pageid=Politics&articleid=a1277395742> (last visited 27 August 2010).

entered into force on 4 May 2010. The courts have already started receiving applications.¹⁰⁷

And on 1 July 2010 the Federal Law of 2008 “On securing access to information on the activity of courts in the Russian Federation”¹⁰⁸ came into force. This law requires Russian courts at all levels to publish their judgments and decisions on the internet. The delay between promulgation and coming into force was intended to give the courts the time to acquire the necessary technical means and expertise.¹⁰⁹ As Anton Burkov points out: “This is an unusual step for a country where there is civil law such as Russia, where, until recently, the only judgments accessible to the public were decisions by the Constitutional Court and partial decisions by the supreme courts.”¹¹⁰

I. Conclusion

Steven Greer and Andrew Williams have recently commented that pursuit by the ECHR system of the individual justice model, “coupled with the ever-increasing case-load, threatens to bring the whole structure grinding to a terminal standstill.”¹¹¹ At the same time, they do not deny that

“[t]he ECtHR has effectively become the Constitutional Court for greater Europe, sitting at the apex of a single, trans-national, constitutional system, which links former communist states with the West, and the EU with non-members. The exercise of public power at every level of governance is formally constrained within this framework by a set of internationally justiciable, constitutional rights.”¹¹²

Greer’s own proposals for reform of the system arrive at a point on which all agree: the survival of the Court is dependent on a much more

¹⁰⁷ See Burkov (2010), *supra* note 2.

¹⁰⁸ No. 262-FZ of 22 December 2008.

¹⁰⁹ See <http://www.newsru.com/arch/russia/01jul2010/courtonline.html> (1 July 2010) (last visited 26 August 2010).

¹¹⁰ See Burkov (2010), *supra* note 2.

¹¹¹ Greer & Williams, *supra* note 12, 463.

¹¹² *Id.*, 470.

effective implementation of the Convention and its jurisprudence by member states in their own legal systems. As Patricia Egli points out:¹¹³

“However, in accordance with the principle of subsidiarity, any reform of the Convention aimed at guaranteeing the long-term effectiveness of the Court must be accompanied by effective measures on the national level. Therefore, at its 114th session in May 2004, the Committee of Ministers of the Council of Europe adopted three recommendations addressed to the member states concerning, respectively, university education and professional training;¹¹⁴ the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention;¹¹⁵ and the improvement of domestic remedies.¹¹⁶”

This is also the “embeddedness” of the ECHR system in domestic law about which Lawrence Helfer has written.¹¹⁷

In the opinion of this author, the construction of this impressive system would have been impossible without Russian membership of the ECHR system since 1998. It is not only the great irony of history, that Russia is now central to the system originally designed to counter the USSR; it is a great achievement for the system itself, in which Russia is still firmly accommodated even after 10 stormy years. Moreover, membership of the system has been of the greatest importance for Russia itself, enabling it to restore the great legal reforms of Tsar Aleksandr II in 1864, and to firmly

¹¹³ P. Egli, ‘Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?’, *17 Journal of Transnational Law & Policy* (2007) 1, 1, 32.

¹¹⁴ See Committee of Ministers, Recommendation Rec (2004) 4 on the European Convention on Human Rights in University Education and Professional Training (May 12, 2004), available at <https://wcd.coe.int/ViewDoc.jsp?id=743277&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> (last visited 26 August 2010).

¹¹⁵ See Committee of Ministers, Recommendation Rec (2004) 5 on the Verification of the Compatibility of Draft Laws, Existing Laws and Administrative Practice with the Standards Laid Down in the European Convention on Human Rights (May 12, 2004), available at <https://wcd.coe.int/ViewDoc.jsp?id=743297> (last visited 26 August 2010).

¹¹⁶ See Committee of Ministers, Recommendation Rec (2004) 6 on the Improvement of Domestic Remedies (May 12, 2004), available at <https://wcd.coe.int/ViewDoc.jsp?id=743317> (last visited 26 August 2010).

¹¹⁷ Helfer, *supra* note 20, 159.

position Russian legislation if, not practice, back into the European tradition.¹¹⁸ A glance at the many textbooks and statutory commentaries published in Russia will show that the ECHR and its case law are a central part of the teaching and understanding of law in Russia, and the process of implementation has begun.¹¹⁹

¹¹⁸ See B. Bowring 'Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation', in E. Orucu (ed.), *Judicial Comparativism in Human Rights Cases* (2003), 159-182.

¹¹⁹ See A. Burkov, *The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996-2006* (2007).
Burkov has now completed his Ph.D. thesis, which will present a more complete and up to date analysis.

„Nothing but a road towards secession“?- The International Court of Justice’s Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo

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Abstract

On 22 July the International Court of Justice (ICJ) delivered its Advisory Opinion on Accordance with international law of the unilateral declaration of independence (UDI) in respect of Kosovo. There is a wide range of legal questions related to Kosovo's UDI. However, the ICJ decided by way of a narrow interpretation of the General Assembly's request to focus only on prohibitive rules. The Court came to the conclusion that the UDI did not violate international law. While this result is defensible, the way the Court got there is problematic. The Court missed its opportunity to provide legal guidance in fields of secession and self-determination. This article shall give a first overview of the Court's reasoning.

A. Introduction

On 10 June 1999, after NATO's military intervention in the Federal Republic of Yugoslavia between March 24 and June 10, the Security Council passed Resolution 1244 which placed Kosovo under the auspices of the United Nations Interim Administration Mission (UNMIK). The mandate of the UNMIK was to "facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiated process".¹ However, the political negotiations failed to determine Kosovo's final status and Kosovo unilaterally declared independence on 17 February 2008. This was rejected by Serbia while some 69 States recognized Kosovo's independence. On initiative of Serbia, the General Assembly requested on 8 October 2008 an Advisory Opinion by the International Court of Justice (ICJ) on the question of compatibility of Kosovo's declaration of independence with international law. The resolution in which this request is set forth² was adopted by the General Assembly on 8 October 2008 with 77 votes in favor, 6 votes against and 74 abstentions.³ The ICJ held oral proceedings between 1-11 December and issued its Opinion on 22

¹ *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, [Kosovo-Opinion] available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited 5. August 2010) [Kosovo-Opinion], at 99.

² GA Res. 63/3, 8 October 2008.

³ General Assembly 63rd session, 22nd Plenary Meeting, 8 October 2008, UN Doc A/63/PV.22, 10.

July 2010 stating that Kosovo's declaration of independence is not in violation of international law. Newspapers and politicians celebrating the Advisory Opinion as confirming the existence of the State of Kosovo, especially in the early days after the Court delivered its Opinion, was a predominant view.

There is a wide range of legal questions related to Kosovo's declaration of independence. This article shall give a first overview of what the Court decided with regard to the Unilateral Declaration of Independence (UDI)⁴ and in particular what it did not decide, considering also the statements of the States participating in the oral proceedings.

B. Jurisdiction

The jurisdiction of the International Court of Justice for giving Advisory Opinions on any legal question is based on Article 96 UNC⁵. The Court has discretion in accepting requests for Advisory Opinions⁶ and can refuse to do so if there are "compelling reasons"⁷. During the hearing in December 2009, States expressed their views on the question of jurisdiction. One point under discussion was the political nature of the dispute.⁸

According to Article 65 para 1 ICJ-Statute⁹, the Court's jurisdiction is confined to legal disputes. However, the argument which challenges the Court's jurisdiction on account of political considerations cannot be seen as a convincing one with good prospects of success. In the literature, the phrase of Article 65 ICJ-Statute is regarded to be without substantive

⁴ UDI, available at <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en> (last visited 26 August 2010).

⁵ *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. 16 [UNC].

⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, 136, 144, para. 13 [Wall].

⁷ *Judgments of the Administrative Tribunal of the ILO upon complaints made against the Unesco*, ICJ Reports 1956, 77, 86; Kosovo-Opinion, *supra* note 1, 14.

⁸ France argued that the matter of secessions or universal declarations of independence (UDI) is not a genuine legal question: Written Comments of France, para. 9, available at <http://www.icj-cij.org/docket/files/141/15607.pdf> (last visited 5 August 2010). Serbia pointed out that the question as to what extent international law regulates a certain matter, is in its core a legal question, Serbia, CR 2009/24, 36 (*Djerić*).

⁹ *Statute of the International Court of Justice*, 26 June, 1945, 33 U.N.T.S. 993.

meaning anymore.¹⁰ If one takes a look at the Court's jurisprudence, the ICJ itself rejected on various occasions challenges against its jurisdiction on the basis of political considerations.¹¹ Hence, unsurprisingly, the ICJ did not refuse to entertain the legal examination only because of the political nature of the dispute under discussion¹².

Another objection raised during proceedings was the question of how different legal spheres can be evaluated. According to some States, the ICJ should have declined the request because the declaration of independence remains within the constitutional or rather domestic sphere¹³; the Court would have to act like a Constitutional Court when deciding whether the UDI was in contravention of the Provisional Settlement and *ultra vires*.¹⁴ In addition, Kosovo argued that a finding of the Court may lack practical purpose: the UDI can be seen as manifestation of the *pouvoir constituant* which might be regulated neither by international law nor, by its very nature, by constitutional law.¹⁵ The Court concluded that it had jurisdiction

¹⁰ J. Frowein/K. Oellers-Frahm, 'Article 65', in: A. Zimmermann *et al.*, *The Statute of the International Court of Justice- A Commentary* (2006), 1408-1410, paras 21-27; E. Lauterpacht, *Aspects of the Administration of International Justice* (1991), 164; C. Tomuschat, 'Article 36', in: A. Zimmermann *et al.*, 1406 para. 12.

¹¹ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166, 172; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Provisional Measures, ICJ Reports 1979, 7, 15; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, 20; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, ICJ Reports 1984, 392, 435; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 6, 234; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 6, 155; see also *Western Sahara, Advisory Opinion*, ICJ Reports 1975, 12, 18; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151, 156; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16, 23.

¹² Kosovo-Opinion, *supra* note 1, 13, para. 27.

¹³ See Written Comments of the United States, at 39-42, available at <http://www.icj-cij.org/docket/files/141/15640.pdf> (last visited 26 August 2010); Written Comments of the United Kingdom, para. 32, available at <http://www.icj-cij.org/docket/files/141/15638.pdf> (last visited 26 August 2010); Written Comments of the Netherlands, para. 2.3, available at <http://www.icj-cij.org/docket/files/141/15652.pdf> (last visited 26 August 2010).

¹⁴ Albania, CR 2009/26, 11 (*Frowein*).

¹⁵ *Id.*; Kosovo, CR 2009/25, 63 (*Murphy*).

without addressing these concerns at this point of proceedings.¹⁶ However, in a further elaboration on the matter, the Court stated that the UNMIK-system derives its binding force from Resolution 1244 and thus from international law.¹⁷

Notwithstanding, the involvement of the Security Council may offer compelling reasons, which could have led the Court to decline the request for its Advisory Opinion. In the end, the Court came to the conclusion that it should not use its discretion to reject the request,¹⁸ but this was not beyond question. The statements of several States¹⁹, four judges²⁰ and the Advisory Opinion itself with its twenty paragraphs on the matter²¹ show that the Court and the States participating in the proceedings took this issue seriously.

Again, the Court denied²² the Article-12-argument²³, according to which the General Assembly may be hindered in requesting an Advisory Opinion when the Security Council is seized of the matter.²⁴ To prove the

¹⁶ Kosovo-Opinion, *supra* note 1, 13, para. 28.

¹⁷ *Id.*, 32-34, paras 88-93.

¹⁸ *Id.*, 19, para. 48.

¹⁹ For the position that the Court has no jurisdiction or at least there are compelling reasons to decline the request: Albania written statement, 25-37, available at <http://www.icj-cij.org/docket/files/141/15618.pdf> (last visited 5 August 2010); Czech Republic, Written Statement, 6, available at <http://www.icj-cij.org/docket/files/141/15605.pdf> (last visited 26 August 2010); France, Written Statement, 15-27, available at <http://www.icj-cij.org/docket/files/141/15607.pdf> (last visited 5 August 2010); Ireland, Written Statement, 2-3, available at <http://www.icj-cij.org/docket/files/141/15662.pdf> (last visited 26 August 2010); Maldives, Written Statement, available at <http://www.icj-cij.org/docket/files/141/15670.pdf> (last visited 5 August 2010); the USA submitted that there are good reasons why the Court should decline the request, Written Statement, 45, available at <http://www.icj-cij.org/docket/files/141/15640.pdf> (last visited 26 August 2010).

²⁰ See Kosovo-Opinion, *supra* note 1, Declaration of Judge Tomka, 1-2, paras 2-9, available at <http://www.icj-cij.org/docket/files/141/15989.pdf> (last visited 26 August 2010); *id.*, Separate Opinion of Judge Keith, 2, para. 6, available at <http://www.icj-cij.org/docket/files/141/15995.pdf> (last visited 26 August 2010); *Id.*, Dissenting Opinion of Judge Bennouna, 1, para. 3, available at <http://www.icj-cij.org/docket/files/141/15999.pdf> (last visited 5 August 2010); *Id.*, Dissenting Opinion of Judge Skotnikov, paras 4-7, available at <http://www.icj-cij.org/docket/files/141/16001.pdf> (last visited 26 August 2010).

²¹ Kosovo-Opinion, *supra* note 1, 13-19, paras 29-48.

²² The Court came to the same conclusion in its Wall-Opinion, *supra* note 6, 150, para. 28.

²³ Kosovo-Opinion, *supra* note 1, at 12-13, paras 24-28.

²⁴ Wall-Opinion, *supra* note 6, 148, paras 24-26.

General Assembly's interest, the Court simply stated that, prior to 1999, the General Assembly issued numerous resolutions with regard to Kosovo²⁵.

Nevertheless, it seems questionable whether one can compare the Kosovo-situation with the circumstances in the Wall-Opinion, bearing in mind that the Security Council was not only seized or involved in some way but also did set up the constitutional framework and ultimately administered the territory. The Court's refusal to exercise its discretion to reject the request evoked much criticism among the judges.²⁶ According to Judge Tomka and Judge Keith, under the given circumstances, only the Security Council should have requested the Advisory Opinion.²⁷ Judge Bennouna pointed out that the Security Council established, by virtue of Resolution 1244, an interim administration in Kosovo and had initiated "a process for bringing it to the end"²⁸. He concluded that an assessment of the UDI fell alone within the competence of the Security Council.²⁹ Judge Keith emphasized that the Security Council set up the Constitutional Framework and should therefore be considered as a central actor, whereas the General Assembly would have no sufficient interest in the legal question put before the Court.³⁰ These objections are based on the concern about the structure of the United Nations, in particular about the system of collective security which is regarded as primarily falling within the competence of the Security Council.³¹ The Court's reasoning described above did not live up to these objections. On account of the strong involvement of the Security Council under Chapter VII UNC, it may indeed be doubtful whether the ICJ should have interfered.

The relationship between the Security Council and the ICJ is, due to the lack of an explicit provision similar to Article 12, open to discussion.³²

²⁵ Kosovo-Opinion, *supra* note 1, 18, paras 45-46.

²⁶ See also Judge Tomka, Separate Opinion Judge Keith, Judge Bennouna, Dissenting Judge Skotnikov (all *supra* note 20).

²⁷ See Tomka, *supra* note 20.

²⁸ Bennouna, *supra* note 20, 3, para. 12.

²⁹ *Id.*, para. 13.

³⁰ See Keith, *supra* note 20.

³¹ Geiger, 'Art. 23' in: Simma (ed.): *The Charter of the United Nations - A Commentary*, 2nd ed. (2002), 437, para. 1.

³² For an overview: D. Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?', 46 *International & Comparative Law Quarterly* (1997) 2, 309-343 ; J. Alvarez, 'Judging the Security Council', 90 *American Journal of International Law* (1996), 1-39; T. Franck, 'The "Powers of Appreciation": Who is the ultimate Guardian of UN-Legality?', 86 *American Journal of International Law* (1992), 519-

The Security Council has the primary responsibility for the maintenance of peace and security, but this competence is not exclusive and does not preclude the International Court of Justice, as principal judicial body of the United Nations, from exercising its judicial function: “Both organs can [...] perform their separate but complementary functions with respect to the same events”.³² Furthermore, the case at hand is not one comparable to the Lockerbie-situation³³ in which a judicial review of an act by the Security Council appeared necessary. The Court was only requested to deliver a legal assessment of the UDI, which undoubtedly falls within its competence as primary judicial organ of the United Nations. A further point is also of relevance: the powers of the Security Council derive from its conception as an organ which was supposed to act quickly in case of imminent danger.³⁴ It is doubtful whether the drafters of the UN Charter envisioned the Security Council to take long-range actions such as the administration of a whole territory.³⁵ It can be argued that in such cases, other organs of the United Nations should not be excluded.³⁶

523; B. Martenczuk, ‘The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie’, 10 *The European Journal of International Law* (1999) 3, 517-547.

³² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 392, 433-434, para. 93.

³³ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident in Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, 9.

³⁴ N. Krisch, *Selbstverteidigung und kollektive Sicherheit* (2001), 45, cites a statement of the United States of America during the San Francisco Conference: “It is our view that the people of the world wish to establish a Security Council, that is, a policeman who will say, when anyone starts to fight, ‘stop fighting’. Period. And then it will say, when anyone is already to begin to fight, ‘you must not fight’. Period. That is the function of a police man, and it must be just that short and that abrupt”, UNCIO VI, 29.

³⁵ However, after the end of the Gulf War, the Security Council has been increasingly involved in the administration of territories, cf. A. Paulus, ‘Article 29’, in: Simma, *supra* note 30, 539, 553; cf. also J. Frowein & N. Krisch, ‘Introduction’, *id.*, 701, 709.

³⁶ Some scholars tend to restrict the Security Council’s powers due to its broader operation range, see N. Krisch, *supra* note 34, 255-261; C. Tomuschat, ‘Die Europäische Union und ihre völkerrechtliche Bindung’, 34 *Europäische Grundrechtezeitschrift* (2007), 1 (2); A. Bianchi, ‘Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion’, 17 *The European Journal of International Law* (2007), 881, 887.

Against this background, the Court correctly found no compelling reasons to decline the request.³⁸ The reasoning of the Court however is less convincing. It would have been preferable for the Court to go more in depth with regard to the objections to the exercise of jurisdiction.

C. Scope of the Question

The question which was put before the Court reads: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”³⁹

Among the States which appeared before the Court there was disagreement whether the question has to be widely interpreted⁴⁰ (including questions of statehood of Kosovo) or rather narrowly⁴¹, focusing on the UDI. Kosovo finally succeeded in providing the key argument to the Court: “No rule of general international law prohibits the declaration of independence of 17 February 2008 made on behalf of the people of Kosovo by their democratically elected representatives. The declaration is therefore ‘in accordance with international law’”.⁴²

The ICJ set up a decisive framework for its course of action by its interpretation of the question. According to the ICJ, the question was sufficiently clear and did not need to be re-formulated; possible legal consequences of the UDI fell outside the scope of the General Assembly’s request. However, the Court did not consider the wording of the General Assembly as a final determination.⁴³ The Court emphasized that it must be free to decide for itself whether the UDI was promulgated by Provisional Institutions of the Self-Government or by other actors. This was criticized in

³⁸ Kosovo-Opinion, *supra* note 1, 19, para. 48.

³⁹ GA Res. 63/3, 8 October 2008.

⁴⁰ For instance: Spain CR 2009/30 (translation), 4-5 (*Escobar Hernández*).

⁴¹ For instance: USA, CR 2009/30, 38 (*Koh*); Austria, CR 2009/27, 6 (*Tichy*); Croatia, CR 2009/29, 52 (*Metelko-Zgombić*); Jordan, CR 2009/31, 27 (*Zeid Raad Zeid Al Hussein*); Burundi, CR 2009/28 (translation), 26 (*d’Aspremont*); Germany, Written Statement, available at <http://www.icj-cij.org/docket/files/141/15624.pdf> (last visited 5 August 2010), 6; Netherlands, Written statement, available at <http://www.icj-cij.org/docket/files/141/15652.pdf> (last visited 5 August 2010), para. 2.1.

⁴² Kosovo, CR 2009/25 (translation), 28 (*Müller*); the Court’s wording reads: “[T]he Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law”, Kosovo-Opinion, *supra* note 1, 32, para. 84.

⁴³ *Id.*, 20, para. 52.

strong terms by Judge Koroma in his dissenting opinion. According to Koroma, the Court does not have the power to reformulate the question implicitly or explicitly to such an extent that it would answer a question about an entity other than the Provisional Institutions of Self-Government of Kosovo. He emphasized that the General Assembly clearly views the unilateral declaration of independence as having been made by the Provisional Institutions of Self-Government of Kosovo.⁴⁴

It is interesting to note in this context that the initial request of Serbia enshrined in the draft resolution asked “whether the 17 February 2008 unilateral declaration of independence of Kosovo is in accordance with international law”. The final wording of the request referred to the “Provisional institutions of Self-Government of Kosovo”. This would reinforce Koroma’s argument that the General Assembly referred in its request to the Self-Government of Kosovo and not to Kosovo’s “democratically elected representatives” without the auspices of their official capacity.

Paragraph 56 of the judgment is essential for the Court’s reasoning and for the legal framework applicable. The ICJ concluded that the General Assembly consciously decided not to ask for the existence of a right to secession.

“It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act such as a unilateral declaration of independence not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.”⁴⁵

The Court took a very narrow view of the question which allowed it not to get involved with highly disputed legal questions, such as the

⁴⁴ Koroma, *supra* note 20, 2, para. 3.

⁴⁵ Kosovo-Opinion, *supra* note 1, 21, para. 56.

statehood of Kosovo, the right of self-determination, and in particular with the issue of so-called remedial secession. Judge Simma issued a separate declaration expressing his “concerns about [the opinion’s] unnecessarily limited — and potentially misleading — analysis”.⁴⁶ By deciding that everything is allowed unless it is prohibited, the Court reverted, according to Simma, to the Lotus-Principle⁴⁷, falling back to “nineteenth-century positivism”⁴⁸, adapting an “anachronistic, extremely consensualist vision of international law”⁴⁹ while the ideas of the contemporary international legal order render “the Court’s reasoning on this point [...] obsolete”⁵⁰.

As to Lotus, of course, a distinction can be made between “legal” and “not illegal”, as Judge Simma emphasized, but how much internal differentiation does international law really admit? If the Court had said that the declaration of independence is tolerated, this would have led to the same outcome. If the Court had argued that the non-prohibition of the declaration of independence is “desirable”⁵¹ under international law, this would beg further questions: what is a desirable non-prohibition? Desirable from which standpoint? Why is the non-prohibition desirable? Because it lacks normative value? How much value judgment has to be involved in identifying a desirable non-prohibition? Thus, the only added normative value would have been to state the circumstances under which international law warrants the secession of certain territories as a consequence of self-determination.

Simma does not follow the Court’s majority in regard of the question’s scope. The request, he argues, does not ask for the identification of the existence of a prohibitive or permissive rule under international law, but the term “in accordance with” indicates a broader scope.⁵² This objection shows that the wording of the question does not provide a sufficient argument only in favor of a limited interpretation. On the contrary, “in accordance with” rather asks for the relationship of the UDI to international law which includes also the application of permissive rules. Against this background, the narrow view in the Court’s opinion is

⁴⁶ See Kosovo-Opinion, *supra* note 1, Declaration of Judge Simma, available at <http://www.icj-cij.org/docket/files/141/15993.pdf> (last visited 5 August 2010).

⁴⁷ *Lotus Case (France v Turkey)*, Judgment 1927, PCIJ (Ser A) No 10.

⁴⁸ Simma, *supra* note 46, para. 8.

⁴⁹ *Id.*, para. 3.

⁵⁰ *Id.*

⁵¹ *Id.*, para. 8.

⁵² *Id.*, para. 4.

regrettable, since the Court misses the opportunity to address relevant questions that had been raised by the States in the written and oral proceedings, and to use the Advisory Opinion for defining its view of the state of the law. However, many States argued to read the question in a narrow way or adopted the view that the UDI is not open to legal assessment⁵³. Moreover, the question found the support of less than 40 per cent of the General Assembly.⁵⁴ In the light of these circumstances, one may at least assume that the way the Court proceeded found support of many States or that a question directed at legal consequences of the UDI would possibly have failed to be adopted by the General Assembly.⁵⁵

D. Legal Assessment

Some States expressed the view that a UDI is a fact which cannot be legally assessed and which therefore cannot be valid or invalid.⁵⁶ The Court however scrutinized whether the UDI violated principles of general

⁵³ See e.g. Burundi, CR 2009/28 (translation), 27 (*d'Aspremont*).

⁵⁴ See Jordan, CR 2009/31, 27 (*Zeid Raad Zeid Al Hussein*).

⁵⁵ In the words of Norway: "In the vote 74 Member States abstained, 35 refrained from participating, and six voted against the draft resolution. In other words, 115 Member States of the United Nations did not support the resolution", CR 2009/31 44 (*Fife*).

⁵⁶ For the fact-thesis: United Kingdom argued that "[a] declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community." CR 2009/32, 47, 54 (*Crawford*); USA, CR 2009/30, 29 (*Koh*); Finland, CR 2009/30, 54 (*Kaukoranta*) and 57 (*Koskenniemi*); Croatia, CR 2009/29, 65 (*Metelko-Zgombić*); Denmark, CR 2009/29, 67 (*Winkler*); France, CR 2009/31 (translation), 6, 9 (*Belliard*); Jordan, CR 2009/31, 38 (*Al Hussein*); Norway, CR 2009/31, 46 (*Fife*); Albania, CR 2009/32, 12 (*Frowein*); Germany, CR 2009/26, 27 (*Wasum-Rainer*); Bulgaria, CR 2009/28, 24 (*Dimitroff*): "Only in rare circumstances has the Security Council or the General Assembly expressed a negative view of declarations of independence, namely, where such declarations were part of an overall scheme that violated fundamental norms of international law", at 68. Following States denied this fact-thesis and argued that UDIs are legally accessible: Spain: „from the legal point of view it is impossible to accept that international law can remain 'neutral' in respect of an act", CR 2009/30, 15 (*Escobar Hernández*); Russia, CR 2009/30, 41 (*Gevorgian*); Bolivia did not comment directly on the issue but stressed the importance of the principle of territorial integrity, CR 2009/28, 12 (*Calzadilla Sarmiento*); China, CR 2009/29, 34 (*Xu*); Cyprus, CR 2009/29, 38 (*Lowe*); Venezuela, CR 2009/33, 9 (*Fleming*); Vietnam, CR 2009/33, 18 (*Nguyen Anh*); Romania, CR 2009/32, 20, 22 (*Aurescu*).

international law (I) or Security Council Resolution 1244 (II) and therefore did not agree with the argument that UDIs are not legally accessible at all.⁵⁷

I. General International Law

1. Application of Prohibitive Rules

While discussing the applicability of prohibitive rules, the majority of the bench took note that the Security Council condemned declarations of independence which are connected to “unlawful use of force or egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)”⁵⁸. In addition to that, some States argued that the declaration of independence violated the principle of territorial integrity. According to Serbia, the only interpretation which lives up to the development of international law is to consider not only States to be bound by the principle of territorial integrity but non-State actors as well.⁵⁹ In the proceedings no consensus emerged about the question whether the principle of territorial integrity is binding upon non-State-actors.⁶⁰ According to

⁵⁷ Kosovo-Opinion, *supra* note 1, 29, para. 78.

⁵⁸ *Id.*, 30, para. 81.

⁵⁹ Serbia, CR 2009/24, 65 (*Shaw*).

⁶⁰ The principle of territorial integrity binds non-State-Actors: Argentina, CR 2009/26, 38 (*Escobar Hernández*); Brazil: “The Unilateral Declaration of Independence of Kosovo sets aside two of the most precious imperatives of the current international order: the authority of the Security Council of the United Nations, according to the Charter of the United Nations, and the principle of territorial integrity.” CR 2009/28, 17 (*Medeiros*); China CR 2009/29, 33 (*Xu*); Spain CR 2009/30, 15 (translation) (*Escobar Hernández*); Serbia: “international practice now clearly regards non-State entities as direct subjects of international law”, CR 2009/24, 66 (*Shaw*); Romania, CR 2009/32, 20 (*Aurescu*); Venezuela, CR 2009/33, 6 (*Fleming*); Vietnam, CR 2009/33, 20 (*Nguyen Anh*). Cyprus did only state that Kosovo is not entitled to secession by way of self-determination, but did not comment on the question of non-state actors in international law, CR 2009/29, 47 (*Lowe*); Azerbaijan did not make a statement whether non-state actors are bound by the principle of territorial integrity, but stressed that this principle is of fundamental value for the states and that consequently secession has to be considered illegal under international law, CR 2009/27, 20 (*Mehdiyev*); Bolivia: “the principle of territorial integrity is the protection of an essential element of a State”, but did not address the question to what extent non-state-actors are bound, CR 2009/28, 11 (*Calzadilla Sarmiento*); following States argued that the principle of territorial integrity binds only states: Austria, CR 2009/27 (*Tichy*), 9); Bulgaria, CR 2009/28 25 (*Dimitroff*); USA, CR 2009/30, 30 (*Koh*); Finland: non-state-actors are only bound in fields of “human rights, economic relations and the

Serbia territorial changes are only valid when conducted in a peaceful way and with the consent of the State concerned.⁶⁰ Concerns were expressed that the opposite would entail “extremely severe consequences for the international legal order. It would mean that any province, district, county, or even the smallest hamlet from any corner of any State, is allowed by international law to declare independence and to obtain secession”.⁶¹

The Court took the view of Kosovo *et altera* and concluded that the principle of territorial integrity applies only to States.⁶² Although the Court adopted a standpoint shared by the majority of the States participating in the proceedings, it remains regrettable that the Court offers no further line of argumentation. If one considers the growing importance of non-State-actors in international relations, it could be asked whether non-State-actors, which have a certain degree of structure or organization, are bound by the principle of territorial integrity. By adopting such a view one would be in a position to differentiate between non-State-actors. For example, the non-State-actors who are partially subject of international law (the PLO and national liberation movements⁶³) and internationally recognized *de-facto* regimes⁶⁴

environment”, but not with regard to territorial integrity, CR 2009/30, 59 (*Koskenniemi*), whereas Finland conceded that territorial integrity may be considered as general value, however “it should be weighed against countervailing values, among them the right of oppressed people to seek self-determination including by way of independence” CR 2009/30, 60 (*Koskenniemi*); Albania, CR 2009/26, 15, 28 (*Frowein*): “[t]he inclusion of such an obligation in a Security Council resolution can also be seen – and this is our position – as establishing an obligation which otherwise would not exist”; France, CR 2009/31, 12 (*Belliard*); Jordan, CR 2009/31, 35 (*Al Hussein*); Norway, CR 2009/31, 48 (*Fife*); UK, CR 2009/32, 53 (*Crawford*); see also Randelzhofer, ‘Article 2(4)’ in Simma, *supra* note 30: the scope of Article 2 (4) includes only states (and *de facto*-regimes); E. Milano, ‘The Independence of Kosovo under International Law’ in: Wittich *et al.* (eds) *Kosovo-Staatsschulden-Notstand-EU-Reformvertrag-Humanitätsrecht* (2009), 21, 24: “The right to territorial integrity [...] is opposable, externally, to third states against actions aimed at changing the territorial configuration of the state, as well as, internally, to international subjects, such as peoples, insurgents, *de facto* independent entities that may acquire international legal personality due to effective control or international recognition in binding instruments (that being the case for Kosovo’s provisional authorities) and may seek to disrupt the territorial unity of a state”.

⁶⁰ Serbia, CR 2009/24, 71 (*Shaw*); see also Koroma, *supra* note 20, 2.

⁶¹ Romania, CR 2009/32, 20 (*Aurescu*).

⁶² Kosovo-Opinion, *supra* note 1, 30, para. 80.

⁶³ On this issue see M. Shaw, ‘The International Status of National Liberation Movements’, 5 *Liverpool Law Review* (1983) 1, 19-34.

can be regarded as addressees of the principle of territorial integrity. As the ICJ already stated in the *Reparation's Case*, the concept of international legal personality does not necessarily encompass the same range of rights and duties for all subjects of law.⁶⁵ Accordingly, in the present authors' view, the general question whether international law binds non-State actors lacks the necessary specificity. "Non-State-actors" is a too broad concept.⁶⁶ It is necessary to differentiate between non-State-entities and also within the category of "international law".⁶⁷

The principle of territorial integrity could indeed be applicable if the UDI can be attributed to States.⁶⁸ However, neither the participation of a State in the self-governing administration of Kosovo, the exercise of effective control over the territory during the provisional administration, nor the recognition by then 63 States of Kosovo's independence suffice for attributing the Declaration of Independence to them.⁶⁹

In the case under review, the Court largely left it to the political process to solve the Kosovo question. This may lead to the result that future secession movements are not regulated by law in the first place, but rather

⁶⁴ See J. Frowein, *Das de facto-Regime im Völkerrecht* (1968), 69, arguing that effective de facto-Regimes take an internationalized position and are consequently bound by certain provisions such as the prohibition on the use of force.

⁶⁵ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: ICJ Reports 1949, 174, 178: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community." This argument would fit well into the "Constitutional" approach which conceives of international law as a hierarchical legal system and does not exclude the non-state actors from its scope, see D. Thürer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State', in: R. Hofmann (ed.), *Non State Actors as New Subjects of International Law* (1999), 37, 51.

⁶⁶ A discussion of a wide range of issues related to the status of non-state actors in international law see in A. Bianchi (ed.), *Non-State Actors and International Law* (2009).

⁶⁷ It makes a difference whether one is examining international criminal law, general international law or international economic law. The question, under which circumstances which non-state-entities, as subjects of international law or simply entities participating in international life without recognition as full-fledged subjects of international law, are bound by which part or rules of international law, cannot be solved here but is subject to discussions without a completely satisfying solution in sight.

⁶⁸ See Burundi, CR 2009/28 (translation), 31 (*d'Aspremont*).

⁶⁹ *Id.*

are evaluated only on a factual basis.⁷¹ It may be asked whether this state of affairs serves the purpose of strengthening the rule of law in international relations or whether it contravenes such a purpose.

2. Discussion of Permissive Rules by the States

Due to the narrow reading of the question, the Court did not need to address the issue whether the right to self-determination or a so-called right to remedial secession confers a right to Kosovo to secede from Serbia.⁷² It is a missed opportunity to shed some light on self-determination which sometimes is called a “lex lata, lex obscura”⁷³.

The idea of the so-called remedial secession is that an organized segment of a population may be entitled to secede if it is persistently and systematically oppressed by a central government⁷⁴. Some scholars admit the existence of such a right⁷⁵, whereupon even advocates of remedial secession concede that the empirical basis for such an assertion is very thin.⁷⁶ Observers argue that, since 1945, the international community has been reluctant to accept unilateral secession of parts of independent States in situations where the secession is opposed by the government of that State.⁷⁷ A very brief overview of international practice reinforces this proposition.

The Albanian leadership of Kosovo declared independence already in October 1991, which was only recognized by Albania.⁷⁸

On 2 November 1991, Chechnya declared its independence from the Russian Federation. A military attempt in 1994 to suppress the secessionist

⁷¹ Judge Cançado Trindade criticized such approach, stressing that one has to distinguish between *Sein* and *Sollen*. Kosovo, *supra* note 1, Separate Opinion of Judge Cançado Trindade, para. 137, available at <http://www.icj-cij.org/docket/files/141/16003.pdf> (last visited 5 August 2010).

⁷² Kosovo, *supra* note 1, 32, para. 84.

⁷³ J. Crawford, ‘Right of Self-Determination’, in P. Alston: *People’s rights* (2001), 10.

⁷⁴ M. Weller, *Escaping the Self-Determination Trap* (2008), 59; see also Y. Dinstein, ‘Is there a right to secede?’, 90 *American Society of International Law Proceedings* (1996), 299.

⁷⁵ See e.g. K. Doehring, ‘Self Determination’, in Simma (ed.), *supra* note 31, para. 40.

⁷⁶ C. Tomuschat, ‘Secession and Self-Determination’, in M. Kohen (ed.): *Secession: International Law Perspectives* (2006), 42; see also J. Crawford, *The Creation of States in International Law* (2006), 417.

⁷⁷ J. Crawford, ‘State Practice in International Law in Relation to Secession’, 69 *British Yearbook of International Law* (1998), 92. A case of successful secession may be found in the separation of Bangladesh from Pakistan in 1971, Crawford, 95-96.

⁷⁸ J. Crawford, *supra* note 76, 408; M. Weller, *Contested Statehood* (2009), 268.

movement was defeated and finally ended in a cease-fire agreement in 1996. Chechnya was not accepted as a State by the international community thereafter. After Russia started a second major operation in 1999, States expressed the view that the conflict is of internal nature and reaffirmed the sovereignty and territorial integrity of Russia.⁷⁹

In the case of the Republika Srpska, the EU arbitration Commission stated that

“it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise”.⁸⁰

The “Independent International Fact-Finding Mission on the Conflict in Georgia” stated that

“international law does not recognise a right to unilaterally create a new state based on the principle of self-determination outside the colonial context and apartheid. An extraordinary acceptance to secede under extreme conditions such as genocide has so far not found general acceptance.”⁸¹

According to the African Commission on Human and People Rights, in the absence of concrete evidence of violations of human rights or of violations of democratic participation, the right to self-determination shall be exercised in a way compatible with the territorial integrity and sovereignty of the State.⁸²

The Canadian Supreme Court accepted in the Quebec Reference that remedial self-determination may exist in certain circumstances, namely “possibly where a ‘people’ is denied any meaningful exercise of its right to

⁷⁹ The British Government stated that the exercise of a right of self-determination has to respect the principle of territorial integrity, see J. Crawford, *id.*, 410.

⁸⁰ Conference on Yugoslavia, Arbitration Commission, Opinion No 2, 11 January 1992, 92 *International Law Reports* (1992), 167, 168.

⁸¹ Independent International Fact-Finding Mission on the Conflict in Georgia, Vol. I, 17, available at http://www.ceiig.ch/pdf/IIFMCG_Volume_I.pdf (last visited 5 August 2010).

⁸² Katangese Peoples’ Congress v. Zaire, African Comm. On Human and Peoples’ Rights, Comm. No 75/92 (1995), para. 6.

self-determination within the State of which it forms part”⁸³. At the same time, the Court emphasized that “it remains unclear whether [...] this proposition [on remedial secession] reflects an established international law standard”⁸⁴.

The ICJ could have used the Advisory Proceeding in order to provide for clarification. The States involved in the proceedings took different positions. Some denied both, the application of the right of self-determination⁸⁵ outside the colonial context, and the existence of remedial secession; some States recognized remedial secession in the present case, whereas others accepted the existence of remedial secession but declined that this right grants the population of Kosovo a right to secede under the given circumstances.⁸⁶ However, the States which appeared before the Court

⁸³ Reference Re Secession of Quebec 2 S.C.R. (1998) 217, printed in 115 *International Law Reports* (1999), 536.

⁸⁴ *Id.*, 587.

⁸⁵ Bolivia: “The principle of self-determination is restricted solely to the circumstances only to peoples under colonial rule and foreign occupation”, CR 2009/28, 11 (*Calzadilla Sarmiento*); China CR 2009/29, 34 (*Xu*); see also Burundi, CR 2009, 35 (translation) (*d’Aspremont*).

⁸⁶ In favor of such a right Finland: “In view of the violent history of the break-up of the SFRY and, in particular, the ethnic cleansing undertaken by or with the consent of Serbian authorities, as well as the deadlock in the international status negotiations thereafter, the people of Kosovo were entitled to constitute themselves as a State”, CR 2009/30, 64 (*Koskenniemi*); Jordan, CR 2009/31, 37 (*Al Hussein*); UK CR 2009/32, 54 (*Crawford*); Albania: “In essence, this argument says that even if the policies and events of the period from 1989 through 1999 were a violation of equal rights and self-determination, that all this should be set aside and that the present Serbian Government is ready to reinstate the autonomous status of the province within Serbia and that therefore there is no right for Kosovo to determine its future as an independent State [...] is an absurd and totally misconstrued reading of the right of self-determination”, CR 2009/26, 22 (*Frowein*); Germany, CR 2009/26, 30 (*Wasum-Rainer*); Netherlands: “The resort to external self-determination is a last resort and it is subject to conditions. [...] A right to external self-determination only arises in the event of a serious breach of either: the obligation to respect and promote the right to self-determination due to the absence of a government representing the whole people belonging to the territory, or the denial of fundamental human rights to a people; or – the obligation to refrain from any forcible action which deprives people of this right. [...]. [T]hese violations are at the root of our view that the people of Kosovo are, as a people, entitled to external self-determination”, CR 2009/32, 9, 14 (*Lijnzaad*). Following States argued that Kosovo - in case that a right of remedial secession exists - cannot invoke such a right: Russia: “For Kosovo to be able to rely on ‘remedial secession’ in 2008, it has to demonstrate that the situation had aggravated as compared to 1999”, CR 2009/30, 44 (*Gevorgian*); Romania, CR 2009/32, 26 (*Aurescu*): “In our

failed to establish consistent criteria for exercising remedial secession. Among those who in principle considered remedial secession lawful, it was unclear at which point in time human rights violations, which may entitle an entity to remedial secession, must exist. Is there a right to remedial secession only when the entity is subject to gross human rights violations at the time? Or would it be sufficient that these violations lie in the past and render it impossible for an entity to remain part of the oppressive State? If we accept the latter solution, we will have to prove that the process of reintegration really failed. In the case that 20 years or more pass between human rights violations and the secession and the violator State undertakes serious efforts in terms of providing meaningful political solutions while taking into account the interests of the victims, it does not seem very plausible to explain the fact of remedial secession only by relying on those past violations. However, such an assessment would be highly circumstance-dependent. In addition, it should also be asked whether it is necessary for the respective entity to be placed under international auspices, like Kosovo, to be in a position to successfully resort to remedial secession as the last possible means towards survival. Or is it sufficient to establish the fact of gross human rights violations and the fact of consistent and organized resistance taking place within a relatively short period of time, like it happened in Chechnya, to conclude that the non-State entity which is a victim of the State's oppressive machine has no other remedy to survive than the secession?

The case of Georgia indicates that secession is disfavored by the international community when there is no real international framework within which the conflicting parties undertake serious attempts to find a political solution respecting the territorial integrity of the State from which secession is sought.⁸⁶ It must be emphasized in this context that an

opinion, an analysis based solely on facts which occurred almost a decade before the critical date, in fundamentally different circumstances, represents a completely artificial construction which is not acceptable. Such a construction would contravene the general legal principle of *tempus regit actum*”, at 23, 25; Venezuela, CR 2009/33, 8 (*Fleming*).

Against such a right: Azerbaijan, CR 2009/27, 18, 40 (*Mehdiyev*); China, CR 2009/29, 35 (*Xu*); Cyprus, CR 2009/29, 47 (*Lowe*); Argentina, CR 2009/26, 41 (*Escobar Hernández*); According to Spain, even if on recognize such right, it would not be applicable since the human rights violations lie in the past before 1999, CR 2009/30 (translation), 12 (*Escobar Hernández*); Vietnam, CR 2009/33, 20 (*Nguyen Anh*).

⁸⁶ “It was principally Russia that had precluded the establishment of an agreement providing for the full inclusion of Abkhazia and South Ossetia within the Georgian political system. Georgia had offered detailed provisions on representation for both

international framework may confer some legitimacy but does not constitute sufficient criteria for triggering remedial secession.

As has been argued before the Court, an explicit recognition of secession as a remedy of last resort could deter States from violating human rights, and peoples from too readily seeking to avail themselves of this remedy.⁸⁷ Taking into account the controversies surrounding the concept of remedial secession, it would have been a difficult task for the Court to identify a proper threshold for triggering the application of remedial secession in international law.

II. Security Council Resolution 1244 (1999)

The Court then addressed the question whether the UDI is in conformity with Security Council Resolution 1244, and whether there is a violation of the constitutional framework based on it. In this regard, the following questions are most relevant: Is the Constitutional framework promulgated under Resolution 1244 to be considered as domestic law (which means: not in reach of the ICJ) or as international law? Does Resolution 1244 determine Kosovo's final status? Who are the authors of the UDI and are they bound by Resolution 1244? Does the UDI violate Resolution 1244? Does Resolution 1244 prohibit a secession of Kosovo?

1. Who are the Authors? Testing the *ultra vires* Argument

Serbia argued that the authors of the UDI acted in their capacity as part of the Provisional Self-Government of Kosovo and were therefore bound by Resolution 1244. This would also mean that they were not allowed to issue the UDI, since Resolution 1244 stressed that the territorial integrity of the Federal Republic of Yugoslavia must be respected.

The Legal office of UNMIK claimed, in a memorandum on the exercise of powers by the provisional authorities within the framework of Resolution 1244 in 2001, that it was not in the competence of the Assembly of Kosovo to adopt acts determinative of the province's final status. Accordingly, in such situation the Special Representative of the Secretary General (SRSG) would be obliged to block such an initiative.⁸⁸ Considering

territories by way of wide-ranging autonomy", M. Weller, *Contested Statehood*, (2009), 274.

⁸⁷ CR 2009/32, 16 (*Lijnzaad*).

⁸⁸ UNMIK Legal Office 25 May 2001, UNMIK/FR/0040/01, available at www.unmikonline.org/pub/features/fr040.html (last visited 5 August 2010).

this position, it becomes obvious why the question of the identity of the authors can be of decisive character. The statement of the year 2001 at least implies that Resolution 1244 excludes any unilateral attempt of the Assembly or other organs of the Provisional Institutions to issue a UDI.

The Court followed the argumentation of Kosovo that the authors did not see themselves as part of the provisional government and act therefore in a private capacity or respectively as “democratically-elected leaders”.⁹⁰

The question in which capacity the authors acted has been one of the most debated issues in the proceedings. Therefore one may have doubts whether the Court’s meager reasoning is fully convincing. It appears strange, or, as Judge Tomka calls it, as “a *post hoc* intellectual construct”⁹¹ that the representatives of the Self-Government Institutions and the authors of the UDI are partially the same persons, meeting in the official building of the Self-Government, but acting in a different capacity.⁹² As Serbia and other States pointed out, many of the States had considered (and welcomed) the UDI as a declaration issued by the Self-Government of Kosovo.⁹³ The impression prevails that this “intellectual construct” is a balancing act, which only serves the proceedings before the ICJ.

⁹⁰ Kosovo-Opinion, *supra* note 1, 37-38, paras 105-107.

⁹¹ See Tomka, *supra* note 20, para. 12.

⁹² Due to the concept of role-splitting (*dédoulement fonctionnel*) it is conceivable that actors act in different capacities. However, it may be doubtful whether this concept is applicable to actors whose role on the international level is in question. For the concept, see G Scelle, *Précis de droit des gens – Principes et systématique, Tome I: Introduction – Le milieu intersocial* (1932), 43; A. Cassese, ‘Remark’s on Scelle’s Theory of “Role Splitting” (*Dédoulement Fonctionnel*) in International Law’, 1 *European Journal of International Law* (1990), 210); on different aspects of the applicability, see P. De Sena & M. Vitucci, ‘The European Courts and the Security Council: Between *Dédoulement Fonctionnel* and Balancing of Values’, 20 *European Journal of International Law* (2009) 1, 193; G. Nolte & H. Aust, ‘Equivocal Helpers—Complicit States, Mixed Messages and International Law’, 58 *International and Comparative Law Quarterly* (2009) 1, 1, 28.

⁹³ See the Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/211 (28 March 2008) para. 3; Council of the European Union, Council Conclusions on Kosovo, 2851st External Relations Council Meeting, Brussels, 18 February 2008, available at: <http://www.auswaertigesamt.de/diplo/de/Europa/Suedosteuropa/Downloads-und-Dokumente/080218-Ratsschlussfolgerungen-Kosovo.pdf> (last visited 5 August 2010); for further references in regard to States which considered the Assembly of Kosovo as author of the UDI see Written Comments received within the time-limits fixed by the Court (17 July 2009) of Serbia, at 25, available at <http://www.icj-cij.org/docket/files/141/15686.pdf> (last visited 5 August 2010).

However, the question arises of whether this “construct” was really necessary. What would have happened if the Court found that the authors of the UDI acted *ultra vires* when issuing their declaration of independence? “The Declaration of Independence would have been *ultra vires* only in the same way that most declarations of independence are — as a contravention of the constitutional or other domestic law”, as Sean Murphy for Kosovo put it.⁹⁴ Furthermore, even if the Court would have reached the conclusion that the declaration has to be considered *ultra vires*, and that – contrary to Murphy – the constitutional framework is not only domestic law, it is highly questionable what the practical consequence would have been. The legal consequences of *ultra vires* acts are much debated⁹⁵; from the ICJ jurisprudence one may refer to the IMCO-Advisory Opinion,⁹⁶ where the Court concluded that the Committee of the Inter-Governmental Maritime Consultative Organization (IMCO) was elected and composed incorrectly,⁹⁷ without drawing a conclusion with regard to legal consequences.⁹⁸ After the ICJ issued its IMCO-Opinion, the Assembly of the IMCO adopted and confirmed the measures that had been taken by the incorrectly constituted

⁹⁴ Kosovo, CR 2009/25, 63 (*Murphy*).

⁹⁵ Some writers argue that an act in international law is either valid or null (see *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Separate Opinion Judge Morelli, 222, who refers to acts of international organizations). A possible alternative consist in a clear-error-doctrine, according to which only clear errors would lead to nullity, Separate Opinion Fitzmaurice, 205). Others want to break the strong dichotomy between valid and void by introducing a third category (see Jennings, who differentiates between “absolute nullity”, “nullity in the sense of voidability” and “validity”, R. Y. Jennings, ‘Nullity and Effectiveness in International Law’, in: *Cambridge Essays in International Law: Essay in Honour of Lord McNair* (1965), 64-68; with regard to legal consequences of *ultra vires*, see also A. Paulus, ‘Kompetenzüberschreitende Akte von Organen der Europäischen Union- die Sicht des Völkerrechts’, in: B. Simma/C. Schulte (eds) *Völker- und Europarecht in der aktuellen Diskussion* (1999), 49.

⁹⁶ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960, 150

⁹⁷ *Id.*, 170.

⁹⁸ The differentiation drawn by Osieke between procedural and substantive *ultra-vires* acts makes no difference in our case, E. Osieke, ‘The Legal Validity of Ultra Vires Decisions of International Organizations’, 77 *American Journal of International Law* (1983), 239, 244; see also B. Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrates* (1996), 121-122.

Committee before its dissolution.⁹⁹ Among scholars it is disputed whether the IMCO Assembly considered the Committee's decisions null and therefore made the same decisions, or whether the former decisions remained legally binding and therefore had to be confirmed by the Assembly.¹⁰⁰ In the case of Kosovo, this would mean that it is doubtful whether a conclusion according to which the authors of the UDI acted *ultra vires* would lead to nullity of the declaration of independence.¹⁰¹ It would be up to the actors to decide what the consequences of such *ultra vires* act are. In the present case the actors are the SRSG¹⁰², the Security Council, and the UN member States in general. They would have to act if they considered a possible *ultra vires* act null.¹⁰³ The silence of the SRSG after February 2008 allows two conclusions: either he did not consider the UDI issued by the Assembly as designed to take effect within the legal order for the supervision of which he was responsible,¹⁰⁴ or he did not want to declare the UDI null because of the changed factual circumstances on the ground. At any rate, this could hardly be seen as a *legal* justification for the SRSG's inaction.¹⁰⁵

2. Compatibility of the UDI With Security Council Resolution 1244?

The ICJ argued that Resolution 1244 did not envision a specific solution. The Court noted that by virtue of Resolution 1244 the Security Council established a temporary legal regime, which aimed at the

⁹⁹ IMCO Res. A.21 II (April 1961), see also E. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations', in *Cambridge Essays in international law: Essay in Honour of Lord McNair* (1965), 88, 102.

¹⁰⁰ Cf. M. Reisman & D. Pulkowski, 'Nullity in international law', *Max Planck Encyclopedia of Public International Law*, available at <http://www.mpepil.com> (last visited 5 August 2010), para. 21.

¹⁰¹ See E. Osieke, *supra* note 97, 255, speaking of a general rule according to which invalidated acts are voidable rather than void *ab initio*.

¹⁰² By virtue of paras 6, 19 of SC Res. 1244, 10 June 1999.

¹⁰³ Cf. the legal opinion of the UNMIK Legal office, *supra* note 88.

¹⁰⁴ Kosovo-Opinion, *supra* note 1, 39, para. 108.

¹⁰⁵ See the critique of Judge Tomka: "But the Advisory Opinion provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002-2005, would no longer have any such character in 2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions [...] remained the same in February 2008 as they were in 2005", *supra* note 20, 10.

stabilization of Kosovo.¹⁰⁶ Resolution 1244 was designed to create an interim régime for Kosovo¹⁰⁷ without “dealing with the final status of Kosovo or with the conditions for its achievement”¹⁰⁸.

After having scrutinized Security Council Resolution 1244, the Court found that the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine the status of Kosovo.¹⁰⁹

This passage contains two important assertions that are relevant to the question of compatibility of the UDI with Resolution 1244.

First, the Court elaborates on the role of the Security Council in the process of determining Kosovo’s final status, a specific view of which the Council did not present. It emphasized that the territorial integrity of the Federal Republic of Yugoslavia must be respected but the Council’s language was not as explicit and unambiguous as, for example, in its Cyprus Resolution 1251 where the Security Council left no doubt that a final solution should be a State of Cyprus.¹¹⁰

Serbia asserted that a UDI without endorsement of the Security Council contradicts its central role with regard to the maintenance of peace and security. Accepting the declaration’s legality would “fundamentally challenge the very foundations of the system of collective security set up by the Charter”.¹¹¹ The ICJ, however, rejected this argument and came to the

¹⁰⁶ Kosovo-Opinion, *supra* note 1, 36, para. 100.

¹⁰⁷ *Id.*, 40, para. 114.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, 40, para. 114.

¹¹⁰ SC Res. 1251, 29 June 1999, para. 11: “Reaffirms its position that a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation”.

¹¹¹ See Serbia, CR 2009/24, 62 (*Zimmermann*). This view was not shared by all States that found the UDI incompatible with Resolution 1244. Cyprus for instance explicitly stated, that the Security Council “does not have the power to amputate parts of the territory of a State without its consent” (see Cyprus, CR 2009/29, 38 (and 44) (*Lowe*)). A unilateral declaration would therefore under no circumstances - even under endorsement of the Security Council - be lawful. Consequently, from the perspective

conclusion that the participation or blessing of the Security Council was not mandatory with regard to the determination of the political status of Kosovo. It is open to question as to how far this proposition deviates from the initial logic of the Security Council itself. Resolution 1244 envisaged that “the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise”¹¹¹. Thus, the Security Council would have to endorse a solution in order to end the 1244-System. Some actors on the international level, for instance the European Union, gave the impression that they shared Serbia’s interpretation of the Security Council’s role. After the release of the Ahtisaari-proposal on Kosovo’s ‘conditional independence’, a Statement of the EU-Presidency was published on 26.3.2007, expressing aspirations “that the Security Council will live up to its responsibility and [...] endorse the proposal in a timely manner.”¹¹² This Statement may prove that the EU considered an endorsement by the Security Council necessary, at least in 2007. Russia furthermore pointed at the so-called “Guiding Principles of the Contact Group for a settlement of the status of Kosovo”, according to which the Security Council is supposed to have the last word.¹¹³ The Guiding Principles may perhaps also serve as a documentation of a changed atmosphere, even before the Ahtisaari-Plan. Resolution 1244 only envisioned “substantial autonomy and meaningful self-determination of Kosovo“, whereas the Guiding Principles envision that the settlement of Kosovo’s status should “contribute to realize the European Perspective of Kosovo, in particular, Kosovo’s progress in the stabilization and association process, as well as the integration of the entire region in Euro-Atlantic institutions”¹¹⁴. This seems to be more than just “substantial

endorsement of the Security Council - be lawful. Consequently, from the perspective of Cyprus, the Security Council’s silence is irrelevant. According to Spain, the silence at least cannot be interpreted as acquiescence (see CR 2009/29, 46 (*Escobar Hernández*)). Russia stressed that the final settlement is to be negotiated between the parties and endorsed by the Security Council, CR 2009/30, 48 (*Gevorgian*), referring to the “Guiding principles of the Contact Group for a settlement of the status of Kosovo” in a “Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General” (S/2005/709) at page 2.

¹¹¹ SC Res. 1244, 10 June 1999, para. 19.

¹¹² http://www.eu2007.de/en/News/CFSP_Statements/March/0326Kosovo.html (last visited 5 August 2010).

¹¹³ “Guiding principles of the Contact Group for a settlement of the status of Kosovo” in a “Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General” (S/2005/709) at page 2.

¹¹⁴ Para. 2 of S/2005/709.

autonomy”¹¹⁶ since it includes an international perspective for Kosovo. However, the Guiding Principles also state that “[a] negotiated solution should be an international priority [...] and the parties have to refrain from unilateral steps.”

Resolution 1244’s referral to the Rambouillet-Accords, which state that a solution of the status of Kosovo should also be based on the will of the people of Kosovo,¹¹⁷ may indicate that the ongoing political process should be open to a wide range of solutions.

Second, the Court made a statement regarding whether a UDI violates the resolution. States offered various arguments that might lead to such a conclusion. First, Resolution 1244 calls for “a political settlement” or “a political solution”. These formulations may imply that both parties to the conflict are supposed to act together, finding a solution at terms on which both can agree, instead of trying to set up a final status unilaterally.

This argument asserted that Resolution 1244 excludes a possible secession of Kosovo by emphasizing the territorial integrity of the Federal Republic of Yugoslavia. Otherwise, the Security Council would have stated the possibility of secession explicitly as it did in Resolution 1246 on the situation in East Timor.¹¹⁸ As convincing as this argument appears at first sight, one can also rely on Security Council Resolution 787 on Bosnia and Herzegovina¹¹⁹ and argue on the other hand, that the Security Council would have explicitly stated so if it wanted to exclude the possibility of a

¹¹⁶ C. Pippan, ‘Die Herausforderungen der ‘Kosovo-Frage’ für die Europäische Union vor dem Hintergrund des Statusprozesses’, in: Nolte/Hilpold (eds): *Auslandsinvestitionen- Entwicklung großer Kodifikationen- Fragmentierung des Völkerrechts-Status des Kosovos* (2009), 231, 244-246.

¹¹⁷ http://www.state.gov/www/regions/eur/ksvo_ambouillet_text.html (last visited 10 August 2010)

¹¹⁸ SC Res. 1246, 11 June 1999, para. 1: “Decides to establish until 31 August 1999 the United Nations Mission in East Timor (UNAMET) to organize and conduct a popular consultation, scheduled for 8 August 1999, on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy for East Timor within the unitary Republic of Indonesia or reject the proposed special autonomy for East Timor, *leading to East Timor’s separation from Indonesia*, in accordance with the General Agreement and to enable the Secretary-General to discharge his responsibility under paragraph 3 of the Security Agreement” (emphasis added).

¹¹⁹ SC Res. 787, 16 November 1992, para. 3: “Strongly reaffirms its call on all parties and others concerned to respect strictly the territorial integrity of the Republic of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted”.

unilateral declaration of independence. It is therefore difficult to interpret the Council's silence in Resolution 1244 in the one or the other way.

3. Who is Addressed by the Legal Regime Based on Resolution 1244?

Even if Resolution 1244 does not preclude a declaration of independence, one could argue that the notion of a “political settlement” is binding also upon those “private individuals” who declared independence of Kosovo. This would mean that Resolution 1244 hinders them to act unilaterally without Serbia's consent. Serbia claimed that Resolution 1244 created a legal regime, which has to be considered as generally binding on all actors. Non-State-entities therefore must be bound; otherwise it would contravene object and purpose of Resolution 1244 if only States but not the actual parties to the conflict are addressed. If the UN administers a territory, everybody should be regarded as being addressed by Security Council resolutions. For Serbia, the resolution does not need to explicitly announce whether non-State-actors are bound. The 1244 Resolution's referral to Resolution 1203¹²⁰, which includes non-State-entities, is sufficient to assume that the Security Council intended to address not only States.¹²¹

The ICJ found that “[t]he language of Security Council resolution 1244 (1999) is at best ambiguous in this regard”,¹²² and concluded that it “did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence”.¹²³ Unfortunately, the Court did not address the argument put forward by Serbia, according to which Resolution 1244 recalls Resolution 1203¹²⁴ that addressed the Kosovo Albanian leadership. Serbia's argument appears convincing at least at first sight. However, to defend the Court's position one can invoke the Security Council's Resolutions 1203 and 1160. Resolution 1203 recalls in the beginning the Resolution 1160¹²⁵ which calls upon the Kosovo Albanian Leadership to

¹²⁰ Para. 4: “Demands also that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)”.

¹²¹ Serbia, CR 2009/24 45 (*Djerić*).

¹²² Kosovo-Opinion, *supra* note 1, 42, para. 118.

¹²³ *Id.*, para. 119.

¹²⁴ SC Res. 1203, 24 October 1998.

¹²⁵ SC Res. 1160, 31 March 1998.

condemn terrorism,¹²⁶ and Resolution 1199 which also refers to Kosovo Albanian leadership¹²⁷. Can we draw some conclusions from this practice of the Security Council? It must be emphasized that the Security Council first recalls Resolution 1160 in the beginning and then explicitly refers to it in the passage in which the Kosovo Albanian leadership is addressed. Does this mean that mere recalling of previous resolutions in the beginning of the respective document is not sufficient, and the Council has to address non-State-actors explicitly in the text of respective resolutions, together with recalling the previous ones? Against this background, Serbia's argument does not seem that convincing as on first sight.¹²⁸

E. Conclusion

The ICJ did not determine whether Kosovo is a State, whether the population in Kosovo is a people entitled to the right of self-determination, whether there is a right of remedial secession in contemporary international law, and what the relationship between territorial integrity and self-determination is. The Court only stated that the declaration was not in violation of international law. The Court leaves it to the States to decide the question of the recognition of unilateral declarations of independence (among other criteria, according to their policy interests).

The existing political realities do not relieve the Court of its primary responsibility to clarify the state of the law in its advisory opinion and to render an opinion which is of real assistance to the respective organs of the United Nations. It may be doubted whether the Court lived up to this task in the present case. The Court had the opportunity to comment broadly on contemporary questions central to international law which could serve as legal guidance in comparable situations. By remaining silent on these

¹²⁶ Para. 2: "Calls also upon the Kosovar Albanian leadership to condemn all terrorist action, and emphasizes that all elements in the Kosovar Albanian community should pursue their goals by peaceful means only".

¹²⁷ SC Res. 1199, 23 September 1998, para. 1: "Demands that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe".

¹²⁸ J. Frowein & N. Krisch, 'An introduction', in Simma, *supra* note 31, 701, 715-716, state that addressing non-state-actors can pose difficulties since "obligations are created for entities whose international legal personality is in doubt".

questions the Court implicitly showed how far away international law today is from a consensus with regard to secession and self-determination.

One may regret that the Court missed its chance to comment on the status of contemporary law. But on the other hand, it can also be argued that the narrow scope of the question did not allow the Court to go any further. We conclude that the question did not necessarily limit the Court's range of action. Although the conclusion of the Court is defensible, the way the Court got to it seems problematic. It would be too easy to lay blame on the question or on those who phrased it. With regard to the authors of the UDI, the General Assembly was, as shown above, very explicit. It was of no use though, since the Court went beyond the question's wording. At the same time, however, the Court unnecessarily limited the scope of the question by focusing only on prohibitive rules of international law.

Time will tell what the future implications of the ICJ's Kosovo Advisory Opinion will be. Counsel for Serbia, Zimmermann raised the concern that future UN-administration will be seen as "nothing but a road towards secession" in case that the Court would not declare the UDI illegal.¹²⁹ The authors of this article do not share these concerns. It is true that the ICJ's Opinion does not provide legal certainty in fields of secession or self-determination, especially in situations of international administrations where, under certain circumstances, these issues may become subject to discussions. Hence the Opinion lacks practical value. Secessionist movements may interpret the Court's Advisory Opinion as favorable to their aspirations; however, the Court's Opinion does not give them a legal tool to realize those aspirations. By narrowing its focus as described above, the Opinion itself remains unique and limited to the circumstances of the concrete case.

¹²⁹ "Indeed, one might wonder whether both, the relevant members of the Security Council, as well as the individual States concerned, would in the future accept such solutions, were the Court to tolerate that such United Nations-led administration is nothing but a road towards secession", CR 2009/24, 60 (*Zimmermann*).

Kampala June 2010 – A First Review of the ICC Review Conference

Hans-Peter Kaul*

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Abstract

In the years and months before the ICC Review Conference, which took place in Kampala, Uganda from 31 May to 11 June 2010, there were, from the perspective of the International Criminal Court (ICC), quite a number of important if not crucial questions: What would be the course and what would be the outcome of the Review Conference? How would it affect the Review Conference that it would be held not only in Africa, but in an African situation country? Would there be only a narrow, maybe inappropriately narrow, examination of the institution of the Court? Or would there be a review of the entire ICC system as established by the Rome Statute? What about the stocktaking with regard to the four critical themes chosen for this Review Conference, namely cooperation, complementarity, impact on victims and affected communities, and the important question of the relationship between peace and justice? Which amendments to the Statute would be considered or adopted? Above all, would there be any progress or maybe even a breakthrough with regard to the very difficult, unresolved issues concerning the crime of aggression as referred to in Article 5(1)(d) of the Statute? It is against this background of questions, hopes and expectations that this contribution tries to briefly assess the Review Conference. The first part of this introductory comment (A) reflects the author's hopes and expectations prior to the Review Conference. It is based on a speech delivered by the author in May 2010.¹ The second part of this comment (B), is a first analysis and review of the course and outcome of the Review Conference. The author hopes that this comparative approach may be an informative and interesting manner to provide in this Article a first summary of what was expected, what happened and what was actually achieved in Kampala.

A. Before Kampala: Hopes and Expectations of the ICC

This comment on the Review Conference will deliberately introduce a particular perspective: the perspective of a Judge of the International

¹ Part (A) corresponds largely to a speech delivered by Judge Hans-Peter Kaul on 3 May 2010 in Berlin at the symposium "Das Verbrechen der Aggression - Die Weiterentwicklung des IStGH-Statuts" organized by the German Red Cross and the German Society for the United Nations (DGVN). The form of the speech as effectively delivered is maintained throughout the text.

Criminal Court who is at the same time a member of the Presidency. Naturally, we have been giving a lot of thought to Kampala beforehand. I would like to focus on two kinds of questions:

First: What is the subject and what is the task of the Review Conference, and what should be the role of the Court and its representatives?

Secondly: What are the hopes and expectations that one can have for Kampala from the perspective of the Court?

Clearly, when speaking of hopes, there is also always some sort of fear that these hopes might be disappointed. But for now we should concentrate on the hopes.

I am aware of the fact that the main issue of this symposium is the crime of aggression - in the wording of the German constitution, the “Grundgesetz”, the crime of the so-called “Angriffskrieg”. At the end of my presentation, I will make some personal remarks on this topic but - and I would like to emphasize this - I do not intend to make these remarks as a judge of the criminal court but as an average German citizen, who is reasonably conscious of recent history, including the unspeakable suffering that Hitler’s aggressive wars have brought to the world, as well as to Germany.

I. Important Aspects and Hopes for the Review Conference

As you know, the first sentence of Article 123 paragraph 1 of the Rome Statute states that seven years after the entry into force, the Secretary-General of the United Nations “*shall convene a Review Conference to consider any amendments to this Statute*”.

Like many others, I believe, that it is actually too early for a real review conference. To really be able to judge the work and functioning of the Court, around three to four cycles of criminal proceedings should be fully completed. Until now we only have two - soon to be three - trials at different stages in the proceedings.

Furthermore, in the past years I have stressed over and over at every possible occasion that changes, proposals for such changes and so on should be treated with utmost precaution. Moreover, I have emphasized that only amendments should be proposed on which it is likely that a broad consensus can be reached.

This caution results from the fact that the Rome Statute as a whole is a very precarious and precious compromise. The interests of the entire

international community had to be taken into account to reach a quite meticulous balance. This balance should not be put at risk inconsiderately. In addition, there is a risk of an improvement for the worse that might affect the acceptance of our Statute.

Moreover, making relevant amendments to a treaty that have not been adopted by consensus always creates the risk of differing contractual obligations for different States. But to have and to maintain a coherent and uniform treaty regime that applies to all States Parties in equal measure is a significant good.

As you know, the States Parties will discuss the following points in Kampala: an amendment to Article 8 on war crimes (the war crime of employing poison or poisoned weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices as well as bullets which expand or flatten easily in the human body, which is so far only criminalized in international armed conflicts, will be extended to armed conflicts not of an international character); a possible deletion of Article 124 (transitional provision on war crimes); and finally the crime of aggression as referred to in Article 5(1)(d) of the Statute.

I would like to make two remarks with regard to the above:

First: These discussions are a matter for the States Parties alone. The Court as well as its highest representatives do not take any position and cannot take part in these discussions. I myself took part in the decision-making of the highest levels of the Court to determine this basic position.

Second: I now come to something more gratifying, bringing about a positive perspective. In my opinion, the amendments mentioned above do not bear the risk of an "improvement" of our basic treaty for the worse. They do not raise concerns that the Rome Statute might be endangered or affected by potentially damaging or controversial amendment proposals (as for example with regard to nuclear weapons or to Article 16 of the Statute). Fortunately, the States have been wise enough to postpone the discussions on these already suggested but complex or controversial proposals to sometime after Kampala.

The other main task in Kampala will be to take stock of and assessing four central issues:

- (1) Cooperation (of States Parties with the Court);
- (2) Complementarity;
- (3) Impact of the Rome Statute system on victims and affected communities

(4) Peace and Justice.

When it comes to these topics, I believe it to be legitimate for the Court to actively take part in the debate and to present its view. These debates will not be a mere survey of the Court, the Court itself being only the object of such a survey, comparable to the audit of a business company. It is rather the whole ICC system that is put to test, not only the Court but also the States Parties, the United Nations, as well as civil society.

That the whole ICC system and not only the Court has to be the subject of the stocktaking exercise at Kampala is in my view a crucial and absolutely fundamental point. It is important to really have a common understanding of that. Let me explain why the ICC system is composed of all these different actors.

Why are States Parties part of the ICC system? This is because they are not only the founders but also the stake-holders of the Court, its guarantors. Their cooperation is absolutely essential to the good functioning of the Court.

Why are even non-States Parties de facto part of the ICC system? This is particularly because the comprehensive codification of genocide, crimes against humanity and war crimes in articles 6, 7 and 8 of the Rome Statute has established value standards which are absolutely binding. It is generally recognized that also non-States Parties have to observe these standards and they have already recognized them - as is the case for example with the United States.

Moreover, the jurisdiction of the ICC can also have a great impact on non-States Parties. This is particularly due to two kinds of mechanisms: firstly, in case of a referral of a situation by the Security Council of the UN, as it happened with regard to the situation in Darfur/Sudan by S/RES 1593, and secondly if nationals of non-States Parties commit international crimes, such as war crimes or crimes against humanity, on the territory of a State Party. In this case, the ICC can have complementary jurisdiction according to the principle of territoriality laid down in Article 12(2)(a) of the Rome Statute.

And why are the Security Council and the United Nations part of the ICC system?

Because the Security Council has been assigned a very significant role in particular in articles 13(b) and 16 and also in Article 5(2) of the Statute

concerning the crime of aggression.² And furthermore, because the United Nations is not only a “mother” to the ICC, but also an extremely important, indispensable partner of the Court. The latter is evidenced by the special Relationship Agreement between these two institutions.

And finally: why is civil society - meaning civil society in all States - part of the ICC system? Because civil society is not only a Godmother to the Court, but also because without its support and understanding, the Court can never be successful.

This is why during the last months we gave a lot of thought to the positions and messages the representatives of the Court should plead in Kampala. This also concerns the hopes and expectations that we have towards the States Parties. Some of these expectations are briefly recapitulated below.

Our first hope is that Kampala will not only bring about good speeches and resolutions. It should also generate concrete pledges, affirmations of support in word and deed, including the assignment of more resources for the ICC system where such resources are needed for the good functioning of the Court. In such a short presentation it is impossible to cover all issues related to the four themes of stocktaking mentioned above. Nonetheless, it may be appropriate to mention a few of the most important topics with regard to these four themes.

When it comes to the topic of cooperation, one should keep in mind the following: as you know, the Court is one hundred percent dependant on effective criminal cooperation. This is our lifeblood as well as our Achilles’ heel: the Court can only be as strong as the States Parties’ cooperation makes it. This is the case especially with regard to the question of arrests and surrenders to The Hague. As it is, only four out of 14 warrants of arrest have been executed. Actually, the matter is simple: no arrests, no trials.

Moreover, recently, on 26 April 2010, Prosecutor Ocampo has again reiterated four concerns that have been reaffirmed consistently:

- (1) The necessity of public and diplomatic support for the enforcement of warrants of arrest;
- (2) No unnecessary contact with individuals who are subject to a warrant of arrest;

² See also A. Reisinger-Coracini, 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at last ... in reach ...', 2 *Goettingen Journal of International Law* (2010) 2, 763, in this issue.

- (3) The necessity of freezing financial and other resources of such individuals;
- (4) Concrete support for the enforcement of warrants of arrest including the provision of well-trained special forces.

Furthermore, the second topic of stocktaking, complementarity, has a positive aspect that needs to be supported. Especially situation countries, like the Democratic Republic of Congo, Uganda, the Central African Republic and finally Kenya need to be enabled by means of concrete support for their criminal justice systems to prosecute and punish grave crimes themselves. This means to support capacity-building - a task that is not within the Court's scope of activities - since the ICC is not an organization which provides development aid.

With regard to the stocktaking issue of the impact on victims and affected communities, one should mention one crucial point. The International Criminal Court has had a great deal of success and has done pioneer work in this area which is very difficult in practice. Nevertheless, we are persuaded that further achievements regarding the work with victims, or the protection of victims and witnesses, or more outreach activities can only be attained if more resources are provided.

And finally, the very contentious issue of the relationship between peace and justice: it is well known that even among States Parties, some see these objectives as alternatives and sometimes ask directly or indirectly for justice and for the Court to step back. This issue is of great importance to me. I have substantiated my view in a speech I gave in Dresden in November 2009, giving concrete examples as to how the work of the Court may contribute both to peace and justice. It should be clarified in Kampala that these two important objectives, peace and justice, indeed strengthen one another if they both are pursued emphatically both in the same way and with the same vigor.

All things considered: Kampala can and hopefully will be a success. Although, one should not have too high expectations. Dramatic things and dramatic improvements are not to be expected - this however is more of a sign for maturity and consolidation. The resolutions to be adopted should have a concrete follow-up and should open new avenues to strengthen the ICC system.

II. Some Remarks on the Crime of Aggression

As I said at the beginning, I would like to finish my presentation by talking about the crime of aggression. I stick to the Court's policy not to comment on the discussion in Kampala on the crime of aggression. This is up to the States Parties only. However, I would like to make some personal remarks as a German national who was born during the Second World War and who knows Article 26 of our constitution, the "Grundgesetz", which contains a prohibition of aggressive wars.³

It seems essential to me, and it would be wonderful, if Kampala would bring about real progress and a breakthrough for the outlawing and penalization of the crime of aggression.

It is common knowledge that without Germany, the crime of aggression would not have been incorporated in Article 5 of the Rome Statute. The German proposal, which was the last one discussed in Rome, at least made sure that the crime of aggression was recognized as an international crime once and for all in Article 5 of the Statute.

In my personal opinion, I feel very close to two American pioneers for the proscription of the crime of aggression, both US prosecutors in Nuremberg. I am referring to Whitney Harris, who passed away on 21 April 2010 in St. Louis and who was an IMT prosecutor in the case against Kaltenbrunner, the Head of the Nazi secret police, the Gestapo. And I also refer to Benjamin Ferencz, prosecutor in the so-called "Einsatzgruppenprozess", the trial against leading officers of the SS. Professor Ferencz will travel to Kampala to attend the discussions on the crime of aggression there, with tremendous energy and charisma despite his advanced age of 91 years.

Whitney Harris, my fatherly friend, who supported the German Ministry of Foreign Affairs with regard to my re-election as a judge in 2005, wrote a book in 1999, called the "Tragedy of War". I would like to cite a single phrase out of the Epilogue of this book:

³ Article 26(1) of the "Grundgesetz" reads: "Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.", For an English translation see <https://www.btg-bestellservice.de/pdf/80201000.pdf> (last visited 23 August 2010).

“The crime of aggressive war must be recognized, defined and punished when it occurs for war is the greatest threat to the survival of civilization.”⁴

Benjamin Ferencz was just awarded with the Erasmus Prize in The Hague’s Royal Palace for his lifelong work. The headline of his website reads: “Law not War”.⁵ Both Harris and Ferencz basically agree on the following: the common task is about repressing, preventing and banning the waging of aggressive wars.

History teaches that war, the evil of war itself, usually leads to numerous war crimes and crimes against humanity. To put it more candidly and also harder, as hard as the reality of war itself is: war crimes are the excrements of war, inevitable and heinous.

Furthermore, another issue should be mentioned. In the past years I have been asked time and again, whether it might not overwhelm the judges at the ICC to judge crimes of aggression.

This is a very serious question. But it also creates a huge responsibility to judicially analyze and ascertain the truth in cases of genocide, crimes against humanity and large scale war crimes. I believe that my fellow judges as well as I myself will approach the issue of the crime of aggression with the same utmost seriousness, objectivity and impartiality. And I further believe that they will reject every attempt to politically instrumentalize the Court.

I might be proven wrong, but at the present stage I am convinced that the judges at our Court will be able to assess whether a crime against peace has been committed or not, just as the judges at Nuremberg have been in 1946.

Like Whitney Harris and Benjamin Ferencz, I maintain the following: all forces of good will have to stand up persistently for the crime of aggression to finally be penalized. They have to do so even if powerful States keep on objecting for all sorts of reasons. War is evil par excellence. It might remain impossible to completely prevent future wars. Nevertheless, the inhibition threshold should be raised as much as possible by establishing a criminal prohibition of this crime of aggression that generally triggers so many other crimes.

⁴ W.R.Harris *The Tragedy of War* (2004).

⁵ <http://www.benferencz.org/> (last visited 23 August 2010).

B. After Kampala: A Successful Review Conference – A Summary

On 11 June 2010 an event has come to an end in Kampala, Uganda that one may call quite significant – the Review Conference of the International Criminal Court's founding treaty. Despite the critiques that will no doubt arise, this first Review Conference of the Rome Statute has been a success for the Court, as well as for the entire system of international criminal justice. Most importantly: the waging of war will become triable after all. But it was only after a long and often difficult debate that this conference ended early in the morning of 12 June 2010 with an affirmative decision on the crime of aggression.

This last intense night was preceded by a two week long conference with a full agenda. Around 4,600 representatives of States as well as of intergovernmental and non-governmental organizations (NGOs) met in Kampala to both discuss amendments to the Rome Statute and take stock of achievements and weaknesses in the system governing the International Criminal Court. The representatives of 87 States Parties and a considerable number of non-States Parties, present as observers, took part in two weeks of plenary discussions as well as formal and informal smaller multilateral and bilateral negotiations. Two heads of States⁶ were present and numerous delegations were represented at the ministerial level.

One outcome could already be presented half way through the conference: the result of the pledges. Prior to the conference, States had the possibility to formally pledge to make various contributions thus showing their commitment to the ICC and the Rome Statute. At the pledging ceremony on the second day of the Conference, the co-focal points for pledges announced that they had received 112 pledges from 37 States - including some non-States Parties - and regional organizations, representing all regions of the world. These pledges concerned such matters as financial contributions, especially to the Trust Fund for Victims, enforcement of sentences agreements, agreements on privileges and immunities or the relocation of witnesses.

Furthermore, the stocktaking process provided an important opportunity for the various actors within the ICC system to consider the

⁶ Yoweri Museveni, Republic of Uganda and Jakaya Kikwete, United Republic of Tanzania, see <http://www.icc-cpi.int/NR/exeres/93D88DCD-C4AE-4432-89FA-3D15146B67FE.htm> (last visited 23 August 2010).

impact of the Rome Statute to date. All of the four key themes of stocktaking – namely: complementarity, peace and justice, the impact of the Rome Statute system on victims and affected communities and finally cooperation - were already addressed in the first resolution of the Conference, the Kampala Declaration, which was adopted at the close of the general debate on the second day.⁷ The declaration reflects the continuing commitment of States Parties to the Rome Statute's historic initiative to end impunity for the gravest crimes of concern to the international community as a whole. It addresses the principle of complementarity by expressing the resolve of States to continue and strengthen the domestic implementation of the Rome Statute and to enhance the capacity of national jurisdictions to prosecute core crimes themselves.⁸ Additionally, it emphasizes that justice is a fundamental building block of sustainable peace⁹ and indicates that the States Parties are determined to continue and strengthen their efforts to promote victims' rights under the Rome Statute.¹⁰ Finally, the declaration embraces what this author has previously called both the Court's lifeblood and its Achilles' heel: the cooperation of States Parties. Regarding this crucial issue, the States Parties declare their resolve to strengthen their efforts to ensure cooperation.¹¹

More concrete outcomes with regard to these four issues can be found in the results of the discussions of the panels devoted to each of the stocktaking topics. Some points shall be addressed here and compared with the author's expectations prior to the Conference:

In relation to complementarity, the discussions focused on practical opportunities that are available to States in order to strengthen and enable other States' capabilities. An emphasis was placed on the duty of actors at the national level to undertake capacity-building, the Court having, at most, a limited role as facilitator in information sharing. Better communication between the different actors, though, proved to be of crucial importance as the need to improve coordination between the different actors was consistently highlighted in the discussions. The resolution finally adopted

⁷ Kampala Declaration, RC/Decl.1, adopted at the 4th plenary meeting, on 1 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf (last visited 23 August 2010).

⁸ Kampala Declaration, para. 5.

⁹ Kampala Declaration, para. 3.

¹⁰ Kampala Declaration, para. 4.

¹¹ Kampala Declaration, para. 7.

thus requests the Secretariat of the Assembly of States Parties “to facilitate the exchange of information” so as to synergize efforts globally.¹²

No resolution was adopted as a result of the discussion on the relationship between peace and justice. This is not surprising given how highly complex or even controversial the matter is. There is still the argument that justice should step back in some cases to promote peace processes and that negotiators in particular should be able to use the promise of impunity in exchange for an agreement to lay down arms. Altogether, the term ‘paradigm shift’ can best be used to describe the evolution of views in recent years, beginning with the foundation of the Court. All actors are still aware that a tension between peace and justice continues to exist. But it is a promising result that while previously, the debate was deemed “peace versus justice”, the predominant view now is one of peace and justice as allies which sustain one another. It may seem that amnesties are no longer considered an option to deal with the most serious crimes as enshrined in the Rome Statute.

The issue concerning the impact of the Rome Statute on victims and affected communities was less contentious. However, embracing this topic at the Review Conference was meant to remind the participating States of how important the ICC system is for victims as stakeholders partaking in this system, and as its direct and indirect beneficiaries with specific rights. The resolution adopted with regard to this issue recognizes these rights, in particular the right to equal and effective access to justice, support and protection, as well as to reparation. It also underlines the need to further optimize outreach activities.¹³

As stated previously, outreach activities require a considerable amount of resources. In relation to this, the pledging process might be seen as a new start. However, more than half of the States Parties did not submit any pledges and thus did not even use the publicity of the Conference as an incentive for further financial contributions. Moreover, some States Parties could not use their voting rights at the Conference due to the fact that they had not paid their contributions as required by the Statute. The awareness among States as to how important material support is for the work with

¹² Para. 9, Resolution RC/Res.1, adopted at the 9th plenary meeting, on 8 June 2010, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf (last visited: 23 August 2010).

¹³ Resolution RC/Res.2, adopted at the 9th plenary meeting, on 8 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf (last visited on 23 August 2010).

victims thus needs to be continually promoted. The debate at the Conference has hopefully been able to boost State efforts.

The lack of pledges by many States Parties might also be seen as an indication of the continuous need to remind States Parties of the importance of their cooperation with the Court. The whole success of the ICC rests on the level of cooperation that the Court and States Parties achieve. Still, many States Parties have refrained from coming to Kampala with pledges in hand. There is still substantial need to improve the means of “vertical” cooperation and judicial assistance between the Court and national authorities. This was consistently highlighted in the debate related to this stocktaking issue. Particularly emphasized - in the debate, as well as in the declaration adopted subsequently¹⁴ - was the crucial role that national authorities play in the execution of arrest warrants. The actors of the ICC system are well aware of the significance their support has for the Court. This was especially evidenced through requests by many speakers in the debate that the Assembly of States Parties should include cooperation as a standing item on the agenda. In any event, there will be a future need for the Assembly to consider how they can best use political and diplomatic tools to bring about cooperation. Such cooperation is a legal obligation of the States Parties while the Court itself has no means to enforce it.

More tangible outcomes of the Conference have been achieved with regard to the amendment proposals. As underlined before, the Court had made the decision not to take part in the discussions on amendments. Likewise, it is not up to the Court, including its judges, to assess the resolutions adopted. Nevertheless, it seems appropriate to give a short overview of their content, of the process leading to them, as well as of the impact they may have on the Court’s future work.

Among the three proposals for amendments, two issues were matters with minor consequences.

The first proposal concerned Article 8 of the Rome Statute that criminalizes different forms of war crimes. So far, the use of certain weapons such as poisonous or poisoned weapons, asphyxiating or poisonous gases, and all analogous liquids, materials and devices as well as expanding bullets were prohibited under the Rome Statute only in the context of armed conflicts of an international character. The resolution adopted in Kampala amends Article 8 of the Statute to the effect that the use of such weapons

¹⁴ Resolution RC/Decl.2, adopted at the 9th plenary meeting, on 8 June 2010 available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf, para. 5 (last visited on 23 August 2010).

also falls under the jurisdiction of the Court in the context of non-international armed conflicts.¹⁵

The amendment was not controversial in any way. It is merely symbolic since no real impunity gap previously existed for the use of such weapons during non-international conflicts. There have, to date, never been any prosecutions before the ICC for the use of these kinds of weapons; but theoretically, prior to the amendment, such atrocities could also have been prosecuted as crimes against humanity or as genocide.

Furthermore, the States Parties have agreed to retain Article 124 of the Statute in its current form, which allows new States Parties to opt out of the Court's jurisdiction over war crimes allegedly committed by their nationals or on their territory for a period of seven years. The resolution contains an agreement for a further review during the fourteenth session of the Assembly of States Parties in 2015.¹⁶

Many NGOs have been very keen on deleting Article 124 of the Statute, stating that the provision as such was incompatible with the purpose of the Rome Statute. At the Review Conference, however, some of the participating States have argued that upholding the provision might provide an incentive for new States to join the Statute. In the end, the latter view prevailed. This, however, is not likely to have great impact on the Court's work or future jurisdiction. So far, only two States, France and Columbia, have availed themselves of this option, with France withdrawing its opt-out declaration in 2008. Hence, one may not expect a frequent use of this provision in the future.

The most important, most awaited but also most controversial amendment on the agenda of the Conference was without doubt the possible adoption of detailed provisions for the crime of aggression. Until this amendment was decided upon, the three Chairmen of the proceedings - Prince Zeid of Jordan, the Convenor of the Special Working Group on the Crime of Aggression, Christian Wenaweser, the President of the Assembly of States Parties and Stefan Barriga, legal adviser to the UN Mission of Liechtenstein - had a difficult task in promoting a compromise among divergent States and non-States Parties. The political stakes of criminalizing

¹⁵ Resolution RC/Res.5, adopted at the 12th plenary meeting, on 10 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf (last visited on 23 August 2010).

¹⁶ Resolution RC/Res.4, adopted at the 11th plenary meeting, on 10 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf (last visited on 23 August 2010).

the waging of war were high and self-evident. But finally, a resolution was adopted that will allow in the future to try what the International Military Tribunal at Nuremberg has described as the “supreme international crime” which “contains the accumulated evil” of all other war crimes¹⁷.

However, an emphasis must be put on “in the future” since the Court will only be able to exercise its jurisdiction in seven years at the earliest. Moreover, its jurisdiction will be limited by several constraints. These limitations reflect a difficult and complex compromise that was needed to appease all sides of the debate.

There was a relatively robust consensus regarding the definition of the crime of aggression. This definition emerged more than a year ago as a result of the work of the Special Working Group on the Crime of Aggression that was established in 2003 to fulfill the mandate emanating from Article 5(2) of the Statute. It is based on the non-binding definition of resolution 3314 that the General Assembly of the United Nations has agreed upon in 1974¹⁸. The text now adopted in Kampala is twofold: in the first paragraph of new Article 8bis of the Statute, a *crime of aggression*, meaning an individual criminal conduct, has been defined as

“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”.¹⁹

In contrast to the individual criminal conduct defined in paragraph 1, paragraph 2 of new Article 8bis of the Statute deals with an *act of aggression* by “the use of armed force by a State” against another State²⁰ as a pre-condition of such crime.

The real debate was on three related issues regarding the exercise of jurisdiction by the Court. First, the possible triggers for referrals to the ICC

¹⁷ France et al. v. Göring et al. in Egbert, Lawrence, 'Judicial Decisions – International Military Tribunal (Nuremberg), Judgement and Sentences', 41 *American Journal of International Law* (1947), 172, 186.

¹⁸ GA RES 3314 (XXIX), 14 December 1974.

¹⁹ For a report on the date of discussion, on the definition of aggression which existed around the years 2000 to 2002, see H.-P.Kaul, 'The Crime of Aggression: Definitional Options for the Way Forward', in M.Politi & G.Nesi (eds), *The International Criminal Court and the Crime of Aggression*, (2004), 97- 104.

²⁰ Annex I, Art. 8bis, Resolution RC/Res.6, adopted at the 13th plenary meeting, on 11 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited 23 August 2010).

and in particular the relationship that should exist between the ICC and the Security Council. Second, the question of whether the amendment should also be applicable to States Parties, that have not accepted it, and to non-States Parties alike. And finally, the conditions under which the Court may start to exercise its jurisdiction with respect to the crime of aggression.

Regarding the first question, the debate focused on what some have defined as the primacy or prerogative of the Security Council. This refers to the power vested in the Security Council by Article 39 of the Charter of the United Nations to determine the existence of an act of aggression. This has led to the argument that, as opposed to the other core crimes under the jurisdiction of the ICC, the Security Council should be the only trigger for the prosecution of a crime of aggression. Unsurprisingly, this view was emphasized again and again in particular by the five permanent members of the Security Council, amongst them two States Parties, the United Kingdom and France.

The majority of the States, however, insisted on limiting the involvement of the Security Council. This issue even led many NGOs, such as Human Rights Watch or Amnesty International, to refrain from supporting an amendment on the crime of aggression, fearing that too close a relationship between the ICC and the Security Council, as a political organ, might undermine the independence and impartiality of the Court²¹.

The compromise reached attempts to reconcile both views. As for the other core crimes, there are three scenarios for the triggering of an investigation. Firstly, the Security Council has the right to refer a situation to the Court after making a determination under Chapter VII of the Charter of the United Nations of an unlawful use of force. Secondly, the States Parties have agreed to authorize the Prosecutor to initiate an investigation in relation to the crime of aggression on his own initiative or - thirdly - upon a request from a State Party. With regard to the last two trigger mechanisms, however, the Prosecutor might initiate an investigation only after having previously consulted the Security Council. The Security Council will therefore remain the principal body in determining an act of aggression. In the event that the Council fails to act within six months, the Prosecutor may

²¹ Human Rights Watch, *Letter to Foreign Ministers of States Parties to the International Criminal Court*, 12 April 2010, available at <http://www.hrw.org/en/news/2010/04/12/april-12-2010-letter-international-criminal-court-states-parties-review-conference-r> (last visited 23 August 2010); 'From Rome to Kampala: Negotiations on the Crime of Aggression', 40 *The Monitor, Journal of the Coalition of the International Criminal Court* (2010), 8.

nevertheless proceed with the investigation. Where the Prosecutor acts in that way, without a prior determination of an act of aggression by the Security Council, he additionally has to obtain prior authorization not only from one of the Pre-Trial Chambers, but from the entire Pre-Trial Division. Having the Pre-Trial Division act as an adjudicating body is a totally new system which will entail some organizational challenges for the judicial divisions of the Court.

The second controversial question addressed above, namely the extent to which the Court may exercise its jurisdiction, was a very serious issue given its relation to the most anxiously guarded value of nation States: State sovereignty. Given this situation, it is not surprising that the result is not revolutionary. Non-States Parties have been excluded from the Court's jurisdiction. In contrast to the other core crimes, this exclusion also applies if an act that could be classified as a crime of aggression under the new Article 8*bis* of the Statute has been committed by nationals of a non-State Party on the territory of a State Party. In such a case, it is not sufficient that the attacked State is party to the Rome Statute if the aggressor State is not.²² Furthermore, States Parties may lodge a declaration stating that they do not accept the jurisdiction of the Court with regard to the crime of aggression. All those States Parties which remain silent will ultimately be bound by the amendment. Naturally, both non-States Parties and States Parties that have made such a declaration still fall under the jurisdiction of the Court in the event that the Security Council has referred a situation to the Court. In this case, the Security Council simply exercises its powers already attributed to it by the Charter of the United Nations.

With regard to the other two trigger mechanisms, and in spite of the fact that some States Parties may lodge such an opt-out declaration, massive restrictions on the Court's jurisdiction are unlikely to occur. Governments which consider making such a declaration will probably have to pay a high political price that many may not be willing to pay.

Finally, with regard to the last of the issues mentioned above, the resolution contains further conditions for the exercise of the Court's jurisdiction. For one, the actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 with the same majority that would be needed for any another amendment of the Statute. Moreover, the amendment must be ratified or accepted by at least thirty States Parties. Thus, it will take quite some time before the Court may have operational

²² Annex I, Art. 15*bis* (5), Resolution RC/Res.6, *supra* note 16.

jurisdiction with regard to the crime of aggression, and even more before the judges will actually be confronted with a crime of aggression for the first time.

The significance of these limitations should not be overestimated. They most probably have increased the viability and acceptance of the compromise. At the same time, their impact seems to be rather limited. It is quite likely that the 30 ratifications will be at hand by 1 January 2017. Comparing this prerequisite with the 60 ratifications needed for the entry into force of the Rome Statute, this is a small number and a lot of political pressure on national governments to ratify is to be expected by civil society, especially by NGOs. Furthermore, the delayed entry into force should be considered in a long term perspective. Given the decades that it took from the first steps in Nuremberg to the criminalization of the waging of war permanently, the delay to be expected until the crime of aggression will actually be activated for purposes of investigations and prosecution should be acceptable to those keen on the aggression issue.

A candid assessment of the amendment on aggression must acknowledge that hard work lies ahead and that the debate on aggression has not been concluded altogether. New challenges may arise. Some may try to reassess the compromise when States Parties take their decision in 2017. But one should not make the mistake of overlooking the achievement of incorporating the crime of aggression in the Rome Statute. It was probably a giant step forward in the *jus ad bellum* domain.

In sum, the Review Conference has been a success. Those who predicted that Kampala would only be a rather formal event with minor consequences for the future of international criminal law have been proven wrong. At the Conference, States Parties have reaffirmed their commitment to the Court they founded eight years ago. They have explicitly expressed this commitment in the main resolution of the Conference, the Kampala Declaration. But Kampala has not only produced resolutions, it has also been an occasion for State representatives, members of NGOs and civil society to meet, discuss and deepen their understanding of the ICC system. Even though the result could have been more substantial, the Conference also had a very real outcome with pledges made by States Parties and a considerable number of non-States Parties supporting the Court by means of material contributions and agreements to cooperate with the ICC in order to make it more effective.

But most importantly, bearing in mind all the widespread skepticism prior to the Conference, States Parties have achieved a breakthrough in a discussion that has lasted for decades. They have – by consensus – agreed

on both a definition of the crime of aggression and the conditions under which the Court may exercise its jurisdiction related thereto. There is now an increasing likelihood that in the years to come the ICC will be able to prosecute perpetrators for the crime of aggression, not like in Nuremberg by means of law created *ex post facto*, but on a strong legal basis created by the common will of States before the commission of the crime.

Lastly, there is another reason why this Conference has been a success: its African venue.²³ Having such a meeting in one of the Court's situation countries was in itself significant. It has underlined and clarified the important role African States play in the ICC system. Moreover, it has brought the Court much closer to the victims. And finally, it has confronted many non-African participants for the first time with the reality of a situation country, making discussions on the ICC and international justice much less abstract.

²³ Cf. S. Klein, 'Uganda and the International Criminal Court Review Conference - Some Observations of the Conference's Impact in the Situation Country Uganda', 2 *Goettingen Journal of International Law* (2010) 2, 687, in this issue.

Uganda and the International Criminal Court Review Conference- Some Observations of the Conference's Impact in the 'Situation Country' Uganda

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Abstract

The International Criminal Court Review Conference took place in a ‘situation country’ of the International Criminal Court (ICC), meaning in a Country the ICC is currently investigating. Therefore, the Conference had a dimension, which arose besides the factual conference and its outcomes. This article pictures observations of developments in Uganda due to the Conference and shows how issues of International Criminal Law have been increasingly recognized and discussed within the regional society. The meaning of the Conference’s venue in a ‘situation country’ in the Rome Statute system is to be assessed, whereby reference is made to the ICC’s outreach and (positive) complementarity.

A. Introductory Remarks

In May and June 2010, the international community met to review the past activities of the International Criminal Court (ICC) at the ICC Review Conference. A special venue had been chosen and the conference did not take place on neutral ground – like New York or The Hague might be termed – but in a ‘situation country’ where the ICC is presently investigating. Uganda hosted the Conference in Kampala. Factors behind the decision for the tropical venue might have been the geographical placement in (Eastern) Africa or the historical significance of Uganda in the proceedings of the ICC, after its jurisdiction there has been triggered through the first self-referral in the young Court’s history. With this unusual venue, the Conference contributed to current developments and needs in International Criminal Law besides the usual events that take place at any conference.

In this article, precursors to the situation in Uganda with the related pending cases at the ICC are referred to as well as the reason for choosing Uganda as the venue is reflected upon. Based on this approach, impressions on the impacts of the Review Conference taking place in Uganda will be delineated. This includes a portrayal of some observations and developments within Uganda respectively the Conference and linking them to legal issues of the ICC’s outreach, and (positive) complementarity.

B. Uganda as an ICC ‘Situation Country’

Uganda is one of the five ‘situation countries’ (besides the Democratic Republic of Congo, the Central African Republic, Sudan and Kenya) at the ICC.

I. Background: Civil War in Northern Uganda

Uganda, once named by Winston Churchill the ‘Pearl of Africa’, obtained already unfortunate notoriousness in the context of the dictatorship of Idi Amin and the various human rights abuses going along with it. Shortly after that, in Northern Uganda a civil war between the Lord’s Resistance Army (LRA, led by Joseph Kony) and the Government of Uganda (GoU) was fought whereby a serious humanitarian crisis was caused. The LRA is blamed for having conducted numerous attacks on civilians with killings, mutilations and assaults characterized by an extreme savage violence and furthermore for abductions¹, often followed by using and training the abductees as child soldiers (males) as well as sexual slaves (females, “wives”) for the LRA fighters.² The fear of abductions caused ‘night commuters’, which includes a major part of the young Northern population leaving the remote villages every evening to seek shelter in the next town (sometimes several hours away) or in the bush at nighttime. Moreover, a major part of the civilian population had been displaced when the GoU established camps (so called “Internally Displaced Person” (IDP) – camps) and sent the entire civil population of Northern Uganda to those camps. At the crest around 80 percent of the northern population stayed in the IDP-camps.³

¹ About the abductions, see T. Allen, *Trial Justice. The International Criminal Court and the Lord’s Resistance Army*, 2nd ed. (2008), 60-71.

² See Human Rights Watch, ‘Uprooted and Forgotten, Impunity and Human Rights Abuses in Northern Uganda’ (2005), 15, available at <http://hrw.org/reports/2005/uganda0905/uganda0905.pdf> (last visited 8 August 2010); D. E. Goldstone, ‘Embracing Impasse: Admissibility, Prosecutorial Discretion and the Lessons of Uganda for the International Criminal Court’, *22 Emory International Law Review* 761 (2008), 770-771.

³ About the IDP-camps, see Allen, *supra* note 1, 53.

II. The ‘Ugandan Case’ at the ICC

After the Rome Statute had come into force and the ICC had been established in 2002, Uganda in 2005 was the first State using the instrument of the self-referral pursuant to Arts 13a and 14 Rome Statute.⁴ Accordingly, the Presidency of the ICC assigned the “situation in Uganda” to Pre-Trial Chamber II.⁵ On 8 July 2005, five warrants of arrest against Joseph Kony and four other leading rebels were unsealed.⁶ The warrants included counts of crimes against humanity and war crimes. Investigations of the Office of the Prosecutor (OTP) continued, while in 2006 under the mediation of South Sudan Vice President Riek Machar in Juba/Sudan peace talks between the LRA and the GoU were achieved.⁷ The Ugandan government and the LRA agreed on a ceasefire in August 2006⁸ and several agreements on the progress of the peace process until February 2008.⁹ *Inter alia*, the agreements included how to deal with crimes committed during the civil war.¹⁰ According to these agreements, those accused of severe crimes would

⁴ ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44, 29 January 2004.

⁵ *Situation in Uganda*, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04-1 (Presidency), 5 July 2004.

⁶ *Situation in Uganda*, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53 (Pre-Trial Chamber II), 27 September 2005; *Situation in Uganda*, Warrant of Arrest for Vincent Otti, ICC-02/04-01/05-54 (Pre-Trial Chamber II), 8 July 2005; *Situation in Uganda*, Warrant of Arrest for Raska Lukwiya, ICC-02/04-01/05-55 (Pre-Trial Chamber II), 8 July 2005; *Situation in Uganda*, Warrant of Arrest for Okot Odhiambo, ICC-02/04-01/05-56 (Pre-Trial Chamber II), 8 July 2005; *Situation in Uganda*, Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/05-57 (Pre-Trial Chamber II), 8 July 2005.

⁷ For an overview of the Peace Talks, see Allen, *supra* note 1, 78.

⁸ Juba Agenda Item No. 1 Agreement: Agreement on Cessation of Hostilities between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, 26 August 2006, available at http://www.beyondjuba.org/peace_agreements/Agreement_on_Cessation_Of_hostilities.pdf (last visited 5 August 2010).

⁹ See listing www.beyondjuba.org/peace_agreements.php (last visited 8 August 2010).

¹⁰ Juba Agenda Item No. 3 Agreement: Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan, 29 June 2007, available at http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf (last visited 8 August 2010); Annexure to Agreement on Accountability and Reconciliation, available at http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf (last visited 8 August 2010).

be tried at the High Court of Uganda before a special division that was to be implemented. During and after the Juba Talks, a debate arose about the influence of the ICC's warrants of arrest on the Ugandan peace talks.¹¹ In addition, the debate about justice versus peace became reinvigorated.¹²

III. Current Situation

1. Relative Peace, LRA Still Active in Surrounding Countries

Today the situation in Northern Uganda is generally termed as one of 'relative peace'¹³. Since 2006 no attacks of the LRA occurred in Uganda. The population in the North is enjoying for the first time for decades a years lasting period of absence of atrocities. The LRA left Uganda, but is still active in the region of Southern Sudan, the Central African Republic (CAR) and the Democratic Republic of Congo (DRC),¹⁴ several hundreds of

¹¹ The "door to peace was closed" after ICC indictments were unsealed, P. Eichstaedt, *First Kill Your Family - Child soldiers of Uganda and the Lord's Resistance Army* (2009), 170-180

¹² C. Dolan, 'Peace First, Justice Later: Traditional Justice in Northern Uganda', *Refugee Law Project Working Paper No. 17* (July 2005) available at http://politicalscience.uwo.ca/faculty/quinn/refugee_law_project_workingpaper.pdf (last visited 9 August 2010); A. Traylor, 'Uganda and the ICC: Difficulties in Bringing the Lord's Resistance Army Leadership before the ICC', *6 Eyes on the ICC (2009-2010)* 1, 23, 34.

¹³ A. Iversen, 'Transitional Justice in Northern Uganda – A Report on the Pursuit of Justice in Ongoing Conflict', 30 September 2009, available at <http://hdl.handle.net/1800/4808> (last visited 20 August 2010), 8, 47, 53; see also L. Lenhart, 'Conflict Transformation, Reconciliation and Peace Building in Northern Uganda – Anthropological Perspectives', African Institute for Peace Communication and Development of the Protestant University of Central Africa, Yaounde, Cameroon, Proceedings of the International Colloquium: The Problematic of Peace and Development in Africa: Balance Sheet and New Stakes in the 3rd Millennium', April 2009, 2 (forthcoming).

¹⁴ "Since early 2008, the LRA is reported to have killed more than 1,500, abducted more than 2,250 and displaced well over 300,000 in the DRC alone. In addition, over the past year, more than 80,000 people have been displaced, and close to 250 people killed by the LRA in Southern Sudan and the Central African Republic.", ICC-OTP Weekly Briefing Issue 40, 1-7 June 2010, 2; on attacks in late 2009 and early 2010 see the recent report of Human Rights Watch, 'Trail of Death: LRA Atrocities in Northeastern Congo', 28 March 2010, 1-56432-614-4, available at <http://www.hrw.org/en/reports/2010/03/29/trail-death-0> (last visited 17 August 2010); on further attacks in 2010, see Human Rights Watch News, 'DR Congo: New Round of LRA Killing Campaign' 21 May 2010, available at

kilometers away from Uganda. Until today, the ICC's warrants of arrest are still unenforced.¹⁵ The Ugandan army, which is called Uganda Peoples Defence Force (UPDF), has troops in the DRC to hunt Kony.¹⁶ The UN Security Council recently declared its deep concern about the ongoing threats of the LRA and called upon the States in the region to cooperate and to take measures to protect the civilian population. Moreover, they called on the UN missions in the region to coordinate strategies and information to protect the civilians.¹⁷

In Northern Uganda, the population returned from the IDP camps and most IDP camps have been closed. In some, however, so called "highly vulnerable people" are still remaining, in particular elders, handicapped people and orphans.

2. Measures to Deal With the Past

Several measures to deal with the past have already been taken in Uganda, whereas a comprehensive policy in this regard is still lacking but in progress. The GoU implemented the National Peace, Recovery and Development Plan for Northern Uganda 2007-2010 (PRDP)¹⁸ starting programs to consolidate the State authority, to rebuild and empower the communities, to revitalize the economy and to build peace and reconciliation. As part of the Justice Law and Order Sector (JLOS)¹⁹, a Working Group on Transitional Justice is developing policy

<http://www.hrw.org/en/news/2010/05/20/dr-congo-new-round-lra-killing-campaign> (last visited 9 August 2010).

¹⁵ The proceedings against Raska Lukwiya have been ceased after his confirmed death: *Situation in Uganda, In the Case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Ochiambo, Raska Lukwiya, Dominic Ongwen*, Decision to Terminate the Proceedings Against Raska Lukwiya, ICC-02/04-01/05-248 (Pre-Trial Chamber II), 11 July 2007.

¹⁶ R. Kasasira, 'Army kills five LRA in CAR', *Daily Monitor*, 1 June 2010, available at <http://www.monitor.co.ug/News/National/-/688334/929798/-/x0abyi/-/index.html> (last visited 9 August 2010); M. Nalugo, 'Army wants Shs25 Billion to hunt down Kony', *Daily Monitor*, 6 May 2010, available at <http://www.monitor.co.ug/News/National/-/688334/913042/-/wyjgjd/-/index.html> (last visited 9 August 2010).

¹⁷ Security Council, 'Press Statement on Lord's Resistance Army', SC/9791-AFR/1908, 17 November 2009.

¹⁸ National Peace, Recovery and Development Plan for Northern Uganda 2007-2010, available at [http://www.internal-displacement.org/8025708F004CE90B/%28httpDocuments%29/F9933A32534907A8C12573B700779C11/\\$file/PRDP+Sep+2007.pdf](http://www.internal-displacement.org/8025708F004CE90B/%28httpDocuments%29/F9933A32534907A8C12573B700779C11/$file/PRDP+Sep+2007.pdf) (last visited 9 August 2010).

¹⁹ The JLOS is a reform process ongoing across the entire justice sector, see <http://www.jlos.go.ug/>.

recommendations for the legislative to include further elements of Transitional Justice. Present challenges in this context are the possibility of truth-telling mechanisms,²⁰ the decision about the extent of the integration of traditional justice mechanisms in the formal justice system and the handling of land and family disputes.²¹

3. Criminal Procedures

a) War Crimes Division at the High Court of Uganda

Regarding criminal procedures, a War Crimes Division has been established at the High Court of Uganda.²² This happened as a way of fulfilling the commitment to the actualization of the Juba Agreement on Accountability and Reconciliation, to deal with the perpetrators of serious crimes and moreover “to fulfill the principle of complementarity as stipulated under the International Criminal Court Statute”.²³ So far, no case has been transferred to the War Crimes Division. The establishment of a War Crimes Unit within the Directorate of Public Prosecutions (DPP) and of a Special Investigative Unit at the Police is also worth mentioning.²⁴

b) Amnesty

Since the year 2000, an amnesty rule has been enforced aiming to break the circle of violence by encouraging members of rebel groups to

²⁰ C. Rose, ‘Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations’, 28 *Boston College Third World Law Journal* (2008) 2, 345, 371-384.

²¹ JLOS, ‘Transitional Justice in Northern Uganda, Eastern Uganda and some Parts of the West Nile Region’, March 2008, 7, available at <http://www.jlos.go.ug/docs/Transitional%20Justice%20Study%20Report%202007.pdf> (last visited 9 August 2010).

²² State of establishment: Several judges have been appointed, also a registrar, available at http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&Itemid=154 (last visited 20 August 2010).

²³ See the Ugandan position, stated during an ICC site-visit in Uganda previous to the Review Conference: Resumed 6th Session of the Assembly of State Parties, Review Conference: Report on the Uganda site-visit, ICC-ASP/6/WGRC/INF.1, 4 June 2008, 2-3; also internet presentation of the High Court of Uganda, available at http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&Itemid=154 (last visited 9 August 2010).

²⁴ *Id.*

return without fearing prosecutions.²⁵ Pursuant to the Ugandan Amnesty Act 2000²⁶, Art. 3 (1), amnesty is declared for “any Ugandan who has at any time since 26 January 1986 engaged in a war or armed rebellion against the government of the Republic of Uganda by –

- (a) actual participation in combat;
- (b) collaborating with the perpetrators of the war or armed rebellion;
- (c) committing any other crime in the furtherance of the war or armed rebellion; or
- (d) assisting or aiding the conduct or prosecution of the war or armed rebellion.”

Such a person shall, pursuant to Art. 3(2) Amnesty Act 2000 “not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.” A ruling in such an unconditional form can be seen as a blanket amnesty.²⁷

The amnesty rule is temporarily restricted (initially to 6 months) due to Art. 16 Amnesty Act 2000 but might be extended by a statutory instrument of the Minister of the Interior. Ever since its enforcement the rule has been extended, which happened lately in May 2010 for another two years.²⁸ The Amnesty Amendment Act from 2006 furthermore empowers

²⁵ Preamble of the Amnesty Act 2000 (Ch. 294), available at http://www.ulii.org/ug/legis/consol_act/aa2000294120/ (last visited 10 August 2010); Amnesty Amendment Act 2006, available at http://www.hurinet.or.ug/index.php?option=com_docman&task=doc_download&gid=47&Itemid=60 (last visited 10 August 2010); critical on the achievement of reconciliation purposes: C. Rose, *supra* note 20, 356-359.

²⁶ Amnesty Act 2000 (Ch. 294), available at http://www.ulii.org/ug/legis/consol_act/aa2000294120/ (last visited 10 August 2010); Amnesty Amendment Act 2006, *supra* note 25; also Allen, *supra* note 1, 74; welcoming the amnesty rules: L. Hovil & Z. Lomo, ‘Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation’, *Refugee Law Project Working Paper, No. 15* (February 2005) available at <http://unddr.org/docs/Who%5C%27s%20Justice.pdf> (last visited 10 August 2010).

²⁷ On inadmissibility of blanket amnesties, see K. Ambos, ‘The Legal Framework of Transitional Justice’, in K. Ambos, J. Large & M. Wierda (eds), *Building a Future on Peace and Justice* (2009), 54 *et seq.*

²⁸ The Amnesty Act (Extension of Expiry Period) (No. 2), Instrument 2003; The Amnesty Act (Extension of Expiry Period), Instrument, 2010.

the Minister of Justice to exclude persons from the amnesty rule.²⁹ So far this instrument has not been used. Since the inception of the Amnesty Commission more than 12,000 amnesties have been granted to former LRA rebels.³⁰ Just recently during the ICC Review Conference, a prominent former LRA spokesman was granted amnesty.³¹ At this stage and on a national level, the existing blanket amnesty rule seems to contradict the effective work of the War Crimes Division at the High Court.³² It remains to be seen in how far this challenge will be approached by the Ugandan legislative, judicative and/or executive in the future.³³

c) Applicable Ugandan Law in Potential Criminal Cases

Recently, the International Criminal Court Bill passed the legislative process at the Parliament of Uganda.³⁴ This act intends, *inter alia*, to domesticate the Rome Statute into national law. A final version of the ICC Act 2010 has not been published until finalization of this paper.

As long as an ICC Act is not enforced, the Geneva Conventions Act of 1964³⁵, which domesticated the Geneva Conventions, is applicable. According to Art. 2 Geneva Conventions Act 1964 grave breaches of the conventions are to be punished.³⁶ Moreover, the Penal Code Act of 1950³⁷ is

²⁹ Para. 2A of the Amnesty (Amendment) Act, 2006 (Ch. 294), *supra* note 26.

³⁰ Information from the Amnesty Commission at 8 February 2010.

³¹ Former LRA spokesman David Nyekorach-Matsanga obtained amnesty on 4 June 2010 in Kenya: R. Olita, B. Among, C. Kiwawulo, 'Amnesty Pardons Matsanga', *Saturday Vision*, 4 June 2010, 4; critical notion hereto: S. Oola, 'Matsanga Should not Have Been Given Amnesty', *The New Vision*, 10 June 2010, 10.

³² Oola even speaks of a "transitional justice dilemma" between amnesty and accountability and reconciliation signed at the Juba Peace Talks, *supra* note 31, 10.

³³ Giving recommendations: R. Murphy, 'Establishing a Precedent in Uganda: The Legitimacy of National Amnesties under the ICC', *3 Eyes on the ICC 2006* 1, 33, 52.

³⁴ International Criminal Court Bill 2006, published in the Uganda Gazette No 67 Volume XCVIX, 17 November 2006; for the record of the parliament passing the bill, see Hansard of the Parliament of Uganda, Wednesday 10 March 2010, para. 256, available at http://www.parliament.go.ug/hansard/hans_view_date.jsp?dateYYYY=2010&dateMM=03&dateDD=10 (last visited 9 August 2010); the final ICC Act 2010 has not been published until this paper's completion.

³⁵ Uganda Geneva Conventions Act 1964 (Ch. 363), available at http://www.ulii.org/ug/legis/consol_act/gca1964208/ (last visited 9 August 2010).

³⁶ Pursuant to Art. 2 Uganda Geneva Conventions Act 1964, the maximum penalty is life imprisonment.

³⁷ Uganda Penal Code Act 1950 (Ch. 120), available at http://www.ulii.org/ug/legis/consol_act/pca195087/ (last visited 9 August 2010).

applicable. In particular, the offences of treason (Art. 23), murder (Art. 188 *et seq.*), assaults (Art. 235 *et seq.*), kidnapping and abduction (Art. 239 *et seq.*), rape (Art. 123 *et seq.*) and arson (Art. 327) might be considerable.

d) Complementarity

The ICC is a court of last resort. Due to the principle of complementarity, codified in Art. 17 Rome Statute, a case is only admissible at the ICC, when the State in question is unwilling or unable of own prosecutions. The ICC started investigating the situation in Uganda after a self-referral of the Ugandan government³⁸ which made the decision about complementarity easy in those days.

Today, many eyes are watching Uganda due to an upcoming challenge in the ICC's decision about complementarity.³⁹ The implementation of the War Crimes Division at the High Court⁴⁰ and the domestication of the Rome Statute in the ICC Act 2010 are officially directing to fulfill the requirements of the principle of complementarity. Ugandan officials seem to feel that the requirements of complementarity have already been met and officials have stated that they will bring some of the suspects to trial before the ICC.⁴¹ However, it is in question which minimal requirements domestic

³⁸ ICC Press Release, *supra* note 4.

³⁹ W. Burke-White & S. Kaplan, 'Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation', *University of Pennsylvania Law School Paper* (2008), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1220&context=upenn_wps (last visited 10 August 2010); K.-P. Apuuli, 'The ICC's Possible Deferral of the LRA Case to Uganda', 6 *Journal of International Criminal Justice* (2008) 4, 801; A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court', 50 *Virginia Journal of International Law* (2009) 1, 107.

⁴⁰ As stated on the War Crimes Division's website, it is "intended to fulfill the principle of complementarity as stipulated under the International Criminal Court Statute", see http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&Itemid=154 (last visited 9 August 2010).

⁴¹ Judge Kiiza, High Court of Uganda, Head of the Special War Crimes Division, stated at the ICC Review Conference that the "national courts were ready and willing to try anyone" and due to the recently passed ICC bill, they will be capable "to prosecute persons at the domestic level accused of the crimes within the jurisdiction of the Court", Review Conference of the Rome Statute, Stocktaking of International Criminal Justice, Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap, (Draft) Informal Summary by the Focal Points, ICC-RC/ST/CM/1, 22 June 2010, paras 25, 26; see also argumentation of the Ministry of Justice and Constitutional Affairs of Uganda in its reply to the 'Request for Information from the

prosecutions have to meet to challenge the ICC's decision about complementarity.⁴² Anyway, the existing amnesty rule questions the ability of the Ugandan legislative to conduct trial proceedings, as it is currently applicable to any Ugandan and therefore also applicable to the ICC's accused.⁴³

4. Conceptions and Opinions of the ICC Within Uganda

There is no united opinion about the ICC and its investigation in Uganda. When the peace versus justice debate increased during the Juba peace talks, a considerable part of the population lacked appreciation and the ICC has been criticized as hindering the peace process, exacerbating violence⁴⁴ and coming at the wrong time⁴⁵. This argument has been used less often nowadays.

Meanwhile, the conception of the ICC is improving. Partly, the ICC is criticized as not recognizing properly traditional justice approaches⁴⁶, which are still practiced, especially in the more remote areas in Africa.⁴⁷ Furthermore, some do not understand why the ICC is only investigating against the LRA, but not against the opposing side (UPDF and the government),⁴⁸ and consequently the ICC is perceived as biased.⁴⁹

Republic of Uganda on the Status of Execution of the Warrants of Arrest', ICC-02/04-01/05-286-Anx2, 28 March 2008, 3.

⁴² E.g. Apuuli is asking for some appropriately instituted proceedings, *supra* note 39, 813; therefore critical on low threshold to ICC's admissibility: N. Jurdi, 'Some Lessons on Complementarity for the International Criminal Court Review Conference: Africa and the International Criminal Court', 34 *South African Yearbook of International Law* (2009), 28, 49-50.

⁴³ Similar Burke-White & Kaplan, *supra* note 39, 31-32 (calling for a reform of the Amnesty Act).

⁴⁴ Allen, *supra* note 1, 102-127.

⁴⁵ 5th Session of the Assembly of State Parties, Strategic Plan for Outreach of the International Criminal Court, ICC/ASP/5/12, 29 September 2006, Part II, paras 105-119.

⁴⁶ About traditional justice mechanisms in Uganda, see the Report of Liu Institute for Global Issues, Gulu District NGO Forum in cooperation with Ker Kwaro Acholi, *Roco Wat I Acoli. Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reconciliation* (September 2005).

⁴⁷ See R. Todwong, 'African Justice Systems Promote Reconciliation', *The New Vision*, 9 June 2010, 13.

⁴⁸ In this regard, the population often refers to the Ugandan saying: "Where two elephants are fighting, only the grass is suffering"; concerning alleged human rights abuses from governmental side: Report 'Between Two Fires – The Human Rights

Some other opponents of the ICC are criticizing the ICC in general as targeting mainly African Countries. Therefore, the ICC's actions are partly perceived as a new form of legal colonialism.⁵⁰

C. Reasons for the Venue in Uganda

Uganda applied to host the Conference⁵¹ and won the bid.⁵² Some issues concerning the decision about this venue are to be emphasized.

During the process of finding an appropriate venue, the Assembly showed interest in implementing the legislation at a national level.⁵³ In fact, Uganda advertised *inter alia* with the (then recently passed) ICC bill in the legislative process⁵⁴ and hereby showed a growing commitment to the ICC in its application to host the Conference.

Located in Eastern Africa, a venue has been chosen in a region where the ICC is mainly active at present (investigations in DRC, CAR, Southern Sudan, Kenya and Uganda). Despite the recent civil war, Uganda is fairly peaceful and stable and has a relatively low criminality rate in comparison to the countries surrounding it.⁵⁵

As the Assembly of State Parties to the ICC noted in their 6th session, Uganda hosting the Conference could help to reach out to the region and could have a positive impact on the relationship between the Court and the civil society and victims.⁵⁶ Portrayed from the other side, the Review Conference offered an opportunity for Uganda and the region to appreciate

Situation in "Protected Camps" in Gulu-District', *Human Rights Focus (HURIFO)*, 26 February 2002, 43.

⁴⁹ Allen, *supra* note 1, 96-102.

⁵⁰ D. Hoile, 'International Criminal Court has Double Standards', *The New Vision*, 8 June 2010, 15.

⁵¹ Uganda's bid to host the conference available at http://www.iccnw.org/documents/ASP6_UgandaBidReviewConference_07Dec07.pdf (last visited 9 August 2010).

⁵² Resolution on the Venue of the Review Conference, ICC-ASP/7/Res.2, 21 November 2008; Argentina also applied for hosting the conference: 7th Session of the Assembly of State Parties, Interim Report of the Focal Points on the Review of the Rome Statute, ICC-ASP/7/WGRC/INF.1, 11 November 2008, 1.

⁵³ Report on the Uganda site-visit, *supra* note 23, 5.

⁵⁴ Uganda's bid to host the conference, *supra* note 51, 2-6.

⁵⁵ Similarly stated in Report on the Uganda site-visit, *supra* note 23, 4.

⁵⁶ 6th Session of the Assembly of State Parties, Review Conference: Scenarios and Options, ICC-ASP/6/INF.3, 4 December 2007, 6.

the ICC and identify with it⁵⁷ and for the victims and the affected communities to make their voices heard,⁵⁸ which is best possible in a 'situation country'.

D. Impressions on the Impact of the Review Conference in Uganda

Apart from the core Conference meetings on the international level, the Conference had a meaning on the national and/or regional level as well. The latter dimension has not been achieved in recorded plenary meetings, but in the circumstances entailed by the setting of the Conference in a 'situation country'. Therefore, some observations of actual developments and activities are to be portrayed briefly. Based on this information, the meaning for the ICC's outreach and the issue of (positive) complementarity will be raised.

I. Some Observations of Developments and Activities due to the Conference

Already prior to the Conference, a number of conference-related events took place. Some months in advance, several members of the ICC and the Assembly of States Parties came to Uganda to meet stakeholders in leading positions as well as to meet victims and affected communities in Northern Uganda.⁵⁹ Roundtable discussions and university lectures took place⁶⁰ and NGOs discussed their positions on their interest and opinions on the ICC and the Review Conference.⁶¹

⁵⁷ Stated by Ugandan representatives previous to the ICC Review Conference, Report on the Uganda site-visit, *supra* note 23, 4.

⁵⁸ Sang-Hyun Song, 'ICC Kampala Conference to Open new Frontiers', *The Observer*, 26 May 2010, available at http://www.observer.ug/index.php?option=com_content&task=view&id=8662&Itemid=66 (last visited 10 August 2010)

⁵⁹ See *e.g.* ICC Newsletter, 'The Visit of the President of the Assembly and Delegates to Uganda', ICC-ASP-NL-04/10, May 2010, 12; A. Mugisa & T. Bwambale 'ICC President Visits Uganda', *Daily Monitor*, 25 January 2010; 'Civil Society Initiatives in Uganda Ahead of the Review Conference' available at <http://www.iccuganda2010.ug/index.php?page=civil-society-initiatives> (last visited 9 August 2010).

⁶⁰ See ICC Newsletter, 'Interview with Ms. Elisabeth Rehn', ICC-ASP-NL-04/10, May 2010, 13; Newsletter for January till March 2010 of APILU (Advocates for Public in

During the Conference, the awareness of the ICC amongst the general public increased. This was illustrated in the coverage by the two leading daily newspapers of Uganda.⁶² During the period of the Conference, the media coverage of issues of the ICC and its Review Conference increased evidently. Just to mention a few examples of the Conference's vivid media coverage, prominent stakeholders from the international community published guest articles⁶³ or were interviewed.⁶⁴ Several Ugandan stakeholders took position on the ICC.⁶⁵ Moreover, a debate between Ugandan stakeholders arose about the possibility of prosecution against Museveni, the President of Uganda, and the UPDF by the ICC.⁶⁶ Furthermore, voices have been heard about the criticism against the ICC that it is targeting African countries.⁶⁷

Moreover, apart from this Conference, stakeholders from the international community met with regional community members and affected communities.⁶⁸ A well-attended public side-event, a 'Victims

International Law in Uganda), 2-4, available at <http://www.apilu.org/Newsletters/Jan-March%20Newsletter2010.pdf> (last visited 9 August 2010).

⁶¹ E.g. a workshop for representatives of several victims' related NGOs took place in February in Gulu (Northern Uganda) to come to a common position during the conference, mentioned in: Resumed 8th Session of the Assembly of State Parties, Report of the Bureau on Stocktaking: The Impact of the Rome Statute system on Victims and Affected Communities, ICC-ASP/8/49, 18 March 2010, 11.

⁶² 'The New Vision' and 'Daily Monitor'.

⁶³ B. Ki-Moon, 'ICC, a Growing System of Global Justice, Peace', *The New Vision*, 30 May 2010, 17.

⁶⁴ Interview with Luis Moreno-Ocampo 'Kony not Interested in Peace', *Sunday Vision*, 6 June 2010, 17; I. Musa Ladu, 'Ocampo's Plan to Hunt Kony', *Daily Monitor*, 30 May 2010, available at <http://www.monitor.co.ug/News/National/-/688334/928750/-/x09mjk/-/index.html> (last visited 20 August 2010).

⁶⁵ D. Pachuto, 'Why the ICC is Important for You and Me', *Daily Monitor*, 19 January 2010, 12; M. Sserwanga, 'ICC Conference Offers Opportunity to Commit to Justice', *Saturday Monitor*, 28 May 2010; Todwong, *supra* note 47, 13.

⁶⁶ J. Eriku, 'ICC Told to Probe Army for War Crimes', *Daily Monitor*, 2 June 2010, 8; O. Opondo, 'Otunnu's Outbursts are Driven by Fear', *The New Vision*, 7 June 2010, 13.

⁶⁷ Hoile, *supra* note 50, 15 (speaking of a new 'legal' colonialism); Vision Reporter, 'Africa Should Embrace ICC, says Museveni', *The New Vision*, 1 June 2010, 3; C. Bekunda & M. Tabajjukira, 'We are not Targeting African Leaders, says ICC Prosecutor', *Saturday Vision*, 28 May 2010, 4.

⁶⁸ P. Aber, 'ICC President Meets Kony War Victims', *The New Vision*, 30 May 2010, 2.

Football Day’ where victims met with representatives from the ICC and from NGOs is also worth emphasizing.⁶⁹

Finally, the Conference has been accompanied by a ‘Peoples Space’, a parallel forum, aimed at providing an opportunity for the civil society (especially: victims’ and affected communities’ representatives) to participate at the Conference. Located on the Conference’s premises, regional NGOs, research institutions and other civil stakeholders represented their interests at informational events, lectures and discussions, where documentaries were shown and victims were interviewed. Further, it was possible for visitors of the Peoples Space to follow the Conference’s activities via a video transmission. On a “Wall of Freedom”, visitors in the Peoples Space could comment on the impact of the ICC.⁷⁰

Unfortunately, the People’s Space – due to the strong restrictions on entry to the Conference’s premises out of security reasons and the need to pass through an accreditation process – might not have been as open to the civil society and to the public as it might have intended to be. Visitors of the Peoples Space were members of regional NGOs and other institutions or delegates from the Conference, but rarely individuals from the Ugandan public. In the end, the People’s Space functioned as a (still valuable) platform for regional stakeholders and intermediaries to approach the delegates of the Conference.

II. ICC Outreach for Uganda and the Region

The ICC established an outreach program to bring information to the affected communities to ensure an understanding of the investigations and proceedings in all phases of its activities. Regarding to the ICC’s outreach strategy, serving justice needs to be seen and therefore “making judicial proceedings public is a central element of a fair trial and therefore necessary to ensuring the quality of justice.”⁷¹ This task is seen as imperative to fulfill

⁶⁹ http://www.victimsfotballday.org/ICC_football/Home.html (last visited 9 August 2010).

⁷⁰ Some inscriptions were: “Let us work together to realize a world where peace, development and freedom and human rights are ensured through strengthening the international justice system” (by H. E. Ban Ki Moon), “Justice for victims”, “Peace and Justice has no substitute”, “Complementarity is the way to go”, “The ICC which Africa created in 1998 is clearly very strong in Uganda today and shows Africa’s resolve to end impunity”.

⁷¹ Strategic Plan for Outreach of the ICC, *supra* note 45, para. 2.

the Court's mandate.⁷² The outreach shall be conducted through a "two-way communication", whereby the Court conveys its role to the population to enable it to better know, understand and reach the Court's work, and in return learns from the communities about their views and needs.⁷³ At the ICC Review Conference, the need of a robust outreach program was highlighted.⁷⁴

The ICC outreach activities are crucial for the success of justice and for the still emerging field of international criminal law. Justice served on the international level comes along with the danger of not being perceived by the victims and the affected communities. For this reason, especially those who have been affected most need to be involved. If the processes on the international level have not been transparent and understandable, justice will not have been there for them. This can, in turn, eventually endanger the peace and stabilization processes. Finally, the still emerging field of International Criminal Law is depending on the commitment of the citizens of its supporting member States.

While it has been agreed on the purpose and need of the outreach, the way and extent in which the outreach shall be conducted in and performed remains a challenge. The outreach activities are still in need to be further optimized and adapted to the needs of victims, whereby creative ways to strengthen the outreach are in quest.⁷⁵ As it has been concluded in the stocktaking process of the ICC Review Conference, difficult tasks are (among others) to fill information gaps within the affected population. Due to lack of sufficient information, many victims have unrealistic expectations about the process and reparations.⁷⁶ This applies especially for people living in remote areas and for women and children.⁷⁷

In Uganda, the ICC is following a specific outreach strategy that is recognizing the contextual factors⁷⁸ and conducts its activities from the ICC

⁷² *Id.*, para. 3.

⁷³ *Id.*; Review Conference of the Rome Statute, Stocktaking of International Criminal Justice: Impact of the Rome Statute System on Victims and Affected Communities, Draft Informal Summary by the Focal Points, RC/ST/V/1, 10 June 2010, para. 26.

⁷⁴ *Id.*, paras 25, 28.

⁷⁵ *Id.*, paras 54, 55.

⁷⁶ *Id.*, paras 48, 50.

⁷⁷ *Id.*, para. 49.

⁷⁸ Strategic Plan for Outreach of the ICC, *supra* note 45, paras 105-107.

field office in Kampala with various activities in Northern Uganda.⁷⁹ During the Review Conference, the outreach team from the ICC Kampala field provided support for the Conference activities, for example by providing information materials, briefing journalists and supporting the organization of the Court's side events.⁸⁰

To reach victims and affected communities in an outreach process, intermediaries are holding an important role. They practice a leading position (religions, political, economical etc.), often being members of the affected population. The role of intermediaries has been discussed at the ICC Review Conference as part of the stocktaking process about the impact of the Rome Statute on victims and affected communities. The role of intermediaries has been concluded as remaining an unclear challenge.⁸¹ The dialogue with intermediaries seems to be potentially extraordinarily fruitful. Often, intermediaries present an umbrella of interest and might be able to communicate the needs of the population to the Court. After the dialogue, they can function as a speaking tube towards the population. Interestingly, a big number of intermediaries – especially from Uganda, but also from other countries in the region and worldwide – has been involved in the Conference's activities, *e.g.* those at the People's Space and in the surrounding events. Therefore, the Conference served as an exchange platform between stakeholders representing international interests and local intermediaries.

From this point of view, the ICC Review Conference in Uganda has been the biggest outreach event ever to take place in international law.

III. (Positive) Complementarity

Regarding the endeavours in Uganda to implement an effective body for prosecution of crimes of international relevance, the Conference offered a unique opportunity and forum for capacity building and knowledge transfer and for assessing the needs of prospective actions in this respect.

⁷⁹ As an example, ICC Press Release, ICC Conducts Outreach Workshop with People with Disabilities in Teso Sub-Region, North Eastern Uganda, ICC-CPI-20090204-PR388, 4 February 2009.

⁸⁰ Calendar of activities of the ICC Outreach Unit within the Kampala field office for June 2010, available at http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/outreach/uganda/calendar%20of%20activities/calendar%20of%20activities_%20june%202010 (last visited 9 August 2010).

⁸¹ Review Conference of the Rome Statute, *supra* note 40, para. 52.

According to the concept of positive (or proactive)⁸² complementarity, the ICC is called to motivate and assist national legal bodies in their activities to prosecute crimes of an international dimension on the national level.⁸³ All State parties of the Rome Statute are obliged to prosecute international crimes⁸⁴ by themselves, but the complex nature of those crimes brings difficulties for some countries to meet this responsibility.⁸⁵ Here, the Court should strive to facilitate national entities with the necessary tools to conduct prosecutions. Possible activities towards positive complementarity are closely connected to the Office of the Prosecutor's (OTP) mission and the OTP's duties in the several investigative stages,⁸⁶ whereby a comprehensive policy on positive complementarity could help to enhance the effectiveness of fulfilling its mandate.⁸⁷ In the current prosecutorial strategy of the OTP, a positive approach to complementarity is incorporated as a fundamental principle⁸⁸ and defined as encouraging genuine national proceedings where possible, but without a direct involvement in capacity building and technical or financial assistance.⁸⁹

Apart from the important position of the OTP in these tasks – namely positive complementarity – the concept involves other ICC institutions⁹⁰ as well. The underlying principles concern the ICC as a whole, which comes especially to importance where the ICC conducts an outreach as it did while holding its first Review Conference in a 'situation country'.

During the Review Conference, State parties expressed their views, interests and needs in the current development in a vivid exchange. Coming

⁸² W. Burke-White, 'Proactive complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' 49 *Harvard International Law Journal* (2008) 1, 53-54.

⁸³ *Id.*

⁸⁴ Preamble of the Rome Statute.

⁸⁵ ICC Newsletter, 'Interview with Ambassador Kirsten Biering on Positive Complementarity', ICC-ASP-NL-03/10, January 2010, 18-19.

⁸⁶ On the legal mandate for a policy of positive complementarity: Burke-White, *supra* note 82, 76-82.

⁸⁷ *Id.*, 73 calls for a policy of proactive complementarity; similar in W. Burke-White, 'Implementing a Policy on Positive Complementarity in the Rome Statute Justice System', 19 *Criminal Law Forum* (2008) 1, 59-85

⁸⁸ The Office of the Prosecutor, 'Prosecutorial Strategy 2009-2012', 1 February 2010, paras 15-17.

⁸⁹ *Id.*, paras 16-17.

⁹⁰ *E.g.* on a possible role of the Assembly of States Parties, N. Jurdi, *supra* note 42, 53-54.

to terms with positive complementarity, this has been an important assessment forum. Interestingly, the Head of the implemented War Crimes Division at the High Court of Uganda explicitly called for assistance in capacity building⁹¹ and simultaneously expressed the readiness and willingness to handle cases with crimes of an international character at the High Court.⁹² Here, the need and importance of measures within the concept of positive complementarity became evidently apparent. A prospective sphere of activity of the ICC is to be seen here.

E. Conclusions

Bringing the ICC Review Conference to the ‘situation country’ Uganda offered a wide range of possibilities to the ICC and to the regional society besides the actual conference proceedings.

The Conference functioned as a big outreach event for the population in Uganda and the region. The ICC showed its presence and interest and thereby enhanced the identification with its work in an environment of a diverse spectrum of opinions about it. This might lead to a further understanding of and commitment to the ICC not only by State actors but also by the affected communities.

The Conference’s delegates highly recognized regional interests of the area, where the ICC so far has been most active. This consideration took place in the stocktaking process prior and during the Conference as well as in a part of the two-way-communication that characterizes the ICC’s outreach. The perception, which was gained, might influence future developments. For example, an approach to measures of positive complementarity could be expected, where capacity building have been or will be demanded.

⁹¹ Judge Kiiza, *supra* note 41, para. 24 (with special regard to needed capacity building for the prosecution).

⁹² *Id.*, para. 25.

**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**

Roger S. Clark*

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Abstract

The first Review Conference on the International Criminal Court had three items on its agenda proposing amendments to the Rome Statute. The proposal to delete Article 124 of the Statute (which permits States to opt out of the war crimes provisions of the Statute for seven years) failed. Proposals for a comprehensive set of provisions facilitating the Court's exercise of its jurisdiction over the crime of aggression were adopted. The existing provisions on weapons that are banned in international armed conflict were incorporated also into the part of the Statute dealing with non-international armed conflicts.

A. Introduction

Article 123 of the Rome Statute of the International Criminal Court¹ provided for a Review Conference on the workings of the Statute, to be convened seven years after the Statute's entry into force. Specifically, the Article said that the Conference was "to consider any amendments to the Statute." While the Conference used a generous interpretation of "review" and devoted much of the first week of a two-week conference to a "stocktaking",² the primary work of the Conference was to examine three potential amendments to the Statute that had been forwarded by the governing body of the Court, the Assembly of States Parties ("ASP"). These were: deletion of Article 124 of the Statute, completion of negotiations to activate the Court's jurisdiction over the crime of aggression, and the addition of a proscription on the use of certain weapons in the provisions of Article 8 dealing with non-international armed conflict.³ I consider each of

¹ U.N. Doc.A/CONF.183/9, 17 July 1998.

² The stocktaking entailed a rich review of the topics of complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice. There are some very useful papers on these issues on the Court's website for the Conference. For the conference website <http://www.icc-cpi.int/Menu/ASP/ReviewConference/> (last visited 20 August 2010). Perhaps the most distressing fact to emerge from the discussions is that fewer than half of the parties to the Statute have adopted adequate domestic implementation legislation to give effect to the treaty.

³ The Assembly had the power to set the agenda for the Conference. Meeting the previous November, it took a cautious view of the amendments that could be considered, limiting the agenda to the three just noted. One of the three, possible

these proposals, and the outcomes on them, *seriatim*. No votes were necessary as a consensus was reached on each of the items, albeit in one case to do nothing.

B. Non-deletion of Article 124 of the Statute

Article 124 of the Statute is the only provision in the Statute that specifically required its own inclusion on the agenda of the first Review Conference. It provides that, upon becoming a party to the Statute, a State may declare that, for a period of seven years, it is not bound by the provisions of Article 8 of the Statute (which deals with war crimes) “when a crime is alleged to have been committed by its nationals or on its territory”. The Rome Statute has a general prohibition of reservations;⁴ this provision, which is headed “Transitional Provision” and often described as an “opt-out clause”, permits, in this special case, what is functionally a reservation. It was negotiated at the very end of the 1998 Diplomatic Conference to enable France to accept the Statute.⁵ Of the 111 existing parties to the Statute, only France and Colombia have availed themselves of it. France, in fact, withdrew its declaration after about six years and Colombia’s seven years have now passed. Article 124 provided, in its own terms, that it “shall be reviewed at the [first] Review Conference.” “Shall be reviewed” amounts to a promise of consideration but not to a promise that a particular – or any – result should be reached.

The procedural stance of the matter going into Kampala was that the 2009 Assembly of States Parties forwarded a bracketed proposal for the

deletion of Art. 124, was required to be on the agenda by the article’s own terms; aggression had been the subject of extensive preparatory work since 1998 and it was inconceivable that it would not be considered, even if it was not strictly *required* to be so; there was wide agreement on the weapons provision by late 2009, but a number of other potential additions to Art. 8 did not proceed to Kampala in the absence of a fairly clear consensus on them. *See infra* at notes 71-77. So too, proposals relating to addition of crimes of terrorism and serious drug crimes to the subject-matter of the Statute were left over to future meetings of the Assembly of States Parties, and indeed, potentially, to later Review Conferences. *See infra* at notes 78-80. (Art. 123 empowers the ASP to call future Review Conferences, but does not indicate any particular time frame. There seems to be a widespread disposition to have reviews on a regular basis, perhaps on a seven-year cycle.)

⁴ Rome Statute, *supra* note 1, Art. 120: “No reservations may be made to this Statute.”

⁵ Apparently the permanent Five members of the Security Council had agreed a day or two earlier that their bottom line was that there should be a ten-year opt-out period in respect of both war crimes (Art. 8) and crimes against humanity (Art. 7), but the United Kingdom and France opted out of that agreement.

deletion of the Article – the brackets indicating that the matter was controversial.⁶ In the course of the Review Conference, an overwhelming majority of those taking the floor spoke in favor of its deletion, although France, along with some States that are non-parties to the Rome Statute, notably Iran and China, supported its retention. Iran and China suggested that it might be helpful in enabling them to come aboard (although it has not done the trick in the past eleven years). Many of those opposed to keeping it emphasized that it detracted from the general policy of the Statute against reservations. Moreover, it did not appear to have played a significant role in achieving the goal of universality, that is, of encouraging all hundred and ninety-odd States to ratify or accede to the Statute. In the event, the Conference adopted a resolution⁷ touching on the various points of view by referring to “the need to ensure the integrity of the Rome Statute”, “the importance of the universality of the founding instrument of the International Criminal Court”, and the “transitional nature of Article 124, as decided by the Rome Conference”. It then asserted that, having reviewed the provisions of Article 124, it “*Decides* to retain Article 124 in its current form” and also decides to “further review the provisions of Article 124 during the fourteenth session of the Assembly of States Parties to the Rome Statute,” that is in 2015.

There is, of course, no guarantee that the review by the ASP in 2015 will result in any other conclusion than to leave “well” alone. This episode in Kampala is a good example of what can happen in a consensus negotiation – a few adamant states (some of them not even parties to the treaty) were able to block what was desired by a very large majority. As will be seen, the minority (many of the same states) chose not to stand in the way of a consensus on the other two amending items on the Kampala agenda.

C. The Crime of Aggression

Activating the Court’s jurisdiction over the crime of aggression was the most important piece of unfinished business from the Rome Diplomatic Conference in 1998. The vast majority of the participants in Kampala, whether they wished the item to succeed or to fail, regarded it as the most significant item at the Review Conference and the one to which they

⁶ See Resolution ICC-ASP/8/Res. 6, 26. November 2009, Annex I.

⁷ Art. 124 ICC Statute, RC/Res.4 (2010).

devoted most of their efforts. Those efforts were fulfilled by adoption of a comprehensive resolution which aspired to resolve all the outstanding issues.⁸

Article 5 (1) of the Statute lists “the crime of aggression” (along with the crime of genocide, crimes against humanity and war crimes) as one of the four items within the subject-matter jurisdiction of the Court.⁹ Paragraph 2 of Article 5 adds, however, that “[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”.¹⁰ Building on Article 5, the Final Act of the Rome Conference instructed the Preparatory Commission for the Court to “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of Aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime”.¹¹ “Definition” here has been understood to refer to the relevant substantive criminal law issues; “conditions” requires consideration of whether some organ of the United Nations (in particular the Security Council) may be able – or even required – to participate in the process alongside the Court. The drafting task not having been completed by the end of the life of the Preparatory Commission,¹² the Court’s Assembly of States Parties created the Special Working Group on the Crime of Aggression (“SWGCA”) to carry forward the task. The SWGCA was open to participation by all States, members of the ICC and non-members alike.

⁸ The Crime of Aggression, RC/Res. 6 (2010).

⁹ Rome Statute, *supra* note 1, Art. 5 (1).

¹⁰ *Id.*, Art. 5 (2).

¹¹ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, para. 7, U.N. Doc. A/CONF.183/10, 17 July 1998, at 8-9 [Resolution F].

¹² The last draft on the table at the Preparatory Commission was a Discussion Paper proposed by the Coordinator on the Crime of Aggression, U.N. Doc. PCNICC/2002/2/Add.2 [Discussion Paper], discussed in R. S. Clark, ‘Rethinking Aggression as Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court’, 15 *Leiden Law Journal* (2002) 4, 859.

The Group's ultimate effort on provisions and conditions was contained in its final Report to the Assembly in February 2009,¹³ which was in front of the Review Conference. It was accompanied by some later suggestions which had been generated at a subsequent informal meeting of the ASP and by the last Chair of the Working Group.

The essence of the SWGCA's draft comprised two articles for addition to the Statute: "Article 8bis" which contained the definition, and "Article 15bis" which dealt with the conditions for exercise. Article 8bis did not contain any alternatives, representing a consensus that held in Kampala, although not everyone at the Working Group was entirely happy with everything. Nonetheless, the SWGCA's work on Article 8bis was adopted verbatim in Kampala. Article 15bis, on the other hand, offered many alternatives – notably variations on the theme of involvement *vel non* of the Security Council in the process by which a specific case would come before the Court. This Article was where most of the debate took place in Kampala. That debate resulted in the emergence of two Articles, 15bis and 15ter, covering the matters in the SWGCA's draft. The Conference considered that Committee's work and a number of new proposals made in Kampala, making some hard political decisions between the alternatives.

Draft Elements of Crimes had also been produced before Kampala, at an informal inter-sessional meeting of the Assembly held in June of 2009.¹⁴

¹³ Report of the Special Working Group on the Crime of Aggression, Doc. ICC-ASP/7/SWGCA/2 (2009) [2009 Report]. The proposed amendments and the proposed "Elements" (*see next note*) are also contained in Annex II to Resolution ICC-ASP/8/Res. 6, *supra* note 6. Concerning the provisions on aggression in general, *see* N. Weisbord, 'Prosecuting Aggression', 49 *Harvard International Law Journal* (2008) 1, 161; S. Barriga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression', in G. R. Bellilli ed., *International Criminal Justice* (2010); 'Symposium: The Codification of the Crime of Aggression', 20 *European Journal of International Law* (2009) 4, 1103. Not all the contributors to the *European Journal* symposium are true believers. Another who is skeptical of the whole exercise is G. Simpson, "'Stop Calling it Aggression": War as Crime', 61 *Current Legal Problems* (2008), 191. The bulk of the Special Working Group's substantive work was done at inter-sessional meetings held at the Liechtenstein Institute on Self-Determination at Princeton University. The SWGCA's materials are usefully collected in S. Barriga, W. Danspeckgruber & C. Wenaweser (eds.), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (2009).

¹⁴ Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009, Doc. ICC-ASP/8/INF.2 (2009), Appendix I [Draft Elements of Crimes]. There is a useful explanatory note on the

While there was some doubt at the time whether these Elements would be formally approved in Kampala, that was what in fact occurred.¹⁵

In what follows, I discuss what seemed to me to be the most significant drafting choices that were made in respect of the definition and the conditions for exercise of jurisdiction.

I. The Basic Structure of Article 8*bis* –the Definition

A major intellectual and juridical contribution of the Nuremberg and Tokyo trials was to take what in the past had been thought of essentially as a question of state responsibility and add to it an enforcement measure based on individual criminal responsibility. As the Nuremberg Tribunal said in a famous quotation, “Crimes are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.¹⁶ As the context of the Tribunal’s discussion made plain, this is not to deny that there is still state responsibility as well. Accordingly, Article 8*bis* uses a drafting convention that builds on this combination of state and individual responsibility. It distinguishes between an “act of aggression” (what a State does) and the “crime of aggression” (what a leader does). “Act of aggression” is defined 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”.¹⁷ This language, based on the United Nations Charter, is followed, in the second paragraph of the Article, by a reference to a list of “acts” that “shall, in accordance with General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as

elements in Annex II of the Report (“Non-paper by the Chairman on the Elements of Crimes”). Art. 9 of the Rome Statute required the production of Elements for genocide, crimes against humanity and war crimes. Resolution F required them for aggression; the SWGCA recommended an amendment to Art. 9 to make clear that aggression, too, requires its Elements. Elements emphasize, in more detail than the Statute, what the prosecution must prove in order to show that there was a crime; they also make some of the connections between the definitions in the “special part” of the Statute (Arts 6, 7 and 8, and now 8*bis*) and the “general principles” contained in Part III of the Statute. *See generally*, discussion of Art. 9 of the Statute (“Elements of Crimes”) in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed. (2008), 505.

¹⁵ Res. 6, *supra* note 8, annex II.

¹⁶ ‘International Military Tribunal (Nuremberg), Judgment and Sentences’, 41 *American Journal of International Law* (1947) 1, 172, 221.

¹⁷ Article 8*bis* (2), *supra* note 8, Annex I.

an act of aggression.”¹⁸ Resolution 3314¹⁹ is the well-known 1974 effort of the General Assembly to define aggression so as to assist the Security Council in doing its work for the maintenance of peace and security. The resolution deals with state responsibility, but there was considerable support in the SWGCA for using it as the basis for a definition in the present context. Utilizing it was a challenge. The ultimate drafting of *8bis* is aimed at avoiding the open-ended nature of Resolution 3314 which says, essentially, that the Security Council may decide that something that meets the definition is nonetheless not aggression and, on the other hand, that acts other than those on the list may be regarded by the Security Council as aggression. As a political body, the Security Council may act in a completely unprincipled and arbitrary manner. A criminal Court constrained by the principle of legality²⁰ must be under more restraint, so the open-textured aspects of 3314 needed some pruning and the Security Council’s determination needed to be removed from the mix. The result is fairly precise. The list of “acts” in Article *8bis* (2), taken verbatim from Resolution 3314, may be open-ended to the extent that it does not say that no *other* acts can amount to aggression. However, any other potential candidates must surely be interpreted narrowly and *ejusdem generis* with the existing list.

“Crime of aggression”, for the purpose of the Statute, “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.”²¹

The crime of aggression is thus a “leadership” crime, a proposition captured by the element that the perpetrator has to be in a position

¹⁸ *Id.* The list of acts that “qualify as an act of aggression” is: invasion, annexation, bombardment, blockade, attack on the armed forces of another State, using forces that are in a State by consent in contravention of the terms of their presence, allowing a State’s territory to be used for the purposes of aggression by another, and 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.

¹⁹ G.A. Res. 3314 (XXIX), 14. December 1974, 29 U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142.

²⁰ Rome Statute, *supra* note 1, Art. 22 – “Nullum crimen sine lege”.

²¹ Art. *8bis* (1), *supra* note 8, Annex I.

effectively to exercise control over or to direct the political or military action of a State.²² There was considerable discussion in the SWGCA about how this applies to someone like an industrialist who is closely involved with the organization of the State but not formally part of its structure.²³ Some support was shown for clarifying the matter by choosing language closer to that used in the United States Military Tribunals at Nuremberg, namely “shape and influence” rather than “exercise control over or to direct”.²⁴

American and French prosecutions at the end the Second World War had made it clear that industrial leaders could potentially be responsible for the crime of aggression, although none were ultimately convicted.

Note should also be taken at this point of the “threshold” clause at the end of the definition of “crime of aggression”, indicating that not every act of aggression is the basis for criminal responsibility. It is only those which by their character, gravity and scale, constitute a “manifest” violation of the Charter.²⁵ The need for such a limitation was strongly debated²⁶ but

²² As well as the leadership language contained in Art. 8*bis* (5) of the amendments adopted in Kampala (in an apparent abundance of caution) adds a para. 3*bis* to Art. 25 (3) of the Statute which deals with individual 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.

²³ See K. J. Heller, ‘Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression’, 18 *European Journal of International Law* (2007) 3, 477.

²⁴ See Informal intercessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, from 11 to 14 June 2007, Doc. ICC-ASP/6/SWGCA/INF.1 (2007) at 3, para. 12. This preparatory work seems to support the proposition that industrialists are potentially covered by the amendments, although no formal language to that effect was added.

²⁵ *Supra* note 21. The Introduction to the Draft Elements of Crimes for aggression, *supra* note 14, stated that: “The term ‘manifest’ is an objective qualification.” There is a comment in the Report of the 2009 Intercessional meeting on the crime of aggression, *supra* note 14, at 6, para. 25, that “the Court would apply the standard of the ‘reasonable leader’, similar to the standard of the ‘reasonable soldier’ which was embedded in the concept of manifestly unlawful orders in article 33 of the Rome Statute.” The phrase “character, gravity and scale” provides a framework for forging such an objective standard. The best analysis of this threshold is J. Potter, *The Threshold in the Proposed Definition of the Crime of Aggression*, 6 N.Z. Y.B. INT’L L. (2008), 155. See also understanding adopted in Kampala, *infra* note 32.

²⁶ See e.g., 2009 SWGCA Report, *supra* note 13 at 3, para. 13: “It was argued that the clause was unnecessary because any act of aggression would constitute a manifest violation of the Charter ... and that the definition should not exclude any acts of

most participants finally accepted that they could live with it in return for removal of any requirement that there be a “war of aggression”²⁷ or that the list of acts in the definition of “act of aggression” be more limited than the list in General Assembly Resolution 3314.²⁸ Some speakers thought it might help in analyzing a (rare) case of principled humanitarian intervention or a case more generally where the legality of the action was definitely in doubt.²⁹ In a speech to the Conference on 4 June 2010, the Legal Adviser to the U.S. Department of State insisted, tendentiously, that:

“If Article 8*bis* were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide – the very crimes the Rome Statute was designed to deter – do not commit “manifest” violations of the U.N. Charter within the meaning of Article 8*bis*. Regardless of how states may view the legality of such efforts, those who plan them are not

aggression. ... Other delegations expressed support for the threshold clause which would provide important guidance for the Court, and in particular prevent the Court from addressing borderline cases.” Some speakers thought it might help in analyzing a (rare) case of principled humanitarian intervention or a case more generally where the legality of the action was definitely in doubt.

²⁷ The Nuremberg Charter had a puzzling requirement of a “war of aggression” which prompted the International Military Tribunal to draw a *de facto* distinction between the conquests of Austria and Czechoslovakia (achieved without actual fighting) on the one hand, and the invasions of Poland and others (achieved with considerable fighting) on the other. The former were classified as “acts of aggression” (and not yet “criminal”), the latter as “wars of aggression” and proscribed under the Charter. Control Council Law No. 10, under which subsequent prosecutions were brought, had language broad enough to treat Austria and Czechoslovakia as criminal aggressions. *See generally*, R. S. Clark, ‘Nuremberg and the Crime against Peace’, 6 *Washington University Global Studies Law Review* (2007) 3, 527.

²⁸ *Supra* note 19. *Cf.* 2002 Discussion Paper, *supra* note 12 (containing alternative which would modify the Res. 3314 list by requiring that the act of aggression be one that “amounts to a war or aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”).

²⁹ Art. 8*bis*, following the drafting style of the other substantive articles in the Statute, does not address specifically grounds of justification or excuse. Such matters, called “grounds for the exclusion of responsibility”, fall to be analyzed by the Court under the general part of the Statute, and, in particular, under article 31 thereof. The requirement that a breach be “manifest” provides an alternative route to analyze some of the “defences”. Obviously, that state is acting in self-defence as understood under the UN Charter, or as authorized by the Security Council, means that there is no act of aggression, without getting to the “manifest” issue. Other cases may be more difficult.

committing the “crime of aggression” and should not run the risk of prosecution.”³⁰

Two paragraphs of “understandings” annexed to the Review Conference’s resolution adopting the amendments on the Crime of Aggression³¹ address these matters, apparently giving comfort to the United States:

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.

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.³²

II. Structure of Articles 15*bis* and 15*ter* – Conditions for Exercise of Jurisdiction

The Special Working Group was less successful in resolving the issue of conditions than that of definition. The second sentence of Article 5, paragraph 2 of the Statute, added without public debate in the last days of the Rome Conference, states that the provision on aggression “shall be consistent with the relevant provisions of the Charter of the United Nations”³³. By and large, the Permanent Members of the Security Council took the position in the negotiations that Article 39 of the Charter confers on them the “exclusive” power to make determinations of the existence of an act of aggression, and thus a Security Council pre-determination of aggression is an essential precondition to exercise of the ICC’s jurisdiction. Most other States pointed out that Article 24 of the Charter confers “primary” power on the Council in respect of the maintenance of international peace and justice and that “primary” does not mean

³⁰ Statement by Harold Koh to the Conference, 4 June 2010, available at <http://www.state.gov/s/l/releases/remarks/142665.htm> (last visited 19 August 2010).

³¹ *Supra* note 8, annex III.

³² Paragraph 7 here underscores the “and” in the phrase “character, gravity and scale”.

³³ Rome Statute, *supra* note 1, Art. 5 (2), second sentence.

“exclusive”. They added that the General Assembly has made several findings of aggression and that the United States, the United Kingdom and France were co-sponsors of the 1950 Uniting for Peace resolution which recognizes the Assembly’s powers³⁴ and that all five of the Permanent Members have voted pursuant to that resolution when it suited them. Non-permanent members tend to add that the International Court of Justice has addressed issues where aggression is in play.³⁵ Like the Security Council, however, the ICJ has been leery of actually using the word “aggression”. The draft sent to Kampala included the General Assembly and the International Court of Justice as alternative “filters” for the crime of aggression in the absence of Security Council action, but these were deleted in Kampala.

The major achievement in this part of the negotiation in the period of the Special Working Group was to de-couple the definition from the conditions. In the version of the definition and conditions for aggression that was on the table at the end of the life of the Preparatory Commission, the Security Council (or possibly the General Assembly or the ICJ) would make a definitive decision on the existence of the element of “act of aggression” which was binding on the ICC.³⁶ Not only would this subvert the power of the Court to decide itself on the existence or otherwise of all the elements of the crime, but it would make it extremely difficult to build a criminal offence around a structure where one of the key elements was decided elsewhere and potentially on the basis of totally political considerations. In such circumstances, there would probably be unbearable weight placed on

³⁴ G.A. Res. 377(V) A, 3. November 1950. The relevant provision reads:
[The General Assembly] “*Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.”.

³⁵ Most recently in *Armed Activities on the Territory of the Congo (DR Congo v. Uganda)*, Jurisdiction of the Court, Judgment, ICJ Reports 2005.

³⁶ See the 2002 Coordinator’s Paper, *supra* note 12. This was the effect of the words “which has been determined to have been committed by the State concerned” which appeared then in paragraph 2 of the definition. The whole context made it clear that someone other than the Court would make the determination.

the mental element provisions of Article 30 of the Statute,³⁷ the mistake provisions of Article 32³⁸ or on the “manifest” threshold.³⁹ This was removed in the Special Working Group’s draft and in the ultimate language adopted in Kampala. Any determination elsewhere is of a preliminary nature, although it may have some evidentiary value.⁴⁰ This opened the way for focusing on the various options put before the Review Conference of giving the Security Council (or other United Nations organ) a “filter” role, providing either a “green light” (permission to go forward) or a “red light” (denial of right to go forward) to the ICC’s proceedings.⁴¹ There was, however, a solid group of states strongly behind the proposition that the Prosecutor should be able to proceed even in the absence of action by someone else.⁴²

The resolution of these divergent positions in Kampala was facilitated by a move to split the SWGCA’s draft Article 15*bis* into two parts, one dealing with state referrals and referrals made by the prosecutor *proprio motu*, and the other dealing with Security Council referrals. These became, respectively, Article 15*bis* and 15*ter*. Article 15*ter* referrals are the most simple to describe and it will thus be helpful to discuss them first.

³⁷ Rome Statute, *supra* note 1, Art. 30, has a general rule that the crimes in the Statute must be accompanied by “intent and knowledge”.

³⁸ In the structure of the Statute, a mistake is the obverse of knowledge or intent – it negates a mental element of a crime. Rome Statute Art. 32 says that a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. It continues that a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. Finally, it adds that a mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or in certain cases of superior orders. A defense that “I made a mistake about the legality of the conduct later held to be aggression” might be potentially open to one charged with the crime of aggression. The Elements of the crime of aggression work a finesse that is commonly applied to Elements of the war crimes under Art. 8 of the Statute by re-directing the enquiry in the direction of the facts. The relevant Element is thus: “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.”

³⁹ *Supra* notes 25-32.

⁴⁰ Draft Art. 15*bis* (5) of the 2009 Report, *supra* note 13, provided: “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.”

⁴¹ *Id.* Draft Art. 15*bis*, paras 2-4.

⁴² *Id.* Draft Art. 15*bis*, para. 4, Alternative 2, Option 1.

Paragraph 1 of Article 15^{ter} is the basic provision authorizing the Court to exercise its jurisdiction under the Statute in respect of the crime of aggression, when a referral is made by the Security Council:

The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this Article.⁴³

Then follow two paragraphs of the Article designed to provide a set of conditions and a time frame for paragraph 1 to come into play. Paragraph 2 says that the Court “may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of amendments by thirty States Parties”⁴⁴. Paragraph 3 says that 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.”⁴⁵ The required majority at this later date is thus two-thirds of all the States Parties at the relevant time.⁴⁶ Accordingly, the earliest date on which these provisions can become operative is the date on which the decision is made by the ASP after 1 January 2017. If the 30 ratifications have been received by then (or at least a year before then), all is well; otherwise there will be a further delay until one year after the 30 ratifications are obtained.⁴⁷

It should be noted that the requirement of 30 ratifications here is a “procedural” hurdle to the *entry into force* of the amendment.⁴⁸ It does not mean that the Security Council is limited to making referrals only in respect

⁴³ Art. 15^{ter}, *supra* note 8, para. 1, Article 13 (b) of the Rome Statute, *supra* note 1, permits Security Council referrals to the Court.

⁴⁴ Art. 15^{ter}, *supra* note 8, para. 2.

⁴⁵ *Id.*, para. 3.

⁴⁶ Rome Statute, *supra* note 1, Art. 121 (3).

⁴⁷ *And see* Understandings, *supra* note 8, annex III, para. 1.

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

Note also Resolution 6 itself, *supra* note 8, in para. 4 of which the Review Conference decided “to review the amendments on the crime of aggression seven years after the beginning of the Court’s exercise of jurisdiction.”

⁴⁸ The Conference presumably found power to impose conditions such as these under the general reference in Art. 5 (2) ICC Statute to “setting out the conditions” for the exercise of jurisdiction over aggression.

of those states that have ratified the amendment (or the Statute itself, for that matter). The nationals of *any* states may be the subject of a referral once the timing and ratification requirements are met.⁴⁹

Paragraph 4 adds the important principle⁵⁰ that “[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.” Including this language in the Article dealing with Security Council referrals underscores the way the negotiation has developed towards making the Court master of its own decisions in respect of the elements of a particular (alleged) crime of aggression.⁵¹

So much for Security Council referrals. Article 15*bis*, as finally adopted, deals with the exercise of jurisdiction over the crime of aggression in the case of State referrals and referrals by the Prosecutor *proprio motu*. The Court is authorized to exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraphs (a) and (c), subject to the other provisions of the Article.⁵² Once again, there is the requirement of ratification or acceptance by 30 States Parties,⁵³ the passage of a year after that, and the further vote after 1 January 2017.⁵⁴ Then follows a strange “opt-out” provision that reads:

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

⁴⁹ This is the general rule on Security Council referrals (as exercised in the case of Sudan and Darfur, Sudan not being a party to the Statute). The “preconditions” for a Security Council referral in Art. 12 of the ICC Statute do not include the requirement, as in the case of state and *proprio motu* referrals, that either the state of territoriality or the state of nationality be party to the Statute. See also Understandings, *supra* note 8, annex III, para. 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 Art. 13 (b) of the Statute, irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.

⁵⁰ *Supra* note 13 and 40, derived from the SWGCA draft. Note, however, that a referral by the Security Council does not necessarily entail a determination that an act of aggression has occurred, although it may. The Council may simply conclude that there is a *prima facie* case, but leave the rest to the Court.

⁵¹ See references in fn. 36, 37.

⁵² Res. 6, *supra* note 8, Art.15*bis* para. 1.

⁵³ *Id.*, para. 2.

⁵⁴ *Id.*, para. 3.

withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.⁵⁵

The careful reader will have noted the language: “exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party.” “State Party” must mean State Party to the Rome Statute. There is no suggestion here that the Court’s jurisdiction is limited to those States that have ratified the amendment. A State which has not done so, can, on the plain language of the amendment, protect its people from the jurisdiction by utilizing the opt-out provision. Indeed, the opt-out language, on *its* face, seems to be coherent only on the possibility that *any* State Party may want to opt out!

The effect of the language also seems to be that a State Party may ratify the amendment and constitute one of the 30 states necessary to bring it into force, but block the application of state or *proprio motu* triggers of the jurisdiction with respect to itself. (Like all other States, it apparently cannot protect its nationals from being the subject of a Security Council referral.) It would take some nerve to help make up the thirty and then opt out, but one

⁵⁵ *Id.*, para. 4. Prior to Kampala, there had been some discussion of the appropriate modalities for adoption and ratification or acceptance of the provisions making the jurisdiction over aggression effective. This took the form of attempts to interpret Art. 121 (3), (4) and (5) of the Rome Statute, the article on amendment. The correct analysis of language that became confusing in the last few days of the Rome Conference could perhaps never be ascertained with certainty. I interpret Art. 15*bis* (4) as a finesse of that whole issue, done by consensus of the Parties. Objecting Parties have their opt-out rights, something not entirely satisfactory to all, but the trade-off is that the provisions can become operative in a reasonable time and with intelligible procedural hurdles. There is, perhaps, a (less-than-convincing) counter-argument in para. 1 of Resolution 6, *supra* note 8, in which the Review Conference:

“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 Art. 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in Art.15 *bis* prior to ratification or acceptance.”

I think this must just be referring to the time frame for the ratification to become effective, thus setting up the requirement of entry into force a year after the 30 are obtained. If all State Parties are not to be bound, the opt-out option makes no sense. Compare the resolution on weapons, *infra* note 70, which makes clear the application of the amendments only to those who specifically accept them. Notice that an opt-out declaration may be made at any time, even before the necessary passage of seven years or the receipt of thirty ratifications.

should never underestimate the acrobatic ability of the diplomatic mind in construing the national interest!

Paragraph 5 addresses the non-State party problem. It was of particular significance for the three Permanent members of the Security Council who have not become party to the Rome Statute - China, the Russian Federation and the United States - and for other non-parties who are wont to use force outside their own territories. It provides that “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”⁵⁶

In the negotiations leading up to Kampala, there was widespread support for the proposition that where an aggression occurs against a State Party to the Statute, the Article 12 precondition of ratification by the state of territoriality should be sufficient for the Court’s jurisdiction. Article 12 requires that either the state of territoriality or the state of nationality be a party. An aggression, so the argument goes, can, as a matter of territoriality, take place both in the state where the aggression is plotted, and in the place where it is executed (the “victim state”). This is in accordance with the normal rules on “effects” or “objective territorial” jurisdiction and seems to be the case with genocide, crimes against humanity and war crimes. Thus, a citizen of a non-state party who commits genocide, war crimes or crimes against humanity on the territory (or having effect on the territory) of a State Party is subject to ICC jurisdiction.

The present provision is aimed at upsetting this implication, specifically in respect of aggression, and preventing jurisdiction over aggression in such cases. It is probably another example of a small but powerful minority protecting its own position in a consensus negotiation.⁵⁷

Paragraphs 6, 7 and 8 resolve the various Security Council “red light” and “green light” options concerning state and *proprio motu* referrals

⁵⁶ Res. 6, *supra* note 8, Art. 15*bis* (5). The argument is that, whatever one might think about jurisdiction over genocide and the other crimes so far as non-parties acting on the territory of parties, aggression is of a different political and juridical dimension and should be treated differently.

⁵⁷ See also the related point made in Understanding 5, *supra* note 8, annex III, 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.” Customary law on universal jurisdiction over aggression (and perhaps even victim state jurisdiction) may not be as developed as it is in relation to other international crimes, and this language is at least neutral, and perhaps discouraging, of developments in custom in this area. Is aggression different?

that had been considered intensively but inconclusively before Kampala. (Note that this is now in the context of cases where the Security Council has not made a referral to the Court and may, or may not, have adopted a resolution in respect of actions by a State in respect of a situation coming before the Court.)

Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, *proprio motu* or following a state referral, he is required to first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor is to notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.⁵⁸ If, in fact, the Security Council has made a determination of an act of aggression, the Prosecutor may proceed with the investigation.⁵⁹ Then comes the crunch issue: what if the Security Council has not acted, and does not now act? The consensus in Kampala represented a strong resolution of an issue that had bedeviled the earlier negotiations. The relevant language reads:

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 16.⁶⁰

The “filter” in the ordinary case is not the Security Council, but the Pre-Trial Division, that is to say, a majority of all six members of that Division sitting together *en banc*. If the Security Council wishes to enter the fray, it must put up its stop-light. But notice that, consistent with the existing Rome compromise, contained in Article 16 of the Statute, a dissenting member of the Permanent Five members of the Security Council cannot stop the process by exercising a veto. It is only where the five are agreed (and obtain the other necessary votes) that proceedings may be stopped in their tracks.

Obtaining such a comprehensive consensus was no mean feat!

⁵⁸ Res. 6, *supra* note 8, Art. 15*bis* (6).

⁵⁹ *Id.*, Art. 15*bis* (7).

⁶⁰ *Id.*, Art 15*bis* (8). This is followed by the statement also found in 15ter (4), *supra* note 13 and 50, that “[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”.

D. Forbidden Weapons in the Statute

It has long been understood in the laws of armed conflict that some weaponry is regarded as so barbaric or so incapable of distinguishing between soldiers and civilians that its use is forbidden.⁶¹ These prohibitions applied originally to international armed conflict but, during the last century, some of the prohibitions were extended, primarily by custom but occasionally by treaty, to their use in non-international armed conflict. The distinctions between rules of all kinds applicable in international and non-international armed conflict are slowly disappearing.⁶² Thus, the non-international armed conflict parts of the Rome Statute include a number of rules taken, for example, from the Hague Convention of 1907 that applied originally only to international armed conflict. Nevertheless, the rules on forbidden weaponry contained in the Rome Statute apply only in the international variety. They are found in Article 8 (2) (b) of the Statute, which deals with “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”⁶³. They provide as follows:

- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices;
- (xix) 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[.]

Article 8 (2) (e) of the Statute, which deals with “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law,” contains no such provisions. A draft amendment forwarded to the

⁶¹ See J.-M. Henckaerts, & L. Doswald-Beck, for International Committee of the Red Cross, *Customary International Humanitarian Law* Volume I: Rules, 243 (examples of weapons causing unnecessary suffering, beginning with barbed lances and barbed spears), 249 (examples of indiscriminate weapons).

⁶² See J. G. Stewart, ‘Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict,’ 85 *International Review of the Red Cross* (2003) 313; L. Moir, ‘Grave Breaches and Internal Armed Conflicts’, 7 *Journal of International Criminal Justice* (2009) 4, 763.

⁶³ Rome Statute, *supra* note 1, Art. 8 (2) (b).

Review Conference contained a proposal originally put forward informally by Belgium early in 2009 and later co-sponsored by nineteen other States Parties. It aimed at including the same language in paragraph (2) (e) of Article 8 as is contained in paragraph 2 (b).⁶⁴ The principle that weapons that are not permissible in international conflict are equally not permissible in civil wars would be enshrined in the Rome Statute.

This amendment and the accompanying Elements of Crimes, based on the similar crimes in international armed conflict, were duly adopted in Kampala.⁶⁵ The way the negotiation developed, however, it was thought necessary to address a matter in the preamble of the adopting resolution that had previously found a solution in the relevant Elements of Crimes adopted by the Preparatory Commission for the Court in respect of the original weapons prohibitions applicable in international armed conflict. Expanding bullets, unlike the other weapons in the Rome Statute, are said not to be absolutely banned, even in armed conflict.⁶⁶ They may have a legitimate use in a narrow range of circumstance, even in the context of an armed conflict. This is particularly the case when troops are endeavouring to rescue hostages taken in the conflict, without killing the hostages. A regular bullet may go through a participant and hit an innocent person. Thus, expanding bullets that remain in the person at whom they are aimed, may be used.⁶⁷ The matter was addressed in Kampala, in part as it had been addressed

⁶⁴ This and other proposals for amendment that got as far as the November meeting of the Assembly of States Parties are contained in Report of the Bureau on the Review Conference, Doc. ICC-ASP/8/43/Add.1, dated 10 November 2009 and in Report of the Working Group on the Review Conference, Annex II to Vol. I, Official Records of the Eighth Session of the Assembly of States Parties. Doc. ICC-ASP/8/20 (2009). At the November meeting, the International Committee of the Red Cross commented in a statement that “[t]he prohibitions of poison or poisoned weapons, asphyxiating, poisonous or other gases as well as bullets which expand or flatten easily in the body, are well-established under customary international law applicable in all armed conflicts and are an expression of the prohibition of weapons that are of a nature to cause superfluous injury or unnecessary suffering or are by nature indiscriminate. Conduct in violation of these prohibitions should therefore be criminalized in all armed conflicts.” (Statement by ICRC to Assembly of States Parties, on file with author.).

⁶⁵ Amendments to Art. 8 of the Rome Statute, RC/Res. 5 (2010).

⁶⁶ They also have an arguably legitimate role in domestic police work, where there is a danger to such persons as hostages, dignitaries, other police officers or bystanders if bullets aimed at criminals go through them and hit someone else.

⁶⁷ Representatives of several armed forces assured the author in Kampala that their troops are armed with a very limited supply of such bullets, carefully kept aside for such events and used sparingly. Belgium, it appears, manufactures such ammunition.

previously in the Elements for international armed conflict⁶⁸ and in part in the preamble to the adopting resolution. The latter insists on an “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”⁶⁹.

This is an important,⁷⁰ if modest, addition to the Statute. It establishes the principle that if weapons are prohibited in international armed conflict, they are also prohibited in the non-international variety.

More might perhaps have been achieved if the stars had been differently aligned. Belgium, again supported by various groups of co-sponsors, had also put before the Assembly several proposals for the addition of other weapons to the lists of those prohibited both in international and in non-international armed conflict. These included chemical weapons,⁷¹ biological weapons,⁷² anti-personnel land mines,⁷³

⁶⁸ The relevant Element of the war crime of employing prohibited bullets adopted in Kampala for non-international armed conflict mirrors precisely that for international armed conflict: “The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.”

⁶⁹ Weapons adopting resolution, *supra* note 65, preambular paragraph 9, 2.

⁷⁰ In accordance with Art. 121 (5) of the Rome Statute, *supra* note 1, this amendment to Art. 8 will apply only to those States Parties to the Statute who specifically ratify or accept it. This is specifically acknowledged in preambular paragraph 2, 1 of the resolution adopting the weapons amendment, *supra* note 65. Compare the finesse of the issue in the aggression amendment, *supra* note 55.

⁷¹ Such weapons are banned by the *Convention on the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, 3 September 1992, 1974 U.N.T.S. 45. Most chemical weapons appear to be banned in warfare under the *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, 17 June 1925, 94 L.N.T.S. 65 [Geneva Protocol], which is reiterated in Art. 8 (2) (b) (xviii) of the Rome Statute, but this is not free from doubt; thus there should probably be express references in the Rome Statute to the later treaty. Drafts on the table in Rome until a very late stage included chemical weapons but the reference to such weapons was deleted in the last few days of the conference.

⁷² Biological weapons are prohibited under the 1925 Geneva Protocol, *supra* note 71, along with asphyxiating and poisonous gases. There are further regime-articulating provisions dealing with them in the *Convention on the Prohibition of the Development, production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction*, 10. April 1972, 1015 U.N.T.S. 163. Biological weapons were deleted from the draft of the Statute along with chemical weapons; there is no reference to them at all in the final Statute.

⁷³ Anti-personnel mines are prohibited under the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their*

non-detectable fragments,⁷⁴ blinding laser weapons⁷⁵ and cluster munitions.⁷⁶ It was not possible to forge a consensus to send these on to the Review Conference. Nor was Mexico able to muster substantial support for its proposal to include nuclear weapons amongst those forbidden by the Statute.⁷⁷ Nonetheless, the Assembly agreed to establish a Working Group as from its ninth session late in 2010 for the purpose of considering these remaining proposals for amendments.

The Working Group to be created later in 2010 will also have on its agenda two other proposals put forward for additions to the Statute that were not sent on to Kampala, terrorism and drug trafficking, the former put forward by The Netherlands,⁷⁸ the latter by Trinidad and Tobago supported by Belize.⁷⁹ Earlier versions of both of these proposals had been considered and deferred at Rome, largely on the basis of the argument that a new and untested organization should not be too ambitious in its early jurisdictional net.⁸⁰ In fact, most of the larger powers were – and continue to be – happy

Destruction, 18 September 1997, 2056 U.N.T.S. 211 [the “Ottawa Convention”]. At the time of Rome, the ink was barely dry on this Convention and it had not yet come into force. It is now widely ratified, having 156 parties by mid-2010. There are still some major powers, like the United States, that have not come aboard.

⁷⁴ Such weapons are prohibited in Protocol I (Non-Detectable Fragments) to the 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, 10 October 1980, 1342 U.N.T.S. 137.

⁷⁵ Protocol IV to the 1980 Convention, *supra* note 74, on Blinding Laser Weapons, 13 October 1995, 2024 U.N.T.S. 163, 167 (Doc. No. CCW/CONF.I/16 Part I).

⁷⁶ See Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Dublin, May 19-30, 2008, *Convention on Cluster Munitions*, Doc. No. CCM/77 (30 May 2008), available at http://www.clusterconvention.org/downloadablefiles/ccm77_english.pdf (last visited 17 August 2010). Arguably, this Convention is not ripe enough for inclusion in the Rome Statute since it is not yet overwhelmingly adopted. It came into force on 1 August 2010, six months after receipt of 30 ratifications.

⁷⁷ See Doc. ICC-ASP/8/43/Add. 1, *supra* note 64 (Annex III), at 9; Doc. ICC-ASP/8/20, Vol. I, *supra* note 64 (Annex II, Appendix II), at 64.

⁷⁸ *Id.*, 8/43/Add. 1 (Annex IV), at 12; 8/20, Vol. I (Appendix III) at 65.

⁷⁹ *Id.*, 8/43/Add. 1 (Annex VI) at 16; 8/20, Vol. I (Appendix IV) at 67.

⁸⁰ The additional argument that terrorism should not be included in the Statute because it is not yet defined is something of a red herring. There is a widely agreed list of suppression treaties that deal with many of the cases of terrorism. It would be easy enough to include such a list as an interim “definition” to be supplemented should the General Assembly ever complete its work on a “general” terrorism convention. Which are the most serious drug crimes and thus appropriate for international jurisdiction is a fair question. The Trinidad and Tobago/Belize draft approached this in a creative manner that certainly provides a basis for further discussion. Their draft in the Report

with the way the current criminalization regime operates in these areas, namely with a suppression obligation in the relevant treaties and prosecution at the domestic level. Since they have the resources to devote to such efforts, the larger powers are comfortable with those modalities. Small states, on the other hand, would often be happy to have an international instance to which they could refer such cases, thereby avoiding having their own resources overwhelmed. The debate will surely continue.

E. Conclusion

The Kampala Conference ended in the early hours of the morning in a mood of euphoria, nearly as great, in the writer's view, as that in Rome in 1998. While the effort to remove Article 124 failed, the principle that if a weapon is forbidden in international conflict it is equally forbidden in a civil war was strongly asserted. The achievement of consensus on the crime of aggression, activating the Court's jurisdiction – albeit with some delay – constituted a remarkable achievement and a great source of satisfaction to those who have laboured for it these many years.

of the Bureau on the Review Conference, *supra* note 64, (at 16) would authorize ICC jurisdiction over assorted breaches of the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, “but only when they pose a threat to the peace, order and security of a State or region.” There is thus a strong threshold element that would have to be proved by the prosecution.

The Crime of Aggression After Kampala: Success or Burden for the Future?

Robert Heinsch*

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Abstract

The article provides a first evaluation of the results achieved in Kampala. The author focuses on the resolution dealing with the crime of aggression which was adopted by consensus. Apart from providing a detailed analysis of the new Article 8bis of the Rome Statute which defines the crime of aggression, he also gives an overview of the provisions foreseen for the exercise of jurisdiction over this crime contained in Articles 15bis and 15ter. This includes also the difficult relationship between the ICC and the Security Council with regard to the exercise of jurisdiction. In the author's view the resolution must already be characterized as yet another remarkable achievement in the field of international criminal law, even though there are some hurdles to cross before the respective amendment will enter into force.

A. Introduction

In the night from 11 to 12 June 2010, the States Parties to the Rome Statute for an International Criminal Court (ICC) adopted at the 13th plenary meeting of the Kampala Review Conference Resolution RC/Res. 6 by consensus. By doing so, they not only agreed on the new Article 8bis defining the crime of aggression, but also on Articles 15bis and 15ter dealing with the exercise of jurisdiction over this crime.¹ This is another milestone in the development of international criminal law.² Those who had thought that, after the rapid development of this discipline in the 1990s with the establishment of the ICTY, the ICTR, various mixed tribunals and finally the permanent International Criminal Court, the first Review Conference of the ICC would end without a satisfactory outcome were mistaken. The agreement on a definition of aggression, envisaged already in 1998 in Article 5 (2) of the Rome Statute, is a landmark in the history of international criminal law.

Although it will take time until the necessary 30 Member States have ratified or accepted the respective amendments, and the Court's exercise of jurisdiction over the crime of aggression is still subject to a decision to be

¹ This is the current enumeration of the Resolution; for the English version of the resolution see the ICC website at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited on 27 August 2010).

² For an overview of this development and a critical evaluation from a philosophical perspective cf. L. May, *Aggression and Crimes against Peace* (2008).

taken by the Member States after 1 January 2017,³ most people will see the outcome of the Kampala conference as a success – at least at first glance.⁴ Almost 100 years after the German Kaiser Wilhelm II was supposed to face charges according to Article 227 of the Treaty of Versailles, being accused of committing the “supreme offence against international morality and the sanctity of treaties” during World War I, and 65 years after the “crime against peace” was included in the Charter of the International Military Tribunal (IMT) in Nuremberg,⁵ the Member States of the ICC finally agreed on a definition of the crime of aggression also for this first permanent international criminal judicial body.

The definition of the crime of aggression was not the supreme problem during the conference in Kampala.⁶ For many observers, the main issue which made it unrealistic to ever reach an agreement on this matter was the exercise of jurisdiction, including especially the relationship between the ICC and the Security Council which according to Article 39 of the UN Charter has a monopoly on stating whether a situation represents an act of aggression.⁷ Because of the latter problem, but also because

³ See Arts 15bis (2), (3) and 15ter; the decision by the Member States has to be taken by the same majority which is required for the adoption of an amendment of the Statute, see Arts 15bis(3) and 15ter, respectively.

⁴ For a very first impression of the discussion which has now started among academics see the respective discussion on EJIL Talk! at <http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited on 27 August 2010); for a first evaluation from participants of the conference see also N. Blokker & C. Kress, ‘A Consensus Agreement on the Crime of Aggression – Impressions from Kampala’ 24 *Leiden Journal of International Law* (forthcoming 2011) and D. Scheffer, ‘The Complex Crime of Aggression under the Rome Statute’, 24 *Leiden Journal of International Law* (forthcoming 2011).

⁵ See Article 6 (a) of the Charter for the International Military Tribunal.

⁶ See for an account of the negotiations during the Rome Conference especially the contributions by J. Harrington, ‘The Aggression Negotiations at the ICC Review Conference’, EJIL Talk, at <http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/> (last visited 27 August 2010); cf. also <http://www.iccuganda2010.ug/> (last visited 27 August 2010); <http://www.iccnw.org/?mod=review> (last visited 27 August 2010) and <http://iccreviewconference.blogspot.com/> (last visited 27 August 2010).

⁷ For an overview of the discussion before the Review Conference, see the symposium in 20 *European Journal of International Law* (2009) 4, 1101-1156 including A. Paulus, ‘Introduction to the Symposium’, 20 *European Journal of International Law* (2009) 4, 1101-1102; R. S. Clark, ‘Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction over it’, 20 *European Journal of International Law* (2009) 4, 1103-1115; A. Paulus, ‘Second

aggression has always been very controversial and political,⁸ there were a few commentators before Kampala who were sceptical about the chances that an agreement on the crime of aggression could be found and whether it would be clever to actually come to a conclusion.⁹ Some statements also indicated that it might not be advisable to agree on a reduced version of the crime of aggression with possible effects on the prohibition of the use of force.¹⁰ However, despite all objections and reluctance, the States Parties were finally able to agree not only on a definition, but also on the conditions to the exercise of jurisdiction over this crime.

The following comments will provide a first evaluation of the results achieved in Kampala.¹¹ As only short time has elapsed since the actual adoption of the respective resolution, the description and evaluation will be cursory in nature. Only the most important aspects of the resolution dealing with the crime of aggression will be highlighted. Special focus will be given to the definition of aggression, while the contribution by Astrid Reisinger Coracini contained in this issue will deal more extensively with the exercise of jurisdiction.¹²

B. The Process Leading to the Kampala Conference

The resolution adopted in Kampala was preceded by a 12 year process, the definition of aggression being one of the “leftovers” from the

Thoughts on the Crime of Aggression’, 20 *European Journal of International Law* (2009) 4, 1117-1128; C. Kress, ‘Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus’, 20 *European Journal of International Law* (2009) 4, 1129-1146; S. Murphy, ‘Aggression, Legitimacy and the International Criminal Court’, 20 *European Journal of International Law* (2009) 4, 1147-1156.

⁸ A history of this discussion is depicted by M. J. Glennon, ‘The Blank-Prosed Crime of Aggression’, 35 *Yale Journal of International Law* (2010) 1, 71-114.

⁹ Paulus, ‘Crime of Aggression’, *supra* note 7, 1126-1127.

¹⁰ *Id.*, 1126-1127.

¹¹ This has already been done during a discussion round at Chatham House, see http://www.chathamhouse.org.uk/files/16935_il240610summary.pdf (last visited 27 August 2010).

¹² A. Reisinger, ‘The International Criminal Court’s Exercise of Jurisdiction over the Crime of Aggression – at last ... in reach ... over some’, 2 *Goettingen Journal of International Law* (2010) 2, 745 in this issue; see also her first remarks on the conference results in A. Reisinger Coracini, ‘More Thoughts on “What Exactly was Agreed in Kampala on the Crime of Aggression”’, available at <http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited 27 August 2010).

Rome Conference in 1998. Although this process has been described on numerous occasions elsewhere,¹³ a short overview seems necessary to grasp the whole impact of the results in Kampala. When drafting the Rome Statute the State Parties were not able to agree on a definition, but it was nevertheless stated in Article 5 (2) of the Statute that the crime of aggression belongs to the jurisdiction of the Court. However, Article 5 (2) made clear that this crime was still a “sleeping beauty”:

“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”.

Therefore, the Final Act of the Rome Conference¹⁴ asked the Preparatory Commission of the Court (“PrepCom”), which was taking over business from the Rome Conference, to “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime”.¹⁵ However, the PrepCom was not able to finish this task until 2002. They had drafted a Discussion Paper which had been proposed by the last Coordinator of the Working Group of the PrepCom.¹⁶ Apart from an initial text with a number of options, the decisive part was the proposal to create a “Special Working Group on the Crime of Aggression” (SWGCA) which would take over the task of preparing a proposal for a definition of the crime of aggression. The SWGCA met between 2003 and 2009 at least once a year, and had its final meeting in 2009 at which a “Proposal for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression” was

¹³ A. Zimmermann, ‘Article 5’, in O. Triffterer (ed.), *Commentary on the Rome Statute*, 2nd ed. (2008), mn. 16-41; R.S. Clark, ‘The crime of aggression’, in C. Stahn & G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009), 709-723.

¹⁴ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, U.N. Doc. A/CONF.183/10, 17 July 1998, para. 7 [Final Act of the Rome Conference].

¹⁵ Resolution F of the Final Act of the Rome Conference.

¹⁶ See Clark, *supra* note 13.

presented.¹⁷ The remarkable achievement of the Special Working Group was that it was able to agree on a proposed Article 8*bis*, with a definition of aggression which did not contain any brackets or open issues.¹⁸ However, they were not able to present a similarly undisputed proposal for the exercise of jurisdiction over the crime of aggression. The respective Article 15*bis* had two alternatives. The first alternative dealt with the case where the Security Council would not give a determination of an act of aggression at all; the second alternative dealt with the situation where the Security Council had not made such a determination within six months and consisted of four options giving, among others, the Pre-Trial Chamber (PTC), the General Assembly (UNGA), or the International Court of Justice (ICJ) different roles in either authorizing the Prosecutor to investigate the crime, or to determine whether there was an act of aggression.¹⁹

C. The Results Reached in Kampala

The results reached in Kampala will be described in two distinct sections: (I) The definition of the crime of aggression contained in Article 8*bis* and the respective amendments to the Elements of Crimes, including the mental requirements and special issues of individual criminal responsibility; and (II) the conditions for the exercise of jurisdiction over the crime of aggression contained in Article 15*bis* and Article 15*ter*. While dealing with these issues, the comments will not only relate to the respective Articles, but also to the newly drafted Elements of Crimes and the “Understandings” attached to Resolution RC/Res. 6.

¹⁷ All the documents elaborated by the Special Working Group can be found on the ICC homepage at: <http://www.icc-cpi.int/Menus/ASP/Crime+of+Aggression/> (last visited 27 August 2010); it is also compiled in S. Barriga, W. Danspeckgruber & C. Wenaweser, *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (2009).

¹⁸ See Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add. 1, Appendix I, at 30.

¹⁹ Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add. 1, Appendix I, at 31-32; for further discussion of these options, see N. Blokker, ‘The Crime of Aggression and the United Nations Security Council’, 20 *Leiden Journal of International Law* (2007) 4, 867-894; see also C. Kress, ‘The Crime of Aggression before the First Review of the ICC Statute’, 20 *Leiden Journal of International Law* (2007) 4, 851, 859-863.

I. The Definition of Aggression: Art. 8*bis* and the Respective Elements of Crimes

As mentioned before, the definition of the crime of aggression as adopted in Kampala as such was not controversially discussed anymore during the conference. In fact, the proposal prepared and adopted by the Special Working Group in February 2009 was taken over by the Review conference without any changes. Only the respective Elements of Crimes were added.²⁰ Nevertheless, the fact that for the first time we now have a definition of the crime of aggression in an international treaty warrants a discussion about whether the definition agreed upon is one that will withstand the test of time.²¹

1. The Structure of Article 8*bis*

The definition of the crime of aggression as adopted by the States Parties in Kampala consists of two paragraphs; paragraph 1 dealing with the “crime of aggression”, and in that regard building the basis for the individual criminal responsibility of possible perpetrators; and paragraph 2 defining the “act of aggression” which lists a number of acts which until now were usually associated with the responsibility of a State, but now might give the opportunity to prosecute an individual for acts of aggression.²²

According to the adopted text of Article 8*bis*(1), this is the first part of the 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,

²⁰ Resolution RC/Res.6, Annex II, Amendments to the Elements of Crimes; see also the Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, para. 42.

²¹ Heavily doubting this: M. J. Glennon, ‘The Blank-Porse Crime of Aggression’, *supra* note 8, 109; also very critical towards this definition: A. Paulus, ‘Crime of Aggression’, *supra* note 7, 1122-1123.

²² Dealing with the relationship between the State responsibility for aggression and individual criminal responsibility: A. Cassese, ‘On Some Problematical Aspects of the Crime of Aggression’, 20 *Leiden Journal of International Law* (2007) 4, 841-849.

gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

This paragraph which lists the modalities necessary to establish individual criminal responsibility can be broken down into four parts.

2. The Acts of Commission: Planning, Preparation, Initiation or Execution

First, Article 8*bis* (1) states four acts of commission of the principal perpetrator, namely the “planning, preparation, initiation or execution” of an act of aggression. Concerning the first three acts, the definition picks up on the language of Article 6 (a) of the Nuremberg Charter only substituting the “waging of a war” in the IMT Charter by “execution”.²³ However, listing these acts of commission does not mean that other modes of participation are excluded from the start. The discussion within the Special Working Group concerning the acts of commission and especially their relationship with Article 25 of the Rome Statute circled for a while around two different approaches: the “monistic approach” and the “differentiated approach”. The latter represents the “legal recognition of all different forms of individual participation in the crime of aggression,²⁴ while the first one “excluded the application of the general part on complicity applicable to other crimes.”²⁵ As will be discussed further below, the final outcome supports the differentiated approach. This becomes evident through the new paragraph 3*bis* to be inserted in Article 25 stating that the provisions of this article in principle also apply to the crime of aggression.²⁶

3. Limited group of perpetrators: “leadership crime”

Article 8*bis* (1) goes on to state that this crime can only be committed by a “person in a position effectively to exercise control over or to direct the

²³ Compare Article 6 (a) Statute of the International Military Tribunal, available e.g. at <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited 27 August 2010).

²⁴ Cf. Kress, *supra* note 19, 855, especially footnote 21 referring to Kress’ own distinction in ‘Discussion Paper I: The Crime of Aggression and Article 25(3), of the Statute’, ICC-ASP/4/32, 376.

²⁵ R.S. Clark, ‘The Crime of Aggression’, in C. Stahn & G. Sluiter (eds), *The Emerging Practice of the ICC* (2008), 709, 718.

²⁶ A more detailed analysis you find below at C I 7.

political or military action of a State”, making this crime clearly a so-called “leadership crime”.²⁷ In this regard, the crime of aggression will be different from the other three crimes covered by the Rome Statute, because war crimes, crimes against humanity, and genocide do not share this limitation concerning the group of people who are able to commit the crime.²⁸ This focus on top political and military leaders evolved during the drafting process in the Special Working Group, and pays tribute to the fact that because of its inherent nature the crime of aggression has different features compared to the other three core crimes.²⁹ While the protected legal value of these other three crimes is focused on the protection of the individual, be it as part of a group in the case of genocide, or as a part of an army or a civilian population in the context of war crimes, the crime of aggression’s focus lies on protection from the use of force against the sovereignty, territorial integrity or political independence of another State. Since this usually presupposes the action of one State against another State, it is logical to reduce the possible actors of this crime to the leaders of the State. In the end, the possible group of people who fall under the envisaged category will encompass heads of States and governments, such as presidents and prime ministers, but also military leaders like ministers of defence or generals commanding the armed forces.

The current definition as included in the Resolution of Kampala nevertheless gives rise to some questions about as to whether it excessively limits the circle of possible perpetrators. The valid question is whether it was necessary to limit it to people who direct the “political or military” actions of a State. We know that since the war crimes trials against German industrialists after World War II it has been accepted that people with economic power are able to support, or help to prepare an aggressive war.³⁰ And nowadays one might think of religious leaders who also have substantial influence on the actions of a State. The reason behind limiting

²⁷ Clark, *supra* note 7, 1105; see for the problematic issues arising from this definition: Kress, *supra* note 7, 1134, replying to Paulus’ concerns raised in Paulus, ‘Crime of Aggression’, *supra* note 7, 1120-1121.

²⁸ Rather to the contrary, these three crimes know a limitation to the possible group of victims of the crime, like e.g. “protected persons” for war crimes, the “civilian population” for the crimes against humanity, or a national, ethnical, racial or religious group for the crime of genocide.

²⁹ For a detailed discussion of this special character, see L. May, *Aggression and Crimes against Peace* (2008).

³⁰ R.S. Clark, ‘The Crime of Aggression’, in C. Stahn & G. Sluiter (eds), *The emerging practice of the ICC* (2008), 709, 715.

the circle of perpetrators to those who can direct the political or military actions can be explained by reference to the definition of the “act of aggression” presented in paragraph 2: here it is necessary to use “armed force” which usually is mainly guided by the political or military leaders of a country. In that regard, the definition actually does not exclude *stricto sensu* religious or industrial leaders from its scope of application, as long as they actually can *influence* the political or military actions of the respective State.

4. The Circumstance Requirement: “Act of Aggression”

The third aspect of paragraph 1 requires that an “act of aggression” has been planned, prepared, initiated or executed. What this act of aggression consists of is legally defined in Art. 8*bis* (2). It is probably the most disputed part of the definition of the crime of aggression and therefore warrants special attention.³¹ According to this paragraph, an “[...], ‘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 a war, shall in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression”. It then reproduces the list of possible acts of aggression listed in Article 3 of the said General Assembly Resolution 3314, commonly also known as the “Definition of Aggression” Resolution. Since the first part of the definition in Article 8*bis* (1) is a verbatim reproduction of Article 1 of Resolution 3314, it becomes obvious that the main authority for defining aggression under the Rome Statute will be this Resolution from 1974 which was not drafted to be applied in cases dealing with individual criminal liability.³²

This last aspect has also been one of the most criticised features of the definition of aggression contained in Article 8*bis*. Questions have been raised whether it makes sense to rely on a definition which was originally

³¹ Just as one example for the criticism, see Paulus, ‘Crime of Aggression’, *supra* note 7, 1120.

³² For more background on Resolution 3314, especially the drafting history, see: T. Bruha, *Die Definition der Aggression* (1980), 211-216; B. Ferencz, *Defining International Aggression. The Search for World Peace. A Documentary History and Analysis*, Volume II (1975), 43-45; see also S. Sayapin, ‘A Great Unknown: The Definition of Aggression Revisited’, 17 *Michigan State Journal of International Law* (2008-2009), 377.

created to deal with *State* responsibility for the violation of the prohibition on the use of force.³³ One of the first issues which will be surely discussed *in extenso* once the amendment enters into force is whether the list in paragraph 2 is exhaustive. This question is especially pertinent because Article 8*bis* explicitly states that the act of aggression has to be determined “in accordance” with Resolution 3314; Article 4 of which provides that “[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter”. From a criminal law perspective, this is problematic because the principle of legality, at least in national law, would require that the list of punishable actions is clearly defined and not open to interpretation (or amendment) by the judges. In this regard, it is interesting to note that during the drafting process in the Special Working Group there were movements which suggested a more clearly defined description of the actions punishable as a crime of aggression. For example, a German proposal was in favour of a more “autonomous and generic” definition of the crime of aggression,³⁴ willing to find a more precise definition which would limit the criminality to “military occupation or annexation.”³⁵ However, in the end there was no majority within the working group in favour of deviating from the approach to use Resolution 3314.

One can surely discuss whether basing the definition of aggression on Resolution 3314 was a sensible step in view of the problems which might arise from a criminal law angle. However, the principle of legality is not as strongly developed in international law as in national law, and it only has a core scope of application on the international level.³⁶ For example, Article 3

³³ Paulus, ‘Crime of Aggression’, *supra* note 7, 1120.

³⁴ Kress, *supra* note 7, 1136.

³⁵ Paulus, ‘Crime of Aggression’, *supra* note 7, 1123, referring also to ‘Compilation of proposals on the crime of Aggression’, Preparatory Commission for the ICC, 2 August 1999, UN Doc. PCNICC/1999/INF/2 (1999), 20 and H. P. Kaul, ‘Definitional Options for the Way Forward’, in M. Politi & G. Nesi (eds) *The International Criminal Court and the Crime of Aggression* (2004), 97-108.

³⁶ This is still the majority opinion today, see R. Heinsch, *Die Weiterentwicklung des humanitären Völkerrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda* (2007), 312; see also O. Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts nach Nürnberg* (1966), 124-125; O. Triffterer, ‘Bestandsaufnahme zum Völkerstrafrecht’, in G. Hankel & G. Stuby (eds), *Strafgerichte gegen Menschheitsverbrechen* (1995), 218; M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression - Historische Entwicklung, Geltung und Definition im Hinblick auf das Statut des Internationalen Strafgerichtshofes* (2001), 38; G. Dahm, *Zur Problematik des Völkerstrafrechts* (1956), 65; A. Bruer-

of the ICTY Statute states that the tribunal has jurisdiction over violations of the laws or customs of war. Following this sentence, we have a list of possible violations, introduced by the phrase: “Such violations shall include, *but not be limited to*”³⁷. In a similar way, the Rome Statute already has a comparable “open” clause which would be quite problematic under a national interpretation of the principle of legality. Article 7(1)(k) speaks of “*Other inhumane acts* of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. This is a norm which is far from specific, at least if one applies the principle of legality as known from national legal systems.

In this regard, it seems of course regrettable that the new definition of aggression opens the possibility for discussion with regard to its specificity; however, the reason for taking recourse to Resolution 3314 is obvious. Already during the drafting of the Rome Statute, the States Parties had the ambition to codify existing customary law – as far as possible – when defining the crimes falling under the jurisdiction of the Court.³⁸ Since the crime of aggression has not been codified on the international level since the Nuremberg and Tokyo trials (with a small exception in the Statute of the Iraqi Special Tribunal),³⁹ the members of the Special Working Group were obviously determined to use a definition which has at least some support on the international level. From this author’s perspective, this is the correct approach. International criminal law has to deal constantly with the tension between the two components of its discipline: the strict application of national criminal law principles and the sometimes “broader” approach of

Schäfer, *Der internationale Strafgerichtshof. Die internationale Strafgerichtsbarkeit im Spannungsfeld von Recht und Politik* (2001), 92-93 and C. Hollweg, *Vom Jugoslawientribunal der UNO zum allgemeinen Internationalen Strafgerichtshof?*, *SchwZStrR* (1994) 3, 251, 264.

³⁷ Emphasis added by author.

³⁸ Kress, *supra* note 7, 1140, who, however, admits that it can be argued that the proposed (and now accepted definition) “goes slightly beyond existing customary international law”.

³⁹ Art. 14 (c) of the Statute for the Iraqi Special Tribunal stated a very limited scope of application for a situation which could be covering an act of aggression; it stated that “The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law: [...] The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.”

public international law.⁴⁰ In this regard, it seems sensible to rely on a text which for more than 35 years has been accepted by States, international courts, and scholars as an authoritative definition of the act of aggression.⁴¹

5. The Qualifier: “Which, by its Character, Gravity and Scale, Constitutes a Manifest Violation”

The fourth condition required by Article 8bis (1) is that the act of aggression as defined in paragraph 2 “by its character, gravity and scale, constitutes a manifest violation” of the Charter of the United Nations. This incorporates a threshold for the use of force which can be found neither in the UN Charter nor in Resolution 3314 on the Definition of Aggression between States. In a way, it is similar to the approach the International Court of Justice took in the *Nicaragua* and *Oil Platforms* cases concerning the requirement that there be a certain *level* of armed attack before force as self-defence was justified.⁴² One could also find similar language in the recent *Case Concerning Armed Activities on the Territory of the Congo*.⁴³ But the term “manifest violation” in the context of aggression as such is new, and the meaning is not completely clear. Therefore, the qualifier has been criticized by a couple of commentators especially for its vagueness.⁴⁴ Since there is no comparable precedent in the history of the prosecution of the crime of aggression, it has been stated that reducing the crime to only manifest violations could have severe effects on the prohibition of the use of force because this would give a *carte blanche* to all incidents of aggression which are not manifest.⁴⁵ Also, it is not clear what kind of “manifest” violations one should envisage. Was the attack of the United States against

⁴⁰ As one of the “fathers” of the discipline, O. Triffterer described it in his doctoral thesis: international criminal law has a “double nature”, cf. Triffterer, *supra* note 36, 22, 28-29, 92.

⁴¹ It is obvious that this is a not a completely undisputed position.

⁴² See for this argument also Chatham House, *The International Criminal Court: Reviewing the Review Conference*, 24 June 2010, Summary of an International Law Meeting, 5 available at www.chathamhouse.org.uk (last visited 27 August 2010).

⁴³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 227, para. 165 where the Court speaks of a military intervention “of such magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Art. 2(4) of the Charter”.

⁴⁴ E.g., Paulus, *supra* note 7, 1121; see also Murphy, *supra* note 7, 1150-1151.

⁴⁵ Paulus, *supra* note 7, 1122.

Iraq a manifest violation of the UN Charter? What about the NATO attacks against Yugoslavia in the context of the Kosovo war? Was this a manifest violation since the NATO Members involved acted without the explicit authorisation of the UN Security Council? What about those situations when States take action on foreign territory to protect/save their own nationals? Would this be a manifest violation?

In the end, this definitely is an issue which will need further elaboration by the Court when dealing with such cases. The Amendments to the Elements of Crimes for Article 8*bis* merely clarify in paragraph 3 of the introduction that “[t]he term ‘manifest’ is an objective qualification.” This tries to illustrate that the interpretation of the term is independent from subjective opinions and not dependent on the opinion of the actors involved.

Furthermore, a qualifier limiting a crime to very serious violations is not completely unknown to international law. One could even say that the “grave breaches” regime of the Geneva Conventions is a classical example for this approach. Not all violations of international humanitarian law entail individual criminal responsibility but only those listed in the respective articles of the Geneva Conventions or Additional Protocol I.⁴⁶ Of course, one could argue that this has created two kinds of norms and that the non-criminalized part of international humanitarian law might be less respected. However, this does not mean that either the other violations of international humanitarian law or the not-manifest violations of the UN Charter in the context of the crime of aggression are put into oblivion, since the normal Chapter VII mechanism stays in place in order to deal with these violations from the perspective of State responsibility. It is just that the International Criminal Court will not have jurisdiction for it.

The only difference one could see when comparing the manifest violations of the crime of aggression to the grave breaches regime in the area of international humanitarian law is that the Geneva Conventions actually provide us with a distinct list of these “grave breaches”, while prospective Article 8*bis* of the Rome Statute does not do the same.

⁴⁶ See Art. 49 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12. August 1949, 75 U.N.T.S. 31, Art. 50 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, 12. August 1949, 75 U.N.T.S. 85, Art. 129 Geneva Convention relative to the Treatment of Prisoners of War, 12. August 1949, 75 U.N.T.S. 135, Art. 146 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12. August 1949, 75 U.N.T.S. 287, and Art. 85 Protocoll Additional to the Geneva Conventions of 12 August 1949, 12. December 1977, 1125 U.N.T.S. 3.

Paragraph 2 of the said article does not give a list of manifest violations but just a list of possible acts of aggression and the structure of Article 8*bis* indicates that these are not meant to be “manifest” by definition. In that regard we have a two-step approach: first we have to determine whether there is an “act of aggression” using the guidance given by paragraph 2, before we decide whether there is a “crime of aggression”, which can only be accepted in cases of a “manifest” violation of the Charter of the United Nations.

One problem in this context which will be in need of clarification by the judges of the Court is the question of how the act of aggression can “by its character, gravity and scale” be a manifest violation of the UN Charter.⁴⁷ The drafting history indicates that this qualifier was inserted “to exclude some borderline cases”.⁴⁸ Number 6 of the “Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression” (the Understandings) states in this regard that

“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.”

The last sentence, especially, begs the question whether two of those components can already be enough to constitute a manifest violation.⁴⁹ In that regard the Understandings seem to be an example where confusion is added to a provision, which actually might have been more easily interpreted without them. If one chooses a textual approach⁵⁰ to interpret the sentence “an aggression which, by its *character, gravity and scale*,

⁴⁷ Paulus, *supra* note 7, 1121 states that “it remains unclear what precisely renders an act of aggression a crime.”

⁴⁸ Informal inter-sessional meeting 2006 of the Special Working Group on the Crime of Aggression, 8-11 June 2006, in Assembly of State Parties, 5th session 2006, Doc ICC-ASP/5/SWGCA/INF.1 (2006), para. 19.

⁴⁹ This question was also raised during the Chatham House International Law Meeting: The International Criminal Court: Reviewing the Review Conference, 24 June 2010, at 6, available at http://www.chathamhouse.org.uk/files/16935_il240610summary.pdf (last visited 27 August 2010)

⁵⁰ In line with the prescribed order by the Vienna Convention on Law of the Treaties, *cf.* Arts 31 and 32 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

constitutes a manifest violation” one would come to the conclusion that the “and” rather indicates that all three of the components have to be fulfilled. This is also supported by the first sentence of Understanding 7 which states:

“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.”

However, if we look at the second sentence of this Understanding (“No one component...”) one would rather be inclined to conclude that two of those components are already sufficient. The interpretation is not made easier by the Understanding 6 which says:

“It is understood that aggression is the most serious and dangerous form of the illegal use of force, and that the 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 and their consequences, in accordance with the Charter of the United Nations”.

Here one component (the “gravity”) is highlighted and put into a pair together with the “consequences”, a component which does not appear in the original definition of the crime of aggression in Article 8*bis*. But since this part of the Understandings is not explicitly referring to “manifest” violations, one can just assume that this refers to an additional consideration of all the circumstances. In a way, it seems partly redundant to the requirement that the violation has to be manifest, because when examining the character, gravity and scale one would probably always look at the acts and the consequences. If not, this Understanding makes clear that one should. Whether this “clarification” is really helpful is highly doubtful.

An interesting question which will probably require more attention is the legal relevance of these Understandings. While with regard to the “Elements of Crimes” Article 9 of the Rome Statute clearly states that they “shall assist the Court in the interpretation and application of Articles 6, 7 and 8”⁵¹ as well as Article 21 which lists them in paragraph 1 (a) after the Statute in the law which the Court shall apply, Understandings were not known until the Review Conference. The Understandings are also not explicitly referred to by the amendments contained in the Resolution of the Review Conference. Rather, paragraph 6 of the Resolution is supposed to amend Article 9 (1) of the Rome Statute by replacing the original sentence

⁵¹ See also E. Gadirov, ‘Article 9’, in O. Triffterer, *Commentary on the Rome Statute*, 2nd ed. (2008), 505-529.

with the new formulation: “Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7, 8, or 8bis.” The Understandings were a reaction to the United States’ original demand to change the definition contained in Article 8bis.⁵² Understandings to a treaty text are of course not unheard of, but pose an additional problem in international criminal law due to the principle of legality. According to the guidelines concerning treaty law interpretation under Article 31 (2) of the Vienna Convention on the Law of the Treaties (VCLT), it is allowed to consider the “context” when the wording of the provision is unclear, including agreements reached by the parties. Although this might be a normal way of interpreting a provision for a public international lawyer, from a national criminal law perspective and against the background of the principle of legality this is problematic to say the least, since the definition of an international crime ought to be clear enough for the affected people to know whether or not they are committing a crime. However, as has been elaborated quite extensively elsewhere, international criminal law does not have the same strict requirements towards the specificity of the crime as national law.⁵³ In that regard, the Understandings were a means to accommodate concerns from affected States – especially in the case of the permanent members of the Security Council.

If one has a look at the *travaux préparatoires*, it becomes clear that the idea behind this qualifier is to exclude all violations of the prohibition of the use of force which are controversial and thereby not “manifest” violations of the UN Charter.⁵⁴ Possible cases which come to mind in this context are so-called situations of “humanitarian intervention”, for example, in the Kosovo-War. Also included are probably cases of anticipatory self-defence in which the attacker seems to have evidence of an imminent attack, but in the end this evidence turns out to be unreliable after the “defensive” action against another country has taken place. While these examples are mainly falling under the aspect of “character”, one could also think of the

⁵² J. Harrington, ‘The Aggression Negotiations at the ICC Review Conference’, June 8, 2010, available at EJIL Talk, <http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/> (last visited 27 August 2010).

⁵³ See O. Triffterer, *Dogmatische Untersuchungen* (1966), *supra* note 36, 124-125.; for the most recent status of the principle of legality, see B. Broomhall, ‘Article 22’, in O. Triffterer (ed.), *Commentary on the Rome Statute* (2008), 714-729 and W. A. Schabas, ‘Article 23’, *id.*, 731-734.

⁵⁴ Informal inter-sessional meeting 2006 of the Special Working Group on the Crime of Aggression, 8-11 June 2006, in Assembly of State Parties, 5th session 2006, Doc ICC-ASP/5/SWGCA/INF.1 (2006), para. 19.

mere exchange of fire after a border incident or a short-term violation of the territorial sovereignty when referring to the “gravity and scale” of the manifest violation.⁵⁵ However, one should keep in mind that some commentators already question whether these “low scale” violations of the prohibition of the use of force fall under the original definition of aggression.

Summing up the discussion on the possible benefit of a qualified “manifest violation” of the UN Charter, one feels inclined to see this as part of a necessary compromise to be able to come to an agreement on the definition as such. Although the use of the term “manifest” gives more room for questions than the grave breaches regime of the Geneva Conventions, both approaches are in principle comparable. Although the grave breaches system of the Geneva Conventions actually took some time to become operable – some would even say that before it was included in the ICTY Statute as part of the jurisdiction of the tribunal, this regime had not much practical relevance⁵⁶ – it is reasonable to have a norm which penalises a certain serious violation of a prohibitory norm. There is no danger that the prohibition of the use of force laid down in Article 2 (4) of the UN Charter will be undermined by this construction. Rather, any kind of penalisation of only a certain (manifest) form of aggression will in the long run strengthen the general norm as well. Comparing it again with the grave breaches regime in the area of international humanitarian law, the experience from the last 15 years of international criminal law jurisprudence shows that the prosecution of grave breaches of international humanitarian law has strengthened the obedience towards general international humanitarian law (i.e. also those rules which are not included in the grave breaches regime) as well.⁵⁷ Without being able to predict whether at any place in time we will

⁵⁵ For a list of possible cases which fall below the threshold of “manifest violations” see Kress, *supra* note 7, 1140-1141, referring among others to E. Wilmschurst, ‘Aggression’, in Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure*, 2nd ed. (2010), 262-280; C. Gray, *International Law and the Use of Force*, 3rd ed. (2008); R. Kolb, *Ius Contra Bellum. Le droit international relative au maintien de la paix* (2003); and T. Franck, *Recourse to Force* (2002).

⁵⁶ See e.g. for a depiction of the grave breaches regime: N. Wagner, ‘The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the Former Yugoslavia’, 850 *International Review of the Red Cross* (2003) 351-385.

⁵⁷ For an interesting study on the system of grave breaches in relation to the concept of war crimes, see M. D. Öberg, ‘The absorption of grave breaches into war crimes law’, 873 *International Review of the Red Cross* (2009) 163-183.

see the same amount of cases before the ICC dealing with aggression, it is nevertheless an important signal to have criminalized this international act which for such a long time has been dealt with very carefully because of the many political implications. Of course, it will pose an additional challenge to the judges of the ICC to come up with a sensible interpretation of the respective qualifier. But one could even say that one more challenge does not really make a difference in this regard.

6. Mental Requirements for the Crime of Aggression

Article 8*bis* does not contain any special requirement concerning the mental elements which have to be fulfilled. Therefore, there is no special intent like that required for the crime of genocide, and instead reference has to be made to the general clause contained in Article 30 of the Rome Statute.⁵⁸

However, the Elements of Crimes contain some clarifications which can be important when determining either the mental element or questions of mistake of fact or mistake of law (Article 32 Rome Statute). Paragraph 2 of the Introduction of the newly drafted Elements of Crimes (EoC Introduction) for Article 8*bis* states that “[t]here 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”. In the same way, paragraph 2 of the EoC Introduction clarifies that “[t]here 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.” This stands in line with Article 32 (2) of the Rome Statute laying down that “[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility”.⁵⁹ Insofar, one could say that the respective paragraphs in the Elements of Crimes are just stating what should already be obvious from the general part of the Rome Statute. However, this redundancy is not new to the wording of the Elements of Crimes, and results from the concerns of some Member States that certain aspects should be made so clear that they cannot be misunderstood. In that regard, it is not surprising that the actual Elements further clarify that not the legal

⁵⁸ For the relation between the definition of aggression and the general provisions of the Rome Statute and especially Article 30, see Clark, *supra* note 7, 1109-1110.

⁵⁹ See also O. Triffterer, ‘Article 32’, in: O. Triffterer, *Commentary on the Rome Statute*, 2nd ed. (2008), 895-914.

evaluation, but the knowledge of the factual circumstances is decisive. Paragraph 4 of the Elements states that “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”, while paragraph 6 clarifies that “[t]he perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations”. Again, all this should already be clear from Article 30 which requires the perpetration of a crime with “intent and knowledge”, the latter being defined in paragraph 3 as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”⁶⁰ Insofar, the Elements of Crimes do not add anything to the mental element of the crime of aggression, but clarify the interpretation of the respective articles – which is the objective of the Elements of Crimes in the first place.

7. Individual Criminal Responsibility: the Amendment of Article 25

One of the main systemic problems created by the new definition of the crime of aggression as a leadership crime is the relationship to Article 25 of the Rome Statute dealing with individual criminal responsibility. The sub-paragraphs (a) to (d) were questioned as to whether they would be suitable to apply in cases of aggression. There were times when it was suggested to exclude any residual effect of those provisions.⁶¹ The solution which was presented at the Rome Conference, and which was finally adopted by the Member States, inserts in Article 25 a new paragraph 3*bis* with the following wording:

“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.”

This solution enables the judges to use the general provisions dealing with individual criminal responsibility, but at the same time ensures that the

⁶⁰ It would lead too far here to discuss the “clarity” of this Article which in the end can actually be coined as not being the best drafted article of the Statute. For more details see D.K. Piragoff, ‘Article 30’, in O. Triffterer (ed.), *Commentary on the Rome Statute*, 2nd ed. (2008), 849-861.

⁶¹ R. S. Clark, ‘The Crime of aggression’, in C. Stahn & G. Sluiter, *The emerging practice of the International Criminal Court* (2009), 709, 718.

crime of aggression stays a leadership crime.⁶² It is thereby prevented that through the “backdoor” of accessory responsibility perpetrators who are not in a position of control foreseen by Article 8*bis* would become liable.

II. The Exercise of Jurisdiction Over the Crime of Aggression

As stated at the beginning of this paper, the open question before Kampala was whether the Member States would find agreement on the trigger mechanism for the exercise of jurisdiction over the crime of aggression. The proposal by the Special Working Group presented in February 2009 suggested an Article 15*bis* with two alternatives and various options giving the Security Council (and other bodies like the ICJ and the General Assembly) either the power to determine whether there was an act of aggression or giving the Prosecutor the possibility to start an investigation with or without authorization by the Security Council.⁶³ Before Kampala the exercise of jurisdiction was seen as the crucial point which could bear the brunt of the blame if there was no agreement at the Review Conference.

1. The Two-Tiered Approach of Article 15*bis* and Article 15*ter*

To the surprise of most of the observers, the Member States not only adopted a definition of aggression, but also came up with a solution to the jurisdiction problem. The key to the success seems partly to have been to split up the provisions dealing with the jurisdiction in two different provisions, Article 15*bis* dealing with the exercise of jurisdiction over the crime of aggression in the case of State referrals as well as *proprio motu* investigations on the one side, and Article 15*ter* dealing with the exercise of jurisdiction in cases of Security Council referrals. This splitting-up into two

⁶² See Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, para. 25 which also stresses that this “provision was sufficiently broad to include persons with effective control over the political or military action of a State but who are not formally part of the relevant government, such as industrialists”; *cf.* also K. Ambos, ‘Strafrecht und Krieg: strafbare Beteiligung der Bundesregierung am Irak-Krieg?’ in J. Arnold, B. Burkhardt, and W. Gropp (eds), *Menschengerechtes Strafrecht, Festschrift für Albin Eser* (2005), 671, 677 who already emphasised before the definition found in Kampala that aggression is a leadership crime.

⁶³ On the relationship between Security Council and ICC with regard to the crime of aggression see e.g. N. Blokker, *supra* note 19.

articles came up during the Review Conference, originally trying to accommodate other concerns, but worked out to be the decisive step in order to reach agreement on the crime of the jurisdiction.⁶⁴ The main difference between these two provisions is the fact that in a case of a Security Council referral, there is no need for the determination of an act of aggression, nor does the Prosecutor have to wait for a determination. For the cases of State referrals and *proprio motu* investigations a special procedure was developed in which the prosecutor has first to ascertain whether a determination of an act of aggression has been made⁶⁵ by the Security Council, and if not, has to wait six months before he may proceed with the investigation provided that the Pre-Trial Division has authorized the commencement of the investigation.⁶⁶

Whether it was good to come up with two different procedures for the exercise of jurisdiction with regard to the crime of aggression, remains to be seen in the future. However, at first glance, this distinction makes sense, since in the case of a Security Council referral there seems to be no need to get a separate determination of an act of aggression from this organ because this is the one situation in which there should be no question of conflicting competences.

2. The Entry into Force of the Definition of the Crime of Aggression

What is striking concerning both respective articles is the fact that although at first glance they claim to deal mainly with the exercise of jurisdiction, both Article 15*bis* (3) and Article 15*ter* respectively address something completely different as well: provisions which appear to modify the amendment procedure concerning the crime of aggression. This is new because originally the necessary article dealing with the amendment procedure, Article 121, could be found in part 13 of the Rome Statute entitled “Final Clauses”. In fact, before the Review Conference in Kampala, there was a rather vivid discussion within the Special Working Group about

⁶⁴ See for a description of the events and the presentation of the President of the ASAP’s non-paper with the respective new structure J. Harrington, ‘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 visited 27. August 2010)

⁶⁵ Art. 15*bis* (6), Resolution RC/Res.6, Annex I.

⁶⁶ Art. 15*bis* (8), *supra* note 65.

the question as to which was the correct paragraph to be applied to the amendment concerning the crime of aggression.⁶⁷ While some assumed that Article 121 (5) should be applied, which explicitly said that “[a]ny amendment of Articles 5, 6, 7 and 8 of this 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”, others would argue that *stricto sensu* there was no “amendment” to Article 5, therefore the procedure laid down in Article 121 (4) requiring seven-eighths of the States Parties to deposit their instrument of ratification.⁶⁸ Yet others believed that because of Article 5 (2) there was no ratification process needed at all, just a respective decision by the Review Conference. Turning to operative paragraph 1 of the Adopting Resolution, this provides now that the Review Conference:

“[d]ecides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court [...] the amendments to the Statute contained in annex 1 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 Party may lodge a declaration referred to in Article 15*bis* prior to ratification or acceptance”.⁶⁹

The Member States hereby make a clear statement in favour of the Article 121(5) procedure, which should solve all problems raised before the conference. But does it really? First of all, it seems questionable whether it is up to the States Parties which procedure to choose. Second of all, in the respective resolution they even go one step further. They lay down *additional conditions* which have to be fulfilled in order for the Court to be able to exercise its jurisdiction. Paragraph 2 of both Article 15*bis* and

⁶⁷ See, e.g. Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 June 10 June 2009, ICC-ASP/8/INF.2, (2009), at 21, Annex IV, para. 9-14.; see also Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, paras 32-43; for an analysis of this problem, see D.M. Ferencz, ‘Bringing the Crime of Aggression within the Active Jurisdiction of the ICC’, 42 *Case Western Reserve Journal of International Law* (2009) 1&2, 531-542.

⁶⁸ See also in general on the amendment procedure, R.S. Clark, ‘Article 121’, in: O. Triffterer (ed.), *Commentary on the Rome Statute*, 1751.

⁶⁹ Emphasis added by author.

Article 15*ter* add a first additional condition by requiring that “[t]he 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*”.⁷⁰ Furthermore, paragraph 3 of both articles demands that “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”. Therefore, it seems that in addition to the requirements of Article 121 (5), two additional conditions have been inserted. However, there even seems to be the view among some commentators that already with the fulfilment of these additional conditions (i.e. the ratification of 30 Member States and the 2/3-majority decision to be taken after 1 January 2017), the amendments enter into force for *all* Member States. It is currently under discussion whether this is actually possible, and whether this is not an implied amendment of Article 121 (5).⁷¹ Although this debate might be interesting from a law of treaties point of view, in a certain way the discussion is moot. Since the Resolution was adopted by consensus it appears to be the clear will of the Member States to proceed in this way.⁷² In principle, the decision to proceed according to Article 121 (5) can only be welcomed. It seemed rather construed to apply Article 121 (4) in the first place, since it was much more persuasive to argue that Article 121 (5) provides the procedure for amendments which deal with the substantive crimes laid down in Articles 5, 6, 7 and 8. The fact that, even if the necessary 30 ratifications have been deposited, we will have to wait at least until 1 January 2017 before the Court is able to exercise its respective jurisdiction is something which has to be accepted, giving in to concerns of

⁷⁰ Emphasis added by author; this idea was already presented in Report of the Special Working Group, ICC-ASP/7/20/ Add.1, para. 30; interestingly the Special Working Group concluded that “No support was expressed for such a possibility, in particular as a number of delegations preferred that the Court’s subject-matter jurisdiction over the crime of aggression be activated upon the adoption of the amendments on aggression by the Review Conference. The point was also made that such a minimum number of ratifications was inconsistent with the wording of Article 121 (5) of the Rome Statute.”

⁷¹ See D. Akande, ‘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/> (last visited 27 August 2010).

⁷² Even Japan, being the State which was very much opposed to this approach and seemed to have preferred the article 121 (4) procedure did not object to the consensus in the end.

some States. The argument that the amendments would enter into force without the additional decision by the Member States might of course also be put forward. In the end it does not make a difference, since the Court would not be able to exercise its jurisdiction before the respective decision is taken (in 2017 or even later). This “delayed” start for the jurisdiction over aggression seems to be beneficial for all. Against the background of the principle of complementarity, the States Parties now have time to bring their national legal system in accordance with the requirements of the new definition. But it also gives the Court some more time to establish itself as the permanent Court dealing with international crimes. By then the first final judgments will have been rendered in the cases already before the Court.⁷³ It might have been too much for this young international organisation to face another challenge and to deal with this new jurisdiction over the crime of aggression too soon.

3. The Opt-Out Clause Contained in Article 15*bis*, Paragraph 4

One of the most interesting results of the Review Conference with regard to the crime of aggression is the clause contained in paragraph 4 of Article 15*bis* dealing with the possibility for States Parties to opt-out from the jurisdiction over the crime of aggression by lodging a respective declaration with the registrar. This provision was put forward during the final days of the Conference.⁷⁴ However, it is not completely clear what exactly the scope of application is for this provision. While this kind of provision would have made sense in case the amendment procedure was to be determined by Article 121 (4), and then a State which is belonging to the minority that did not ratify the amendment had a chance to exclude the jurisdiction over its nationals, this argument *prima facie* can not be raised now that States Parties have settled for the Article 121 (5) procedure. According to the second sentence of this provision, it is clear that “[i]n respect of a State Party which has *not* accepted the amendment, the Court

⁷³ Although it will probably still take some time until the first final judgment has been rendered, having in mind that in July 2010 Trial Chamber I again stopped the proceedings in the *Lubanga* case, *cf.* ICC Press release of 8 July 2010, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr555> (last visited 27. August 2010).

⁷⁴ *Cf.* J. Harrington, ‘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 visited 27 August 2010).

shall not exercise its jurisdiction regarding a crime covered by the amendment.”

Therefore, one can think of a couple of questions which follow from this paragraph: why would a State Party which has accepted the amendment afterwards want to opt-out of the regime again? Would it then not be more sensible not to ratify the amendment in the first place? Furthermore, why would a State Party which has not accepted the amendment lodge a declaration of opting out, since Article 121 (5) makes it crystal clear that the Court would not be able to exercise its jurisdiction regarding that crime? There are some answers which come to mind, which are however, not completely persuasive.⁷⁵ First, it might be that a State Party wants the Security Council referral mechanism for the crime of aggression to be enacted, therefore ratifies the amendment, but does not want the Article 15*bis* system to be operative for itself. The answer to the second question could be that even though a State Party has not ratified the amendment, it wants to ensure that it definitely will not be subject to the jurisdiction of the Court with respect to the crime of aggression. Some commentators seem to think that all States Parties are bound to the amendments – i.e. even though they have not accepted or ratified them – unless they opt out.⁷⁶ This latter interpretation definitely would explain the need for an opt-out clause. However, although this approach might be understandable from a political standpoint, legally it is not completely persuasive. In the end, one could get the impression that paragraph 4 has been hastily inserted in Article 15*bis* without bringing it completely in coherence with the articles dealing with the amendment procedure.

⁷⁵ Giving a first overview over the discussion which is at the moment mainly taking place on international law blogs, see D. Akande, ‘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/> (last visited on 27 August 2010); see also W.A. Schabas, ‘The Kampala Review Conference: A Brief Assessment’, at <http://humanrightsdoctorate.blogspot.com/2010/06/kampala-review-conference-brief.html> (last visited on 27 August 2010); and K. J. Heller, ‘The Sadly Neutered Crime of Aggression’, at <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/> (last visited on 27 August 2010).

⁷⁶ E.g. W. A. Schabas, *supra* note 75.

4. The Exercise of Jurisdiction for State Referrals and *proprio motu* Investigations

In order to summarise the further procedure contained in Article 15*bis* for the exercise of jurisdiction for State referrals and *proprio motu* investigations, a short overview will be given over the remaining paragraphs. Paragraph 5 is especially important with regard to non-States Parties because it makes clear that “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory”. This provision was necessary because under the conditions of Article 12 it theoretically would have been possible for the Court to exercise its jurisdiction with respect to the crime of aggression over non-State Parties.⁷⁷ However, in order not to further alienate States like the United States, Russia or China from the Court, it was agreed to make an exception from the principles contained in Article 12.

Finally, paragraphs 6 to 8 highlight the procedure the Prosecutor has to follow in cases of State referral or investigations *proprio motu*: when he has concluded that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, “he shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.” He shall also notify the UN Secretary General accordingly (paragraph 6). If the Security Council has already made such a determination, the Prosecutor can proceed with the investigation (paragraph 7). In case no such determination has been made by the Security Council after six months, and provided the Pre-Trial Division has authorized the investigation in accordance with Article 15, the Prosecutor can also proceed with the investigation (paragraph 8). The possibility of the Prosecutor to investigate crimes of aggression without an explicit determination by the Security Council definitely comes as a surprise, considering the fact that there were options in the original proposal of the Special Working Group which would not have allowed for this.⁷⁸ In this context, one has to keep in mind that with France and the United Kingdom we have two of the five permanent Security Council members among the ICC Member States.

⁷⁷ In general on the mechanism laid down in Article 12 see S. A. Williams, ‘Article 12’, in O. Triffterer, *Commentary on the Rome Statute*, 547-561.

⁷⁸ See proposed Article 15*bis* (4), alternative 1, option 1 in the Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, Appendix I.

However, Article 15*bis* foresees various safeguards to ensure the special position of the Security Council with regard to acts of aggression: the last half-sentence of paragraph 8 makes clear that the Prosecutor is only allowed to proceed with his investigations “provided [...] the Security Council has not decided otherwise in accordance with Article 16”. This shows that even in case there is no express determination by the Security Council, the organ with the primary responsibility for international peace and security can defer an investigation under Article 16. Again, this did not need to be expressly re-stated, since Article 16 from its ambit applies to all investigations of the Prosecutor, but probably this was necessary to ensure the agreement of the P-2 (France and the United Kingdom).

Paragraph 9 and 10 finally contain two clarifications: First, it is stated that “[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”. This provision is important since it ensures that in cases where the Security Council, which in the end is a political organ, has made a respective determination, the Court is independent to come to another conclusion. Second, since Article 15*bis* contains quite a number of special regulations for the exercise of jurisdiction over the crime of aggression, there should be no misunderstanding about the fact that “[t]his Article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5”. Both paragraphs have been taken over from the Special Group’s proposal from February 2009.

5. The Exercise of Jurisdiction for Security Council Referrals: Article 15*ter*

Concerning the exercise of jurisdiction over the crime of aggression with respect to Security Council referrals the most important elements have already been mentioned above. The procedure envisaged in Article 15*ter* is much simpler than the one of Article 15*bis*: the most important provision is paragraph 1 which states that “[t]he Court may exercise jurisdiction over the crime of aggression in accordance with Article 13(b), subject to the provisions of this article”. This means that the same procedure has to be complied with which is already known from the Security Council referral with respect to the three other crimes. It follows that there does *not* have to be an explicit determination by the Security Council with regard to the existence of an act of aggression. The only factor which has to be kept in mind is that the same restrictions concerning the exercise of jurisdiction (paragraph 2: one year after 30 ratifications) and the prerequisite of a

decision by the States Parties subject to certain conditions after 1 January 2017 (paragraph 3) remain in place. Paragraphs 4 and 5 are identical to paragraphs 9 and 10 of Article 15*bis* described above. This underlines that the more complicated procedure is contained in Article 15*bis*.

D. Conclusion

Before the Review Conference in Kampala, commentators were divided whether it would be the right time to come to an agreement on the crime of aggression.⁷⁹ Many people – including the present author – were also sceptical whether it would be good for the Court in the long run to be faced with the politically charged crime of aggression, and whether it would ever be possible to reach consent on this difficult matter. Against this background, the Resolution which was adopted by consensus in Kampala defining the crime of aggression and providing a solution for the difficult relationship between the ICC and the Security Council with regard to the exercise of jurisdiction, must already be characterised as yet another revolution in the field of international criminal law, even though there still are some hurdles to cross before the respective amendment will enter into force.

Of course, if one examines the definition of the crime of aggression in Article 8*bis*, one may conclude that – especially from a criminal law perspective – the chosen solution is far from perfect. Yes, Article 8*bis* would not withstand a strict application of the principle of legality in national criminal law. But, if we are honest, few of the substantial provisions contained in the statutes of international criminal tribunals do. The reason is simply that this principle is not so strictly applied in international law. Despite the incorporation of the principle of legality in Articles 22 and 23 of the ICC Statute, one has to take into account that international criminal law is still a young and slowly developing discipline. The definition of Article 8*bis* is another step towards a strengthening of a core of four commonly accepted international crimes: aggression, genocide, crimes against humanity and war crimes. The judges of the ICC will bear

⁷⁹ The present author actually doubted whether it would not be too much of a burden for this young institution to carry, expressing this opinion during the Conference on the Crime of Aggression organized by the German Red Cross and the German Association for the United Nations in Berlin on 3 May 2010, see for more information <http://www.dgvn.de> (last visited 1 August 2010).

some responsibility in further defining this crime, once the amendment has entered into force.

More remarkable are the provisions contained in Articles 15*bis* and 15*ter*. These have established a system to exercise jurisdiction over the crime of aggression, thereby attempting successfully to accommodate most of the concerns raised by Member States and also non-Member States. However, due to the time pressure in the “heat of the moment” during the Conference, the articles are far from perfect. Especially the provisions dealing with the entry into force of the amendments as well as the opt-out provisions are problematic because instead of creating legal certainty, they will fuel intense discussion “[o]n what was actually agreed in Kampala on the Crime of Aggression?”⁸⁰ No doubt, these results will stimulate academic debate for the years to come. One might be afraid that this will constitute a stumbling block to the entry into force of the amendments concerning the crime of aggression. However, now that the Member States have agreed on a regime for including the crime of aggression into the Rome Statute, it will in due time be operable as well. Academics as well as practitioners have enough time to ensure the gaps are filled.

⁸⁰ See the discussion which has already been cited numerous times: D. Akande, ‘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/> (last visited on 27 August 2010).

The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some

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Abstract

The first review conference to the Rome Statute of the International Criminal Court, held in June 2010 in Kampala successfully concluded decades of negotiations over a statutory definition of the crime of aggression and its prosecution by a permanent international criminal court. The main unresolved issues to be addressed by the review conference concerned the determination of an act of aggression as a (procedural) prerequisite for the exercise of jurisdiction over the crime of aggression and the appropriate activation procedure for a provision on aggression. Most importantly, the compromise of Kampala could safeguard an independent and effective criminal prosecution of the crime of aggression by not subjugating the Court's exercise of jurisdiction to decisions of outside organs. However, in case of a referral of a situation by a State Party or the initiation of a *proprio motu* investigation, the Court's reach over perpetrators is significantly narrowed with a view to crimes of aggression involving a non-state party or a state-party that does not accept the Court's exercise of jurisdiction. These concessions, built on state consent to the exercise of criminal prosecution over individuals and elements of reciprocity, concepts that are alien to the Rome Statute, form part of a political compromise that enabled the activation of the Court's jurisdiction over the crime of aggression.

A. Introduction

In the late night hours of 11 June 2010 the first Review Conference of the Rome Statute of the International Criminal Court (ICC Statute)¹ convened in Kampala consensually adopted a Resolution on the Crime of Aggression (the Resolution)². By “defining the crime”³ and “setting out the

¹ 2187 U.N.T.S. 90. Articles without further specification are those of the ICC Statute.

² See Draft Resolution submitted by the President of the Review Conference. The Crime of Aggression, RC/10, dated 11 June 2010, 17:30, complemented by untitled fragment, 15*bis* para. 3 and 15*ter* para. 3, submitted by the President, dated 11 June 23:00, adopted at the 13th plenary meeting, on 11 June 2010, by consensus; republished as one document in Resolution RC/Res.4, 14 June 2010, 11:00, RC-Res.6-ENG.advance.16Jun1200 and Resolution RC/Res.6, advanced version of 28 June 2010, 18:00, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited 27 August 2010); references to Art. 8*bis*, Art. 15*bis* and 15*ter* without further specification are those of Annex I of the Resolution.

³ Art. 5 (2); see Art. 8*bis*, Annex I of the Resolution.

conditions under which the Court shall exercise jurisdiction with respect to this crime”⁴, the Resolution delivers the necessary requirements for the ICC’s exercise of jurisdiction over the crime of aggression in accordance with Article 5 (2) ICC Statute. In addition, the Resolution formulates Elements of Crimes⁵ and contains several “understandings” regarding the amendments to the ICC Statute on the crime of aggression⁶.

The success of Kampala is an important step for international criminal justice. More than sixty years after the trials of major war criminals in Nuremberg and Tokyo for the crime against peace, the “supreme international crime”⁷, and more than 10 years after the adoption of the ICC Statute that lists the crime of aggression as one of the “most serious crimes of concern to the international community as a whole” over which the Court has jurisdiction⁸, the international community finally agreed on the parameters under which a permanent international criminal court can enforce this crime⁹.

The road has been stony and not all hurdles have yet been cleared. In particular, the Resolution provides for a sequence of procedural steps until the ICC will eventually be able to exercise its jurisdiction over the crime of aggression. Annex I of the Resolution, which contains the relevant amendments to the Statute, is subject to ratification or acceptance and needs to enter into force in accordance with Article 121 (5)¹⁰. Moreover, the ICC’s exercise of jurisdiction is limited “to crimes of aggression committed one

⁴ Art. 5 (2); see Art. 15*bis* and 15*ter*, Annex I of the Resolution.

⁵ Para. 7 of Resolution F, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries of the Establishment of an International Criminal Court, available at <http://www.un.org/icc/iccfnact.htm> (last visited 17 August 2010); see Annex II of the Resolution and amendment contained in para. 6 Annex I of the Resolution.

⁶ Annex III of the Resolution.

⁷ Judgment of the International Military Tribunal at Nuremberg, International Military Tribunal (ed.), *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 -1 October 1946*, Vol. I (1947) 186.

⁸ Art. 5 (1).

⁹ For an account of almost a century of negotiations in the International Law Commission, legal, special, *ad hoc* and preparatory committees, working and special working groups in the era of the League of Nations and the United Nations, see e.g. B. Ferencz, *Defining International Aggression: The Search for World Peace* (1975) and M. Ch. Bassiouni, ‘Historical Survey: 1919-1998’, in M. Ch. Bassiouni (ed.), *International Criminal Law* 2nd edition (1999), 597. For post Rome developments see *infra* note 33 and 35.

¹⁰ Para. 1 of the Resolution.

year after the ratification or acceptance” by thirty States Parties and needs to be activated by “a decision to be taken after 1 January 2017”¹¹.

With a view to the negotiations leading to the review conference, the jurisdictional regime laid down in Articles 15*bis* and 15*ter* is innovative in various aspects. Most importantly, the Court's exercise of jurisdiction over the crime of aggression does not require a prior determination by an outside organ that an act of State aggression has occurred¹². Even if such a determination exists, it has no binding effect for the purpose of the criminal proceedings¹³. This is independent of whether the Court is seized with a matter following a referral of a situation by a State Party, a referral by the Security Council or the initiation of a *proprio motu* investigation by the Prosecutor. In practice, therefore, inactivity by an outside organ will not impede the Court from exercising its independent jurisdiction. However, these acknowledgements were counterbalanced by far-reaching exceptions to the Court's reach over perpetrators of the crime of aggression in case of a State Party referral or a *proprio motu* investigation. The Court may only “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”¹⁴ and “shall not exercise its jurisdiction over the crime of aggression” when committed by a national or on the territory of a non-State Party¹⁵.

In light of this rough outline of the conditions under which the ICC may exercise its jurisdiction over the crime of aggression, this paper will first take a glance back at the negotiations leading up to and at the review conference and will subsequently concentrate on legal questions arising from the compromise solution adopted in Kampala and their implications for the prosecution of individuals for the crime of aggression.

B. From Rome to Kampala

I. The Compromise of Rome

Article 5 lists the crime of aggression as one of the “most serious crimes of concern to the international community as a whole” within the

¹¹ Art. 15*bis* and 15*ter* common paras (2) and (3) Annex I of the Resolution.

¹² Art. 15*bis* (8) and Art. 15*ter* Annex I of the Resolution.

¹³ Art. 15*bis* (9) and Art. 15*ter* (4) Annex I of the Resolution.

¹⁴ Art. 15*bis* (4) Annex I of the Resolution.

¹⁵ Art. 15*bis* (5) Annex I of the Resolution.

jurisdiction of the ICC¹⁶. However, the Court shall exercise this jurisdiction only “once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime”¹⁷.

The ICC’s jurisdiction over the crime of aggression was a major component of the final package, which led to the adoption of the Rome Statute¹⁸. Article 5 confirms its status as a “core crime” and clearly distinguishes it from other crimes, which were not generally accepted as crimes under international customary law at the time of the Rome Conference and consequently not included in the Statute¹⁹. More importantly, the inclusion of the crime of aggression in Article 5 has legal consequences. Since the Rome Statute does not allow reservations²⁰, every State that ratifies, accepts, approves or accedes to the Statute²¹, accepts the jurisdiction of the ICC, including the crime of aggression, in accordance with the Statute²² and its obligation to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”²³. The provisions of the Statute are therefore in principle applicable to the crime of aggression and become operative, once the Court’s jurisdiction is activated in accordance with Article 5 (2). They have been accepted however under the caveat that the conditions under which the Court may exercise its jurisdiction may provide otherwise.

Next to the “definition” of the crime of aggression, the “conditions” govern procedural aspects of the Court’s exercise of jurisdiction. Both components of the provision on the crime of aggression “shall be consistent with the relevant provisions of the Charter of the United Nations”²⁴. This

¹⁶ Art. 5 (1) (d).

¹⁷ Art. 5 (2).

¹⁸ See *e.g.* P. Kirsch and D. Robinson, ‘Reaching Agreement at the Rome Conference’, in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Vol. I, 2002) 67.

¹⁹ See generally *e.g.* O. Triffterer, ‘Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article* 2nd ed. (2008), mn. 33.

²⁰ Art. 120.

²¹ Art. 125.

²² Art. 5 (1); see expressly Art. 12 (1). In this sense also *e.g.* Report of the informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, June 2005, ICC-ASP/4/32, paras 8 & 12.

²³ Art. 86.

²⁴ Art. 5 (2).

requirement provides little guideline for the drafting of conditions for the ICC's exercise of jurisdiction, as the Charter is not directly concerned with the exercise of criminal jurisdiction²⁵. Considering that the definition of the crime of aggression requires the determination of an act of aggression by a State²⁶, which also falls under the competencies of the Security Council²⁷, the clause has been interpreted as requiring particular respect for the role of the Security Council in the maintenance of international peace and security²⁸. Next to consistency with the UN Charter, statutory limitations²⁹ and core values of the Rome Statute³⁰ further govern its content. Moreover, in order to safeguard the integrity of the Statute, the SWGCA agreed that only "indispensable minimal modifications should be made to the Statute"³¹.

Negotiations on the conditions have been dominated by defining an appropriate filter for the exercise of jurisdiction over the crime of aggression with a view to the determination of a State act of aggression. However, Article 5 (2) leaves the drafters with considerable discretion to arrive at a provision on the crime of aggression. It does neither exclude the addition of further procedural steps, nor the modification of provisions of the existing

²⁵ In light of Art. 103 UN Charter the call for consistency even appears superfluous.

²⁶ Art. 8*bis* Annex I of the Resolution.

²⁷ Art. 39 UN Charter.

²⁸ See *e.g.* Report of the informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, June 2006, ICC/ASP/5/SWGCA/INF.1, para. 57. As a legal argument for an exceptional treatment of the crime of aggression, this is not entirely convincing, since all the crimes falling within the jurisdiction of the ICC "threaten the peace, security and well-being of the world", Preamble (3) and consequently fall within the scope of Chapter VII UN Charter. An interpretation understanding this clause as reflecting an exclusive power in the determination of an act of aggression under the UN Charter is widely rejected as legally unsound. See in this respect M. S. Stein, 'The Security Council, The International Criminal Court and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?', 16 *Indiana International & Comparative Law Review* (2005) 1; C. McDougall, 'When Law And Reality Clash – the Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression', 7 *International Criminal Law Review* (2007) 277.

²⁹ *E.g.* the principle of legality, Arts. 22 & 23 and non-retroactivity, Art. 24 .

³⁰ *E.g.* the independence of the Court, Preamble (9); the principle of effective prosecution, Preamble (4) & (9); and the fight against impunity, Preamble (4), (5), (6) & (9).

³¹ Report of the informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, June 2004, ICC/ASP/3/SWGCA/INF.1, conclusions after para. 18 [2004 Princeton Report].

judicial framework, nor the unconditional application of the Statute to the crime of aggression³².

II. Continued Efforts

With a view to activate the Court's jurisdiction over the crime of aggression, the Rome Conference mandated a Preparatory Commission for the ICC with the preparation of "proposals for a provision on aggression"³³. After the entry into force of the Rome Statute, the Assembly of States Parties of the ICC (ASP) secured continuity of the negotiations by establishing a Special Working Group on the Crime of Aggression (SWGCA), open to all States on equal footing³⁴. The SWGCA completed its work at the seventh session (second resumption) of the ASP with the adoption of proposals for a provision on the crime of aggression³⁵.

The SWGCA proposals delivered a widely accepted definition of the crime of aggression³⁶. With a view to the conditions under which the Court may

³² For the view that Art. 5 (1) requires that the crime of aggression should not be treated differently than any other crime under the jurisdiction of the Court, see *e.g.* Report of the Special Working Group on the Crime of Aggression, June 2008, ICC-ASP/6/20/Add.1, Annex II, para. 58; 2004 Princeton Report, *supra* note 31.

³³ Established by Resolution F of the Final Act, *supra* note 5. For the final work product see Report of the Preparatory Commission of the ICC, Part II, PCNICC/2002/2/Add.2, 24 July 2002; see also S. Fernandez de Gurmendi, 'Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court', 25 *Fordham International Law Journal* (2002) 589; R. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002) 4, 859. On the different mandates of Art. 5 (2) and Resolution F see *e.g.* A. Reisinger Coracini, 'Defining the Crime of Aggression for the Rome Statute of the International Criminal Court', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (2010) 425, 445-6.

³⁴ ICC-ASP/1/Res.1, para. 2.

³⁵ Proposals for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression, Report of the Special Working Group on the Crime of Aggression, 20 February 2009, ICC-ASP/7/SWGCA/2 [February 2009 SWGCA Report], Annex I, Appendix [SWGCA Proposals]. See *e.g.* S. Barriga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression', in: R. Bellelli (ed.), *International Criminal Justice* (2010), 621.

³⁶ Draft Art. 8bis of the SWGCA proposals; equally no controversy surrounded the proposed changes to Arts. 9 (1), 20 (3) and 25 (3) ICC Statute foreseen in paras (4), (5) and (6) of the SWGCA proposals, February 2009 SWGCA Report, *supra* note 35, paras 25-26.

exercise its jurisdiction, the SWGCA could reach agreement on the applicability of the three trigger mechanisms provided for in Article 13³⁷. The proposals reflected the “primary role of the Security Council in the maintenance of international peace and security”³⁸ by obliging the Prosecutor to “ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned” in order to proceed with an investigation in respect of a crime of aggression³⁹, whereas such a determination would constitute a purely procedural requirement⁴⁰. Furthermore, the proposals establish that “[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”⁴¹. Draft Article 15*bis* of the SWGCA proposals presented a fairly clean text, but still offered two alternatives with several options concerning the potential function of the Security Council in the determination of an act of aggression⁴². Alternative 1 assigned the Security Council a mandatory role in the procedure by either demanding the actual and explicit determination of an act of aggression (option 1) or a request “to proceed with the investigation in respect of a crime of aggression” by a resolution adopted under Chapter VII of the Charter of the United Nations (option 2, so called “green light option”). Alternative 2 aimed at identifying other procedural benchmarks for the Prosecutor to proceed with an investigation “[w]here no such determination is made within [6] months after the date of notification”. These related to the mere expiration of the six months period (option 1), an authorization of the commencement of an investigation by the pre-trial chamber in accordance with the procedure contained in Article 15 (option 2) or the determination of an act of aggression by either the General Assembly (option 3) or the International Court of Justice (option 4). The SWGCA proposals also did not specify the procedure to activate the Court’s exercise of jurisdiction with respect to the crime of aggression⁴³. With little movement of the delegations regarding these open issues, the way forward was opened by a non-paper discussed at the last meeting of the

³⁷ Draft Art. 15*bis* (1) of the SWGCA proposals, *supra* note 35.

³⁸ Art. 24 (1) UN Charter.

³⁹ Draft Art. 15*bis* (2) of the SWGCA proposals, *supra* note 35.

⁴⁰ *Id.*, Draft Art. 15*bis* (3).

⁴¹ *Id.*, Draft Art. 15*bis* (5).

⁴² *Id.*, Draft Art. 15*bis* (4).

⁴³ Para. 1 Resolution of the SWGCA proposals; see also Non-paper on other substantive issues on aggression to be addressed by the Review Conference, February 2009 SWGCA Report, *supra* note 35, Appendix II.

SWGCA that indicated “further substantive questions to be addressed by the Review Conference”⁴⁴. Largely in the form of “understandings” potentially to be included in the resolution by which the provisions on aggression were to be adopted, or elsewhere in the final act of the review conference, they address procedural or policy options and formulate clarifying language where the provisions of the Rome Statute allow different interpretations. They include the question whether the Court’s jurisdiction on the basis of a Security Council referral will be activated upon adoption or entry into force of a provision of aggression⁴⁵, whether, in the latter case, it would require a minimum number of ratifications⁴⁶ and whether the jurisdiction could be exercised with respect to all States, independent of acceptance⁴⁷. With a view to a State Party referral and *proprio motu* investigation the potential application of Article 121 (5), in the context of which States Parties had voiced different interpretative approaches to the provision’s last sentence, prompted explanatory language, as to whether the Court may exercise its jurisdiction over a crime of aggression, if committed by a (national of a) State Party that has accepted the provision on aggression against a State Party that has not accepted the provision or a non-State Party and vice versa⁴⁸. Further understandings concerned the concurrent territorial jurisdiction of an aggressor and a victim State, which both would be able to provide the Court with a jurisdictional link in the sense of Article 12 (2) (a)⁴⁹ and the Court’s non-retroactive exercise of temporal jurisdiction, before the adoption or entry into force of the provision on the crime of aggression⁵⁰.

From this groundwork, an informal inter-sessional meeting of the ASP strived to bridge the remaining gaps through “further discussions, including

⁴⁴ February 2009 Non-paper, *supra* note 43.

⁴⁵ *Id.*, para. 3.

⁴⁶ *Id.*, para. 5; no support was expressed for such an option, February 2009 SWGCA Report, *supra* note 35, para. 30.

⁴⁷ February 2009 Non-paper, *supra* note 4, para. 4.

⁴⁸ *Id.*, paras 6-11. The understandings were also drafted under the prerogative not to discriminate between non-States Parties and States Parties that have not accepted the amendment, February 2009 SWGCA Report, *supra* note 35, para. 31.

⁴⁹ February 2009 Non-paper, *supra* note 43, para. 12.

⁵⁰ *Id.*, paras 13-14. The understandings are drafted analogously to Art. 11. Similar to the entry into force of the ICC Statute, adoption or entry into force is considered an absolute limit of the Court’s exercise of temporal jurisdiction. For States that accept the amendment in accordance with Art. 121 (5), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under Art. 12 (3).

on the basis of new ideas and suggestions”⁵¹. A chairman’s non-paper, which formed the basis for the discussions, departed from the assumptions that the three existing trigger mechanisms are applicable to the crime of aggression, second, that in case of a Security Council referral, the Court’s exercise of jurisdiction would not require the consent of the State concerned, and that third, in case of a State Party referral or *proprio motu* investigation, the alternative requirements of Article 12 (2) would apply⁵². Striving to overcome paralyzed views on draft Article 15*bis* (4) of the SWGCA proposals and Article 121 ICC Statute, the chairman’s non-paper focussed the debate on exploring common grounds for the employment of State consent as a condition for the exercise of jurisdiction or as a jurisdictional filter in order to meet “substantive concerns of delegations”. Next to the acceptance of the provision on the crime for aggression, such State consent was suggested potentially to be addressed through the use of opt-in or opt-out declarations⁵³.

As a result of these efforts, some of the previously discussed understandings on the irrelevance of State consent in the context of a Security Council referral, the Court’s jurisdiction *ratione temporis* and the interpretation of Article 121 (5) last sentence were annexed to the draft resolution on the crime of aggression and submitted to the review conference⁵⁴. An

⁵¹ Non-paper by the Chairman on the conditions for the exercise of jurisdiction, para. 1, referring to February 2009 SWGCA Report, *supra* note 35, para. 19; Report of the informal inter-sessional meeting on the crime of aggression, June 2009, ICC-ASP/8/INF.2 [2009 Princeton Report], Annex III. Next to outstanding issues regarding the conditions for the exercise of jurisdiction, the 2009 Princeton meeting finalized the Elements of Crimes of the crime of aggression that had been drafted during an informal retreat on the Elements of Crime at Montreux, Switzerland, 16-18 April 2009.

⁵² June 2009 Non-paper, *supra* note 51, paras 3-5.

⁵³ *Id.*, paras 9-12. In that regard the Report contemplates: “Some participants expressed interest in the idea of an opt-out declaration, combined with a system that would otherwise not require that the alleged aggressor State have accepted the amendment on aggression. Such an approach would strongly reduce the number of States who were beyond the Court’s jurisdictional reach, as it would exclude only those States who took an active step to that effect. A system that required potential aggressor States to accept the amendment would not be effective: It was unlikely that such States would move to take such a step. An opt-out declaration, however, reversed that default situation and provided an incentive for States to reflect on the amendment and to come to a decision as to whether they could live with the amendment or not.”, 2009 Princeton Report, *supra* note 51, para. 41.

⁵⁴ Conference Room Paper on the Crime of Aggression, RC/WGCA/1, 25 May 2010; for the origin of the understandings see *supra* note 48. Further understandings were

accompanying non-paper laid out further elements with a view to enabling a compromise solution on the crime of aggression⁵⁵. They included the possibility to delay the Court's exercise of jurisdiction for a still to be defined period of time and a review clause. Furthermore, the non-paper introduced a previously not discussed understanding on domestic jurisdiction over the crime of aggression, reiterating in several variations the language and content of Article 10.

III. Negotiations at the Review Conference

The Review Conference commenced with a promising general debate. Delegations underlined the importance to complete the ICC Statute by adopting a provision on the crime of aggression, their spirit of compromise and dedication to arrive at a solution in the course of the first review conference⁵⁶. After a brief introduction of the chairman's conference room paper and non-paper⁵⁷ on Tuesday 1 June and a sequence of bilateral meetings⁵⁸, the working group on the crime of aggression (WGCA) had its first formal debate on Friday 4 June. The contributions, which focused on the outstanding issues⁵⁹, significantly enhanced the positive working atmosphere. At the same time, Brazil introduced the idea of "successive modalities" on the entry into force of a provision on aggression⁶⁰.

proposed by the United States at the review conference. See Untitled, undated non-paper, distributed on 7 June 2010 (on file with the author).

⁵⁵ Non-Paper by the Chair. Further elements for a solution on the Crime of Aggression, RC/WGCA/2, 25 May 2010.

⁵⁶ The strong support of delegations during the general debate on 31 May and 1 June made up for the disappointing silence of the UN Secretary-General on the issue in his opening statement. But he is reported having positively referred to the crime of aggression in a speech during a dinner at the eve of the Review Conference, see W. Schabas. 'Kampala Diary 31/5/10', available at <http://iccreviewconference.blogspot.com/2010/05/kampala-diary-31510.html> (last visited 19 August 2010).

⁵⁷ *Supra* note 54.

⁵⁸ Informal consultations with the chairman were held on 2 and 3 June.

⁵⁹ Delegations voiced particular strong support for the definition and Elements of Crimes of the crime of aggression. The United States delegation's attempts to spread doubts about the existence of a consensus on issues of substantive law were univocally rejected. See *e.g.* Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes on 1 June, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-USA-ENG.pdf and Statement by Harold Hongju Koh, Legal Adviser, U.S. Department of State on 4 June, available at <http://www.state.gov/s/l/releases/remarks/142665.htm>, (last visited 19 August 2010).

⁶⁰ Non-paper presented by Brazil, '2 successive modalities on the entry into force of the amendment on the crime of aggression', 4 June 2010 (on file with the author).

Seemingly based on an innovative entry into force mechanism, an amendment on the crime of aggression would enter into force after a certain number of ratifications. Whereas, the definition of the crime and referrals by the Security Council would subsequently be immediately applicable by the Court, the exercise of jurisdiction on the basis of a State Party referral or *proprio motu* investigation would be delayed until one year after ratification of seven-eighths of the States Parties.

The first revision of the chairman's conference room paper, presented at the beginning of the second week of the review conference significantly reduced the options of draft Article 15*bis* (4) of the SWGCA proposals⁶¹. In the absence of a Security Council determination of an act of aggression by the State concerned, the remaining two alternatives foresaw that the Prosecutor may either not proceed with an investigation in respect of a crime of aggression (alternative 1)⁶² or may, after [six] months, proceed upon authorization of the commencement of the investigation by the pre-trial chamber in accordance with Article 15 (alternative 2)⁶³. The green light option⁶⁴ was not completely eliminated but moved to a footnote. Omitting reference to the General Assembly and the International Court of Justice⁶⁵ marks the end of a lengthy process that had gradually decreased support for the use of alternative external filters⁶⁶. With regard to the internal filter stipulated in alternative 2, a footnote reflected a proposal to seize the pre-trial division with the authorization of an investigation⁶⁷. Finally, all three further elements of the chairman's non-paper made their way to the revised conference room paper⁶⁸. It would be the aim of the remaining days to find a compromise solution based on alternative 2 that would not prompt the permanent members of the Security Council to risk a vote.

⁶¹ Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.1, 6 June 2010; the paper was circulated on 6 June and formally introduced on 7 June.

⁶² Alternative 1 option 1 of the SWGCA proposals, *supra* note 38.

⁶³ *Id.*, Alternative 2 option 2.

⁶⁴ *Id.*, Alternative 1 option 2.

⁶⁵ *Id.*, Alternative 2 options 3 und 4.

⁶⁶ See *e.g.* Report of the Special Working Group on the Crime of Aggression, 13 December 2007, ICC-ASP/6/SWGCA/1 [December 2007 SWGCA Report], para. 39.

⁶⁷ Revised Conference Room Paper of 6 June, *supra* note 61, fn. 2.

⁶⁸ *Supra* note 55. See fn. 2 of the draft resolution for the review clause, fn. 1 of draft Art. 15*bis* with respect to the time element and Understanding 4*bis* on domestic jurisdiction.

On the same day Argentina, Brazil and Switzerland introduced a non-paper⁶⁹. The ABS proposal did not suggest substantive changes but applied the general idea behind the earlier Brazilian proposal to the chairman's conference room paper, while remaining faithful to the entry into force mechanisms foreseen in Article 121 (4) and (5). The proposals suggested all substantive provisions and those related to a Security Council referral to formally amend Article 5 (2) in accordance with Article 121 (5). The provisions dealing with a referral by a State party and *proprio motu* investigation would enter into force in accordance with Article 121 (4). Most importantly, all elements of the provision on the crime of aggression would be adopted jointly and ratified by one single instrument of ratification⁷⁰. Thereby, the proposal would prevent States Parties ratifying only certain parts of the provision. Following the strong support expressed by delegations, the chairman adopted the ABS structure, splitting the procedural part of the provision on aggression in Article 15*bis* and 15*ter* in the second revision of his conference room paper⁷¹. However, due to some concerns, the different modalities for the entry into force were not taken up. Instead, the discussion on an "objective" entry into force for the Court as opposed to the "subjective" entry into force for States Parties under Article 121 (5) was reopened⁷².

Regretfully, the intriguing dynamic of the first days of the SWGCA debate was seriously disturbed by the discussion following a Canadian non-paper (referred to by the sponsoring State as a "menu approach")⁷³, which significantly divided the views between "western European and other" on one side and of African, Latin American and Caribbean States on the other. The Canadian proposal built upon draft Article 15*bis* (4) alternative 2 of the revised chairman's conference room paper, suggesting a combination of pre-trial chamber authorization and State consent as an additional judicial filter. Its main pillars, a State Party's choice to declare acceptance of the Court's jurisdiction on the basis of a State Party referral or *proprio motu* investigation without a previous determination of an act of aggression by the Security Council "at the time of deposit of its instrument of ratification or

⁶⁹ Non-paper submitted by Argentina, Brazil and Switzerland as of 6 June 2010, ABS proposal (on file with the author).

⁷⁰ Para. 1 draft resolution, ABS proposal, *supra* note 69.

⁷¹ Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.2, 7 June 2010, formally introduced on 8 June 2010.

⁷² Second revised conference room paper, *supra* note 71, fn. 2.

⁷³ Proposal by Canada, 8 June 2010, 9:30 (on file with the author).

acceptance or at any time thereafter”⁷⁴ and the requirement of double (or multiple) State consent⁷⁵ was subject to serious criticism, particularly for introducing an element of reciprocity alien to the ICC Statute and the system of international criminal justice.

Reiterating the multiple consent element of the Canadian proposal with a view to reach out to its opponents, a Slovenian proposal mandated the Prosecutor to readdress the possibility of a Security Council referral in case not all States concerned have accepted the amendment on the crime of aggression⁷⁶. In addition, it suggested a mandatory review conference to be convened by the Secretary-General after the deposit of instruments of ratification or acceptance by seven-eighths of States Parties (calculated at the time of the adoption of the amendment by the Review Conference) “to consider the applicability of the amendment of the crime of aggression to all State Parties”⁷⁷. The proposal regenerated some interest, though particularly from delegations that also supported the Canadian proposal.

In this unfortunate situation, the WGCA ended its work forwarding the second revised version of the chairman's conference room paper to the plenary of the review conference⁷⁸. However, there were only a few, short plenary meetings until the last day of the conference and no formal debate was conducted regarding the following proposals, the various president's non-papers and the final compromise. Discussions moved entirely to bilateral consultations and informal regional and “like-minded” group meetings.

⁷⁴ Art. 15bis (4) of the Canadian proposal, *supra* note 73. Similar ideas had previously been discussed on an informal basis at meetings of the SWGCA in 2008 and 2009. See also *e.g.* December 2007 SWGCA Report, *supra* note 66, para. 19.

⁷⁵ Art. 15bis (4) (ii) of the Canadian proposal required that “[all state(s) concerned with the alleged crime of aggression] [the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused of the crime] have declared their acceptance”.

⁷⁶ Art. 15bis (4bis) of the Non-paper by Slovenia, 8 June 2010 (on file with the author).

⁷⁷ Art. 15bis (4bis) and Understanding 2 of the Slovenian proposal, *supra* note 77.

⁷⁸ The Draft Report of the Working Group on the Crime of Aggression, RC/WGCA/3 of 6 June 2010 had already been adopted on 7 June 2010 (except for paras 16 and 20) before convening in informal format. The previously not adopted paragraphs were revised to accurately reflect that only “one view” had expressed doubts regarding the existence of a consensus on the definition of the crime of aggression, its reflection of customary international law and the need to redraft the Elements of Crimes, and adopted on Wednesday, 9 June 2010 (see also document dated 8 June 2010, 22:00); republished as one document, Report of the Working Group on the Crime of Aggression, RC/5, 10 June 2010.

After the completion of the WGCA, all States which had previously submitted proposals joined by like-minded States engaged in a last effort. Their “declaration” proposed the Court’s exercise of “jurisdiction over the crime of aggression committed by a State Party’s nationals or on its territory in accordance with Article 12, unless that State Party has filed a declaration of its non-acceptance of the jurisdiction of the Court”⁷⁹. Such a declaration was to be submitted to the Secretary General of the United Nations latest until 31 December 2015, or upon ratification or accession for States acceding to the Rome Statute at a later stage, and may have been withdrawn at any time⁸⁰. Full application of Article 12, combined with the possibility to opt-out of the Court’s thereby established jurisdictional reach over a crime of aggression involving a State Party that has not accepted the amendment addressed most points of critique brought up against the Canadian proposal. States Parties would not “opt-in” with regard to the Court’s jurisdiction of the crime of aggression, which is already part of the Statute, exercise of criminal jurisdiction was not subjected to reciprocal consent and the possibility to file a declaration of non-acceptance was limited in time. In addition to elements that had been covered by previous proposals, the joint declaration provided that “[i]n respect of a State which 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”⁸¹. Read in the context of draft Article 15*bis*, this provision would further limit the Court’s reach over perpetrators of the crime of aggression involving non-State Parties. Such exclusion would introduce a novelty to the statutory system, however in line with the previously determined policy consideration to treat non-State Parties and States Parties not accepting the amendment equally⁸². To give States the opportunity to make themselves familiar with this jurisdictional system, the proposal delayed the exercise of the Court’s jurisdiction for five years after the entry into force of draft Article 15*bis*⁸³.

The joint declaration was never formally discussed, but the first non-paper of the President of the review conference reflected the idea of a

⁷⁹ Art. 15*bis* (4*bis*) of the Declaration (draft of 9 June 2010 16h00). Based on the Chairman’s Conference Room Paper Rev.2, jointly elaborated by Argentina, Brazil, Switzerland, Canada, Slovenia and other “like-minded” countries.

⁸⁰ *Id.*, Art. 15*bis* (4*ter*).

⁸¹ *Id.*, Art. 15*bis* (4*cor*).

⁸² See *supra* note 48; see also *e.g.* June 2009 Princeton Report, *supra* note 51, para. 33.

⁸³ Art. 15*bis* (1) of the joint declaration, *supra* note 79.

declaration of non-acceptance⁸⁴. Draft Article 1*bis* provided that “[t]he Court may, in accordance with Article 12, exercise jurisdiction with respect to an act of aggression committed by a State Party, unless that State has lodged a declaration of non-acceptance with the Registrar”, accompanied by footnote 3, which reflected the time element of the joint declaration. Draft Article 1*ter* confirmed that “[t]he Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State Party”. Different from the joint declaration, which focused on the jurisdictional links provided by Article 12 (2) and opened a possibility to opt-out with regard to the effects of these jurisdictional links, the President’s non-paper chose the commission of an act of aggression by a State Party as a point of reference. Consequently, Article 12 ICC Statute would *per se* not be applicable to an act of aggression committed by a non-State Party and a State Party that has lodged a declaration of non-acceptance. This point of reference, which seriously departed from the formulation of the ICC’s jurisdiction over persons⁸⁵, contrary to acts of States, the exclusion of acts of aggression by non-States Parties against States Parties that accept the Court’s jurisdiction, as well as the fact that a declaration of non-acceptance would be lodged with the Registrar and not with the Secretary General as depositary of the ICC treaty, met with (partly strong) resistance. The non-paper further settled the entry into force of the amendments relating to the crime of aggression in accordance with Article 121 (5)⁸⁶ and the exercise of jurisdiction on the basis of a Security Council after entry into force of the amendments⁸⁷. Almost unnoticed in the heated debate over draft Article 15*bis*, brackets and a footnote added to draft Article 15*ter* suggested to delete the requirement of a prior determination of an act of aggression by the Security Council in the case of a Security Council referral⁸⁸.

The 10 June 23:00 o’clock version of the President’s non-paper reflected some critique by redefining the point of reference for the exercise of jurisdiction as “jurisdiction over a crime of aggression arising from an act

⁸⁴ Non-paper by the President of the Assembly, 10 June 2010, 12:00, draft resolution: The crime of aggression, available at http://gojil.uni-goettingen.de/joomla/images/stories/Non-Paper_PASP_CoA_10_June_12_00__2_.non_paper.pdf (last visited 18 August 2010).

⁸⁵ Art. 1.

⁸⁶ Para. 1 draft resolution of the 10 June, 12:00 President’s non-paper, *supra* note 84.

⁸⁷ *Id.*, Understandings 1 and 3.

⁸⁸ *Id.*, fn 8.

of aggression by a State Party”⁸⁹. Explicit language regarding the non-exercise of jurisdiction over acts of aggression committed by a non-State Party⁹⁰ was omitted, though still applicable interpreting draft Article 1*ter a contrario*⁹¹. In addition, the non-paper included a provision regarding the non-exercise of jurisdiction over crimes of aggression committed by nationals or on the territory of non-States Parties⁹², as stipulated by the joint declaration⁹³. Finally, it executed all footnotes and reflected them in the text. The non-paper conditioned the exercise of jurisdiction, independent of the trigger mechanism, by five years after the adoption of the amendments and thirty ratifications.⁹⁴ The declaration of non-acceptance was garnished with some modalities relating to withdrawal and reconsideration⁹⁵. Draft Article 15*bis* (4) alternative 1 was adorned with the “green light option”⁹⁶, Alternative 2 obtained the pre-trial division as an enhanced internal trigger and resurrected the long abandoned “red light option”⁹⁷. Article 15*bis* lost its requirement of a prior determination of an act of aggression by the Security Council and the complete jurisdictional regime was subjected to a mandatory review, “seven years after the beginning of the Court’s exercise of jurisdiction”⁹⁸.

On 11 June at the afternoon plenary, the President announced the long awaited break-through: the deletion of alternative 1. At the same time, the “red light option” in alternative 2 was downgraded to a decision by the Security Council in accordance with Article 16 ICC Statute⁹⁹. However, the

⁸⁹ Draft Art. 15*bis* (1*ter*) of the Non-paper by the President of the Assembly, 10 June 2010, 23:00, draft resolution: The crime of aggression, available at http://gojil.uni-goettingen.de/joomla/images/stories/Non-Paper_PASP_CoA_10_June_23_00__3_.pdf (last visited 18 August 2010).

⁹⁰ See *supra* text after note 84.

⁹¹ Draft Art. 15*bis* (1*ter*) of the 10 June, 23:00 President’s non-paper, *supra* note 89.

⁹² *Id.*, draft Art. 15*bis* (1*quarter*).

⁹³ See *supra* note 79.

⁹⁴ Draft Art. 15*bis* (1*bis*) and 15*ter* (2) and Understandings 1 and 3 of the 10 June, 23:00 President’s non-paper, *supra* note 89.

⁹⁵ *Id.*, draft Art. 15*bis* (1*ter*).

⁹⁶ See *supra* text after note 42.

⁹⁷ See e.g. December 2007 SWGCA Report, *supra* note 66, paras 21-23.

⁹⁸ Draft Art. 3*bis*, Annex I of the Resolution of the 10 June, 23:00 President’s non-paper, *supra* note 89.

⁹⁹ Draft Art. 15*bis* (4), untitled, undated fragment related to 15*bis* para. 4, 4*bis* and 15*ter*, submitted by the President, dated 11 June 2010, 2 p.m., 15*bis* para. 4 announced as agreed at 17:00; see also Non-paper by the President of the Review Conference, dated

discussions continued with a particular focus on time elements and no compromise was yet in sight. Should the Court be able to exercise its jurisdiction over the crime of aggression after the expiry of a certain period of time unless the ASP would decide otherwise¹⁰⁰ or would it not be able to exercise its jurisdiction until the ASP so decides¹⁰¹? Should such an affirmative decision be taken no earlier¹⁰² or not later than 2017? A further time element was also introduced in the context of a declaration of non-acceptance. Should such a declaration automatically expire after a period of seven years, unless confirmed¹⁰³? The final compromise proposal submitted to the review conference by its President for adoption by consensus at 00.19 a.m.¹⁰⁴. It subjected the Court's exercise of jurisdiction to a decision to be taken after 1 January 2017 by a qualified majority but did not alter the modalities of the declaration of non-acceptance¹⁰⁵.

C. Towards a Factual Exercise of Jurisdiction

I. Adoption

The Review Conference decided to adopt the amendments to the Statute contained in Annex I, "in accordance with Article 5 paragraph 2"¹⁰⁶. This specification was introduced at a rather late stage¹⁰⁷ to accompany the plain reference to adoption in the enabling Resolution. Article 5 (2) mandates the Court to exercise its jurisdiction over the crime of aggression,

11 June 2010, 16:30, available at http://gojil.uni-goettingen.de/joomla/images/stories/draft_resolution_CoA_11_June_1630_TRACK.pdf (last visited 18 August 2010).

¹⁰⁰ Draft Art. 15ter, fragment of 11 June 2010, 14:00, *supra* note 99.

¹⁰¹ *Id.*, draft Art. 15bis (4bis).

¹⁰² *Id.*, draft Art. 15bis (4bis).

¹⁰³ Draft Art. 1ter, untitled, undated fragment 1ter submitted by the President on 11 June 2010, 14:00; see in this regard Art. 124.

¹⁰⁴ See the accurate description of the dramatic last hours in Kampala by W. Schabas, 'Success', available at <http://iccreviewconference.blogspot.com/2010/06/success.html> (last visited 16 August 2010).

¹⁰⁵ Untitled fragment, 15bis para. 3 and 15ter para. 3, submitted by the President, dated 11 June 23:00 to complete draft Resolution submitted by the President of the Review Conference. The Crime of Aggression, RC/10, dated 11 June 2010, 17:30.

¹⁰⁶ Para. 1 of the Resolution.

¹⁰⁷ Para. 1 of the draft Resolution of the 10 June, 23:00 President's Non-paper, *supra* note 89. On different accounts of the phrase "in accordance with article 5 (2)" see *e.g.* fn 2 of the second revised conference room paper, *supra* note 71; informal inter-sessional meeting of the of the Special Working Group on the Crime of Aggression, June 2005, ICC-ASP/4/32, para. 15.

“once a provision is adopted in accordance with Articles 121 and 123”. Of these Articles, only Article 121 (3) relates to adoption, providing that the adoption of an amendment “on which consensus cannot be reached shall require a two-thirds majority of States Parties”¹⁰⁸. During the general debate most States Parties emphasized their preference for a consensus adoption of the provision on the crime of aggression. But many clarified that consensus meant also to previously compromise. Despite these assurances, the potential threat of a vote was never entirely discarded, even if it was subject to wild speculations whether a qualified majority could be reached¹⁰⁹.

The quorum of Article 121 (3) could have been easily identified as the proper provision without such an addition. But the explicit reference to Article 5 (2) may provide further elements for the interpretation of the Resolution. It recalls the mandate to complete the Rome Statute by adopting a provision on the crime of aggression. During the negotiations one option repeatedly put forward for the procedure activating the Court’s jurisdiction over the crime of aggression was the simple adoption of a provision in accordance with Article 5 (2) in order to complete the Statute. In that sense

¹⁰⁸ Art. 121 (3). Differently, Art. 9 (1) provides the adoption of Elements of Crimes by a two-thirds majority of States Parties. Given the consensus procedure, one might wonder whether this quorum was fulfilled in Kampala (see also note 109). On the other hand, Art. 9 is not (yet) applicable to Elements of Crimes of the crime of aggression. The adoption, as well as the adoption of “Understandings” which are not regulated in the Statute, might therefore have been governed by Art. 112 (7) (a). The deviating language of paras 1 and 2-3 of the enabling Resolution as well as the different treatment regarding entry into force suggests that the adoption of these texts did not follow Art. 121.

¹⁰⁹ With 111 States Parties, an affirmative quorum of two-thirds would require 74 States Parties. The draft Report of the credentials committee noted the receipt of formal credentials of representatives by 72 States Parties. Further credentials of 12 States Parties, which were communicated during the conference, were accepted (Draft Report of the Credentials Committee, RC/L.2 of 9 June 2010, paras 4-7. However, not all of these 84 States Parties were actually present in Kampala, some delegations had not come at all, some did not attend the full conference and some had their return flight booked on Friday evening. Some States Parties had previously transferred their voting rights to another delegation and the request of 5 out of 8 States Parties in arrears for an exemption of the loss of their voting rights was approved by the review conference (Draft Report of the Review Conference, RC/L.1 of 11 June 2010, para. 20). The Secretariat kept busy getting hold of the exact numbers of delegations present at the last evening of the conference but they were kept confidential. An emergency scenario, in case the required majority were not reachable or not reached, would have been to close the deal in Kampala and (re)submit it to vote at the next session of the ASP in New York.

Article 5 (2) was understood as merely referring to Article 121 (3) for the required quorum of adoption, but would not mandate the application of a full amendment procedure. The Court's exercise of jurisdiction over the crime of aggression would thus be activated and without the need for a supplemented entry into force mechanism¹¹⁰.

The Review Conference did not go as far as adopting a provision without subjecting it to an entry into force mechanism. But still, reference to Article 5 (2) plays an important role in the interpretation of the Resolution, in that it underlines the specific position of the crime of aggression, which upon adoption and ratification of the Rome Statute has been accepted as one of the crimes of concern to the international community as a whole for which the Court has jurisdiction¹¹¹.

II. Entry into Force

While adopting amendments to the Statute, amendments to the Element of Crimes and Understandings¹¹², only the amendments to the Statute contained in Annex I are subject to ratification or acceptance¹¹³. The Resolution contemplates that they shall enter into force in accordance with Article 121 (5)¹¹⁴.

The background to this decision is a lengthy debate that considerably separated States Parties over the question, whether Article 121 (3)¹¹⁵, Article 121 (3) and (4)¹¹⁶ or Article 121 (3) and (5)¹¹⁷ contain the

¹¹⁰ See *e.g.* February 2009 SWGCA Report, *supra* note 35, para. 10; June 2005 Princeton Report, *supra* note 107, para. 14; June 2004 Princeton Report, *supra* note 31, para. 14; see also R. S. Clark, 'Ambiguities in Articles 5 (2), 121 and 123 of the Rome Statute', 41 *Case Western Reserve Journal International Law* (2009) 2&3, 413, 416–418.

¹¹¹ Art. 5(1); for details see *supra* at B I.

¹¹² See *supra* note 108.

¹¹³ Paras 1 & 5 of the Resolution.

¹¹⁴ Para. 1 of the Resolution.

¹¹⁵ See *supra* C I.

¹¹⁶ Art. 121 (4) provides for the entry into force of an amendment „for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them“. Before that point in time, the amendment is not applicable; thereafter it applies to all States Parties. With regard to States Parties that have not accepted the amendment, Art. 121 (6) formulates the possibility to withdraw from the Statute with immediate effect.

¹¹⁷ Amendments in accordance with Art. 121 (5) only “enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not

appropriate procedure to activate the Court's jurisdiction over the crime of aggression¹¹⁸. On a textual basis, Article 5 (2) merely requires the adoption of a provision on the crime of aggression¹¹⁹. In this light, its reference to Articles 121 and 123 would simply specify the forum and the required quorum for such an adoption. If an entry into force mechanism was required, the plain language of Article 121 (5) excludes its applicability to a provision on the crime of aggression. Since the crime of aggression already falls within the jurisdiction of the ICC, the activation of the Court's jurisdiction would not constitute an amendment to Article 5¹²⁰, let alone Articles 6 to 8. Consequently the catch clause of Article 121 (4) would come into play. From a teleological point of view, Article 121 (5) was advanced as covering amendments to all provisions of the Statute that concern the Court's subject matter jurisdiction. But even if such an argument were accepted for the definition of the crime, it is questionable why the procedural component of the provision on the crime of aggression should equally submitted to this procedure¹²¹.

Beyond statutory interpretation, the discussion was widely influenced by policy considerations. From early on, the SWGCA intended applying one single procedure to the complete package necessary to activate the Court's jurisdiction over the crime of aggression¹²². While most States were sceptical towards a mere adoption, the argument that the Court's subject matter jurisdiction over the crime of aggression already is an integral part of the Statute, was also fundamental for those States that favoured an entry into force in accordance with Article 121 (4). On the other side, the thus implied entry into force for all States Parties was strongly opposed by others. A further controversy surrounded the interpretation of the last sentence of Article 121 (5) and its potential detrimental effects on the Court's

accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory“.

¹¹⁸ See *e.g.* February 2009 SWGCA Report, *supra* note 35, paras 28-37; June 2008 SWGCA Report, *supra* note 32, paras 6-14; June 2005 Princeton Report, *supra* note 107, paras 5-17; June 2004 Princeton Report, *supra* note 85, paras 10-19.

¹¹⁹ See *supra* text before note 110.

¹²⁰ Fulfilling the mandate of Art. 5 (2) does not require its deletion.

¹²¹ But see in this respect *e.g.* A. Seibert-Fohr, 'Das Verbrechen der Aggression im Rom Statut: Fragen der Vertragsänderung und Jurisdiktion', 3 *Zeitschrift für Internationale Strafrechtsdogmatik* (2008) 8, 361, available at http://www.zis-online.com/dat/artikel/2008_8_254.pdf (last visited 16 August 2010).

¹²² See already 2004 Princeton Report, *supra* note 31, Conclusions after para. 18; reaffirmed *e.g.* by November 2008 SWGCA Report, *supra* note 74, para. 18.

jurisdiction over the crime of aggression, relating to the Court's exercise of jurisdiction with regard to States Parties. Its language can either be understood (narrowly) as a confirmation of the Article's first sentence, in that States Parties that do not ratify an amendment are not bound by it or (broadly) as limiting the Court's jurisdictional reach over perpetrators of crimes covered by an amendment when committed by a national or on the territory of a State Party that has not accepted the amendment¹²³. To avoid a deadlock evolving from controversies over the applicable activation procedure, also more creative solutions going beyond the seemingly inconclusive statutory options were encouraged¹²⁴. At the review conference, the discussion on Article 121 mainly evolved in the context of the ABS proposal. But some States showed little willingness to overcome somewhat petrified positions regarding the "right" activation mechanism.

By reference to Article 121 (5), the Resolution takes a decision with regard to an entry into force mechanism. But it still leaves some room for interpretation. At one end of the spectrum, underlining the legal requirement of an adoption of the provision on the crime of aggression in accordance with Article 5 (2)¹²⁵, this reference may be understood as adding an (otherwise not required) entry into force mechanism to the activation procedure as a condition under which the Court may exercise its jurisdiction. Application of the relevant entry into force language of the first

¹²³ For a detailed analysis, see A. Reisinger Coracini, "Amended Most Serious Crimes": A New Category of Core Crimes Within the Jurisdiction but out of the Reach of the International Criminal Court?, 21 *Leiden Journal of International Law* (2008) 3, 699 [Reisinger Coracini, Amended Most Serious Crimes]. Under a broad understanding of the last sentence, the limiting effect on the Court's exercise of jurisdiction would arguably be of relevance independent of the way by which the jurisdiction of the Court is triggered in accordance with Art. 13, *id.*, at 707. The SWGCA however has taken the view that it should not affect the referral of a situation by the Security Council (*supra* D II). In the context of a State Party referral and *proprio motu* investigations, the focus of the discussion moved significantly from the relationship between Art. 121 (5) and 12 (2) to the question whether an aggressor State (independent of whether it is a State Party or a non-State Party) would need to have accepted the amendment in order for the Court to exercise its jurisdiction ("negative understanding") or not ("positive understanding"), whereby the consent of the victim State was not seen as decisive. Understandings in that respect were ultimately not included in the Resolution. One may wonder whether the issue has been finally clarified by para. 2 of Resolution RC/Res.5 on Amendments to Art. 8 of the Rome Statute, adopted by consensus on 10 June 2010; see also note 180.

¹²⁴ See *e.g.* WGCA Report, *supra* note 78, para. 14; November 2008 SWGCA Report, *supra* note 74, paras 39-40.

¹²⁵ See *supra* text before note 110.

sentence of Article 121 (5) would destine the provision on the crime of aggression to “enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance”¹²⁶.

If the reference intended to invoke the complete amendment mechanism set forth in Art. 121 (5), the understanding of its second sentence would be decisive for the interpretation of its contents, in particular the reference to an exercise of jurisdiction “in accordance with Article 12”¹²⁷. Under a narrow understanding, no interpretive difficulties would evolve and the declarative reference to Article 12 would simply confirm its applicability. If the last sentence were to be understood as establishing a specific jurisdictional regime for crimes covered by an amendment, which requires the cumulative establishment of two jurisdictional links, including under Article 12, it would still be arguable, that such a regime was not applicable to the crime of aggression given, firstly, its prior inclusion under the jurisdiction of the Court¹²⁸, secondly, States Parties’ acceptance of the Court’s jurisdiction over the crime of aggression upon ratification¹²⁹, and thirdly, the fact that the conditions under which the Court may exercise its jurisdiction over the crime of aggression¹³⁰ do not provide otherwise but explicitly confirm the Court’s jurisdiction in accordance with Article 12¹³¹.

Only if Article 121 (5) last sentence was to be understood as (a) implicitly amending Article 12 and (b) applicable even to the crime of aggression, the reference to Article 12 in Article 15*bis* (4) would need to be understood as constitutive. In that sense, it would override the limiting effect of Article 121 (5) last sentence by virtue of being *lex posterior* and *lex specialis*¹³² with a view to the Court’s exercise of jurisdiction over a

¹²⁶ As an explicit reference to entry into force, it could be particularly directed at Art. 121 (5) first sentence, or may comprise the complete Article if the second sentence was to be understood in a narrow way as confirming the subjective entry into force mechanism laid down in the first sentence; for details see Reisinger Coracini, Amended Most Serious Crimes, *supra* note 123, 707-8. The fact that the drafters abandoned the Understanding regarding Art. 121 (5) may be seen as a hint that the question is not of relevance anymore under the current constellation.

¹²⁷ Art. 15*bis* (4) Annex I of the Resolution; for details see *infra* D 2.

¹²⁸ Art. 5 (1).

¹²⁹ Art. 12 (1).

¹³⁰ Art. 5 (2).

¹³¹ Art. 15*bis* (4). Annex I of the Resolution.

¹³² While Art. 121 (5) is applicable to “[a]ny amendment to articles 5, 6, 7 and 8”, Art. 15*bis* is only concerned with the crime of aggression. For a discussion whether Art. 121 (5) was amended by Art. 15*bis* Annex I of the Resolution see also A. Reisinger

crime covered by an amendment when committed by a national or on a territory of a State Party that has not accepted the amendment. Under such an interpretation, the question would arise, whether the consensual adoption of the Resolution could be understood as the States Parties' legally binding renunciation of rights they have previously attributed to themselves or whether to achieve this effects, States Parties would first need to ratify the amendments. But then, a further question, whether such an amendment to Article 121 (5) last sentence would be subject to the amendment procedure of Article 121 (4) or whether, as part of the package on the crime of aggression, it would follow the procedure of Article 121 (5), would need to be solved. In the latter case, Article 121 (5) last sentence would continue to be applicable to those States Parties, which have not ratified the amendments. In the former case, the provision would continue to be applicable for all States Parties until one year after seven-eighths of them have deposited their instruments of ratification, at which point in time it would enter into force for all States Parties. Both scenarios appear far from what seems to have been intended by the drafters when establishing an opt-out system for States Parties¹³³.

III. Delayed Exercise and Activation of Jurisdiction

In 1998, when the crime of aggression was listed as one of the most serious crimes of concern to the international community as a whole for which the ICC has jurisdiction¹³⁴, the Court's exercise of jurisdiction was delayed until a time when the ASP would adopt a provision defining the crime and setting out the conditions for the Court's exercise of jurisdiction¹³⁵. The provision adopted in 2010 further postpones the ICC's exercise of jurisdiction. "The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendment by thirty States Parties"¹³⁶. In addition, the

Coracini, 'More Thoughts on "What Exactly was Agreed in Kampala on the Crime of Aggression"', EJIL:talk!, available at <http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (last visited 16 August 2010)

¹³³ For details see *supra* D I 1 b. Under both scenarios, the relationship of Art. 15*bis* Annex I of the Resolution Annex I of the Resolution and Art. 121 (5) ICC Statute would have been simplified, if the amendments entered into force for all States Parties after thirty ratifications; see *supra* note 139.

¹³⁴ Art. 5 (1).

¹³⁵ Art. 5 (2).

¹³⁶ Art. 15*bis* and Art. 15*ter*, common para. (2). Annex I of the Resolution.

activation of the jurisdictional regime over the crime of aggression is “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”¹³⁷.

The Court’s delayed exercise of jurisdiction specified by a minimum number of ratification and an activation decision can be understood as a condition for the exercise of jurisdiction in accordance with Article 5 (2). They are not to be seen as a condition for the entry into force in accordance with Article 121 (5) and consequently do not amend this provision¹³⁸.

The requirement of ratification by thirty States Parties opens the question, whether following one year after thirty ratifications the amendments would be applicable for all States Parties. Different from the entry into force procedure according to Article 121 (4), Article 121 (5) clearly does not provide for an *erga omnes* effect. Nevertheless, such an effect may have been foreseen by the drafters as a condition for the exercise of jurisdiction in accordance with Article 5 (2). However, lacking clear wording in that regard, it seems difficult to deduce such an application from Article 15*bis* (2) and the reference to entry into force according to Article 121 (5) rather suggests the contrary¹³⁹.

The package adopted in Kampala comprises all relevant substantive and procedural issues of a provision on the crime of aggression in accordance with Article 5 (2). The decision to be taken after 1 January 2017 is therefore a merely formal decision to finally activate the Court’s exercise of jurisdiction over the crime of aggression. Reference to the adoption of an amendment specifies that if consensus cannot be reached, the activation decision requires a two-third majority of States Parties¹⁴⁰. This is a considerably higher quorum as foreseen in the previous draft that suggested

¹³⁷ Art. 15*bis* and Art. 15*ter*, common para. (3). Annex I of the Resolution.

¹³⁸ See expressly in this regard *e.g.* Non-paper of 25 May, *supra* note 55, para. 2. For a discussion, see also February 2009 Non-paper, *supra* note 43, para. 5.

¹³⁹ If such an effect were indeed intended by the drafters, a clear interpretive statement would be essential. But see R. Clark, ‘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’, 2 *Goettingen Journal of International Law* (2010) 2, 707, in this issue, arguing for the entry into force of the amendments for all States Parties.

¹⁴⁰ Art. 121 (3).

a decision by two-thirds of those States Parties, which are present and voting¹⁴¹.

One interpretative question that might be subject to discussions, concerns the Court's jurisdiction over acts of aggression committed one year after ratification by thirty States Parties, but before the ASP decides to activate the jurisdictional regime. According to the wording of Articles 15*bis* and 15*ter*, such acts might be prosecuted, once the activation decision is taken. This understanding would advance the provision's deterrent effect while not contravening the principle of *nullum crimen sine lege*, as the amendment would already be in force for those States that have ratified it¹⁴². Understandings 1 and 3's reversed structure and "whichever is later" language, on the other side, suggest that the minimum number of ratifications and the activation decision are cumulative conditions for the Court to exercise jurisdiction over crimes of aggression. Should a swift ratification of thirty States unfold such a scenario, the Court's exercise of jurisdiction will depend on its interpretation of the Understandings, in particular whether an agreement that is to be taken into account when establishing the context of a treaty for the purpose of legal interpretation may have an influence on a seemingly unambiguous textual setting of the legal norm as such¹⁴³.

D. Jurisdictional Framework

Annex I of the Resolution distinguishes two procedural regimes according to the way the Court's jurisdiction is triggered in accordance with Article 13. Article 15*bis* applies where a situation is referred to the prosecutor by a State Party or when the Prosecutor initiates an investigation *proprio motu*¹⁴⁴. Article 15*ter* governs the referral of a situation by the Security Council acting under Chapter VII of the UN Charter¹⁴⁵. The requirements for a minimum number of ratification and a decision by the

¹⁴¹ See the unspecified decisions contained in draft Art. 15*bis* (4*ter*) and Art. 15*ter*, fragment, *supra* note 99, in accordance with Art. 112 (7) (a) or even Art. 112 (7) (b).

¹⁴² Art. 121 (5); see also *supra* note 50. For a similar discussion see K. Schmalenbach, 'Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen', 15/16 *Juristen Zeitung* (2010), 745, 752.

¹⁴³ Art. 31 (2) (a) *Vienna Convention on the Law of Treaties*, 23 Mai 1969, 1155 U.N.T.S. 331 [VCLT].

¹⁴⁴ Art. 15*bis* (1) Annex I of the Resolution Annex I of the Resolution; see Art. 13 (a) and 14 ICC Statute, Art. 13 (c) and 15 ICC Statute respectively.

¹⁴⁵ Art. 15*bis* (1) Annex I of the Resolution; see Art. 13 (b) ICC Statute.

ASP to activate the Court's jurisdiction that apply to both jurisdictional strands have been discussed above¹⁴⁶, the following section will therefore concentrate on other conditions provided for the Court to exercise its jurisdiction over the crime of aggression¹⁴⁷.

I. State Party Referral and *proprio motu* Investigation

1. A Limited Jurisdictional Basis

According to Article 15*bis* (4), the Court may “exercise jurisdiction over a crime of aggression, arising from an act of aggression by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction”. Consequently, the ICC may not exercise jurisdiction over a crime of aggression, arising from an act of aggression committed either by a non-State Party or by a State-Party that has previously lodged a declaration of non-acceptance. Using the act of aggression by a State as a point of reference, the drafters ascribed a double function to it. On one side, a State act of aggression is a material element of the crime of aggression¹⁴⁸ that needs to be proven as a requirement to establish individual criminal responsibility¹⁴⁹. On the other side, it serves as a judicial filter. In order to

¹⁴⁶ Art. 15*bis* (1) and (2) as well as 15*ter* (1) and (2) Annex I of the Resolution; see *supra* C III.

¹⁴⁷ The following discussion is based on the understanding of the use of the term “State Party” in the Resolution as referring to a State Party of the Rome Statute independent of whether the State Party has accepted the amendments. The introduction of the categories of a State Party that accepts an amendments and a State Party that does not accept an amendment as opposed to a non-State Party (to the unamended Staute) through Art. 121 (5) ICC Statutewas crucial for the discussions in Kampala. This use of terms seems also reflected in the language of the Resolution, *e.g.* in the reference to States Parties in Art. 15*bis* (2) and (3) Annex I of the Resolution Annex I of the Resolution. If the term “State Party” were to be understood as referring to a State Party of the amended treaty only, a State Party to the Rome Statute that does not ratify the amendment would, as a non-State Party to the amended treaty, simply fall under the provision of Art. 15*bis* (5) ICC Statute.

¹⁴⁸ Art. 8*bis* (1) and (2) Annex I of the Resolution; Elements 3 to 6 Annex II of the Resolution.

¹⁴⁹ For the different standards of proof foreseen at the respective stage of the proceedings, see *e.g.* “reasonable basis to proceed with an investigation” for the initiation of an investigation, Art. 15 (3) and (4), see also Art. 53 (1); “reasonable grounds to believe” at the arrest warrant stage, Art. 58 (1) (a) ICC Statute; “sufficient evidence to establish substantial grounds to believe” to confirm charges, Art. 61 (7); and “beyond reasonable doubt” with a view to conviction, Art. 66 (3) ICC Statute.

ascertain whether jurisdiction may be exercised, the Court must therefore satisfy itself¹⁵⁰ that an act of aggression has been committed, and if so, by which State.

By accepting the amendments, the Court's jurisdiction, including Article 12, over the crime of aggression is activated for the accepting State Party¹⁵¹. The Court may in principle establish a jurisdictional link in respect of that State Party with a view to crimes committed by its nationals or on its territory. The declaration of non-acceptance under this constellation excludes the application of Article 12 *ab initio*, in cases where the respective State Party is an aggressor State¹⁵². This limitation of the Court's exercise of jurisdiction is an additional condition for the Court's exercise of jurisdiction over the crime of aggression established by Article 15*bis* in accordance with Article 5 (2) with particularly far-reaching consequences. The non-exercise of jurisdiction comes close to an annihilation of the Court's jurisdiction over the crime of aggression arising from an act of aggression by a non-State Party and a State Party that has lodged a declaration of non-acceptance¹⁵³.

2. The Rule: Application of Article 12

With regard to a crime of aggression arising from an act of aggression by a State Party that has not previously lodged a declaration on non-acceptance, the ICC may exercise jurisdiction "in accordance with article 12" of the ICC Statute¹⁵⁴.

Article 12 comprises key principles for the Court's exercise of jurisdiction upon the referral of a situation by a State Party or the initiation of a *proprio motu* investigation, which, alongside the compromise on the crime of aggression, were at the heart of the final package that led to the adoption of the Rome Statute¹⁵⁵. It endorses the principle of automatic or "inherent" jurisdiction of the ICC for all "crimes referred to in Article 5",

¹⁵⁰ Art. 19 (1).

¹⁵¹ Art. 121 (5).

¹⁵² For a detailed discussion see *supra* DI 3.

¹⁵³ Against this background one may wonder whether the activation of the Court's exercise of jurisdiction over the crime of aggression limited to crimes of aggression, arising from an act of aggression by a State Party that has not declared its non-acceptance, ultimately fulfils the mandate of Art. 5 (2) and whether the deletion of this provision provided by Annex I (1) of the Resolution might be premature.

¹⁵⁴ Art. 15*bis* (4) Annex I of the Resolution.

¹⁵⁵ See Kirsch, *supra* note 21, 85.

which States accept by becoming a party to the Statute¹⁵⁶. No further formal consent is required for the Court to exercise its jurisdiction¹⁵⁷. More specifically, Article 12 (2) provides two alternative jurisdictional links. The Court may exercise its jurisdiction, if either “[t]he State on the territory of which the conduct in question occurred” or “[t]he State of which the person accused of the crime is a national” is a State Party¹⁵⁸. In addition, such jurisdictional link may be established with respect to a non-State Party that lodges a declaration accepting the Court’s jurisdiction *ad hoc* with regard to a situation in question¹⁵⁹.

By explicit reference to Article 12, Article 15*bis* (4) confirms the application of this jurisdictional regime to the crime of aggression. This reference is of a declarative nature in that it substantiates that States Parties have accepted the Court’s jurisdiction over the crime of aggression upon ratification, under the constraint that the conditions under which the Court may exercise its jurisdiction over the crime of aggression do not provide otherwise¹⁶⁰. In some regard, the conditions adopted in Kampala do indeed provide otherwise, since they limit the Court’s exercise of jurisdiction in accordance with Article 12 to crimes of aggression arising from an act of aggression by a State Party. However, within this jurisdictional limitation,

¹⁵⁶ Art. 12 (1). See W. Schabas & S. Williams, ‘Article 12’, in O. Triffterer *supra* note 19, mn 13; Triffterer, Preliminary Remarks, *supra* note 19, mn 85.

¹⁵⁷ The system of the International Law Commission’s draft Statute (Draft Statute of an International Criminal Court, Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994 (A/49/10), 43, at 82–4) that was based on specific State consent and similar proposals were rejected at Rome. See *e.g.* D. N. Nsereko, ‘The International Criminal Court: Jurisdictional and Related Issues’, 10 *Criminal Law Forum* (1999) 1, 87, 93–4. For the same reasons, the Canadian proposal did not find widespread support; for details see *supra* text around note 75.

¹⁵⁸ Art. 12 (2) (a) and (b).

¹⁵⁹ Art. 12 (3) in connection with Rule 44 ICC RPE. On the misleading term “case” in Art. 12 (3) see *e.g.* M. Ch. Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of the International Criminal Court’, 32 *Cornell International Law Journal* (1999) 3, 443, 453–454. See in this regard also the practice of Art. 12 (3) declarations. By declaration lodged on 1 October 2003, Ivory Coast accepted the exercise of the jurisdiction of the Court under Art. 12 (3) with respect to alleged crimes committed from 19 September 2002. Similarly, the declaration lodged by the Palestinian National Authority on 22 January 2009, relates to acts committed on the territory of Palestine since 1 July 2002. For details see <http://www.icc-pi.int/Menu/ICC/Structure+of+the+Court/Registry/Declarations.htm> (last visited 17 August 2010).

¹⁶⁰ For details see *supra* text around note 128.

Article 12 is applicable and confirmed, in order not to leave any doubt, by express reference to Article 12.

The application of Article 12 (as the application of the amendments *in extensu*) is further relativized by reference to Article 121 (5) in the enabling Resolution. Since, in accordance with this provision, the amendments only enter into force for those States Parties that have accepted them, ratification or acceptance is a precondition also with respect to Article 12 (2). Therefore, the Court may exercise its jurisdiction over the crime of aggression only if either the "State on the territory of which the conduct in question occurred" or the "State of which the person accused of the crime is a national" has accepted the amendments. If one of these alternative links¹⁶¹ can be established, the Court's jurisdiction may as a matter of exercising criminal jurisdiction, cover acts committed by nationals or the territory of States that have not accepted the amendments.

Such a jurisdictional link can equally be provided if either the State of territoriality or the State of nationality has accepted the jurisdiction of the Court in accordance with Article 12 (2). Since Article 15*bis* (4) limits the application of Article 12 to a crime of aggression arising from an act of aggression by a State Party that has not lodged a declaration of non-acceptance, it seems that a victim State's declaration in accordance with Article 12 (3) may not successfully activate the exercise of jurisdiction over a crime of aggression arising from an act of aggression by a non-State Party or a State Party that has lodged a declaration of non-acceptance. The application of Article 12 (3) only becomes relevant, once the condition of Article 15*bis* (4) is established. The scope of application of such a declaration is therefore significantly limited. However it could be of relevance with respect to a crime of aggression arising from an act of aggression committed by a State Party that has not accepted the amendments against another State Party that has not accepted the amendments. It would be unfortunate not to allow a State Party that is

¹⁶¹ For a discussion of potential implications of the last sentence of Art. 121 (5) ICC Statute on the interpretation of Art. 15*bis* (4) Annex I of the Resolution, see *supra* C II; critical as to whether jurisdiction in accordance with Art. 12 ICC Statute may be exercised, see *e.g.* R. Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future?', 2 *Goettingen Journal of International Law* (2010) 2, 731 in this issue; Schmalenbach, *Das Verbrechen der Aggression*, *supra* note 142, 752.

willing to submit itself under the jurisdiction of the Court, by an *ad hoc* declaration to do so, for instance in case of regime change¹⁶².

3. Exception: Declaration of Non-Acceptance

With a view to a crime of aggression, arising from an act of aggression committed by a State Party the Court may in principle exercise jurisdiction in accordance with Article 12, “unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar”¹⁶³. Such a declaration may be withdrawn at any time and shall be considered by the State Party within three years¹⁶⁴.

The declaration aims at excluding the Court’s exercise of jurisdiction in accordance with Article 12 over a crime of aggression arising from an act of aggression committed by a State Party that has lodged a declaration of non-acceptance¹⁶⁵. The declaration of non-acceptance only affects potential acts of aggression by a State Party that has lodged a declaration of non-acceptance, the ICC’s exercise of jurisdiction if such a State becomes the victim of an act of aggression consequently remains unaltered. Insofar States Parties have introduced a privilege that may also serve as an incentive to ratify the Statute. The opt-out clause, which has to be understood as a condition for the exercise of jurisdiction in accordance with Article 5 (2), undermines the explicit inclusion of the crime of aggression under the jurisdiction of the ICC in accordance with Article 12 (1) with a view to a

¹⁶² A State Party may wish to use Art. 12 (3) *ad hoc* instead of going through a lengthy domestic ratification process or a State Party that accepts the amendments after the ICC’s exercise of jurisdiction over the crime of aggression is activated may wish to extend the scope of temporal jurisdiction until the activation date, see *supra* note 50; see also the declaration of Uganda, *supra* note 159.

¹⁶³ Art. 15*bis* (4) Annex I of the Resolution.

¹⁶⁴ Art. 15*bis* (4) Annex I of the Resolution. The consequences of the obligation to “consider”, if any, remain open.

¹⁶⁵ According to Art. 15*bis* (4) Annex I of the Resolution a declaration of non-acceptance even prevails when the Security Council has determined that an act of aggression has taken place. Previous drafts had limited the possibility to opt-out of the Court’s exercise of jurisdiction to situations where the Security Council has not previously made such a declaration. The Canadian proposal, *supra* note 73 and the joint declaration, *supra* note 79 where both still placed under alternative 2 of the Second revised conference room paper, *supra* note 71. Insofar, Art. 15*bis* (4) Annex I of the Resolution broadens the exceptional regime. But where the Security Council has determined the existence of an act of aggression, the situation could arguably also be referred to the Court through Art. 13 (b) ICC Statute.

declaring State Party, which it had accepted by ratifying the Statute and consequently activated by ratifying the amendments¹⁶⁶. Given the wide discretion entrusted to the drafters in formulating the conditions for the exercise of the Court's jurisdiction over the crime of aggression, a limitation even of expressly provided provision cannot be seen as *contra legem*¹⁶⁷. The applicability of the provisions of the Rome Statute to the crime of aggression remained under the caveat of Article 5 (2). However, different from adding conditions to the statutory framework, the changing of existing obligations may have a different effect with regard to State Parties that do not become a party to the amended treaty.

Article 15*bis* (4) refers to a previous declaration. The formulation appears to intend excluding the lodging of an *ad hoc* declaration upon the commission of an act of aggression. This does not only include declarations lodged in the immediate context of an act of aggression. A declaration lodged "previously" with the intent to avert the exercise of the Court's jurisdiction, may be conduct that depending on the circumstances falls under the definition of the crime of aggression as part of the planning and preparation of an act of aggression¹⁶⁸. As a criminal act falling under the jurisdiction of the Court, it may eventually be considered invalid.

A more detailed reference is contained in para. 1 of the enabling Resolution: the declaration may be lodged "prior to ratification or acceptance". The provision does not give any further indication as to whether the declaration of non-acceptance is linked to a process of ratification or acceptance. From the plain wording, "prior to" rather seems to indicate a purely consecutive order in time between the declaration and ratification or acceptance. In that regard, ratification or acceptance may follow immediately up to any distant unforeseeable point in time¹⁶⁹. Thus,

¹⁶⁶ Accepting an amendment that activates a jurisdictional regime, in order to opt-out of this regime seems odd. However, since the declaration of non-acceptance is limited to a crime of aggression arising from an act of aggression by the State Party that declares its non-acceptance, this State Party may wish to submit itself under the protection of the Court's jurisdiction for the case it becomes a victim of aggression, or it may wish to contribute accelerating the commencement of the Court's exercise of jurisdiction.

¹⁶⁷ See *supra* B I.

¹⁶⁸ Art. 8*bis* (1) Annex I of the Resolution.

¹⁶⁹ This was, for instance, the position contemplated by the Canadian proposal, *supra* note 73, but limited in time by the drafters of the joint declaration, *supra* note 79. Offering States Parties that do not accept the provision on aggression and non-States Parties a possibility to opt out from the effects of the Court's jurisdiction in

States Parties to the Rome Statute that do not accept the amendments may lodge a declaration of non-acceptance directed at blocking the Court's jurisdictional reach in accordance with Article 12.

The assumption that a declaration of non-acceptance may be lodged outside the process of ratification or acceptance involves some interesting aspects. The legal basis for a declaration of non-acceptance is set forth in the amendments, which only enter into force for those States that have ratified them¹⁷⁰. Offering States Parties that have not ratified the amendments a possibility to lodge a declaration of non-acceptance is justifiable under the maxim *pacta tertiis nec nocent nec prosunt*¹⁷¹. Accordingly, a State Party would not have to ratify the amendments in order to avail itself of such a privilege, but may accept it as a "third State" with regard to the amended treaty. However, it seems peculiar that, against the background of the amendments' entry into force in accordance with Article 121 (5), a relatively small number of State Parties may grant such a right that may involve serious consequences for other State Parties that have not (yet) ratified the amendments. Furthermore, it is debatable whether third States to the amended treaty, which are also State Parties to the unamended Statute, may legally accept such a right. The Rome Statute does not foresee a possibility to opt out of Article 12¹⁷². On the contrary, it expressly provides that upon ratification State Parties accept the jurisdiction of the ICC over the crime of aggression in accordance with the Statute¹⁷³. It will ultimately be up to the Court to decide whether a declaration of non-acceptance would be covered by the undeniably wide discretion provided in Article 5 (2) or whether such a declaration would amount to a prohibited reservation according to Article 120¹⁷⁴.

accordance with Art. 12 (2) had previously been suggested, but not discussed in detail, 2009 Princeton Report, *supra* note 85, para. 40.

¹⁷⁰ Para. 1 of the Resolution and Art. 121 (5).

¹⁷¹ Art. 36 (1) VCLT.

¹⁷² For States Parties that lodge a declaration of non-acceptance independent of their ratification of the amendment, the declaration would exempt that State to be subject to the Court's jurisdiction in accordance with Art. 12, based on a link provided by another State Party.

¹⁷³ Arts. 5 & 12.

¹⁷⁴ For a comparable argument brought up in the context of applying Art. 121 (5) last sentence under a broad understanding (*supra* note C II), see February 2009 SWGCA Report, *supra* note 35, para. 9. Both problems cease to exist, if the ratification of thirty States Parties were to be effective for all States Parties. From that point in time on, the legal basis for granting rights to third States would be legitimized by all States Parties and the opt-out of Art. 12, as a genuine part of the treaty in force for all States, would not contravene Art. 120.

The lodging of a declaration of non-acceptance with the registrar has been subject to strong criticism, particularly from individual experts of the NGO community. Although the lodging of declarations with the registrar is not unfamiliar to the Rome Statute¹⁷⁵, it is indeed questionable why the Secretary General of the United Nations as depositary of the treaty and recipient of declarations in accordance with Article 124 was not considered the appropriate organ. The practice of the registrar was particularly criticized as intransparent and declarations under Article 12 (3) were said to have been long unknown to the public. To avoid detrimental effects in this regard, the ASP might consider appropriate ways to ensure the publishing of declarations under Article 15*bis* (or in general)¹⁷⁶.

4. Exception: Crimes Committed by Nationals or on the Territory of Non-State Parties

Article 15*bis* (5) contains an exception to the Court's jurisdictional reach provided by Article 12: "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".

This provision, previously formulated in the joint declaration¹⁷⁷, contains further concessions with regard to non-States Parties. However, to some extent, it remains symbolic, since the exercise of jurisdiction over a crime of aggression arising from an act of aggression by a non-State Party is already excluded by Article 15*bis* (4). Acts committed by nationals or on the territory of a non-State Party that amount to an act of aggression will in many instances be attributable to that State and therefore fall under the

¹⁷⁵ See Art. 12 (3).

¹⁷⁶ Neither the Statute, nor the Rules and the Regulations of the Registry in accordance with Rule 14 ICC Rules of Procedure and Evidence do foresee a particular procedure for the publishing of declarations received by the registrar. The registrar dedicates a section of the ICC website to declarations in accordance with Art. 12 (3), available at <http://www.iccpi.int/Menus/ICC/Structure+of+the+Court/Registry/Declarations.htm> (last visited 18 August 2010). The site includes information, though not the original and complete text, about declarations lodged by Ivory Coast on 1 October 2003 and the Palestinian National Authority on 22 January 2009. It does not provide information of a "declaration on temporal jurisdiction" by Uganda; see thereto, W. Schabas & S. Williams, 'Article 12', in O. Triffterer *supra* note 19, mn 17.

¹⁷⁷ See *supra* text around note 81.

category of an act of aggression by that State¹⁷⁸. Paragraph 5 might be an additional safeguard in the context of joint acts of aggression by non-States Parties and States Parties, where for instance command structures are interlinked and not clearly attributable. The exclusion of nationals of non-States Parties from the Court's jurisdiction further guarantees that such persons may not be held accountable before the ICC even when involved in an act of aggression by a State Party.

The exclusion of crimes committed on the territory of a non-State Party however, has another consequence. Since a crime of aggression is usually considered to take place concurrently on the territory of the aggressor State as well as on the territory of the victim State¹⁷⁹, the provision also excludes jurisdiction over a crime of aggression committed by a State Party (that would otherwise fall within the jurisdiction of the Court) against the territorial integrity of a non-State Party. Insofar the provision introduces an element of reciprocity so far unknown to the Rome Statute¹⁸⁰. It affects the relationship between State Parties and non-State Parties, different from the relationship among States-Parties that accept the amendments, States Parties that do not accept the amendments and States Parties that lodge a declaration of non-acceptance. As a consequence of shielding nationals of non States-Parties from the jurisdiction of the Court, their protection from acts of aggression committed by States Parties is equally removed. At the same time, the Court may not exercise jurisdiction

¹⁷⁸ In particular, it is assumed that in most instances, "a person in a position effectively to exercise control over or to direct the political or military action of State" (Art. 8*bis* (1) Annex I of the Resolution) will be a national of that State.

¹⁷⁹ February 2009 SWGCA Report, *supra* note 35, paras 38-39; November 2008 SWGCA Report, *supra* note 74, paras 28-29.

¹⁸⁰ Neither Part 2, nor Art. 121 (5) establish a specific jurisdictional regime where non-States Parties are concerned. The latter provision simply leaves Art. 12 untouched with regard to non-States Parties (under any Understanding, see *supra* C II). The introduction of a consent requirement as a condition for the exercise of jurisdiction over the crime of aggression considerably deviates from Art. 12 but does, strictly speaking, not amend Art. 121 (5). For a different view, see the statements made by Japan before and after the consensual adoption of the Resolution in Kampala available as audio file at <http://www.radioradicale.it/scheda/306439/the-international-criminal-court-giornata-conclusiva-dei-lavori> (last visited 18 August). Since deviations from the statutory provisions can only be justified by Art. 5 (2) and are consequently limited to the exercise of jurisdiction over crime of aggression, the exclusion of the Court's jurisdiction over crimes committed by nationals or on the territory of non-States Parties in the context of other crimes would be contrary to the Statute, see also *supra* note 123.

over a crime of aggression committed by a State Party that has accepted the amendments, and should therefore be under a higher scrutiny, against a non-State Party.

In light of the exception of Article 15*bis* (5) the question arises whether a declaration of acceptance of the Court's jurisdiction in accordance with Article 12 (3)¹⁸¹ could be a basis for the Court's exercise of jurisdiction over the crime of aggression where a non-State Party is involved. Does Article 15*bis* (5) constitute a *lex posterior* exception with regard to Article 12 (2) or Article 12 (2) and (3)? Article 15*bis* is not clear in that regard. On first sight the wording of Article 15*bis* (2) seems to be directed at Article 12 (2). If the reason for the exclusion were to grant third States a privilege to consent to the exercise of jurisdiction of the Court¹⁸², the *ratio* behind the provision would not impede the exercise of the Court's jurisdiction if the State in question accepts the jurisdiction of the Court pursuant to Article 12 (3). The situation would however be different if the provision aims at establishing a strictly reciprocal relationship among State Parties and non-State Parties.

If a declaration in accordance with Article 12 (3) may substitute a jurisdictional link in the sense of Article 12 (2) despite Article 15*bis* (5), jurisdiction could be established *ad hoc* for a crime of aggression arising from an act of aggression committed by a State Party that has accepted the amendments against a non-State Party and a crime of aggression arising from an act of aggression committed by a State Party that has not accepted the amendments against a non-State Party.

5. Synopsis

The following chart provides an overview, under which circumstances the ICC will be able to exercise its jurisdiction over the crime of aggression in accordance with Article 15*bis*.

¹⁸¹ See *supra* note 159 for the assumption that a non-State Party may only accept the jurisdiction of the Court with regard to a situation.

¹⁸² This privilege goes far beyond the requirements for the exercise of jurisdiction under international criminal law and under the Rome Statute. Even more, as a shield against the exercise of jurisdiction by the ICC, it is in sharp contrast to the goals of the Statute to end impunity, see Preamble (4), (5), (6) and (9).

| Article 15bis Resolution on the Crime of Aggression, Annex I: The ICC may exercise its jurisdiction over the crime of aggression arising from an act of aggression | | | | |
|---|--|--|--|---|
| By \ Against | a State Party that has accepted the amendments | a State Party that has not accepted the amendments | a State Party that has declared not to accept the ICC's jurisdiction | a non-State Party |
| a State Party that has accepted the amendments | YES (Art. 15bis (4)) | YES (Art. 15bis (4) in accordance with Art. 12 (2) (a)) ¹⁸³ | NO (Art. 15bis (4)) | NO (Art. 15bis (4), <i>a contrario</i>) |
| a State Party that has not accepted the amendments | YES (Art. 15bis (4) in accordance with Art. 12 (2) (a) or (b)) ¹⁸⁴ | NO jurisdictional link under Art. 12 (2) in accordance with Art. 121 (5) first sentence; but <i>ad hoc</i> acceptance of jurisdiction by State Party in accordance with Art. 12 (3)? [YES, if provision is applicable to all states parties after 30 ratifications] ¹⁸⁵ | NO (Art. 15bis (4)) | NO (Art. 15bis (4), <i>a contrario</i>) |
| a State Party that has declared not to accept the ICC's jurisdiction | YES (Art. 15bis (4) in accordance with Art. 12 (2) (a) or (b)) ¹⁸⁶ | YES (Art. 15bis (4) in accordance with Art. 12 (2) (a)) ¹⁸⁷ | NO (Art. 15bis (4)) | NO (Art. 15bis (4), <i>a contrario</i>) |
| a non-State Party | NO (Art. 15bis (5); <i>Ad hoc</i> acceptance of jurisdiction by non-State Party in accordance with a Art. 12 (3)? | NO jurisdictional link under Art. 12 in accordance with Art. 121 (5) first sentence; <i>ad hoc</i> acceptance of jurisdiction by State Party/by either State in accordance with Art. 12 (3)? [NO even if provision is applicable to all states parties after 30 ratifications (Art. 15bis (5))] | NO (Art. 15bis (4)) | NO (Art. 15bis (4), <i>a contrario</i>) |

¹⁸³ Since the crime of aggression *per definitione* requires cross border activities, jurisdiction based on Art. 12 (2) (a) can be established by way of the aggressor State and by way of the victim State; see also *supra* note 179.

¹⁸⁴ See *supra* notes 178 & 183.

¹⁸⁵ See *supra* note 172.

¹⁸⁶ See *supra* note 184.

¹⁸⁷ See *supra* note 183.

6. Role of the Pre-Trial Division

“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”¹⁸⁸. If the Security Council has made such a determination, it fulfils a judicial filter function with regard to the Court’s exercise of jurisdiction over the crime of aggression and the Prosecutor may proceed with his or her investigation¹⁸⁹. A determination of the Security Council does not bind the Court in substance, it is without prejudice to the Court’s own findings¹⁹⁰, but can be assumed to have strong probative value for the Court’s determination of an act of aggression as an element of the crime of aggression.

The structure of Article 15*bis* respects the primary role of the Security Council in the maintenance of international peace and security but clearly rejects the claim of an exclusive role¹⁹¹. Where, after notification of the relevant situation before the Court, the Security Council does not make a determination within six months, “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”¹⁹². By reference to the pre-trial division, not the pre-trial chamber, Article 15*bis* incorporates the idea of an “enhanced

¹⁸⁸ Art. 15*bis* (6) Annex I of the Resolution.

¹⁸⁹ Art. 15*bis* (7) Annex I of the Resolution.

¹⁹⁰ Art. 15*bis* (9) Annex I of the Resolution confirms this principle with a view to any outside organ.

¹⁹¹ See *supra* note 28 and text around note 38. In explanations after the consensus adoption of the Resolution, the permanent members of the Security Council took position in that respect. While only France reiterated language with a view to an alleged exclusive role, the United States and the United Kingdom expressly referred to the primary role of the Security Council according to the UN Charter.

¹⁹² Art. 15*bis* (8) Annex I of the Resolution.

internal filter”¹⁹³. The pre-trial division currently consists of six judges, which is its minimum number of judges¹⁹⁴. This equal number of six judges raises the question of the appropriate quorum for the authorization of an investigation in respect of a crime of aggression. Would the presiding judge have the decisive voice? Would a qualified quorum be required? Or should the number of judges of the pre-trial division be increased? A clarification of this issue, *e.g.* in the ICC Rules of Procedure and Evidence would certainly be helpful.

The authorization by the pre-trial division is required in case of a referral of a situation by a State Party as well as in case of a *proprio motu* investigation in accordance with Article 15. Insofar, the language “in accordance with the procedure contained in Article 15” extends the application of Article 15 (3)-(5) to State Party referrals¹⁹⁵ and constitutes an additional internal filter. With respect to *proprio motu* investigations, where such a filter already exists with regard to all crimes under the jurisdiction of the Court, it increases the number of deciding judges.

As a judicial filter, the involvement of the pre-trial division may have a double function. Foremost, it shall authorize the commencement of an investigation, without prejudice to subsequent findings of the Court, if it “considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court”¹⁹⁶. But this decision, based on a rather low standard of proof, needs to be distinguished from a decision following a challenge to the jurisdiction of the Court, that may be brought before the Court by a “State from which acceptance of jurisdiction is required under Article 12”¹⁹⁷. The Court is likely to encounter such challenges at an early stage of the proceedings, where the involvement of States Parties that have accepted the amendments on the crime of aggression, States Parties that have lodged a declaration of non-acceptance and non-State Parties may warrant a determination of an act of aggression in order to establish the Court’s ability to exercise jurisdiction in accordance with Article 12¹⁹⁸. The impact of such a decision confirming the

¹⁹³ Draft Art. 15*bis* (4) alternative 2 of the 10 June, 23:00 President’s Non-paper, *supra* note 89; see also fn. 5 of the previous draft, 10 June, 12:00 President’s Non-paper, *supra* note 84.

¹⁹⁴ Art. 39 (1).

¹⁹⁵ See in this regard *e.g.* February 2009 SWGCA Report, *supra* note 35, para. 21.

¹⁹⁶ Art. 15 (4).

¹⁹⁷ Art. 19 (2) (c).

¹⁹⁸ For details see *supra* D 1.

Court's exercise of jurisdiction on future findings with regard to the act of aggression as an element of crime may also require some clarification.

II. Security Council Referral

The ICC's exercise of jurisdiction over the crime of aggression in case of a referral of a situation by the Security Council does not provide any limitations or extensions vis à vis the Statute. Next to confirming the applicability of Article 13 (b)¹⁹⁹, it only contains provisions on the delayed exercise and activation of the Courts jurisdiction over the crime of aggression and the non-prejudicial nature of the determination of an act of aggression by an outside organ and the exercise of jurisdiction over other crimes referred to in Article 5, that are common to Articles 15*bis* and 15*ter*²⁰⁰.

According to Article 13 (b), “[t]he Court may exercise its jurisdiction over a crime referred to in article 5 [...] if [...] a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”. Thereby the Statute acknowledges the Chapter VII powers of the Security Council to establish *ad hoc* tribunals for the prosecution of crimes under international customary law and opens the option to seize the permanent ICC with situations involving crimes that equally fall under its jurisdiction.

On the basis of a Security Council referral, the Court may exercise its jurisdiction “irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard”²⁰¹. The jurisdictional reach accordingly includes States Parties (independent of their ratification or previous declaration of non-acceptance) as well as non-States Parties. Similar to the reference to Article 13 (a) and (c) in Article 15*bis* (1) and the reference to Article 12 in Article 15*bis* (4), Article 15*ter* (1) confirms the applicability of Article 13 (b) to the crime of aggression in a declarative way. Article 13 regulates the Court's exercise of jurisdiction with respect to a crime referred

¹⁹⁹ Art. 15*ter* (1) Annex I of the Resolution.

²⁰⁰ Compare Art. 15*ter* (2), (3), (4) & (5) with Art. 15*bis* (2), (3), (9) & (10) Annex I of the Resolution. Against this background, the wisdom of a separate provision may be questioned. The splitting of Art. 15*bis* and 15*ter* in the ABS proposal was originally mandated by the application of different entry into force mechanisms, see *supra* text after note 69. It was maintained and served a good purpose in facilitating to concentrate the discussions on open issues in the context of Art 15*bis*.

²⁰¹ Understanding 2, Annex III of the Resolution.

to in Article 5, which at the time of the adoption of the Statute and consequent ratification already included the crime of aggression. The express reference underlines that the conditions do not provide otherwise.

Understanding 2 confirms that the entry into force of the amendments in accordance with Article 121 (5) does not impede the Court's exercise of jurisdiction. In case of a referral of a situation by the Security Council, the Court may not only exercise its jurisdiction over those States Parties that have accepted the amendment, but over all States. Article 121 (5) in principle does not distinguish between different trigger mechanisms in accordance with Article 13. Its potential limitations are therefore arguably applicable independent of the way the jurisdiction of the Court is triggered²⁰². Article 121 (5), which is based on a system of subjective entry into force with regard to States Parties, does not expressly deal with the question of an "objective" entry into force of an amendment, vis-à-vis the Court. It has however been argued, that with the entry into force of an amendment upon its first ratification by a State Party, the subject matter jurisdiction of the Court could be seen as amended for the Court. Article 13, which refers to the list of crimes in Article 5 would therefore automatically be applicable to a crime covered by an amendment²⁰³. Furthermore, an unconditional exercise of jurisdiction of the Court based upon a referral by the Security Council seems in line with the general understanding of the role of the Security Council under the ICC Statute and the intention of the drafters.

The Security Council may only refer situations to the Court, within which the Prosecutor remains free to determine the direction of the investigation with a view to the crimes and persons involved when he or she finds that there is a reasonable basis to proceed²⁰⁴. Different from earlier drafts, Article 15*ter* does not require a prior determination of an act of aggression by the Security Council²⁰⁵. Certainly the Security Council is not impeded from making such a determination, in which case Article 15*ter* (4)

²⁰² Reisinger Coracini, Amended Most Serious Crimes, *supra* note 123, 707; see also *e.g.* November 2008 SWGCA Report, *supra* note 74, para. 8.

²⁰³ Reisinger Coracini, Amended Most Serious Crimes, *supra* note 123, 706. The SWGCA had also discussed an entry into force "for the Court" immediately with the adoption of a provision on the crime of aggression. See *e.g.* June 2009 SWGCA Report, *supra* note 35, para. 28-9, as still reflected in the second revised conference room paper, *supra* note 71, Annex III, Understanding 2.

²⁰⁴ Art. 53 (1).

²⁰⁵ See *supra* text before notes 88 & 98.

would apply, but it is not a prerequisite for the Court's exercise of jurisdiction over the crime of aggression.

E. Conclusions

By defining the crime and setting out the conditions under which the ICC may exercise its jurisdiction, the Resolution on the crime of aggression, adopted in Kampala, delivers the necessary requirements to activate the Court's jurisdiction over the crime of aggression as stipulated in Article 5 (2). That alone is a success which should not be diminished by the, though unfortunate, fact that the actual exercise of jurisdiction is conditioned by a specific number of ratifications and an activation decision to be taken after 1 January 2017. These purely procedural steps should not constitute a hurdle, if States Parties stand behind the provision on the crime of aggression and, especially, if a significant number of States Parties will have ratified the amendments by the time of the activation decision.

The jurisdictional regime laid down in Article 15*bis* and 15*ter* upholds several significant principles of the ICC Statute and in this regard clearly exceeds the expectations of many as to what could be achieved in Kampala. All trigger mechanisms foreseen in the Statute apply to the crime of aggression. The independence of the Court and its organs is safeguarded, not only regarding the establishment of individual criminal responsibility but also with a view to the determination of an act of aggression by a State, as a prerequisite for individual criminal responsibility. Firstly, the exercise of jurisdiction does not require a prior determination by an outside organ that an act of State aggression has occurred. In practice, therefore, inactivity by an outside organ will not impede the Court from exercising its jurisdiction. Secondly, if such a determination exists, it has no binding effect for the purpose of the criminal proceedings. These important elements also contribute to an effective jurisdiction and guarantee the rights of the accused.

However, the protection of these principles came with a price. Highly disputed until the end of the review conference, the Court's exercise of jurisdiction in case of a referral of a situation by a State Party or *proprio motu* investigations by the prosecutor, independent of a determination by the Security Council that an act of aggression has been committed, is counterbalanced by far-reaching exceptions to the Court's reach over perpetrators of the crime of aggression. Most importantly, the Court may exercise jurisdiction in accordance with Article 12 only with respect to a crime of aggression arising from an act of aggression by a State Party that

has not previously declared that it does also do not accept such jurisdiction. A crime of aggression arising from an act of aggression by a non-State Party or an act of aggression committed by a State Party that has declared its non-acceptance does also not trigger the application of Article 12. This limited jurisdictional basis determined by the status of a State committing an act of aggression vis-à-vis the Court is further narrowed by exceptions regarding the exercise of jurisdiction over individual perpetrators. Arguably, also a State Party that does not ratify the amendments may lodge a declaration of non-acceptance, in which case the declaration would constitute an opt-out from the reach of the Court's jurisdiction in accordance with Article 12. In addition, crimes of aggression committed by a national or on the territory of a non-State Party are exempt from the Court's exercise of jurisdiction. Accordingly, States Parties that do not accept the amendments and non-States Parties are both under a dual shield, which can be activated on the level of an act of aggression as well as on the level of the crime of aggression. With a view to non-States Parties the non-exercise of jurisdiction over the crime of aggression is the rule; a rule unprecedented in the Rome Statute. With a view to States Parties the non-exercise of jurisdiction is foreseen as an exception. Insofar the Resolution acknowledges the inclusion of the crime of aggression as a crime falling under the jurisdiction of the Court at Rome. The compromise of Kampala could not resolve all ambiguities in the applicable law of the Rome Statute, in particular with a view to Article 121 (5) and its relationship with Article 12 in the context of the crime of aggression. Divergent interpretations may also be put forward regarding the declaration of non-acceptance and implications following the ratification of the amendments by thirty States Parties. A final decision on these issues will ultimately be up to the Court, which may receive further guidance from the ASP and scholarly opinions until the time the provision on the crime of aggression will be applied for the first time.

This jurisdictional regime differs considerably from the Court's exercise of jurisdiction over genocide, crimes against humanity and war crimes. Its establishment was not mandated by legal but rather warranted by political considerations. The legal basis for such a deviating regime is the reference to the elaboration of conditions for the exercise of jurisdiction in Article 5 (2), which provided the drafters with considerable flexibility. Nevertheless, the opening of substantial exceptions to the Court's reach over perpetrators of the crime of aggression is highly regrettable and questionable considering the aims of the Statute as expressed in its Preamble. It was ultimately the price to operationalize the crime of

aggression within an independent judicial framework. The responsibility to counter shortcomings in the context of State Party referrals and *proprio motu* investigations now rests with the States Parties. The Court's jurisdictional reach grows with each unconditional ratification of the amendments. Once the regime is well accepted, a review of Article 15*bis* in light of a uniform jurisdictional regime for all core crimes is not excluded.

Complementarity After Kampala: Capacity Building and the ICC's Legal Tools

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Abstract

Twelve years after the creation of the first permanent International Criminal Court and eight years since the entry into force of its Statute, the first ever Review Conference took place in Kampala, Uganda. Besides successfully introducing aggression as one of the crimes under the Court's jurisdiction and expanding the coverage for war crimes, the Review Conference provided a timely opportunity to reflect on some of the key aspects of the Court's regime. An integral part of the Review Conference was the "stocktaking exercise". The exercise provided a platform for the participants at the Review Conference to reflect on the successes and the failings of the ICC following the first few years of its operation and to consider measures that could be taken to enhance and strengthen the Court's functions in the years to come. The stocktaking exercise focused on four themes: complementarity, cooperation, victims and affected communities and peace and justice. These themes represent major aspects of the ICC's operation which will continue to warrant consideration as the Court matures as an institution. The theme of complementarity is of particular importance because of its uniqueness to the ICC. The ICC's complementarity regime places a primary obligation on States to investigate and prosecute international crimes. It does so by limiting the jurisdiction of the ICC to situations where States are shown to be unwilling or unable genuinely to investigate and prosecute, in respect of cases of sufficient gravity to justify action by the Court. The principle of complementarity was an innovation, specifically tailored for the ICC. The Review Conference therefore provided an important opportunity to reflect on the effectiveness of the principle and steps that could be taken to strengthen it. This piece will consider the tenor of the debate concerning complementarity during the Review Conference and the emphasis that was placed on strengthening national capacity for the investigation and prosecution of core international crimes. In particular, it will highlight a significant shift in the use of the term "positive complementarity". The term, which had originally been used to refer to the ICC's role in the construction of national capacity, was used throughout the Review Conference to refer to the involvement of States, international organisations and civil society in strengthening justice at the national level. It will also draw attention to the efforts that were made during the Conference to identify means to put positive complementarity into practice with the hope of overcoming some of the problems that States had faced in the investigation and prosecution of serious international crimes within their national systems. The article will go on to discuss the relevance of the ICC

Legal Tools Project, a unique collection of legal databases, digests and applications designed to facilitate the application of international criminal law, to the discussions that took place in Kampala. It will be concluded that the ICC's Legal Tools provide an important means of supporting the principle of complementarity, positive or otherwise.

A. Background to the Principle of Complementarity

Before turning to the discussions that took place in Kampala with respect to complementarity, it is worth considering the original understanding of the principle incorporated into the Rome Statute. During its inception and the early years of the Court's operation, the principle of complementarity has been subjected to much academic scrutiny, both in terms of its constituting elements and the potential ramifications of its use.¹

Complementarity strikes a delicate balance between the competing interests of State sovereignty and judicial independence.² The balance

¹ See, *inter alia*, J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (2002), 41, 45; M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity', (2003) 7 *Max Planck United Nations Yearbook* 591, 599; J. K. Kleffner & G. Kor (eds), *Complementary Views on Complementarity* (2006); M. M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', 23 *Michigan Journal of International Law* (2002), 869; I. Tallgren, 'Completing the International Criminal Order: The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court', 67 *Nordic Journal of International Law* (1998) 2, 107; B. Perrin, 'Making Sense of Complementarity: The Relationship Between The International Criminal Court and National Jurisdictions', 18 *Sri Lanka Journal of International Law* (2006) 2, 301.

² See M. Bachrach, 'The Rome Statute Explained', 12 *International Law Practicum* (1999) 1, 37, 40; see also J. Pejic, 'Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness', 29 *Columbia Human Rights Law Review* (1998) 2, 291, 309-311. Arguably, the protection the ICC provides will compensate for the relinquishment of whatever sovereign rights. On this particular issue see R. Bhattacharyya, 'Establishing a Rule-of Law International Criminal Justice System', 31 *Texas International Law Journal* (1996), 57, 75; see also R. A. Brand, 'External Sovereignty and International Law', 18 *Fordham International Law Journal* (1995) 4, 1685, 1696-1697.

between these two interests was crucial to the materialisation of the Court.³ In order to secure the agreement of States it was necessary to offer national institutions the primary responsibility over the investigation and prosecution of international crimes. At its inception, therefore, complementarity was envisaged primarily as a means of determining the forum that would assume jurisdiction over a particular case. The Statute recognises that whereas some States have well-functioning judiciaries, others do not.⁴ Article 17 of the Rome Statute allows the ICC to step in and exercise jurisdiction where States are unable or unwilling genuinely to investigate and prosecute without replacing judicial systems that function properly.⁵

When complementarity was first introduced into the Rome Statute, State Parties could not have foreseen its full practical implications or its potential to assist the Court in reaching its goal of ending impunity for core international crimes.⁶ Since the principle of complementarity allows the Court jurisdiction only where national institutions are unable or unwilling to exercise jurisdiction, States may feel 'forced' to investigate or prosecute cases involving core international crimes so as to avoid any intrusion by the ICC into situations involving their nationals or their territory. The real or perceived threat of ICC action, encapsulated in the application of complementarity, serves a useful purpose in practice and came to be recognised as complementarity's "catalytic effect".⁷

Effective national prosecutions have been an issue since the early function of the ICC. In 2003, the Court's Prosecutor, upon taking his position, suggested that the lack of cases prosecuted by his Office would be

³ B. B. Ferencz, 'International Criminal Courts: The Legacy of Nuremberg', 10 *Pace International Law Review* (1998) 1, 203, 227.

⁴ J. L. Dunoff, & J. P. Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict', 93 *American Journal of International Law* (1999) 2, 394, 405.

⁵ J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *American Journal of International Law* (1995) 2, 404, 413; see also 'Establishing an International Criminal Court; Major Unresolved Issues in the Draft Statute', 1 *International Criminal Court Briefing Series* (1998) 1, available at <http://www.iccnw.org/documents/LCHRUnresolvedIssues.pdf> (last visited 27 August 2010); Bassiouni puts it, "complementarity requires deferral to capable national systems", M. C. Bassiouni *et al.*, 'Conference Convocation', 13 *American University International Law Review* (1998) 6, 1383, 1396.

⁶ The goal of contributing to the fight against impunity for international crimes is recognized in the Preamble to the Rome Statute, para. 5.

⁷ See generally, J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 309-339.

its major success, if this is to be a consequence of effective national prosecutions.⁸ In its 2006 Policy Paper,⁹ the Office of the Prosecutor (OTP) further elaborated on this issue, by introducing what has since become known as ‘a positive approach to complementarity’¹⁰:

With regard to complementarity, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.¹¹

For positive complementarity to work, it is not enough to rely on the OTP to steer national processes towards more investigations and prosecutions. Although such encouragement is influential,¹² it runs the risk of becoming a paper exercise if there is no strong national framework in place enabling States to exercise criminal jurisdiction. It was clear, even prior to shaping the agenda for the Review Conference, that if positive complementarity was to succeed, a more systematic approach towards empowering national legal orders was needed.

⁸ *Statement made by the Luis Moreno-Ocampo, Chief Prosecutor, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, The Hague.*

⁹ ICC-Office of the Prosecutor, *Report on Prosecutorial Strategy* (2006).

¹⁰ For the general discussion on positive complementarity approach see: W. W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 *Harvard International Law Journal* (2008), 53; W. W. Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice’, 19 *Criminal Law Forum* (2008) 1, 59.

¹¹ *Supra* note 9, 5.

¹² W. W. Burke-White, *supra* note 11, 71.

B. Developments Relating to Complementarity During the Stocktaking Exercise

Throughout the lead up to the Review Conference and the stocktaking exercise, the importance of the principle of complementarity was re-affirmed. However, the main emphasis was on the construction of national capacity. The difficulties that States had faced in fulfilling their role under the ICC's complementarity regime gave new impetus to the pursuit of positive complementarity. The next sections will highlight how the term "positive complementarity" which began as a prosecutorial policy came to be recognized by State Parties as a vital means of strengthening the ICC's regime.

I. The Background to the Review Conference

The foundations for the Review Conference discussion on complementarity can be found in the 8th Session of the Assembly of States Parties to the Rome Statute (ASP) in November 2009.¹³ The States Parties to the Rome Statute approved complementarity as one of the four themes for consideration as part of the stocktaking exercise.¹⁴ In the following months, the Bureau of the ASP became actively involved in shaping the format and content of the negotiations that were due to take place in Kampala. A Resumed 8th Session of the ASP was held in New York in March 2010, during which the Bureau presented a report entitled "*Taking stock of the principle of complementarity: bridging the impunity gap*", which was appended to the Resolution on the Review Conference.¹⁵ The paper emphasized the integral nature of the principle of complementarity to the functioning of the ICC's system of justice and the long term efficacy of the

¹³ See, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/8/Res.3, adopted at the 8th plenary meeting, on 26 November 2009, by consensus. Paragraph 6 of the resolution reads: "Encourages States Parties to further discuss issues related to the principle of complementarity and to explore proposals by States Parties introduced as 'positive complementarity'", available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.3-ENG.pdf (last visited 27 August 2010). See also a discussion paper submitted by Denmark and South Africa at the 8th ASP, entitled: 'Bridging the Impunity Gap through Positive Complementarity', 6 November 2009.

¹⁴ *Id.*, *supra* note 3, Annex IV, "Topics for stocktaking".

¹⁵ *Review Conference*, Resolution ICC-ASP/8/Res.9, adopted at the 10th plenary meeting, on 25 March 2010, by consensus, Appendix.

Court.¹⁶ However, the clear emphasis of the paper was positive complementarity.

In the paper, “positive complementarity” was defined as

“all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations 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”.¹⁷

The paper discussed various issues relating to the notion. Firstly, it identified three categories of support; namely, legislative assistance, technical assistance and capacity building.¹⁸ Secondly, it discussed different “scenarios” in which assistance could be provided; before, during and after situations arise, where the Court is investigating and prosecuting and where it is not.¹⁹ Thirdly, and most significantly, the paper considered the actors involved in positive complementarity.²⁰ It highlighted the limited role that the ICC should play in positive complementarity, as a result of its judicial mandate and limited budget which should remain directed at the Court’s primary function in investigating and prosecuting the crimes under its jurisdiction.²¹ The paper clearly stated that the “Court is not a development agency”.²² Instead, the focus was shifted to States and civil society and the ways in which they could encourage and assist national institutions to fulfil their role under the Rome Statute. The report included as an aim for the stocktaking exercise the identification of ways in which State Parties, assisted by civil society, and in dialogue with the Court, may “even better, more targeted and more efficiently assist one another in strengthening national jurisdictions in order that these may conduct national investigations and prosecutions”.²³

¹⁶ *Id.*, para. 4.

¹⁷ *Id.*, para. 16.

¹⁸ *Id.*, para. 17.

¹⁹ *Id.*, paras 19-26.

²⁰ *Id.*, paras 27-45.

²¹ *Id.*, para. 4.

²² *Id.*, para. 4.

²³ *Id.*, para. 51.

Denmark and South Africa, the two States which had been identified as focal points for the stocktaking on complementarity, also compiled a paper ahead of the Review Conference.²⁴ The paper, entitled “*Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes*”, outlined a number of examples of projects which had already been established and developed to enhance the capacity and willingness of States to fulfil their role in the ICC’s complementarity regime.

The report of the Bureau made positive complementarity a central aspect of the stocktaking exercise. Not only did the preparations for Kampala reflect a new emphasis on positive complementarity, they also seem to represent a change in the use of the term. Whereas the term “positive complementarity” had previously been used by the OTP to refer to the involvement of the Court in the construction of national capacity,²⁵ the focus of the report of the Bureau had shifted to the involvement of States and civil society in capacity building activities. Although the paper in itself had no legally binding effect, its structure and content influenced the debate that took place in Kampala and the resolution that was adopted with respect to complementarity at the end of the Review Conference.

II. Stocktaking in Kampala

The formal stocktaking exercise on complementarity took place on the fourth day of the Review Conference.²⁶ The exercise was organised by Denmark and South Africa, the focal points for complementarity, who had played an integral role in the preparations for the stocktaking exercise. In addition to the formal stocktaking exercise, several informal side events were organised throughout the Review Conference to allow States Parties, civil society and other delegates to engage in further discussion both prior to and following the time allocated on the official agenda.²⁷

²⁴ RC/ST/CM/INF.2 *Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes*, 30 May 2010.

²⁵ *Supra* section 1.

²⁶ The plenary took place on Thursday 3 June 2010. Held in a panel format, with contributions from the floor; the plenary of the stocktaking on complementarity largely reflected the content of the discussion paper prepared by the Bureau.

²⁷ See for instance an informal event on complementarity, organized by the Coalition for the International Criminal Court (CICC) in advance of the plenary session, held on 1 June 2010. A further panel discussion on complementarity was hosted by South Africa and the Denmark, the focal points for complementarity on 2 June 2010. In addition, a

The template that had been outlined by the Bureau of the ASP provided a framework for the formal stocktaking event. It listed, as a tentative programme of work, the elaboration of the principle of complementarity, the practical application of complementarity and the Rome Statute system, positive complementarity, what it is and why it is necessary, and practical implementation of positive complementarity, or the enabling of national jurisdictions.²⁸ These themes were also discussed in the informal meetings that took place outside of the plenary.

At the plenary, States and panellists highlighted the centrality of the principle of complementarity to the ICC's regime and the importance of States fulfilling their role under the Rome Statute by investigating and prosecuting crimes committed on their territory or by their nationals.²⁹ Specific attention was drawn on the significance of the principle of complementarity in bringing justice closer to victims and affected communities. The visibility of justice has been thought to play a central role in increasing its legitimacy in the affected community and therefore the restorative impact of the trial process.³⁰ The investigation and prosecution of serious international crimes by national courts may allow more victims and members of the local community to attend hearings and facilitate communication of the occurrence and significance of the proceedings to local populations. The ability to participate in proceedings, which is more likely when justice takes place closer to the affected population, has also been thought to increase the cathartic effect of criminal trials amongst the victim population.³¹ Furthermore, the investigation and prosecution of international crimes in national institutions increases the likelihood that local personnel will play an integral role in the proceedings. The involvement of local personnel may result in more effective communication of the purpose and value of the trial process than that which could be achieved by staff who are unfamiliar with local languages and cultural practices.³² The practical advantages of national justice were also

side event was hosted by the Democratic Republic of the Congo, the United States and Norway on "*The DRC and Positive Complementarity*", also on 2 June 2010.

²⁸ *Review Conference*, Resolution ICC-ASP/8/Res.9, adopted at the 10th plenary meeting, on 25 March 2010 by consensus.

²⁹ In accordance with Article 12 of the Rome Statute.

³⁰ M. Drumbl, *Atrocity, Punishment and International Law* (2007), 148.

³¹ C. L. Sriram, 'Revolutions in Accountability: New Approaches to Past Abuses' 19 *American University International Law Review* (2003) 2, 301, 383-384.

³² Justice mechanisms located within post-conflict societies have been considered 'better able to demonstrate the importance of accountability and fair justice to local populations', see J. E. Stromseth, 'Pursuing Accountability for Atrocities After

highlighted during the course of the discussions.³³ Like other international tribunals, the ICC is reliant on the cooperation of States to collect and transfer evidence as well as suspects and accused persons to the Court.³⁴ Even where States are cooperative, in line with their obligations under the Rome Statute,³⁵ the distance of the Court from the territories in which crimes may have occurred is likely to cause delays or obstacles to the pursuit of justice. Where justice is carried out at the national level, access to evidence, witnesses and perpetrators is likely to be easier, and thus facilitate the process of holding perpetrators to account for their crimes.

With regard to the practical application of positive complementarity, the discussions served to highlight the difficulties that States had faced in undertaking the investigation and prosecution of core international crimes.³⁶ Three main challenges facing the application of complementarity in practice were raised during the stocktaking exercise. The first is the lack or inadequacy of national implementing legislation.³⁷ Having legislation in place is the first step in putting an end to impunity for atrocities and constitutes a means of materialising the application of complementarity. Linked to this point was the discussion on whether it would be desirable to prosecute core international crimes as ordinary crimes. At a panel meeting on complementarity which was organised by CICC, it was felt that prosecuting core crimes such as murder or rape, rather than their international equivalents, is not desirable since ordinary crimes do not represent the scope, scale and gravity of the conduct.³⁸ A second problem concerns the lack of operational capacity. In particular, the problems faced by domestic institutions operating in the context of a weak economy, lack of infrastructure, lack of confidence in the judicial structure and disputed authority were highlighted at the Danish and South African panel on complementarity.³⁹ Such operational capacity problems are likely to be exacerbated particularly where there may be a large backlog of cases, which

Conflict: What Impact on Binding the Rule of Law', 38 *Georgetown Journal of International Law* (2007) 2, 251, 260.

³³ Panel discussion on complementarity hosted by South Africa and Denmark, *supra* n.28.

³⁴ Rome Statute, Art. 86: "States are obliged to provide for the various forms of co-operation outlined in Parts IX and X of the Rome Statute".

³⁵ *Id.*

³⁶ Plenary, *supra* note. 28

³⁷ *Id.*

³⁸ *Id.*,

³⁹ Panel discussion on complementarity hosted by South Africa and Denmark, *supra* note 28.

is usually the case in the aftermath of mass atrocity where criminal justice institutions with restricted resources or expertise normally have limited capacity to process cases. Linked to this point is the lack of training, the third challenge identified by the plenary at the stocktaking exercise. Whilst the need for specific training was identified, the panellists at the South Africa - Denmark event reflected on the importance of the design of the training in empowering national judicial systems to oversee justice at the national level.⁴⁰

The meaning of the term “positive complementarity” was discussed during the plenary. Whilst repeated reference was made to the term, some States questioned its use, preferring the term “technical assistance”.⁴¹ It was highlighted that the term had no basis in the Rome Statute and served to confuse judicial capacity building with the principle of complementarity as laid down in Article 17 of the Rome Statute.⁴² Despite some hesitation of the use of the term “positive complementarity”, there was general agreement during all meetings that the active involvement of States and civil society in building national capacity is desirable. Furthermore, doubts as to the use of the term “positive complementarity” may have been outweighed by the frequency with which the term was used.

A significant proportion of the discussion in all events on complementarity was focused on the ways in which national capacity could be increased so as to strengthen the ICC’s overall system of justice. It was highlighted that the role of the Court in positive complementarity should be limited so as to ensure that the construction of national capacity would not interfere with the ICC’s judicial function or divert funds from investigations and prosecutions being carried out by the Court.⁴³ There was general agreement that States, international organizations and civil society should play a leading role in encouraging and assisting States to enact national implementing legislation and to investigate serious international crimes committed on their territory or by their nationals.⁴⁴ Efforts were made to identify tangible means of increasing national capacity. Several projects

⁴⁰ *Id.*

⁴¹ This issue was raised by the Spanish delegation during the plenary session, *supra* note 28.

⁴² This point was made by the German delegation during the plenary session, *id.*

⁴³ This point was emphasized in the CICC side event on complementarity, *supra* note 27.

⁴⁴ At the CICC side event, proposals were made for the Assembly of States Parties to play a role in overseeing and linking different activities aimed at the construction of national capacity so as to streamline activities and reduce duplication of tasks.

tailored to the construction of national capacity were highlighted during the plenary session.⁴⁵ In addition, the role of the United States in projects to strengthen judicial processes in the Democratic Republic of the Congo (DRC) was discussed in the US - Norway sponsored side event on positive complementarity and the DRC.⁴⁶

The stocktaking exercise served to reaffirm the importance of the principle of complementarity but, at the same time, recognised the difficulties faced by States in carrying out investigations and prosecutions of the crimes under the Court's jurisdiction at the national level. Whilst there was some hesitation over the use of the term "positive complementarity", there was general agreement that States needed assistance in fulfilling their role as reflected in the Rome Statute and that States and civil society should take a leading role in building national capacity.

III. The Outcome of the Stocktaking Exercise

The outcome of the stocktaking exercise was a resolution which reflects the contribution of the Bureau of the ASP in its report on stocktaking, as well as the content of the debates that took place in Kampala. The resolution stresses the primary responsibility of States to investigate and prosecute the crimes under the jurisdiction of the International Criminal Court.⁴⁷ It also notes the importance of States Parties "taking effective domestic measures to implement the Rome Statute".⁴⁸ In doing so, it serves to reaffirm the commitment of States to the principle of complementarity that forms the foundation for the ICC's system of justice. The resolution recognises 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" and encourages the Court, State Parties and other stakeholders, including international organisations and civil society

⁴⁵ Reference was made to the ICC Legal Tools Project as a means of contributing to national jurisdictions by the delegation of Norway during the plenary debate. During the plenary session, the Netherlands highlighted the Justice Rapid Response Initiative as well as the ICC's Legal Tools. Both projects had been included in the "Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes", see *supra* note 24.

⁴⁶ See *supra* note 28.

⁴⁷ Resolution RC/Res.1, adopted at the 9th plenary meeting, on 8 June 2010, by consensus, para. 1.

⁴⁸ *Id.*, para. 4.

“to further explore ways in which to enhance the capacity of national jurisdictions”.⁴⁹ Whilst the resolution does not make explicit reference to the term “positive complementarity”, it acknowledges the activities referred to in terms of positive complementarity during the stocktaking exercise.

The resolution, adopted by consensus of the Assembly, does not introduce any new legal obligations. It does, however, serve to recognise and emphasize the importance of the principle of complementarity and engagement in initiatives to boost national capacity so as to ensure that States are able to apply international criminal law at the national level. In future, it is hoped that the resolution will translate into concrete initiatives which will serve to strengthen the Court’s system of justice and help it work towards ending impunity for international crimes.

C. The ICC’s Legal Tools

The Legal Tools Project was identified in the lead up to the Review Conference by the Focal Points for complementarity as an example of a project directed towards strengthening national jurisdictions and enabling them to address core international crimes.⁵⁰ Moreover, the importance of projects such as the ICC’s Legal Tools Project, were highlighted during the general debate and the stocktaking exercise of the Review Conference.⁵¹

The ICC’s Legal Tools offer a comprehensive online or electronic knowledge system and provide an expansive library of legal documents and range of research and reference tools. The Tools were developed with the aim of encouraging and facilitating the efficient and precise practice of criminal justice for core international crimes. Whilst the Tools were initially created and envisaged for use within the Court, realisation of their value as a means of increasing national capacity led to their development for use by a range of external actors. As the Project expanded, the further development of the Legal Tools was outsourced to a number of academic partners (the “Legal Tools Outsourcing Partners”) with specific expertise in the field,⁵² whose activities are overseen by practitioners and experts in the field,

⁴⁹ *Id.*, paras 3 and 8.

⁵⁰ See the practical examples illustrating how several actors could assist States in enhancing national capacity with regard to the investigation and prosecution of serious international crimes, with a view to stimulating debate in Kampala, compiled by the Focal Points, *supra* note. 28.

⁵¹ See *supra* note 45.

⁵² See <http://www.legal-tools.org/en/work-on-the-tools/> (last visited 27 August 2010)

including the Legal Tools Advisory Committee of the ICC, with representation from the different Organs of the Court, as well as a Legal Tools Expert Advisory Group with some of the leading legal informatics experts serving as members.

The Legal Tools Project includes three main clusters of services, (i) the Legal Tools Database and Website,⁵³ (ii) digests on the law and evidence of international crimes and modes of liability, and (iii) the *Case Matrix* application for organising and structuring evidence in core international crimes cases.

The Legal Tools Database and Website provide a free, publicly accessible platform for the dissemination of legal information relating to the investigation, prosecution, defence and adjudication of serious international crimes. The Database contains over 44,000 documents, including decisions and indictments from all international and internationalised criminal tribunals, preparatory works of the ICC, jurisprudence and decisions from the ICC, treaties, information about national legal systems and relevant decisions from national courts, which are fully searchable using a state of the art search engine. The Legal Tools Database also contains a specific search engine which allows users to search specific aspects of national legislation implementing the Rome Statute.

The Elements Digest provides raw data and notes on the elements of crimes as well as the modes of liability contained in the Rome Statute and Elements of Crimes document. The text is drawn from all sources of international law. Relevant sources will be hyperlinked in the Digest to allow users direct access to primary material. The Means of Proof Digest allows users to see the types or categories of evidence that have been used in national and international criminal jurisdictions to satisfy the elements of crimes and modes of liability contained in the Rome Statute. The two Digests can be accessed through the Case Matrix. They do not represent the views of the ICC, its Organs or any participants in proceedings before the Court.

The Case Matrix is a law-driven case management and legal information application developed for the efficient and precise investigation, prosecution, defence and adjudication of international crimes. The Case Matrix allows users to access documents selected from the Legal Tools Database (the "Legal texts" function) as well as access to the Elements and Means of Proof Digests. The application also serves as a database for the

⁵³ See <http://www.legal-tools.org> (last visited 27 August 2010).

organisation of information and evidence relating to core international crimes, tailored to the specific crimes that have been committed and relevant modes of liability. It can also be adapted for use by different actors involved in the processing of core international crimes, such as human rights personnel, investigators, prosecutors, defence teams, victims' representatives, judges and civil society.

D. The Legal Tools and Positive Complementarity

Access to legal information is the bread and butter of lawyers. Without adequate access to legal information lawyers can not write proper legal motions, arguments and decisions. It is not enough to have talented and well-educated lawyers and investigators. Providing effective access to legal information on war crimes, crimes against humanity and genocide is therefore one of the first steps in all capacity building in criminal justice for such crimes. If the access is expensive, it can not be effective insofar as many potential users are excluded.

The Legal Tools seek to provide basic legal information with respect to core international crimes. The Tools are not a mere aspiration. Rather, they are in place and they have been developed and are maintained in a sustainable manner. Additionally, the related *Case Matrix Network*⁵⁴ provides capacity building activities which enhance positive complementarity in more than twenty countries, drawing, *inter alia*, on the technical platform of the Legal Tools. The *Network* seeks to reach all countries which have recently had or are currently engaging in core international crimes cases by mid-2012.⁵⁵

The *Case Matrix Network* provides several layers of services including those presented in the following three sections.

I. Access to Legal Information Relating to Serious International Crimes

The Legal Tools provide free and easy access to legal information relevant to core international crimes. The wide range of resources contained in the Legal Tools Database, which can be easily accessed through the search or browse functions on the Legal Tools Website, is of potential value

⁵⁴ See www.casematrixnetwork.org (last visited 27 August 2010).

⁵⁵ See <http://www.casematrixnetwork.org/users/> (last visited 27 August 2010).

for any lawyer or institution operating in the field of international criminal law. Such resources may not be of existential value for legal actors who have access to a wealth of legal materials and expertise. Such actors constitute a small minority. The resources in countries that have suffered the commission of mass atrocities may be particularly limited. In the aftermath of international crimes, there may not be the budget to build up resources necessary to hold perpetrators to account for their crimes.

The availability of the Legal Tools serves to level the playing field in the investigation, prosecution, defence and adjudication of core international crimes, allowing national judicial institutions to process international crimes involving their nationals or committed on their territory that may otherwise have lacked the means to do so. National institutions working on one or more core international crimes cases which do not have access to the Internet can access relevant information from the Legal Tools Database via the Case Matrix. In offering universal access to relevant information in the field of international criminal law, the Legal Tools can make a significant contribution to local empowerment, the importance of which had been stressed throughout the stocktaking exercise in Kampala.

The resources included in the Legal Tools Database and Website assist not only in the investigation, prosecution, defence and adjudication of core international crimes, but also in the drafting and amendment of implementing legislation. The specific search engine for national implementing legislation (NILD) allows States to compare approaches that have been taken in different jurisdictions and to model their legislation on that of States with similar characteristics, for example those sharing the same legal tradition. NILD also highlights the approaches which are likely to facilitate States in fulfilling their role under the ICC's complementarity regime and those which might be narrower than what is required, thus falling short of the Statute.

The resources found in the Legal Tools have value not only for the States that would normally exercise jurisdiction over crimes following territoriality or nationality. They can also be used by States wishing to investigate and prosecute serious international crimes through the exercise of universal jurisdiction. Furthermore, they can be used by States, international organisations and civil society wishing to place political pressure on States to discharge their obligations under the Rome Statute. The Legal Tools can also be used by civil society working in the documentation of human rights violations amounting to core international crimes and which may lead to the investigation and prosecution of international crimes.

In sum, the Legal Tools provide a complete library of materials relating to the practice of international criminal law. The materials provided by the Legal Tools are likely to have value for fully-functioning national judicial institutions. However, their significance is of particular importance within States which have access to fewer resources. Use of the information contained within the Legal Tools may allow States that would not have been able to engage in investigations and prosecutions to fulfil the role that has been attributed to them by the principle of complementarity under Article 17 of the Rome Statute.

II. Facilitating Transfer of Legal Knowledge and Expertise

International criminal jurisdictions have not only produced a wealth of legal documents since the mid-1990s. They have also contributed to the development of detailed knowledge and expertise in international criminal law. Making these resources available to national legal actors is essential.

The ICC's Legal Tools have been designed and developed by practitioners and experts with over fifteen years of experience in the practice of criminal justice for atrocities. The Tools serve as a means of transferring this experience to national criminal justice institutions in a manner which is practical and user friendly, respectful of local legal traditions and according to the logic of the law.

The Case Matrix application offers a low cost and instant means of increasing the capacity of national legal actors. It offers a comprehensive system which can be integrated within existing infrastructure and used by domestic personnel without the need for lengthy training or international oversight. Furthermore, following the installation of the Case Matrix, the application remains within the national judicial system, ensuring that the State in question will be ready to respond to possible future conduct that may form the basis of investigations and prosecutions. The fact that the Case Matrix can be incorporated into existing legal structures and operated by local personnel increases its value as a mechanism for local empowerment.

Once installed, national legal actors have ready access to the necessary resources and an effective methodology to conduct investigations, prosecutions, defence and adjudication of international crimes. Users will have access to the Elements and Means of Proof Digests which incorporate knowledge and experience derived from theory and practice in a format that can be easily accessed and imparted into national judicial institutions. The

Digests not only provide valuable guidance for legal actors who are not familiar with the processing of international crimes; they can also encourage compliance with international standards and practices by providing a model for national jurisdictions.

The case management application contained within the Case Matrix provides a methodology for the oversight of serious international crimes cases. The application has been designed by practitioners with considerable experience in criminal justice for atrocities with the intention of increasing the efficiency and precision of the justice process. The application allows for the efficient organisation of evidence by reference to the elements of crimes and modes of liability being charged. In doing so, it facilitates effective case assessment by indicating which charges are supported by sufficient evidence to allow for prosecution and potential conviction. It also allows for the development of more effective prosecutorial strategies and the focusing of time and resources on the weak points of strong cases. Furthermore, it reduces the potential for duplication of work by providing a platform for sharing and transferring information between teams and amongst different elements of the criminal justice system. The efficiency and precision of the criminal justice process, which is encouraged by the use of the Case Matrix, is particularly important for national institutions working on a limited budget, especially where there is a large backlog of serious crimes cases. The application can be customised to suit the needs of particular institutions. This allows national capacity to be constructed in a manner which is sensitive to cultural differences.

The ICC's Legal Tools amount to a technical platform which can be used as a means of transferring the expertise that has amassed at the international level and feed it into national institutions, particularly those lacking resources and expertise in the field of international law. The provision of resources and a methodology for the processing of core international crimes cases may assist States in overcoming some of the challenges they face in such activities in a manner which is fast, cost-efficient, respectful of local traditions and capable of being sustained in future years.

III. Provision of Legal Skills in the Field of Criminal Justice for Atrocities

Alongside the expansion and development of the ICC's Legal Tools, a network of experts and practitioners in the field of criminal justice for atrocities has been established to assist with installation of the Case Matrix

and training in the use of the Legal Tools, in addition to a range of other capacity building services. The *Case Matrix Network* was created with the specific purpose of strengthening national ability to investigate, prosecute and adjudicate core international crimes and to increase the cost-efficiency and quality of justice delivered by national institutions,⁵⁶ by transferring skills linked to key work processes in criminal justice for atrocities. The *Case Matrix Network* offers two categories of services.⁵⁷ The first category of services relates to the installation and use of the Case Matrix and the training and use of the Legal Tools Database. Some members of the *Network* assist the Coordinator of the Legal Tools Project with the implementation of such services. The second category draws on the combined expertise of a team of Network Advisers and the Director of the *Case Matrix Network* with regard to the investigation, prosecution, defence and adjudication of core international crimes. The Network Advisers have amassed considerable expertise in the processing of serious international crimes, as well as in the legislative and administrative aspects of the process.

The Network Advisers can provide a wide range of services upon request by national criminal justice institutions. The range of services includes advice on the establishment and organisation of units for the investigation and prosecution of serious international crimes; advice on or organisation of work processes relating to the documentation, investigation, prosecution, adjudication or defence of core international crimes cases; and advice on the drafting and review of legislation and other legal documents relating to serious international crimes. The services can be offered remotely or *in situ*, on an *ad hoc* basis or through secondment and can be provided confidentially.

Through the provision of such services, the *Case Matrix Network* allows expertise developed in international criminal jurisdictions to be quickly and easily utilised by national legal actors. In doing so, it can contribute to national empowerment by ensuring that national institutions have the capacity to carry out their vital role in the fight against impunity.

⁵⁶ See <http://www.casematrixnetwork.org/purpose/> (last visited 27 August 2010).

⁵⁷ See <http://www.casematrixnetwork.org/services/> (last visited 27 August 2010).

E. Conclusion

The ICC's Legal Tools, together with the *Case Matrix Network*, provide an effective means of overcoming several of the problems faced by States in the pursuit of justice which were raised throughout the stocktaking exercise. The resources contained in the Legal Tools Database can be used to assist States in accessing legal information, including the drafting of legislation implementing the crimes under the jurisdiction of the Court into national law. Use of the Legal Tools can strengthen national institutions and increase their capacity to investigate and prosecute core international crimes. The resources available through the Case Matrix can facilitate the documentation, investigation, prosecution, defence and adjudication of serious international crimes. The logic and methodology provided by the Case Matrix allow knowledge and experience accumulated through the practice of international criminal jurisdictions to be transferred to national institutions in a fast and cost-effective manner which is empowering and respectful of local traditions. The separate services offered by the *Case Matrix Network* provide a further source of assistance for legal actors engaged in the application of international criminal law.

To conclude, the ICC's Legal Tools and the *Case Matrix Network* offer an effective way of building the capacity of legal actors to investigate, prosecute and adjudicate international crimes. In doing so, they contribute to strengthening the ICC's complementarity system in the manner envisaged by the stocktaking exercise at the ICC Review Conference. The debates in Kampala suggest a growing tendency to refer to this kind of assistance as "positive complementarity". Regardless of the terminology that was used during the Review Conference, the stocktaking exercise served to highlight the importance of projects such as the ICC's Legal Tools Project in contributing to the ICC's complementarity regime.

