# CRIME OF AGGRESSION UNDER ROME STATUTE: A *JUS AD BELLUM* PERSPECTIVE*

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*It is not peace which was natural and primitive and old, but rather war. War appears to be as old as mankind, but peace is a modern invention.*[1]

## ROMA STATÜSÜNDE SALDIRI SUÇU: BİR *JUS AD BELLUM* PERSPEKTİFİ

**Özet**

2010 yılında, Kampala Konferansı'ndaki delegeler, saldırganlık suçunun, Uluslararası Ceza Mahkemesi (UCM) yetkisine dâhil edilmesi hususunda, saldırganlık kavramının yüksek derecede politik tabiatı dolayısıyla, güçlü muhalefetlerle karşılaştılar. Bu tablo, gerçekten de, saldırganlık kavramının tanımı üzerine yoğun düşünce farklılıklarını kanıtlamaktadır. Kuvvet kullanma yasağının her türlü ciddi ihlali, *jus ad bellum* kapsamında saldırganlık oluşturur. Bununla birlikte, Roma Statüsü, *jus ad bellum*'da olan tanımdan daha dar bir tanım getirmiş, bunun sonucunda uluslararası sorumluluk için daha yüksek bir sınır öngörmüştür. Dar bir saldırganlık tanımı yaratmak UCM'nin amaçları bağlamında anlaşılabilir ve ikna edici görünse de, bu yaklaşımın *jus ad bellum* kavramının etkisini azaltma potansiyeli vardır. Bundan dolayı, bu makale uluslararası ceza hukukundaki saldırganlık fenomenini analiz etmeyi

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1 Sir Henry Sumner Maine, *International Law* (London 1888) 8 cited in Majid Khadduri, *War and Peace in the Law of Islam* (first published 1955, The Lawbook Exchange, Ltd., Clark-New Jersey, 2006) 72

amaçlamaktadır. Bilhassa, saldırganlık kavramının tarihsel arka planıyla yola çıkmakta ve Roma Statüsü'ndeki saldırganlık suçu ile *jus ad bellum*'daki saldırganlık konsepti arasındaki bağlantıyı sorgulayarak, saldırganlık kavramının tanımını incelemektedir. Bu anlamda, yakın gelecekteki başarılı UCM kovuşturmaları adına bazı problem ve görünmez tehlikeleri görünür kılmayı amaçlamaktadır.

**Anahtar kelimeler:** Saldırganlık, UCM, Roma Statüsü, Kampala Konferansı, *Jus Ad Bellum*.

## CRIME OF AGGRESSION UNDER ROME STATUTE: A *JUS AD BELLUM* PERSPECTIVE

**Abstract**

In 2000, the delegates to Kampala Review Conference confronted strong oppositions to include the aggression within the jurisdiction of the International Criminal Court due to the highly political nature of the concept of 'aggression' itself. This picture, indeed, proves the intense differences of opinions about the definition of aggression. Under the *jus ad bellum*, any serious violation of the prohibition on the use of force constitutes aggression. However, the Rome Statute of the ICC provides a much narrower definition than the one within the *jus ad bellum*, and thus, a higher threshold for the international responsibility. Creating a narrower definition is understandable and convincing for the purposes of the ICC; however this approach has a potential to dilute the *jus ad bellum*. Therefore, at the outset, this paper aims to critically analyse the phenomenon of aggression in international criminal law. It particularly starts with searching the historical background of aggression, and then examines the definition of aggression under the Rome Statute as pointing the correlation between the crime of aggression under Rome Statute and the concept of aggression within *jus ad bellum*. In this way, it tries to show some problems and pitfalls regarding the forthcoming successful prosecutions of the ICC.

**Key words:** Aggression, ICC, Rome Statute, Kampala Conference, *Jus Ad Bellum*.

## ПРЕСТУПЛЕНИЕ АГРЕССИИ В РИМСКОМ СТАТУТЕ: ПЕРСПЕКТИВА *JUS AD BELLUM*

**Аннотация**

В 2010 году делегаты на Кампальской конференции столкнулись с сильной оппозицией по поводу включения агрессии под юрисдикцию Международного уголовного суда, из-за крайне политического характера данного термина. Эта картина доказывает существование широких различий в мнениях об определении агрессии. Под jus ad bellum любое серьезное нарушение запрета на применение силы и считается агрессией. Однако Римский статут МУС обеспечивает гораздо более узкое определение, чем в jus ad bellum, и, таким образом, более высокий порог для международной ответственности. Создание более узкого определения - это понятные и убедительные для целей МУС, однако, этот подход может снизить потенциал силы jus ad bellum. Поэтому эта статья направлена на то, чтобы проанализировать феномен агрессии в международном уголовном праве. И в частности, начинается с поиска исторических предпосылок агрессии, а затем рассматривает определение агрессии согласно Римскому статуту, как указывающую корреляцию между преступлением агрессии в соответствии с Римским статутом и понятием агрессии в рамках jus ad bellum. Таким образом, в статье предпринята попытка раскрыть некоторые проблемы и так называемые «подводные камни», касающиеся предстоящих успешных преследований МУС.

Ключевые слова: Агрессия, МУС, Римский статут, Кампальская конференция, *Jus Ad Bellum.*

## INTRODUCTION

This paper begins unlikely in a way, with a famous quotation of Benjamin Ferencz who made great contributions to international criminal law: “The most important accomplishment of the Nuremberg trials was the condemnation of illegal war-making as the supreme international crime. That great step forward in the evolution of international humanitarian law must not be discarded or allowed to wither. Insisting that wars cannot be prevented is a self-defeating prophecy of doom that repudiates the rule of law. Nuremberg was a triumph

of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason."[2]

Ben Ferencz, a former prosecutor at Nuremberg trials has constantly argued that the crime of aggression should be included in the Rome Statute of International Criminal Court (*hereinafter*- the ICC).[3] On 17 July 1998, the Rome Statute was adopted. Following the necessary 60 ratifications, the Statute was entered into force in 2002 and the International Criminal Court was officially established. The Rome Statute provided a jurisdiction over the crime of aggression; however there were no consensus on certain aspects. Therefore, the Statute did not authorize the Court to exercise jurisdiction over this crime until the provision defining the crime and setting out the conditions was adopted in Kampala Review Conference in 2010.

Although in international law the prohibition on aggression is considered a *jus cogens* norm, in Kampala the delegates to ICC Review Conference confronted strong oppositions. Some delegates strongly defended that the crime of aggression should not be incorporated within the jurisdiction of the ICC, at all.[4] Because, prosecuting such a crime will be too difficult due to its highly political nature.

This picture, indeed, proves the intense differences of opinions about the definition of aggression. Therefore, this paper aims to critically analyse the phenomenon of aggression in international criminal law. It particularly starts with searching the historical background of aggression, and then examines the definition of aggression under the Rome Statute as pointing the correlation between the crime of aggression under Rome Statute and the concept of aggression within *jus ad bellum*. In this way, it tries to show some problems and pitfalls regarding forthcoming successful ICC prosecutions.

2 Benjamin B. Ferencz, 'Ending Impunity for the Crime of Aggression', (2009) 41 Case Western Reserve Journal of International Law 281, 290

3 As a matter of fact, the inclusion of aggression could mean a closure of a loophole. Because in 1945 San Francisco drafting conference, a US delegate expressed clearly that "the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; … there should be no loopholes." United Nations Conference on International Organization, Vol. 6 (UN Information Organizations, 1945) 34, 35

4 H.H. Koh, 'Statement Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court', 23 March 2010, <http://usun.state.gov/briefing/statements/2010/139000.htm> accessed 24 April 2014

## THE CRIME OF AGGRESSION: A BRIEF HISTORICAL REVIEW FROM PEACE OF WESTPHALIA TO KAMPALA

International community has had a major concern of ending conflicts and maintaining peace since The Peace of Westphalia in 1648. The series of treaties which gave rise modern international law and a new political order placing sovereign state system in its centre, provided that states must try to resolve problems peacefully.[5] However, the first attempt to entrench the individual accountability for engaging in aggression was the trial of German Kaiser by a special tribunal provided in Article 27 of the Versailles Treaty for "a supreme offence against international morality and the sanctity of treaties."[6]

Although the Covenant of League of Nations condemned the 'external aggression' for the first time in 1919[7]; under international law, prohibiting states from engaging in aggression came only true with the adoption of Kellogg-Briand Peace Pact in 1928.[8] The pact did not give a definition of aggression or even used the particular term, but condemned "recourse to war for the solution of international controversies."[9] Furthermore, the pact did not provide the provisions of criminal accountability for individuals[10], but this became possible by the judges of Nuremberg who relied on the premise that a war of aggression had been a crime under international law since Kellogg-Briand Pact.

Aggression has been prosecuted as an international crime of individuals by the Nuremberg and Tokyo Tribunals as "crime against peace."[11] The crime was defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any

5 M.E. O'Connell, *International Law and the Use of Force: Cases and Materials* (2nd edn., Foundation Press, 2009) 127-129

6 *ibid*, 142

7 *ibid*, 139 and R.L. Griffiths, 'International Law, the Crime of Aggression and the Jus Ad Bellum', (2002) 2 International Criminal Law Review 301, 303

8 General Treaty for Renunciation of War as an Instrument of National Policy, 27 August 1928

9 *ibid,* article 1

10 Michael J. Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 Yale J. Int'l L. 71, 74

11 A. Cassese, *International Criminal Law*, (2nd ed. Oxford University Press, 2008) 152

of the foregoing."[12] The Nuremberg Tribunal convicted twelve defendants and the Tokyo Tribunal found twenty-five defendants guilty of engaging aggressive war.[13] However, judgements only focused on punishing the aggression, but provided no provision as to how it must be defined.[14]

In the 1950s, International Law Commission attempted to codify a Code of Offenses against the Peace and Security of Mankind by the authorization of United Nations General Assembly (*hereinafter*- the UNGA), but difficulties to define such a crime ended up as suspension of the ILC in 1954.[15]

Following unsuccessful efforts, on 14 December 1974 the UNGA adopted a resolution on aggression.[16] Significantly, Resolution 3314 provided a definition of act of aggression[17], but, "no explicit reference to individual criminal responsibility."[18] However, Resolution 3314 played an important role in the subsequent efforts to codify the crime of aggression and served as "the backbone[19]" of Special Working Group on the Crime of Aggression (*hereinafter*- SWGCA)'s proposed definition in Kampala.[20]

On 17 July 1998, Rome Statute was adopted[21] and the Statute provided a jurisdiction for the ICC over the crime of aggression.[22] However, "the crime of aggression was stillborn."[23] Because, the state parties could not reach consensus on two aspects: "a) the definition of the crime and b) the conditions

12 Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, Annex, 39 AJIL (1945) Suppl. 258, article 6 (a)

13 Glennon (n 10) 74

14 Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20.4 EJIL 1117, 1120

15 G.A. Res. 897 (IX), at 50, U.N. Doc A/2890 (Dec. 4, 1954)

16 Definition of Aggression, UN GA Res. 3314 (XXIX), UNGA OR 29th Sess., Supp. No. 31, UN Doc A/Res/3314 (1974)

17 Resolution 3314 article 1: "Aggression is 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 …"

18 Glennon (n 10) 79

19 *ibid*

20 Kai Ambos, 'The Crime of Aggression after Kampala' (2010) 53 GYIL 463, 464

21 Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF. 183/9; 2187 U.N.T.S. 90

22 Rome Statute, article 5.

23 D. Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2010) 23 LJIL 897, 897

for the exercise of jurisdiction over it."[24] Therefore, it was decided that the Court shall not exercise jurisdiction over the crime of aggression until further provisions defining the crime and setting out the conditions were adopted.[25]

The task to work on the proposals of aggression was given initially to the Preparatory Commission (1999-2002)[26] and SWGCA (2003- 2009).[27] Finally, The SWGCA's proposal was adopted by the Assembly of State Parties on 26 November 2009[28] and presented to the delegates to Kampala Review Conference under the name of "Conference Room Paper on the Crime of Aggression" on 25 May 2010.[29]

## THE KAMPALA REVIEW CONFERENCE

The conference took place in Kampala, Uganda between 31 May and 11 June 2010.[30] In Kampala, the delegates adopted a resolution on the crime of aggression by consensus. The resolution amended the annexes I, II and III.[31] These amendments include: "a) the definition for the crime (details a crime and an act of aggression), b) the conditions for the exercise of jurisdiction, c) elements of the crime and d) seven understandings on the crime of aggression for the further prosecutions."[32]

24 C. Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective' (2010) 23 LJIL 883, 884

25 Rome Statute, article 5(2).

26 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/10, 17 July 1998, Annex I, Resolution F

27 Resolution on Continuity of Work in Respect of the Crime of Aggression, ICC-ASP/1/Res.1, 9 September 2002

28 Res. ICC-ASP/8/Res.6. The proposal is annexed as appendix I to the February 2009 Report of the SWGCA (ICC-ASP/7/20/Add. 1)

29 RC/WGCA/1, 25 May 2010.

30 Review Conference of the Rome Statute, International Criminal Court, Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression, ICC Doc RC/10 (11 June 2010).

31 Review Conference Annex I: Amendments to the Rome Statute of the ICC on the Crime of Aggression.
Annex II: Amendments to the Elements of Crimes. Annex III: Understandings Regarding the Amendments to the Rome Statute of the ICC on the Crime of Aggression-Final Understandings

32 Annex III: Final Understandings and NN Jurdi, 'The Domestic Prosecution of the Crime of Aggression after the International Criminal Court Review Conference: Possibilities and Alternatives' (2013) 14 MJIL 1, 2

As a matter of fact, the resolution "is a decisive step in the completion of the Rome Statute."[33]Moreover, the willingness and cooperation of state parties, especially the adoption of amendments by "a text-book example" of consensus[34], was one the most important achievements of the conference. Therefore, the conference represents an important turning point in the evolution of international criminal law.

## DEFINING THE CRIME OF AGGRESSION

### Preliminary Remarks on *Jus ad Bellum*

In order to understand today's *jus ad bellum*; first Charter of United Nations must be assessed. Article 2 (4) of Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

However, there are two exceptions in the UN Charter. One exception is found Article 39 and 42 "with respect to threats to the peace, breaches of the peace and acts of aggression." And another exception is provided in Article 51 of right of individual or collective self-defence. The Security Council has extensive authority to use of force in Articles 39 and 42, but states have limited right of individual and collective self-defence in case of an actual armed attack, until the Security Council takes necessary measures to prevent the threats against the peace.

Under Article 51, states have a right of individual or collective self-defence in case of an actual attack, not any other violation of prohibition on the use of force in Article 2(4). Therefore, it is possible to say that not all violations constitute aggression. As a matter of law, in *Nicaragua Case* of 1986, the International Court of Justice (ICJ) held that "the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been

33 N. Blokker & C. Kreß, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23.4 LJIL 889, 889

34 *ibid,* 891

carried out by regular armed forces."[35] Also the ICJ scales the acts of use of force as 'grave' or 'less grave', as in the *Case of Oil Platforms*.[36] Hence, in the Resolution 3314, the distinction between 'aggression' and 'other uses of force' was clearly put.[37]

**Definition of Aggression**

As above-mentioned, Resolution 3314 served as the basis of the SWGCA's draft amendments in Kampala. Therefore, first the definition provided in Resolution 3314 should be discussed.

First of all, in Article 1, Resolution 3314 provides that aggression is "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, as set out in this Definition." As seen, Article 1 defines aggression as based on Article 2(4) of the Charter, thus as a violation of use of force. In this regard, as provided in the Article 2, "the first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression."[38] Secondly, Article 3 lists some acts that qualify as aggression. Article 4 states that the acts are not "exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."

The definition in Resolution 3314 has been criticized for not clarifying the ambiguity of the prohibition on use of force.[39] This is particularly because of the outcome in Resolution 3314 which provides a description more than a definition.[40] Furthermore, the negotiating historical record of the definition[41] proves that the resolution was not adopted "for the purpose of imposing criminal liability", but however "it was intended only as a political guide."[42]

35 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ Reports (1986) 14, 103

36 *Oil Platforms (Iran v. U.S.),* 6 November 2003, ICJ Reports (2003) 161, 187

37 Definition of Aggression (n 16), paragraph 3

38 Definition of Aggression (n 16), Article 2

39 Constantine Antonopoulos, 'Whatever Happened to Crimes against Peace?' (2001) 6.1 Journal of Conflict and Security Law 33, 39

40 M.E. O'Connell & M. Niyazmatov, 'What is Aggression? Comparing *Jus ad Bellum* and the ICC Statute' (2012) 10 Journal of International Criminal Justice 189, 194

41 Report of the Special Committee on the Question of Defining Aggression, UN Doc A/C.6/SR.1471,8
October 1974, Annexes 19, 20, 22, 26, 32, 35, and 39

42 Glennon (n 10) 79 citing the US representatives' remarks on the Resolution 3314

Moreover, Resolution 3314 did not provide provisions entailing individual criminal responsibility. Article 5(2) mentions war of aggression "as something apparently distinct from aggression."[43] The article provides that "[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility."[44] As seen, there is no distinction between individual responsibility and state responsibility, even no clarity on what the international responsibility means. Some authors have argued that Resolution 3314 entrenches individual criminal responsibility[45], others have believed that it ensures individual criminal responsibility in contact with a war of aggression, because Article 5(2) has a reference to crime.[46] The controversy, indeed, derives from the definition itself. Briefly put, if Resolution 3314 had attempted to provide individual criminal accountability, it would have included provisions for *mens rea* of the crime, such as an element of intent concerning a potential perpetrator.[47]

Taken together, "within the *jus ad bellum* aggression is any serious (manifest i.e.) violation of the prohibition on the use of force. A violation of Article 2(4) of the UN Charter is a *prima facie* act of aggression. Acts serious enough to trigger the Article 51 right of self-defence will constitute aggression. There is no distinct category of 'war of aggression' in the *jus ad bellum* and, therefore, no basis on which to establish individual criminal accountability on something other than the *jus ad bellum* prohibition of aggression."[48]

## THE CRIME OF AGGRESSION AND THE ROME STATUTE

### Rome Statute After Kampala

As in the famous statement of Nuremberg trials, "crimes are committed by men, not by abstract entities, and only by punishing individuals who

43 *ibid*, 195

44 Definition of Aggression (n 16), Article 5(2)

45 Benjamin B. Ferencz, 'The United Nations Consensus Definition of Aggression: Sieve or Substance', (1975) 10 Journal of International Law and Economics < http://www.benferencz.org/index.php?id=4&article=30 > accessed 30 April 2014

46 J.H. Doran & B.T. van Ginkel, 'Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court' (1996) 43 NILR 321, 335 and I.M. Schieke, 'Defining the Crime of Aggression' (2001) 14 LJIL 409, 417

47 Doran & Ginkel (n 46) 335

48 O'Connell & Niyazmatov (n 40) 198

commit such crimes can the provisions of international law be enforced."[49] Significantly, Article 8*bis* of the Rome Statute builds its trivet on a combination of state and individual criminal responsibility. The article distinguishes 'acts of aggression' and 'crime of aggression'.

Article 8*bis* defines crime of aggression 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."[50]

According to Article 8*bis* (2), 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."[51] Also, Article 8*bis* (2) lists example acts of aggression as in Article 3 of Resolution 3314.[52]

The definition of crime of aggression makes an end of the ambiguity about the individual responsibility and definitely extends it from the concept of 'war of aggression' to 'acts of aggression'[53], yet there are important questions. The crime of aggression is a leadership crime; however the determination of a high-ranking position is not based on formal criteria. In the Review Conference, there was a considerable debate on the question of whether 'shape and influence' (Nuremberg standard) or 'control over or to direct' should be included in the definition, finally the latter was incorporated in the Kampala definition. However, the question arises as to whether terrorist organizations,

49 *International Military Tribunal (Nuremberg)*, 'Judgment and Sentences' (1947) 41.1 AJIL 172, 221

50 Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Res. RC/Res.6, Annex I, 11 June 2010

51 *ibid*, article 8*bis*, para. 2.

52 Definition of Aggression (n 16), Article 3

53 "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." cited in R.S. 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' (2010) 2.2 GJIL 689, 698

insurgency and liberation movements or industrialist economic leaders[54] are accountable for aggression; this is, indeed, a mystery. Also, another problem is that how this requirement can be applied in the chain of command. There are no formal criteria in the definition and it is entirely based on the person's effective position, so how far down will the persons in the chain of command be responsible?

Obviously, not all acts of aggression induce criminal responsibility. Only those acts, which constitute a manifest violation of the Charter by their character, gravity and scale, give rise to the responsibility. However, it was strongly defended that the word 'manifest' is unnecessary because already "… any act of aggression would constitute a manifest violation of the Charter."[55] As some argued, it is enough to trigger the ICC's jurisdiction.[56] In fact, the need for such an additional clause is vague. Because the ICC has already jurisdiction over the most serious crimes of international concern[57] and aggression is the gravest violation of the prohibition on the use of force in the UN Charter[58], thus, the contribution of 'manifest' is quite unclear.. Also, Paulus points out the definition of the 'manifest' and asks brilliantly: "[w] hat… is obvious for one is completely obscure to the other, in particular in international law".[59] Moreover, the reason for not adopting 'flagrant' instead of 'manifest' would have meant to establish a very high threshold.[60] Each word raises a different concern, that's for sure.

However, developing a narrower definition than the one within *jus ad bellum* is somehow understandable for the purposes of the ICC. In fact, this was necessary to "exclude some borderline cases"[61] from the jurisdiction of the ICC. These cases include some 'grey areas' of the *jus ad bellum*, such as

54 Nuremberg Tribunal found thirteen directors of IG Farben which was a large German chemical company, guilty of aggression in *The United States of America vs. Carl Krauch, et al.,* also known as *IG Farben Trial.*

55 2009 SWGCA Report (n 27) 3 para 13

56 S.D. Murphy, 'Aggression, Legitimacy and the International Criminal Court' (2010) 20 EJIL 1147, 1151

57 Rome Statute, article 1.

58 Resolution 3314 (n 16), the Preamble

59 ('clearly revealed to the eye, mind, or judgment; … obvious') in the Oxford English Dictionary A. Paulus, 'Second Thoughts on the Crime of Aggression', (2010) 20 EJIL 1117, 1121

60 O'Connell & Niyazmatov (n 40) 204 citing S. Barriga, 'Against the Odds: The Result of the Special Working Group on the Crime of Aggression' (Farnham: Ashgate Pub, 2010)

61 *ibid*

anticipatory self-defence and humanitarian intervention.[62]

Especially, humanitarian intervention is a sensitive issue which caused a great concern in the conference. Because, NATO's humanitarian intervention of 1999 which was led by the very leading countries of the ICC against Serbia during the Kosovo crisis is considered as a serious violation of the UN Charter.[63] Therefore, as in the words of U.S. representative: "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 that the Rome Statute is designed to deter—do not commit "manifest" violations of the U.N. Charter within the meaning of Article 8*bis*."[64] In this regard, producing a new and narrower definition for a well-functioning prosecution for the crime of aggression and providing higher threshold for individual criminal responsibility is quite convincing and understandable.

On the other hand, considering the purposes of the ICC, the high threshold can be strongly defended, but one can argue that this approach has a "potential to dilute *the jus ad bellum*."[65] Also, O'Connell and Niyazmatov discuss that "creating a narrower crime of aggression than the one found in the *jus ad bellum* had no precedent. At the Nuremberg and Tokyo trials, crimes against the peace were based on the *jus ad bellum* of the time. The ILC in its commentary to the Draft Code of Crimes against the Peace and Security of Mankind took the position that individual criminal responsibility for the crime of aggression depends on 'a sufficiently serious violation of the prohibition contained in Article 2(4)' of the UN Charter."[66]

However, even the wording 'sufficiently serious' in the authors' argument suggests different thresholds for the responsibility. Why is it 'sufficiently serious', not only 'serious'? Also, a state can depend on state responsibility in the *jus ad bellum*, even if the act does not pass the threshold entailing responsibility. This is to say, there can be a manifest violation of the UN

62 *ibid*, citing R. Cryer et al., An Introduction to International Criminal Law and Procedure (2nd edn., Cambridge University Press, 2010) 326, 327

63 M. Koskenniemi, ''The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law', (2002) 65 The Modern Law Review 159, 175

64 Harold Koh, Statement to the Conference, 4 June 2010 <http://www.state.gov/s/l/releases/remarks/142665.htm> accessed 30 April 2014

65 O'Connell & Niyazmatov (n 40) 201

66 *ibid*, 203

Charter even though the crime does not satisfy the requirements of character, gravity and scale. Indeed, Murphy explains this aspect with comparison of several possible examples.[67] For example, a single aerial attack on a naval vessel causing some death and property damage would lead to the breach of article 2(4) of the UN Charter entailing State responsibility, also allows for a response under Article 51 but not constitute a crime of aggression. Because, it cannot pass the threshold. Second, the invasion of a State would lead to the breach of article 2(4) of the UN Charter entailing State responsibility, and constitute the crime of aggression entailing individual criminal responsibility.[68]

In this regard, one important aspect about the definition's coherence with the *jus ad bellum* is the question of whether the ICC's jurisdiction can reach the threats of use of force. As stated in the Article 2 (4) of the UN Charter, within *jus ad bellum,* not only use of force, but also the threat to use of force is prohibited. On the other hand, the definition of the crime of aggression does not mention the threats in Article 8*bis*. So the article only refers to actual acts of aggression. But at the same time, as stated in the Article 8*bis* (1), 'the planning' and 'preparation' are within the jurisdiction of the ICC, in other words, criminalized. So is this to say that an individual could be held accountable for the planning and preparation only if such an act actualizes? The doctrine thinks that this is a theoretical mismatch. For example, these are important questions to ask: "Why is it conceptually coherent for the ICC to regard such threats as not being criminal? Similarly, if a massive conspiracy of senior officials to commit large-scale aggression is uncovered and thwarted at the last minute, why should that conduct not be regarded as criminal?"[69]

As seen, there are controversial issues about the definition of aggression in the Rome Statute and important questions that need to be answered. Eventually, these problems will come out in the first aggression prosecution in the near future. Now, it may be the time to try to solve them.

**Mens Rea**

Article 30 (1) of the Rome Statute reads as follows: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment

67 Murphy (n 56), 1153
68 *ibid*
69 *ibid*, 1152

for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."[70] The article further provides that: "…a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[71]

Nevertheless, given the interpretative guidance for *mens rea* of the crime of aggression in the Amendments to the Elements of Crimes[72], there is no clarity. Particularly, as stated in Paragraph 2, "[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." However, Paragraph 4 and Paragraph 6 of the Elements bring uncertainty into the equation. Paragraph 4 states that "[t]he 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." According to some authors, the paragraph refers to the inconsistency with the Charter, thus it arguably refers to examples of act of aggression in Article 8*bis* (2).[73] On the other hand, Paragraph 6 of the Elements provides that "[t]he perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations."

As discussed by O'Connell and Niyazmatov, "it seems realistic to require the Court to find that a defendant was aware of the factual circumstance that the use of the armed force was inconsistent with the UN Charter, but it is hard to see how the Court will be able to find a defendant was also aware of the factual circumstances demonstrating the manifest violation of the UN Charter."[74] For example, in the recent armed conflict between Russia and Ukraine over Crimea, it could be doubted that the actions of Russia constituted an act of aggression by its character, gravity and scale[75], but Moscow could argue that they took action to protect the Russian citizens in Crimea, and thus

70 Rome Statute, article 30(1).
71 *ibid*, art. 30(2)
72 Amendments to the Elements of Crimes, Annex II, RC/Res.6,11June 2010.
73 O'Connell & Niyazmatov (n 40) 206
74 *ibid*
75 Ambassador Muhamed Sacirbey, 'Might Putin Face International Criminal Court by Annexing Crimea?' *Huffington Post,* (US, 3 October 2014) ; Kurt Willems, 'Try Putin for 'war crimes'? Unfortunately, not applicable' *Newsobserver*, (US, 20 March 2014)

these actions do not constitute a manifest violation of the UN Charter. It is extremely hard to establish that Russia was aware of the factual circumstances that such a use of force constituted a manifest violation of the Charter. In this manner, some specific provisions in terms of *mens rea* could have been provided in Kampala. This would help the ICC to exercise its jurisdiction for further prosecutions more, rather than the adoption of a new definition.

## CONCLUSION

One thing is clear that, the consensus on the crime of aggression constitutes a remarkable achievement. Yet, the ICC was established to end and defeat the impunity for the most serious crimes of international concern, but unless it is not done through fair trials, the question of legitimacy arises. Therefore, for the successful further prosecutions of the ICC regarding the crime of aggression, the Court must develop careful approaches.

As mentioned above, it is quite understandable and convincing that for effective criminal prosecutions, the ICC would tamper with the concept of aggression. Nevertheless, rather than adopting a new substance for the crime itself to reach a compromise for political motivations, for example *mens rea* of the crime could have been discussed more. Or, the threshold for the individual responsibility could have been narrowed by adding undisputable standards considering the importance of the wording of legal documents.

Taken together, above-discussed aspects raise serious doubts; however, despite some problems and pitfalls, the door is still open for clarifying the flaws which the conference has failed to solve. At least, this is necessary for ending impunity for the serious crime of aggression and thus, preserving the hope for the well-functioning of the ICC.

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