

## **CRIME OF AGGRESSION, FACILITATION, NEW YORK 25 APRIL 2017**

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I was asked particularly to discuss some history and Article 8 *bis*.

### **ANCIENT HISTORY**

As to history, I thought at first to spend a couple of hours discussing in detail the Treaty of Versailles, the Kellogg-Briand-Pact, the Conventions for the Definition of Aggression done at London in July 1933 and the Nuremberg Charter and Judgment. Then I would move on to the work of the ILC, the Preparatory Committee for Rome, Rome itself, the Preparatory Commission that followed and the work of the Special Working Group on the Crime of Aggression set up by the Court's ASP at its first meeting and which did most of its substantive work in Princeton..

That history, beginning with the efforts to try the German Kaiser for a “supreme offence against international morality and the sanctity of treaties” and to extract reparations from Germany would underscore that we are still engaged in a negotiation that has continued now for close to a century. It would also underscore the close connection, found in Article 8 *bis*, between state responsibility and

individual criminal responsibility. The Nuremberg Tribunal's emphatic assertion that "Crimes against international law 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" is not to deny that the state may also be responsible, nor that the state's actions may constitute one of the elements of the individual's crimes.

I concluded that, important as such material is, it might be more useful today to discuss the way in which aggression found its way into the Rome Statute at the eleventh hour in a confused manner and the light that shines on what we did in Kampala. I hope that provides some useful background to the law and politics surrounding what Kevin Heller will have to say. So let me talk about substance for a while and then I'll come back to those heady final days in Rome.

#### **ARTICLE 8 *BIS***

And so to Article 8 *bis* which you have in front of you.

You will notice at the outset that it proceeds from a drafting convention which distinguishes between the "crime of aggression", what the natural person commits, and the "act of aggression", what the abstract entity does. Both are drafted with much more precision than the rudimentary standards proposed for the

Kaiser and applied in Nuremberg and Tokyo. See the stunning vagueness in Article 6 of the Nuremberg Charter (circulated).

In 8 *bis*, the “act” is a fundamental element of the “crime”.

“Act of aggression”, according to paragraph 2, deals with the use of armed force by a State against another State. It references the standards of the United Nations Charter and adds a list of concrete examples. The examples represent an open list; but any other instances must surely be close to them, interpreted *ejusdem generis*, lest Article 22 of the Statute’s proscription of extending crime by analogy be breached. The list tracks G.A. Resolution 3314, the 1974 consensus Definition of Aggression, which has significant antecedents in the 1933 treaties I mentioned. What the drafting does, however, is to remove the open-ended nature of Resolution 3314 under which the Security Council could decide that even something fitting the categories was not aggression, or add to the list, all with no governing standards. Such an open-ended approach might be appropriate where state responsibility is concerned, but is unacceptable for individual criminal responsibility, governed by the principle of legality. The Nuremberg precedent spoke of a “war” but that term was totally unclear, and not explained usefully by the IMT. It must have meant some sort of shooting attack that killed numerous people, but what of a massive show of force that does not leave bodies in the streets? The Kampala definition is closer to that in Control Council Law No. 10

that included “invasions” such as those of Austria, Sudetenland, Bohemia and Moravia which were achieved without direct bloodshed – through threats of overwhelming force.

A fundamental decision made in Princeton was that the act of aggression element had to be decided by the Court. The principle of legality required no less. There was simply no way in which responsible drafters of criminal law could devise a crime in which a fundamental element of the crime was decided by a political actor, such as the Security Council, on indeterminate grounds.

Paragraph 1, like the provisions in Articles 6, 7 and 8, begins with a definition that is said to be “for the purpose of this Statute”. It refers to certain actions, planning, preparation, initiation or execution, of an act of aggression (as defined in paragraph 2). Those actions must be taken by a person who is in a position effectively to exercise control over or to direct the political or military action of a State. Aggression is said to be a leadership crime and this element of the crime reflects that. For the most part, it involves people who are agents of the upper echelon of the regular state apparatus, but I believe that the preparatory work, utilizing some of Kevin Heller’s writing, accepts that, as was understood at Nuremberg, industrialists close to the reins of power may come within the formula. The leadership nature of the offence was underscored, out of an abundance of

caution, by an amendment, paragraph 3 *bis*, to similar effect in the individual criminal responsibility provisions in Article 25 of the Statute.

The most controversial part of the language in paragraph 1 was that modifying the term “act of aggression”. The act must be one that by its “character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” Manifest is, as the Elements point out, an objective qualification, I call it the standard of the reasonable statesperson. It serves two purposes. Firstly, it makes clear that a minor breach of the Charter, limited firing across a border for example, is not enough for the crime – there will be state responsibility, but the criminal threshold is higher. Secondly, it seeks to deal with the “grey area” where the use of force may be protected by a justification such as humanitarian intervention. Such a justification is highly contested under general international law and there was no possibility that the issue could be resolved by a negotiation among parties to the ICC. I should add that, in some cases, it will be possible to argue that one engaging in a humanitarian intervention lacks the necessary mental element or comes within the residual collection of grounds for excluding criminal responsibility contained in Article 31 (3) of the Statute. There is, incidentally, no need to do this kind of analysis in respect of a State’s acts in self-defense or in response to Security Council authorization since the reference to the Charter in the chapeau to paragraph 2 takes care of that.

Although the Statute was silent on the matter, the Final Act of Rome assumed that Elements, like those for other crimes, would be drafted. The amended Elements of Crimes state the physical or material basics of the crime in succinct language. They assume the default rule on required mental elements (namely intent and knowledge) in relation to Element 1 (planning, preparing etc.), and Element 2 (the situation of the perpetrator within the administration). They also explain the objective nature of the manifest issue by insisting that there is no need to prove that the perpetrator made a legal evaluation as to its manifest nature. They also work a finesse that is common in many of the Elements of war crimes, by stating that there is no requirement to prove that the perpetrator has made a legal evaluation of the consistency of his acts with the UN Charter – it is sufficient that he is aware of the factual circumstances establishing that such a use of force was inconsistent with the Charter. Reliance on disingenuous legal advice is thereby discouraged, avoiding the impact of Article 32 on mistake of law.

I think that is enough for now to introduce Article 8 *bis* but I'd be happy to answer questions on it later.

## **A SHORT HISTORY OF ROME 1998**

Now, back to the history. It is no secret that both inclusion and how to define the crime were controversial in Rome. The end-game on aggression began

with a proposal from the Non-Aligned Countries on 14 July 1998, Bastille Day. It said that paragraph (d), the crime of aggression, should be added to the list of crimes over which the Court has jurisdiction in Article 5,<sup>1</sup> and that the Preparatory Commission should, by means left vague, elaborate the definition and the elements. The day earlier, Monday, 13 July, Ambassador Slade of Samoa, Coordinator of the negotiations on the Final Clauses, had introduced his final document to the Committee of the Whole (dated 11 July). It contained a bracketed and controversial version of the first sentence of what became Article 121 (5), but did not include the second sentence. That emerged from whole cloth at the end of the week. Most of the Coordinating Group's participants believed that all significant amendments should be treated the same, pursuant to what is now Article 121 (4). Others sought a distinction which would make it difficult to add new crimes applicable to all. (While objections tended to be stated abstractly, my recollection is that the proponents of what became paragraph 5 wanted to cut off, say, adding terrorism and drug crimes at a later date, in a way that would apply to all parties pursuant to the general position in Article 121 (4), or, especially, adding the use of nuclear weapons in either international or non-international armed conflict.)

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<sup>1</sup> At the time, Article 5 included all that later became Articles 5, 6, 7 and 8.

No significant further discussion of Article 5 or Article 121 appears on the public record. The crucial last-minute decisions by the Bureau of the Committee of the Whole to the package of Article 5 and Article 121<sup>2</sup> on aggression emerged the last day of the Conference, Friday, 17 July. They were not accompanied by any explanation from the Bureau and were not passed on by either the Coordinating Group on Final Clauses or the Drafting Committee. Alone among the delegates in the final meeting of the conference, Sir Franklin Berman spoke to protect the position of the Security Council, but did not discuss the matter beyond that.

Article 5 (2) spoke of the Court's exercise of jurisdiction over aggression once a *provision is adopted* in accordance with article 121 and 123. I confess that I thought that day that "adopted" meant the same thing in Article 5 (2) and in Article 121 (3), with the effect that the "provision" (so-called) would require a two-thirds majority vote of all Parties and would then become binding on all. I assumed that the reference to "conditions" in Article 5, paragraph 2 would permit some delay in effectiveness to enable states to get their legislative act together. It was only several years later that I was disabused of the obviousness of that notion in the Princeton meetings. Then, many of the participants saw the so-called "provision"

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<sup>2</sup> In Rome the last day, paragraph 5 of Article 121 referred only to Article 5. The Chair of the Committee of the Whole explained later that this as a clerical error and that the reference should be to Article 5, 6, 7 and 8. A correction was made.

as a set of provisions, and indeed as requiring not just adoption but an “amendment”. The players then began to focus not only on the two alternative possibilities for “adoption” – Article 121 paragraphs 4 and 5 – which now meant adoption-plus-ratification, but also the possibility of excluding some parties – and non-parties – from its application. Political preferences inevitably drove the legal analysis. You will notice, though, that Article 5 (2)’s phrase “exercise of jurisdiction” is an obvious reference to Article 12 (2) containing “preconditions to the exercise of jurisdiction”, language which had been on the table since the PrepCom in New York. It is a strong indication that Article 12 is part of the analysis, unless “exercise”, like “adopt”, has some different but unspecified meaning. And paragraph 1 of Article 12 insists that “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.”

In the same final package, the brackets around what is now the first sentence of draft Article 121 (5) were removed, so that paragraph 5 was “in”, and other material in there was deleted altogether. The second sentence was added to paragraph 5.

Few people seem to have been involved in the end-negotiation in Rome, so there is little purpose in trying to divine their intentions beyond the written words. What the history does show, is that the aggression provision is *sui generis* but left

open some hard calls for Kampala on just what that entailed. It is a sort of amendment, since it invokes the amendment procedure, but not wholly so. *It is not adding jurisdiction over aggression, it is adding provisions and conditions for the exercise of that jurisdiction.* All the State Parties had already consented to the jurisdiction in Article 5 (1) (d) and Article 12 (1); exercise of that jurisdiction was the problem. It is against this that the Kampala solution has to be understood.